FILED, Clerk of the Appellate Division, May 22, 2023, **A-000133-22**

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

INDICTMENT NO. 17-08-743-I
APPELLATE DOCKET NO. A-000133-22T1

STATE OF NEW JERSEY, PLAINTIFF/RESPONDENT,

v.

RAHEEM J. JACOBS, DEFENDANT/APPELLANT

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION-CRIMINAL
THE HONORABLE CRISTEN P. D'ARRIGO, J.S.C.

APPELLANT'S BRIEF AND APPENDIX
Date of Submission to Court: May 10, 2023

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PROCEDURAL HISTORY

On October 7, 2015, Appellant, Raheem Jacobs [hereinafter "Defendant" or "Mr. Jacobs"], who was in the custody of the Cumberland County Jail on other charges, was charged pursuant to warrant W2015-002241-0601 with the murder of Keon Butler on August 11, 2015. **1a.** This charge, along with included weapons related offenses, malicious damage to property, attempted murder, and obstruction of justice, was brought against Mr. Jacobs by Detective James Riley, then an employee of the Bridgeton city Police Department. T2, 16-21.

On February 8, 2017, Raheem Jacobs was indicted for the murder of Keon Butler.[1] **4a.** Indictment No. 17-02-00111-I/A charged Mr. Jacobs in Count 1 with first degree murder in violation of N.J.S.A. 2C:11-3a(1)(2); in Count 2 with possession of a weapon for an unlawful purpose in violation of N.J.S.A. 2C:39-4a, a crime of the second degree; in Count 3 with unlawful possession of a weapon, a crime of the second degree in violation of N.J.S.A. 2C:58-4; and, in Count 7, with possession of a weapon by a convicted person in violation of N.J.S.A. 2C:39-7b, a crime of the second degree. Counts three, four, five and six pertained to Mr. Jacobs' co-defendant, Sharee Jamison.

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[1] Error in the Grand Jury proceedings dated February 8, 2017 came to light during the trial and is the subject of Appellant's argument at Point Heading VI (not raised below). GJT is included as an exhibit to Appellant's Brief and Appendix.

On August 16, 2017, a superseding indictment was returned against Mr. Jacobs which charged him again with the murder of Keon Butler, but also charged him with the additional murder of Jeron King. **7a.** The first eight counts of the superseding indictment, 17-08-00743-I/A, remained the same as Indictment 17-02-00111-I/A. Indictment 17-08-00111-I charged Mr. Jacobs in Count 9 with first degree murder in violation of N.J.S.A. 2C:11-3a(1) or (2), a crime of the first degree; in Count 10 with possession of a weapon for unlawful purpose in violation of N.J.S.A. 2C:39-ra(1), a crime of the second degree; in Count 11 with unlawful possession of a weapon in violation of N.J.S.A. 2C:48-4, a crime of the second degree; and in Count 12, possession of a weapon by a convicted felon, in violation of N.J.S.A. 2C:39-7b(1), a crime of the second degree.

On December 18, 2017, the defense submitted a motion to sever the two murder charges as well as a motion to dismiss the indictment. **12a-13a.** On February 12, 2018, the Court, the Honorable Cristen P. D'Arrigo presiding, denied the motion to dismiss the indictment but granted the motion to sever the murder charges. **14a.** On February 21, 2018, the State submitted a motion to reconsider Judge D'Arrigo's severance Order. **33a.** On September 21, 2018, the Court granted the State's motion for reconsideration and consolidated for trial the heretofore severed murder charges of Jeron King and Keon Butler. **34a-41a.**

While the reconsideration of the severance motion was pending, Sharee Jamison, Mr. Jacobs' co-defendant, was sentenced by the Court on February 22, 2018 to two years non-custodial probation as a result of her plea on September 11, 2017, to Count 5 of Indictment No. 17-08-00743-I to hindering prosecution in violation of N.J.S.A. 2C:39-3a(3), a crime of the second degree. The remaining counts of the indictment, 4, 6, and 7, were dismissed as part of the plea agreement.

On May 22, 2018, the defense submitted a motion requesting that Judge D'Arrigo recuse himself. **42a.** On June 29, 2018, Judge D'Arrigo denied the recusal motion. **43a.** On October 11, 2018, the defense filed an interlocutory appeal challenging Judge D'Arrigo's Order granting the State's motion for reconsideration of his previous severance order and consolidating the murder charges against Mr. Jacobs for the killings of Keon Butler and Jeron King. **44a-48a.** On November 8, 2018, the Appellate Court denied the interlocutory request. **49a.**

On November 9, 2020, the defense submitted a motion to suppress the evidence relating to Mr. Jacobs' out-of-court statements to law enforcement. **50a.** On March 29, 2021, the trial court granted the defendant's motion. **51a.**

On May 26, 2021, the defense filed a second motion to dismiss the indictment against Mr. Jacobs. **52a.** On May 6, 2022, the defense withdrew the motion to dismiss the indictment.

As the case approached trial, the State filed for a Protective Order relating to the disciplinary history of one of the detectives at the Prosecutor's Office involved in the investigation of the Keon Butler homicide.[2] The Court signed the Protective Order on January 4, 2022. **54a.** A second Protective Order was signed by the Court on April 28, 2022. **55a.**

On April 26, 2022, immediately before trial began, the Court, *sua sponte*, signed a severance Order as to the Butler and King homicides. **56a.** Jury selection began on April 26, 2022. On April 25, 2022, immediately before jury selection began, the State designated Special Agent John Hauger as an expert in GeoTime analysis replacing its previously named expert, a New Jersey State Police detective.

On May 4, 2022, the defense moved to bar Special Agent Hauger's report based on its late production and its failure to meet the evidentiary standards set forth in Rule 703 of the New Jersey Rules of Evidence. **57a.** After the hearing on May 6, 2022, the Court denied the defense motion to bar the expert's testimony and report. **58a.**

The opening statements of counsel occurred on May 10, 2022. On May 20, 2022, before the conclusion of witness testimony, the Court held a charge

[2] This motion is not a subject of the within appeal and is designated as "Restricted" on the Court's docket. It is, thus, omitted from Appellant's Appendix.

conference. The Court questioned counsel as to charging the lesser included offenses of aggravated manslaughter and reckless manslaughter. Both counsel objected. T7, 89:11-20 and T7, 90:2-6. Over both counsel's objections, the Court decided to charge the lesser included offenses of aggravated and reckless manslaughter. **95a.**

On May 24, 2022, the Court heard and denied the defense's motion to dismiss the indictment as the end of the State's case. On May 26, 2022, the jury returned a verdict of not guilty of murder, not guilty of aggravated manslaughter, guilty of reckless manslaughter, not guilty of possession of a weapon for an unlawful purpose, and not guilty of possession of a weapon without a permit. **59a-61a.** Immediately after the verdict was returned, the State moved to dismiss the remaining count of the indictment, possession of a weapon by a convicted felon.

On June 3, 2022, the defense submitted a motion for judgment of acquittal which it supported with a brief filed on July 1, 2022. **62a.** The State submitted a motion for an extended term on June 1, 2022. **64a.** On August 5, 2022, the court denied the defendant's motion for judgment of acquittal. **65a.** On the same date, the court granted the State's motion for an extended term. **66a.** The trial court then entered a Judgment of Conviction as to Defendant and, on the charge of reckless manslaughter, sentenced Raheem Jacobs to twenty years in New Jersey State Prison pursuant to the provisions of the No Early Release Act. **67a.**

On September 15, 2022, a notice of appeal was filed with the Appellate Division under docket number A-000133-22. **71a.** An Amended Notice of Appeal was filed on September 20, 2022. **76a.** Mr. Jacobs awaits trial on the Jeron King homicide.

STATEMENT OF FACTS

On August 11, 2015, Keon Butler was shot and killed in the City of Bridgeton, New Jersey. Immediately before his death, Mr. Butler was driving a vehicle occupied by his passenger, Sharee Jamison. T3, 4-25. Following a lengthy car pursuit, shots were fired from the pursuing vehicle, one of which struck and killed Mr. Butler. T3, 3-10 and T4, 197:1-4. After Mr. Butler was shot, his car, now being maneuvered by Sharee Jamison, crashed into a pole. T2, 49:2-10; T3, 97:19-25 and 98:1-8.

On October 7, 2015, Raheem Jacobs was charged by Detective James Riley of the Bridgeton City Police Department with the murder of Keon Butler on August 11, 2015. On February 8, 2017, the grand jury returned the first of two indictments against Mr. Jacobs. The Procedural History sets forth the rather complicated history of the charges brought against Mr. Jacobs. Suffice it to say, this appeal deals only with the Keon Butler homicide. Despite the fact that the original indictment, #17-02-00111-I/A was superseded by indictment #17-08-00743-I/A, in which Mr. Jacobs

was also charged with the murder of Jeron King, Mr. Jacobs was eventually tried for the Butler murder alone.

Three witnesses, Erica Jackson, Ordale Telfair and Special Agent John Hauger provided the most significant testimony against Mr. Jacobs. Beginning with Erica Jackson, she was called by the State on May 13, 2022. On direct examination, she testified that she had a “friendly” relationship with Mr. Jacobs and also acknowledged that the two of them had had a “mild affair”. T4, 24:18-22. Ms. Jackson was questioned about a statement she had given to the New Jersey State Police on March 29, 2016. T4, 27:10-18. When questioned about some of the statements which she made at that time, 2016, Ms. Jackson indicated that she did not recall making many of the statements attributed to her. T4, 29:3-19; T4, 31:1-20.

After the direct testimony of Erica Jackson, the State sought to introduce into evidence the statement Ms. Jackson gave to the police on March 29, 2016. The court conducted a Gross hearing to determine the admissibility of Ms. Jackson’s prior statement. After hearing testimony at the Gross hearing as to the admissibility of both Erica Jackson’s statement to law enforcement as well as to Ordale Telfair’s statement to law enforcement, the trial court ruled that both prior statements, subject to some restrictions, were admissible. T4, 46:19-25, 47:1-3.

The redacted version of Ms. Jackson’s statement was introduced through

Detective John Riley on May 14, 2022. According to her statement, Ms. Jackson and Mr. Jacobs had a "close relationship". T6, 77:22-25, 78:1-3. According to Ms. Jackson, Mr. Jacobs "confided" in her on a "couple of occasions". T6, 78:12-15. Ms. Jackson said that on the night Smash (Keon Butler) got killed, Raheem Jacobs called her and allegedly said to her he was filled with "revenge" and confessed to being so emotional, he wanted to cry. T6, 80:1-13. Mr. Jacobs allegedly called her between 12:00 and 1:00 a.m. T6, 80:19-22. Tellingly, she said that Mr. Jacobs never told her that he had killed Smash. T5, 81:3-5. The van which Mr. Butler was driving when he was shot is seen crashing into a pole at approximately 3:13 a.m. T4, 94:5-25, 95:1.

In further elaborating on Mr. Jacobs' emotional condition during Ms. Jackson's alleged telephone conversation with him on the night of Smash's murder, Ms. Jackson in her statement to the police said that Raheem was "upset" and "crying" and "filled with emotion". T6, 81:17-21. When Ms. Jackson told Mr. Jacobs "let it go", he responded "it's too far" which Ms. Jackson interpreted to mean that whatever was bothering Mr. Jacobs he could not "let it go". T6, 81:22-25. Ms. Jackson also said that Mr. Jacobs always carried a "big gun" which she said was a .40. T6, 82:24-25. She quoted Mr. Jacobs as saying that he "got .40 for these niggas". T6, 83:1-3.

In an undated telephone conversation sometime after the discussion which allegedly took place on the night of Smash's murder, Mr. Jacobs allegedly lamented "that the cops traced all the stuff down to him. They found the gun. They had his phone. They seen him on camera going through the light. They had the girl car, the girl car they put something on the car to try to get the evidence off of it. That's pretty much what I know." T6, 83:9-14.

As with Ms. Jackson, the State was not able to adduce from Ordale Telfair what he had told the police when he was initially questioned by law enforcement about the Keon Butler murder. Unlike Ms. Jackson whose direct testimony was filled with "I don't recall" comments, Mr. Telfair stated that when he spoke to law enforcement about the Keon Butler homicide, he lied to the police. T3, 160:1-12. As to his motive to lie when specifically asked about Mr. Jacobs, Mr. Telfair said that the police had it "out" for Mr. Jacobs and that they kept "threatening" Mr. Telfair "with fake charges". T3, 160:17-25. Upon the State's application, the Court approved the introduction of Mr. Telfair's statement. T5, 48:8-12.

As it did with Ms. Jackson, the State introduced the redacted statement of Ordale Telfair through Detective Riley. The salient points of Mr. Telfair's statement are as follows:

1. He was in the car with Smash somewhere between 3:00 and 3:30 when he, Smash and Shumar Cotto went to the 7-Eleven. T6, 30:20-25, 31:1.

2. Telfair left Smash, went back to the "Ville". T6, 31:10-12.

3. "Che", full name unknown, was on the phone and on speaker with Smash when Telfair began to hear shots. T6, 31:18-20. (Detective Riley later identified "Che" as Jose Ramos.) T6, 139:16-19.

4. Smash was giving Che "play by play" of his location.

5. Later in the day on August 11, 2015, Telfair met with Mr. Jacobs, whom he identified as Gucci, during which Mr. Jacobs, in remarks that Telfair attributed to the Butler killing said "that shit done deal". T6, 32:18-25, 33:1-5.

6. In the same conversation with Mr. Jacobs, Mr. Telfair quotes Mr. Jacobs as saying that he emptied a whole clip and that he was asking for bullets, .40 and .9. T6, 33:21-25.

7. Telfair also quoted Jacobs, "Head shots, you already know how we do". T6, 38:8-12.

8. Telfair saw Jacobs in the Yellin vehicle (the car allegedly loaned to Mr. Jacobs prior to the Butler homicide and the car identified as being the pursuit vehicle during the chase of the Butler vehicle) on the night of the Butler homicide. T6, 41:10-12; T5, 7-19.

During its investigation, law enforcement seized the cellphone of Mr. Jacobs. Based on the cellphone data, Special Agent John Hauger performed a geo-time analysis. On May 6, 2022, after defense counsel moved to exclude Detective Hauger's testimony and report, the trial court conducted a hearing pursuant to Rule 104 of the New Jersey Rules of Evidence. The court was required to address two issues: 1) the timeliness of the State's submission of the report (it was provided to

the defense on April 25, 2022, one day before jury selection began); and 2) the forensic reliability of the report and proffered testimony.

Agent Hauger's report replaced an earlier report prepared by the New Jersey State Police which set forth a geo-time analysis. T1, 150:11-12. According to Detective Hauger, the previously submitted report contained information about longitude and latitude which Detective Hauger said had the potential to be misleading. T1, 153:11-19.

Agent Hauger testified that he was a special agent with the FBI and had been so employed for 18 years. T1, 103:12-19. In 2011, he joined the Southern Analysis Survey Team and then later became a member of the Cellular Analysis Survey Team in Atlantic City. T1, 104:4-16. Agent Hauger said that as part of his training, he received instruction from Sprint. T1, 107:8-15. As part of his training from Sprint, Agent Hauger testified that he was taught by Sprint how to use per call measurement data. T1, 111:12-18. He described Sprint's use of PCMD as follows:

> PCMD is an engineering system. It's used by network engineers to optimize the network. To look for dead spots, to handle complaint calls, that sort of thing. So what it does is it talks to the phones and takes measurements of how far the phone is from the tower that it is providing service to, or a tower that's in the footprint of. So it does an internal calculation based on the speed at which it takes the signal to get from the tower to the phone and back to the tower, and it provides an estimated distance from the tower . . . Again, they use this to optimize their networks. It's not like somebody's out there with a tape measure for every transaction. It's a signal. It's a calculation, so sometimes it's

> extremely accurate. Sometimes it's a little less than accurate. T1, 111:24-25 to 112:1-21

PCMD is used by Sprint for network optimization. Law enforcement uses the data to locate a phone based on measuring data. T1, 117:14-23. Sprint attached a disclaimer to its records warning that due to server capacity problems, the Sprint records (used in the case) may be incomplete. T1, 156:21-25 to 157:1-4. Sprint data contains known inaccuracies, at least according to Special Agent Hauger as to latitude and longitude. T1, 160:1-17. Agent Hauger acknowledged that Sprint is unable to certify or testify to the accuracy of PCMD records. T1, 160:20-23. Sprint created PCMD to oversee its network. T1, 160:25 to 161:1-6. Sprint further advised that PCMD "was not created as a tool to identify customer location, pursuant to exigent circumstances or legal demand". T1, 161:7-13.

Detective Hauger acknowledged that one of the ways to verify cell site information is to do a drive by but said that he got the case too late to do it in Mr. Jacobs' case. T1, 164:20-25. Sprint does not have "documented error rates for CDR or cell site location information records". T1, 178:8-24.

The Court admitted Agent Hauger's testimony. At trial, Detective Hauger's map of various sectors upon which Mr. Jacobs' cell phone allegedly traveled through was admitted into evidence. Cross-examination of Agent Hauger generally followed the pattern established at the 104 hearing during which Sprint's disclaimers

regarding PCMD were largely explored. Specific data which Agent Hauger placed on his maps were questioned. He acknowledged that with respect to the map marked 27E that it contained an "outlier" which the "program got wrong". T7, 70:7-21. Certain maps contained the same times in different sectors. T7, 13:3-10; T7, 7-19.

The other probative evidence upon which the State relied included the testimony of Michael Willis, who found a .40 caliber weapon at Seabreeze Beach, the direction in which the State claimed Mr. Jacobs was traveling in the Yellin vehicle after the shooting of Keon Butler. The gun was found sometime in August 2015. T2, 130:25 to 131:1-5. The State's ballistic expert, Daniel Studzinski, matched the weapon found by Michael Willis to the weapon used to shoot Keon Butler. T8, 23:10-21.

Inconsistencies and infirmities to the testimony of the State's witnesses were developed on cross-examination. As developed at Grand Jury, the State's theory of the case articulated by Detective Riley was that Sharee Jamison had lured Keon Butler from his home so that Mr. Jacobs could shoot him. **130a-132a.** On cross-examination, Detective Riley acknowledged that he gave inaccurate testimony under oath in support of the above-mentioned theory by incorrectly stating the nature and time the texts between Sharee Jamison and Keon Butler began on August 11, 2015 at 2:45 a.m. T6, 115:18-25; T6, 116:1-24; T6, 118:7-18; T6, 123:4-24. That false

premise led to Ms. Jamison being charged in a conspiracy with Raheem Jacobs to commit an aggravated assault upon Keon Butler. T6, 120:3-25. The charge was later dismissed.

As to the interview with Ordale Telfair, Detective Riley acknowledged that nothing in Keon Butler's phone records on August 11, 2015, verified that he was on the phone with Che, later identified as Jose Ramos, at or near the time of the Keon Butler shooting. T6, 139:5-9; T6, 144:1-11. Sharee Jamison testified that, during the car pursuit of the Butler vehicle, Butler was largely silent except to state at one point that his vehicle was being followed. T3, 91:3-20; T6, 104:2-8. Furthermore, Mr. Telfair said that he was with Mr. Butler between 3:00 and 3:30. T6, 30:20-25. The shooting occurred at 3:15 when Mr. Butler was in the company of Sharee Jamison with whom he had been communicating since 2:38. T6, 137:17-25; T6, 138:1-8.

It should be noted that in court when he was under oath, Mr. Telfair said that the entirety of his statement to the police was a lie. T3, 161, 18-20. He was not under oath when he gave his statement. One further inconsistency in Mr. Telfair's statement was developed through Detective Riley's cross-examination. Detective Riley interviewed Shumar Cotto who denied that he was present during a discussion with Mr. Telfair and Mr. Jacobs wherein Mr. Jacobs requested certain caliber bullets and made statements presumably relating to the shooting of Keon Butler. T6,

148:16-25; T6, 149:1-25.

