SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1142-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SAMUEL K. DAVIS,
a/k/a KEVIN S. DAVIS,
GARY RATLIFF, and
RODNEY RICHARDS,

Defendant-Appellant.

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Argued February 14, 2023 – Decided May 24, 2023

Before Judges Sumners, Susswein and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 12-12-1189.

Marcia Blum, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Marcia Blum, of counsel and on the briefs).

William P. Cooper-Daub, Deputy Attorney General, argued the cause for respondent (Mathew J. Platkin,

Attorney General, attorney; William P. Cooper-Daub, of counsel and on the brief).

PER CURIAM

Defendant Samuel Kevin Davis appeals from his jury trial conviction for aggravated manslaughter in connection with the March 2012 death of seventy-nine-year-old Thirza Sweeten. Defendant was originally charged by indictment with murder, aggravated assault, and various weapon charges involving a golf club and knife found at the crime scene. At his first trial in 2015, the jury rendered inconsistent verdicts, acquitting defendant of all the indicted offenses, but convicting him of aggravated manslaughter as a lesser-included offense of murder. On appeal, we reversed that conviction because the judge failed to properly respond to a question posed by the jury during deliberations. State v. Davis, No. A-5173-14 (App. Div. July 18, 2017) (slip op. at 2). We remanded for a new trial on the sole remaining charge of aggravated manslaughter. After a mistrial, a third jury once again found defendant guilty of that offense.

In the present appeal, defendant argues the Fifth Amendment's Double Jeopardy Clause precluded the State from retrying him for aggravated manslaughter. In the alternative, he argues the State improperly elicited testimony regarding his possession of the golf club and knife in view of the prior acquittals with respect to those weapons. He also contends that the trial court

erred in its instructions to the jury, the prosecutor committed misconduct during summation, and the State's forensic expert's testimony was improper.

After carefully reviewing the record in view of the governing legal principles, we conclude the acquittals at the first trial did not preclude the State from retrying defendant for aggravated manslaughter. However, because the first jury acquitted defendant of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2)—which requires a knowing or purposeful mental state—it was improper for the prosecutor to argue to the jury in summation that "[t]his [killing] wasn't reckless. This was done on purpose and intentional." In practical effect, the State's theory of the case, as explained in the prosecutor's summation, was tantamount to retrying defendant for first-degree murder—an offense for which he was acquitted. Because the first jury made an ultimate determination that defendant did not act knowingly or purposely, the State was collaterally estopped from proving—or arguing—that defendant acted with either of those culpable mental states. See State v. Kelly, 201 N.J. 471, 486 (2010). We are thus constrained to reverse the conviction and remand yet again for a new trial on the aggravated manslaughter charge.

I.

In December 2012, defendant was charged by indictment with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); third-degree possession of a weapon for an unlawful purpose (a golf club), N.J.S.A. 2C:39-4(d); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree possession of a weapon for an unlawful purpose (a knife), N.J.S.A. 2C:39-4(d); fourth-degree unlawful possession of a weapon (a golf club), N.J.S.A. 2C:39-5(d); and fourth-degree unlawful possession of a weapon (a knife), N.J.S.A. 2C:39-5(d).

Defendant was tried over the course of nine days in January and February 2015. On the second day of deliberations, the jury sent a note that asked: "Do charges include the suspect's presence at the time of the crime, without placing the weapon in his hand?" The trial court responded by reminding the jury of the State's burden of proof and the jury's duty to determine whether defendant committed the charges in the indictment. Later that day, the jury found defendant guilty of aggravated manslaughter, a lesser-included offense of murder, and acquitted defendant of all other charges.

In an unpublished opinion, we concluded that the trial court erred by not directly answering the jury's question. Davis, slip op. at 10–13. We reversed

the conviction and remanded for a new trial on the charge of aggravated manslaughter.

On remand, defendant moved to dismiss the aggravated manslaughter charge, arguing a new trial was precluded by double jeopardy and collateral estoppel. Alternatively, defendant moved to exclude evidence pertaining to his possession of the weapons based on his prior acquittal of the possession charges. In both oral and written opinions, the same judge who convened the first trial denied defendant's motion to dismiss the manslaughter charge.

The retrial commenced on June 11, 2019. On June 18, 2019, the judge granted defendant's motion for a mistrial under Rule 3:20-1[1] because the jury heard evidence from defendant's parole officer that indicated defendant had a prior felony conviction.

Defendant was tried a third time before the same judge over the course of nine days in June and July 2019. Defendant was once again found guilty of aggravated manslaughter. In October 2019, defendant was sentenced pursuant to the Three Strikes Law, N.J.S.A. 2C:43-7.1, to a term of life in prison without the possibility of parole.

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[1] Rule 3:20-1 permits a trial judge to grant a new trial on defendant's motion "if required in the interest of justice."

Defendant raises the following contentions for our consideration:

POINT I[2]

BECAUSE THE VERDICT AT THE FIRST TRIAL ACQUITTING DEFENDANT OF ALL OF THE CHARGED OFFENSES—MURDER, ASSAULT, AND WEAPON POSSESSION—DECIDED THE ULTIMATE FACT THAT DEFENDANT DID NOT COMMIT THE HOMICIDE, THE STATE WAS PRECLUDED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL FROM RETRYING DEFENDANT ON AGGRAVATED MANSLAUGHTER.

