SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-2313-18
A-2870-18
A-5706-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HAKEEM MALONEY, a/k/a RAHEEM BROWN, RAHEEM BROUND, ALTARIQ COOK, ALTERIQ COOK, HAKIM HICKSOB, HAKIM HICKSON, ALLATEEF JACKSON, HAKIM MALON, and RAHEEM BROWN,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASHAN M. JACKSON, a/k/a JAQUAN JACKSON, and RASHAN JACKSON,

Defendant-Appellant.

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STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NAIM JONES,
a/k/a CLEMONS SHAQUAM,

Defendant-Appellant.

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Argued (A-2313-18 and A-5706-18) and Submitted (A-2870-18) October 26, 2022 – Decided November 3, 2022

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 16-07-2088, 17-07-1974, 17-07-1976 and 17-07-1977.

Robert C. Pierce argued the cause for appellant Hakeem Maloney in A-2313-18 (Robert Carter Pierce, attorney; Jeff Thakker, of counsel; Robert C. Pierce, on the briefs).

Stephen W. Kirsch, Designated Counsel, argued the cause for appellant Naim Jones in A-5706-18 (Joseph E. Krakora, Public Defender, attorney; Stephen W. Kirsch, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Rashan M. Jackson in A-2870-18 (Louis H. Miron, Designated Counsel, on the briefs).

Emily M. M. Pirro, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent State of New Jersey in A-2313-18 and A-5706-18 (Theodore N. Stephens II, Acting Essex County Prosecutor, attorney; Emily M. M. Pirro, of counsel and on the briefs).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent State of New Jersey in A-2870-18 (Emily M. M. Pirro, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the briefs).

Appellant Hakeem Maloney filed a pro se supplemental brief.

Appellant Rashan M. Jackson filed a pro se supplemental brief.

PER CURIAM

In these three back-to-back appeals, which we now consolidate for purposes of this opinion, defendants Hakeem Maloney, Rashan M. Jackson, and Naim Jones challenge their convictions and sentences for conspiracy to commit murder and other offenses. We affirm all of defendants' convictions and the sentences the trial judge imposed on Maloney and Jackson. In Jones's case, however, we remand for resentencing.

I.

An Essex County grand jury returned an indictment charging defendants with the following offenses: first-degree conspiracy to commit murder, contrary

to N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3(a)(1)(2) (count one); first-degree murder, contrary to N.J.S.A. 2C:11-3(a)(1)(2) (count two); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(b) (count three); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a) (count four); first-degree promoting organized street crime, contrary to N.J.S.A. 2C:33-30 (count five (Maloney and Jones)); third-degree conspiracy to hinder, contrary to N.J.S.A. 2C:5-2 and N.J.S.A. 2C:29-3 (count six (Jackson)); and third-degree hindering apprehension or prosecution, contrary to N.J.S.A. 2C:29-3(a)(3) (count seven (Jackson)). The grand jury also charged Maloney and Jones in separate indictments with first-degree unlawful possession of a weapon by a person with a prior conviction under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, contrary to N.J.S.A. 2C:39-5(j).

Defendants were tried together over the course of eighteen days. While the jury was deliberating, defendants moved for a mistrial following alleged juror misconduct in the jury room. The trial judge denied these motions.

The jury found Jackson guilty on all five counts against him. As for Maloney and Jones, the jury found them both guilty on counts one (conspiracy to commit murder), three (unlawful possession of a weapon), and four (possession of a weapon for an unlawful purpose). The jury hung on counts two

(murder) and five (promoting street crime). Immediately after the verdict, Maloney and Jones were tried together before, and found guilty by, the same jury on the unlawful possession of a weapon by a person with a prior NERA conviction charge.

At Jackson's sentencing, the judge denied the State's motion for an extended term. The judge merged the conspiracy to commit murder conviction (count one) and the possession of a weapon for an unlawful purpose conviction (count four) with Jackson's murder conviction (count two), and sentenced Jackson to life in prison with an eighty-five percent period of parole ineligibility pursuant to NERA. On count three, unlawful possession of a weapon, the judge sentenced Jackson to a concurrent ten-year term in prison with a five-year period of parole ineligibility. The judge merged count six, conspiracy, with count seven, hindering apprehension and sentenced Jackson to a five-year term in prison with a two-and-a-half-year period of parole ineligibility, which was also to run concurrently to count two.

As for Maloney, after finding he was extended term eligible as a persistent offender under N.J.S.A. 2C:44-3(a), the judge sentenced him on count one, conspiracy to commit murder, to a term of fifty years in prison with an eighty-

five percent period of parole ineligibility pursuant to NERA.[1] The judge merged count three, unlawful possession of a weapon, with Maloney's conviction for unlawful possession of a weapon by a person with a prior conviction under NERA, and sentenced Maloney to twenty years in prison with a ten-year period of parole ineligibility, which was to run consecutively to his sentence on count one.

After finding that Jones was extended term eligible as a second firearm offender under N.J.S.A. 2C:44-3(d), the judge sentenced Jones on count one, conspiracy to commit murder, to life in prison with an eighty-five percent period of parole ineligibility pursuant to NERA. Following the same mergers he applied to Maloney's convictions, the judge sentenced Jones to a consecutive ten-year term in prison with a five-year period of parole ineligibility for the unlawful possession of a weapon by a person with a prior conviction. These three appeals followed.

On appeal, Maloney raises the following contentions in his counseled brief:

POINT I

[1] The judge merged count four, possession of a weapon for an unlawful purpose, with the conspiracy conviction.

THE ANIMOSITY BETWEEN JURORS 4 AND 7, REVEALED AFTER THE ALLEN/CZACHOR INSTRUCTION, SHOULD HAVE RESULTED IN THE REQUESTED MISTRIAL; THE TRIAL JUDGE'S DENIAL OF . . . MALONEY'S MOTION WAS ERRONEOUS AND SHOULD BE REVERSED.

POINT II

THE TRIAL JUDGE'S INCONSISTENT INSTRUCTIONS TO THE JURORS ABOUT FINAL PARTIAL VERDICTS INTERFERED WITH THEIR DELIBERATIONS.

POINT III

THE VIDEO 'COLOR COMMENTARY' BY DETECTIVE STABILE EFFECTIVELY EMPANELED A THIRTEENTH JUROR; THE TRIAL JUDGE'S RULING IS NOT ENTITLED TO DEFERENCE, AND IT IS IN ANY EVENT PLAINLY ERRONEOUS.

POINT IV

DETECTIVE STABILE'S IDENTIFICATION OF THE DEFENDANTS IN THE VIDEO VIOLATED THE PRINCIPLE OF STATE V. TILGHMAN.

POINT V

THE BLOOD/'HYBRID' EVIDENCE FAILED TO SATISFY THE COFIELD STANDARD FOR ADMISSIBILITY, AND THE JURY SHOULD NOT HAVE HEARD AN EXPERT OPINION THAT RENDERED . . . MALONEY STRICTLY LIABLE FOR CRIMINAL CONDUCT COMMITTED BY . . . JACKSON.

POINT VI

THE "AND/OR" CONSPIRACY INSTRUCTION CONFUSED THE JURORS. (Not raised below).

A. "AND/OR" REGARDING THE CONSPIRATORS.

B. "AND/OR REGARDING THE PROSCRIBED ACT.

POINT VII

THE CHARGES AGAINST . . . MALONEY SHOULD HAVE BEEN SEVERED; IT WAS PLAIN ERROR FOR THE TRIAL JUDGE NOT TO DO SO. (Not raised below).

POINT VIII

THE SENTENCING WAS AN ABUSE OF DISCRETION.

In addition, Maloney raises the following issues in his pro se supplemental brief:

POINT I

PERMITTING THE JURY TO CONTINUE THEIR DELIBERATIONS, IN LIGHT OF THE ACRIMONIOUS AND IRRECONCILABLE DIFFERENCES DURING THEIR DELIBERATIONS, PARTICULARLY SINCE THE COURT'S SUPPLEMENTARY INSTRUCTIONS PROVIDED THE JURY UNCLEAR AND MISGUIDED DIRECTIONS, REQUIRES A NEW TRIAL BE ORDERED WHEREBY THE ULTIMATE VERDICT

SHALL BE FREE FROM ANY TAINT OR COERCION.

POINT II

SINCE THE COURT DECLINED TO ISSUE CURATIVE INSTRUCTIONS DURING DETECTIVE MARCELLI'S INADMISS[I]BLE AND PREJUDICIAL TESTIMONY, A NEW TRIAL MUST BE ORDERED.

POINT III

. . . MALONEY'S CONVICTION ON COUNT FIVE, ALLEGING CONSPIRACY TO PROMOTE ORGANIZED STREET CRIME, WAS A MANIFEST DENIAL OF JUSTICE UNDER THE LAW AND, AS SUCH, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE JUDGMENT OF ACQUITTAL.

A. Standard of Review.

B. Dismissal of Count Five.

C. Insufficiency of Evidence to Sustain First-Degree Conspiracy to Commit Murder and Related Weapons Offenses.

POINT IV

WHOLESALE VIOLATIONS OF DEFENDANT'S RIGHTS TO A FAIR TRIAL, UNDER THE FEDERAL AND STATE CONSTITUTIONS, OCCURRED WHEN THE LOWER COURT MISAPPLIED THE COFIELD ANALYSIS AND PERMITTED THE GANG EXPERT WITNESS TO INTRODUCE INADMISSIBLE AND PREJUDICIAL

TESTIMONY "MOTIVE" EVIDENCE; AS SUCH, A NEW TRIAL MUST BE ORDERED AS TO CORRECT A MANIFEST INJUSTICE.

A. Standard of Review.

B. Admittance of . . . Maloney's Two Tattoos Was Improper, And Contrary To Governing Authorities.

C. Introducing . . . Maloney's Social Media Posts were [sic] Irrelevant and Did Not Satisfy N.J.R.E. 901.

Jackson raises these contentions in his counseled brief:

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE TO PRESENT EXPERT TESTIMONY CONCERNING GANGS WHERE THE STATE FAILED TO SATISFY ALL OF THE REQUIREMENTS OF COFIELD IN CONNECTION WITH CHARGES AGAINST DEFENDANT.

POINT II

THE COURT SHOULD REVERSE DEFENDANT'S CONVICTION BECAUSE THE PROSECUTOR'S STATEMENTS CONCERNING DEFENDANT'S CREDIBILITY CONSTITUTED PROSECUTORIAL MISCONDUCT AND UNDULY PREJUDICED DEFENDANT.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A

MISTRIAL UPON LEARNING OF THE PRESENCE OF INTIMIDATION AND CONFRONTATION DURING THE JURORS' DELIBERATION AND THE TRIAL COURT'S ATTEMPT TO AMELIORATE THE SITUATION WITH A SUPPLEMENTAL CHARGE CONCERNING THE JURORS' CONTINUING DELIBERATIONS WAS FATALLY FLAWED AND GROUNDS FOR REVERSAL.

POINT IV

DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN INFORMING THE JURY THAT THE COURT WOULD ACCEPT AN INTERIM PARTIAL VERDICT AGAINST DEFENDANT BEFORE THE JURY COMPLETED ITS DELIBERATIONS WITH RESPECT TO THE CO-DEFENDANTS.

POINT V

DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN NOT SEVERING THE CHARGES AGAINST HIM FROM THE CHARGES AGAINST THE CO-DEFENDANTS WHERE DEFENDANT ADMITTED THAT HE ENGAGED IN CRIMINAL CONDUCT BUT WAS HIGHLY PREJUDICED BY THE TESTIMONY PRESENTED BY THE STATE AGAINST THE CO-DEFENDANTS CONCERNING THEIR ALLEGED GANG INVOLVEMENT. (NOT RAISED BELOW).