As to Ms. Jackson, cross-examination developed the fact that no cellphone records supported her statement to the police that Mr. Jacobs had called her around midnight on the night that Keon Butler was shot. T6, 155:2-12. Unlike what Detective Riley had reported, Ms. Jackson did not initiate contact with law enforcement. T6, 152:2-22. Rather, she indicated that she did not know why she was being interviewed. T6, 74:14-25; T6, 75:1-25.

Ms. Jackson testified that in 2015 she was suffering mental health problems. T3, 122:1-25; T3, 123:1-24; T3, 198:8-25; T3, 199:1-25; T3, 200:1-25; T3, 201:1-15. She was taking various prescription medicines. She testified that her memory was impacted by the condition of her health. As a result of her health conditions, Ms. Jackson had reason to doubt the accuracy of her statement to the police.

Following the presentment of all of the evidence at trial, the jury returned a verdict as follows:

- As to the murder of Keon Butler, <u>not guilty</u>;
- As to aggravated manslaughter, <u>not guilty</u>;
- As to reckless manslaughter, <u>guilty</u>;
- As to possession of a weapon for an unlawful purpose, <u>not guilty</u>;
- As to unlawful possession of a weapon, <u>not guilty</u>. **59a.**

STANDARDS OF REVIEW

The standard to be applied by a reviewing court following a trial court's ruling on a motion for judgment of acquittal is *de novo*. State v. Williams, 218 N.J. 579, 593-94 (2014). On appeal, the State's evidence, be it direct or circumstantial, is to be considered in its entirety to determine whether a judgement of acquittal is warranted. State v. Samuels, 189 N.J. 236, 246 (2007). The approach is one "of logic and common sense". Id. It is only "[w]hen each of the interconnected inferences [necessary to support a finding of guilt beyond a reasonable doubt] is reasonable on the evidence as a whole" that a conviction should stand. State v. Jones, 242 N.J. 156, 169 (2020). The State is entitled to the benefit of favorable inferences that can reasonably be drawn from the evidence and the benefit of favorable testimony. Id. Ultimately, "the applicable standard is whether such evidence would enable a reasonable jury to find that the accused is guilty beyond a reasonable doubt of the crime or crimes charged." Id. (further citations omitted).

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). "It is a well-established principle of appellate review that a reviewing court is neither bound by, nor required to defer to, the legal conclusions of a trial or intermediate appellate

court." State v. Gandhi, 201 N.J. 161, 176 (2010). With regard to the trial court's legal decision to charge the jury on the lesser-included manslaughter offenses, over the objection of both counsel, therefore, it is submitted that the decision is entitled to no deference by this Court.

As to the trial court's evidentiary rulings where, as here, the defense lodged the appropriate objections, the Court employs an abuse of discretion standard. State v. Prall, 231 N.J. 567, 580 (2018). Likewise, with regard to the court's sentencing decisions, the appropriate inquiry is whether the trial court abused its discretion in imposing punishment following the jury's determination. State v. Cassady, 198 N.J. 165, 180 (2009).

LEGAL ARGUMENT

I. THE VERDICT ENTERED BY THE JURY WAS AGAINST THE WEIGHT OF THE EVIDENCE (65a; T9, 25-31)

The illogical findings of the jury in this matter pertaining to Defendant's guilt as to the offense of reckless manslaughter and innocence as to the offenses of possession of a weapon for an unlawful purpose and possession of a weapon without a permit illustrate how the guilty verdict was against the weight of the evidence. In the absence of a factual premise for a finding of reckless conduct on Defendant's part (the weapons offenses), the jury had no basis upon which to find him guilty of reckless manslaughter. For the reasons that follow, the trial court should have granted the Defendant's motion for acquittal pursuant to New Jersey Court Rule 3:18-2 accordingly. State v. Reyes, 50 N.J. 454, 458- 59 (1967); see also, State v. Mayberry, 52 N.J. 413, 436-37 (1968), cert. denied, 393 U.S. 1043 (1969).

N.J.S.A. 2C:39-4a(1) prohibits an individual from possessing a weapon in the State of New Jersey and provides as follows: "Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree." The crime of unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) prohibits possession of a weapon without the requisite license to carry the same in accordance with N.J.S.A.2C:58-4. Defendant was charged with, and acquitted, of both offenses by the jury after the State presented

its entire case against him. The only conclusion to be drawn from these not guilty verdicts is that the jury was not convinced beyond a reasonable doubt that Mr. Jacobs was the shooter of the weapon that killed Keon Butler. Indeed, this conclusion was echoed by the Assistant Prosecutor at the time of oral argument on Defendant's motion for JNOV before the lower court. T9: 19, 20-25; 20, 1-6.

The trial court in the case before the Court charged the jury on the offenses of aggravated and reckless manslaughter, in addition to offense of murder, over the objection of both counsel (an error more fully addressed in Point II, *infra*). The provision of the New Jersey Criminal Code which defines the conduct "criminal homicide" is N.J.S.A. 2C:11-2 and provides as follows:

> a. A person is guilty of criminal homicide if he purposely, knowingly, recklessly or, under the circumstances set forth in N.J.S.2C:11-5 or section 1 of P.L.2017, c. 165 (C.2C:11-5.3), causes the death of another human being,
>
> b. Criminal homicide is murder, manslaughter or death by auto or vessel.

N.J.S.A. 2C:11-4(b) states that "Criminal homicide constitutes manslaughter when (1) It is committed recklessly". The trial court charged the jury, therefore, on the various states of mind that would support a guilty verdict as to murder or manslaughter, including reckless manslaughter, the latter of which required the State to prove that Mr. Jacobs caused Keon Butler's death when he was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that death will result

from his conduct." The jury was also instructed that it was required to find that Defendant "caused the death" of Keon Butler beyond a reasonable doubt.

An analysis of the elements of the charge of reckless manslaughter, as contained in the charge to the jury and as interpreted by New Jersey case law confirms that there was an insufficient factual basis upon which to convict Defendant of that particular offense. The charge, as presented to the jury, directed as follows:

> A person is guilty of reckless manslaughter if he recklessly causes the death of another person. In order for you to find the defendant guilty of reckless manslaughter, the State is required to prove each of the following elements beyond a reasonable doubt:
>
> (1) that the defendant caused Keon Butler's death; and
>
> (2) that the defendant did so recklessly.
>
> One element that the State must prove beyond a reasonable doubt is that the defendant acted recklessly.
>
> A person who causes another's death does so recklessly when he is aware of and consciously disregards a substantial and unjustifiable risk that death will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the defendant's conduct and the circumstances known to the defendant, his disregard of that risk is a gross deviation from the standard of conduct that a reasonable person would follow in the same situation.
>
> The other element that the State must prove beyond a reasonable doubt is that defendant caused Keon Butler's death.
>
> You must find that Keon Butler would not have died but for defendant's conduct.

First, the State was required to prove that Defendant engaged in reckless conduct beyond a reasonable doubt. The only theory advanced by the State to suggest reckless conduct on Defendant's part was that he fired a weapon from inside of a moving vehicle in a residential neighborhood. In order to engage in that conduct, Mr. Jacobs would necessarily have had to possess the fired weapon. The jury found, however, that Defendant did not possess the weapon that the State alleged that he fired and, further, that he did not possess a weapon for an unlawful purpose. The only rational inference that can be drawn from the jury's verdict of not guilty on both of the weapons offenses is that the jury did not believe that Mr. Jacobs was the shooter.

In cases where a defendant has been convicted of a lesser included offense, our courts hold that the sufficiency of the evidence should be tested upon a consideration of the entire record and not merely upon a limited application of the *Reyes* criteria to the State's proofs to determine whether a conviction of the lesser-included offense can be sustained. State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990). It is only if the State's evidence and its favorable inferences can support a guilty verdict, that the motion for acquittal should be denied. Jones, *supra*, 242 N.J. at 168.

Contrast this matter with State v. Lane, 288 N.J. Super. 1 (App. Div. 1995),

where a jury conviction for reckless manslaughter, death by auto and various motor vehicle offenses was affirmed since there was a sufficient factual basis upon which to support the verdict. There, the State presented evidence of defendant's intoxication while driving (which formed the basis for the reckless element of the offense) and factual and expert witness testimony as to the happening and reconstruction of the motor vehicle accident which caused the injuries leading to the victim's death. Id. at 4-5. Additionally, the State presented evidence that the cause of death, specifically, was a fatal brain hemorrhage. Id. at 5.

In reviewing the evidence introduced at the Lane trial, the Appellate Division affirmed the convictions since there was ample evidence of intoxicated driving to support the jury's verdict. Had the jury there determined that the defendant was not guilty of driving while intoxicated or had it rendered any verdict that would have suggested that he was not the driver of the vehicle that struck the decedent at all, then there would have been no basis upon which to find that he was guilty of death by auto or reckless manslaughter since the decedent died from injuries sustained in a car accident. Likewise, since the only conduct relied upon by the State to support the homicide charge in this case was shots fired from a gun, once the jury acquitted Mr. Jacobs of all weapons-related offenses, the factual basis upon which to find that he engaged in reckless conduct leading to the death of Keon Butler was lost.

In attempting to explain or justify the jury's verdict of reckless manslaughter, the trial court suggested that the killing of Keon Butler may have been accidental and that all the shots fired may not have been intended to kill him. The arguments necessarily incorporate the use of the weapons in the shooting for which Mr. Jacobs would have been held accountable if the jury accepted the court's theory. That is to say, if Mr. Jacobs was driving while someone inside of his vehicle was shooting at the Butler vehicle, Mr. Jacobs as an aider or abettor would have been found guilty of the weapons charges.

In another case illustrating the interrelatedness of weapons offenses and homicide offenses when charged together, the court in State v. Rodriguez, 392 N.J. Super. 101, 103 (App. Div. 2007), aff'd, 195 N.J. 165 (2008), opined as follows: "If defendant possessed the knife for purposes of self-defense and was attempting to defend himself at the time he used the knife, albeit in an honest but unreasonable belief that he needed to use deadly force, he should have been acquitted of unlawful weapons possession and possession for an unlawful purpose." Since the determination of the defendant's guilt on the weapons offenses in Rodriguez had a direct bearing on whether he was guilty of reckless manslaughter in that case, the convictions for all three offenses were reversed by the court.

With regard to the causation prong, the New Jersey Supreme Court's decision

in State v. Campfield, 213 N.J. 218 (2013) is instructive. There, the court analyzed whether a factual statement from a defendant who entered a guilty plea to the charge of reckless manslaughter was sufficient to support a conviction based upon the admission he made. The facts upon which the plea was based included a statement by the defendant that the decedent had been injured while he was being pursued by him, that he assaulted the decedent, robbed him, forced him to remove most of his clothing and then left him, intoxicated, incoherent, injured and bleeding alone in the woods in the midwinter cold. Id. at 237. The defendant in that case admitted that his conduct was reckless, and that it was a contributing factor in the victim's death, which was determined to have been caused by asphyxiation from drowning. Id. The Court in Campfield made clear that "when a defendant is tried for reckless manslaughter, the factfinder must determine whether the 'result' of the defendant’s reckless conduct, i.e. the victim's death, was within the scope of the risk contemplated by the defendant. Id. at 235.

In the case before the Court, there was no allegation that Defendant lawfully possessed a weapon but engaged in conduct that was reckless, e.g. brandishing the weapon in a crowd of people, mishandling or misusing the gun in the backseat of Mr. Butler's vehicle, etcetera. Even if, however, the jury had determined that Mr. Jacobs lawfully possessed the weapon but used it in connection with the shooting of

Mr. Butler in his vehicle, the jury would necessarily have had to convict Mr. Jacobs of possession of a weapon for an unlawful purpose.

Unlike in Campfield and Lane, the State in the case at bar did not prove, or attempt to prove, that any reckless conduct on the part of Raheem Jacobs caused the death of Keon Butler. To the contrary, the State's entire theory, and the evidence that was introduced to prove it, was that Mr. Jacobs participated in an intentional shooting that led to a death. As further indication that the State's evidence did not support a finding of guilt on the reckless manslaughter charge, the Court is urged to consider the fact that both the defense and the State objected to the instruction to the jury regarding its ability to find Mr. Jacobs guilty of the lesser included offenses of aggravated or reckless manslaughter. Nevertheless, the trial court presented the jury with these alternate options, despite both parties' positions that the evidence introduced at trial did not support a basis to instruct on either lesser charge. It appears that the court decided to charge the lesser included offenses based upon the fact that originally Sharee Jamison, not Raheem Jacobs, was charged with conspiring to commit aggravated assault with Raheem Jacobs on Keon Butler. The charge was on a complaint warrant. The State rejected the theory and instead presented Indictment 17-08-00111-I/A to both the grand and petit juries.

Defendant’s argument on appeal is thus based on the inescapable fact that the

jury's verdict cannot be supported by the evidence that was adduced at trial, given the finding that Mr. Jacobs was determined to be not guilty of the weapons offenses charged in the indictment and given the lack of any other evidence that reckless conduct on his part caused the death of Mr. Butler. While the defense recognizes that the analysis calls for the evidence to be viewed by affording the State the benefit of all favorable testimony and all favorable inferences that can be drawn therefrom, even doing so does not support a finding of guilt beyond a reasonable doubt given the evidence presented at trial.

Once again, the entirety of the State's case in this matter was premised upon the fact that Raheem Jacobs shot or shot at Keon Butler with a weapon that he was not authorized to possess and/or that he possessed for an unlawful purpose or aided and abetted another individual who shot him with a weapon. Significantly, the unrefuted testimony from the medical examiner confirmed that Mr. Butler died from the gunshot wound, not from injuries related to the crash of his motor vehicle. The jury considered the evidence and found that Mr. Jacobs was not guilty of either of those weapons offenses. Removing the weapon from the equation leaves no other basis upon which to find that Raheem Jacobs committed the manslaughter, even recklessly. There was simply no other evidence, even when viewed in a light favorable to the State, to support a finding that Defendant engaged in conduct that

caused the death of Keon Butler if he did not do so with use of the weapon which formed the basis of two (2) not guilty findings. A judgment of acquittal was, therefore, warranted.

II. THE TRIAL COURT ERRED IN CHARGING THE JURY AS TO WHAT IT BELIEVED WAS THE LESSER-INCLUDED OFFENSE OF RECKLESS MANSLAUGHTER OVER THE OBJECTION OF BOTH COUNSEL (81a; T8, 88-95)

A trial court's decision to charge on a lesser-included offense is governed by N.J.S.A. 2C:1–8(e). That statute provides that "The court ***shall not*** charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense" (emphasis supplied); see also, Cassady, *supra*, 198 N.J. at 178. In State v. Alexander, 233 N.J. 132, 142 (2018), the New Jersey Supreme Court expounded that "[a] party must request a charge or object to an omitted charge at trial for the rational basis test to apply." The court continued: "In the absence of a request or an objection, we apply a higher standard, requiring the unrequested charge to be 'clearly indicated' from the record." Id. at 143.

In State v. Garron, 177 N.J. 147, 180 (2003), the New Jersey Supreme Court explained that the "primary obligation" of trial courts is to "see that justice is done." That obligation includes ensuring "that a jury is instructed properly on the law and on all clearly indicated lesser-included offenses, even if at odds with the

strategic decision of counsel." Id. It has long been held that trial courts have an independent duty to *sua sponte* charge on a lesser-included offense "only where the facts in evidence 'clearly indicate' the appropriateness of that charge." State v. Savage, 172 N.J. 374, 397 (2002) (quoting State v. Choice, 98 N.J. 295, 298 (1985)). As clarified in State v. Denofa, 187 N.J. 24, 42 (2006), the evidence must "jump[ ] off the page" in order to trigger a trial court's duty to *sua sponte* instruct a jury on that charge.

In State v. Thomas, 187 N.J. 119, 130 (2006), the court acknowledged that jury instructions on related offenses "raise constitutional concerns because criminal defendants have rights to a grand jury presentment and fair notice of criminal charges against them." To prevent infringement of those rights, a trial court may instruct the jury on a related offense only when "the defendant requests or consents to the related offense charge, and there is a rational basis in the evidence to sustain the related offense." Id. at 133.

In the case before the Court, and for the reasons more fully set forth in Point I, *supra*, the facts presented at the trial of Raheem Jacobs did not "clearly indicate" the appropriateness of an aggravated or a reckless manslaughter charge and they certainly did not "jump off the page". Thus, it was error for the trial court to instruct the jury in this regard, especially in light of the unanimous objection of both parties.

The illogical verdict rendered by the jury confirms the erroneous nature of the issuance of the charge and is further support for this Court to overturn the unsupported guilty verdict.

III. THE COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE TESTIMONY OF THE STATE'S EXPERT, JOHN HAUGER, WHO WAS NOT NAMED BY THE STATE UNTIL THE DAY PRIOR TO JURY SELECTION (58a; T1, 68-91).

On April 25, 2022, the day prior to the start of jury selection in this matter, the State notified counsel for Defendant that it intended to rely upon the expert testimony of Special Agent John Hauger and supplied Agent Hauger's report for the very first time. Agent Hauger's opinion was related to geo-time tracking of Mr. Jacobs' cell phone records on August 11, 2015. The State had previously named a different expert in mid-2019, and the defense presented the expert report of Roger Boyell on March 4, 2020 in response thereto. It wasn't until over two (2) years later, on the literal eve of trial, that the State identified a brand-new expert on the issue of per call measurement data ["PCMD"] with regard to Defendant's cell phone number. Defendant objected to the introduction of the evidence, given the late submission, and his inability to adequately address the opinions articulated by Mr. Hauger's report so close in time to the trial of the matter. The trial court denied the defense application to bar the late expert report and ruled that, in lieu of producing a rebuttal

expert report, Defendant could submit a proffer as to his own expert as to the expected testimony.

New Jersey Court Rule 3:13-3(I) governs the use of expert witness testimony in criminal matters and provides as follows:

> (I) names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial[.]

On this procedural issue, Defendant recognizes that the decision to allow or exclude testimony based upon a discovery violation rests within the discretion of the trial court. State v. Williams, 214 N.J. Super. 12, 22 (App. Div. 1986), cert. denied, 107 N.J. 629 (1987). “In exercising its discretion, the court may consider (1) whether the party who failed to disclose intended to mislead; and (2) whether the aggrieved party was surprised and would be prejudiced by the admission of expert testimony.” State v. Heisler, 422 N.J. Super. 399, 415 (App. Div. 2011) (further citations omitted). “Prejudice”, as explained by the court in Heisler, refers not to the impact of the testimony itself, but “the aggrieved party's inability to contest the testimony because of late notice.” Id.

In evaluating a claim of prejudice stemming from a trial court's decision to bar the testimony of an expert offered by a defendant in State v. Marshall, 123 N.J. 1, 129–30, (1991), cert. denied, 507 U.S. 929 (1993), the higher court relied upon the reasoning that unfairness results to an opposing party who might then have difficulty engaging in effective cross-examination or be unable to locate and prepare a rebuttal witness. This reasoning is applicable here, where two years elapsed from the time that both parties exchanged expert reports and the defense was surprised with the addition of a brand-new expert with a different opinion on the eve of trial.

The trial court's decision to permit the testimony of Agent Hauger, despite the State's violation of Rule 3:13-3(I), under the circumstances, was "so wide of that mark that a manifest denial of justice resulted." State v. Brown, 170 N.J. 138, 147 (2001), quoting State v. Marrero, 148 N.J. 469, 484 (1997). Despite the extended period of time between the issuance of both parties' expert reports in 2019 and 2020, the defense was provided with only a week and few days to consult with Defendant's own expert witness in order to rebut the late-submitted expert opinion of Agent Hauger. Given the impact of geo-time analysis evidence and the complexity of that issue, Defendant was most assuredly prejudiced by the rushed manner in which his own expert had to be consulted and formulate a responsive opinion.