POINT II

BECAUSE THE PROSECUTOR INTRODUCED EVIDENCE CONCERNING DEFENDANT'S POSSESSION OF THE FATAL WEAPONS AND ARGUED THAT DEFENDANT WAS GUILTY OF WEAPON POSSESSION AND MURDER DESPITE THE FACT THAT DEFENDANT WAS PREVIOUSLY ACQUITTED OF WEAPON POSSESSION AND MURDER, DEFENDANT WAS FORCED TO RELITIGATE THE WEAPON-POSSESSION AND MURDER CHARGES IN VIOLATION OF THE GUARANTEE AGAINST DOUBLE JEOPARDY AND THE DOCTRINE OF COLLATERAL ESTOPPEL, THE RIGHT TO DUE PROCESS AND A FAIR TRIAL, AND THE TRIAL-COURT RULING EXCLUDING EVIDENCE THAT DEFENDANT POSSESSED THE WEAPONS.

[2] This point is again articulated in defendant's reply brief.

POINT III

THE COURT ERRED IN CHARGING ON ACCOMPLICE LIABLIITY IN THE ABSENCE OF EVIDENCE TO SUPPORT THE CHARGE.

POINT IV

BECAUSE DEFENDANT WAS ACQUITTED AT THE FIRST TRIAL OF POSSESSION OF THE WEAPONS FOR THE PURPOSE OF ASSAULTING OR KILLING THE VICTIM, THE GUARANTEE AGAINST DOUBLE JEOPARDY DICTATED THAT THE COURT INSTRUCT THE JURY THAT IT COULD NOT CONVICT DEFENDANT AS AN ACCOMPLICE TO AGGRAVATED MANSLAUGHTER ON THE GROUND THAT HE SHARED THE PRINCIPAL'S INTENT TO USE THE WEAPONS TO COMMIT THE HOMICIDE.

POINT V

THE PROSECUTOR REPEATEDLY MISREPRESENTED CRITICAL TESTIMONY AND EVIDENCE TO DEFENDANT'S DETRIMENT.

POINT VI

THE TESTIMONY OF THE FINGERPRINT EXPERT THAT THERE IS NO ERROR RATE IN FINGERPRINT ANALYSIS AND THAT THE LATENT FINGERPRINT LIFTED FROM THE WINDOW "BELONGS TO ONLY [DEFENDANT] . . . IT CANNOT BE ANYONE ELSE" VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

A. The Fingerprint Expert's Absolutist Claims.

B. Scientific Authorities Recommend Against Definitive Conclusions of Identification in Fingerprint Analysis Because Comparison Methods Lack the Necessary Data and Objectivity.

C. The Fingerprint Expert's Unsubstantiated Absolutist Claims Grossly Overstated the Probative Value of the Fingerprint Evidence to Defendant's Prejudice.

D. Alternatively, the Court Should Remand the Matter for a R[ule] 104 Hearing to Assess the Scientific Reliability of This Evidence and the Ability of a Fingerprint Examiner to Make an Identification or Match.

II.

On March 19, 2012, the victim's daughter, Lisa Ann Montalto, reported to police that she found her mother, Thirza Sweeten, unresponsive on the floor in Sweeten's house. When police arrived, there were no signs of life. They observed a large gash on the victim's forehead, bruises and cuts on her face, and "a puncture wound on her chest near her breast." The victim was wearing sweatpants, a white shirt, sweater, and a bra. The shirt, sweater, and bra were "pushed up above her head, exposing her breasts and the injury to her chest."

The police officer interviewed Montalto at the scene. Montalto testified that her brother, Barry Sweeten, lived with her mother and that he "did drugs."

Barry's[3] health was poor, and on the date Sweeten's body was found, he was hospitalized. Montalto said that Barry would have a "few people in and out" of the house. They would go to the window in Barry's bedroom and knock until he let them inside.

Police also interviewed Elizabeth Burgos, who was a friend of Sweeten and Barry. She was with Sweeten the night before her body was discovered and agreed to give a recorded statement to police. Burgos testified that on the night before Sweeten was found, she received a call from Barry, who was in the hospital. He asked her to bring soda with crushed ice to Sweeten. Burgos did as Barry asked, arriving at Sweeten's house around 10:00 p.m. Burgos said that she was there for about "thirty-five, forty minutes" and that she and Sweeten talked about defendant, who had been stopping by Sweeten's house, doing yardwork with Barry.

After talking with Sweeten for some time, Burgos said that she "heard clicking," "like trying to pull the window up," coming from Barry's bedroom, but never said anything to Sweeten. She went into the bedroom, sat on the bed, and called her uncle to ask him to pick her up. After speaking with her uncle,

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[3] Because Montalto's brother and her mother share the same surname, we use his first name to avoid confusion. We mean no disrespect in doing so. Barry passed away in 2013.