POINT VI

DEFENDANT'S CONVICTION SHOULD BE VACATED AND THIS COURT SHOULD ORDER A

NEW TRIAL BASED UPON THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS THROUGHOUT DEFENDANT'S TRIAL. (NOT RAISED BELOW).

POINT VII

THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING DEFENDANT TO A MANIFESTLY EXCESSIVE AND UNREASONABLE SENTENCE BASED UPON DEFENDANT'S RECORD AND, THEREFORE, DEFENDANT'S SENTENCE SHOULD BE VACATED.

Jackson raises the following arguments in his pro se supplemental brief:

POINT I

DEFENDANT'S CONFRONTATION RIGHTS WERE VIOLATED WHEN THE SUBSTITUTE EXPERT (DR. JULIA DE LA GARZA-JORDAN) READ PORTIONS OF THE UNAVAILABLE MEDICAL EXAMINER'S (DR. WILLIAMS') AUTOPSY REPORT TO THE JURY, RATHER THAN TESTIFYING BASED ON HER OWN OBSERVATION AND CONCLUSIONS.

POINT II

DETECTIVE STABILE'S 'COLOR COMMENTARY' REGARDING THE SURVEILLANCE VIDEO EVIDENCE WAS HIGHLY PREJUDICIAL AND AMOUNTED TO EMPANELING A THIRTEENTH JUROR; THE TRIAL JUDGE'S RULING IS NOT ENTITLED TO DEFERENCE, AND IT IS IN ANY EVENT PLAINLY ERRONEOUS.

POINT III

DETECTIVE STABILE'S IDENTIFICATION OF THE DEFENDANTS IN THE SURVEILLANCE VIDEO VIOLATED THE PRINCIPLE OF STATE V. TILGHMAN.

POINT IV

THE TRIAL COURT[']S FAILURE TO COMPLY WITH THE STRICTURES OF RULE 3:9-1(f) AND RULE 3:9-3(g), TO PROPERLY INFORM THE DEFENDANT OF HIS MAXIMUM SENTENCE EXPOSURE IN VIOLATION OF DEFENDANT'S SUBSTANTIVE AND PROCEDURAL RIGHTS TO DUE PROCESS [SIC].

Finally, Jones presents the following arguments in his counseled brief:

POINT I

THE JUDGE IMPROPERLY DENIED THE MOTION FOR A MISTRIAL UNDER STATE V. DORSAINVIL WHEN IT BECAME EVIDENT AFTER DAYS OF DELIBERATION THAT AT LEAST ONE JUROR WAS THREATENING TO PHYSICALLY INJURE ANOTHER JUROR, AND THAT THE DELIBERATIVE PROCESS HAD BROKEN DOWN OVER THE CONFLICT; THE JUDGE FURTHER ERRED BY GIVING THE JURY AN INSTRUCTION THAT, ALSO CONTRARY TO DORSAINVIL, IMPOSED A JUDICIALLY CREATED "CODE OF CONDUCT" ON THE JURORS FOR THEIR REMAINING DELIBERATIONS AND COERCED THEM INTO RETURNING A VERDICT.

POINT II

THE JURY INSTRUCTIONS ON CONSPIRACY TO MURDER IMPROPERLY FAILED TO RESTRICT SUCH CONSPIRACIES TO AGREEMENTS TO PURPOSELY KILL THE VICTIM, INSTEAD EXPANDING THE DEFINITION OF THE CRIME FAR TOO WIDE TO INCLUDE AGREEMENTS TO PURPOSEFULLY OR KNOWINGLY KILL OR SERIOUSLY INJURE THE VICTIM, IN A CASE SUCH AS THIS WHERE THE EVIDENCE OF A CONSPIRACY TO PURPOSELY KILL WAS EXTREMELY VAGUE, SUCH A SERIOUS ERROR IS PLAIN ERROR MANDATING A REVERSAL OF THE CONSPIRACY CONVICTION. (NOT RAISED BELOW).

POINT III

THE SEPARATE STATE V. RAGLAND TRIAL ON THE CHARGE OF POSSESSION OF A FIREARM BY A PERSON PREVIOUSLY CONVICTED OF A NERA OFFENSE WAS HOPELESSLY TAINTED BY PLAIN ERROR WHEN THE JUDGE FAILED TO GIVE THE STANDARD "OTHER CRIMES"/NON-PROPENSITY INSTRUCTION TO THE JURY THAT ALWAYS MUST BE GIVEN IN A RAGLAND TRIAL. (NOT RAISED BELOW).

POINT IV

THE REPEATED USE OF "AND/OR" LANGUAGE IN THE JURY INSTRUCTIONS REQUIRES REVERSAL OF THE CONVICTIONS BECAUSE IT IS IMPOSSIBLE TO KNOW WHETHER THE JURY'S VERDICTS REST ON UNANIMOUS FINDINGS OF THE SAME CRIMINAL ACTIVITY. (NOT RAISED BELOW).

POINT V

THE ADMISSION OF GANG-EXPERT TESTIMONY AND OTHER EVIDENCE OF GANG MEMBERSHIP IS NOT PROPER UNLESS THERE IS INDEPENDENT EVIDENCE IN THE CASE TO DEMONSTRATE A GANG-RELATED CRIME; HERE THE STATE IMPROPERLY USED A GANG EXPERT (AND OTHER EVIDENCE OF GANG MEMBERSHIP AND STATUS) TO CREATE A MOTIVE THAT WAS NOT OTHERWISE DEMONSTRATED IN THE CASE, RATHER THAN TO EXPLAIN A MOTIVE THAT WAS ALREADY IN THE CASE. ALTERNATIVELY, EVEN IF THE EVIDENCE HAD SOME MINIMAL PROBATIVE VALUE, ITS PREJUDICIAL EFFECT WAS TOO OVERWHELMING TO ALLOW ITS ADMISSION.

POINT VI

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE.

II.

These cases stem from the death of William Porter IV, who died from gunshot wounds sustained in a parking lot across the street from a nightclub in Newark. Jackson testified at trial and admitted to shooting Porter as revenge for the death of his older brother. The State presented evidence that Jackson and his codefendants, Jones and Maloney, were all members of the Bloods gang. The State's theory of the case was that Jones and Maloney were higher-ranking

members of the Bloods and Jackson's superiors. The State maintained that Jones and Maloney either gave Jackson permission to shoot Porter or instructed him to shoot Porter, who was a member of the Crips, a rival gang.

The evidence produced at trial showed that at approximately 2:30 a.m. on April 21, 2017, Newark law enforcement received a call that a male, who was later identified as Porter, had been shot in a parking lot, across from the entrance to a nightclub and adjacent to a gym. Porter was taken to the hospital, where he died as a result of his injuries that same morning. The medical examiner ruled that Porter's cause of death was eight gunshots to his head, neck, and torso, and the manner of death was a homicide.

Detective Jodi Napolitano obtained surveillance footage from the scene and additional footage from the nightclub and the gym. After reviewing the footage, Detective Donald Stabile identified Jackson and Jones. Maloney was later identified after additional investigation was conducted and known photographs of Maloney were obtained and compared to the individual depicted in the footage.

The State played the video footage at trial during Stabile's testimony. The footage showed that at approximately 12:33 a.m., on April 21, 2017, Porter along with two other men drove a gold Buick into the parking lot across the

street from the nightclub. The men parked the car, exited, and entered the nightclub.

At approximately 12:54 a.m., Jackson, driving a green Lexus, entered the same parking lot. After parking, Jackson remained in the car with the lights off. Shortly thereafter, at 1:01 a.m., the vehicle that was parked in the spot next to Jackson left, and Jackson repositioned the Lexus so that it blocked the spot he was just occupying in addition to the spot that had just been vacated.

At 1:02 a.m., Maloney, driving a minivan with Jones sitting in the passenger seat, entered the parking lot and parked in the recently vacated spot that Jackson had blocked and saved. Jackson, Maloney, and Jones then exited their cars and walked together toward the nightclub. Before getting to the nightclub, however, the three men turned around and returned to the parking lot. Jackson leaned into the driver's side door of the Lexus and made "a gesture" towards Jones. Jones's hand moved toward his waistband. Maloney, meanwhile, stood back. Jackson then moved away from the Lexus and the three men proceeded once again toward the nightclub.

At 1:08 a.m., Jackson and Maloney were searched by security prior to entering the nightclub. Jones, however, was not searched; instead, he walked around the queue and greeted another security guard who stood by the door.

At 2:22 a.m., Jackson, Jones, and Maloney left the club, and returned to the parking lot. They stopped next to Maloney's minivan and talked with one another. At 2:28 a.m., Maloney entered his minivan while the conversation continued. At 2:31 a.m., while Maloney remained in his minivan, Jones drove Jackson's Lexus out of the parking lot and Jackson moved to stand next to a white SUV. Jones then idled the Lexus in the street immediately outside of the nightclub and across from the parking lot.

At 2:33 a.m., Porter exited the nightclub and approached his vehicle in the parking lot. When he crossed in front of Maloney's minivan, the minivan's lights turned on, and Jackson ran over to Porter and shot him multiple times. Jackson then ran away from the scene and Maloney drove away in the minivan. At 2:34 a.m., Jones, who had remained idling the Lexus across the street from the parking lot, drove back into the parking lot and turned around near Porter's body. Jones spoke briefly with another person and then drove away.

Lieutenant Dominick Tafuri testified that while he was working in the Gang Unit at the Department of Corrections, he met with Jones. Jones told Tafuri that he was a member of the Bloods gang.

The State also presented the testimony of a "gang expert," Detective John Marcelli of the Essex County Prosecutor's Office. After accepting Marcelli as

an expert in gangs, the trial judge permitted him to testify in the areas of "gang identification, hierarchy, organization, and discipline."

Marcelli recited the history of the Crips, Bloods, and hybrid gangs[2] operating in Newark, and the animosity they held for each other. Marcelli also explained the hierarchical structure of each group, and testified that "[l]oyalty is key" in a gang and that "[d]iscipline is huge." Gang leaders have subordinates who do "all the work for" them. The lower-ranked members are obligated to carry out orders and execute whatever "a superior tells them to do."

By examining photographs of Porter, Marcelli determined he was a ranking member of the "Grape Street Crips" and a hybrid gang known as "ABG." Marcelli had previously interviewed Jackson, who told him he was a member of the Bloods. Marcelli found Maloney's social media postings and photographs that showed he was a higher ranked member of the Bloods. After reviewing similar information concerning Jones, Marcelli testified that Jones was a "very high-ranking member of the Red Breed Guerillas Bloods."

Jackson was the only defendant who testified at trial. He admitted that he was the "person in the video with a gun--shooting." Jackson stated he was a

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[2] Marcelli testified that "hybrid gangs" were formed by Bloods and Crips working together for the purpose of making money. According to Marcelli, these hybrid gangs posed a threat to both the Bloods and the Crips gangs.

member of the Bloods, but denied knowing whether Jones or Maloney were members. Jackson stated he was a "soldier," which is a lower-ranking member of the gang. He confirmed that the Crips were one of the gang's enemies.

Jackson testified that his brother was killed in October 2016, while leaving his place of work. Jackson stated he later learned the Grape Street Crips gang was responsible for his brother's death, and he bought a gun to protect himself.