On a substantive level, Agent Hauger's testimony should have been disallowed as a result of the expert's own acknowledgement that the data supplied by the cell phone carrier was admittedly incomplete and unverifiable. The trial court was presented with evidence of the carrier's admission that the system was not designed for use in law enforcement investigations and that, by its own representation "there are known accuracy defects with Sprint PCMD reporting." The trial court was aware that Detective William Deininger's Investigation Report dated January 5, 2016 outlined the following information provided directly from Sprint and which impacted the reliability of the location data:

> Please be advised that there are known accuracy defects with Sprint PCMD reporting. Therefore, Sprint is unable to certify or testify to the accuracy of PCMD records. It is important to understand that the tool used to provide PCMD records was created as a tool for Sprint to oversee the network. It was not created as a tool to identify customer location, pursuant to exigent circumstances or legal demand...

Additionally, Roger L. Boyell, a licensed professional engineer and electronics analyst offered by the defense as an expert witness in this matter, offered his written opinion prior to trial that the use of PCMD data is not reliable as a means of determining the location of a cell phone at any given point in time. Rather, the techniques and data are "employed by the carriers to develop their networks by aggregating large volumes of calls in geographic areas of interest." Moreover, the use of PCMD techniques have not been validated, are of unknown error rate and

have not been court- accepted as a means of locating individual mobile phones."

The trial court thus conducted a hearing pursuant to Frye v. United States, 558 U.S. 916 (2009). The purpose of a so-called "Frye hearing" is to ensure that the scientific evidence that is sought to be introduced at trial is sufficiently reliable such that it has gained "general acceptance in the particular field in which it belongs." State v. Ghigliotty, 463 N.J. Super. 355, 374 (App. Div. 2020). This comports with Rule of Evidence 702, which provides that expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."

It is well-settled that, in order for expert testimony to be admissible, it must meet the following three prerequisites: first, "the intended testimony must concern a subject matter that is beyond the ken of the average juror"; second, *"the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable";* and third, "the witness must have sufficient expertise to offer the intended testimony" State v. Jenewicz, 193 N.J. 440, 454 (2008) (further citations omitted) (emphasis supplied); see also, State v. Olenowski, 253 N.J. 133 (2023), citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 594-95 (1993) (holding that the "Daubert" factors should prospectively be employed in

criminal cases to ensure that an expert's opinion is based "solely on principles and methodology, not on the conclusions that they generate"). Id. at 594-95.

In the present case, the second prerequisite was not met given the data owner's own admission regarding known accuracy defects and a system that was not designed for the purpose sought to be furthered by the State here. Sprint and the defense expert agreed in this regard and Agent Hauger's own anecdotal evidence should not have formed the basis for an alternate finding with regard to reliability.

The court below, in admitting the evidence, was persuaded by the fact that the cell phone carrier, Sprint, had certain purposes in collecting the data, to wit, network optimization and accurate billing. Those purposes, however, do not equate with scientific reliability in a court of law and the court's reasoning was based upon assumptions rather than direct testimony from a Sprint employee. Ultimately, the trial court determined that the issues of inaccurate or incomplete data were ones of credibility for the jury. Defendant submits that, on the contrary, this was a question of admissibility, and it was harmful error for the trial court to permit the testimony under those circumstances.

IV. THE COURT ERRED IN ALLOWING THE REDACTED OUT OF COURT STATEMENTS OF ERICA JACKSON AND ORDALE TELFAIR TO BE READ TO THE JURY (T4, 151-267; T5, 3-56).

Following a hearing conducted by the trial court in accordance with State v. Gross, 121 N.J. 1, 10 (1990), the out-of-court, inconsistent statements of two

witnesses, Erica Jackson and Ordale Telfair, were read to the jury as evidence in Defendant's trial. In evaluating the admissibility of those hearsay statements, the trial court was guided by New Jersey Rule of Evidence 803(a), which provides as follows:

> The following statements are not excluded by the hearsay rule:
>
> (a) A Declarant-Witness' Prior Statement The declarant-witness testifies and is subject to cross examination about a prior otherwise admissible statement, and the statement:
>
> (1) is inconsistent with the declarant-witness' testimony at the trial or hearing and is offered in compliance with Rule 613. However, when the statement is offered by the party calling the declarant-witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the declarant-witness in circumstances establishing its reliability; or (B) was given under oath at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; or
>
> (2) is consistent with the declarant-witness' testimony and is offered to rebut an express or implied charge against the declarant-witness of (A) recent fabrication or (B) improper influence or motive; or (3) is a prior identification of a person made after perceiving that person if made in circumstances precluding unfairness or unreliability.

Here, subsection (a)(l)(A) is relevant since the hearsay statements of both individuals were inconsistent with their trial testimony and were recorded. With regard to each, the State, as the proponent of introducing the statements, maintained the burden of establishing their reliability for admission at trial. In Gross, the court set forth fifteen (15) factors to be considered in determining whether a prior

inconsistent statement of a testifying witness was made in "circumstances establishing its reliability". Id. at 7. Those factors were outlined as follows:

1. the declarant's connection to and interest in the matter reported in the out-of-court statement;
2. the person or persons to whom the statement was given;
3. the place and occasion for giving the statement;
4. whether the declarant was then in custody or otherwise the target of investigation;
5. the physical and mental condition of the declarant at the time;
6. the presence or absence of other persons;
7. whether the declarant incriminated or sought to exculpate himself by his statement;
8. the extent to which the writing is in the declarant's hand;
9. the presence or absence, and the nature of, any interrogation;
10. whether the offered sound recording or writing contains the entirety, or only a portion [or a] summary of the communication;
11. the presence or absence of any motive to fabricate;
12. the presence or absence of any express or implicit pressures, inducement or coercion for making the statement;
13. whether the anticipated use of the statement was apparent or made known to the declarant;
14. the inherent believability or lack of believability of the statement; and
15. the presence or absence of corroborating evidence.

Id. Ultimately, the Gross court expounded that a prior inconsistent statement is

admissible so long as there are "sufficient indicia of antecedent reliability." Id. at 15. The burden rests with the party offering the out-of-court statement to show its reliability by a "fair preponderance of the evidence." Id. at 15. The Rule requires, when the statement is offered by the party calling the witness, both the opportunity to cross-examine *and* sufficient indicia of antecedent reliability.

Thus, the status of a witness has been declared to be a "highly relevant circumstance" by the Gross court. Id. at 12. There, the court recognized that "antecedent reliability poses *heightened concerns* in this case because the prior inconsistent statement was made by a witness who was in police custody and was himself a suspect" in the crimes. The statement inculpated defendant and served to absolve the witness on some level. The Appellate Division in that case had acknowledged that "[s]tatements which exonerate the declarant and implicate another, or which are otherwise given under circumstances in which the declarant stands to gain by implicating another, have been held, in other settings, to be 'presumptively suspect' and to raise 'special suspicion.'" 216 N.J. Super. 110, fn.8.

An application of the Gross factors to the proffered statements here illustrates that antecedent reliability was lacking as to both and, therefore, should not have been admitted. First, as to the recorded statement of Ordale Telfair, which he claimed at trial to have been entirely untruthful, the Gross factors failed to support a finding of reliability. The State did not produce phone records or other independent evidence to corroborate the factual statements contained in that

statement and, in fact, other trial testimony refuted some of the claims contained in the inconsistent statement. It should be noted that Mr. Telfair, who had subsequently been convicted of murder, was apprehended by the police after a chase during which Mr. Telfair allegedly discarded his cellphone. The cellphone was not found. Something as simple as obtaining surveillance video evidence to corroborate a statement made by Mr. Telfair as to his whereabouts on the night in question could have provided some *indicia* of reliability; however, the State failed to provide this proof.

Importantly, Mr. Telfair offered his statement while he was under arrest and in custody, which provided him with a motivation to fabricate since he believed that he could potentially help himself by providing incriminating information about Defendant. According to Mr. Telfair's sworn testimony during the 104 hearing at trial on May 12, 2022, members of law enforcement used to "harass" him and hold charges "over [his] head", which ultimately induced him to provide the untrue statement. It was reversible error, therefore, for the trial court to permit the jury to consider the unreliable and inconsistent hearsay statement of Mr. Telfair.

As to Erica Jackson, whose prior statement was offered to establish that a phone call between her and Defendant occurred, despite her inconsistent testimony at trial, the same is true of the lack of corroboration. Cell phone records from either party could have proven that the prior statement bore some indication of reliability such that it was appropriate for the jury to consider the evidence. Once again, the

State did not produce this corroborating evidence and the testimony of Ms. Jackson at the 104 hearing refuted the claim of the State that her prior statement was reliable due to her extensive memory-related issues and her mental health condition at the time she gave it. According to Ms. Jackson, her statement given on March 29, 2016 she was undergoing trauma-related mental issues and required inpatient hospitalization as a result of her daughter's suicide attempt. As a result, Ms. Jackson repeatedly indicated that a review of her prior statement felt like "reading a book", not reviewing statements that she, herself, made. The most compelling factor with regard to Ms. Jackson, therefore, was her mental state at the time that she rendered the hearsay statement. Throughout her testimony, she made clear that, contemporaneous to March of 2016, she was an unreliable historian. Combined with her inconsistent trial testimony, which was under oath, the statement should have been deemed inadmissible by the trial court.

The cumulative effect of the trial court's rulings admitting both of these hearsay statements to be read to the jury is harmful error that should result in the reversal of Defendant's conviction. See e.g., Jenewicz, *supra*, 193 N.J. at 473-74 (requiring that an appellate court's assessment of whether a defendant received a fair trial consider the "cumulative effect" of an individual series of errors which may, standing alone, not rise to the level of reversible error).

V. THE EXTENDED TERM SENTENCE IMPOSED BY THE TRIAL COURT WAS EXCESSIVE AND CONSTITUTED AN ABUSE OF DISCRETION (66a; T9, 54-62).

In sentencing the Defendant, the trial court found the existence of the following aggravating factors enumerated in N.J.S.A. 2C:44-1(a):

- Aggravating factor 3 – the risk that the defendant will commit another offense, to which substantial weight was afforded;
- Aggravating factor 6 – the extent of defendant's prior criminal record, to which substantial weight was also afforded;
- Aggravating factor 9 – the need for deterrence, to which substantial weight was also afforded.

With regard to the application of mitigating factors, the trial court found only that mitigating factor 6 was applicable—that the Defendant has compensated or will compensate the victim of his conduct for the damages or injury that the victim sustained. The trial court afforded only slight weight to this factor, however. The trial court further found that an extended term was appropriate as to Mr. Jacobs and imposed an extended term of twenty (20) years in prison, subject to the No Early Release Act.

The imposition of an extended term in the case of a "persistent offender" is discretionary, not mandatory. State v. Thomas, 195 N.J. 431, 436 (2008). The

standards for an extended sentence are set forth in State v. Dunbar, 108 N.J. 80(1987) except to the extent that the need to protect the public should be addressed only if the Court finds that the State has proven the prerequisite number of convictions. State v. Pierce, 188 N.J. 155, 167-168 (2006).

It is acknowledged that Raheem Jacobs's prior criminal record met only the bare requirements of N.J.S.A. 2C:44-3 for persistent offender status. However, given the discretion that the statute affords in applying an extended term in this regard, it is submitted that the trial court placed unwarranted emphasis on this criminal record. Compellingly, all of the offenses that the State alleged to qualify Defendant for "persistent offender" status occurred within a span of a few years, 2014 and 2015, which is also contemporaneous in time to the offense presently on appeal.

At the time of his sentencing, Defendant was thirty-three (33) years old and the criminal offense with which he convicted was his third. Taking into consideration that the term "persistent" is defined as "continuing to exist or endure over a prolonged period", the spirit of the statute was not furthered by the trial court exercising its discretion to categorize him as such. His offenses did not occur over a long period of time such that his pattern of offending endured; rather, the close proximity in time of Mr. Jacobs' convictions are more aptly qualified as a criminal spell for which he is now being punished. Under the circumstances, the Court is

asked to reverse the decision of the sentencing court imposing an extended term of twenty (20) years imprisonment for this second-degree conviction.

VI. THE CHARGES AGAINST APPELLANT SHOULD BE DISMISSED AS A RESULT OF PROSECUTORIAL MISCONDUCT THAT OCCURRED IN THE PRESENTATION TO THE GRAND JURY BUT WHICH ONLY BECAME EVIDENT DURING THE TRIAL TESTIMONY OF JOHN RILEY (NOT RAISED BELOW).

Detective James Riley of the Cumberland County Prosecutor's Office testified at the grand jury presentment on February 8, 2017, as well as at trial in this matter. His testimony from the initial grand jury proceeding was replayed during the presentment on the evidence for the superseding indictment on August 16, 2017. Detective Riley acknowledged at trial that his testimony at grand jury was false. Specifically, the detective testified under oath on February 8, 2017 that the text messages between Sharee Jamison and Keon Butler started at 2:45a.m. on August 11, 2015 with Ms. Jamison reaching out first to Mr. Butler. GJT22:17-25; GJT23:1. According to the detective's initial testimony, phone records that had been obtained by law enforcement after the incident showed a "back and forth" between the two individuals beginning at that 2:45a.m. and were initiated by Ms. Jamison.

Detective Riley's trial testimony, however, was that the text exchange was started by Mr. Butler to Ms. Jamison at 2:39a.m. on August 11, 2015, which was in direct contradiction to his testimony to the grand jury at a time when the State was

attempting to advance a theory that Ms. Jamison lured Mr. Butler out of his home shortly before the shooting. Detective Riley admitted on cross-examination that, at the time of his false grand jury testimony, he was already in possession of the extraction report pertaining to Mr. Butler's cell phone activity and knew that Mr. Butler was the one who initiated the first text message.

Significantly, the Assistant Prosecutor who presented the case to the grand jury was without a doubt likewise aware of the evidence that had already been gathered by that time, including the cell phone records of Mr. Butler. Despite being aware of the initiation of the text message exchange between Mr. Butler and Ms. Jamison on the night of the shooting, testimony was elicited that directly refuted that evidence. Presumably, this was done to support the original theory that Ms. Jamison was involved in the crime and lured Mr. Butler from his home.

Inherent in the grand jury process is the basic principle of fairness that "a prosecutor has the primary duty of ensuring that justice is done and may not use improper methods calculated to produce a wrongful conviction." State v. Triestman, pierc416 N.J. Super. 195, 205 (App. Div. 2010), citing, In re Grand Jury Appearance Request by Loigman, 183 N.J. 133, 149 (2005). Here, both the assistant prosecutor and Detective Riley possessed evidentiary information that directly refuted the facts as presented to the grand jury, which without a doubt constitutes prosecutorial

misconduct. The indictment filed against Mr. Jacobs on the basis of those misrepresented facts should therefore be dismissed.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court reverse the conviction entered against the Defendant, Raheem Jacobs and/or remand for a new sentencing.

RESPECTFULLY SUBMITTED BY
AGRE & ST. JOHN
ATTORNEYS FOR APPELLANT

s/Robert N. Agre
____
ROBERT N. AGRE, ESQUIRE

Dated: May 10, 2023

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Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-0133-22T1

CRIMINAL ACTION

STATE OF NEW JERSEY, :

Plaintiff-Respondent, :

v. :

RAHEEM J. JACOBS, :

Defendant-Appellant. :

On Appeal from a Final Judgment of Conviction in the Superior Court of New Jersey, Law Division, Cumberland County.

Sat Below:
Hon. Cristen P. D'Arrigo, J.S.C.,
and a jury.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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October 20, 2023

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Db - Defendant's brief
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1T - Transcript of Motion, May 6, 2022
2T - Transcript of Trial, May 10, 2022
3T - Transcript of Trial, May 12, 2022
4T - Transcript of Trial, May 13, 2022
5T - Transcript of Trial, May 17, 2022
6T - Transcript of Trial, May 19, 2022
7T - Transcript of Trial, May 20, 2022

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[1] This document was appended to defendant's motion in limine brief filed in the Law Division and is thus part of the record on appeal. See R. 2:5-4(a).

[2] This document was appended to defendant's motion in limine brief filed in the Law Division and is thus part of the record on appeal. See R. 2:5-4(a).

[3] The question of whether an issue was raised in the trial court is germane to the appeal. See R. 2:6-1(a)(2).

[4] In his table of citations, defendant lists a May 17, 2022 motion transcript as 11T, (Dbv), but does not otherwise reference this transcript in his brief. The State is not aware of a second transcript for proceedings on May 17, 2022 and believes this is a scrivener's error.

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8T - Transcript of Trial, May 24, 2022
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COUNTERSTATEMENT OF PROCEDURAL HISTORY

On August 16, 2017, a Cumberland County Grand Jury returned superseding indictment number 17-08-00743-I, charging Raheem J. Jacobs with first-degree murder, N.J.S.A. 2C:11-3a(1) or (2) (counts one and nine), second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (counts two and ten), second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1) (counts three and eleven), and second-degree possession of a weapon by a convicted person, N.J.S.A. 2C:39-7(b)(1) (counts eight and twelve).[5] (Da7-11). Counts nine through twelve, which pertained to a separate murder, were severed on April 26, 2022. (Da7-11; Da56).

On May 6, 2022, defendant's motion to bar Special Agent John Hauger's expert testimony was denied. (Da58; 1T91-14 to 96-3; 1T188-18 to 198-9).

A jury trial began on May 10, 2022 before the Honorable Cristen P. D'Arrigo. (2T). Following a N.J.R.E. 104 hearing on May 13 and 17, 2022, Judge D'Arrigo permitted the out-of-court statements of Erica Jackson and Ordale Telfair to be admitted with redactions. (Pa1; 5T38-22 to 56-6). On May 26, 2022, the jury found defendant guilty of second-degree reckless manslaughter, N.J.S.A. 2C:11-4(b)(1), as a lesser-included offense of murder

[5] Sharee L. Jamison was charged under counts four through seven with aggravated assault, hindering, and tampering with physical evidence. (Da8-9).

(count one). (Da60). Defendant was found not guilty of counts two and three, and count eight was dismissed. (Da59-60; 9T16-10 to 17-6).

On August 5, 2022, Judge D'Arrigo denied defendant's motion for judgment of acquittal. (Da65; 10T25-3 to 31-4). The judge granted the State's motion for an extended term and sentenced defendant to twenty years in prison subject to the No Early Release Act (NERA). (Da66-67; 10T32-25 to 33-4; 10T57-21 to 58-4).

Defendant filed his notice of appeal on September 20, 2022. (Da76-80).

COUNTERSTATEMENT OF FACTS

During the early morning hours of August 11, 2015, Keon Butler was shot in the back of the head after attempting to elude a pursuing vehicle during a car chase through Bridgeton. Defendant was in the pursuing vehicle.

* * *

At 3:16 a.m., officers from the Bridgeton Police Department were dispatched to the area of North Laurel Street and Myrtle Street where they observed a minivan that had crashed into a parked car and a utility pole. (2T48-8 to 49-10; 2T51-11 to 22; 2T60-12 to 61-1; 2T72-12 to 18; 2T75-20 to 76-20; 2T125-20 to 21). A man later determined to be Keon Butler was in the driver's seat slumped over with a single gunshot wound to the back of the head. (2T49-11 to 23). The bullet traveled through the driver's headrest.

(2T87-12 to 88-3; 4T111-13 to 17; Pa17-18). The window of the driver side sliding door and rear windshield were shattered. (2T61-15 to 25; 4T108-8 to 10; Pa2, 5). Bullet strikes were observed in the rear passenger side tire, rear driver side hubcap, low on the front driver side door, rear bumper, and just below the rear windshield. (4T108-6 to 112-12; Pa9-16, 19). Butler's cellphone and a projectile were collected from inside the van. (4T112-13 to 113-10). Seven .40 caliber and nine 9-millimeter shell casings were collected around the minivan and along Myrtle Street, extending two blocks east, and submitted to the State Police Ballistics Laboratory for analysis. (2T50-24 to 51-5; 2T54-1 to 55-9; 2T78-5 to 82-6; 2T92-15 to 98-17; 6T215-20 to 216-8).