Burgos sat quietly on the bed to see if she could hear the clicking sound again. She knew that Barry "let several people in and out [of his] window." Burgos then saw defendant outside of Barry's window. She said he looked "high." Burgos told defendant that Barry was not there and that he should leave. She then shut the window and locked it. After that, Burgos left the house and waited for her uncle to pick her up out front. Sweeten closed and locked the door behind her. Burgos said that prior to leaving, she "went around the whole house" and did not see defendant again. She was picked up by her uncle around 11:00 p.m.

Police spoke with defendant on March 20, 2012. That interview was recorded and played to the jury. Defendant admitted to knowing Barry and visiting him at his house where they would "get high." Defendant clarified, however, that he had only known Barry for a month. Defendant told police that the last time he went over to Barry's house was two weeks prior. When he got there, Sweeten told him that Barry had a heart attack and that she did not want defendant coming over any longer. According to defendant, after that conversation, he never returned to the house.

Defendant said that on the night before Sweeten's body was found, he was with a friend, Marlene Waller, and they were using cocaine together. After he left Waller's house, he went back to the place where he was staying. Defendant

stated he returned to Waller's home twice, but that she did not let him in. He denied any involvement with Sweeten's death.

Police spoke with Waller, who gave a recorded statement and testified at trial. Waller confirmed that she was with defendant on the night in question, and that they smoked "coke" together at her house. She said that defendant was "not [there] long" and that he left at about "ten-thirty or eleven." He came back at "about eleven-thirty," but she did not allow him back in the house. Waller testified she heard her doorbell again later that night but did not go to see who was there.

The autopsy revealed that Sweeten died of "sharpened blunt trauma," which included "stab wounds to the chest with rib fractures, striking of the lung with bleeding into the chest cavity, multiple lacerations, bruises and abrasions of the head and a nasal fracture and blunt trauma to the neck with fractures of the neck organ . . . and hemorrhage bleeding within the soft tissues of the neck."

Several items that were collected from Sweeten's house and from defendant were sent to the lab to be tested, including: Sweeten's sweatpants, bra, shirt, and sweater; the golf club; telephone cord; and defendant's sneakers, pants, belt, shirt, and gloves. Melissa Johns, a scientist with the New Jersey State Police Office of Forensic Sciences, testified that DNA belonging to

Sweeten was found on defendant's pants. DNA belonging to defendant was found on Sweeten's bra. Neither Sweeten nor defendant could be excluded as DNA contributors to substances found on defendant's shirt. DNA belonging to the victim was found on the golf club. As for the golf club handle, a "mixture of DNA profiles" was obtained; Sweeten's DNA could not be excluded, but defendant's DNA was excluded. DNA belonging to Sweeten, but not to defendant, was found on the telephone cord.

Gloucester County Prosecutor's Office Detective Nicholas Danze testified as an expert regarding fingerprint evidence that was found at the crime scene. He explained that defendant's fingerprint was lifted from the outside of a window at Sweeten's house. Detective Danze further testified that after he arrived at his conclusions, he "passed [the fingerprint] off to [his] partner, another latent print expert," Gloucester County Prosecutor's Office Detective Nicholas Kappre. Detective Kappre conducted the same analysis and arrived at the same conclusion as Danze. Fingerprints were not found on any of the other items that were collected at the scene, including the suspected murder weapons.

III.

We first address defendant's contention the Fifth Amendment's Double Jeopardy Clause precluded the State from retrying him for aggravated

manslaughter. Prior to the start of his second trial, defendant moved before the trial court to dismiss the sole remaining charge on double jeopardy grounds. Following oral argument, the trial court issued a written decision denying defendant's motion, ruling that:

> [I]t is not in dispute that [d]efendant cannot be tried for the offenses of which he was acquitted . . . at the first trial. However, [d]efendant, relying on the doctrines of [d]ouble [j]eopardy and collateral estoppel, asserts that the acquittals of the weapons related offenses constituted a determination of an issue of ultimate fact—that [d]efendant did not possess the knife, phone cord and golf club—precluding a retrial of [d]efendant as the person of interest in the victim's death. Defendant further argues that the jury could not have properly acquitted him of the weapons related offenses and still have convicted him of [a]ggravated [m]anslaughter, as the State alleges [d]efendant used those weapons to facilitate the offense. It is for these reasons that [d]efendant seeks to have the indictment dismissed. The court, however, disagrees. There is no reason to dismiss the indictment charging [d]efendant with [a]ggravated [m]anslaughter simply because one cannot rationalize how the jury in the first trial arrived at their verdict. This is consistent with the Court's holding in [Kelly, 201 N.J. at 488], where the defendant's [d]ouble [j]eopardy claims [were] rejected, and the Court concluded that the acquittals of the weapons related charges did not collaterally estop the retrial of the remaining charges in the indictment.

Because the issue before us is a question of law, we review the trial court's decision de novo. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140

N.J. 366, 378 (1995). We afford no special deference to the trial court's legal interpretation. Ibid.

A.