Jackson stated he was in the nightclub on the night of Porter's death. Porter approached him and told Jackson there was "a price on [his] head, and that he was gonna get it the same in which he did with my brother." Porter then lifted his shirt and showed he had a handgun. Jackson testified he got "really angry" and believed Porter planned to kill him. He later shot Porter in the parking lot.

Jackson testified that he never saw Maloney with a gun. He stated there was "never" a plan or plot between him and Maloney to shoot Porter and denied that Jones or Maloney had any involvement in Porter's death.

III.

In their briefs, all three defendants argue that the trial court erred in denying their motions for a mistrial, which they maintain should have been granted because of the jury's behavior during deliberations. In addition, Jackson

and Maloney argue that the court erred in its instructions to the jury regarding a partial verdict. These contentions lack merit.

On the fifth day of jury deliberations, the jury sent a note to the court advising it had reached a decision as to Jackson's charges but was deadlocked on Maloney and Jones. After conferring with counsel, the judge told the jury he would not accept a partial verdict at that juncture and instructed the jury to continue to deliberate on the unresolved charges.

Two days later, Juror No. 7 knocked on the door of the jury room at approximately 5:00 p.m. She told a sheriff's officer that "one of the jurors threatened to pull her braids out" during the deliberations. Jones moved for a mistrial. The judge immediately questioned Juror No. 7 in the courtroom. The juror repeated what the other juror had told her, but stated she had no fear for her physical safety and "fe[lt] okay to be in the room with [the other juror] after today." The judge told the juror not to discuss the matter with the other jurors and dismissed the jury for the weekend.

On the following Monday, the judge told the attorneys he would address the motions for a mistrial after he had the opportunity to question the remaining jurors about the incident. Juror No. 7 again stated she did have concerns for her safety, and that the incident did not cause her to change her position in any way.

The judge next questioned Juror No. 4, who was the juror who stated she would pull out Juror No. 7's braids. The juror said she "shouldn't have said it" and she "was just frustrated." The judge told the juror that comments like that were not acceptable.

The judge then questioned each of the remaining jurors. Each juror stated that the incident did not affect their ability to deliberate.

Defendants again moved for a mistrial. The judge denied the motions, and explained on the record that the facts here did not rise to the level of those in State v. Dorsainvil, 435 N.J. Super. 449 (App. Div. 2014), where a mistrial was granted because there was "an actual physical assault" and the juror had told the court that she could not continue after that incident. The judge noted that it is "not uncommon at all that tensions rise" when jurors deliberate "for a period of time," as was the case here. The judge said that his "main concern" was that "none of the jurors would allow [that incident] to in any way affect their ability to render a verdict, and it wouldn't interfere with their decision-making ability."

Moving forward, the judge stated that he would instruct the jury regarding partial verdicts because two days prior to the incident, the jury indicated that it had reached a verdict on the charges against Jackson, and the court could have taken that verdict at that time. The judge emphasized that he "want[ed] the

jurors to know that with regard to it, if that verdict still stood, they still could return that verdict." As for Maloney and Jones, the judge said he would ask the jury, "[a]t this point in time, do you feel your deliberations -- further deliberations would be beneficial, or do you feel that you've reached a point in which your deliberations would be futile?"

Minutes after the judge provided the jury with these instructions, it sent a note indicating it had reached a unanimous decision on three counts pertaining to Jones and Maloney. The jury confirmed that it could not reach a decision on the remaining counts against these two defendants, and that it had already reached a decision on Jackson's charges. The judge then brought the jurors back into the courtroom and they delivered their verdicts.

A trial judge's decisions in handling jury issues are reviewed for abuse of discretion. State v. R.D., 169 N.J. 551, 569 (2001); see also State v. Rockford, 213 N.J. 424, 440 (2013) (holding that deference is given to the trial court with respect to assessing witness credibility and a feel of the case). Here, defendants argue that the judge abused his discretion in denying their motion for a mistrial after the argument in the jury room. We disagree.

Jury deliberations often become heated, and jurors may place all sorts of pressures on each other in the course of deliberations. See State v. Young, 181

N.J. Super. 463, 468 (App. Div. 1981). It is not the court's role to inquire into their deliberations, absent evidence of impropriety. While "[a] physical altercation between two or more deliberating jurors constitutes an irreparable breakdown in the civility and decorum expected to dominate the deliberative process," Dorsainvil, 435 N.J. Super. at 482, there is simply no comparison between jurors exchanging caustic comments and jurors engaging in physical violence in the jury room.

In Dorsainvil, the case upon which defendants primarily rely, there was evidence that one juror was "slapped" by another juror and two or three other jurors needed to be physically separated from each other by sheriff's officers. Id. at 467-68. Here, on the other hand, Juror No. 7 consistently maintained she would feel comfortable returning to the jury room to deliberate. Indeed, the record reveals that Juror No. 7's main concern was not for her physical safety, but that there was a lack of "respect" among jurors.

In addition, and unlike in Dorsainvil, the judge conducted an appropriate investigation into the matter, revealing that deliberations could continue without being tainted by what had occurred between Jurors No. 4 and 7. Not only was Juror No. 7 interviewed twice, but Juror No. 4 was also interviewed about the incident along with every other juror. All jurors described a similar sequence

of events. While the investigation revealed that a threat was indeed made, not one juror indicated that they feared for their physical safety or that the experience would impact their judgment.

In contrast, in Dorsainvil, the court's investigation was so minimal that the juror who "actually, did the striking" was not identified. Additionally, not one juror was questioned about the incident, not even the victim juror. Rather, the court simply "reminded" each juror that they were "under court order" to "treat each other with courtesy and respect," and "asked" whether they would be able to "follow those directions and continue fully deliberating." Id. at 473-78. Simply put, the court in Dorsainvil had no idea what happened in the jury room, only that something did happen. That was not the case here.

Moreover, none of the defendants have demonstrated that any alleged conflict in the jury room prejudiced them, causing an unjust result. As for Jackson, the jury indicated that it had reached a verdict as to the charges against him days prior to the altercation between Jurors No. 4 and 7. As for Jones and Maloney, the jury found them guilty of three counts, one first-degree and two second-degree and was unable to reach a verdict on two counts, both first-degree. Thus, it is evident that jurors did not feel coerced into deciding

anything, but indeed, disagreed with each other and ultimately returned no verdict as to two counts.

Under these circumstances, the trial judge properly exercised his discretion in denying defendants' motions for a mistrial. We are also satisfied that the judge properly instructed the jury on the partial verdict and on its continuing deliberations.

It is "left to the sound discretion of the trial court" to decide whether supplemental charges should be given to a deadlocked jury. State v. Figueroa, 190 N.J. 219, 235 (2007). Trial courts should consider "factors [such as] length and complexity of [the] trial and the quality and duration of the jury's deliberations" when deciding whether supplemental charges are appropriate. Ibid. If such charges are given, then on review, we consider: "(1) whether the supplemental instruction has the capacity to improperly influence the dissenting jurors to change their votes; and (2) whether 'the weighty role that the judge plays in the dynamics of the courtroom' improperly coerced the jury into returning a verdict." Dorsainvil, 435 N.J. Super. at 481 (quoting Figueroa, 190 N.J. 237-38). "Even subtle intrusions into the neutral area of jury deliberations" are not allowed. State v. Czachor, 82 N.J. 392, 400 (1980).

Jackson argues that upon learning of the jurors' deadlocked verdict, the judge should have repeated the following instruction to the jury: "not [to] surrender your honest conviction as to the weight or effect on the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict."[3] Because this was not repeated, Jackson asserts that the jurors were coerced into a decision.

As noted above, however, it is within the discretion of the trial judge whether to give any additional instructions to a deadlocked jury. Figueroa, 190 N.J. at 235. There are no "per se" rules that would either require the judge to give a specific instruction or would limit the number of times an instruction could be given. Id. at 234-35. If an instruction is given, however, the question on review is whether that instruction improperly influenced the dissenting jurors to change their votes. Id. at 238.

Here, there was nothing coercive about the judge's instructions to the jury regarding its continuation of deliberations. The judge made it clear that the jury had multiple options at that point in time: one, it could not return any verdict

[3] This language is part of "the modified Allen charge." See Czachor, 82 N.J. at 397-407 n.4 (modifying the charge that was traditionally given to deadlocked juries because of the Supreme Court's decision in Allen v. United States, 164 U.S. 492 (1896)).

and continue to deliberate on all charges; two, it could return a partial verdict and continue to deliberate as to the other charges; or, three, it could return a partial verdict and indicate that further deliberations as to the other charges would be futile. The jury was given time to consider its options, and ultimately, returned a verdict as to all the charges against Jackson, three of the five charges against Jones, and three of the five charges against Maloney. Thus, as evidenced by their verdict, the jurors were not coerced to decide one way or another.

We also conclude that the judge's partial verdict instruction was appropriate. In cases involving multiple counts to an indictment or multiple defendants tried together, a trial court may accept a partial verdict "specifying the counts on which [the jury] has agreed." R. 3:19-1(a). While the routine use of partial verdicts is discouraged, trial courts nonetheless possess the discretion to accept partial verdicts absent a showing of prejudice to the defendant. State v. Shomo, 129 N.J. 248, 257 (1992). Interim partial verdicts may be warranted, for example,

> when the jury has deliberated at length, when the charges against a defendant are rooted in unrelated facts, when the court has reason to be concerned that a juror may become ill before deliberations conclude, when there is a risk of taint to the jury's decision-making process, or when the State has indicated its intention to dismiss the unresolved counts.

[Id. at 257-58.]

If a jury returns an interim partial verdict, the trial court "must ensure that the jury intended its partial verdict to be final by specifically instructing the jury regarding the verdict's finality." Id. at 258. The court should offer "a 'neutral explanation of the jury's options either to report the verdicts reached, or defer reporting of all verdicts until the conclusion of deliberations.'" Ibid. (quoting State v. DiLapi, 651 F.2d 140, 147 (2d Cir. 1981)). In instructing the jury, the court "should inform the jury unambiguously, before the court receives the verdict, that its partial verdict will be treated in all respects as a final verdict, not subject to reconsideration, even though the jury will continue deliberations on other counts." Ibid. If the court fails to instruct a jury on the finality of a partial verdict, the defendant's right to a unanimous jury verdict could be tainted. Ibid.

Applying these principles, we are satisfied the judge followed the correct procedure when he instructed the jury regarding partial verdicts. At the time the judge gave the instruction, the jury had been deliberating for seven days and had asked "a lot of pertinent questions." On the fifth day, they indicated they were deadlocked as to the charges against Jones and Maloney but continued to deliberate for two more days until the argument arose between Jurors No. 4 and

7. Given these circumstances, it was appropriate for the judge to instruct the jury that it could return a partial verdict.

Moreover, the judge properly instructed the jury that its partial verdict would be "final" and "not subject to reconsideration" even if it continued deliberating with regard to the other defendants. The charge was neutral and did not pressure the jury into reaching a decision. The judge did not tell any dissenting jurors to question their opinions or that they should consider shifting their views to adhere to the majority.