Sharee Jamison, a family member of Butler's, was at her mother's house on Cohansey Street when Butler texted her around 2:39 a.m. (3T82-8 to 84-3; 3T92-8; 3T114-10 to 12; 6T115-7 to 10). After a conversation via text, Jamison got dressed and went outside to wait for him. (3T84-4 to 87-7). When Butler arrived in his van around 3:00 a.m., Jamison noticed there was another car behind him. (3T3T87-11 to 89-12). Jamison got into the front passenger seat. (3T88-16 to 22). Butler started going in "circles" around the block. (3T89-1 to 92-2). As they approached Irving and Pearl Streets, Butler stated, "Cuz, somebody following me." (3T92-1 to 8). Butler started "flying," so Jamison "[got] down." (3T93-21 to 94-6). Butler turned right onto Irving,

left onto Walnut Street, and left onto Myrtle Street when shots started being fired. (3T94-23 to 96-8). When they reached the intersection of Myrtle and Bank Streets, Butler fell over onto Jamison. (3T96-9 to 97-14). She unsuccessfully attempted to steer the van as it passed through the intersection of Pearl Street before crashing at Laurel Street. (3T96-18 to 98-8).

When she regained consciousness, Jamison asked a bystander to call 911 because her cell phone was not working. (3T98-15 to 20; 3T99-18 to 21). Seeing that Butler was unresponsive, Jamison panicked, and escaped through the shattered driver's side window. (3T98-21 to 99-5; 3T101-24 to 102-24). She returned to her mother's house around the corner. (3T102-25 to 103-6). Jamison's cousin took her to the hospital two hours later. (3T105-6 to 17).

At the Bridgeton hospital, Jamison told police, "'I don't got no phone right now.'" (3T106-8 to 107-17). A couple of days after Butler was killed, she allowed her daughter to perform a "master reset" of her phone because her daughter told her it would fix the phone. (3T108-16 to 109-9). As a result of wiping her phone, Jamison entered a plea agreement of two years probation which she had already completed. (3T82-8 to 83-9; 3T114-17 to 21).

Based on Jamison's description of their route of travel prior to the crash, detectives collected surveillance video from eight area businesses and government agencies. (2T152-20 to 153-8; 2T158-1 to 166-22; 4T57-18 to 58-

7; 4T59-12 to 18; 4T61-6 to 62-6; Pa21). The surveillance videos depicted a maroon sedan following Butler's van turn-by-turn through the streets of Bridgeton beginning on Cohansey Street at 3:08 a.m. until the van crashed into a pole on the west side of Laurel Street at the intersection of Myrtle Street at 3:12 a.m. (4T65-1 to 101-8). After the crash, the tailing vehicle turned left from Myrtle Street onto Laurel Street and traveled southbound at a high rate of speed. (4T95-15 to 100-2). The video depicted Jamison emerging from the driver side window of the van and walking away from the crash scene. (4T100-3 to 102-4).

On August 30, 2015, a fisherman found a .40 caliber Glock semiautomatic handgun on the beach in Seabreeze along the Delaware Bay and turned it over to police. (2T130-15 to 133-5; 2T136-9 to 138-15; 2T142-1 to 145-13). Comparing test specimens fired from the gun with the .40 caliber casings recovered from the crime scene, the State Police Ballistics Laboratory determined that it was one of the guns used in the shooting. (6T220-3 to 226-14). Cumberland County Prosecutor's Office Detective James Riley was familiar with the route from Bridgeton to Seabreeze, and stated the most direct route goes by the Sunoco in Fairton, south of Bridgeton. (4T127-17 to 129-1; 4T135-1 to 24; Pa23-25). Surveillance from the Fairton Sunoco showed the maroon sedan going by at 3:45 a.m. on the morning of the shooting. (4T135-

25 to 139-19).

The ballistics lab determined that the .40 caliber shells and 9-millimeter shells were discharged from two different weapons: the .40 caliber Glock found in Seabreeze and an unknown .38 caliber class firearm. (6T216-2 to 8; 6T219-22 to 220-2; 8T19-20 to 20-16). Three projectiles were also submitted for analysis and determined to be .38 caliber class. (6T216-9 to 21). While a .38 caliber bullet can be fired from a .40 caliber firearm, it was determined that the three .38 caliber projectiles recovered from the scene and victim's brain were not discharged from the .40 caliber Glock recovered in Seabreeze. (6T193-4 to 194-10; 6T217-2 to 219-3; 8T18-4 to 19-19).

On August 18, 2015, Detective Riley happened to pass by the maroon sedan matching the vehicle in the surveillance videos. The car was being operated by Nathan Yellin, and registered to his mother, Margaret Yellin. (4T113-23 to 116-22). Margaret identified the sedan depicted in the August 11 surveillance video as her vehicle. (3T38-14 to 40-6). She testified that Nathan died in 2018 or 2019 and primarily used the Mercury Sable, but would loan the vehicle to others. (3T35-12 to 37-25). The day after the shooting, Margaret recalled finding a bottle of cleaning agent in the front seat, which was not something she or Nathan used. (3T43-7 to 44-13). After interviewing Nathan on August 19, 2015, officers took him to the location on the south side of

Bridgeton where he had loaned his vehicle. (3T41-15 to 17; 4T123-25 to 125-1). While driving in the area of South Pine Street and Fremont, Detective Riley observed defendant and told Nathan "[t]o duck." (4T125-2 to 22).

Erica Jackson, who was involved in an extramarital affair with defendant around the time of the homicide, provided a statement at the Bridgeton Police Department on March 29, 2016. (3T242-5 to 8; 4T26-3 to 27-6; 4T33-15 to 18; 6T66-5 to 67-18; 6T153-12 to 17). At trial, Jackson denied having any recollection of what she told detectives about the night of the offense. (4T28-23 to 29-19; 4T31-1 to 32-17). Following a mid-trial Gross[6] hearing in which Judge D'Arrigo found her claimed memory loss to be feigned, (5T40-7 to 11), the State was permitted to play her redacted statement for the jury. (Pa49).

In her statement, Jackson acknowledged that defendant—whom Jackson knew as "Smash"—had "confided" in her on a "couple of occasions" to vent. Between midnight and 1:00 a.m. on the morning Butler was killed, defendant called her crying and in an "uproar," with "revenge . . . in his mind." (6T78-12 to 15; 6T80-1 to 22). Defendant asked to borrow Jackson's car because he "had something to do." (6T81-5 to 17). She refused and tried to convince him to "let it go," but he said he was "too far gone." (6T81-15 to 25). Jackson

[6] State v. Gross, 121 N.J. 18 (1990) (Gross I).

stated that defendant "always carried that big gun, the .40," and his "favorite line" was that he "got .40 for these niggas. He gonna put .40 in somebody." (6T82-24 to 83-5).

On an unspecified date after Butler was killed, defendant told Jackson "that the cops traced all the stuff down to him. They found the gun. They had his phone. They seen him on camera going through the light. They had the girl car, the girl car they put something on the car to try to get the evidence off of it." (6T83-9 to 14). Investigators in fact had observed a vehicle going through a red light on the surveillance. (6T167-1 to 13). Police recovered a phone belonging to defendant, but it was unknown whether it was the same device defendant had on him the day of the homicide or if he had any other devices. (6T167-1 to 169-11; 6T175-15 to 17). While defendant's call detail records from the service provider did not indicate that he made any outbound calls between 12:00 a.m. and 3:00 a.m. on August 11, investigators were unable to extract the data from his cellphone to determine if he communicated over other applications. (6T88-15 to 89-7; 6T147-18 to 148-1; 6T154-12 to 155-12; 6T169-17 to 170-10).

In the early morning of August 21, 2015, Ordale Telfair was arrested on an unrelated matter and was "eager" to provide a statement about Butler's homicide. (6T17-25 to 22-5; 6T134-1 to 24). At trial, Telfair, who by then

was serving a 60-year prison term for a 2021 murder conviction, claimed that he concocted his statement because police were holding "fake" drug charges over his head. (3T156-2 to 13; 3T159-16 to 161-19). Telfair acknowledged that Nathan always showed up in a red Mercury when buying drugs from Telfair. (3T161-20 to 162-23). Following the Gross hearing, Judge D'Arrigo approved the introduction of Telfair's redacted statement. (5T48-8 to 56-6).

In his recorded statement, (Pa50), Telfair stated that around midnight or 1:00 a.m. on August 11, 2015, he was walking to the Bridgeton Villas apartment complex (the "Ville"), when he saw defendant—who he knew as "Gucci"—riding down Cottage Avenue as the front passenger in Nathan's red car. (4T121-16 to 18; 6T39-3 to 11; 6T41-25 to 42-2; 6T44-9 to 45-5; 6T52-7 to 23; 6T57-8 to 58-10). A "young boy" he could not identify was driving and he could not tell if anyone else was in the car. (6T41-16 to 42-2; 6T52-24 to 53-2). Telfair had seen defendant in Nathan's car before. (6T41-4 to 42-14; 6T44-13 to 45-5).

Telfair was at "the Ville" with Shumar Cotto around 3:00 a.m. when "Smash" dropped off "Che."[7] (6T30-20 to 31-18; 6T35-1 to 4; 6T58-11 to 20). Telfair got in Smash's van and they drove to 7-Eleven. (6T30-24 to 31-1;

[7] Detective Riley identified Che as Jose Ramos. (6T138-17 to 22).

6T34-22 to 25). There, Telfair saw a "smoke gray color[ed] Impala" with two people he could not identify pull in and quickly pull out. (6T31-1 to 5; 6T34-7 to 9; 6T58-21 to 59-6). Smash asked Telfair who was in the Impala and called Che. (6T31-5 to 12; 6T59-6 to 17). As Smash was scared to leave, Telfair started walking away, eventually finding a ride back to the Ville about eight minutes later. (6T31-5 to 12; 6T34-15 to 18; 6T35-11 to 23; 6T59-6 to 22).

When Telfair returned to the Ville, he overheard Che on speaker phone with Smash, who was giving a "play by play where he was at." (6T31-1 to 23; 6T34-18 to 35-10; 6T59-24 to 60-3). Not long after Smash said he was by the Dollar Store on Irving Avenue, Telfair heard the sound of two gunshots over the speaker phone followed by a car screeching. (6T31-21 to 32-3; 6T36-18 to 20; 6T50-5 to 21; 6T60-4 to 8). Che desperately tried to find someone at the Ville to give him a ride to find Smash. (6T51-1 to 3; 6T60-11 to 14).

Sometime before 7:00 p.m. on August 11, defendant called Telfair looking for Cotto. (6T32-13 to 22; 6T37-15 to 22; 6T47-20 to 48-8; 6T51-22 to 52-8). Telfair handed his phone to Cotto with Telfair "standing right there." (6T32-20 to 22; 6T37-20 to 25; 6T48-7 to 13). Defendant stated, "that shit done deal," and asked for .40 caliber and 9-millimeter bullets because he "empt[ied] the whole clip." (6T33-3 to 24; 6T61-2 to 5). Telfair and Cotto met defendant on the south side of Bridgeton, on South Pine Street near

Fremont Avenue, and provided defendant with 9-millimeter bullets; they did not have .40-caliber bullets. (6T33-25 to 34-2; 6T37-15 to 22; 6T39-3 to 20; 6T44-13 to 20; 6T48-13 to 23; 6T52-13 to 15). Defendant was standing with a group of five or six people bragging about "[h]ead shots, you already know how we do." (6T38-2 to 39-25; 6T48-21 to 49-5; 6T60-15 to 24). Defendant went on, "I don't miss." (6T48-21 to 49-5).

Following a Frye[8] hearing on May 6, 2022, the trial court permitted Special Agent Hauger to testify as an expert on using per call measurement data (PCMD) to track defendant's cell phone location on the morning of the offense. (1T188-18 to 198-9). Hauger was a member of the FBI's Cellular Analysis Survey Team (CAST) and had specific training and experience with Sprint PCMD technology. (7T10-18 to 12-23). Hauger explained that PCMD used an algorithm to calculate how far a phone is from a tower even when not in use. (7T27-15 to 28-14; 7T29-18 to 21; 7T35-4 to 5).

Hauger used the Sprint records of defendant's phone number to determine his location between 2:00 a.m. and 5:07 a.m. on August 11, 2015. (7T36-18 to 45-8). Using PCMD, Hauger was able to determine that between 2:53 a.m. and 3:29 a.m., defendant's phone only used one tower, located in

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[8] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

downtown Bridgeton. (7T52-3 to 13; Pa28). From 2:53 a.m. to 3:07 a.m., the phone used sector three of the tower facing west. (7T51-8 to 16; 7T54-6 to 11; Pa28). At 3:07 a.m., the phone utilized sectors three and one, indicating that the phone could have been in an overlapping area between them. (7T53-15 to 54-25; Pa28). From 3:07 a.m. to 3:12 a.m., the phone used sector one. (7T51-17 to 21; 7T54-12 to 55-8; Pa28). From 3:17 a.m. to 3:18 a.m., the phone utilized sector three again. (7T51-22 to 23; Pa28). And from 3:19 to 3:29 a.m., the phone utilized sector two facing southeast. (7T51-23 to 25; Pa28).

The call detail records showed voice calls from 3:54 a.m. to 5:07 a.m. (7T45-8 to 46-15). During the calls at 3:54 a.m., 4:40 a.m., and 5:07 a.m., the phone used a tower in downtown Bridgeton where the sector faced south and east. (7T45-8 to 15; Pa26). The calls at 4:47 a.m. and 4:54 a.m. used the north-facing sector of a tower in Fairfield. (7T45-15 to 24; Pa26). No calling events were recorded between 2:00 a.m. and 3:54 a.m., but call detail records would not show data and third-party application use or text messages. (7T46-7 to 21; 7T80-14 to 18). The Sprint 3G records for defendant's phone showed that it was closer to the Bridgeton tower from 3:54 a.m. to 4:40 a.m. and closer to the Fairfield tower from 4:28 a.m. to 4:56 a.m. (7T58-11 to 59-19).

Based on the above evidence, the jury found defendant guilty of the lesser included offense of reckless manslaughter. This appeal follows.

LEGAL ARGUMENT

POINT I

GIVING THE STATE THE BENEFIT OF ALL OF ITS FAVORABLE TESTIMONY AND INFERENCES, A RATIONAL JURY COULD FIND DEFENDANT GUILTY OF RECKLESS MANSLAUGHTER.

Defendant maintains that the "verdict was against the weight of the evidence" because the acquittal of the weapons offenses precluded a finding that he was a gunman, and there was no evidence of recklessness to support manslaughter. (Db18). He is mistaken on both counts. As to the former, the ample evidence of defendant's guilt—as a principal or an accomplice—validated the manslaughter conviction regardless of the acquittals on separate counts. As to the latter, the substantial evidence that defendant was in the pursuing car chasing another car through Bridgeton while firing shots at it supports that he consciously disregarded a substantial and unjustifiable risk that death would result. Defendant's lawful conviction must stand.

At the outset, defendant's weight-of-the-evidence argument is waived. Following the verdict, defendant never filed a motion for a new trial pursuant to Rule 3:20-1, instead moving for a judgment of acquittal notwithstanding the verdict pursuant to Rule 3:18-2. (Da62-63, 65; 10T3-15 to 14-21). This Court "do[es] not consider a weight-of-the-evidence argument on appeal unless the

appellant moved in the trial court for a new trial on that ground." State v. Fierro, 438 N.J. Super. 517, 530 (App. Div. 2015) (citing R. 2:10-1). A motion for a judgment of acquittal does not satisfy Rule 2:10-1's requirement because it is "controlled by a different standard than a motion for a new trial." State v. Johnson, 203 N.J. Super. 127, 133 (App. Div. 1985) (in context of R. 3:18-1). Having failed to preserve the issue below, defendant's present argument that the jury verdict is against the weight of the evidence is not cognizable. However, even construing defendant's argument as an appeal of the order denying judgment of acquittal—which is what his argument appears to be, see (Db18) (citing R. 3:18-2); (Db18) ("the trial court should have granted the Defendant's motion for acquittal")—it fails because ample evidence supported the manslaughter conviction.

Regardless of the timing of such a motion, a motion for a judgment of acquittal will not be granted if,

> the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt.
>
> [State v. Fuqua, 234 N.J. 583, 590-91 (2018) (citation omitted).]

This Court "appl[ies] the same standard . . . to decide if the trial judge

should have granted a judgment of acquittal." State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990) (citing State v. Moffa, 42 N.J. 258, 263 (1964)).

Defendant maintains that the conviction for manslaughter cannot stand because it is inconsistent with the acquittal on the weapons offenses. (Db18). Besides being incorrect, this claim fails because "[o]ur system of justice has long accepted inconsistent [jury] verdicts as beyond the purview of correction." State v. Maloney, 216 N.J. 91, 109 (2013) (citation omitted). The jury has the prerogative to acquit even "'in the face of overwhelming evidence of guilt.'" State v. Franklin, 184 N.J. 516, 536 (2005) (citation omitted). Thus, that defendant was acquitted of the weapons offenses is not part of the analysis whether there was sufficient evidence—giving the State the benefit of all of its favorable testimony and inferences—supporting reckless manslaughter.

Nevertheless, contrary to defendant's claim, there are at least two logical explanations for the verdict. First, the jury could have found that defendant was one of the shooters but that the State failed to prove the requisite elements for the two weapon possession offenses. Indeed, this is quite plausible since defendant was only found guilty of a reckless homicide. A person commits reckless manslaughter when they consciously disregard a substantial and unjustifiable risk that death will result from their conduct. N.J.S.A. 2C:11-4(b)(1); N.J.S.A. 2C:2-2(b)(3). The risk must be of such a nature and degree

that its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. N.J.S.A. 2C:2-2(b)(3). The degree of risk must be more than "a mere possibility of death." State v. Curtis, 195 N.J. Super. 354, 364 (App. Div. 1984).

In contrast, possession of a weapon for an unlawful purpose under N.J.S.A. 2C:39-4(a)(1)—as the name of the offense implies—requires proof that the defendant acted purposely. Thus, if the jury only found defendant acted recklessly, it could have acquitted defendant of the unlawful purpose charge even if it found that defendant possessed one of the guns. Indeed, the unlawful purpose the State alleged defendant had under N.J.S.A. 2C:39-4(a)(1) was "to cause the death of Keon Butler." (8T150-23 to 151-4). Having found him guilty of recklessly causing Butler's death, it actually would have been inconsistent had the jury convicted defendant of the unlawful purpose charge.

Furthermore, unlawful possession of a weapon under N.J.S.A. 2C:39-5(b)(1) requires proof that the defendant did not possess a permit to carry, an element lacking from reckless manslaughter, which does not require proof that defendant used a weapon. See N.J.S.A. 2C:11-4(b)(1). It does not appear from the record that the State presented any evidence that defendant lacked a permit. While the jury may infer from this lack of evidence that defendant did not have a valid permit, it is not required to draw such an inference. See State

v. Ingram, 98 N.J. 489, 500 (1985). Thus, the manslaughter conviction was not mutually inconsistent with the acquittals of the weapons offense even if the jury believed defendant used one of the handguns involved in the shooting.

A second plausible explanation, recognized by Judge D'Arrigo and accepted by defendant as a "rational inference" (Db21), is that defendant acted as an accomplice. In rejecting defendant's similar argument about inconsistency below, the judge considered that the jury could have found that defendant was the driver. (10T27-5 to 16). This was supported by the fact that two guns were used yet the jury acquitted defendant of the weapons offenses. (10T18-23 to 19-3). As the driver, defendant may not have necessarily shared the intent of the shooters, but could have "created this reckless situation that eventually resulted in people shooting at the vehicle." (10T27-13 to 16; 10T28-13 to 24; 10T29-20 to 30-1).

That defendant aided unknown shooters by driving is certainly a rational inference because, while there was substantial evidence that defendant was in the pursuing vehicle, there was no eyewitness, video, or forensic evidence demonstrating that defendant was one of the shooters, let alone that he fired the fatal shot. The evidence showed that there were two guns used—a 9-millimeter and a .40 caliber (2T92-15 to 98-17; 6T193-4 to 194-10; 6T215-20 to 220-2; 6T226-2 to 14; 8T18-4 to 20-16)—and, therefore, potentially two

shooters. Moreover, defendant was known to borrow Nathan Yellin's red Mercury Sable observed in the multiple surveillance videos chasing down Butler's van. (3T37-20 to 25; 6T41-4 to 42-14; 6T44-13 to 45-5). Telfair observed defendant as a passenger in Nathan's vehicle two to three hours before the shooting, (4T121-16 to 18; 6T39-3 to 45-5; 6T52-7 to 53-9; 6T57-8 to 58-10), demonstrating that at least one other person was with defendant. Thus, the jury could rationally conclude that at the time of the pursuit, defendant was the driver as opposed to a shooter.