The Double Jeopardy Clauses of the federal and New Jersey Constitutions provide that no person shall be tried twice for the same criminal offense. U.S. Const. amend. V; N.J. Const. art. I, ¶ 11. Our Supreme Court "has consistently interpreted the State Constitution's double-jeopardy protection as coextensive with the guarantee of the federal Constitution." State v. Miles, 229 N.J. 83, 92 (2017) (citing State v. Schubert, 212 N.J. 295, 304 (2012)).

"The Double Jeopardy Clause contains three protections for defendants." Ibid. "It protects against (1) 'a second prosecution for the same offense after acquittal,' (2) 'a second prosecution for the same offense after conviction,' and (3) 'multiple punishments for the same offense.'" Ibid. (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). "[A] prime concern when reviewing a double-jeopardy claim is 'whether the second prosecution is for the same offense involved in the first.'" Id. at 92–93 (quoting State v. Yoskowitz, 116 N.J. 679, 689 (1989)).

"Generally, the Double Jeopardy Clause does not 'bar reprosecution of a defendant whose conviction is overturned on appeal' because, until the

proceedings have run their full course, the defendant remains in a state of 'continuing jeopardy.'" Kelly, 201 N.J. at 485 (quoting Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294, 308 (1984)); see also Bravo-Fernandez v. United States, 580 U.S. 5, 18 (2016) (noting that when a conviction is overturned on appeal, the general rule is that the Double Jeopardy Clause does not bar reprosecution).

As the United States Supreme Court explained in Bravo-Fernandez:

> This "continuing jeopardy" rule neither gives effect to the vacated judgment nor offends double jeopardy principles. Rather, it reflects the reality that the "criminal proceedings against an accused have not run their full course." [Justices of Boston, 466 U.S. at 308]. And by permitting a new trial post vacatur, the continuing-jeopardy rules serves both society's and criminal defendants' interests in the fair administration of justice. "It would be a high price indeed for society to pay," we have recognized, "were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." United States v. Tateo, 377 U.S. 463, 466 (1964). And the rights of criminal defendants would suffer too, for "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." Ibid.
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> [580 U.S. at 18–19.]

The Double Jeopardy Clause also incorporates the doctrine of collateral estoppel. Kelly, 201 N.J. at 486 (citing Ashe v. Swenson, 397 U.S. 436, 444–46 (1970)). "Thus, 'when an issue of ultimate fact has [] been determined by a valid and final judgment' in one trial, the State is collaterally estopped from relitigating the same issue in a second trial." Ibid. (alteration in original) (quoting Ashe, 397 U.S. at 443).

The doctrine of collateral estoppel does not apply "when a jury, in a single trial, returns a verdict of acquittals and convictions that are inconsistent with one another." Id. at 487 (citing United States v. Powell, 469 U.S. 57, 62–67 (1984)). "Our system of justice has long accepted inconsistent verdicts as beyond the purview of correction by our courts, and therefore a defendant is forbidden from collaterally attacking a guilty verdict on one count with an apparently irreconcilable acquittal on another count." Ibid. (citing Powell, 469 U.S. at 58).

The United States Supreme Court in Bravo-Fernandez held that the issue-preclusion component of the Double Jeopardy Clause does not bar retrial after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal when the conviction is later vacated for legal error unrelated to the inconsistency. 580 U.S. at 17–18. The Court explained, "[t]he ordinary

consequence of vacatur, if the Government so elects, is a new trial shorn of the error that infected the first trial." Id. at 18. The Court nonetheless cautioned that a retrial may be prohibited if the trial error leading to the reversal could resolve the apparent inconsistency in the jury's verdicts. Id. at 21.

The critical issue in the matter before us is whether we can determine with the requisite degree of certainty whether the inconsistent verdict rendered by the first jury can be explained by the trial court's failure to answer the jury's question. We find helpful instruction in Kelly. In that case, a jury convicted the defendant of committing multiple crimes, including two murders and a robbery. Kelly, 201 N.J. at 475. Based on the trial court's instructions, our Supreme Court determined that the jury could only have found that those crimes were committed with the use of a .357 or .38 caliber handgun. Ibid. The jury, however, acquitted the defendant of both having unlawfully possessed that weapon and having possessed it for the purpose of committing the murders and robbery. Ibid. The trial court ordered a new trial because of a defense witness's perjured testimony. Ibid. At the second jury trial, the defendant was convicted, as a principal, of the murders and robbery. Ibid. The defendant argued that the second trial violated the Double Jeopardy Clause on the theory that by finding him not guilty of possessing the murder weapon, the first jury must have

concluded that he was an accomplice and not the shooter, thereby precluding the State from prosecuting him in the second trial on a theory that he was the shooter. Ibid.

Writing for a unanimous Court, Justice Albin rejected Kelly's argument, ruling that the retrial "did not offend any principle of collateral estoppel incorporated within the constitutional guarantee against double jeopardy." Ibid. The Court reasoned:

> A review of the jury charge and verdict sheet in the first trial indicates that the acquittals and convictions constituted an inconsistent verdict. Therefore, we cannot know with any certainty the reasons behind the jury's verdict, and indeed the jury may have acquitted based on compromise, lenity, or other concerns unrelated to the evidence.
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> [Ibid. (emphasis added).]