Maloney argues that the charge was "inconsistent," particularly regarding Jackson, but the record reveals no such inconsistencies. After the jury first notified the court of its impasse, the judge said that he was "not going to take a partial verdict at [that] time." The judge instructed jurors to continue "to deliberate with a view towards reaching agreement if [they could] do so without doing violence to [their] individual judgment." The judge properly emphasized that no juror should change his or her opinion for the sole purpose of returning a verdict. The judge never said that it would never take a partial verdict. Following these instructions, the jurors deliberated for two more days before they were interrupted by the argument between Jurors No. 4 and 7. After it was decided that this incident did not warrant a mistrial, and that the jurors could

continue deliberations, the judge then appropriately instructed the jurors on the possibility of returning a partial verdict for the reasons previously discussed. The judge made it clear that the jury had multiple options; nothing was "etched in stone," contrary to Maloney's argument. Although the jurors previously indicated that they had reached a verdict on Jackson's charges, the judge still told them, "You have the option of returning the partial verdict now as to defendant Rashan Jackson if the jury is unanimous as to his counts in the indictment . . . or continue deliberations on his charges if you are not unanimous." There were thus no inconsistencies in the court's instructions.[4]

IV.

We now turn to Jones's and Maloney's contentions regarding the judge's final instructions to the jury. Jones argues that the judge's instructions on conspiracy to commit murder improperly expanded the definition of conspiracy. Next, both Jones and Maloney argue that the judge erred by repeatedly using the

[4] Jones argues that the trial court's instructions were improper because they imposed "a judicially created 'code of conduct' on jurors that is antithetical to jury deliberation." This argument lacks sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

phrase "and/or," as this terminology had the capacity to create confusion.[5] We reject each of these arguments.

Jones argues for the first time on appeal that the trial court's instruction on "conspiracy to murder" was incorrect in that it "allowed the jury to convict for levels of criminal intent that fall well short of what is necessary to convict for conspiracy to murder." Jones likens "conspiracy" to "criminal attempt" and thus, maintains that "conspiracy to murder" requires "a purposeful attempt to kill," like criminal attempt. Jones argues that it was "a fundamental misstatement of the law" for the court in this case to instruct jurors that they could find defendants guilty of conspiracy "to cause serious injury or to knowingly (rather than purposely) kill," and thus, his convictions for conspiracy should be reversed and remanded for a new trial.

"Appropriate and proper charges to a jury are essential for a fair trial." State v. Carrero, 229 N.J. 118, 127 (2017) (quoting State v. Daniels, 224 N.J. 168, 180 (2016)). "The test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of

[5] Jones also argues for the first time on appeal that the court erred in its instructions to the jury during his separate trial on the charge of possession of a handgun by a person previously convicted of a NERA offense. These arguments lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e).

law." State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997)). A jury charge is presumed to be proper when it tracks the model jury charge verbatim. State v. R.B., 183 N.J. 308, 325 (2005). Because Jones did not object to the conspiracy charge that was given below, his arguments on appeal are reviewed for plain error. R. 2:10-2.

Here, the judge instructed the jury on conspiracy to commit murder in accordance with the model jury charge. Model Jury Charges (Criminal), "Conspiracy (N.J.S.A. 2C:5-2)" (rev. Apr. 12, 2010). Nevertheless, Jones argues that the instruction incorrectly allowed the jury to convict based on states of mind other than purposeful.

However, the judge's instruction clearly provided that in order to find the defendants' guilty of conspiracy to commit murder, two elements needed to be proven beyond a reasonable doubt. That is, one, the defendant agreed with another person or persons that they or one or more of them would engage in conduct which constitutes a crime or an attempt or solicitation to commit such crime, and two, the defendant's purpose was to promote or facilitate the commission of the crime of murder. N.J.S.A. 2C:5-2.

As the judge made clear in his instructions, conspiracy to commit murder and murder are two separate charges, and consequently, must be considered

separately. While it is true that a person can be found guilty of murder whether they acted purposely or knowingly, the charge of murder is distinct from the charge of conspiracy to commit murder, which the judge correctly instructed requires purpose to promote or facilitate a crime, in this case, murder.

Contrary to Jones's newly-minted argument, the purposeful nature of the offense of conspiracy applies to the agreement itself, and not to the underlying offense.

> When the State prosecutes a defendant for conspiracy to commit a first or second degree crime, it need not prove that a defendant committed an overt act in pursuance of the conspiracy. N.J.S.A. 2C:5-2[(d)]. Therefore, because defendants were convicted of conspiracy to commit first and second degree crimes, the sufficiency of the evidence as to the commission of an overt act is not at issue. Ibid. The only question is whether a reasonable jury, viewing the State's evidence in its most favorable light, could find beyond a reasonable doubt that defendants, acting with a purposeful state of mind, agreed to commit, attempted to commit, or aided in the commission of [a crime]. [State v.]Reyes, [] 50 N.J. [454,] 459 [1967].
>
> [State v. Scherzer, 301 N.J. Super. 363, 401 (App. Div. 1997).]

Thus, contrary to Jones's argument, there is no "clear limitation that a conspiracy to murder is only an agreement to purposely kill." The underlying crime, in this case, murder, does not have to be purposeful for the agreement to

be purposeful. See State v. Lavary, 152 N.J. Super. 413, 418 (App. Div. 1977) ("A conspiracy is not the commission of the crime which it contemplates, and the conspiracy neither violates nor 'arises under' the statute whose violation is its object."). Consequently, there was no error in the judge's instructions on the conspiracy charge.

Jones and Maloney next argue, again for the first time on appeal, that the judge's use of the "and/or" in its jury instructions was erroneous. They contend that the use of this term joined defendants' names in the instructions for conspiracy and allowed the jury to render a guilty verdict if it found that any one of the defendants had the purpose to commit murder or one of the weapons charges. We disagree.

Here, the trial judge instructed the jury multiple times that "[e]ach defendant, and each count in the indictment, should be considered separately." As far as its use of "and/or" was concerned, the judge specifically instructed:

> And you notice I say and/or, because you're to consider each one separately. You can find one, two, or three -- it's up to you . . . each individual defendant. So, I have that over and over in the charge -- and/or -- because each defendant must be considered differently on each count.

In maintaining that the judge's use of the phrase "and/or" was erroneous, both Jones and Maloney rely on State v. Gonzalez, 444 N.J. Super. 62 (App.

Div. 2016). In that case, the State's theory was that the defendant conspired with two codefendants to rob and shoot a drug dealer. Id. at 66-67. The issue at trial was whether the defendant shared the codefendants' intent to commit the crimes or whether his participation was the product of duress. Ibid. On appeal, the Appellate Division found error in the trial court's jury charge on conspiracy and accomplice liability because the charge referred to "robbery 'and/or' aggravated assault" when referring to the substantive crimes the codefendants were alleged to have committed for which the defendant was to be considered accountable. Id. at 73-75.

The Appellate Division explained:

> [T]he nature of the indictment required that the jury decide whether defendant conspired in or was an accomplice in the commission of a robbery, or an aggravated assault, or both. By joining (or disjoining) those considerations with "and/or" the judge conveyed to the jury that it could find defendant guilty of either substantive offense – which is accurate – but left open the possibility that some jurors could have found defendant conspired in or was an accomplice in the robbery but not in the assault, while other jurors could have found he conspired in or was an accomplice in the assault but not the robbery. In short, these instructions did not necessarily require that the jury unanimously conclude that defendant conspired to commit or was an accomplice in the same crime. Such a verdict cannot stand.

> The jury was also told that "to find the defendant guilty of committing the crimes of robbery and/or aggravated assault charges, the State must prove [among other things] that [the codefendant] committed the crimes of robbery and/or aggravated assault." Assuming the "and/or" in this instruction was interpreted as being a disjunctive, it is entirely possible the jury could have convicted defendant of both robbery and aggravated assault even if it found [the codefendant] committed only one of those offenses, i.e., the jury was authorized, if it interpreted "and/or" in this instance as "or," to find defendant guilty of robbery because it was satisfied the State proved that [codefendant] committed an aggravated assault.
>
> [Id. at 75-77 (citations omitted).]

In denying certification of Gonzalez, the Supreme Court expressly limited the court's holding "to the circumstances in which it was used in this case." State v. Gonzalez, 226 N.J. 209 (2016).

Here, the court's use of the phrase "and/or" was for a different purpose than what it was used for in Gonzalez, and thus, Jones's and Maloney's reliance on that case is misplaced. In this case, the judge used the phrase "and/or" to avoid having to repeat certain charges when more than one defendant was charged with the same offense. The judge specifically told jurors that the reason he was using this phrase was because they were to consider each defendant separately, and thus, they could find all three defendants guilty, none of them guilty, or some combination of them guilty.

Unlike Gonzalez, the judge did not use the phrase "and/or" during its description of any of the offenses. Therefore, the possibility that some jurors could have found the defendants conspired to do one crime while other jurors found the defendants conspired to do another crime did not exist. Gonzalez, 444 N.J. Super. at 75-76. Accordingly, we reject defendants' contention.

V.

Jackson, Jones, and Maloney next argue that the trial judge abused his discretion when he allowed the State's expert witness on gangs, Marcelli, to testify. We disagree.

Pre-trial, on May 3, 2018, September 5, 2018, and September 6, 2018, the judge held a hearing to determine the admissibility of Marcelli's testimony. On September 6, 2018, the judge preliminarily found:

> With regard to the gang testimony, I find that it is relevant how the different gangs that are being testified to have developed over the years, and it certainly goes to the expertise of Detective Marcelli. So I will allow testimony concerning how the gangs were developed.
>
> I am more concerned with regard to specific instances that could be prejudicial.

On September 20, 2018, following several days of jury selection, the judge expanded on his ruling. Citing State v. Torres, 183 N.J. 554 (2005), the judge noted that expert testimony on gangs is admissible if the expert is properly

qualified and if the testimony would help the jury understand the evidence presented. Thus, the judge determined that Marcelli's testimony in the field of gangs was generally admissible because, based on Marcelli's experience, he was qualified in this area. The judge pointed out, however:

> [T]hat doesn't deal with a lot of the issues that have been raised, and specific issues, with regard to the testimony that he gave at the 104 hearing, which is not necessarily the testimony that will be admissible at the point of trial.
>
> Again, he indicated that his opinion was based upon gang member interviews, other officers' field observations, [including] a review of tattoos, seminars, telephone calls, correspondence, as well as social media.
>
> Just because he relied upon that in his report, doesn't necessarily mean that the [c]ourt is going to allow everything he testified to before the jury, obviously. There's certain thresholds that must be required -- that must be met before the [c]ourt will allow testimony.
>
> So with regard to the specific items -- I know it's going to take a little time -- but I'd like to go through, basically, what the State would like to offer.

The State then presented what it intended to present at trial. As far as Marcelli's testimony regarding the formation of gangs and their hierarchies, the judge found that was admissible, as it was not unduly prejudicial. The judge cautioned, however, that Marcelli "shouldn't be talking about specific acts of

violence with regard to any particular gang." But Marcelli could testify as to the "punishment that can be meted out for failure to obey orders." Additionally, the judge ruled that photographs from defendants' Facebook and Instagram pages and photographs of their tattoos, which Marcelli relied upon in his expert report and to which he intended to refer to during trial, were admissible, because the photographs were not prejudicial and the social media pages would likely be authenticated as business records.

On September 25, 2018, the judge held further discussion on the issue of defendants' tattoos and Marcelli's testimony in that regard. Following counsels' arguments, the judge first found, as to Maloney, that the tattoo evidence was relevant to a material issue in the case, which was, "gang membership and/or hierarchy to prove motive." Next, the judge found "based upon the testimony of [Marcelli], that the tattoos [were] clear and convincing [evidence] of a gang affiliation." And finally, the judge found "that the probative value" with regard to the tattoo evidence was not "outweighed by any possible prejudice." Thus, the tattoo evidence was admissible, and the judge noted it would give the jury "an appropriate limiting instruction" concerning that evidence.