In maintaining that defendant would have to have been convicted of the weapons offenses to also be an aider and abettor of the homicide (Db23), defendant conflates accomplice liability with possession. An individual is an accomplice of another if "[w]ith the purpose of promoting or facilitating the commission of the offense[,] he . . . [s]olicits such other person to commit it, [or] [a]ids or agrees or attempts to aid such other person in planning or committing it." N.J.S.A. 2C:2-6(c). For accomplice liability to attach, the jury "must find that [the defendant] 'shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.'" State v. Bielkiewicz, 267 N.J. Super. 520, 528 (App. Div. 1993) (citation omitted). However, "[a]n accomplice is only guilty of the same crime committed by the principal if he shares the same criminal state of mind

as the principal." State v. Whitaker, 200 N.J. 444, 458 (2009).

Possession, on the other hand, "'signifies intentional control and dominion, the ability to affect physically and care for the item during a span of time.'" State v. McCoy, 116 N.J. 293, 299 (1989) (quoting State v. Brown, 80 N.J. 587, 597 (1979)). Actual possession is defined as "physical or manual control" of an object. State v. Spivey, 179 N.J. 229, 236 (2004) (citing Brown, 80 N.J. at 597). "A person constructively possesses an object when, although he lacks 'physical or manual control,' the circumstances permit a reasonable inference that he has knowledge of its presence, and intends and has the capacity to exercise physical control or dominion over it during a span of time." Id. at 237 (quoting State v. Schmidt, 110 N.J. 258, 270 (1988)).

A rational jury could conclude that defendant did not actually possess the guns if they were actively possessed by unknown shooters. The same jury also could rationally find that defendant did not "intend [to] and ha[ve] the capacity to exercise physical control or dominion" over the shooters' guns merely because they were in the car he was driving. Spivey, 179 N.J. at 237; see also N.J.S.A. 2C:39-2(a)(1) (recognizing exception to presumption of a weapon in a vehicle belonging to all occupants "[w]hen it is found upon the person of one of the occupants."). "An accomplice may be guilty of [a substantive crime] even though he did not personally possess or use the

firearm in the course of the commission of the [substantive crime]." State v. White, 498 N.J. 122, 130 (1984) (in context of armed robbery). The jury was not obligated to find constructive possession in order to convict defendant of aiding and abetting the homicide. And the fact that the jury only found defendant guilty of a reckless crime—manslaughter—further separates him from the actual or constructive possession of the guns.

Ultimately, even if the verdict was arguably inconsistent, this Court does not "speculate" as to the reason the jury acquitted defendant of the weapon offenses because "'[e]ach count in an indictment is regarded as if it was a separate indictment'" evaluated on its own merits. State v. Banko, 182 N.J. 44, 53-55 (2004) (quoting Dunn v. United States, 284 U.S. 390, 393 (1932)); State v. Kelly, 201 N.J. 471, 487-88 (2010) (explaining that it is impossible to know whether jury's inconsistent verdict reflects leniency, compromise, or misapplication of law). As long as the evidence supporting reckless manslaughter is sufficient, the jury's verdict must stand. See State v. Goodwin, 224 N.J. 102, 116 (2016). This is true even where an acquittal on one count can be construed as precluding the finding of an element of another offense of which a defendant is convicted. See State v. Grey, 147 N.J. 4 (1996) (recognizing abrogation of State v. Peterson, 181 N.J. Super. 261 (App. Div. 1981) for relying on such an exception to the inconsistent verdict rule).

Here, giving the State the benefit of all its favorable evidence and inferences therefrom, a rational jury could—and did—find that defendant recklessly caused Butler's death. The cell site data, video footage, statements from Telfair and Jackson, and ballistics evidence collectively established that defendant was in the pursuing vehicle and possessed the .40 caliber handgun involved in the shooting. While defendant maintains that "there was no allegation that [he] . . . engaged in conduct that was reckless," (Db24), the applicable inquiry is not the State's theory, but whether a reasonable jury could find guilt beyond a reasonable doubt "giving the State the benefit of all its favorable testimony and all the favorable inferences." State v. Reyes, 50 N.J. 454, 458-59 (1967); see State v. Feaster, 156 N.J. 1, 65 (1998) (approving jury instruction that arguments of counsel "are not evidence").

Judge D'Arrigo properly found sufficient evidence supporting a reckless intent as opposed to the specific intent to kill. The act of firing a gun from a moving vehicle at another moving vehicle "distinguishes this case from those in which a defendant shoots directly into a crowd or directly at another person, conduct which this [C]ourt has concluded defeats an inference that the shooter was not aware that death was a practical certainty." State v. Gaines, 377 N.J. Super. 612, 622 (App. Div. 2005) (citing State v. Mendez, 252 N.J. Super. 155, 160-62 (App. Div. 1991), certif. denied, 127 N.J. 560 (1992); State v. Sanchez,

224 N.J. Super. 231, 242-43 (App. Div.), certif. denied, 111 N.J. 653 (1988)). As the judge observed, most of the shots missed the van, and many of those that did hit it, struck lower down near the tires supporting an inference that the individual(s) in the pursuing vehicle were attempting to "disable" Butler's vehicle. (4T109-1 to 112-12; 10T25-24 to 25; Pa8-15). And while the chase looped through Bridgeton, the shooting was confined to one area of Myrtle Street. (10T5-18 to 6-4; 10T20-8 to 21-5). Thus, even if defendant were one of the shooters, there was sufficient evidence for a rational jury to return a guilty verdict for reckless manslaughter.

Equally, Telfair's observation of more than one individual in the maroon sedan at the time he saw defendant, the testimony that defendant would borrow Yellin's vehicle and was looking to borrow a vehicle the day of the shooting, and the ballistics evidence of two guns having been used, all supported a rational inference that defendant was the driver of the vehicle with potentially two other occupants. Even if these other occupants had a murderous intent, defendant did not have to share this intent. See Whitaker, 200 N.J. at 458. A rational jury could find that defendant's conduct in pursuing the minivan at a high rate of speed through the streets of Bridgeton, while other armed occupants fired at the minivan, constituted a conscious disregard of a substantial and unjustifiable risk that his conduct, or the conduct of the other

occupants, would result in Butler's death.

To be sure, the State presented evidence of defendant's intent through statements of Telfair and Jackson suggestive of planning. But "[j]urors are free to believe some, all or none of a witness' testimony." Gaines, 377 N.J. Super. at 622 (citation omitted). Thus, the jurors were free to accept their statements supporting, for example, defendant's presence in the pursuing vehicle, and reject their statements inasmuch as they shed light on his intent.

In sum, the verdict was not inconsistent. More importantly, the evidence and rational inferences supported the reckless manslaughter conviction. This Court should affirm the proper denial of the motion for judgment of acquittal.

POINT II

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON RECKLESS MANSLAUGHTER AS A LESSER-INCLUDED OFFENSE OF MURDER BECAUSE IT WAS CLEARLY INDICATED FROM THE RECORD.

In line with his argument in Point I, defendant argues that the trial court erred in instructing the jury on reckless manslaughter as a lesser-included offense over the parties' objections. (Db27). To the contrary, the judge was obligated to give the unrequested charge because it was clearly indicated by the record. Accordingly, this Court should affirm the conviction.

At the charge conference, which took place during trial, the judge

questioned the parties as to charging aggravated and reckless manslaughter as lesser-included offenses to murder. (7T88-15 to 89-10). Defense counsel objected, opining that "this is either a murder case or it's not." (7T89-13 to 14). Counsel believed charging lesser-includeds "would give the jury the option of compromising," which had "some appeal" to the defense, but ultimately did not "believe that the evidence suggest[ed]" the lesser offenses. (7T89-11 to 20). The prosecutor agreed, believing that "the number of shots that were fired" and "the number of projectile strikes to the vehicle," demonstrated that the shooters' purpose was "to actually cause the death of another individual." (7T90-5 to 10; 7T91-25 to 92-8).

Judge D'Arrigo indicated that the testimony and evidence he heard during trial caused him to reassess his initial inclination to instruct the jury only on murder. (7T88-15 to 89-5; 7T94-9 to 13). Specifically, "[t]here was a period of time when the maroon vehicle . . . followed the victim" on "a circuitous route without firing," suggesting that there was not "a clear intent to kill" from inception. (7T92-15 to 93-7). The surveillance video showed the vehicles relatively close together at the beginning of the pursuit, which would have been "a more opportune moment to start shooting." (7T93-8 to 16). The delay suggested that defendant's purpose could have been to "alarm" or "scare" Butler. (7T92-21 to 24).

The judge further considered that "shooting a moving car is not very precise," and the fatal shot that traveled through the rear windshield and two headrests could have either been a "lucky shot or an unfortunate shot." (7T94-24 to 95-4). In this regard, the judge honed in on the fact that only six out of sixteen shots struck Butler's van. (7T90-11 to 91-21). And four of those shots struck lower down on the vehicle around the rear bumper, driver and passenger side rear tires, and low on the front driver side door. (7T90-15 to 91-15).

Finally, the judge considered Detective Riley's testimony that Sharee Jamison was only charged with conspiracy to commit aggravated assault, as opposed to murder, because the State did not think she would knowingly put herself at risk of harm. (6T120-3 to 25; 6T171-2 to 15; 7T88-24 to 89-5; 7T93-17 to 94-4). Judge D'Arrigo explained that "the combination of things over the course of the trial . . . leads me to the point where I think I'm gonna have to give that charge." (7T94-11 to 13). Accordingly, the judge instructed the jury on aggravated and reckless manslaughter, as well as accomplice liability for the lesser-included offenses. (8T132-1 to 137-6; 8T142-11 to 144-23). The trial judge made the correct decision which this Court should affirm.

If neither side requests a lesser-included charge, the court nonetheless "has an independent obligation to instruct on lesser-included charges when the facts adduced at trial clearly indicate that a jury could convict on the lesser

while acquitting on the greater offense." State v. Thomas, 187 N.J. 119, 132 (2006) (citing State v. Jenkins, 178 N.J. 347, 361 (2004)). The record "clearly indicates" a lesser included offense if the evidence for the offense is "jumping off the page." State v. Dunbrack, 245 N.J. 531, 545 (2021) (citing State v. Denofa, 187 N.J. 24, 42 (2006)). "In applying the 'clearly indicated' standard, the court must not consider 'the credibility of the witnesses' or the 'worth' of the evidence; rather, it must look only to the 'existence of evidence to support the lesser included offense [charge].'" State v. Canfield, 252 N.J. 497, 501 (2023) (citation omitted) (alteration in original). Importantly, the trial judge has an independent obligation to instruct on lesser-included offenses regardless of a defendant's tactical position because the public interest in a correct verdict takes precedent. State v. Garron, 177 N.J. 147, 180 (2003).

Here, despite the parties' preferences, the evidence clearly indicated the appropriateness of instructing the jury on reckless manslaughter. As found by the trial judge, a jury could find that the individuals in the pursuing car had a reckless intent from the chaotic nature of the shooting. During the five-minute pursuit, no shots were fired until the cars turned onto Myrtle Street moments before the crash, (2T50-24 to 51-5; 2T54-1 to 55-9; 2T78-5 to 82-6; 3T96-2 to 8; 4T92-21 to 96-2; 4T100-3 to 101-8), supporting the inference that the individuals in the pursuing vehicle may have wanted to scare Butler rather than

kill him. When the shooting began, the majority of the shots missed Butler's van. Of the six shots that hit it, three struck the tires or bumper. (4T108-6 to 112-12; Pa8-15). Given the diffuse pattern, the judge correctly discerned that the fatal shot—believed to have passed through the rear windshield and two headrests—could be viewed either as intentional or inadvertent.

The nature of this chaotic shooting sets this case apart from cases where lesser-included offenses for murder were not appropriate because the defendant shot directly at an intended victim from close range. See, e.g., State v. Ramsey, 415 N.J. Super. 257, 271 (App. Div. 2010) ("it cannot reasonably be said that shooting a victim in the abdomen upon discharge of a firearm four times, in close range (within five to ten feet of the defendant), involved mere reckless conduct or a conscious disregard of a substantial risk of death.") (footnote omitted), certif. denied, 205 N.J. 77 (2011); Mendez, 252 N.J. Super. at 160-62 (finding no rational basis for reckless manslaughter where the defendant fired a machine gun into a crowd); Sanchez, 224 N.J. Super. at 243 (finding no basis to charge on reckless manslaughter where the perpetrator "brutally shot" the victim in the face, neck, and chest with a sawed-off shotgun inside an apartment kitchen); State v. Hammond, 338 N.J. Super. 330, 338-39 (App. Div. 2001) (finding no credible evidence to support anything other than an intentional murder where the defendant "stood over the victim with the

barrel of the gun pointed directly at him, and discharged two shots in succession at close range directly at the victim").

Unlike the above cases, where there was no question that the defendants knew for a practical certainty that their conduct would cause death, the nature of this shooting was susceptible to different conclusions about "defendant's state of mind as to the risk of death." See Jenkins, 178 N.J. at 363. And that Butler died from a gunshot wound as opposed to some unexpected or intervening factor is not determinative. In Gaines, the defendant shot a gun into a crowd of over 200 people attending an outdoor party, killing a party-goer. 377 N.J. Super. at 616-17. Forensic evidence revealed that the bullet had passed through a wooden object before striking the victim. Id. at 618. Gaines told a State witnesses that he had intended to kill someone else. Id. at 619. This Court found that "[w]here as here, the evidence permits a finding that the defendant was aware of and disregarded a probability but not a practical certainty that his conduct would cause death, the crime of reckless manslaughter and extreme indifference reckless manslaughter should be submitted to the jury." Id. at 623. See also State v. O'Carroll, 385 N.J. Super. 211, 229-232 (App. Div. 2006) (finding a rational basis in record for jury to find the defendant acted recklessly even though the victim died from asphyxiation due to strangulation where, among other evidence, defendant

gave a statement that he "accidentally wrapped the telephone cord tight around [his girlfriend's] neck as he attempted to make her drop the knife").

Further, as discussed in Point I supra, the jury could have concluded that while defendant participated in the attack on the victim either as the driver or a shooter, he did not share the same state of mind as the individual who delivered the fatal shot; namely, defendant did not act purposely or knowingly to cause Butler's death. See State v. Ramirez, 246 N.J. 61, 67 (2021) ("[A]n accomplice may be guilty of a lesser crime if their state of mind is different from the principal's.").

Reckless manslaughter was clearly indicated by the physical and video evidence. The fact that it could support defendant's role as an accomplice further made an all-or-nothing charge run counter to the judge's independent obligation in the charging decision and the public interest. The judge properly left it to the jury to decide defendant's state of mind as to the risk of death.

POINT III

AGENT HAUGER'S EXPERT TESTIMONY ON PCMD AND CELLPHONE LOCATION WAS PROPERLY ADMITTED.

Defendant maintains that Special Agent Hauger's expert testimony should have been disallowed, first, on the ground of late production, and second, that PCMD data was unreliable. Defendant is incorrect on both scores.

In rejecting defendant's claim about the timeliness of the State's production of Hauger's report, Judge D'Arrigo properly considered that the issue of cell site analysis was on defendant's radar as early as 2019 and his own expert had already prepared a report in response to an earlier report from the State on the issue. The judge further considered that the State's second expert report was occasioned by recent caselaw clarifying the limits of expert testimony on the issue. Rather than the draconian remedy of preclusion, the judge reasonably resolved the issue by giving defendant time to consult the expert he had already retained years earlier and provide a proffer in response to the State's expert. As to the reliability of PCMD data, Judge D'Arrigo properly found Hauger's opinion satisfied the Frye standard, and that his expert opinion on PCMD gave a general area without overstating its precision. The trial court's thoughtful decision on both issues should be affirmed.

A. Alleged late production of expert opinion

At the May 6, 2022 motion hearing, defense counsel argued that he received Agent Hauger's report on April 25, 2022, the day before jury selection began. (1T69-7 to 18). The pretrial memorandum filed on February 8, 2019 indicated, "State to provide expert report on cell phone GPS, with defense given the opportunity to retain its own expert." (1T71-13 to 15). After the State provided the defense with a GeoTime analysis authored by

Steven Foster dated May 9, 2019, the defense retained Roger Boyell, who authored a two-page expert report dated March 4, 2020 refuting the State's analysis. (1T71-16 to 25; Pa30-40).[9] Defense counsel indicated that after receiving Hauger's report, he had spoken to Boyell, who found "issues" with Hauger's report, but was unable to write a rebuttal report due to time constraints. (1T72-4 to 8). Counsel maintained that the State was required by Rule 3:13-3 to furnish expert reports no less than 30 days before trial, and thus asked for Hauger's opinion to be excluded. (1T72-25 to 73-14).

The prosecutor countered that Boyell's 2020 report had already critiqued the underlying PCMD data and the State's original GeoTime report plotting that data as specific locations on a map. (1T73-17 to 74-13). After receiving defendant's April 14, 2022 trial memorandum seeking to bar the State's GeoTime analysis, the prosecutor reviewed the Appellate Division's March 31, 2022 decision in State v. Burney, 471 N.J. Super. 297 (App. Div. 2022), and determined that the GeoTime analysis would likely be inadmissible in plotting defendant's cell phone's specific location data rather than a general area. (1T74-15 to 79-17). After consulting with colleagues and determining that the

[9] The Geotime analysis and Boyell's expert report were appended to defendant's motion in limine brief filed in the trial court, (Pa30-40; 1T71-16 to 72-3; 1T74-7 to 77-11; 1T50-11 to 154-18) and is thus part of the appellate record. See R. 2:5-4(a).

FBI would be able to provide a report consistent with precedent in providing a general sector rather than a particular location, the prosecutor expeditiously obtained a report from Hauger. (1T79-19 to 80-21).

In denying defendant's motion to exclude Hauger, Judge D'Arrigo found that the 2019 pretrial memorandum specifically indicated that cell-site location was an issue to be developed after the case was placed on the trial list. (1T93-20 to 94-1). The judge further noted that the State was prepared to proceed on its original report, but the Appellate Division decision in Burney clarified the law with respect to cell-phone-location data. (1T91-24 to 92-8). The judge recognized that the discovery rule did not mandate exclusion for late production of an expert report and observed that defendant already had an expert report who understood the issue. (1T90-5 to 18; 1T94-14 to 21). The judge afforded counsel an opportunity to consult with his expert and provide a proffer to the State by the time of Hauger's anticipated testimony, which defense counsel believed he could accomplish. (1T94-24 to 97-20). The judge's discovery ruling should be affirmed.

Deference is owed to a trial court's resolution of a discovery matter "provided its determination is not so wide of the mark or is not 'based on a mistaken understanding of the applicable law.'" State in Interest of A.B., 219 N.J. 542, 554 (2014) (citation omitted). A conviction will only be reversed if

the discovery violation so prejudiced the defendant that a new trial is required. State v. Blake, 234 N.J. Super. 166, 173 (App. Div. 1989).

Pursuant to Rule 3:13-3(b)(1)(I), the State must provide the defense with the names, qualifications, and reports of experts it expects to call at trial. "[I]f this information is not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial[.]" Ibid. (emphasis added). A party has a continuing duty to provide discovery. R. 3:13-3(f). If a party fails to comply, the court may "order such party to permit the discovery of materials not previously disclosed, grant a continuance or delay during trial, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate." Ibid. (emphasis added).

The sanction of preclusion is a drastic remedy and should be applied only after other alternatives are fully explored. State v. Washington, 453 N.J. Super. 164, 190 (App. Div. 2018). In light of the "general policy of admissibility," it is preferable for the trial judge to explore alternatives such as "according defense counsel an opportunity to [analyze the new evidence], by granting a brief continuance, or by some other procedure which would have permitted defense counsel to prepare to meet the evidence." Id. at 191.