The Court further explained, "we cannot conclude the acquittals constituted the finding of a critical fact rather than the expression of lenity, compromise, or mistake." Id. at 483. Because the first trial's acquittals "did not determine as an ultimate fact that defendant was an accomplice rather than the shooter, it follows that the State was not foreclosed on double jeopardy grounds from proceeding on a theory that he acted alone." Id. at 476. Importantly for purposes of this appeal, the Court added that "[m]uch of this discussion should

suggest that divining whether the jury decided an ultimate issue by a verdict of acquittal will seldom be possible." Id. at 491.

We find further guidance on the level of certainty needed to reconcile inconsistent verdicts in State v. Grey—a case where our Supreme Court ruled a subsequent prosecution was barred. 147 N.J. 4 (1996). The Court emphasized that inconsistent verdicts are accepted. Id. at 9–10. The Court further stressed that a reviewing court "should not speculate as to whether the verdicts resulted from jury lenity, compromise, or mistake not adversely affecting the defendant." Id. at 11.

In the unique circumstances of that case, the Court concluded that "there [was] virtually no 'uncertainty,'" as "[t]he reason for the verdict appear[ed] [in] the record." Id. at 12. The Court found that an erroneous jury instruction "charging sequence undoubtedly led the jury to acquit defendant of the underlying predicate to a felony murder conviction." Id. at 14 (emphasis added). The Court added:

> This . . . is an idiosyncratic case. It is not a case in which the jury having "properly reached its conclusion on the compound offense . . . then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." Powell, 469 U.S. at 65. It is a case in which the inconsistency in the verdicts is undoubtedly due to the jury's erroneous belief that it could convict defendant of

> felony murder based on the conspiracy count. Although the jury might well have convicted the defendant of aggravated arson as an accomplice, it did not do so for reasons acknowledged by the prosecution to be related to the sequence of the charge and recharge on aggravated arson. This problem will most likely never arise again.
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> . . .
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> To sum up, this case is not about speculation as to the reasons for the inconsistent verdict but, rather, about a misleading charge that led to a verdict not permitted under our law.
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> . . .
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> . . . The unusual sequence in the charge on aggravated arson explains why the jury did not convict defendant as an accomplice to aggravated arson. The conviction of conspiracy to commit aggravated arson may not serve as the predicate to a felony-murder conviction.
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> [Id. at 16–17 (emphasis added).]

B.

We next apply the foregoing legal principles to the matter before us. Defendant asserts the acquittals on the counts charging murder, assault, and weapon possession constitute a conclusive determination by the jury that defendant did not kill Sweeten and thus cannot be retried for her death. He reasons "the jury's question about mere presence" shows that it "believed that

[he] was present when the victim was killed, but that [he] did not possess the weapons and was not the killer." Thus, defendant argues, "[t]he apparently inconsistent finding of aggravated manslaughter was attributable to the trial court's failure to explain that the jury could acquit [defendant] not only of murder, but also of the lesser manslaughter offense if it believed that he was at the scene but did not participate in the homicide."

We are not persuaded that defendant's interpretation is the only plausible explanation for the inconsistent verdicts. As in Kelly, defendant contends the jury must have found that he acted as an accomplice rather than a principal. While that assumption presents one potential explanation, we cannot say there is virtually no uncertainty that is what the jury found, cf. Grey, 147 N.J. at 12, especially considering that was not the theory posited by the prosecution and the jury was not instructed on accomplice liability.[4]

Defendant's hypothesis as to the reason for the inconsistent verdict is based principally on an inference he draws from the question the first jury posed. We acknowledge that in certain circumstances, a jury question may provide insight into what at least some jurors are thinking. State v. Middleton, 299 N.J.

[4] At the retrial, the court gave an accomplice instruction. Defendant contends the trial court committed reversible error in doing so. See infra Section VI.

Super. 22, 30 (App. Div. 1997) (noting the jury was "obviously concerned" with an issue "as evidenced by its question"). We are not persuaded, however, that the question in this case conclusively demonstrates that the jury made an ultimate determination defendant did not kill Sweeten by his own hand but rather was merely present at the scene of the crime committed by some unidentified perpetrator.

In sum, in contrast to the unique circumstances in Grey, we are not prepared to state there was "virtually no uncertainty" that the trial court's failure to directly address the jury question explains the inconsistent verdict, and, therefore, we cannot discount the possibility that the verdict was an expression of lenity, compromise, or mistake. Grey, 147 N.J. at 12, 16. Consequently, the doctrine of collateral estoppel did not bar defendant's retrial on the aggravated manslaughter charge.

IV.