During trial, prior to Marcelli taking the stand, Jones's counsel again objected to Marcelli's testimony. Jones's counsel argued that the sole purpose

of Marcelli's testimony was to demonstrate motive, but, up to that point, the State had failed to present any independent evidence that the motive was gang related, making Marcelli's testimony irrelevant. Maloney's counsel joined the objection. The judge overruled these objections. Jones and Maloney raised similar objections during Marcelli's testimony, and the judge overruled these objections as well.

Generally, when reviewing the admission or exclusion of evidence, appellate courts afford "[c]onsiderable latitude" to a trial judge's determination, examining "the decision for abuse of discretion." State v. Kuropchak, 221 N.J. 368, 385 (2015) (alteration in original) (quoting State v. Feaster, 156 N.J. 1, 82 (1998)); see also State v. Jenewicz, 193 N.J. 440, 456 (2008) (stating "the abuse-of-discretion standard" is applied "to a trial court's evidentiary rulings under Rule 702"). "Under th[is] standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling was so wide of the mark that a manifest denial of justice resulted.'" Kuropchak, 221 N.J. at 385-86 (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

As far as expert testimony is concerned, it is admissible if it meets three criteria:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2)

> the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.
>
> [State v. Henderson, 208 N.J. 208, 297 (2011) (quoting Jenewicz, 193 N.J. at 454).]

The introduction of expert testimony regarding gang behavior is guided by Torres, 183 N.J. at 554. In that case, the defendant was charged with first-degree murder as an accomplice in the killing of a member of his gang by fellow gang members. Id. at 562-64. Examining whether gang-related expert testimony was admissible under N.J.R.E. 702, the Court aligned with other jurisdictions and concluded "testimony explaining the structure, organization, and procedures of street gangs would be helpful to a jury's understanding of the relevant issues at trial." Id. at 573. The Court cautioned, however, that expert gang testimony

> must be restricted to those areas that fall outside the common knowledge of jurors. For example, a juror generally would not be expected to be familiar with the structure and organizational aspects of gangs or the significance of particular gang symbols. Those areas fall within the specialized knowledge of the expert, who by virtue of his training, experience, and skill can shed light on such subjects.
>
> [Ibid.]

The Court ultimately concluded that the expert testimony regarding defendant's gang involvement was admissible because it was "relevant to show the connection between defendant's actions as the leader of the gang and the actions of the other gang members who actually committed the murder." Ibid.

Here, it was discovered during jury voir dire that many jurors had no experience with gangs. Additionally, as was revealed during the pretrial hearing, Marcelli's education, experience, and training made him qualified to testify as an expert in the field of gangs, and defendants do not challenge his qualifications on appeal.

Therefore, because it was the State's theory that the motive behind Porter's death was gang related, it was not an abuse of discretion for the judge to permit Marcelli to testify regarding gangs and their general structure, organization, operation, and history during trial. Importantly, the judge was careful to exclude any evidence that exceeded the scope of his ruling or was otherwise unreliable or prejudicial, such as certain testimony regarding Maloney's and Jones's nicknames and tattoos. Marcelli was also not permitted to opine as to the specific motives of any defendant.

Jackson argues that it was an abuse of discretion for the judge to permit Marcelli's testimony because it went "beyond the scope of the issues in this

case," as Jackson "admitted that he killed Porter in revenge for his brother's murder and to protect himself from being murdered." Jackson further argues that it was an abuse of discretion for the judge to permit Marcelli's testimony because the evidence was not "reasonably close in time to the offense charged," "not clear and convincing," and "the probative value of the references to Jackson's possible gang ties to the Bloods were substantially outweighed by its undue prejudice."

N.J.R.E. 404(b)(1) prohibits the use of "evidence of other crimes, wrongs, or acts . . . to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." The rule does, however, permit the use of such evidence for other purposes, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b)(2). "Because evidence of a defendant's previous misconduct 'has a unique tendency' to prejudice a jury, it must be admitted with caution." State v. Willis, 225 N.J. 85, 97 (2016) (quoting State v. Reddish, 181 N.J. 553, 608 (2004)). "[T]he party seeking to admit other-crimes evidence bears the burden of establishing that the probative value of the evidence is not outweighed by its apparent prejudice." Reddish, 181 N.J. at 608-09.

To "avoid the over-use of extrinsic evidence of other crimes or wrongs," courts must utilize a four-prong case-by-case analysis to determine admissibility:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [State v. Cofield, 127 N.J. 328, 338 (1992).]

As for prong one, the "proffered evidence must be 'relevant to a material issue genuinely in dispute.'" State v. Gillispie, 208 N.J. 59, 86 (2011) (quoting State v. Darby, 174 N.J. 509, 519 (2002)). Evidence is relevant if it tends "to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. "The analysis can include all evidentiary circumstances that tend to shed light on a defendant's motive and intent or which tend fairly to explain his actions, even though they may have occurred before the commission of the offense." State v. Skinner, 218 N.J. 496, 515 (2014) (citations omitted). "The main focus 'in determining the relevance of evidence is whether there is a logical

connection between the proffered evidence and a fact in issue.'" State v. Garrison, 228 N.J. 182, 195 (2017) (quoting State v. J.M., 225 N.J. 146, 160 (2016)).

Here, Jackson argues that there was no issue genuinely in dispute because his own testimony addressed the motive behind Porter's death "clearly and unequivocally." Contrary to Jackson's argument, however, the issue of motive was in dispute. Although Jackson claimed that he shot Porter out of revenge, that was not the State's theory of the case; therefore, the issue was in dispute and the judge did not err in permitting the State to put forth evidence to support its theory.

Jackson further argues the gang evidence was not "reasonably close in time" because the "offered gang-related evidence concerned an incident (i.e., the murder of Jackson's brother) that took place six months prior to the Porter shooting." But Marcelli's testimony related to why Jackson, Jones, and Maloney murdered Porter. The alleged incident that occurred between Porter and Jackson's brother was not the subject of defendants' trial and was not an issue the jury had to decide. In any event, the evidence was "reasonably close in time" because defendants' gang memberships were ongoing.

Additionally, Jackson claims the third prong was not satisfied because the evidence "was not relevant" but relevance is not what the third prong discusses. Whether the evidence was "clear and convincing" is the third prong, and here, it was because, as was found by the trial judge, Marcelli credibly explained that his testimony regarding defendants' gang memberships was based on gang member interviews, other officers' field observations, review of tattoos, various correspondence, as well as social media.

As for the fourth prong, Jackson further argues the probative value of Marcelli's testimony was not outweighed by its prejudice. However, when it comes to evidence of motive or intent, a "very strong showing of prejudice" is required to justify exclusion. State v. Green, 236 N.J. 71, 84 (2018) (quoting Garrison, 228 N.J. at 197). And here, because the judge was careful to limit Marcelli's testimony, there was no strong showing of prejudice to defendants. Also, the judge gave the jurors a limiting instruction regarding Marcelli's testimony in which he specifically said that,

> you can never use [the testimony concerning gangs] to conclude that a defendant has a pre-disposition to commit any crimes, or that simply because you find that he was a gang member, or that the victim may have been a member of a gang, that the defendant therefore must be guilty of the crimes charged in the indictment.

That limiting instruction was given at least seventeen times during the trial.

Like Jackson's argument regarding relevance, Jones argues that the State "improperly used a gang expert . . . to create a motive that was not otherwise demonstrated in the case." Jones maintains that there was "[n]o evidence . . . to show that this killing was anything more than a personal beef between codefendant Jackson and the victim." Therefore, he asserts that admission of Marcelli's testimony regarding gangs was inadmissible.

What Jones forgets to mention, however, is that he and Maloney were both charged with promoting organized street crime. At trial, both defendants maintained that they were not guilty of the offense, and the State contended that they were. Thus, Marcelli's gang-related testimony was directly relevant to this issue that the jury had to decide.

What is more, despite Jones's arguments to the contrary, there was evidence to show that this killing was more than a "personal beef" between Jackson and Porter. Indeed, the substantial surveillance footage showed Jackson, Jones, and Maloney interacting with one another before the shooting. Marcelli's testimony, particularly in the absence of eyewitness testimony, aided the jury in understanding why the events as depicted in the footage unfolded as they did. See State v. Terrell, 452 N.J. Super. 226, 262-63 (App. Div. 2016), aff'd o.b., 231 N.J. 170 (2017) (upholding trial court's decision to admit

testimony by a street gang expert to support motive and opportunity for commission of the crimes).

Citing Skinner, 218 N.J. at 517-21 and State v. Lumumba, 253 N.J. Super. 375, 386-91 (App. Div. 1992), Jones argues that like the evidence presented in those cases, Marcelli's gang-related testimony should also have been excluded as it was not "specifically relevant to a matter in the case." In Skinner, the defendant was accused of shooting a fellow drug dealer. 218 N.J. at 501-02. The State sought to introduce "inflammatory" bad act evidence—violent rap lyrics about shooting people—that it asserted represented motive evidence. Id. at 503. While the Court agreed with the State that the defendant's motive was genuinely in dispute, the Court noted that the State had evidence other than the defendant's rap lyrics that it could have used to prove motive, namely, the victim's testimony. Id. at 519-20. The Court found that the "effect of [the] defendant's rap lyrics was simply to bolster the State's motive theory," which was impermissible. Id. at 520.

Further, the Court noted that many of the lyrics "were written long before" the time of the shooting and "there was no evidence that the crimes and bad acts about which [the] defendant wrote in rap form were crimes or bad acts that he in fact had committed." Id. at 520-21. Finally, the Court found that the

"prejudicial effect overwhelm[ed] any probative value that [the] lyrics" might have had. Id. at 521. The Court explained, "[t]he difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views." Ibid. Therefore, the admission of the defendant's lyrics was error, and the Court reversed his convictions. Id. at 525.

Contrary to Jones's argument, Skinner has no bearing on his case. Here, unlike the rap lyrics in Skinner, Marcelli's gang-related testimony was directly relevant to two issues: (1) whether Jones and Maloney were promoting organized street crime; and (2) the motive behind Porter's shooting. No other evidence was available to prove those points. Thus, the trial judge did not err in holding that the probative value of Marcelli's testimony was not outweighed by its prejudicial effect. Marcelli did not opine as to defendants' motives; instead, he identified defendants as gang members and explained to the jury the structure, organization, and procedures of gangs. The jury was ultimately left to decide whether defendants' gang involvement had anything to do with the shooting.

Next, in Lumumba, the defendant had committed a murder and a separate attempted murder in the same weekend. 253 N.J. Super. at 378-80. While on trial for the murder, the State introduced extensive evidence of the attempted murder, maintaining that it was "evidence of a plan to kill two unrelated people." Id. at 386. Finding that the admission into evidence of the attempted murder was error, the Appellate Division said, "we have difficulty discerning any common or high goal to which the killings were related." Id. at 388. In fact, the court ultimately found that the attempted murder was "totally unrelated" to the murder. Ibid. Additionally, the court found that the "defendant's alleged plan to snuff out the lives of two he did not like during the same weekend was probative of nothing in the [murder] trial." Id. at 390.

Like Skinner, Lumumba has no bearing on defendants' trial because the evidence at issue in that case had absolutely no relevance to the charges for which the defendant was on trial. Here, however, Marcelli's testimony was relevant to multiple issues, and because there was no other evidence to prove those points, the trial judge did not err in permitting Marcelli to testify.