In the exercise of its "broad discretion to determine what remedy, if any,

it should impose because of a failure to make expert disclosures," the court may consider whether: (1) "the party who failed to disclose intended to mislead"; and (2) "the aggrieved party was surprised and would be prejudiced by the admission of expert testimony." State v. Heisler, 422 N.J. Super. 399, 414-15 (App. Div. 2011). "Prejudice" in this context "refers not to the impact of the testimony itself, but the aggrieved party's inability to contest the testimony because of late notice." Ibid. These factors favored Judge D'Arrigo's resolution; namely, giving the defense additional time to consult the expert they had already retained on the issue over two years earlier.

First, defendant does not argue the failure to disclose Hauger's report sooner was motivated by an intention to mislead; nor does the record support such an intent. As the prosecutor explained, the late decision to obtain a second expert report was occasioned by recent developments in the law. Further, the prosecutor had been occupied through February and March with another trial and the death of a family member. (1T76-3 to 14).

Second, there was neither surprise nor prejudice that could not be addressed by the trial court's pragmatic approach. The defense was on notice from the State's original 2019 report that the State was relying on PCMD data. And the defense expert was already pointing out flaws in the methodology over two years before trial, opining in his March 4, 2020 report that PCMD

data, specifically, is not reliable as a means of determining the location of a cell phone at any given point in time. (Pa40). As early as the February 8, 2019 pretrial memorandum, defendant was on notice that cell site analysis was going to be an issue. (1T71-13 to 15; 1T93-16 to 24).

The defense had an opportunity to consult their already-retained expert on Hauger's report after it was received on April 25, 2022. Indeed, defense counsel had already consulted his expert about Hauger's report prior to the May 6, 2022 motion hearing. (1T72-4 to 8; 1T97-3 to 4). Further, the court obviated defense counsel's concern about not being able to get another report from Boyell by indicating it was sufficient for the defense to provide a proffer by the following week, which counsel believed he could accomplish.

By the time Hauger testified at trial on May 20, 2022, twenty-five days had passed from when his report was received. Ultimately, defendant chose not to present expert testimony to contradict Hauger. However, defense counsel—no doubt informed by his consultations with Boyell—cross-examined Hauger about the unreliability of PCMD, (7T61-19 to 78-15), and emphasized this point in his summation. (8T57-11 to 63-11). Indeed, the jury acquitted defendant of murder and the weapons offenses, perhaps suggesting that it may not have accepted the PCMD evidence at least in regard to defendant's post-shooting path. Thus, defendant fails to explain how the delay

prevented him from contesting the PCMD evidence.

The trial court wisely decided against a drastic remedy that would have kept important evidence from the jury contrary to public interest. See Washington, 453 N.J. Super. at 192 ("The trial of criminal cases involves 'important interests' of the State, the alleged victims, and the public, not just 'those of defendant alone.'") (quoting State v. Gallegan, 117 N.J. 345, 353 (1989)). This proper exercise of discretion should be affirmed.

B. Reliability of PCMD

After defendant sought to preclude expert testimony about using PCMD to track the location of a cellphone, the trial court held a N.J.R.E. 104 hearing. Hauger testified that, since 2011, he had been a member of CAST, which was "specifically trained in cell phone technology," locating phones, and determining the "historical location of a phone." (1T104-16 to 105-8). Hauger attended classes given by the service providers, including Sprint, and was familiar with their technology and records. (1T106-3 to 108-4). Hauger had used PCDM to locate an individual over 100 times, and had performed historical cell site analysis using service providers' records "thousands of times." (1T119-21 to 120-5; 1T122-9 to 123-2; 1T147-23 to 148-5).

Hauger acknowledged that the phone companies used PCMD for network optimization and troubleshooting, while CAST used it to locate

people and show where they were previously. (1T112-25 to 113-20; 1T117-7 to 118-3; 1T179-5 to 15). Hauger testified that PCMD "narrows the search area down" and experience showed it to be accurate within "a couple hundred yards," and sometimes "extremely accurate." (1T113-7 to 18; 1T117-23 to 118-3; 1T133-23 to 134-5). CAST found that when PCMD "says [a phone is] going to be someplace, it is going to be that place." (1T119-13 to 15). While it was not "100 percent accurate," PCMD gave "a good general area to look for" that in combination with other investigative facts "get you to the exact spot." (1T119-16 to 20). Hauger also acknowledged that Sprint issued a "disclaimer" that it would not verify the accuracy of the latitude and longitude provided by PCMD.[10] (1T116-1 to 117-6). CAST had found that the latitudes and longitudes in PCMD reports could be misleading, but the distances provided had been accurate. (1T123-14 to 21; 1T134-2 to 17; 1T160-10 to 17). Its reliability had been "corroborated" through CAST's success "finding people." (1T166-4 to 13). In terms of his analysis using PCMD, Hauger testified the results are peer reviewed and verifiable for accuracy by other CAST members. (1T129-23 to 130-8).

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[10] A records custodian from T-Mobile—which acquired Sprint in 2020—authenticated call detail records and PCMD associated with defendant's phone number in August 2015. (2T29-21 to 39-13). At trial, she could not attest to the completeness of the PCMD, but did affirm its accuracy. (2T40-13 to 45-3).

After considering Hauger's testimony, Judge D'Arrigo ruled that PCMD analysis was sufficiently reliable to satisfy the Frye standard. (1T196-17 to 20). The judge observed that Sprint relied on PCMD data to optimize its networks and had a monetary interest in ensuring its accuracy. (1T189-6 to 191-6; 1T192-20 to 193-10). The judge considered that Hauger had been in the field for years and consistently found it accurate in locating individuals and devices. (1T191-16 to 19; 1T194-1 to 7). Observing that the methodology did not have to be "perfect," the court reasoned that objections to PCMD's precision would be assuaged by presentation of such limitations by cross-examination, as well as the model jury charge on expert testimony directing the jury to consider the accuracy of the information upon which the opinion relies. (1T188-18 to 24; 1T193-15 to 18; 1T195-16 to 19; 1T196-22 to 24). The court found any shortcomings of PCMD went to weight, not admissibility, of Hauger's testimony. (1T197-2 to 9). The court's ruling was correct.

If specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a qualified expert may testify thereto in the form of an opinion. N.J.R.E. 702. Here, defendant only challenges the second prong of the three-part test governing admissibility—whether "the field testified to [is] at a state of the art such that the expert's testimony could be sufficiently reliable." State v. Jenewicz, 193 N.J. 440, 454 (2008). This prong

asks whether the scientific community "generally accepts the evidence," which "does not require complete agreement over the accuracy of the test or the exclusion of the possibility of error." State v. Harvey, 151 N.J. 117, 170-71 (1997). The standard is construed liberally given N.J.R.E. 702's tilt favoring the admissibility of expert testimony. Jenewicz, 193 N.J. at 454.

Hauger was qualified in the field of historical cell site analysis. Historical cell site analysis is "at a state of the art" such that a qualified expert's testimony "could be sufficiently reliable." Indeed, numerous decisions have so found. See, e.g., State v. Burney, 255 N.J. 1, 21-22 (2023) ("Across the nation, state and federal courts have accepted expert testimony about cell site analysis for the purpose of placing a cell phone within a "general area" at a particular time."); id. at 22 (collecting cases); United States v. Hill, 818 F.3d 289, 298, 299 (7th Cir. 2016) ("Historical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well-populated one. . . . the science is well understood.").

Defendant, however, focuses on the reliability of PCMD specifically, claiming that Hauger's "anecdotal" attestation to the reliability of PCMD was insufficient, given Sprint's disclaimer. "[W]hen an expert grounds testimony in personal views, rather than objective facts, the net opinion rule requires the exclusion of such unsupported views." Burney, 255 N.J. at 23. N.J.R.E. 703

permits expert opinion "based on facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject." State v. Townsend, 186 N.J. 473, 494 (2006).

Insofar as derived from PCMD, Hauger's testimony was not a net opinion, because it was based on data contained in Sprint records coupled with the proven, consistent reliability of PCMD, having been effectively used by Hauger and other CAST members in thousands of investigations. While the "net opinion" rule will exclude an expert's opinion that is based on "personal views" untethered to any standard, Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372-73 (2011), an expert's education, training, and, "most importantly," experience, can provide "a sound foundation" for his opinion and take it outside the net opinion rule. Townsend, 186 N.J. at 495; Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002) ("Evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience"). See, e.g., Townsend, 186 N.J. at 495 (allowing opinion based on witness's 14 years of clinical experience counseling hundreds of patients); Rosenberg, 352 N.J Super. at 403 (upholding opinion that chemotherapy

dosage was cause of death, based on witness's 20 years as an oncologist).

Consistent with this precedent, the jury was made fully aware, by direct and cross-examination of Hauger, as well as testimony of the Sprint record custodian, that historical call detail record analysis determines a "general geographic area of where a phone was when it did something" (7T21-1 to 3); that Sprint used PCMD for system optimization, not for locating phones (7T28-25 to 29-6; 7T32-18 to 33-6); and that PCMD "gives you a great place to look for [a phone] and it validates itself when we go find it," but "[i]t's not always 100 percent accurate." (7T48-21 to 25; 7T75-12).

Hauger's use of PCMD in his historical cell site analysis was permissible and did not render his opinions unreliable. See, e.g., United States v. Medley, 312 F. Supp. 3d 493, 501-03 (D. Md. 2018) (upholding admissibility of expert's cell site location opinions which included use of PCMD); State v. Harvey, 932 N.W.2d 792, 808-09 (Minn. 2019) (same); see also State v. Timley, 469 P.3d 54, 57-58, 60 (Kan. 2020) (no reversible error where prosecutor remarked that PCMD-based location analysis showed defendant's phone was "exactly at the location of the shooting" where testimony clearly indicated PCMD measurement was an estimate only). Ordinarily, the persuasiveness of sources relied on to support an opinion go to the weight of the opinion, not its admissibility. State v. Smith, 262 N.J. Super.

487, 521 (App. Div.), certif. denied, 134 N.J. 476 (1993). The jury was charged that the weight it assigned Hauger's opinions depended on the facts upon which they were based. (8T122-17 to 123-13).

Defendant's concern that PCMD's original purpose was to optimize cell phone networks is of no moment. As the prosecutor remarked in summation, there are many devices and processes originally intended for one purpose and used for another. (8T86-17 to 87-1). What matters here is that law enforcement's application of the technology was validated by its own success after thousands of uses. Hauger's (and CAST's) work was peer-reviewed and reproducible. Thus, the evidence was properly admitted under N.J.R.E. 702 and N.J.R.E. 703 and the jury was properly guided how to assess it.

And there is no reason to hold otherwise based on the Supreme Court's recent decision in Burney. There, the Court held an FBI Special Agent violated the net-opinion rule of N.J.R.E. 703 by basing his expert opinion that area cell towers had about a one-mile range of coverage based on a "rule of thumb" that stemmed only from his experience. Burney, 255 N.J. at 25. The agent's opinion was unsupported by factual evidence or data and did not consider factors that can affect the sector's coverage range. Id. at 24-25. The range was critical in Burney, as the one-mile radius the expert testified to placed the defendant's phone at the approximate area of the crime scene at the

time of the home invasion. Id. at 30.

Hauger's testimony here did not suffer from the same defect. At the N.J.R.E. 104 hearing, in response to the court's questioning of whether there was "an outer limit" on tower range, Hauger testified that he had "seen some up to seven, eight miles," and denied that service providers maintain data with regard to specific towers and their ranges. (7T146-16 to 147-4). At trial, Hauger did not testify to the range of the cell towers; rather, he testified generally that a cellphone typically connects to the tower with the best signal, but acknowledged that obstructions and terrain can cause the phone to connect to a different tower. (7T20-8 to 19; 7T22-21 to 24-1).

Where he testified to distances, these numbers came from Sprint, not CAST. For example, for the timeframe of 2:43 a.m. to 2:49 a.m., Hauger mapped the distances provided from Sprint's own PCMD data. (7T48-1 to 49-13; Pa27). The distances were indicated as curved bands on the map, which were "the measurement given by Sprint with a plus or minus of a tenth of a mile," which CAST had determined from experience was an acceptable margin of error. (1T179-23 to 180-15; 7T49-14 to 20). Hauger couched his language in generalities, testifying that the phone "could have been inside of that or outside of that." (7T49-20 to 21). Cf. Burney, 255 N.J. at 25 (emphasizing agent's testimony that it was "highly, highly unlike[ly]" that victim's home

fell outside the one-mile coverage area).

Notably, for the critical timeframe of 2:53 a.m. to 3:29 a.m., Hauger had no distance data from Sprint on which to rely, testifying candidly and repeatedly that "with no distance the phone could be right next to the tower, or it could be way out here, you know, measuring a few miles away." (7T51-14 to 16); see also (7T51-19 to 21) ("Again, could be very close to the tower or it could be further away. There is no distance so there is no way to tell.").

The Sprint records contained distances for the timeframe of 3:54 a.m. to 5:00 a.m., showing "overlapping" arcs between the Fairfield and Bridgeton towers. (7T58-1 to 59-19; Pa29). Hauger emphasized here, "I'm not trying to say that this phone is in any one spot or it's not in any one spot. All I'm doing is interpreting the records and putting them on the map." (7T71-19 to 22).

Overall, Hauger was candid that the PCMD data gave a general approximation and had limits, but ultimately provided a good idea where a phone was located at a particular time based on his own experience and the experience of CAST as a whole. Hauger certainly did not "overpromise." See Burney, 255 N.J. at 22 (quoting Hill, 818 F.3d at 299). In Hill, cited favorably in Burney, the Seventh Circuit found that "because the agent 'emphasized that [the defendant]'s cell phone's use of a cell site did not mean that [the defendant] was right at that tower or at any particular spot near that tower,'

'[t]his disclaimer saves his testimony' that the phone was in the general area of the cell site." Burney, 255 N.J. at 22 (quoting Hill, 818 F.3d at 298). That is clearly the case here, where, for the critical time period when the chase and shooting happened, the State only relied on the tower and sector, and for the other time periods, Hauger stressed he was not pronouncing that the "phone is in any one spot." There was no error.

Finally, even if Hauger's PCMD-based opinions should not have been admitted, any error was harmless. Defendant's location was also demonstrated by Telfair's observation of defendant as a passenger in Yellin's maroon car that he was known to borrow about two to three hours before the shooting. (3T37-20 to 25; 4T121-16 to 18; 6T39-3 to 45-5; 6T52-7 to 58-10). Hauger's testimony was thus cumulative to other evidence on the essential point for which it was offered. Cf., e.g., State v. McGuire, 419 N.J. Super. 88, 134 (App. Div.) (improper admission of expert opinion harmless if cumulative to other evidence properly before the jury), certif. denied, 208 N.J. 335 (2011).

Moreover, counsel emphasized in summation that for the five-minute period in which the pursuit and shooting occurred, there were "absolutely no distance measurements. Literally that phone could have been anywhere." (8T60-7 to 18). And the defense emphasized that the PCMD data tracking defendant's cellphone between 3:54 to 5:00 a.m. did not correlate to the timing

the Yellen vehicle was observed on the Fairton Sunoco surveillance as testified to by Detective Riley. (8T62-7 to 22). Indeed, as defendant emphasizes in Points I and II, he was acquitted of the weapons offenses, suggesting that the jury may have rejected at least some of the expert testimony. Defendant has not shown that Hauger's opinions were inadmissible or, even if they were, that he was concretely prejudiced at trial. His conviction should be affirmed.

POINT IV

THE JUDGE PROPERLY EXERCISED HIS DISCRETION IN ADMITTING OUT-OF-COURT STATEMENTS, WHICH WERE NONETHELESS HARMLESS BECAUSE THE JURY ASSESSED THEIR RELIABILITY IN LIGHT OF THE COURT'S REPEATED INSTRUCTIONS.

A. Gross Hearing Facts

1. Ordale Telfair

At trial, Telfair claimed that his "whole statement was a lie," and he just told police what "they wanted to hear" since they were holding "fake" drug charges over his head. (3T159-16 to 161-19). Accordingly, the court determined a Gross hearing outside the presence of the jury was required to determine the admissibility of Telfair's prior statement. (3T168-1 to 171-7).

At that hearing, Telfair continued to maintain the details from his statement were untruthful. (3T171-15 to 172-12). Telfair claimed that he was questioned off the record before and after his statement and fed "little things"

about the investigation that he "can draw conclusions from." (3T172-13 to 17; 3T174-15 to 175-15). So, Telfair allegedly "just started making things up that put it together." (3T175-16 to 17). Telfair testified that after he was "raided" in 2014, officers continually harassed him and threatened him and his girlfriend with drug charges to get him to talk. (3T173-5 to 24).

Detective Riley testified at the hearing that, on August 21, 2015, he was summoned to the Bridgeton Police Department around 2:30 a.m. to speak to Telfair who was under arrest for an outstanding warrant. (4T151-24 to 153-5). Telfair expressed that he wanted to provide information about who was involved in Butler's death. (4T153-8 to 24). Telfair was uncuffed from a bench and escorted to a 10-by-15-foot interview room. (4T154-12 to 156-21). Telfair appeared "fine" and was cooperative. (4T154-17 to 20). Riley made no promises or guarantees to Telfair and told him to be honest. (4T155-3 to 7). Prior to Telfair's interview, the fact that Butler was shot in the head had not been made public. (5T28-10 to 12).

2. Erica Jackson

Jackson testified in front of the jury as to the statement she had given to State Police on March 29, 2016. (4T27-10 to 18). Jackson claimed that she did not recall making most of the statements because she had "problems with memory loss." (4T29-3 to 32-24). In 2015, she required inpatient treatment

due to her daughter's suicide attempt. (4T33-25 to 34-12). In 2016, she was taking various prescription mental-health medications "on and off." (4T34-15 to 35-2). She testified that these conditions and medications affected her memory, causing her to doubt the accuracy of her statement. (4T35-7 to 38-19; 4T40-3 to 19).

Riley testified at the Gross hearing that he and another officer went to Jackson's workplace to ask if she would speak with them regarding a separate homicide in which defendant was a suspect because she was dating him at the time. (4T259-14 to 262-19). Jackson was cooperative and did not appear to be "emotionally disturbed." (4T262-20 to 263-22; 4T265-11 to 24). She agreed to accompany the officers on the five-minute drive to the police station. (4T262-20 to 263-22). The officers made no threats, applied no coercion, and never indicated that she was the target of an investigation. (4T264-11 to 14; 4T265-25 to 266-12). After the interview ended, Jackson was escorted back to her job. (4T264-15 to 25).

B. Trial court's decision

Judge D'Arrigo made the following findings: There were no promises or pressure to induce either witness to provide a statement. (5T43-25 to 44-8). Indeed, the lead detective—Riley—did not even know who Telfair was prior to the interview. (5T41-2 to 5). While Telfair was in custody, he was a

"voluntary participant." (5T39-10 to 40-5). His arrest was unrelated to the instant case, and although he potentially had a "motive to . . . make a deal for himself," this was fairly typical under those circumstances. (5T39-11 to 40-6; 5T43-15 to 24). Telfair also had a significant criminal record and would have understood that his statement could be used in court. (5T44-9 to 13). Telfair was not in handcuffs during the interview, which was "quite conversational." (5T41-12 to 20). The interview was "unstructured," with the officers seeing what Telfair "had to say." (5T41-21 to 42-1). Contrary to his testimony that he was just telling the police "what they wanted to hear," Telfair denied some of the assertions in the officers' questions. (5T47-7 to 17).

With regard to Jackson, Judge D'Arrigo found her trial testimony "wholly incredible and [an] act of feigned lack of memory." (5T40-7 to 11). She remembered what "she wanted to remember," yet had "no memories of things she didn't want to remember." (5T40-21 to 24). Having viewed her 2016 statement, the judge observed none of the mental and emotional problems she claimed to be experiencing at the time. (5T40-12 to 16; 5T41-6 to 11). In her statement, Jackson did not demonstrate any inability to recall, but rather "had clear recollections." (5T40-17 to 20). She did not want to be involved, but "wanted to be truthful" and "come clean" with what she knew. (5T42-13 to 20). The judge found she had no reason to fabricate. (5T43-12 to 14).