We next address whether the manner in which the retrial occurred violated defendant's rights under the Double Jeopardy Clause. It is axiomatic that defendant could not be retried for any offense for which he was acquitted by the first jury. Pearce, 395 U.S. at 717. Although defendant was convicted by the

first jury of criminal homicide,[5] he was acquitted of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2), which requires either a knowing or purposeful mental state. We thus know with virtual, indeed absolute, certainty that the first jury found that with respect to the killing, defendant did not act with a knowing or purposeful culpable mental state.[6]

The ultimate determination of that critical fact by the first jury not only precluded a contrary finding at retrial, but also precluded the State from prosecuting defendant for criminal homicide on the theory that he killed Sweeten purposely or knowingly. See Kelly, 201 N.J. at 486 (explaining the State is collaterally estopped from relitigating an ultimate fact determination by a valid and final judgment).

The prosecutor in summation nonetheless argued, "[e]ven though we only have to require reckless behavior, I contend to you that this was purposeful behavior. It was knowing[] behavior. You heard of the way that Ms. Sweeten

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[5] N.J.S.A. 2C:11-2(a) provides in relevant part that "[a] person is guilty of criminal homicide if he purposely, knowing, recklessly . . . causes the death of another human being."

[6] The crime of murder requires proof "[t]he actor purposely cause[d] death or serious bodily injury resulting death," N.J.S.A. 2C:11-3(a)(1), or by proof that "[t]he actor knowingly cause[d] death or serious bodily injury resulting in death," N.J.S.A. 2C:11-3(a)(2).

was killed. This wasn't reckless. This was done on purpose and intentional[ly]." The question before us is whether that argument misled the jury into believing that it could find defendant guilty of a knowing or purposeful homicide—a higher culpability crime than the one that could be tried in view of the first jury's acquittal for murder.

We recognize that "[p]rosecutors are expected to make a vigorous and forceful closing argument to the jury, and are afforded considerable leeway in that endeavor," State v. Ingram, 196 N.J. 23, 43 (2008) (quoting State v. Jenewicz, 193 N.J. 440, 471 (2008)), "so long as their comments are reasonably related to the scope of the evidence presented," 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." Timmendequas, 161 N.J. at 575 (quoting State v. Roach, 146 N.J. 208, 219 (1996)).

We are satisfied the prosecutor's argument that defendant committed an intentional killing was clearly and unmistakably improper in view of the double jeopardy collateral estoppel doctrine. The New Jersey Code of Criminal Justice

defines the kinds of culpability that apply to each material element of an offense, listing them in descending order as: purposely, knowingly, recklessly, and negligently. N.J.S.A. 2C:2-2(b). Under ordinary circumstances, the State is permitted to prove that a defendant acted with a higher culpable mental state than the one required for commission of the offense. See N.J.S.A. 2C:2-2(c)(2) (expressly authorizing substitution of a higher kind of culpability than what suffices for the offense).

That general statutory principle, however, must yield to the demands of the Double Jeopardy Clause. See Pugliese v. Perrin, 731 F.2d 85, 86–88 (1st Cir. 1984) (holding double jeopardy rights violated where defendant was initially charged with manslaughter but convicted of the lesser-included offense of negligent homicide and, after reversal of that conviction, the judge at retrial erroneously instructed the jury that while negligence suffices to prove negligent homicide, the prosecution may also prove beyond a reasonable doubt he acted purposely, knowingly, or recklessly). Although the jury in the matter before us was properly instructed on the culpable mental state required to prove aggravated manslaughter, and although the judge did not mention the culpability substitution provision codified in N.J.S.A. 2C:2-2(c)(2), the judge's final instructions did not preclude the jury from accepting the prosecutor's forceful

argument that the State had proved that defendant acted knowingly and purposely in killing Sweeten.

We recognize that defendant did not object to the prosecutor's argument, which "suggests that defense counsel did not believe the remarks were prejudicial at the time they were made." State v. Frost, 158 N.J. 76, 84 (1999). The failure to object, however, does not preclude us from holding that the prosecutor committed plain error by disregarding the collateral estoppel doctrine. See R. 2:10-2 (an unchallenged error constitutes plain error if it was "clearly capable of producing an unjust result").

Nor was that constitutional error ameliorated by the trial court's general instruction that "[a]rguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence" and that "[a]ny comments by counsel are not controlling." The prosecutor's substitution of culpability argument was not merely a comment that might be mistaken for "evidence." Rather, it explained the theory of the prosecution, suggesting to the jury that for all practical purposes, defendant was being tried for a knowing or purposeful homicide. Because the crime of "murder" was not explained to the retrial jury—quite appropriately—jurors would have no way of knowing that "aggravated manslaughter" is a lesser form of homicide. Nor would they be

aware that they were precluded from finding that defendant committed a knowing or purposeful homicide by virtue of defendant's acquittal for murder.

Furthermore, the prosecutor's argument had a clear capacity to impact the course of the jury's deliberations. We reiterate that defendant's initial conviction for the lesser offense of aggravated manslaughter may have been a compromise verdict or an expression of lenity, resulting in the first jury downgrading the murder charge for which he had been indicted. The prosecutor's closing argument at the retrial, in essence, sought to raise the level of culpability. Thus, if the retrial jury were disposed to express lenity or compromise, it might do so by moving "down" to recklessness from the purposeful and knowing levels of culpability urged by the prosecutor.

Stated differently, if the jury accepted the prosecutor's argument and thus started from an erroneously high level of culpability—one definitively precluded by the initial acquittal for murder—lenity might be expressed by downgrading to a reckless level of culpability, effectively depriving defendant of any benefit from the intended expression of lenity. The jury, in other words, might think it was expressing lenity by finding that defendant acted only recklessly, and not knowingly or purposely as the prosecutor argued. That might, for example, have dissuaded the jury from convicting defendant for a

lesser form of homicide than first-degree aggravated manslaughter, that is, second-degree reckless manslaughter, N.J.S.A. 2C:11-4(b)(1), on which the jury was instructed.

As we stressed in the preceding section, we are admonished not to speculate as to why juries reach their conclusions. See Grey, 147 N.J. at 9–10. We need not engage in speculation, however, to conclude that it was clearly and unmistakably improper for the prosecutor to argue that defendant acted with the level of culpability associated with the crime for which he had already been acquitted. Because no corrective action was taken to ensure the jury would disregard the prosecutor's improper argument, we believe her argument constituted plain error. See R. 2:10-2. We therefore reverse the conviction and remand for a new trial on the aggravated manslaughter charge.

V.

We decline to rule on the trial errors asserted by defendant for the first time on appeal because it is not certain they will be repeated on remand and because any objections that may be raised at the new trial should be ruled upon in the first instance by the trial court. With that caveat in mind, we briefly address defendant's contention that the State improperly elicited testimony and made comments in summation regarding whether defendant possessed the

weapons that were used to kill Sweeten. As we have noted, defendant argued to the trial court that if the aggravated manslaughter charge were not dismissed on double jeopardy grounds, then, in the alternative, "the State should be precluded from introducing evidence related to unlawful possession of a weapon and possession of a weapon for an unlawful purpose" under the collateral estoppel doctrine. The trial court rendered a written opinion, ruling:

> As previously stated, defendant cannot be tried for the offenses of which he was acquitted of at the first trial. However, simply because defendant was acquitted of the weapons[-]related offenses does not mean that the State is precluded from introducing evidence of the manner in which the victim incurred her fatal injuries at this second trial.

Defendant contends for the first time on appeal that contrary to the trial court's holding, "[t]he [S]tate did not limit the evidence concerning the weapons to 'the manner in which the victim incurred her fatal injuries.'" Defendant does not claim the police officers' testimony regarding their observations of the crime scene was improper. Nor does he challenge the medical examiner's testimony. Rather, he contends that the State defied the trial court's ruling when it prompted its witnesses to testify regarding DNA and fingerprint testing that was performed on the weapons to determine whether defendant possessed the weapons.

Defendant further contends that the State impermissibly argued in its summation that he wielded those weapons.

We reiterate and stress that defendant at trial did not make any contemporaneous objections, depriving the trial court an opportunity to rule on whether the testimony and summation argument exceeded the limitation the court had imposed. We presume that on remand, defendant will renew the objections made for the first time on this appeal, and that the trial court will thus have an opportunity to address them.

VI.

We likewise decline to rule on defendant's contention the trial court erred in instructing the jury on accomplice liability. As we have noted, at the first trial, the court did not instruct the jury on accomplice liability. During deliberations, the jury sent the court a note asking, "[d]o charges include the suspect's presence at the time of the crime, without placing the weapon in his hand?" At defendant's retrial, defense counsel at the charge conference requested "a mere presence charge."[7] The trial court explained that in view of

[7] The portion of the accomplice liability model jury charge pertaining to "mere presence" reads:

our opinion reversing the first trial conviction, it "would be loath not to give the instruction" requested by the defense. The court further reasoned:

> If the murder weapons, the supposed murder weapons, the ligature, the golf club, we don't know about the knife, if . . . there's nothing that directly ties him to those particular items from a forensic standpoint, and yet forensically, blood of the victim was found on his pants, then the argument potentially could be, and you could see how a jury would begin to go that direction,

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> Mere presence at or near the scene does not make one a participant in the crime, nor does the failure of a spectator to interfere make him/her a participant in a crime. It is, however, a circumstance to be considered with the other evidence in determining whether he/she was present as an accomplice. Presence is not in itself conclusive evidence of that fact. Whether presence has any probative value depends upon the total circumstances. To constitute guilt there must exist a community of purpose and actual participation in the crime committed.
>
> While mere presence at the scene of the perpetration of a crime does not render a person a participant in it, proof that one is present at the scene of the commission of the crime, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is possible for the jury to infer that he/she assented thereto, lent to it his/her countenance and approval and was thereby aiding the same. It depends upon the totality of the circumstances as those circumstances appear from the evidence.
>
> Model Jury Charges (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6), Accomplice, Charge # Two" (rev. June 7, 2021).

> was that, well, maybe he didn't pick up the golf club and use it, and he was there and somebody else did it.

The prosecutor argued that if the court were to give the mere presence charge, it should also include certain other paragraphs of the accomplice liability model charge "so that the jury [would have] a clear definition . . . as to what they are to consider when they are assessing mere presence itself." The court agreed.