Finally, in a footnote, Jones argues that "in direct contravention" of the court's order, the prosecutor referred to Jones as a "godfather" in the Bloods, "which furthered the undue prejudice." But this comment came during cross-

examination, in response to Jackson saying that he knew Jones and Maloney and was also relevant to whether Jackson was possibly exculpating Jones and Maloney due to their ranks. The comment was followed by a curative instruction from the trial judge, which told the jury that "the mere fact that an attorney injects supposed facts into a question in no way proves the existence of those facts. It is the answers of the witness that is the evidence in this case." Consequently, there was no undue prejudice warranting a mistrial.

Maloney argues for the first time on appeal that Marcelli's testimony regarding Blood-Crip "hybrid" gangs "serves only as proof that the prevailing Blood-versus-Crip theory is not as reliable as was once thought," and therefore, Marcelli's testimony should have been barred pursuant to N.J.R.E. 702. Again, we disagree.

For expert testimony to be admissible under N.J.R.E. 702, the discipline, methodology, or premises relied upon by the witness must be sufficiently reliable. There are three ways a proponent of scientific evidence can prove its general acceptance and reliability:

> (1) by expert testimony as to the general acceptance among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3)

> judicial opinions that indicate the expert's premises have gained general acceptance.
>
> [State v. Harvey, 151 N.J. 117, 169-70 (1997).]

As for expert testimony on gangs, our Supreme Court in Torres found that persuasive judicial decisions rendered such testimony reliable. 183 N.J. at 569. The Court noted that "many out-of-state cases have considered the issue and have admitted the evidence. Those jurisdictions have concluded that interviews of former gang members are a permissible factual source for the formation of expert testimony and opinion, even though some of the information may be suspect." Ibid.

Since Torres, our courts have permitted expert testimony regarding gang behavior, specifically, the structure, organization, and procedures of gangs, when such testimony would be helpful to a jury's understanding of the relevant issues at trial. Terrell, 452 N.J. Super. at 260-61; see also State v. Goodman, 415 N.J. Super. 210, 221, 230 (App. Div. 2010) (holding that testimony about gang culture and rivalry from a gang expert is admissible to help establish motive in a murder case).

Maloney points to no case law, either in this jurisdiction or elsewhere, that supports his position that gang-related testimony is no longer reliable due to the emergence of "hybrid" gangs. As our case law stands, so long as the proffered

gang expert is qualified and his or her proposed testimony would be helpful to a jury's understanding of relevant issues at trial, then the expert is permitted to testify. Additionally, it is important to point out that Marcelli's training and experience in gangs was extensive. His testimony was based on years of work studying gangs and interviewing gang members. Contrary to Maloney's argument, his testimony was not "speculative, guess-work, [or] mind-reading." Therefore, his testimony was not barred by N.J.R.E. 702.

Additionally, Maloney maintains that it was error for the trial judge to allow Marcelli "to opine that an alleged gang leader is a presumptive accomplice merely by reason of his (or her) status." But contrary to Maloney's arguments, Marcelli was not allowed to give such testimony. Marcelli merely provided testimony regarding the general operation, hierarchy, and symbology of gangs. He did not say that Jackson killed Porter because he was ordered to by Jones and Maloney. Nor did he more generally say that every killing done by a lower-ranking gang member was the result of an order given by a higher-ranking member. Thus, Marcelli's testimony was not improper.

In addition to the arguments raised in Maloney's plenary brief, Maloney raises several other arguments in his pro se brief regarding Marcelli's testimony. First, he argues that following Marcelli's testimony that "if you're a ranking

individual you've put work in," the trial judge should have issued a curative instruction, as that testimony implied that Maloney and Jones have committed prior acts of violence.

This objection was raised at trial, along with a more general objection to any testimony regarding gang membership status. The judge overruled the objection, finding:

> There was nothing improper about bringing out somebody's status and how the gangs operate. That's exactly what Torres deals with. So ultimately what the [c]ourt is not allowing is the witness to opine that in this particular case that Mr. Jones was the Godfather and therefore ordered the shots. But certainly he could testify as to what high ranking members can and can't do and how the gangs operate in general and it will be ultimately up to the parties to argue what that means, if anything. So -- I mean Torres clearly allowed that type of testimony. So as long as the witness doesn't testify specifically that it's his opinion that each specific defendant did that, certainly counsel can argue the meaning of what happened, the facts of the case. And also, counsel is free to question at length in cross examination as to whether or not a witness has free -- a gang member has free (Inaudible) they had to do everything their supervisor tells them to do. So I don't find it improper at this point.

Contrary to Maloney's arguments, it was not an abuse of discretion for the judge to permit Marcelli's testimony that gang members have to work for a higher rank because this testimony pertained to gang structure, organization and

procedure, and was helpful to the jury's understanding of relevant trial issues. Torres, 183 N.J. at 572-73. Moreover, this testimony was not overly prejudicial. Marcelli did not testify as to what "work" meant; he simply stated that someone with a higher rank has done more work for the gang than someone with a lower rank. This information is precisely the type of information that our courts have found an expert in gangs is permitted to provide.

The judge also did not abuse his discretion by permitting Marcelli to testify that higher-ranking gang members may direct or must approve certain actions of lower-ranking members. This testimony pertained to gang structure, organization, and procedure, and was helpful to the jury's understanding of relevant trial issues, most notably motive. Again, the State's theory of the case was that the shooting of Porter was gang related. Jackson's theory of the case was that the shooting was not gang related. Thus, the issue of motive was in dispute and gang expert testimony regarding the general operation of gangs was relevant and probative. Therefore, because the testimony was proper, the court correctly found that a curative instruction was not necessary.

Also, in his pro se brief, Maloney argues that the admittance of two of his tattoos as indicative of gang membership was "improper" as they were not relevant to the charged offenses and were highly prejudicial. However, for

reasons previously discussed, Maloney's gang membership and his status was relevant to the issue of motive and whether Maloney was promoting organized street crime. Therefore, his tattoos, which Marcelli testified that in his expert opinion signified Maloney's high-ranking membership in the Bloods, were indeed relevant.

VI.

We now turn to defendants' contentions concerning the video surveillance testimony. Maloney argues that Stabile's narration of the surveillance footage during trial was improper. He maintains that Stabile was "effectively . . . a thirteenth juror." Jackson makes the same argument in his pro se brief. Additionally, both contend that Stabile's identification of the three defendants in the footage violated State v. Tilghman, 345 N.J. Super. 571 (App. Div. 2001). For the reasons that follow, these contentions lack merit.

During trial, the State showed surveillance footage to the jury while Stabile testified. Just prior to the footage being shown, defendants' counsels objected, and Jackson's counsel specifically said that it "appear[ed] that Detective Stabile is about to engage in a narrative of what it is, his interpretation with what's on the video." Maloney's counsel added that the video spoke for itself. The trial judge overruled the objections and held that Stabile could testify

as to what he observed on the footage but could not testify as to "how the jurors should ultimately determine what those actions mean," as that could be argued by counsel during summation. The judge found that Stabile's observations were relevant to how he proceeded with the investigation, "ultimately arresting these individuals and identifying them."

The judge instructed Stabile:

> THE COURT: . . . Detective, don't test -- testify to ultimately what other people could or could not see. Just testify as to what you observed on the video, all right?
>
> STABILE: Okay.
>
> THE COURT: Don't offer any opinion as to what somebody might believe it meant, all right?
>
> STABILE: Yes, sir.

Then the judge addressed the jury:

> All right. Yeah, mem -- members of the jury, with -- with regard to the video himself the Detective will be allowed to testify what he observed on the video, but not what he believed that meant. Ultimately that's a question for the jury to determine, what the video actually shows, because you're going to see the video for yourself. He can just testify to what -- what he observed on the video, but any ultimate determination as to what it means is up for you to determine. All right?

In his brief, Maloney argues that the judge "allowed the jury to be influenced by an experienced police investigator's interpretation of the footage instead of having them view the videos themselves." Maloney highlights several portions of Stabile's testimony that he contends were particularly problematic, including Stabile's testimony that Jackson was "gesturing toward Mr. Maloney" while Maloney was parking in the parking lot. He also notes that while the footage was playing, the prosecutor referred to Jackson, Maloney, and Jones as "the defendants" in his questions to Stabile. Maloney further contends that the "testimony of Detective Napolitano proves that the State was capable of presenting this evidence without 'color commentary.'"

As previously discussed, on evidentiary matters, an appellate court defers to a trial court's ruling absent an abuse of discretion. Kuropchak, 221 N.J. at 385. Thus, a trial court's ruling will only be disturbed if it was so wide of the mark that a manifest denial of justice occurred. Id. at 385-86.

It is well established that a police officer may provide testimony describing "what the officer did and saw," because "[t]estimony of that type includes no opinion, lay or expert, and does not convey information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." State v. Singh, 245

N.J. 1, 15 (2021) (quoting State v. McLean, 205 N.J. 438, 460 (2011)). When the officer's testimony transitions into non-expert, lay opinion testimony, the parameters of his or her testimony are different.

"Lay opinion is admissible 'if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function.'" State v. Sanchez, 247 N.J. 450, 466 (2021) (quoting Singh, 245 N.J. at 14). Opinion testimony of a lay witness is governed by N.J.R.E. 701, which states, "[i]f a witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences may be admitted if it: (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." The Rule was adopted to "ensure that lay opinion is based on an adequate foundation." Singh, 245 N.J. at 14 (quoting State v. Bealor, 187 N.J. 574, 586 (2006)).

"The first prong of N.J.R.E. 701 requires the witness's opinion testimony to be based on the witness's 'perception,' which rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." Singh, 245 N.J. at 14 (quoting McLean, 205 N.J. at 457). Therefore, the witness's knowledge may not be acquired through "hearsay statements of

others." Sanchez, 247 N.J. at 469 (citing N.J.R.E. 701). But "[t]he witness need not have witnessed the crime or been present when the photograph or video recording was made in order to offer admissible testimony" about what is depicted. Ibid.

Under the Rule's second prong, the lay witness's testimony must "assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Singh, 245 N.J. at 15 (quoting McLean, 205 N.J. at 458).

In Sanchez, our Supreme Court identified four factors for trial courts to consider when determining whether lay opinion testimony will assist the jury. 247 N.J. at 470. First, "the nature, duration, and timing of the witness's contacts with the defendant are important considerations." Ibid. For example, if the witness "has had little or no contact with the defendant, it is unlikely that his or her lay opinion testimony will prove helpful." Id. at 471 (citing State v. Lazo, 209 N.J. 9, 24 (2012)). On the other hand, if the witness has had "sufficient contact with the defendant to achieve a level of familiarity," then that lay opinion would be helpful. Id. at 470-71 (citing United States v. Beck, 418 F.3d 1008 (9th Cir. 2005)).

Second, "if there has been a change in the defendant's appearance since the offense at issue, law enforcement lay opinion identifying the defendant may be deemed helpful to the jury." Id. at 472 (citing Lazo, 209 N.J. at 23).

Third, "[c]ourts evaluating whether a law enforcement official may offer a lay opinion on identification" should consider "whether there are additional witnesses available to identify the defendant at trial." Ibid. (citing Lazo, 209 N.J. at 23). "Law enforcement lay opinion identifying a defendant in a photograph or video recording 'is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution.'" Ibid. (quoting United States v. Butcher, 557 F.2d 666, 670 (9th Cir. 1977)).