Jackson was neither in custody nor a target of the investigation when she gave her statement. (5T40-3 to 4; 5T41-2 to 5).

The judge did not find the absence of corroborating evidence in the phone records to be significant. (5T46-4 to 7). There were "plenty of possibly explanations" as to why the records would not contain evidence of the phone call that Telfair overheard between Che and Butler or the calls Telfair and Jackson received from defendant. (5T45-3 to 6). Other applications or burner phones could have been used. (5T45-7 to 46-3). And with respect to the call between Che and Butler, Che's phone was never recovered, and the call could have been made on Jamison's phone, which she had wiped. (5T45-7 to 25).

Judge D'Arrigo ruled that both statements were sufficiently reliable, and it was the jury's duty to decide on their credibility. (5T46-8 to 48-7).

C. The prior inconsistent statements were properly admitted at trial.

N.J.R.E. 803(a)(1) provides that "[a] statement previously made by a person who is a witness at trial or hearing" is not excluded by the hearsay rule if "it would have been admissible if made by the declarant while testifying and the statement . . . is inconsistent with the witness' testimony at the trial or hearing . . . ." If offered by the party calling the witness, the statement is admissible only if it was recorded or contained in a writing made or signed by the witness "in circumstances establishing its reliability." N.J.R.E. 803(a).

When in dispute, a prior inconsistent statement sought to be admitted for substantive purposes under N.J.R.E. 803(a) must be the subject of a Rule 104 hearing to establish its reliability as a condition to admissibility. Gross I, 121 N.J. at 15, 17; State v. Gross, 216 N.J. Super. 98, 110-112 (App. Div. 1987) (Gross II); State v. Spruell, 121 N.J. 32, 41-41, 46-47 (1990). "[T]he purpose of the [Rule 104] inquiry 'is not to determine the credibility of the out-of-court statements' but 'whether the prior statement was made or signed under circumstances establishing sufficient reliability that the factfinder may fairly consider it as substantive evidence.'" Spruell, 121 N.J. at 46 (1990) (quoting Gross II, 216 N.J. Super. at 110). In determining the reliability of pre-trial statements, the Supreme Court enumerated fifteen factors to be considered:

> (1) the declarant's connection to and interest in the matter reported in the out-of-court statement; (2) the person or persons to whom the statement was given; (3) the place and occasion for giving the statement; (4) whether the declarant was then in custody or otherwise the target of investigation; (5) the physical and mental condition of the declarant at the time, (6) the presence or absence of other persons; (7) whether the declarant incriminated himself or sought to exculpate himself by his statement; (8) the extent to which the writing is in the declarants hand; (9) the presence or absence, and the nature of, any interrogation; (10) whether the offered sound recording or recording contains the entirety, or only a portion of the summary, of the communication; (11) the presence or absence of any motive to fabricate; (12) the presence or absence of any express or implicit pressures, inducement or coercion for making of the

> statement; (13) whether the anticipated use of the statement was apparent or made known to the declarant; (14) the inherent believability or lack of believability of the statement; and (15) the presence or absence of corroborating evidence.
>
> [Gross I, 121 N.J. at 10 (quoting Gross II, 216 N.J. Super. at 109-10).]

The State must establish the reliability by a preponderance of the evidence given all surrounding relevant circumstances. Id. at 15-16; Spruell, 121 N.J. at 42. Substantial deference is afforded to a trial court's evidentiary rulings which are upheld absent an abuse of discretion. State v. Weaver, 219 N.J. 131, 149 (2014).

Judge D'Arrigo's admission of Telfair's and Jackson's prior inconsistent statements was properly supported by credible evidence in the record and should not be disturbed on appeal. Jackson's trial testimony—in which she denied or did not remember all the statements from her out-of-court interview with police (4T29-9 to 32-9)—clearly differed from her recorded statement. Even after being presented with an opportunity to refresh her recollection, she claimed that a review of the transcript of her statement would not help because she had "problems with memory loss." (4T32-19 to 24). But during Riley's testimony, her statement was played, and—consistent with Riley's testimony about his own observations of Jackson—the judge observed none of the mental and emotional problems she claimed to be experiencing at the time. (4T262-

20 to 263-22; 4T265-11 to 24; 5T40-12 to 41-11). Thus, Judge D'Arrigo deemed her memory loss to be feigned, which is sufficient foundation for the introduction of a prior inconsistent statement found reliable. (5T40-7 to 11); see State v. Brown, 138 N.J. 481, 544 (1994).

Telfair's testimony was also wholly inconsistent with his pretrial statement. Telfair claimed that all of the details he provided were "lies" fed to him by police. (3T171-15 to 173-24). Thus, subject to a reliability determination, Telfair's statement was admissible. See State v. Savage, 172 N.J. 374, 405 n.1 (2002) (explaining that a witness's prior statement to the police would be admissible after the witness disavowed the statement at trial and denied parts of the statement by claiming he could not recall them).

Judge D'Arrigo thoroughly analyzed the Gross I factors, careful to note all applicable circumstances in admitting both statements. (5T43-25 to 48-7). In maintaining otherwise, defendant focuses on the lack of corroboration, Telfair's custodial status, and Jackson's mental state. As for corroboration, Judge D'Arrigo correctly found that the lack of cell phone records corroborating the phone calls was, on balance, insignificant because there were several possible explanations for why they did not appear: a different phone number could have been used, Telfair's phone was lost and Jamison's phone was wiped, and a separate calling application could have been used.

More importantly, both statements were substantially corroborated by other evidence. For example, Telfair's statement that he heard Butler say he was by the Dollar Store on Irving Avenue right before hearing the gunfire, (6T31-21 to 32-3; 6T50-5 to 21), was corroborated by Jamison's testimony about their route, (3T94-23 to 96-1), the Martin Dye surveillance, (4T83-8 to 87-7), and Hauger's testimony about defendant's cell phone location, (7T51-17 to 21; 7T54-12 to 55-8). And Telfair's testimony, that defendant called looking for .40 caliber and 9-millimeter bullets because he "empt[ied] the whole clip," (6T33-3 to 24; 6T61-2 to 5), was corroborated by the casings and projectiles recovered from the scene. (2T92-15 to 98-17; 6T215-20 to 216-8). Notably, due to the ongoing investigation, the details of the shooting had not been made public at the time Telfair spoke to police. (6T23-3 to 25-9).

In regard to Jackson, her statement that defendant asked to borrow her car the night of the shooting was corroborated by the testimony that Yellin's vehicle observed on the surveillance had been lent out that night. (3T37-20 to 25). Moreover, defendant's statements to Jackson that the car he was in ran red lights and that the gun and his phone had been recovered by police, (6T83-9 to 14), aligned with Riley's testimony that the vehicle did run a red light on surveillance, (6T167-1 to 13), the recovery of a phone from defendant, (6T167-1 to 169-11), and the recovery of the handgun from the beach in

Seabreeze. (2T144-10 to 145-13; 6T226-2 to 14). Thus, while the presence or absence of corroboration is but one of fifteen Gross factors, here, this factor supported the reliability of both statements.

Equally without merit is defendant's emphasis on Telfair's custodial status. Telfair was arrested on an unrelated warrant, was not handcuffed, and was not a target of this investigation. In fact, it was Telfair who advised police that he wanted to volunteer information about this case. And while Telfair claimed he was fed information by law enforcement, Judge D'Arrigo found Telfair's testimony on this point to be flatly contradicted by his viewing of the recording and after having the opportunity to listen to both Telfair and Riley testify. As Riley (the lead investigator) testified, he did not even know of Telfair's existence prior to the interview. (5T9-15 to 17; 5T29-7 to 8). And as the judge found, the interview was conversational and unstructured. Indeed, Telfair largely gave lengthy narrative answers not suggested by the question. E.g., (4T167-2 to 169-22; 4T170-6 to 22). Numerous times throughout the interview, he stated that he did not know the answer to the question, e.g., (4T184-21 to 185-11), denied any facts assumed in the question, e.g., (4T197-18 to 24), or corrected the interviewer, e.g., (4T221-2 to 6). Thus, as the judge correctly found, the mere fact that Telfair was in custody did not render his statement unreliable, even if he was seeking a benefit in return.

Finally, with respect to Jackson's mental state, Judge D'Arrigo had an opportunity to observe her testify and found her to be utterly incredible. The judge's credibility findings were reinforced by his viewing of her recorded statement, during which Jackson spoke at ease, provided details about her conversations with defendant, and had no trouble remembering. While defendant may disagree, that is not a basis to overturn credibility and factual findings that were fully supported by the record. See State v. Hubbard, 222 N.J. 249 (2015) (deference extends not only to trial court's credibility findings, but also factual findings based on review of video and documentary evidence).

Ultimately, the overwhelming majority of the Gross factors weighed in favor of the judge's finding that these out-of-court statements were reliable. The jury had the opportunity to watch Telfair's and Jackson's trial testimony and pretrial statements and make its own determination about which account was true. The jury also was repeatedly instructed, both prior to the playing of the statements and in the final jury charge, to consider the statements in context of the Gross factors and all the surrounding circumstances. (6T26-7 to 29-10; 6T70-22 to 73-11; 6T115-5 to 118-7). Because substantial credible evidence supported the reliability of the statements, Judge D'Arrigo properly exercised his discretion in admitting them. This ruling should be affirmed.

POINT V

THE TWENTY-YEAR PRISON SENTENCE WAS FAIR PUNISHMENT FOR A DEFENDANT WITH A HISTORY OF POSSESSING WEAPONS CULMINATING IN A FATAL SHOOTING.

An appellate court is bound to affirm the trial court's sentence "unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'" State v. Rivera, 249 N.J. 285, 297-98 (2021) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). Judge D'Arrigo properly followed the sentencing guidelines in imposing an extended term and maximum sentence in light of defendant's "history of violent offenses and weapons offenses" and inability "to remain out of criminal trouble for any period of time." (10T56-1 to 2; 10T57-4 to 6). Accordingly, this Court should affirm.

As the trial court correctly found, defendant qualified as a persistent offender based on his age at the time of the present offense (twenty-six), his record of at least two predicate convictions, and the time of his last release from confinement. (10T56-16 to 57-1). See N.J.S.A. 2C:44-3(a). If the defendant's criminal record renders him statutorily eligible, "whether the court chooses to use the full range of sentences opened up to the court is a function

of the court's assessment of the aggravating and mitigating factors, including the consideration of the deterrent need to protect the public." State v. Pierce, 188 N.J. 155, 168 (2006). In imposing the extended term, the judge explained that defendant's "prior record certainly establishes that he has been unable to remain out of criminal trouble for any period of time." (10T57-4 to 6).

Having reviewed the presentence report, Judge D'Arrigo gave substantial weight to aggravating factors three (risk of re-offense), six (prior record), and nine (need for deterrence), and slight weight to mitigating factor six (restitution), and found that the aggravating factors "substantially outweigh[ed] the mitigating factors." (10T55-7 to 56-7). The court summarized defendant's prior record: "He has a juvenile record of three arrests. As an adult, he has a record of five arrests with one ordinance violation, two indictable convictions, and one federal conviction." (10T54-25 to 55-3). As the court explained, defendant was "in need of specific deterrence" because, despite a "history of violent offenses and weapons offenses" and being "exposed to a full array of criminal sanctions," defendant had not yet been dissuaded "from continued antisocial criminal behavior." (10T55-24 to 56-5). Accordingly, the court imposed a twenty-year prison term pursuant to NERA. (10T57-21 to 58-4).

Defendant's claim that his prior offenses "did not occur over a long

period of time" should be rejected. (Db41). While the two convictions that served as the predicate for persistent offender status occurred in 2014 and 2015, his record dated back to his three juvenile arrests, the first two of which resulted in diversions with conditions. (PSR 7-8). See State v. C.W., 449 N.J. Super. 231, 259-60 (App. Div. 2017) (holding that an adult defendant's juvenile record may be considered at sentencing). At age sixteen, defendant was waived to adult court, and, in 2017, sentenced to a five-year prison term with three years of parole ineligibility for third-degree aggravated assault and second-degree possession of a firearm for an unlawful purpose. (PSR 8). Defendant maxed out his prison sentence in November 2010. (PSR 8).

Just over three years later, in January 2014, defendant was again arrested for weapons offenses. (PSR 8-9). In 2016, defendant was convicted of second-degree unlawful possession of a handgun and sentenced to an eleven-year prison term, half without parole eligibility, as a second offender with a firearm. See N.J.S.A. 2C:44-3d; (10T44-17 to 19). Defendant was also convicted of possession of a firearm by a convicted felon in federal court in 2017 and sentenced to 120 months prison for an offense that occurred on August 4, 2015, one week before the instant offense. (PSR 10; Pa41-46).[11]

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[11] The prosecutor presented the JOC at sentencing. (10T31-23 to 32-4).

The federal crime, 18 U.S.C § 922(g)(1), punishes conduct substantially similar to New Jersey's certain persons offense under N.J.S.A. 2C:39-7(b)(1).

Thus, the 2014 and 2015 offenses were not a "criminal spell" (Db41), but rather part of a "continu[ous]" and serious criminal history. (10T56-5). As the judge further found, prior opportunities for rehabilitation, including diversions and incarceration had failed to deter defendant. (PSR 7-9); (10T56-1 to 5). Significantly, his three[12] prior indictable convictions were all for the same type of conduct—guns and violence—that culminated in Butler's shooting death. As demonstrated by his past and present conduct, defendant was "incapable of living a law-abiding life for a significant period of time," and thus exactly fell within the aim of N.J.S.A. 2C:44-3(a). See State v. Clarity, 454 N.J. Super. 603, 610 (App. Div. 2018). Likewise, there was a strong deterrent need to impose an extended term due to defendant's escalating association with guns and violence. See Pierce, 188 N.J. at 168.

Moreover, as explained in State v. Tillery, 238 N.J. 293, 327-28 (2019), it was proper for the judge to rely on defendant's criminal record both to determine he was a persistent offender and to support the findings of aggravating factors three, six, and nine. See also State v. McDuffie, 450 N.J.

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[12] Defendant mistakenly states that the instant offense was his third criminal conviction. (Db41). It was his fourth. (PSR 8-9); (10T55-2 to 3).

Super. 554, 576-77 (App. Div. 2017) (rejecting the defendant's claim the sentencing court impermissibly doubled-counted his criminal record when it granted the State's motion for a discretionary extended term, and again when imposing aggravating factor six).

Thus, not only did defendant have more than the requisite number of offenses to qualify for an extended term, but also all of his prior criminal convictions were for serious second- and third-degree firearms offenses and assault that went well beyond the bare minimum needed to make out a crime. In light of the aggravating factors dwarfing the single mitigating factor, Judge D'Arrigo properly fixed the sentence at the upper end of the sentencing range. There is no cause to disturb defendant's fair sentence.

POINT VI

THE CLAIM OF PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY IS WAIVED AND WITHOUT MERIT AS THE EVIDENCE WAS SUFFICIENT FOR THE PETIT JURY TO CONVICT.

Defendant claims that the indictment should be dismissed based on Detective Riley's mistaken testimony that Sharee Jamison—not Keon Butler—initiated the text message conversation the morning of the homicide. This claim fails for several reasons. First, the motion to dismiss the indictment was not based on this ground. (See Db42) (alleging that the "misconduct . . . only became evident during the trial" and stating that this issue was "not raised

below"). Defendant maintained below that the State elicited testimony from Riley that Jamison lured Butler "when no such evidence . . . exists to support this conclusion." (Pa48).[13] However, now, defendant argues that the State affirmatively "misrepresented" the facts to support the luring theory. (Db44). Grounds for objection must be clearly stated to preserve the issue for appeal. See State v. Melton, 136 N.J. Super. 378, 381 (App. Div. 1975); R. 1:7-2.

"[T]he notice of appeal is hardly the vehicle to question the integrity of the grand jury proceeding, especially when the basic information to challenge the indictment was known or knowable before the trial commenced." State v. Simon, 421 N.J. Super. 547, 557 (App. Div. 2011); see also R. 3:10-2(c) (stating challenges to the indictment must be made before trial). The defense had the means to discover Riley's error as soon as Butler's cell phone records were received in discovery. Likewise, "transcripts of grand jury proceedings are discoverable prior to trial." State v. Lee, 211 N.J. Super. 590, 597 (App. Div. 1986) (citing R. 3:13-3(a)(3)). Indeed, the defense relied on these records in confronting Riley on this issue at trial. (6T115-7 to 116-15). Defendant's complaint should not be heard now when he failed to "mov[e] for dismissal of

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[13] An excerpt from defendant's motion to dismiss brief is appended to the State's respondent's brief because the question of whether this issue was raised in the trial court is germane to the appeal. See R. 2:6-1(a)(2).

the indictment immediately" upon discovering the error. See ibid.

Second, "a guilty verdict is universally considered to render error in the grand jury process harmless." Simon, 421 N.J. Super. at 551-52 (citing Lee, 211 N.J. Super. at 599). Thus, even if the alleged misconduct now raised for the first time warranted further consideration, it would not compel reversal of defendant's conviction because the guilty verdict obviates his claim.

Third, defendant's claim falls on the merits. A deficiency premised upon prosecutorial misconduct "must be so extreme that it 'clearly infringes' on the grand jury's 'decision-making function,' or . . . 'independence.'" State v. Jeannotte-Rodriguez, 469 N.J. Super. 69, 89 (App. Div. 2021) (quoting State v. Bell, 241 N.J. 552, 560-61 (2020)). "[A]n indictment should not be dismissed unless the prosecutor's error was clearly capable of producing an unjust result. This standard can be satisfied by showing that the grand jury would have reached a different result but for the prosecutor's error." State v. Majewski, 450 N.J. Super. 353, 365-66 (App. Div. 2017) (citation omitted).

Defendant makes no such showing here. As an initial matter, there is no evidence of intentional misconduct. The testimony regarding the text message exchange was presented in support of the charges against Jamison. The facts presented to the grand jury before and after the contested testimony gave rise to a reasonable inference that Jamison had lured Butler, given the fact that she

lied to police on numerous occasions and had reset her phone in an effort to subvert the investigation. (GJT20-15 to 28-9).

Regardless, the contested testimony did not lead the grand jury to a determination it would not otherwise have reached. In addition to the evidence linking defendant to the crime—e.g., the GPS location of his phone matching the surveillance, Jackson's and Yellin's statements, and the recovery of the .40 caliber handgun that matched the ballistics evidence at the scene (GJT29-14 to 42-13)—Riley testified that multiple shots were fired from two guns, (GJT14-9 to 15-23; GJT42-22 to 43-4), a pursuit preceded the shooting, (GJT18-14 to 20), and defendant would always say "I have a .40 for you," (GJT39-24 to 40-4). Thus, the remaining evidence sustained the indictment for murder.

Ultimately, the grand jury testimony had no impact on defendant's conviction. Counsel cross-examined Riley about his grand jury testimony in an attempt to undermine his credibility. (6T115-7 to 119-16). Counsel then argued that Riley's "misrepresentation" was a basis not only to question his credibility but to find reasonable doubt. (8T45-20 to 47-9). The error was not repeated at trial, with Riley testifying that it was Butler who initiated the text conversation. (6T116-9 to 11). The jury heard the full context of why investigators originally suspected Jamison of luring the victim and ultimately abandoned this theory. (6T107-8 to 121-21; 6T171-2 to 172-20). To the

extent it can be claimed that the contested grand jury testimony supported a theory that the shooting was premeditated, the petit jury rejected that theory by acquitting defendant of purposeful murder. Thus, clearly there was no prejudice to defendant in his indictment for murder. The verdict demonstrates that the jury carefully considered the evidence in finding defendant guilty of reckless manslaughter while acquitting him of the other counts.

Defendant's belated attempt to dismiss the indictment should be denied.

CONCLUSION

For the reasons stated above, this Court should affirm defendant's conviction and sentence.