After hearing the parties' arguments, the court ruled:

> [W]hen considering what happened in the first trial, the evidence that came before the jury here, the possibility based upon the implements used to commit the murder, that a rational jury could consider accomplice liability.
>
> And based upon State v. Hakim, 205 N.J. Super. 385 (App. Div. 1985), as I cited previously, the [c]ourt, if there's a rational basis for it, can charge it, even though it wasn't charged in the indictment.
>
> And within that accomplice liability instruction is the instruction that . . . if the jury thinks the defendant was there it doesn't mean he's guilty of anything.
>
> There still must be more.
>
> And that would be appropriate within the confines of an accomplice liability instruction.
>
> So, I don't see that the Appellate Division's opinion was directing the [c]ourt to only charge mere presence. Not at all.

> I think the Appellate Division addressed what it had before it, which was the failure of this [c]ourt, me, to answer the jury's question as posed.
>
> And that if it had, this would be -- the mere presence instruction could be given.
>
> Here, I'm presented now with a trial with facts that support, in this [c]ourt's judgment, accomplice liability, and within that structure of the accomplice liability instruction, mere presence would be appropriate to charge.

After the court's ruling, defendant raised an additional argument, claiming the defense had "no notice that there was going to be an accomplice liability theory," and that if there had been such notice, cross-examination, for example, "may have been different." The court rejected that argument, saying: "Well, how could you not know based upon . . . how the first trial resolved and what the Appellate Division decided? How could you not know? . . . That's exactly what happened in the first trial, so you are on notice without question. You are on notice."

The following court date, prior to summations, defense counsel moved to withdraw his request for the court to give the "mere presence" charge. The trial court concluded:

> In the end, the [c]ourt's job is not to instruct the [j]ury as to what the parties' arguments are going to be,

> the [c]ourt's job is to instruct the [j]ury as to the law that applies to the case.
>
> The facts, as we discussed and what we discussed at great deal the other day in the charge conference surround the fact that the defendant had the victim's DNA on his pants, which would suggest his presence at the crime. The implements believed to be used to kill Ms. Sweeten[—]those being a knife, ligature and a golf club[—]cannot be tied forensically to the defendant. In this [c]ourt's view, that . . . could suggest[—]and, I think, it did suggest it to the [j]ury in the first trial[—]the presence of a second individual. And that's where accomplice liability or mere presence comes in, is whether the defendant was present during the commission of the crime and somebody else did it[—]was he an accomplice; did he have that same mens rea; or, he was merely, present and didn't do anything to stop the individual, meaning, he did not share the same mens rea and his mere presence is not sufficient for him to be found guilty as an accomplice.
>
> . . . I think the facts support that. There's no evidence before the [j]ury, other than speculation. And speculation can allow for argument that there's cross-contamination.

In its final instructions to the jury, the court gave the model accomplice liability jury charge. See Model Jury Charges (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6), Accomplice, Charge # Two" (rev. June 7, 2021) (applicable where a defendant is charged as an accomplice and the jury does not receive instructions on lesser included offenses). On appeal, defendant argues that the court erred in charging the jury on accomplice liability because

neither party litigated the case on the theory that defendant acted as an accomplice.

"[A]ppropriate and proper charges to a jury are essential for a fair trial." State v. Maloney, 216 N.J. 91, 104 (2013) (quoting State v. Green, 86 N.J. 281, 287 (1981)). As a general rule, "[w]hen a defendant may be found guilty either as a principal actor or as an accomplice, the jury should be instructed about both possibilities." Roach, 146 N.J. at 223. However, as our Supreme Court more recently explained in Maloney, "[w]hen the State's theory of the case only accuses the defendant of being a principal, and a defendant argues that he was not involved in the crime at all, then the judge is not obligated to instruct on accomplice liability." Maloney, 216 N.J. at 106. It is long settled, moreover, that "where the evidence indicates a rational basis for accomplice liability, the judge can charge the jury on that basis even though the indictment does not expressly allege a violation of N.J.S.A. 2C:2-6." Hakim, 205 N.J. at 388. Importantly, "[w]here the facts warrant such an instruction, the court may give it even without request of either party." Id. at 389. But "[o]f course the position of the parties should be considered." Ibid. (emphasis added).

The record before us shows the "positions of the parties" were in flux during the charge conference and even thereafter. We decline to speculate on

what positions will eventually be advocated on remand, or whether the parties can come to an agreement once they have figured out their respective theories of the case at the new trial. Nor are we willing to speculate on what evidence will be introduced at the retrial that might provide a basis for the accomplice liability model charge. See supra Section V (noting that timely defense objections might limit the scope of the State's evidence on remand). In these circumstances, other than reciting the governing legal principles as we have done, we deem it unwise to render what essentially would be an advisory opinion and take no position on whether the full accomplice liability charge, or a redacted portion of it concerning "mere presence," see supra note 7, should be given to the jury on remand. We expect that this issue, along with all other trial errors defendant raises for the first time on appeal, will be addressed at in limine hearings or at appropriate stages of the retrial for aggravated manslaughter.

We reverse defendant's conviction and remand for a new trial. We do not retain jurisdiction.