Fourth, the quality of the photograph or video recording at issue may be a relevant consideration. Id. at 473. "If the photograph or video recording is so clear that the jury is as capable as any witness of determining whether the defendant appears in it, that factor may weigh against a finding that lay opinion evidence will assist the jury." Ibid. For example, in United States v. Sanchez, 789 F.3d 827, 837 (8th Cir. 2015), the Eighth Circuit held that "[a] witness's opinion concerning the identity of a person depicted in a surveillance photograph is admissible if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the

jury." In that case, the court observed that "the relatively low quality of the footage" favored the admission of the lay opinion because "the surveillance photograph made it difficult for the jury to make a positive identification of the defendant." Ibid.

"Conversely, if the photograph or video recording is of such low quality that no witness – even a person very familiar with the defendant – could identify the individual who appears in it, lay opinion testimony will not assist the jury, and may be highly prejudicial." Sanchez, 247 N.J. at 473. As succinctly noted by the First Circuit, and cited with approval by our Supreme Court,

> a lay witness's testimony identifying a defendant in a surveillance photograph is helpful to the jury "when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess, and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification."
>
> [Ibid. (quoting United States v. Jackman, 48 F.3d 1, 4-5 (1st Cir. 1995)).]

Importantly, these four factors that were identified in Sanchez "are not exclusive; other considerations may be relevant to the question of whether lay opinion testimony will assist the jury in a given case." Ibid. "Moreover, no single factor is dispositive." Id. at 473-74 (citing Lazo, 209 N.J. at 20-24 and Beck, 418 F.3d at 1015). In short, "the critical fact-sensitive issue to be decided

on a case-by-case, indeed, question-by-question basis is whether a specific narration comment is helpful to the jury and does not impermissibly express an opinion on guilt or on an ultimate issue for the jury to decide." State v. Watson, 472 N.J. Super. 381, 445 (2022).

Here, the Sanchez factors were met, and therefore, contrary to Maloney's arguments, there was no error in the trial judge's admission of Stabile's testimony regarding the surveillance footage. First, Stabile testified that he personally viewed all the footage. He indicated he recognized Jackson and Jones at the outset, and that he was able to identify Maloney after some further investigation. Stabile's identifications of defendants were thus rationally based on his perception.

Next, while there were additional witnesses present at the time of the crime, they either had no further information to provide or declined to cooperate, and therefore, there were no other witnesses available to identify defendants. Finally, the quality of the footage was such that narration was particularly appropriate. There were multiple camera angles and dozens of people and vehicles, which rendered the footage confusing. Therefore, there is no doubt that Stabile's testimony helped the jury focus on the relevant action.

Stabile's testimony was also limited to what he perceived in the recording; he did not opine as to defendants' guilt. Therefore, his testimony was not prejudicial and did not deprive defendants of a fair trial. See also, Watson, 472 N.J. Super. at 465 (When reviewing whether "the proffered narration testimony would be helpful, the issue is not whether the jury could have discerned the narrated observation unaided, but whether the narration testimony would assist the jury, for example, by focusing its attention on that portion of the video so it can make its own evaluation.").

Maloney likens his case to McLean, 205 N.J. at 445. In that case, the Court found the officer's testimony that he observed a "hand-to-hand drug transaction" was improper as it was an "expression of a belief in defendant's guilt." Id. at 463. Contrary to Maloney's assertions, however, Stabile's testimony did not opine as to his, Jackson's, or Jones's guilt. Stabile merely described what he saw on the footage in neutral terms. A review of Stabile's testimony shows that he did not share his personal beliefs as to what occurred.

Maloney also claims his case is similar to Lazo, 209 N.J. at 9. There, the Supreme Court reversed the defendant's conviction based on the improper admission of testimony from a detective unacquainted with the defendant that the defendant's arrest photograph resembled a composite sketch prepared in a

criminal investigation. Id. at 19-25. But unlike the detective in Lazo, Stabile did have familiarity with defendants both from prior interactions and because of his investigation into the shooting. Thus, Stabile's identification of the defendants on the footage was based on his perception.

Finally, citing Singh, Maloney argues that it was error for he, Jackson, and Jones to be referred to as "defendants" when discussing the footage because, as the court determined in Singh, that could have been interpreted to imply guilt. 245 N.J. at 18. A review of the record shows, however, that defendants' attorneys specifically asked the State to use the term "defendants" when describing the footage, stating that "defendants" was a less prejudicial term than "actors," which was the term the State was originally using. Regardless, the use of the term "defendant" or "defendants" during the showing of the footage was not unduly prejudicial because, again, Stabile did not opine as to any issues the jury had to decide. Instead, he merely described what he saw on the footage.

Therefore, we find there was no error, let alone reversable error, in permitting Stabile to testify as to the events depicted on the surveillance footage.

Maloney further argues that it was error for the trial judge to allow Stabile to testify that he "recognized the defendants by prior knowledge of them." Jackson, in his pro se brief, raises the same argument. Again, we disagree.

At trial, Stabile testified:

> STATE: Detective, at what point -- at what point had you identified the defendants who are now charged in this case?
>
> STABILE: After I reviewed the video that was given to me from the FAQs (phonetic) Unit, the day after, in my office.
>
> STATE: Okay. And when you're saying the video, which videos helped you with that identification?
>
> STABILE: The -- the video that helped me with the identifications came from the Boulevard nightclub.
>
> STATE: Okay. And who were you able to identify on your own from that ident -- from -- from review of that video?
>
> STABILE: Mr. Jackson and Mr. Jones.
>
> . . . .
>
> STATE: Now, with regard to Mr. Maloney, who's obviously been so further charged, did you require some additional investigation?
>
> STABILE: Yes.
>
> STATE: And at some point you obtained known photographs of Mr. Maloney?
>
> STABILE: Yes, I did.
>
> STATE: And you were able to match them to the person you can see on the video. Is that fair?

STABILE: That is correct.

At that point, the trial judge gave the jury the following instruction:

> I just want to give you an instruction with regard to the testimony that he identified Naim Jones, Hakeem Maloney, and Rashan Jackson on the video surveillance, as well as still shots from the same.
>
> With . . . reference identification, it's common for members of law enforcement to be familiar with members of the community in which they work and you are not to consider that fact that Detective Stabile identified Naim Jones, Hakeem Maloney, and Rashan Jackson from the surveillance video as individuals he recognized as prejudicing them in any way.
>
> The identifications are not evidence that the defendants have ever been arrested or convicted of any crime. Prior interactions with law enforcement for innocent purposes is common, and law enforcement members are familiar with photographs of individuals from a variety of sources including, but not limited to: driver's license applications, passports, ABC identification cards, various forms of government employment, private employment requiring State regulation, including but not limited to the casino license applications, security guard applications, etc., or from a variety of other sources totally unconnected with criminal activity.

For the first time on appeal, Maloney argues that Stabile's identification was highly prejudicial, as it is "axiomatic that the jurors . . . would assume that any police contact would be law-enforcement related." We review Maloney's argument for plain error. R. 2:10-2.

In Tilghman, 345 N.J. Super. at 578, a police officer testified that after he heard the victim's description of her assailant, the officer suspected it was the defendant because he knew him. The officer thus testified that based on that knowledge, he included the defendant's photo in the array he showed to the victim. Ibid. The Appellate Division held that the "testimony was not necessary to the proofs respecting the victim's identification, and, if anything improperly bolstered it by letting the jury know that the victim had chosen the photograph of the person the officer already suspected." Ibid. Further, the court concluded that the officer's testimony as to why he included the defendant's picture in the array served "no legitimate need" and risked that the jury would draw the impermissible inference "that defendant had prior criminal contact with the police." Id. at 578-79.

Here, Maloney argues that like the officer in Tilghman, Stabile improperly communicated to the jury that he knew defendants. But Stabile never testified that he "knew" the defendants. Instead, when asked by the prosecutor who he was able to identify from the footage, Stabile simply answered, "Mr. Jackson and Mr. Jones." Stabile identified Maloney after further investigation.

Stabile's limited testimony revealed nothing about his knowledge of defendants. Significantly, Stabile did not testify that his prior contacts with

defendants sprang from their involvement in any criminal investigation. And even if he did indicate that he was familiar with the defendants, that testimony in and of itself is not prejudicial. See State v. Love, 245 N.J. Super. 195, 197-98 (App. Div. 1991) (officer's testimony on cross-examination about "prior contact" with the defendant, in which the officer interviewed him during a homicide investigation, did not provide the jury with an inference that the defendant "had been involved in prior criminal activity"); State v. Ramos, 217 N.J. Super. 530, 537-38 (App. Div. 1987) (finding an officer's testimony that he was familiar with the defendant did not "prejudice the defendant by implying that he had committed previous criminal acts or was otherwise disposed toward criminal behavior"). Additionally, there was no risk that Stabile's testimony could have provided improper weight to any other witness's identification of defendants in the footage, as no other witness provided such an identification.

What Tilghman and related cases stand for is the idea that an "officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant." State v. Branch, 182 N.J. 338, 351 (2005). In this case, Stabile's testimony did not suggest that he had any superior knowledge that would incriminate defendants. Nonetheless, the trial judge still gave the jury a curative instruction, which was timely and appropriate. The jury is

expected to follow such instructions. State v. Manley, 54 N.J. 259, 270 (1969). Accordingly, there was no error in the admission of Stabile's testimony.

VII.

For the first time on appeal, Jackson argues that during summation, the prosecutor made "several improper and highly prejudicial statements" concerning Jackson's "credibility," which warrant reversal of Jackson's convictions. This argument lacks merit.

Jackson identifies the following statements as problematic:

> But Mr. Jackson's testimony, I will demonstrate to you with the evidence, with the video, with the jail calls, with the other materials, was false. It's not worthy of belief.
>
> . . . .
>
> Let's talk a little bit about why Mr. Jackson is unworthy of belief, why, based on his testimony and the evidence, he should not be believed. Because yesterday counsel all want you to just blindly accept what Mr. Jackson said. He was under oath after all. How much do you think that oath mattered to Mr. Jackson?
>
> . . . .
>
> Oh, but he took an oath. The gospel according to numbnuts [Jackson's nickname].
>
> He provided false testimony to you. And I submit it is with the intention to deceive you, to protect his co-conspirators.

. . . .

> The claims of passion/provocation were part of the false testimony.

As previously noted, Jackson did not object to these comments when they were made. Therefore, we review the record for plain error. R. 2:10-2. When a defendant fails to make a contemporaneous objection to an argument presented during summation, it is "fair to infer from the failure to object below that in the context of the trial the error was actually of no moment." State v. Ingram, 196 N.J. 23, 42 (2008) (quoting State v. Nelson, 173 N.J. 417, 471 (2002)).

"Prosecutors are expected to make a vigorous and forceful closing argument to the jury, and are afforded considerable leeway in that endeavor." Ingram, 196 N.J. at 43 (quoting Jenewicz, 193 N.J. at 471). "[S]o long as their comments are reasonably related to the scope of the evidence presented" at trial, courts afford prosecutors "considerable leeway" in the vigor and force of the language used in closing arguments." State v. Timmendequas, 161 N.J. 515, 587 (1999) (citing State v. Harris, 141 N.J. 525, 559 (1995)). "To justify reversal, the prosecutor's conduct must have been 'clearly and unmistakably improper,' and must have substantially prejudiced the defendant's fundamental right to have a jury fairly evaluate the merits of his [or her] defense." Id. at 575.

There is, however, "a fine line that separates forceful from impermissible closing argument. . . . [A] prosecutor must refrain from improper methods that result in wrongful conviction, and is obligated to use legitimate means to bring about a just conviction." Ingram, 196 N.J. at 43 (quoting Jenewicz, 193 N.J. at 471). Thus, it is improper for a prosecutor to declare he or she knows a defendant is guilty in a manner suggesting the State knows information to which the jury is not privy. State v. Wakefield, 190 N.J. 397, 440 (2007). Additionally, a prosecutor should not "vouch for the State's witnesses, offer a personal opinion of defendant's veracity, or refer, explicitly or implicitly, to matters outside the record." State v. Morton, 155 N.J. 383, 457-58 (1998).