Respectfully submitted,

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IN THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

INDICTMENT NO. 17-08-743-I
APPELLATE DOCKET NO. A-000133-22T1

STATE OF NEW JERSEY, PLAINTIFF/RESPONDENT,

v.

RAHEEM J. JACOBS, DEFENDANT/APPELLANT

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION-CRIMINAL
THE HONORABLE CRISTEN P. D'ARRIGO, J.S.C.

APPELLANT'S REPLY

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PROCEDURAL HISTORY, STATEMENT OF FACTS

Defense counsel relies on its previously submitted recitation of the procedural history and statement of facts. Specific counters to the State's proffer of trial events are outlined within the foregoing.

LEGAL ARGUMENT

I. THE ENTIRETY OF THE EVIDENCE SUBMITTED BY THE STATE IS INSUFFICIENT TO WARRANT A CONVICTION OF RECKLESS MANSLAUGHTER BEYOND A REASONABLE DOUBT, EVEN GIVING THE STATE THE BENEFIT OF ALL REASONABLE INFERENCES.

Defendant maintains that the trial court erred when it denied Defendant's motion for judgement of acquittal on the single guilty verdict of reckless manslaughter under N.J. Stat. 2C:11-4b(1) pursuant to New Jersey Court Rule 3:18-2. The State correctly cited in their brief the standard for such a motion. Specifically, a motion for judgement of acquittal is to be denied if and only if,

> the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt.
>
> [State v. Fuqua, 234 N.J. 583, 590-91 (2018) (citations omitted).]

The State correctly interprets the above as tasking the trial court to analyze the entirety of the evidence as it pertains to the singular conviction at hand, specifically, reckless manslaughter. See State v. Reyes, 50 N.J. 454, 458 (1967).

Subsequent to Fuqua, the New Jersey Appellate Division further described what exactly goes into an "entirety of the evidence" analysis. Just this past year in State v. Martin, the Appellate Division explained, "a jury may draw an inference from a fact whenever it is more probable that not that the inference is true; the veracity of each inference need not be established beyond a reasonable doubt for the jury to draw the inference." State v. Martin, 2023 WL 4546121, 7 (App. Div. 2023) (unpublished) (quoting State v. Brown, 80 N.J. 587, 592 (1979); see Reyes, 50 N.J. at 458-59 (applying standard to motion pursuant to R. 3:18-1)). Therefore, when the trial court analyzes the entirety of the evidence, the Court is also inherently tasked with considering the weight of the evidence to determine if the necessary inferences to return a guilty verdict for reckless manslaughter were *reasonable*.

The only series of events proposed by the State or the trial court that could explain how Defendant acted recklessly, and that recklessness caused the victim's death, is if the Defendant was driving the car, within which two guns fired at least 16 shots at the victim's vehicle, five of which hit the victim's vehicle, for a purpose *other* than killing the victim. (Sb, 3). There is no evidence to support a *reasonable* inference that the driver, whoever they may be, had any intention other than killing the victim when they continued to pursue him, spraying over a dozen bullets as it pursued the victim. (Sb, 3). This inference is unreasonable whether the driver was shooting at the victim, or they acted as an accomplice by continuing to pursue the

victim while other occupant(s) fired over a dozen shots. Furthermore, there was no evidence presented to the trial court to suggest this theory.[1]

The State references State v. Gaines in their brief, however their application of such to the current matter is misleading. (Sb, 21). In Gaines, the Appellate Division discussed the difference between shooting *above* a crowd at a wooden object and shooting directly *at* a crowd. State v. Gaines, 377 N.J. Super. 612, 622 (App. Div. 2005). The Gaines court reasoned, " [when] a defendant shoots directly into a crowd or directly at another person… [such conduct] defeats an inference that the shooter was not aware that death was a practical certainty." Id. The Gaines court reasoned that physical evidence such as the wooden splinters on the victim's shirt, the entry wound and path of the bullet all reasonably supported a theory that the defendant shot *above* the crowd. Id.

Compare these facts this to the current matter where Defendant is proposed to be driving a car that is shooting bullets *directly at the vehicle in which the victim is sitting*. The facts at hand directly align with Gaines precedent that such behavior is universally inferred to be purposeful, not reckless. At least six bullets hit the vehicle. (7T91-21). These shots hit the rear bumper, the rear windshield, both rear tires, the

[1] Defense counsel acknowledges that the trial court's initial decision to charge the jury with lesser included offenses was also partially based on the testimony of Det. Riley. (7T93-20 to 25). Specifically, that Sharee Jamison was also charged in connection to the murder. (6T120-1 to 25).

driver side door, and the center sliding door of the van on the driver's side. (7T90-11 to 91-21). Based on this physical evidence, it is unreasonable to infer that there was anything less than purposeful intention to cause death to the victim. Furthermore, there was no argument nor testimony presented to suggest otherwise. The State should not receive the benefit of an unreasonable inference pursuant to Fuqua and Gaines. Defendant's motion for acquittal should have been granted.

II. THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY ON RECKLESS MANSLAUGHTER AS A LESSER-INCLUDED OFFENSE OF MURDER OVER BOTH COUNSEL'S OBJECTION BECAUSE IT WAS NOT CLEARLY INDICATED FROM THE RECORD NOR JUMPED OFF THE PAGE.

As previously stated in Defendant's brief, a trial court's decision to charge a lesser-included offense to the jury is governed by N.J. Stat. 2C:1-8(e). Precedent mandates that when neither party requests a jury charge of a lesser-included offense, the court should do so *sua sponte* only when there is "obvious record support" for such a charge. State v. Funderburg, 225 N.J. 66, 81 (2016) (quoting State v. Powell, 84 N.J. 305, 319 (1980)). In the event that both counsel object to the court's offer to charge a lesser-included offense, the court is only required to charge the jury with the lesser-included offense if the support for such "jump[s] off the page." Id (quoting State v. Denofa, 187 N.J. 24, 42 (2006)). In other words, the need for such a charge must be "clearly indicated" from the record. State v. Alexander, 233 N.J. 132, 142 (2018) (additional citations omitted).

The New Jersey Supreme Court applied this standard to a parallel set of facts in State v. Fowler. State v. Fowler, 239 N.J. 171 (2019). In Fowler, the defendants were indicted for first-degree murder, unlawful possession of a weapon, and possession of a weapon for unlawful purpose. Id, at 175. Defendant testified that when acting in self-defense against an armed assailant, a struggle ensued. Id, at 176-77. As a result of this non-lethal use of force, the gun unintentionally went off and hit the victim, who was present nearby. Id. The State argued that the defendants purposefully and knowingly murdered the victim. Id, at 177. Upon inquiry, defense counsel and the State confirmed to the court that they did not want to include jury instructions for lesser-included charges. Id, at 177-78. As such, when charging the jury, the trial court did not instruct the jury on lesser-included charges. Id, at 179.

Upon review, the New Jersey Supreme Court upheld the trial court's decision to omit an instruction for aggravated manslaughter and reckless manslaughter. Id, at 188. Specifically, they held that neither of the two theories proffered to the jury reasonably suggested the requisite state of mind for aggravated or reckless manslaughter, let alone "jump[ed] off the page." Id, at 189-90. The Court's analysis focused on the theories set forth by counsel because when acting *sua sponte*, the trial court is not required to '"scour the statutes to determine if there are some uncharged offenses to which the defendant may be guilty."' Id, at 188 (quoting State v. Brent, 137 N.J. 107 (1994)). Trial courts are not expected "'to meticulously sift through the

entire record...to see if some combination of facts and inferences might rationally sustain a lesser charge." Id (quoting Funderburg, 225 N.J. at 81 (additional citations omitted)). It appears that the trial court in the current matter did exactly that.

Fowler explains that jury instructions are intended to be "a roadmap of clarity for the jury to follow," Id, at 192. While courts may have a "well-intentioned desire to be thorough," additional instructions should only be included under these circumstances when "clearly indicated" to avoid misleading or confusing the jury. Id. Sua sponte lesser-included jury charges are subject to this higher standard because New Jersey courts readily acknowledge that,

> the court's duty [is] to assure that the jury is able properly to discharge its most important responsibility in a criminal trial, determining guilt or innocence... This judicial obligation, to assure the jury's impartial deliberations upon the guilt of a criminal defendant based solely upon the evidence in accordance with proper and adequate instructions, is at the core of the guarantee of a fair trial...Errors impacting directly upon these sensitive areas of a criminal trial are poor candidates for rehabilitation under the harmless error philosophy.
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> [State v. Simon, 79 N.J. 191, 206 (1979) (citations omitted); see also State v. Reddish, 181 N.J. 553, 613 (2004) (trial courts have an "independent duty...to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case").]

Consequently, when the trial court disregards the "clearly indicated" standard and charges the jury with extensive and repetitive jury instructions that are in no tangential way supported by the evidence, it disregards the carefully placed

safeguards assuring Defendant a fair trial. A trial court's failure to instruct fully, clearly and *accurately* the fundamental and essential issues before the jury is a reversable error. See State v. Green, 86 N.J. 281, 287 (1981). Under R. 2:10-2 jurisprudence, trial court errors are reversible where there is "some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. Bankston, 63 N.J. 263, 273 (1973); State v. R.B., 183 N.J. 308, 330 (2005). Furthermore, while there is a presumption against error when a defendant does not object to a jury charge, both defense counsel and the State objected to the trial court's decision to charge the jury with reckless manslaughter. State v. Montalvo, 229 N.J. 300, 320 (2017) (additional citations omitted); (8T89-6 to 92-8).

Here, there is no question that the trial court's error affected the verdict; but for the trial court's erroneous inclusion of the lesser-included charge of reckless manslaughter to the jury, the jury would not have been able to return a guilty verdict on such an offense. There is no need to speculate as to the possible influence this mistake had on this jury. There was no obvious record support, nor evidence clearly indicating or jumping off the page that warranted the trial court's *sua sponte* instruction to the jury against the objection of both counsel. As such, the trial court failed in their duty to provide proper instructions based on the evidence to the jury,

striking Defendant's fundamental right to a fair trial to the core. Such error is a manifest injustice and requires reversal, regardless of whether a motion for new trial was made before the trial court under R. 2:10-2.

III. THE TRIAL COURT ERRED IN ADMITTING AGENT HAUGER'S TESTIMONY ON PCMD AND CELLPHONE LOCATION DATA PURSUANT TO STATE V. BURNEY.

The Defendant will rely on its arguments in its initial brief on the issue of inadmissibility due to late production under R. 3:13(b)(1)(I).

As defense counsel expressed throughout the Frye hearing and in its initial appellate brief, Defendant sharply contests the accuracy of PCMD data and argues that the State's proffer of its reliability based on the record is misleading. Defendant does not contest that Agent Hauger is qualified to interpret the data that is given to him and other CAST law enforcement agents by Sprint. Defendant's consistent argument has been that *the data in which they are interpreting has not been shown to be sufficiently reliable* for the purposes of cell phone location in a court of law at a criminal trial where a man's liberty is at stake. As such, Defendant maintains that this evidence falls short of the sufficient reliability requirement under State v. Jenewicz and was a harmful error against the Defendant. State v. Jenewicz, 193 N.J. 440, 454 (2008) (additional citations omitted).

In State v. Burney, the State presented a Special Agent from the FBI who was also a member of the FBI's Cellular Analysis Survey Team (CAST), like Agent

Hauger in the current matter. State v. Burney, 255 N.J. 1, 11 (2023). The Burney expert was similarly found by the trial court to be an expert in historical cell site analysis, referred to as "the use of cell phone companies' business records to approximate where a user may have been at a particular time of interest." Id. Within those business records included the date and time of calls and text messages, as well as the cell towers that the phone used. Id, at 11-12. Of note, the records that the Burney expert assessed were also Sprint records from 2015, as are the records assessed by Agent Hauger in the current matter. Id.

In the Burney Frye hearing, the CAST expert testified that information from the cell phone's communication with a given cell tower could be used to estimate a sector extending from each of the cell towers, within which the phone would reasonably be located. Id, at 12. The Burney expert testified that this sector had a radius of approximately one mile. Id. This distance was based on a "rule of thumb" based on his knowledge and experience with the "particular technology" and "this particular frequency in this particular area." Id. Based on such, the expert opined that the defendant's phone was reasonably within the coverage sector he created from the Sprint records, and the crime scene was also reasonably within that coverage sector. Id, at 13. Of note to the New Jersey Supreme Court:

> [The expert] testified that he did not test the actual range of the [cell tower]. The agent further noted that the tower's range and coverage area can be affected by many

> factors, including the height of the antenna, surrounding terrain and building, signal frequency, transmitter and phone power ratings, and antenna direction, but he did not offer measurements or data as to those specific factors when testifying as to his estimated range for the [cell tower]. [The expert] similarly did not measure the actual coverage area of the Parkway Tower through either 'drive testing' or 'propagation maps.'
>
> [Id.]

The New Jersey Supreme Court ruled that the Burney expert's opinion that the coverage sector spanned a radius of one mile was unsupported by any factual evidence or data and was an improper net opinion: "By [the expert's] own admission, he determined the tower range 'just based on [his] training and experience' ...[B]ecause the testimony was based on nothing more than [the expert's] personal experience, the trial court erred in allowing the jury to hear this testimony." Id, at 24-25 (citing United States v. Evans, 892 F. Supp. 2d 949, 956 (N.D. Ill. 2012) (holding that estimations of cell tower coverage areas require scientific calculations and consideration of external factors)).

Of note, the New Jersey Supreme Court's ruling in Burney occurred just recently on August 2, 2023. At the time of this matter's Frye hearing, the State was correct that this type of data had been found to be admissible by the Appellate Division. See State v. Burney, 471 N.J. Super. 297 (App. Div. 2022).

However, the Supreme Court has subsequently overturned that ruling, affirming

Defendant's consistent stance. Burney, 255 N.J. at 31. Here, Agent Hauger, a fellow CAST agent and expert on interpreting the information given to him by Sprint, gave no factual evidence or data to support the accuracy of that information upon which his coverage sectors and opinions were based, relying only on his training and experience. Under the New Jersey Supreme Court's ruling in Burney, this testimony is inadmissible.

The State cites multiple statements made by Agent Hauger as evidence as to PCMD's reliability. (Sb, 36-38). However, the full context surrounding this data includes multiple statements from Agent Hauger acknowledging the inaccuracies and unknowns of where or how the data he relies on is collected:

> PCMD is [sic] an engineering system. It's used by network engineers to optimize the network...So what it does is, it talks to the phones and takes measurements of how far the phone is from the tower that is providing service to...So it does a[n] internal calculation based on the speed at which it takes the signal to get from to the tower to the phone and back to the tower, and it provides an estimated distance from the tower... Again, they use this to optimize their networks. It's not like somebody's out there with a tape measure for every transaction. It's a signal. It's a calculation, so sometimes it's extremely accurate. Sometimes it's a little less than accurate.
>
> [1T111-24 to 1T112-18]

The data, the result of this calculation, is determined through "a trade secret within the company's formula that calculates how far a phone is from a tower." (T28:1-2). Furthermore, Sprint's measurement is affected by multiple factors: "It's

based on a propriety algorithm that they use to optimize their network. Certain things affect it; where the phone is in relation to the tower. So if the signal takes longer, if it has to travel through a building, through a wall, that's going to affect the measurement." (1T145-4 to 9). Without further investigation himself, Agent Hauger had no way to verify the information which formed the basis of the diagrams for the jury to consider as evidence. While he claimed that his interpretations are peer-reviewed by fellow CAST agents (i.e. not Sprint engineers), those reviews only ensure that his presentation of the data is correct – not that the data itself is reliable. (1T130-3 to 8; 7T43-12 to 23).

The accuracy of such data was consistently challenged by defense counsel, who cited Sprint's own disclaimer about the data provided to which Agent Hauger agreed that "Sprint is unable to certify or testify to the accuracy of the PCMD records" due to a multitude of factors potentially affecting the data (1T65-10 to 68-6). While the Defendant acknowledges that Agent Hauger may be more than qualified to *interpret* the data given to law enforcement by Sprint, Agent Hauger has no way to analyze the accuracy or idiosyncrasies of the data he is interpreting. Agent Hauger acknowledged existing methods to corroborate Sprint's data through test phones, but those were not completed in Defendant's case. (1T155-3 to 11).[2]

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[2] Similar to the Burney expert's "rule of thumb", Agent Hauger noted that the distance arcs he produced to show the jury the estimated distance from the cell

The State attempts to remedy this clear deficiency in a footnote, stating that a records custodian affirmed the accuracy of PCMD data provided to Agent Hauger. (Sb, 37). That statement is misleading. The records custodian testified to the reliability of the collection and production of Sprint records, not to the reliability of the PCMD data therein (2T39-21 to 40-3). Identical to Burney, Agent Hauger is basing his opinion on nothing more than his training and experience; there is no consideration or analysis of the quality or accuracy of the data itself. Expert opinions must be based on "facts or data of the type identified by and found acceptable under N.J.R.E. 703." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011) (cited by Burney, 255 N.J. at 23). While CAST agents may have a common practice of relying on this data, supported by general anecdotal success, no radio wave engineer nor scientist in this field testified to any common practice of relying on such data as accurate for these purposes. In fact, Sprint specifically issued a disclaimer cautioning the data for such use. (1T65-10 to 68-6). As affirmed in Burney, "'[e]stimating the coverage area of radio frequency waves [of a cell tower] requires more than just training and experience,... it requires

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tower includes "plus or minus a tenth of a mile, which is what we, you know, kind of come to an agreement within CAST as to where the phone may have been in that particular period. Again, it certainly could have been inside that or outside of that." (7T49-16 to 21). This further substantiates the Defendant's position that this expert opinion is based on nothing more than Agent Hauger's experience, rather than scientific, evidence-based calculations.

scientific calculations that take into account facts that can affect coverage.'" Burney, 255 N.J. at 24 (quoting Evans, 892 F. Supp. 2d at 956 (N.D. Ill. 2012)). Agent Hauger's testimony is a net opinion based on his and other CAST agents' experience with PCMD data. Precedent mandates be net opinions be excluded, as they do not meet the threshold of reliability under Jenewicsz. Jenewicsz, 193 N.J. at 454; see Pomerantz Paper Corp., 207 N.J.at 372-74.

The State also discusses United States v. Hill in their brief, arguing that Agent Hauger appropriately couched his opinion as the Hill expert did. United States v. Hill, 818 F.3d 289 (7th Cir. 2016). In Hill, the cell-tower expert did not testify to the specific range or distance from which the target cell phone was from the tower. Id, at 298. While the State is correct that Agent Hauger also did not testify to a specific range or distance during the shooting, he did testify to the specific range or distance of Defendant's phone immediately after from 3:54AM to 5:00 AM. (Sb, 44; 7T58-1 to 59-19). Of note, at 3:45 AM, the vehicle in which the Defendant is allegedly driving is seen on surveillance passing a Sunoco, in the direction of where the murder weapon was ultimately found. (4T138-13 to 139-19; 2T131-23 to 133-5). Agent Hauger's PCMD analysis begins at 3:54 AM. (7T58-8 to 59-8). While Agent Hauger acknowledged that he was not opining that the phone is in any "one spot," he testified that he is confident the phone was is in certain, specific areas based on PCMD data at certain, specific times(7T70-19 to

20; 7T78-7 to 15; 7T59-3 to 19). Testimony of an expert witness, especially a member of law enforcement who is endorsed to have specialized knowledge or experience in a field, "will likely have a profound impact on the deliberations of a jury." State v. Cain, 224 N.J. 410, 427 (2016) (citations omitted). Defendant maintains that the admission of such unreliable evidence was harmful error.

POINTS IV -VI

Defendant relies on arguments made in its initial brief on issues raised in Points IV-VI.

CONCLUSION

The Defendant substantiates is previous brief with the aforementioned arguments. Defendant maintains that individually, each of these trial court errors were harmful and require reversal. At minimum, these errors had a cumulative effect, requiring reversal.

RESPECTFULLY SUBMITTED BY
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/s/ Robert N. Agre

DATED: NOVEMBER 2, 2023

ROBERT N. AGRE, ESQUIRE