Contrary to Jackson's assertions, the prosecutor's comments in summation were fair, as he did not offer a personal opinion regarding Jackson's veracity, but instead, suggested that based on the evidence presented, Jackson's version of events was false. Indeed, the prosecutor specifically stated that Jackson's testimony was "not worthy of belief" because "[i]t is contradicted by the unerring videotape evidence."

In his brief, Jackson correctly cites to State v. Daniels, 182 N.J. 80, 96 (2004), for the proposition that "prosecutorial comments suggesting that a defendant fabricated or tailored his or her testimony undermines the defendant's

exercise of fundamental rights." Jackson claims that the prosecutor here defied Daniels. However, Daniels is distinguishable from this case. In Daniels, our Supreme Court reversed and remanded for a new trial when the prosecutor, in his summation, commented on the defendant's ability to tailor his testimony by virtue of his presence at trial. 182 N.J. at 85. In Daniels, the prosecutor stated in his summation the following:

> Now, I said that the defendant in his testimony is subject to the same kinds of scrutiny as the State's witnesses. But just keep in mind, there is something obvious to you, I'm just restating something you already know, which is all I do in my summation, the defendant sits with counsel, listens to the entire case and he listens to each one of the State's witness[es], he knows what facts he can't get past. The fact that he was in the SUV. The fact that there's a purse in the car. The fact that a robbery happened. But he can choose to craft his version to accommodate those facts.
>
> [Id. at 87 (emphasis added).]

Although the defendant in Daniels did not object at trial, the Court reversed and remanded for a new trial, noting that to allow such comments in the State's summation effectively "punish[es]" the defendant for exercising his right to confrontation. Id. at 98. In so doing, it "issued a blanket prohibition against a prosecutor's 'drawing the jury's attention to defendant's presence during

trial and his concomitant opportunity to tailor his testimony' during summation." State v. Feal, 194 N.J. 293, 298 (2008) (quoting Daniels, 182 N.J. at 98).

Here, in contrast, the prosecutor made no such comments regarding Jackson's presence at trial and his opportunity to tailor his testimony. The prosecutor's comments were based upon evidence in the record and were proper. Therefore, Jackson's reliance on Daniels is misplaced.

Additionally, Jackson identifies the following comments as problematic, to which at least one defense counsel objected:

> So while I do not dispute that Mr. Jones returned to the scene a second time, ask yourself why. Because he already knew what had happened. I'd submit he knew what happened before, before it had happened. Then he confirmed, and then he comes back again. And what's the purpose of the second trip? The second trip he's eyed all the witnesses who were being detained in here. To talk to one of the witnesses being detained in here.
>
> And when he starts talking to the witness here, all of them start trying to leave. Some of them are kept back. Do you know what [the Cox brothers] wouldn't talk to us or wouldn't talk to Detective Stabile --

The trial judge sustained the objection because it agreed that the prosecutor was "engaging in sheer speculation," The judge then instructed the jury with the following:

> Members of the jury, I'm going to ask you to ignore that. Strike that last comment from the prosecutor. Again, speculation plays no part in your jury functions. You can – obviously with regard to facts that you find, I'm going to advise you on circumstantial evidence. If you find that certain evidence can draw an inference, but speculation itself plays no part.

The next day, prior to administering the final jury charges, the judge instructed again:

> Before I go into the actual charge, I just wanted to comment briefly with regard to one of the objections that was made yesterday by [Jones's counsel], with regard to a comment by the Prosecutor during his summation, regarding Naim Jones returning to the scene after Mr. Porter was killed.
>
> With regard to that comment, there was a -- a -- an allegation that perhaps Mr. Jones might have been intimidating witnesses -- the Cox brothers. I wanted to indicate -- I told you -- I think I said ignore the comment. When I mean -- what I say by, ignore, you could -- should strike that comment as if it never occurred and it should take part in your deliberations. I indicated that you shouldn't engage in speculation.
>
> Mr. Jones was not charged with any charge of intimidating a witnesses [sic]. So you shouldn't consider it any way, shape or form, all right? And I just want to make that clear.

Then, in the final charge, the judge once again reminded the jury that "[a]rguments, statements, remarks, openings and summations of counsel are not

evidence and must not be treated as evidence" and that "speculation, conjecture, and other forms of guessing, play no role in the performance of your duty."

Thus, the record shows that a timely objection was made to the prosecutor's comments and the judge provided adequate limiting instructions, not just once, but multiple times, to remove any potential prejudice. Thus, a mistrial was not warranted, as the judge did not err in his handling of the situation.

VIII.

Jackson and Maloney argue for the first time on appeal that the trial court abused its discretion by not severing defendants' trials. Specifically, Jackson argues that it was plain error not to sever his trial from Jones's and Maloney's trials because he was highly prejudiced by the testimony concerning Jones's and Maloney's gang involvement. Additionally, Maloney argues that severance was warranted because he was prejudiced by testimony that Jackson's actions had to be approved by his superiors, and because Jackson admitted to shooting Porter, that testimony lowered the State's burden of proof and made Maloney's motivations irrelevant. We reject these contentions.

Rule 3:7-7 provides that:

> Two or more defendants may be charged in the same indictment or accusation if they are alleged to have

> participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charge in each count. The disposition of the indictment or accusation as to one or more of several defendants joined in the same indictment or accusation shall not affect the right of the State to proceed against the other defendants. Relief from prejudicial joinder shall be afforded as provided by R. 3:15-2.

There is a "general preference to try co-defendants jointly," State v. Robinson, 253 N.J. Super. 346, 364 (App. Div. 2012), particularly when "much of the same evidence is needed to prosecute each defendant," State v. Brown, 118 N.J. 595, 605 (1990). "Nevertheless, a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial." State v. Sanchez, 143 N.J. 273, 290 (1996). Therefore, Rule 3:15-2 provides an avenue for separate trials where defendants may be prejudiced by being tried jointly:

> If for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief.
>
> [R. 3:15-2(b).]

Generally, "separate trials are necessary when [the] co-defendants' defenses are 'antagonistic and mutually exclusive or irreconcilable.'" State v. Brown, 170 N.J. 138, 160 (2001) (quoting Brown, 118 N.J. at 605-06). However, "the potential for prejudice inherent in the mere fact of joinder does not of itself encompass a sufficient threat to compel a separate trial." State v. Scioscia, 200 N.J. Super. 28, 42 (App. Div. 1985); see also Brown, 118 N.J. at 605 ("The danger by association that inheres in all joint trials is not in itself sufficient to justify a severance . . . ."). "A severance should not be granted 'merely because it would offer defendant[s] a better chance of acquittal.'" Scioscia, 200 N.J. Super. at 42-43 (quoting State v. Morales, 138 N.J. Super. 225, 231 (App. Div. 1975)). Courts have specifically held that severance was not warranted where the only basis for the motion was that some evidence would be admissible as to only one codefendant, State v. Mayberry, 52 N.J. 413, 421 (1968), or where the evidence against one defendant was stronger than that against the other, State v. Laws, 50 N.J. 159, 175-76 (1967). The "danger of guilt by association . . . can generally be defeated by forceful instructions to the jury to consider each defendant separately." Scioscia, 200 N.J. Super. at 43.

Here, there was no prejudice to either Jackson, Maloney, or Jones by joining their trials. Defendants were charged with conspiracy to murder in

which the same evidence, namely the surveillance footage, was relevant. It was the State's theory of the case, based on that footage, that the motive behind Porter's killing was gang related; thus, gang membership was at issue for all three defendants and evidence of that membership would have been admissible even if the trials were separated.

As for Maloney's argument that joinder was improper because it effectively lowered the State's burden of proof, this argument has no basis in the record. While testimony was given that suggested that Maloney was one of Jackson's superiors, that evidence did not change the State's burden at all.

Importantly, as previously noted, Maloney did not move for severance pretrial. This is likely because Jackson's testimony would have been helpful to him. In fact, if the jury believed Jackson, it would have completely exonerated Maloney and Jones. Jackson testified that neither Maloney nor Jones ordered him to shoot Porter, that he did not know that either of them were gang members, that neither of them knew he had a weapon, and that neither of them knew he had been threatened. Consequently, there was no prejudice from trying defendants' cases together.

Moreover, the jury was adequately instructed to consider each defendant's case separately. Specifically, the trial judge stated:

> Now, there's multiple charges in this case. There's seven offenses charged in the indictment. Six of them relate to Rashan Jackson, and five of them relate to Naim Jones, and five relate to Hakeem Maloney. They are separate offenses, by separate counts in the indictment.
>
> In your determination of whether the State has proven a defendant guilty of the crimes charged in the indictment beyond a reasonable doubt, each defendant is entitled to have each count considered separately by the evidence which is relevant and material to that particular charge, based upon the law as I will give to you.
>
> You must also return separate verdicts for each defendant as to each of the charges being tried. In other words, you will have to decide each case individually.
>
> Whether the verdicts as to each defendant are the same depends upon the evidence, in your determination, as the judges of the facts.

The judge reiterated this instruction multiple times.

Under these circumstances, the judge's failure to sua sponte sever defendants' trials did not constitute plain error.

IX.

The contentions raised by Jackson in Point VI of his counseled brief and Points I and IV of his pro se supplemental brief, and the contentions Maloney raises in Points II and III of his pro se supplemental brief are without sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

X.

Jackson and Maloney argue that the trial court abused its discretion in imposing their sentences. We disagree.

Trial judges have broad sentencing discretion as long as the sentence is based on competent credible evidence and fits within the statutory framework. State v. Dalziel, 182 N.J. 494, 500 (2005). Judges must identify and consider "any relevant aggravating and mitigating factors" that "are called to the court's attention[,]" and "explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Blackmon, 202 N.J. 283, 297 (2010)). "Appellate review of sentencing is deferential," and we therefore avoid substituting our judgment for the judgment of the trial court. Id. at 65; State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 365 (1984).

We are satisfied the judge made findings of fact concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record, properly considered all of the information set forth in defendants' presentence reports, and applied the correct sentencing guidelines enunciated in the Code. Accordingly, there is no reason for us to second-guess the sentences the judge imposed on Jackson and Maloney.

XI.

Jones also challenges his sentence to an extended term of life in prison subject to NERA for conspiracy to commit murder. He argues that the trial judge failed to specify whether he was sentencing defendant to a discretionary persistent-offender extended term under N.J.S.A. 2C:44-3(a) or whether he was imposing a mandatory Graves Act extended term pursuant to N.J.S.A. 2C:44-3(d). He asserts that under N.J.S.A. 2C:44-3(d), a trial judge may only impose a mandatory Graves Act extended term for certain enumerated offenses. Conspiracy to commit murder under N.J.S.A. 2C:5-2 is not one of these enumerated offenses. Therefore, Jones contends the judge erred by considering the Graves Act. Because the record does not clearly indicate whether the judge sentenced him to a discretionary extended term with a sentencing range of ten years to life, Jones argues that he must be resentenced.

The State agrees with Jones's contention, as do we. We therefore remand for resentencing so that the judge assigned may consider whether to impose a discretionary extended term upon Jones.

In sum, we affirm Maloney's, Jones's, and Jackson's convictions. We also affirm Maloney and Jackson's sentences, but remand in Jones' case for resentencing. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION