SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0692-22
Indictment No. 19-12-00794-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From A Judgment Of Conviction Entered In
v.	:	The Superior Court, Law Division, Union County.
ANTHONY RECIOFIGUEROA,	:	
		Sat Below:
Defendant-Appellant.	:	
		Hon. John M. Deitch, J.S.C.,
	:	and a jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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"PSR" – Presentence Report

"1T" – February 10, 2021 (motion)

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"3T" – June 1, 2022 (trial)

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PRELIMINARY STATEMENT

The State alleged that defendant Anthony RecioFigueroa shot someone. But the State did not offer testimony from anyone who witnessed the shooting, nor did it offer a motive, a firearm, or any identification of a man observed with a gun. Instead, the State relied upon circumstantial evidence alone: inconsistent descriptions of the fleeing suspect; surveillance footage that purportedly showed the suspect exiting a black Chevy Malibu; and evidence that RecioFigueroa had previously driven that vehicle. However, the case had numerous flaws – two of which would have been fatal were it not for errors at trial. First, the only camera that purportedly depicted the shooter exiting the Chevy was taken from such a great distance that the images on screen are indistinguishable. Second, the descriptions of the suspect were as consistent, if not more consistent, with the appearance of Darrion Pierce, a man who was known as a driver of the Chevy. It was only by virtue of the errors discussed below that the State overcame these flaws. Namely, despite having not witnessed the shooting, a detective gave improper video narration testimony identifying the Chevy, the shooter, and RecioFigueroa on video. Additionally, the court did not instruct the jury on third-party guilt, despite evidence indicating that Darrion Pierce may have committed the crime. Considering the weaknesses of the case, these errors deprived RecioFigueroa of due process and a fair trial, requiring reversal.

PROCEDURAL HISTORY

On December 11, 2019, a Union County Grand Jury returned Indictment Number 19-12-00794-I charging defendant-appellant Anthony RecioFigueroa with: first-degree murder, N.J.S.A. 2C:11-3(a)(1) (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count two); and second-degree unlawful possession of a weapon (handgun), N.J.S.A. 2C:39-5(b)(1) (count three). (Da1-2)

Trial began on May 31, 2022, before the Honorable John M. Deitch, J.S.C., and a jury, and continued for five non-consecutive days. (2T, 3T, 4T, 5T, 6T, 7T, 8T) On June 9, 2022, the jury found RecioFigueroa guilty on all three counts. (8T14-15 to 15-7) On October 6, 2022, the trial court sentenced RecioFigueroa to a fifty-five year term of imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, for murder (count one), imposed a concurrent eight-year imprisonment term with forty-eight months parole ineligibility subject to the Graves Act for unlawful possession of a weapon (count three), and merged the remaining conviction of weapon possession for an unlawful purpose with the murder conviction. (9T24-15 to 25-14)

A Notice of Appeal was filed on November 1, 2022. (Da8-10)

STATEMENT OF FACTS

Elizabeth police officers responded to a call of a shooting, and arrived at 548 East Jersey St. at 7:06 p.m. on July 6, 2019. (2T19-5-7, 20-21 to 25) They found Carlos Rodriguez lying wounded on the sidewalk. (2T21-9 to 23) Rodriguez later died of a gunshot wound. (2T57-7 to 13) The State offered no eyewitnesses to the shooting, no surveillance footage of the shooting, and no firearm used in the shooting. (7T43-9 to 15, 44-18 to 20) (5T238-5 to 7)

Four witnesses testified as to what they observed that evening. Jasmin Guifarro heard gunshots while she was standing outside Denny's Liquor Store, located on the Northwest corner of the intersection of 6th St. and East Jersey Ave., about half a block away from where the victim was found wounded. (2T95-23 to 96-15) (Da13) Guifarro saw a man outside the Speed Wash Laundromat – located diagonally across from the liquor store, on the Southeast corner of the same intersection – run towards and enter a white vehicle. (2T97-18 to 22) (Da13) The white car was parked on 6th St. between East Jersey Ave. and Livingston St., about half a block away from the Speed Wash. (2T101-8 to 12, 107-7 to 15) (Da13) Guifarro observed the man for only "a very short period of time," and caught only "a glimpse" of him. (2T111-5 to 24) She could not make out any facial features and could only see that he was "wearing a gray

hoodie, holding a gun in his hand"; that he was "not short…like, five eight, five ten" and that he was light skinned, or "tannish." (2T100-4 to 101-3, 106-2 to 13)

Ana Lozano was standing outside the same liquor store when she heard gunshots. (2T116-8 to 11) Lozano was not able to "remember very much because [she] was very nervous," but testified that "minutes" after hearing gunshots she "saw a guy running." (2T116-13 to 117-14) The man ran away from East Jersey Ave., put something in his left pants pocket, and got into a white car parked on 6th St., and drove down 6th St. towards Livingston St., in the opposite direction of the liquor store. (2T118-6 to 15, 119-3 to 4) (Da13) Lazono did not see the man's face but described him as wearing "gray pants" and a "short sleeve, white shirt" with a complexion of a "light brown color," or, in Spanish, "a little dark." (2T118-5 to 20, 123-16 to 18)

When Oneida Ventura heard gunshots, she was standing in the doorway of her home at 787 East Jersey St., about two and a half blocks away from where police encountered the victim. (2T126-22 to 23, 127-14 to 128-6) She "saw a person run" towards the laundromat before making a right-hand turn, running up 6th St., away from East Jersey Ave. (2T128-19 to 21, 132-8 to 9) (Da13) Ventura could only see the person for a few seconds and observed them from a distance that she estimated to be greater than the width of the courtroom (about 39 feet, per the Court). (2T134-3 to 21) She could not see the person's face but

described them as "tall and skinny" wearing "gray pants and a gray shirt" made of "sporty material" with a complexion that was "darker than [her] skin color." (2T129-14 to 23, 135-9 to 12) As the person ran, they held something black in their hands and "were putting it in the sweater's pocket." (2T130-6 to 11)

Prior to the shooting, Quashanna Epps had been sitting with a number of people, including the victim, Carlos Rodriguez, on the porch where police later found him wounded. (3T14-15 to 25) Epps testified that while they were on the porch, "some guy randomly walked down and asked 'why are you running? Why is everybody running?' And then he just pulled a weapon out. So I ran." (3T16-1 to 4) After hearing shots, Epps returned to the porch and called 9-1-1. (3T16-5 to 6) During the 9-1-1 call, which was played to the jury, Epps described the person she saw as a male, "wearing all gray" who "was walking" towards 5th Street, and she noted "[h]e was black. He was black. He was black." (3T19-2 to 19) When Epps described the man during trial, she said that he was taller than her (at 5'6"), was skinny, and was wearing "a gray sweater and gray sweatpants" with Nike "Air Force" sneakers. (3T21-17 to 22-4) She could not see his face because he had a hoodie on but saw that he had a "little beard" on his chin. (3T22-12 to 23-3) She described him at trial as an "African American or Hispanic" man who was "a little lighter than [her]," despite indicating in a police

report that the man had a "beard and [was] dark skinned" similar to her own "brown skin" color. (3T23-2 to 7, 34-17 to 24; 5T262-8 to 13)

Police Officer George Tovar received descriptions of the suspected shooter from a number of people on the scene, and, according to his report, put a call over the airways describing the shooter as "a black man." (2T31-13 to 21) Another Elizabeth police officer recorded the scene on his body-worn camera, part of which was played for the jury depicting a man describing the shooter as "African American with gray hoodie." (7T23-13 to 14, 29-20 to 15) (Da12 at 2:10 to 2:20) That witness was never located, and the lead detective, Sonia Rodriguez, testified that she never attempted to locate him. (7T24-20 to 35-2) None of the witnesses observed any tattoos. (2T111-7 to 10, 124-2 to 10, 135-13 to 20) According to Rachel Maiorano, RecioFigueroa's girlfriend, he "has tattoos on his hands and other parts of his body." (3T136-6 to 12)

Jonathan Piro testified that in June of 2019 he purchased a black Chevy Malibu in the state of Vermont. Piro purchased the car for his friend, Erica Gilbert, who traveled to Vermont along with her boyfriend – whom Piro knew as "Bully" – to help buy and insure the vehicle. (6T14-13 to 16-16) After registering the car at the Vermont DMV, Piro gave the car to Erica and "Bully." (6T16-17 to 17-8) Piro testified that he was "90 percent" or "three quarters plus" certain that photos depicting a black Chevy with Vermont plate HNC 855 was

the car he had purchased. (3T40-25 to 41-1; 6T22-2 to 23-1) (Da16) Piro was shown a photo of an unidentified man's face (Da17) and said, "that's a picture of the man I know as Bully," although Piro had only met "Bully" on a "handful" of occasions – "a half dozen [to] a dozen" times.[1] (6T23-2 to 4, 15-20 to 22)

The State presented evidence that after Piro transferred the vehicle, it was driven by at least two different people, including RecioFigueroa and a man named Darrion Pierce. (3T38-23 to 39-20, 65-16 to 66-18) Pierce was driving the Chevy when it was pulled over in New York on July 26, 2019. (3T38-23 to 39-20) The officer who pulled over the car described Pierce as "a black male, approximately six foot two, 210 pounds" wearing "sweat / jogging clothes, gray." (3T40-1 to 4, 44-12 to 14) The officer identified Pierce in a photograph which was admitted into evidence. (3T42-3 to 42-22) (Da25) When the Chevy was later impounded, two of Erica's friends drove Piro to pick up the car, one of whom Piro described as a "six foot two black guy" who "looks generally" like Darrion Pierce. (6T28-8 to 18) (Da25)

Lead detective Sonia Rodriguez collected dozens of videos from the night of the shooting in the area of 548 East Jersey St. and organized them into what she determined to be chronological order. (4T147-17 to 148-3; 5T231-19 to 23)

[1] The State did not provide context to the jury as to where this photo was taken or originated. (6T23-2 to 4)

She identified fifty videos that, in her opinion, depicted either the black Chevy Malibu with Vermont plates, or the suspected shooter, all of which were published to the jury. (4T156-22 to 184-25) She marked the location of each surveillance camera on a large poster-board map (Da14) and outlined the route that she believed the shooter took, based upon her observation of the videos. (4T150-10 to 151-8) In nearly all the videos, the detective identified a location on the screen that she believed depicted either the Chevy or the shooter. (4T156-22 to 184-25) Of the 50 videos, some of them have clear images, while others are blurry. (Da11 at S-19, S-30, S-42, S-20, S-22) Some depict the identified car from an angle where only the side is visible, and the license plate cannot be seen. (Da11 at S-3, S-8, S-16) Others were recorded from a long-distance away, from poor vantage points, or depict cars moving at a high rate of speed, making the cars difficult to see. (Da11 at S-4, S-14, S-29)

The first video, S-1, depicts a car pulling into the toll booth at Exit 13 of the NJ Turnpike, and a person paying the toll. (Da11 at S-1, S-2) The parties stipulated that on July 6, 2019, a Chevy Malibu with Vermont plates HWC [sic] 855 entered the NJ turnpike at Exit 14C and departed at Exit 13. (4T145-18 to 146-23) The same video, and a photo captured from that video, were shown to Amneris RecioFigueroa, the defendant's mother. (2T141-15 to 20) (Da24) Ms. RecioFigueroa identified the person in the photo as her son and said the person

on video "looks like [her] son." (2T141-15 to 20, 147-19 to 148-11) When Rachel Maiorano was shown "blurry" photos from that video, she was not able to identify anybody in the first two photos (Da18, Da19), and said the second two photos (Da20, Da21) showed someone that "resembled" Mr. RecioFigueroa, but she was not certain enough to make an identification. (3T89-22 to 92-11)

Videos S-3 through S-11 were recorded on cameras between 547 Bayway Ave. and 640 3rd Ave. (4T161-1 to 167-13) (Da11 at S-3 to S-11) As those videos played, the detective identified what she believed to be "the vehicle of interest which was the [Chevy] Malibu." (4T161-18 168-6) Videos S-12 and S-13 were recorded from the same camera at 705 3rd Ave. (4T168-8 to 21) S-12 depicts two people walking from the left side of the screen to the right side, and S-13 depicts one person walking in the opposite direction. There is no Chevy on screen in either video. (Da11 at S-12, S-13) Maiorano was shown a photo depicting a still image from video S-12. (395-18 to 25) (Da23) She explained that the video was taken on her block, that the person on the left side of the photo "looked like me but I didn't recognize [sic]" and that the person on the right side of the photo was "Anthony." (3T96-18 to 98-11) RecioFiguero's mother identified the male in video S-12 as her son. (2T147-19 to 25)

S-13 shows the same location as S-12, only 9 minutes later. (5T224-3 to 11) (Da11 at S-13) A person wearing a hooded sweatshirt can be seen walking

from the right side of the screen to the left side. That person was never identified. The next twenty-four videos (S-14 to S-36) were collected from cameras between the intersection of 3rd Ave. & South 7th St. and 549 Livingston St. As these videos played, the detective again identified what she believed to be the Chevy. (4T168-25 to 177-15) (Da11 at S-14 to S-36)

The following three videos (S-37, S-38, S-39) were critical to the State's case as the only videos that purport to show the suspected shooter, on foot, in the direct vicinity of the location where the victim was later found wounded.[2] (Da11 at S-37, S-38, S-39) Those videos are discussed in the legal argument below. The final nine videos were recorded between 563 New Point Rd. and Route 1 & 9. (Da11 at S-41 to S-50) The detective pointed to parts of the video, opining that the Chevy appeared on screen. (4T182-15 to 184-22) When S-42 was played, she pointed to a white car traveling behind a black car and said that the owner of the white car was named Alex Maldonado. (4T183-2 to 9)

Alex Maldonado provided a statement to police, which was played for the jury following a Gross hearing outside of the jury's presence, where he explained that on July 6, 2019, he was driving on East Jersey St. between 5th and 6th Street

[2] S-41 was admitted into evidence and depicts the same footage as S-37 at a later time. No witness identified any people or vehicles of interest in S-41, but the State argued in summation that the video shows the shooter entering the Chevy and driving away. (4T177-19 to 20, 182-15 to 20) (7T86-8 to 10)

when he heard gunshots. (4T47-4 to 15) He testified that he drove a white Honda Accord. (4T17-15 to 18) On the evening of July 6, he saw someone run and get into a dark-colored vehicle, but he was not able to make out details of the person except that they were wearing a hoodie. (4T47-16 to 21, 64-8 to 13) Maldonado followed the vehicle until it reached Route 1 & 9, at which point he stopped trailing the car. (4T49-1 to 53-12) He took a "blurry" photo on his phone, but could not make out the license plate number. (4T54-1 to 2) A cellphone image sent from Maldonado's cellphone number depicting the back of a black car was admitted into evidence and published to the jury. (2T158-9 to 160-1) (Da15)

The State presented testimony from an expert in historical cell-site analysis. (3T145-5 to 7) The expert analyzed the location of cellphone towers that two different cellphones had connected to between the dates of July 1, 2019, and July 10, 2019. (3T162-17 to 169-23) The parties stipulated that one of the phones "had been used" by RecioFigueroa and the other "had been used" by Maiorano. (3T152-12 to 19) The expert explained that his analysis could not determine who used the phones during the relevant time frame; it provided no content of any calls or messages; it was "absolutely possible" for a phone to connect to two cell-towers simultaneously; and the analysis was "not as an exact a science as GPS" in estimating the location of a phone. (3T183-2 to 184-6, 185-11 to 21, 191-24 to 192-2) The expert concluded that the phone RecioFigueroa

used had connected to cellphone towers in Vermont between July 1 and July 6, and that on July 6, 2019, between 7:09pm and 7:45pm, both phones had connected to towers in downtown Elizabeth before "sequencing Northbound and then back to the Jersey City area," and later connected to cell-towers in Philadelphia. (3T162-3 to 5, 169-11, 179-1 to 25)

A Vermont State Trooper testified that he had seen RecioFigueroa on two occasions in Vermont, that RecioFigueroa "goes by the nickname Bully" and that he recognized RecioFigueroa as the defendant in the courtroom. (3T10-1 to 12-13) At the request of Detective Rodriguez, Vermont officers recovered a pair of "Air Max shoe[s]" that RecioFigueroa was wearing, which were admitted into evidence. (3T6-17 to 8-8) The State argued that the sneakers matched a person on video, which defense counsel disputed. (7T46-24 to 48-4, 82-10 to 12)

In closing argument, defense counsel highlighted that the eyewitness testimony describing the unidentified man near the scene was inconsistent and vague. Defense counsel noted that the State did not offer any testimony that identified the man on the scene as RecioFigueroa; did not offer any possible motive; and did not produce the gun. (7T43-8 49-16) Moreover, defense counsel underscored that the descriptions of the suspected shooter were actually more consistent with Darrion Pierce – a 6'2" Black man who was a known driver of the Chevy– than they were with RecioFigueroa. (7T57-23 to 15)

LEGAL ARGUMENT

POINT I

DEFENDANT'S CONVICTIONS MUST BE REVERSED BECAUSE THE DETECTIVE IMPROPERLY NARRATED VIDEO FOOTAGE BY (A) DESCRIBING EVENTS ON VIDEO OF WHICH SHE HAD NO FIRSTHAND KNOWLEDGE, (B) DESCRIBING THE PATH OF TRAVEL TAKEN BY THE SUSPECT, AND (C) IDENTIFYING THE DEFENDANT ON VIDEO. (Not raised below)

The State did not present any direct evidence that RecioFigueroa was the suspected shooter, or offer any motive for the shooting. The police did not find a gun tied to the crime. No eyewitnesses saw the shooting itself, and no eyewitnesses implicated RecioFigueroa as the person on the scene suspected to be the shooter. Moreover, the descriptions of the suspected shooter from witnesses who heard gunshots – but did not see the actual shooting – were vague and inconsistent: some described the suspect as a Black man, others described him as Hispanic; some saw him getting into a black car, others saw him getting into a white car; some saw him wearing a hoodie, others saw him in a short sleeve shirt. None of the witnesses described the shooter as having any of RecioFigueroa's distinctive characteristics, such as the tattoos on his hands and arms. And defense counsel highlighted how the descriptions of the suspect were more consistent with Darrion Pierce – a Black man who had previously driven

the black Chevy Malibu – than they were with RecioFigueroa: "The description that was given by the witnesses were all over the place. [Pierce's] description fits the perpetrator more than Anthony's does because he is a black individual. He was tall. He was wearing sweat clothes." (7T58-11 to 15)

Thus, to prove that RecioFigueroa was the shooter, the State relied heavily on the detective's narration of surveillance videos she collected from downtown Elizabeth. Specifically, the detective testified that: (a) the videos depict the shooter exiting the Chevy and walking towards the location where the victim was found; (b) the shooter drove on a specific route throughout downtown Elizabeth as reflected in a map that she created; and (c) RecioFigueroa was the person on the video that she had identified as the shooter. Because the detective did not personally observe the events on video, had next to no familiarity with RecioFigueroa, and drew her conclusions from the videos alone, her lay opinion testimony was inadmissible under State v. Watson and State v. Sanchez, and infringed upon the jury's role to determine crucial, contested issues. Namely, whether the Chevy was involved in the shooting, whether the shooter can be seen on foot in the videos, and whether the person identified as the shooter was actually RecioFigueroa. Even under plain-error review, the erroneous admission of this testimony was clearly capable of producing an unjust result because these questions lay at the heart of the State's case. The detective's improper testimony

deprived RecioFigueroa of due process and a fair trial, requiring reversal. See R. 2:10-2; U.S. Const. amends. V, VI, and XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

Our Supreme Court recently established rules governing video narration testimony in State v. Watson. 2023 WL 4918557 (Aug. 2, 2023). There, the Court considered the admissibility of testimony from a police officer who narrated a video of a bank robbery despite not being present during the actual robbery. Id. at *7-*8. Though the Court ultimately reversed the defendant's convictions on grounds other than the video footage narration, it nonetheless established "limiting principles" that control the proper scope of admissible video narration testimony. Id. at *23-*25.

Drawing on several evidentiary rules, the Court first underscored that video narration testimony from a lay witness must satisfy two fundamental requirements: it must (1) be based upon the witness' "firsthand knowledge" and (2) it must be helpful to the jury. Id. at *22 (citing to N.J.R.E. 701, 602, and 403). In light of the first requirement – that witnesses have firsthand knowledge – the extent to which a lay witness may testify about the content of a video is largely dependent upon their prior experience. Witnesses who participated in the depicted events can provide "opinion testimony about [those] parts of [the video] recording that depict what they perceived in real time." Id. at *21. So,

for example, a "bank employee can testify about the portion of a [video] recording that depicts their encounter with a robber." Ibid.

Witnesses who did not experience the actual events depicted on camera, on the other hand, are subject to substantial limitations in their video narration testimony. The Court referred to this type of witness as an "investigator" defined as a lay witness who "did not observe [the] events depicted [on] video in real time" but who nonetheless provided testimony about the contents of video footage based upon their viewing of the video prior to trial. Id. at *21-*22. Investigators can satisfy the firsthand knowledge requirement for lay opinion testimony so long as they watch the video "a sufficient number of times prior to trial." Ibid. However, because the jury is just as capable as investigators to view the video for themselves, investigators will only satisfy the "helpful[ness]" requirement in a limited set of circumstances. Id. at *22-*23. Specifically, the Court established four "limiting principles" which serve to exclude certain types of narration comments that would be unhelpful to the jury. Id. at *23-*25. All narration testimony from investigators "must accord with [these] specific limits" in order to be admissible. Ibid.

First, investigators cannot provide "continuous" or "running commentary" while the video is played, and counsel offering the testimony is required to ask "focused questions designed to elicit specific, helpful responses." Ibid. Second,

"investigators can describe what appears on a recording but may not offer opinions about the content[.]" That is, investigators can offer "objective, factual comments" such as: "the individual opened the door with his elbow." However, they cannot offer "subjective interpretations" of those objective facts, such as: "he [opened the door with his elbow] to avoid leaving fingerprints." Ibid (internal citation omitted). Third, "investigators may not offer their views on factual issues that are reasonably disputed." Thus a "witness cannot testify that a video shows a certain act when the opposing party reasonably contends that it does not." Fourth, "investigators should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence." Such comments are "appropriate only for closing argument." Ibid.

Beyond establishing these limiting principles, the Court in Watson also reaffirmed its prior holding in State v. Sanchez, 247 N.J. 450 (2021). Id. at *19 (summarizing Sanchez and noting that its holding applied the two fundamental requirements of narration testimony – firsthand knowledge and helpfulness – consistent with the present holding in Watson). The Court in Sanchez considered whether a testifying officer was permitted to identify the defendant from photographs derived from video taken shortly after the crimes. 247 N.J. at 458. The Court compiled a non-exhaustive list of four factors to consider in determining whether such lay identification testimony will be helpful to the jury.

Id. at 473. Those factors include: (1) "the nature, duration, and timing of the witness's contacts with the defendant"; (2) "if there has been a change in the defendant's appearance since the offense at issue"; (3) "whether there are additional witnesses available to identify the defendant at trial"; and (4) "the quality of the photograph or video recording at issue." Id. at 470-73. Because the officer in Sanchez had "met with [the] defendant more than thirty times as she supervised him on parole," her testimony was helpful to the jury, and thus admissible. Id. at 475.

Here, Detective Rodriguez qualifies as an "investigator" as defined by the Court in Watson because she did not observe the shooting itself but nonetheless testified about the content of video surveillance footage based upon her viewing of the footage prior to trial. And during her video narration testimony, she identified RecioFigueroa as a person depicted on screen. (5T246-10 to 24) Accordingly, in order for her testimony to be admissible, it must comport with the factors from Watson that limit video narration testimony in general, as well as the factors from Sanchez that specifically limit video narration testimony identifying a defendant. Application of these factors reveals that three parts of the detective's narration testimony were inadmissible.

First, her testimony explaining that the video depicted the "shooter" exiting the Chevy and walking towards the crime scene was prohibited because

it was based upon inferences drawn from other facts in evidence, and it provided her opinion as to facts that were reasonably in dispute – in violation of the third, and fourth factors of Watson. Second, her testimony concerning the suspect's path of travel was inadmissible for the same reasons: it was based upon inferences, and it provided her opinion on facts that were reasonably in dispute. And third, the detective had next to no familiarity with RecioFigueroa, rendering her identification of him on screen inadmissible under Sanchez. Each error – individually and collectively – requires reversal.

A. The Detective Improperly Identified The Shooter And Described Him Exiting The Vehicle Of Interest.

Detective Rodriguez responded to the scene at 8:00 p.m., about an hour after the shooting occurred. (4T141-7) She did not witness the shooting; did not observe anyone believed to be the shooter; and did not see the Chevy. She thus had no "firsthand knowledge" of the event beyond her review of the surveillance footage. Accordingly, any portions of her testimony that ran afoul of the limiting principles articulated in Watson were unhelpful and inadmissible lay opinion testimony. Watson, 2023 WL 4918557, at *23. Detective Rodriguez violated factors three and four of Watson during her narration of videos S-37, S-38, and S-39. (4T177-19 to 181-12; 5T244-19 to 246-24)

In S-37, an empty parking lot occupies the vast majority of the frame, and no action can be seen in the parking lot itself. (D11 at S-37) On its face, the

video appears to show nothing of relevance to the case, but the detective believed it was one of two videos with the best vantage points of the shooter. (5T240-7 to 22) Although Detective Rodriguez did not witness the events on video, she had visited the location where that video was taken, giving her "firsthand knowledge" of the location only. (4T147-17 to 148-3; 5T231-19 to 23) She was thus authorized to provide the "objective, factual" description of the road in the uppermost portion of the frame as "6th Street." Watson, 2023 WL 4918557, at *21, *23 ("Investigators can likewise testify about parts of a recording that reflect their…familiarity with an area depicted in a video based on prior experience."). The detective was also permitted to "draw [the] jury's attention to particular spots" on the video, so long as she did so in a manner that ensured the jury could "make its own evaluation" as to what the video depicted. Id. at *23. That, however, is not what she did. The detective offered her own evaluation of what the video depicted.

The video was paused at 19:02:07, and the detective pointed to an area in the top-right corner which occupied "less than an inch" of the screen, explaining that the Chevy can be seen turning onto 6th St. and making a U-turn. (4T177-25 to 178-12; 5T241-4 to 8) (Da11 at S-37) The State asked, "what were you pointing to" and the detective responded, "to the individual getting out of the vehicle…wh[om I] believe to be the shooter." (5T245-3 to 22) As discussed,

Detective Rodriguez did not observe the incident, the Chevy, or anyone suspected to the be the shooter. Accordingly, her comment could only have been based upon other facts in evidence: that the person in video S-37 appeared as a light-colored image, and that certain eyewitnesses had described a person observed near the victim as wearing gray clothing. From this evidence she drew two inferences: (1) that the light-colored image on video depicted the person observed near the victim; and (2) that the person observed near the victim was, in fact, the shooter – despite no eyewitness observation of the shooting itself. Comments like this that are based upon inferences drawn from other facts in evidence are prohibited under the fourth Watson factor.

The detective's testimony also violated the third Watson factor because the image in question was so unclear that it was difficult to decipher, making any evaluation of what the image depicted subject to reasonable dispute. The Court in Watson held that narration of an unclear video will be unhelpful, and thus inadmissible, when the parties dispute the content of that video: "If footage is unclear or grainy, but not reasonably in dispute, testimony from investigators might help the jury. The opposite is true if a video is so unclear that it is difficult to decipher and the parties dispute its contents." Watson, 2023 WL 4918557, at *23. Here, the relevant images were difficult to decipher, and RecioFigueroa disputed the detective's evaluation of its contents.

Video S-37 was taken from such a great length that the purportedly relevant images on screen were exceptionally blurry and pixelated. No viewer of S-37 – regardless of their prior knowledge – could identify or describe the person, car, or actions on screen with any degree of confidence or detail. The building in the background cuts off most of the view of 6th Street so that only the top half of vehicles can be seen, making it impossible to discern the full shape of any vehicles, let alone see their license plates. Moreover, the sunlight reflecting off the windows of the identified car blends into the light reflected off of the roof of the building, making it difficult to discern the specific color of that car, or keep track of the vehicle or driver's movements, if any. The image identified by the detective as the "shooter" exiting the car is even harder to discern. Absent contextual clues, the light-colored amorphous shape would not even be discernible as a person. (Da11 at 37, 19:03:13) Indeed, the jury evidently had a difficult time discerning the images in S-37, because they requested to watch a magnified version of that video while deliberating. (8T3-8 to 4-13)

But even when the video is magnified, no features can be discerned that would support the detective's testimony because the video was magnified without being enhanced in any way, making the zoomed-in version just as obscure and blurry as S-37, only closer-up. (Da11 at 173) (5T241-12 to 244-15; 6T72-22 to25) Even under the most charitable interpretation, the video shows,

at best, a light-colored shape moving at a walking pace away from a dark colored sedan. The detective's opinion that the image depicted the shooter exiting the Chevy was thus far from clear, and was subject to reasonable dispute. In fact, RecioFigueroa did dispute Detective Rodriguez's ability to reliably determine what the video showed during cross-examination. (5T241-1 to 244-15)

Accordingly, Detective Rodriguez violated factor three of Watson by offering her opinion that the unclear image depicted the shooter exiting the Chevy. Watson, 2023 WL 4918557, at *24; see also State v. Allen, 2023 WL 4915228, at *10-*11 (Aug. 2, 2023) (holding that an officer's video narration testimony that "a particular frame depicted the suspect 'turning towards the officer' [and] that that the video showed where [the suspect] was standing" violated factor three of Watson because it provided "[the officer's] view" as to "sharply disputed facts"); State v. Higgs, 253 N.J. 333, 366 (2023) (holding that an officer's video narration testimony describing an image on video as a gun was inadmissible because that fact was in dispute, the image was difficult to discern, and the jury was just "as competent as the officer to determine what [the video] showed.").

Next, the State asked the detective "do you have a picture of that individual in another video," and Detective Rodriguez identified S-38. (5T246-3 to 246-7) Video S-38 depicted the entrance way to the laundromat at 563 East Jersey St., and according to the detective, showed a "closeup" of the shooter.

(4T179-2 to 10; 5T245-23 to 246-9) (Da11 at S-38) Six seconds into the video, a person can be seen walking past the laundromat. The video was paused, the detective pointed to the screen, the State asked, "who do you believe that to be," and she responded: "The defendant." (5T246-9 to 24) The Court told the jury that the testimony was "the detective's opinion as the person who's worked on the case" and that the question of whether or not the person on screen was the defendant was for "[the jury] to answer." (5T247-4 to 9)

As will be discussed in Point I.C., the identification of the defendant was improper and highly prejudicial under Sanchez. But even short of identifying the person as the defendant, it was still improper for the detective to identify the person in S-38 as the shooter for the same reasons that her identification of the shooter in S-37 was improper: her evaluation as to what the image depicted was reasonably in dispute, and it was based upon an inference she drew from other facts in evidence, in violation of Watson factors three and four.

The blurry video in S-38 does not depict facial features, and the lack of context makes it difficult to reliably discern the person's height or body type. At best, the video shows that the person wore light-colored clothing with sleeves and a hood, but no further details can be discerned (a viewer could not determine, for example, whether the clothing was white or a light gray color). (Da11 at S-38, 04:35:37) The detective had no firsthand knowledge of the

incident or the suspected shooter. Accordingly, her identification of the shooter could only have been based upon other facts in evidence: that the person on video appeared to be wearing light colored clothing, and that a person wearing gray was observed near the victim. Her description of the person as the shooter was thus an inference based on other facts in evidence, in violation of factor four of Watson. Moreover, the image is so blurry that any description of the person on video – including the Detective's identification of them as the shooter – was subject to reasonable dispute, in violation of factor three of Watson.

Finally, S-39 was the second of two videos which the detective believed had the "best view" of the shooter. (5T240-13 to 22) It was recorded about "30 feet" away where the victim was found. (5T238-11 to 21) The detective pointed to a section of the screen no larger than "two inches" and explained that the shooter can be seen "walking in the top left corner." (5T239-4 to 240-10) This testimony was inadmissible for the same reasons as above: it was based upon an inference drawn from other facts in evidence; and the image was blurry and indistinguishable, and thus subject to reasonable dispute. (5T238-11 to 21)

Considering the evidentiary gaps discussed above – where the State offered no firearm, no motive, and no eyewitness to the shooting itself – the improper admission of these video narration comments constitutes plain error. See State v. Singh, 245 N.J. 1, 13-14 (2021) ("[Plain error] must be evaluated

in light of the overall strength of the State's case.") (internal quotation omitted). It was effectively undisputed that RecioFigueroa was one of at least two known drivers of the Chevy. (3T38-23 to 39-20, 65-16 to 66-18) The only characteristic of the suspected shooter that was consistent across descriptions was that he wore some type of gray clothing. Thus, the State needed additional evidence to link the car to the shooter, and to identify the shooter as RecioFigueroa.

To make those crucial links, the State principally relied upon Detective Rodriguez's improper video narration testimony. And because footage from S-37 was taken from the only camera which purportedly depicted the shooter interacting with the Chevy, it was an essential part of the State's case which got to the heart of their argument.[3] That essential video also happened to have the least clear depiction of the supposedly relevant images on screen out of all the videos introduced by the State. Without the detective's improper testimony, the video appears wholly irrelevant to the case. And even if the detective had merely highlighted the portion of the video that she found relevant in purely objective, factual terms – which she did not do – the supposedly relevant images were still

[3]As discussed above, the State argued in summation that S-41 also depicts the shooter, this time entering the vehicle and driving away. Because S-41 was recovered from the same camera and showed the same exact image as S-37, the prejudice of the detective's lay opinion testimony as to S-37 likewise intruded upon the jury's role of drawing their own conclusions as to what S-41 depicted.

nearly indistinguishable. The State therefore needed the detective's improper narration testimony in order to make out its case beyond a reasonable doubt.

Indeed, in summation, the State cited to the detective's narration as a crucial component of its case: "So as [police were] tracking this car, they get to an area right by the shooting. And we know that this camera, Detective Rodriguez testified that the car comes up into this area, the upper portion of the screen. I submit that you can see it's the same black car that those other stills were." (7T84-8 to 13) The importance of these videos was also clear in the jury's request to re-watch only seven of the fifty total videos, four of which were those tainted by improper narration: S-37, S-38, and S-39, and S-41. (8T3-8 to 11)

Moreover, police officer opinion testimony such as this runs the risk of being accorded undue weight by virtue of the tacit authority accorded to law enforcement. See Neno v. Clifton, 167 N.J. 573, 583 (2001); Commonwealth v. Wardsworth, 124 N.E.3d 662, 685 (Mass. 2019) (recognizing the risk that testimony about what the jury was going to see on a video – "priming" – "risked creating a cognitive bias" that was particularly significant because "the recording was of poor quality"). It is likely that the jury interpreted the amorphous light-colored shape as being the shooter, and interpreted the half-obscured, blurry image of a dark sedan as the Chevy, because they expected to see the shooter and the Chevy after hearing the detective's testimony. But, as

discussed, there was no legitimate evidentiary basis for her opinions, and the jury had equal access to the facts that she relied upon to draw her conclusions. Under these circumstances, the improper admission of Detective Rodriguez's narration testimony was plain error requiring the reversal of the convictions.

B. The Detective Improperly Identified The Suspect's Path Of Travel, And Created A Map Illustrating Her Belief As To The Path Of Travel.

Detective Rodriguez created a map (labeled S-96) marking the location of each surveillance camera which had recorded video that she found relevant to the investigation. (4T153-3 to 7) (Da14) Accompanying each marker denoting the location of each camera was a description of the camera's address, such as "562 Third Ave." (Da14) Because the detective had visited the location of the cameras, she had first-hand knowledge about the location depicted such that she was authorized to provide, in "objective, factual" terms, the address of those locations. Watson, 2023 WL 4918557, at *23. However, Detective Rodriguez did not observe the suspect or the Chevy on the evening of the shooting. She was thus prohibited under Watson from providing testimony about the alleged path of travel taken by the suspect based only upon inferences drawn from other facts in evidence, particularly because RecioFigueroa reasonably and consistently disputed the detective's opinion as to the suspect's path of travel. Despite this prohibition, Detective Rodriguez testified that the videos collectively depict the "route" of the suspected shooter, and she illustrated her

belief of the suspect's path of travel with a solid red line on the map. (4T152-20 to 154-1) (Da14) Her testimony, and the map illustrating her testimony, violated Watson factors three and four.

Beginning with factor three, the detective arrived at her opinion of the path of travel by identifying videos she believed depicted either the Chevy or the suspect walking on foot; she put those specific videos in chronological order based upon their timestamps; and then she drew a line that connected the earliest video to the latest video. (4T149-21 to 154-1). This act of selecting particular videos out of a larger pool of footage already implicated reasonably disputed facts. In many of the videos that the detective selected, it was not clear that the Chevy or the shooter can be seen, despite the detective's expressed belief that each video depicted the suspect. The impropriety of the detective's identification of the suspect walking on foot was discussed in Point I.A. Her identification of the Chevy was likewise improper during her narration of several videos.

As she narrated the videos, Detective Rodriguez recurringly paused the recording, pointed to a specific car, and identified the Chevy through comments such as "that's the vehicle[.]" (4T183-1) Such comments are prohibited if they concern a fact that is reasonably in dispute. In fact, the Watson Court identified precisely this type of comment as inadmissible, explaining that investigators cannot say, "[T]hat's the same blue car" in reference to an image on screen if

that fact is in dispute. Watson, 2023 WL 4918557, at *24. In at least half a dozen of the surveillance clips that were played, the video quality was either blurry, discolored, or recorded from a far-away distance; or the purportedly relevant vehicle was either traveling too fast to observe in detail, or traveling at an angle that obscured the license plate. (Da11 at S-29, 19, 4, 14, 42, 44) It was thus reasonably disputed whether each of these videos actually depicted the Chevy. (7T60-10 to 21) Accordingly, Detective Rodriguez's narration testimony identifying the Chevy in each of these videos was inadmissible under factor three of Watson. (4T161-24 to 183-9)

Moreover, even if the detective had narrated the videos in an "objective, factual" manner that did not include any improper disputed identifications, her opinion as to the route of the shooter – as expressed in S-96 – would still have been inadmissible because there was no basis for her belief as to the shooter's path between video cameras, making it both subject to dispute and based upon inferences alone. (Da14) There were simply no facts to support the detective's expressed belief as to where the Chevy traveled when it was not on video. The only basis for that opinion was an inference: given the timestamps of the videos, the detective inferred that the suspect traveled in the path she outlined that connected the camera locations. Such an opinion based upon an inference is prohibited under factor four of Watson. It was also clearly subject to dispute,

and RecioFigueroa explicitly disputed the detective's ability to reliably determine the path of travel between camera locations. (5T205-21 to 211-14)

One anecdote from the pretrial investigation illustrates the inferential nature of the detective's opinion of the path of travel; RecioFigueroa's dispute with the detective's opinion of the route; as well as the prejudicial effect of its inclusion. When the police first interviewed Maiorano, they had collected some, but not all, of the footage that was ultimately introduced into evidence. (5T247-12 to 25) Crucially, police had not yet retrieved video S-12 depicting a woman that, according to Maiorano, "looked like [her]" walking on her block. (3T96-18 to 98-11) (Da11 at S-12) Having not yet seen this video, the detective relied upon the location of the other cameras to conclude that Maiorano had been riding inside the Chevy during the shooting. (5T205-21 to 211-14) In other words, she relied on the video alone to draw an inference as to the route of the Chevy, and then drew a conclusion about the vehicle's occupants based upon the inference. This inference, and the resulting speculative conclusion, were both incorrect.

Accordingly, when the detective made a second inference about the path of travel, this time at trial, she ran the risk of committing the same error because her inference was still not based upon any perception of the suspect's route. Whether the evidence supported an inference as to the suspect's path of travel was not the detective's determination to make – that role is reserved for the jury.

Watson, 2023 WL 4918557, at *23. Because the State's case contained crucial omissions, this inadmissible narration testimony that outlined the shooter's route based on nothing more than inferences and conjecture was highly prejudicial.

As discussed, the State needed to establish a link between the shooter and the Chevy, and needed to identify RecioFigueroa as the shooter. The path-of-travel testimony was a core part of establishing those links because it purported to show that the Chevy traveled from Maiorano's home to the area where the victim was found, and because it was the only detail that made the cellphone expert opinion testimony relevant. The cellphone expert purportedly showed that a cellphone which RecioFiguero had used was "sequencing Northbound and then back to the Jersey city area" on the evening of the shooting. (3T168-5 to 8) This conclusion would only be relevant if the jury believed that the shooter was traveling in a direction consistent with the path charted by the expert, making the detective's testimony as to the suspect's route a crucial component of the State's case. But without any firsthand knowledge, the detective's belief as to the path-of-travel was based only upon an inference she drew from other facts in evidence. Such an inference is prohibited under Watson, and its improper admission amounted to plain error, requiring reversal.

C. The Detective Improperly Identified The Defendant On Video.

Based on her viewing of a blurry surveillance video (S-38), Detective Rodriguez identified RecioFigueroa as the person depicted on screen, whom she had previously identified as the shooter. (5T245-23 to 246-24) All four factors governing lay identification delineated by the Supreme Court in Sanchez distinctly weigh against admission of her lay identification, and make clear that her testimony was improper. 247 N.J. at 470-73.

As to the first factor, there was only one mention of a prior encounter between the detective and RecioFigueroa, where a Vermont State Trooper testified that he was accompanied by the detective when he saw RecioFigueroa. (3T6-3 to 16) This one-time encounter fell well short of the degree of familiarity deemed sufficient in Sanchez, where the officer knew the defendant prior to the incident, had a relationship with him as his parole officer, and had met with him on over thirty occasions. 247 N.J. at 458, 471 ("[W]hen the witness has had little or no contact with the defendant, it is unlikely that his or her lay opinion identification testimony will prove helpful."). For the second factor, there was no mention of any change in appearance in evidence or argument. See id. at 472.

As to the third factor, there were three other witnesses who identified RecioFigueroa in photos and video: his mother, his ex-girlfriend, and a Vermont State Trooper. Their availability obviated the need for the detective's

identification. Ibid. ("[L]aw enforcement lay opinion identifying a defendant in a photograph or video recording is not to be encouraged, and should only be used only if no other adequate identification testimony is available to the prosecution.") (internal citation omitted). For the fourth factor, video S-38 does not afford the viewer any ability to discern facial features, skin complexion, or the details of clothing. In such circumstances, where the "video recording is of such low quality that no witness – even a person very familiar with the defendant – could identify the individual who appears in it, lay opinion testimony will not assist the jury, and may be highly prejudicial." Id. at 471 (emphasis added) The identification was thus not only impermissible, but highly prejudicial.

Accordingly, Detective Rodriguez was not permitted to identify the defendant on video under Sanchez.[4] She lacked the knowledge necessary to render her identification helpful, particularly where RecioFigueroa's ex-girlfriend and mother were available to make identifications. And the video is so blurry that no one – regardless of their familiarity – could identify the person on screen. Because identification was the paramount issue at trial, and because the State's case on identification was far from overwhelming, the admission of the lay identification amounted to plain error, requiring reversal.

[4] Detective Rodriguez was also prohibited from identifying the defendant under Watson, where the Court held that identification of a defendant on video is improper if identity is disputed. Watson, 2023 WL 4918557, at *24.

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE JURY ON THIRD-PARTY GUILT. (Not Raised Below)

When the trial court instructed the jury, it erroneously failed to provide an instruction on an issue at the heart of RecioFigueroa's defense theory: third-party guilt. As discussed, identity was the central issue in this case, but the State did not present any identifications of the shooter. Instead, it offered inconsistent testimony from witnesses who heard the shooting and saw a man with a gun near the incident, combined with identifications of RecioFigueroa as one of at least two drivers of the vehicle believed to be associated with the shooting. As defense counsel argued in summation, the descriptions of the man on the scene – some of which described him as a tall, Black man – fit the appearance of the other known driver of the suspected vehicle, Darrion Pierce, a 6'2" Black man.

Given the weaknesses of the State's case concerning the identity of the shooter, and given the significant evidence supporting the possibility that Darrion Pierce could have been the shooter, the Court was required to give the jury charge on third-party guilt. And because third-party guilt was a pivotal issue in the case, the court's failure to provide the instruction deprived RecioFigueroa of a fair trial, amounting to plain error, and requiring reversal. See U.S. Const. amends. V, VI, and XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; R. 2:10-2.

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. Afanador, 151 N.J. 41, 54 (1997). "The [trial] judge 'should explain to the jury in an understandable fashion its function in relation to the legal issues involved.'" State v. McKinney, 223 N.J. 475, 495 (2015) (quotation omitted). Without guidance on how to evaluate the evidence, "a jury can take a wrong turn in its deliberations." State v. Martin, 119 N.J. 2, 15 (1990). Where, as here, no request for the appropriate charge is in the record, the omission of that charge is reviewed for plain error. Meeting this standard requires that that the error be clearly capable of producing an unjust result and be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" R. 2:10-2; State v. Jordan, 147 N.J. 409, 422 (1997) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

Trial courts have an independent responsibility to provide complete jury instructions, even when specific charges are not requested. State v. Reddish, 181 N.J. 553, 613 (2004) ("It is the independent duty of the court to ensure that the jurors receive accurate instructions...irrespective of the particular language suggested by either party."). Defendants may "justifiably assume that fundamental matters will be covered in the charge." State v. Green, 86 N.J. 281, 288 (1981). Therefore, inaccurate or incomplete charges on a material issue "are presumed to be reversible error." State v. Collier, 90 N.J. 117, 122-23 (1982).

The model jury charge on third-party guilt instructs the jury that:

> The defendant contends that there is evidence before you indicating that someone other than he or she may have committed the crime or crimes, and that evidence raises a reasonable doubt with respect to the defendant's guilt.….[T]here is no requirement that this evidence proves or even raises a strong probability that someone other than the defendant committed the crime. You must decide whether the State has proven the defendant's guilt beyond a reasonable doubt, not whether the other person or persons may have committed the crime(s).
>
> [Model Jury Charge (Criminal), "Third Party Guilt Jury Charge" (approved Mar. 9, 2015).]

The record clearly indicates the need for this instruction. The State offered testimony showing that both RecioFigueroa and Darrion Pierce had driven the Chevy on prior occasions, and both had been pulled over while driving. (3T38-23 to 39-20, 65-16 to 66-18) As defense counsel argued at summation, the descriptions of the shooter were more consistent with Pierce's appearance than with RecioFigueroa's appearance. (7T57-18 to 58-25) Darrion Pierce is a 6'2" Black man weighing 210 pounds, and RecioFigueroa is a 5'8" man from Puerto Rico weighing 180 pounds. (3T40-1 to 4; 4T143-4). In photos admitted into evidence, Pierce and RecioFigueroa have strikingly similar hair styles and facial hair: both have short, buzzed haircuts with a hairline across the same part of their upper forehead, and both sport a mustache. (Da17, Da25) Descriptions of

the suspect given by the witnesses were as consistent with Pierce's appearance as they were with RecioFigueroa's appearance, if not more so.

Out of all the descriptions of the suspect, those given immediately after the incident – when the memories of the witnesses were most reliable – universally described the suspect as a Black man. See Model Jury Charge (Criminal), "Identification: Out-Of-Court Identification Only" at 5 (revised July 9, 2012) ("Memories fade with time….the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken."). When Quashanna Epps called 9-1-1, she described the shooter as Black. (3T19-18 to 19) An unnamed witness interviewed by police after the shooting described the shooter as "African American[.]" (7T23-13 to 14, 29-20 to 15) (Da12, at D-3, 2:10 to 2:24) And when police put a call over the radio after arriving on scene, they described the suspected as a "black man." (2T28-14 to 25, 131-19 to 21)

The subsequent descriptions of the shooter given at trial – nearly three years after the shooting – were vague and inconsistent. One witness described the suspect as "tall and skinny," and another described him as "not short," estimating his height to be "like, five eight, five ten." (2T100-17 to 21, 129-14 to 23, 135-9 to 12) Having previously described the shooter as a Black man in her 9-1-1 call, Quashanna Epps described him at trial as a "dark skinned" man, who was "African American or Hispanic" and whose complexion was "a little

lighter" than her own "brown skin." (3T23-2 to 7, 34-17 to 24; 5T262-8 to 13) One witness indicated the suspect was "light skinned" or "tannish" with a skin tone similar to her own. (2T100-4 to 101-3, 106-2 to 13) Another witness described him as "a little dark" with a complexion darker than her own. (2T118-5 to 20, 123-16 to 18) A third witness said his complexion was "darker than [her] skin color." (2T129-14 to 23, 135-9 to 12) Other than Epps's testimony that the suspect was either "African American or Hispanic," no other witness identified the shooter as Hispanic or Latino. (3T23-2 to 7) Indeed, the only other mention of the shooter's ethnicity described him as Black or African American.

Lastly, the only description that was entirely consistent across witness testimony was that the shooter was wearing some type of gray clothing. This description is equally consistent with Pierce, who was described as wearing gray sweatpants, and RecioFigueroa, who was identified in video while wearing what appears to be gray pants. (3T44-7 to 16, 96-18 to 98-11)(Da11 at S-12)

Accordingly, there was a substantial evidentiary basis from which the jury could have concluded that Pierce was just as likely to have committed the crime as RecioFigueroa. Indeed, this possibility was such a crucial aspect of the evidence that both parties discussed Pierce at length in summation. Defense counsel noted that Pierce had driven the Chevy, and highlighted similarities between him and the suspect: "[Pierce's] description fits the perpetrator more

than Anthony's does because he is a black individual. He was tall. He was wearing sweat clothes." (7T58-77 to 15) The State, in turn, acknowledged Pierce's interactions with the Chevy, arguing that the descriptions were more consistent with RecioFigueroa. (7T87-24 to 88-25) Given Pierce's central role, the Court was required to instruct the jury on third-party guilt, regardless of whether that instruction was requested. Reddish, 181 N.J. at 613.

Faced with a variety of factual disputes and credibility determinations, the jury needed to be instructed that the State retained the burden of proving that RecioFigueroa committed the crimes, and that they could acquit based on evidence that Pierce did the shooting – even if such evidence did not amount to a "strong probability" of Pierce's guilt. Model Jury Charge (Criminal), "Third Party Guilt Jury Charge" (approved Mar. 9, 2015). Ultimately, "[t]he determination of plain error depends on the strength and quality of the State's corroborative evidence rather than on whether defendant's misidentification argument is convincing." State v. Cotto, 182 N.J. 316, 326 (2005). Because the State's case was not overwhelming, and because there was substantial evidence supporting the possibility of Pierce's guilt, the omission of the third-party guilt instruction was plain error warranting reversal.

POINT III

THE CUMULATIVE IMPACT OF THE DETECTIVE'S IMPROPER VIDEO NARRATION TESTIMONY COMPOUNDED BY THE LACK OF PROPER JURY INSTRUCTION DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL. (Not Raised Below)

Each of the errors cited above is sufficient alone to require a new trial. If the Court does not concur, it must find that the cumulative effect of these errors requires a new trial. State v. Orecchio, 16 N.J. 125, 129 (1954); U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10. This is especially so considering that the identity of the shooter was the key issue in the case; that the State's evidence as to the shooter's identity was far from overwhelming; and that all of the above errors improperly bolstered the State's argument on identity.

POINT IV

RESENTENCING IS REQUIRED BECAUSE THE COURT IMPROPERLY CONSIDERED DEFENDANT'S EXERCISE OF HIS RIGHT AGAINST INCRIMINATION, AND ACCORDED INSUFFICIENT WEIGHT TO YOUTH AS A MITIGATING FACTOR. (9T15-23 to 26-2)

The sentencing court sentenced RecioFigueroa to an aggregate term of fifty-five years of imprisonment subject to the No Early Release Act. (9T24-15 to 25-14) In reaching this sentence, the court found that aggravating factors three, six, and nine "substantially outweigh[ed]" mitigating factor fourteen – the

only mitigating factor the court found. (9T22-22 to 24-14) The court made two prejudicial errors in reaching this sentence: it improperly considered RecioFiguero's exercise of his right against self-incrimination, and it failed to accord appropriate weight to mitigating factor fourteen, resulting in an excessive sentence. As such, if this Court does not concur that the convictions should be reversed for the reasons above, the matter should be remanded for resentencing.

A. The Sentencing Court Improperly Considered Defendant's Exercise Of His Right Against Self-Incrimination As Contributing Substantial Weight To Aggravating Factor Three.

In applying aggravating factor three – the risk that a defendant will reoffend – the court gave "substantial weight" to RecioFigueroa's purported lack of remorse. N.J.S.A. 2C:44-1(a)(3). (9T20-15 to 21-3) However, RecioFigueroa made no statements concerning the incident; he maintained his innocence throughout the entirety of the proceedings; and neither the State nor the court identified any statement as demonstrating a lack of remorse. Instead, the State argued, and the court found, that his decision to not speak at sentencing, combined with speculative interpretations of his body language, constituted a lack of remorse deserving of substantial aggravation weight.

The State argued that RecioFigueroa had demonstrated a "complete lack of remorse" through his refusal to come to court on a few occasions and "through the way he's just sitting there, um, his body language and the fact that while the

family was speaking, he even stood up and turned his back." (9T13-13 to 14-4) The court adopted the State's argument, finding that RecioFigueroa lacked remorse because he did not provide an allocution statement at sentencing and because the victim-impact testimony did not elicit the correct emotional response: "Mr. Reciofigueroa, uh, had no reaction, showed no emotion, and had no, uh, response to their statements whatsoever." (9T20-12 to 21-3)

Contrary to the court's finding, RecioFigueroa's decision to remain silent during sentencing was not an expression of a lack of remorse but was a lawful exercise of his right against self-incrimination and his right to defend his innocence. RecioFigueroa maintained his innocence throughout the entirety of the trial, and never admitted to any involvement in the incident. (PSR3) Defense counsel indicated that the decision to remain silent was nothing more than a lawful – and indeed laudable – strategic decision in light of his direct appeal: "My client intends to appeal his conviction. His hope is that it will be a reversal and he'll get a new trial, so he feels it's not in his best interest to address the Court about the facts of the case." (9T5-3 to 7) See State v. Poteet, 61 N.J. 493, 500 (1972) (Jacobs, J., concurring) ("[A]n admission [of guilt] might jeopardize [a defendant's] right of appeal or a motion for a new trial") (quoting Miler v. United States, 255 A.2d 497, 498 (D.C. App. 1969)). The sentencing court erred by considering RecioFigueroa's silence in its sentencing determination.

The right against self-incrimination is "[o]ne of the most fundamental rights protected by both the Federal Constitution and state law." U.S. Const. amends. V, XIV; State v. O'Neill, 193 N.J. 148, 167 (2007). In New Jersey, this right affords specific protection for defendants facing sentencing. N.J.S.A. 2C:44-1(c)(1) holds that "[a] plea of guilty by a defendant or failure to so plead shall not be considered in withholding or imposing a sentence of imprisonment." This Court cited to this statute to support the principle that "[a] defendant has a right to defend, and a sentencing judge may not enhance the penalty because he contests his guilt." State v. Jimenez, 266 N.J. Super. 560, 570 (App. Div. 1993).

The right to defend oneself applies with equal force to defendants who choose to appeal as it does for those who choose to go to trial. In State v. Poteet, our Supreme Court held that a defendant cannot be sentenced more severely for exercising his right to trial, or his right to appeal. 61 N.J. at 495-96. ("[A] sentence may not be increased because a defendant defended against the charge or insisted upon his right of appeal.") (quoting State v. De Stasio, 49 N.J. 247, 259 (1967)). In State v. Marks, 201 N.J. Super. 514 (App. Div. 1985), this Court, citing to Poteet and N.J.S.A. 2C:44-1(c)(1), found that "a defendant's refusal to acknowledge guilt following a conviction is generally not a germane factor in the sentencing decision." Id. at 540. See also Mitchell v. United States, 526 U.S. 314, 325-27 (1999) (holding that the right against self-incrimination persists

during sentencing). Accordingly, the sentencing court erred where it considered RecioFigueroa's refusal to acknowledge guilt in its sentencing determination. Poteet, 61 N.J. at 495-96.

A distinction must be drawn here in light of the sentencing court's finding that it was considering RecioFigueroa's so-called "lack of remorse" rather than an exercise of his right against self-incrimination. These are two distinct concepts: a defendant's refusal to acknowledge guilt while maintaining his innocence; and a defendant's admission (to some or all of the accused conduct) and his corresponding failure to recognize the gravity of the admitted-to conduct. The former cannot be considered within sentencing determinations, while the latter can be considered if the court finds that the lack of remorse increases the likelihood of reoffending. Three cases illustrate this distinction.

In State v. Rivers, the defendant's denial of guilt was considered a relevant sentencing factor only because the defendant had already admitted guilt in his presentence report. 252 N.J. Super. 142, 153-54 (App. Div. 1991). In State v. Carey, the defendant did not deny that he was involved in the relevant car accident, but denied that he was responsible for the crash itself and refused to admit that he had a drinking problem. 168 N.J. 413, 426-27 (2001). In State v. Hess – cited by the sentencing court as authority for its consideration of RecioFigueroa's purported lack of remorse – the defendant pled guilty to sexual

assault and admitted to having contact with the victim, but attempted to justify his behavior by "placing [his] motives on a lofty plane" and "rationaliz[ing]" his actions. 198 N.J. Super. 322, 328-29 (App. Div. 1984).

Accordingly, these cases which properly considered "lack of remorse" all involved defendants who had admitted to some form of wrongdoing, either by admitting guilt outright, or by admitting to some involvement in the accused conduct but diminishing the gravity of that behavior. Stated differently, a criminal defendant does not – and cannot – demonstrate a lack of remorse if they maintain their innocence. Where, as here, the defendant has unfailingly maintained his innocence and has not admitted to any involvement in the accused conduct, his decision to simply continue to maintain his innocence at sentencing, especially in light of his direct appeal, cannot be considered within the court's sentencing determination. That is exactly what RecioFigueroa did. It was thus erroneous for the sentencing court to consider RecioFigueroa's exercise of his right against self-incrimination in its sentencing determination.

Likewise, it was erroneous to impute a lack of remorse to RecioFigueroa's body language. A court's "finding of any [sentencing] factor must be supported by competent, credible evidence in the record" and "speculation and suspicion must not infect the sentencing process[.]" State v. Case, 220 N.J. 49, 64 (2014). RecioFigueroa attended the sentencing hearing via Zoom. (9T3-11 to 14)

According to the State, he turned away from the camera during victim-impact testimony. (9T13-13 to 14-4) And according to the court, he failed to exhibit a sufficiently emotional reaction during that testimony. (9T20-12 to 21-3) It is pure speculation to suppose that maintaining a stoic demeanor and turning away from a camera was indicative of a lack of remorse. To learn that one has been convicted of murder is a devastating emotional event, and listening to victim-impact testimony is likewise emotional for everyone. It was not proper for the court to speculate about the meaning of RecioFigueroa's emotional response, and it was certainly improper to punish him for not emoting "correctly."

In State v. Nyema, our Supreme Court cautioned against the interpretation of ambiguous body language as being indicative of criminal culpability. 239 N.J. 509, 530 (2022). While the Court's reasoning there was applied in the context of determining reasonable suspicion for a traffic stop, the principle that a "wide range of behavior exhibited by many different people for varying reasons while in the presence of police" is nonetheless applicable to sentencing hearings, where there is equal cause for defendants to have a strong emotional reaction in response to criminal legal consequences – reactions which may manifest in myriad and inconsistent ways that elude clear interpretation. Id. at 533.

Accordingly, if this Court does not reverse RecioFigueroa's convictions for the reasons expressed in Points I, II, and III, then this Court must reaffirm

the principle that maintaining one's innocence cannot be used against a defendant at sentencing, and reverse and remand this matter for resentencing. Poteet, 61 N.J. at 495; U.S. Const., amends. V, XIV; N.J. Const., art. I, ¶¶ 9, 10.

B. The Sentencing Court Did Not Accord Appropriate Weight To Mitigating Factor Fourteen, Resulting In An Excessive Sentence.

Although the sentencing court found that mitigating factor fourteen applied, it did not attribute sufficient weight towards mitigation in consideration of RecioFigueroa's youth. RecioFigueroa was twenty-five years old at the time of the offense, so the sentencing court applied mitigating factor fourteen which instructs sentencing courts to consider a defendant's youth as a mitigating circumstance when they are younger than twenty-six years old at the time of the offense. N.J.S.A. 2C:44-1(b)(14). However, the sentencing court attributed "minuscule" weight to factor fourteen because RecioFigueroa was "3 months away from being 26" and "there appear[ed] to be very little applicability to this factor." (9T22-22 to 23-10) By attributing minuscule weight, the court failed to consider the insights concerning the unique status of youthful defendants that the Legislature intended for courts to consider when it created factor fourteen.

In Miller v. Alabama, the United States Supreme Court explained that newly available findings in brain science and developmental psychology have led to the understanding that youthful brains are fundamentally different from the brains of adults. 567 U.S. 460, 471-72 (2012). These insights, according to

the Court, "lesse[n] [the] moral culpability" of youthful offenders and "enhance[e] the prospect" that they will mature out of reckless youthful behavior. Id. at 472. Prompted by this decision, the Legislature added mitigating factor fourteen to ensure that courts properly consider that youthful defendants have a reduced moral culpability and a reduced likelihood of reoffending.[5]

Each of these insights should have applied to RecioFigueroa. Instead, the sentencing court supplanted the judgment of the Legislature with its own view of maturation and responsibility, reasoning that "a 25-year-old man is of an age when he knows right from wrong, and he knows the significance of his actions when they're done knowingly or purposely." (9T23-7 to 10) By disregarding the Legislature's intent in creating mitigating factor fourteen and relying instead on its own understanding of maturity in order to attribute only minuscule weight towards mitigation, the sentencing court abused its discretion. Accordingly, the matter should be remanded for imposition of a reduced sentence.

[5] See State v. Rivera, 249 N.J. 285, 301-02 (2021) (detailing legislative history of mitigating factor fourteen, including Recommendation #5 from New Jersey Criminal Sentencing & Disposition Commission's 2019 report that cites to Miller as part of its recommendation to enact a mitigating factor considering youth).

CONCLUSION

RecioFigueroa's convictions must be reversed because the State's case principally relied upon inadmissible video narration testimony that identified the shooter on video; described them exiting the vehicle of interest; outlined the suspect's path of travel; and identified RecioFigueroa on screen. The erroneous admission of this prejudicial testimony was then compounded by the court's failure to instruct the jury on third-party guilt, despite undisputed evidence that the suspect was described by multiple eyewitnesses as being a tall, Black man, and that a man fitting that description was one of two known drivers of the vehicle of interest. Alternatively, RecioFigueroa's sentence must be vacated and remanded for resentencing because the court improperly considered his decision to maintain his innocence in its sentencing determination, and did not accord sufficient weight to his youth, resulting in an excessive sentence.

Respectfully submitted,

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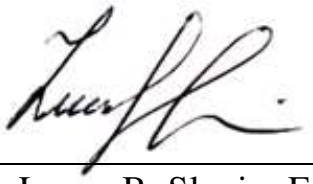
BY: 

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Dated: August 30, 2023

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-0692-22T2

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Respondent,	:	On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Union County.
v.	:	Sat Below:
ANTHONY RECIOFIGUEROA,	:	Hon. John M. Deitch, J.S.C., and a jury.
Defendant-Appellant.	:	

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January 19, 2024

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9T – October 6, 2022, sentencing transcript

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On December 11, 2019, a Union County Grand Jury returned Indictment 19-12-00794-I, charging defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (a)(2) (count 1); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count 2); and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1) (count three). (Da1-2).

Trial was held before the Honorable John M. Deitch, J.S.C., and a jury between May 31, 2022, and June 9, 2022. (2T to 8T). On June 8, 2022, the jury convicted defendant on all counts. (8T14-15 to 15-6; Da3-4). On October 6, 2022, defendant was sentenced to a fifty-five-year New Jersey State Prison term under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, for count one, count two was merged into count one, and a concurrent eight-year New Jersey State Prison term with forty-eight months of parole ineligibility under the Graves Act for count three. (Da5-7; 9T24-15 to 25-6).

On November 1, 2022, defendant filed a notice of appeal. (Da8-10).

COUNTERSTATEMENT OF FACTS

The following facts were deduced from defendant's trial.

A. A shooting occurred on East Jersey Street.

On July 6, 2019, Officer George Tovar was dispatched to 548 Jersey Street in Elizabeth at 7:06 p.m. (2T18-14 to 20-25). When he arrived, it was a

"chaotic scene" with people saying, "Someone had been shot." (2T21-4 to 8). He found a "male lying on the floor who had sustained injuries." (2T21-9 to 10). The male was the victim, Carlos Rodriguez, also known as Bebo, who ultimately died from a gunshot wound to the head. (2T21-16 to 23; 2T57-7 to 13; 3T14-11 to 21). Witnesses at the scene gave descriptions of the shooter. The descriptions varied but included elements of the shooter's race and his clothing. (2T21-13 to 21; 2T35-1 to 5).

One of the witnesses, Oneida Ventura, who lived on East Jersey Street was standing outside the door of her house when she "heard some noise and . . . saw many people run." (2T127-8 to 25). After hearing the noise, she saw a "tall and skinny" man run from East Jersey Street toward 6th Street wearing all grey. (2T128-17 to 129-15). She could not see his face because his sweatshirt covered it, but she noticed "they had something in their hands, and they were putting it in the sweater's pocket." (2T129-21 to 130-7).

Carlos's brother, Matthew Rodriguez, was also standing on the front steps of his building on East Jersey Street. (2T151-16 to 21; 2T153-2 to 5). He said that as Carlos approached the building, he told Matthew to go inside. Matthew thought the police were coming, and because he was on probation, he ran inside. (2T154-1 to 10). From inside the building, he heard gunshots, and when he came back outside, he found his brother dead. (2T154-11 to 14). Sometime after the shooting, a person known as Al sent Matthew a photograph

of a car, purportedly connected to the murder of his brother, from a specific phone number. (2T155-24 to 156-5; 2T158-9 to 18). On July 15, 2019, when Matthew spoke to detectives, he gave them the photograph he received. (2T156-21 to 157-3; 2T160-16 to 18; Da15).

Quashanna Epps used to date Matthew and was sitting on the porch with him on the day of the shooting. (3T14-5 to 25). She said they were "sitting, talking. Just doing regular stuff. And, I don't know, just some random guy walked down the block . . . . And then he just pulled out a weapon. So I ran." (3T16-1 to 4). She had run into the building, and when she came out, she saw Carlos "lying on the floor" and "the guy running down the street." (3T21-12 to 14). Quashanna called 9-1-1 and told the operator that the shooter was black, wearing all grey, and walked away toward 5th Street. (3T16-5 to 6; 3T19-2 to 20-21). In addition to calling 9-1-1, Quashanna also gave two statements to police. The first statement was taken on July 6, the same day as the shooting, and her second statement was on January 12, 2021. (3T27-13; 3T33-17 to 20). At trial, she testified that the shooter was dressed in all grey sweat clothes with the hood up. She also said that the shooter had on Nike Air Force sneakers but could not remember the color. (3T21-12 to 22; 3T21-23 to 22-4; 3T28-21 to 24). In her initial statement, she said the sneakers were white. (3T27-13 to 28-10). At trial, Quashanna described the shooter as "African American." She further elaborated, stating that the shooter could be either "African American

or Hispanic" and that his complexion was "a little lighter than [hers.]" (3T23-1 to 7). But in her second statement, she said the shooter was dark-skinned "like [her] skin color." (3T33-17 to 34-24).

Two other witnesses saw the shooter flee the area. On July 6, 2019, Jasmin Guifarro was at the Raymond Supermarket on Franklin Street with her mom, Ana Lozano, and sister. While walking home, they heard gunshots, and "not even 30 seconds" later, Jasmin saw a man running away by the intersection of East Jersey and 6th Street. (2T94-4 to 96-1; 2T97-18 to 98-8; 2T102-17 to 21). She said the individual wore a grey hoodie and had a firearm beside him. At trial, Jasmin said the man she saw running was approximately between five feet eight inches and five feet ten inches and mentioned that he had light skin, "[l]ike, tannish." (3T101-1 to 3). But when Jasmin gave a statement at the prosecutor's office following the shooting, she had said she could not recall the man's complexion because she "didn't see his face . . . . cause the hoodie was over him." (2T111-18 to 20).

Ana recounted that around 6:30 p.m., while returning home from buying ice with her daughters, she heard gunshots and told her daughters to get down. (2T114-19 to 115-23; 2T116-6 to 11; 2T117-2 to 4). When they got up, she saw a person running and saw him put something in his pants pocket. (2T116-13 to 15; 2T118-9 to 13). At trial, she could not remember what that person was wearing, but in her initial statement, she had said the person was wearing

grey pants and a white shirt. (2T117-15 to 118-5). Ana described the complexion of the person as "light brown color . . . . a little . . . . darker than me." (2T118-16 to 22).

B. The police investigation centered on a "vehicle of interest."

On July 16, 2019, Lieutenant Johnny Ho from the Union County Prosecutor's Office interviewed Alexander Maldonado who owned a 2005 white Honda.[1] (4T12-1 to 9; 4T96-18 to 21; 4T97-21 to 98-1). He told Ho that on July 6, 2019, he was hanging out with his girlfriend on East Jersey Street when his barber asked him to pay for his haircut. He left East Jersey Street to pay his barber, and as he returned, making a right onto 6th Street, he heard "either what is to be firecrackers or gunshots." (4T106-8 to 25; 4T107-25 to 107-25).

Alexander then saw "an individual . . . running . . . with a hoodie on . . . get into a dark colored vehicle." (4T107-11 to 14). Alexander noted that "something didn't seem right" because "[w]hy would be he [sic] running." So he attempted to pursue the car and take a picture of the license plate. But due to the rain, he could not catch up. (4T107-14 to 25). Alexander described the car he was following as a dark, medium-sized four-door car with tinted

[1] Alexander's statement was played for the jury following a State v. Gross, 121 N.J. 1 (1990) hearing.

windows. (4T115-17 to 116-16). He said he gave up following the car when the car "jumped on the highway." (4T112-12 to 23). Alexander said he did not try to remember the license plate because he assumed he had gotten a picture of the car. But when he reviewed the photographs, "everything was blurry," making it impossible to read the license plate, so he said he deleted the picture. (4T113-17 to 114-4). Nonetheless, the phone number Alexander provided Detective Ho with was the same number that had sent Matthew the image of the car. (4T114-11 to 17). He was confident that the car's license plate was not from New Jersey because he regularly saw New Jersey license plates working in the repo yard. (4T119-4 to 8). He said that the license plate looked "green maybe," which would indicate it came from Vermont. (4T118-23 to 15).

Detective Sonia Rodriguez canvassed for video and witnesses based on the information they had at the time. (4T140-7 to 15). She obtained over thirty videos from residential homes and commercial businesses, tracking the "vehicle of interest," a black Chevy Malibu. (4T147-16 to 19; 4T148-1 to 3; 4T157-9 to 10; 4T162-10 to 13). It took "weeks to months to get" all the footage used in the investigation. (4T147-20 to 22). The State presented fifty video clips during the trial through Rodriguez's testimony. These clips depicted the purported route of the "vehicle of interest," as reconstructed by the police using the location and time stamps from the videos. (4T152-15 to

22). The State also introduced a map of all the video surveillance and their locations. (4T152-24 to 153-4; Da14). There was no objection to the introduction of the map, the surveillance videos, or any of Rodriguez's testimony.

Rodriguez explained that the purpose of the video surveillance was to follow the car. (4T161-18 to 23; 4T162-10 to 13; 4T166-12 to 15; 4T168-14 to 18). As the fifty surveillance clips played, Rodriguez would point when prompted by the Assistant Prosecutor to show which car to look at while the clip played. See generally (4T156-7 to 4T184-9; Da11).

In the spring or early summer of 2019, Jonathan Piro, while living in Vermont, helped Erica Gilbert and her boyfriend, known to him as Bully, purchase a black Chevy Malibu. (6T14-1 to 21; 6T14-24 to 15-7). Piro identified a picture of defendant as the man he knew as Bully. (6T23-2 to 4). All three of them went to the seller, paid for the car, and registered it in Piro's name with a Vermont license plate. (6T15-23 to 17-2). After everything was registered, Piro "turned the keys over to Bully." (6T17-3 to 8). Rachel testified that defendant did not have a car of his own, and she had seen him in a Chevy Malibu with Vermont plates. (3T70-17 to 21; 3T80-6 to 9; 3T81-4 to 22).

On July 26, 2019, a 2010 black Chevy Malibu with a Vermont license plate was pulled over for a traffic violation. (3T39-3 to 15). The car had four

occupants—two males and two females—with Darrion Pierce driving. (3T39-15 to 22). David Rivera, the Triborough Bridge and Tunnel Authority Officer who stopped the car, described Darrion as a "black male, approximately six foot, 210 pounds." (3T38-10 to 15; 3T40-1 to 4).

Then, on August 5, 2019, the same Chevy Malibu was pulled over by Officer Jake Badalmenti of the Jersey City Police Department in Jersey City. (3T64-13 to 17; 3T65-16 to 20 to 66-9). This time defendant was driving alone. (3T66-10 to 18). On August 7, 2019, the Union County Prosecutor's Office processed the car. (3T50-14 to 19; 3T52-2 to 4; 3T53-5 to 18). They found an Econo Lodge receipt with the defendant's name in the trunk. (3T56-19 to 57-10). After defendant was pulled over in the Chevy Malibu, Rachel gave a statement to police. She was shown a series of photographs in which she identified both herself and defendant. (3T86-21 to 89-18).

A month or two after he and defendant bought the Malibu, Piro received a call "to go get [the car] out of impound in New York because it was in [his] name." (6T17-17 to 21). He traveled from Vermont to New York with friends of Erica, a male and a female, who she arranged to go with him. (6T18-11 to 18). Piro described the friends as "a small white girl with black hair . . . [and a] six foot two black guy." (6T19-6 to 10). Piro retrieved the car from the impound lot and later left it in New York or New Jersey. He parked it in a designated spot and left the keys. (6T18-21 to 24; 6T20-1 to 3). At a trial, he

said that a photograph of Darrion Pierce resembled the man he drove down with from Vermont. (6T28-8 to 20).

Based on phone records for numbers used by defendant and Rachel, Detective Sergeant Nicholas Falcicchio, recognized as an expert in historical cell-site analysis, created a report and map for each number. (3T145-5 to 7; 3T152-12 to 19; 3T153-9 to 13). Based on his analysis, Falcicchio determined that when the phones called each other at around 7:09 p.m., they were in the "downtown general Elizabeth area." (3T179-1 to 5). Then, "[b]oth devices ended up terminating their usage in Jersey City." (3T179-6 to 10). These records show that the phone associated with defendant followed the same path as the "vehicle of interest."

* * * *

Based on these facts, the jury found defendant guilty of all charges. (8T14-15 to 15-6). This appeal follows.

LEGAL ARGUMENT

POINT I

THE DETECTIVE'S COMMENTS WERE PROPER RULE 701 TESTIMONY THAT HELPED EXPLAIN THE POLICE'S INVESTIGATION OF A "VEHICLE OF INTEREST."

The unchallenged narration presented during the State's case in chief, though preceding the State v. Watson decision, adhered to the framework outlined by the Supreme Court. The testimony was primarily limited to objective pointing testimony and was used to explain the police's investigation of a "vehicle of interest."

The narration was based on the detective's personal review of the videos obtained from various sources, including city cameras, residential homes, and commercial businesses. The police investigation was based on the lead they had at the time, focusing on a dark colored Chevy Malibu. The narration was, therefore, helpful to the jury as it explained the investigative steps that led to additional evidence. Moreover, it guided the jury on where to focus their attention while viewing short clips of moving traffic with multiple cars. Any potentially inappropriate remarks made during the narration, which were not objected to, were promptly addressed by the judge. Consequently, they were harmless considering the comprehensive evidence presented and the parties' arguments.

A. The pointing testimony was helpful to the jury to know which car to look at to evaluate the police's investigation and decide if it was, in fact, the same car in each clip that was involved in the shooting.

This Court has recently reaffirmed its acknowledgment that "there has been an explosive growth in the number of surveillance cameras in operation.'" State v. Knight, ___ N.J. Super. ___ (App. Div. 2023) (slip op. at 21) (quoting State v. Watson, 472 N.J. Super. 381, 472 (App. Div. 2022), rev'd on other grounds, 254 N.J. 558 (2023)). And like the facts here, "[p]olice investigations involve 'canvassing the surrounding neighborhood not just for potential suspects and eyewitnesses but also for public and privately-owned video cameras that may have captured a reported crime, the events leading up to it, or its aftermath (e.g., flight from the scene).'" Ibid. (quoting Watson, 472 N.J. Super. at 471). And as a result, "such recordings have become a staple of criminal trials." Ibid. (quoting Watson, 472 N.J. Super. at 471). The footage presented in this case resulted from the police employing that precise canvassing method.

Rule 701 has two requirements. The first prong, known as the 'perception' prong, requires that a witness's "testimony . . . be based on the witness's 'perception,' which 'rests on the acquisition of knowledge through the use of one's sense of touch, taste, sight, smell or hearing.'" State v. Higgs, 253 N.J. 330, 363 (2023) (omission in original) (citation omitted). The second

prong, known as the "helpfulness" prong, limits lay opinion testimony "to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Ibid. (citation omitted). But "Rule 701 'does not require that the lay witness have "superior" ability or 'offer something that the jury does not possess.'" Watson, 254 N.J. at 593 (quoting State v. Singh, 245 N.J. 1, 19 (2021).

On August 2, 2023, the Supreme Court decided two cases offering guidance on the presentation of video surveillance to juries and establishing a structure for an officer's testimony introducing the footage to comply with Rule 701. The Court acknowledged that "it is not reasonable to expect that jurors can perceive and understand all parts of a complex incident, or even a fleeting gesture in a simple scene, that is depicted in a video." Thus, it created a "framework to assess video narration evidence by a witness who did not observe events in real time" under Rules 701, 602, and 403. Id. at 600.

The Court settled that "an investigator who has carefully reviewed a video recording can satisfy the 'perception' prongs under N.J.R.E. 701 and 602 and the 'helpfulness' prong under N.J.R.E. 701 and offer lay witness testimony." Id. at 569. While "it is for the jury to determine what a recording depicts, there are times when narration testimony can help jurors better understand video evidence and aid them in 'determining a fact in issue." Id. at

601 (quoting N.J.R.E 701(b)).

The Court noted that "[e]ven with short videos, jurors might miss a small or nuanced detail." Id. at 601. And in those instances, "[a]n investigator who has carefully analyzed a video can draw a jury's attention to particular spots can be quite helpful to the finder of fact.'" Ibid. (quoting Watson, 472 N.J. Super. at 465). The pointing testimony allows the jury to then "make its own evaluation." Ibid. (quoting Watson, 472 N.J. Super. at 465). In fact, the Court found that "[d]espite the brevity of the recording" it was "appropriate to draw attention to the split second when the suspect used his elbow to open the outer door—a point that might otherwise have been missed." Id. at 608.

Recognizing that an investigator who didn't witness the crime can appropriately testify under Rule 701 about recordings they reviewed, the Court established guidelines to prevent the testimony from exceeding the observations derived solely from watching the footage and encroaching upon the jury's role as the factfinder. See id. at 602-04. Under that framework, an officer whose knowledge is based solely on viewing the recording of an event cannot: present (1) "continuous commentary," (2) "subjective interpretations," (3) personal views on 'factual issues that are reasonably disputed," or (4) observations of what "is depicted in a video based on inferences or deductions, including any drawn from other evidence." Id. at 604

But "investigators can describe what appears on a recording about the

content" such as "objective, factual comments[.]" Id. at 603. As an example, the Court said that "an investigator who carefully reviewed a video in advance could draw attention to a distinctive shirt or a particular style of car that appear in different frames, which a jury might otherwise overlook." Id. at 604. The Court also stated that State v. Allen, 254 N.J. 530 (2023), decided the same day, "provides additional examples of what narration evidence may and may not include." Id. at 604. There, the Court found the detective's narration testimony "about how parts of the video helped him 'locate areas of interest for his processing of the crime scene" was proper. Id. at 605 (quoting Allen, 254 N.J. at 539).

The testimony in Allen, which explained the police's use of surveillance footage in their investigation of the crime scene, is analogous to the use of the surveillance evidence presented here. In Allen, "[m]ost of the detective's narration focused on his use of the video as he investigated the crime scene." 254 N.J. at 535, 548. The officer "explained how he used the video to identify areas that he considered likely to contain evidence relevant to his investigation" and that "he focused on locations in which the surveillance video captured muzzle flashes." Id. at 548. The Court said the "explanation of the manner in which the surveillance video informed his processing of the crime scene did not invade the jury's province." Id. at 548. Instead, his testimony represented two types of admissible testimony: (1) fact testimony

from a forensic investigator about the steps he took at the crime scene, and (2) testimony rationally based on the witness's perception and helpful to the trier of fact. Ibid.

Detective Rodriguez offered both factual testimony detailing the investigative steps she undertook regarding the "vehicle of interest" and testimony regarding her perception from reviewing numerous and extensive videos. This testimony benefited the jury in their analysis of the same videos. Hence, it is crucial to delineate Detective Rodriguez's testimony for its content, what it did not entail, and the sequence in which the jury received the information. First, it was not the testimony of an investigator saying, "'that's the same blue car,'" but rather, was testimony giving the jury the tools it needed to make that conclusion by explaining the police's investigation of the "vehicle of interest" and which car to look at. Watson, 254 N.J at 604. After Rodriguez pointed out which car to look at, it was up to the jury to determine whether the car in each clip was the same. They then had to decide if that particular car was present at the shooting and, ultimately, if defendant was the individual in the car at the time of the shooting. See People v Brown, 82 N.E.3d 148, 167 (Ill. App. Ct. 2017) (finding detective's testimony about interactions and movements of specific individuals in parking lot footage helpful to jury by focusing on relevant actions, considering distance of faces and outdoor winter clothing concealing identities).

When introducing the surveillance videos, Detective Rodriguez explained that when a homicide occurs, police "canvass in the area of the homicide, and [then] expand." The canvassing includes "video canvassing or canvassing for any witnesses that may have information." (4T147-10 to 15). In this case, the police received more than thirty videos, which took "weeks to months to get." (4T147-16 to 22). The footage came from mostly "residential homes, [and] commercial businesses." (4T148-1 to 3). To get the footage from homeowners, Rodriguez needed to ascertain whether they were tenants or homeowners. For commercial businesses, the police attempted to contact the manager and landlord, scheduling appointments as necessary. (4T148-7 to 12). And the footage from the New Jersey Turnpike had to be subpoenaed. (4T13-1 to 6).

The videos presented to the jury did not encompass all the footage obtained from every location; instead, they were a relevant selection from the footage received. (4T155-3 to 17). Detective Rodriguez specified that for each video collected by the police, they "gathered an average of two hours" and would scrutinize the footage to identify any evidence related to the homicide. (4T155-19 to 23). She reviewed each video five "or more" times. (5T218-17 to 25). Irrelevant portions of the videos were kept out of the clips. (4T156-2 to 6). Then, she put the videos into chronological order. (5T231-19 to 232-1).

After collecting several pieces of video surveillance, the police could trace a route the vehicle had traveled. The fifty clips, State exhibits S-1 to S-50, illustrated the route formed by the police using timestamps and locations. (4T152-15 to 22). The prosecutor went through all fifty clips with Detective Rodriguez.

The first clip, sourced from the New Jersey Turnpike, depicted the car passing through the toll at Exit 13, with the driver paying the toll. This clip was presented without narration. (4T156-7 to 11; Da11:S-1). Rodriguez explained that the police expanded the surveillance while pursuing the "vehicle of interest," trying to trace the route taken by the car leading up to the homicide. (4T156-24 to 157-8). Clip two, played without narration, showed the same toll payment from inside the toll booth. (4T157-11 to 15; Da11:S-2).

The third clip was also presented without narration, and Detective Rodriguez explained that the reason the police collected the surveillance video was to track the movements of the Chevy Malibu. (4T161-18 to 23). The fourth clip was also played without narration, and Rodriguez stated again that the police "were following the vehicle of interest, which was the Malibu." (4T161-24 to 162-13; Da11:S-4).

As the rest of the clips played, Detective Rodriguez would point out when the Chevy Malibu appeared on the screen. These clips included footage from four-way intersections with numerous cars, traffic lights with multiple

cars, scenes where the roadway was not the primary focus, two-way streets with multiple cars moving in both directions, and multiple intersections. (4T166-21 to 167-3; Da11:S-9); (4T167-20 to 168-7; Da11: S-11); (4T168-25 to 169-11; Da11:S-14); (4T170-1 to 6; Da11: S-15); (4T170-12 to 17; Da11:S-16); (4T170-24 to 171-3; Da11: S-17); (4T171-4 to 10; Da11: S-18); (4T171-24 to 172-4; Da11; S-19) ;(4T172-9 to 11; Da11:S-20); (4T172-16 to 20; Da11: S-21); (4T173-2 to 4; Da11: S-22); (4T173-11 to 18; Da11: S-23); (4T174-3 to 6; Da11: S-24); (4T174-14 to 15; Da11: S-25); (4T174-22 to 23; Da11: S-26); (4T175-1 to 4; Da11: S-17); (4T175-12 to 15; Da11: S-28); (4T175-18 to 19; Da11: S-29); (4T176-2 to 5; Da11: S-30); (4T177-5 to 6; Da11: S-34); (4T177-14 to 15; Da11: S-36); (4T177-25 to 178-1; 4T178-17 to 24; Da11: S-37); (4T184-8 to 9; Da11: S-47).

During the presentation of clip thirty, Detective Rodriguez noted the significance of this location to her investigation. She highlighted the placement of the camera in other footage, the residences of witnesses interviewed by the police, and the recording location in relation to the crime scene. (4T179-11 to 181-12; Da11: S-39). Then, for clip forty, Rodriguez pointed out where the victim was found. (4T181-18 to 23; Da11: S-40). When clip forty-two was played, she directed the jury's attention to a new car that had not been featured in the preceding forty-one clips. This car belonged to Alexander, who had earlier described for the jury both his vehicle and his

attempt to follow the fleeing Chevy Malibu. (4T183-2 to 9; Da11: S-42).

To provide context to the narration testimony in this case, within the State's case-in-chief, out of fifty clips presented, twenty-three were played without any narration or testimony from Detective Rodriguez, except for indicating the camera's location or the source of the footage. Another twenty-three were shown, with Rodriguez's sole testimony pointing out the specific car to look at among multiple cars. Throughout this testimony, there were no objections from defendant.

Moreover, the questions posed by the defendant during cross-examination underscore that Detective Rodriguez's testimony clarified the investigation, outlining how the police constructed the route and timeline. Defendant, attempting to show the jury that the police rushed to judgment, questioned Rodriguez about the police's belief that the "vehicle of interest" went from the turnpike to the scene of the crime without stopping. (5T207-25 to 208-8; 5T210-23 to 211-1). In her response, Rodriguez acknowledged they were assembling the travel route as surveillance from their canvassing arrived. She clarified that she could not rule out the possibility of the car making stops after leaving the turnpike because they were still investigating other areas and did not have enough videos to make a definite determination. (5T207-25 to 208-6; 5T233-23 to 234-2). Rodriguez noted that the police received all the surveillance footage by August 15, and the complaint against defendant was

not filed until August 28. (5T249-13 to 250-5).

Detective Rodriguez's narration played a crucial role in assisting the jury in making their ultimate decision of the car's identity. By explaining which car the police were tracking in each clip, her guidance enabled the jury to piece together and comprehend the sequence of events more effectively. Without her narration, identifying and evaluating the relevant car would have been significantly more challenging for the jury, hindering their ability to decide whether it was indeed the same car.

B. Any identification testimony from Detective Rodriguez either occurred after the jury had already heard that defendant was identified in the same footage by his girlfriend or was immediately cured by the judge.

Among the fifty clips presented, Detective Rodriguez identified defendant as the person in the clip on only two occasions. While explaining the investigation and the video compilation process, she mentioned noticing defendant and his girlfriend at a particular location. The second identification occurred during redirect-examination, expressing her belief that the individual in the video was defendant. Considering the court's instructions emphasizing the jury's role in evaluating the identification, these two instances among the fifty clips do not rise to the level of plain error.

Clip twelve was taken from a residence on 705 3rd Avenue. (4T168-8 to 10). The police obtained the footage from that location on August 15, 2019,

after receiving all other footage tracking the "vehicle of interest," apart from the turnpike footage. (4T185-4 to 10; 4T186-10 to 13). When clip twelve was played, Detective Rodriguez explained that in this clip, police could see "defendant and Ms. Maiorano." (4T168-14 to 18). But the jury had already heard that Rachel identified herself and defendant from a still image extracted from this footage. (3T96-22 to 98-1; Da23). Clip thirteen was taken from the same location and showed an individual walking back from where Rachel and defendant had gone. This clip was played without narration. (4T168-19 to 24; Da11:S-13). Thus, the only testimony Rodriguez made identifying defendant from that location came after defendant's girlfriend already identified him to the jury in the still from the clip.

During cross-examination, defendant sought to downplay Detective Rodriguez's examination of the surveillance footage. Initially, he had Rodriguez concede that she reviewed the footage on an approximately eight-or-ten inch screen, significantly smaller than the screen in the courtroom. (5T217-24 to 218-16). Then he asked Rodriguez if any of the footage she reviewed showed the individual in a hoodie that the State alleged was the shooter. (5T238-8 to 10). When she responded it did, he asked her which clip had the best view of the person and from what distance. (5T238-11 to 15). She told him that the best view of the suspect was in clip thirty-nine, and the person was probably thirty feet away. (5T238-16 to 239-2). Defendant then

played the clip and asked Rodriguez to stop the clip when she had the best view and to point at the shooter. (5T239-5 to 19). When the purported shooter was visible, defendant prompted Rodriguez to estimate the portion of the screen occupied by the best view of the person. She responded that the person took up approximately two inches of the screen. (5T239-20 to 240-5). Defendant did the same thing for clip thirty-seven. (5T240-21 to 241-3). This time, Rodriguez said that the person took up less than an inch of the screen, and defendant reiterated that when reviewing the footage, Rodriguez had examined a screen smaller than the one in the courtroom. (5T241-4 to 11).

In response to the defendant's line of questioning during re-direct, the prosecutor inquired if there was any other surveillance footage showing the "individual." This time, Detective Rodriguez pointed out clip thirty-eight. (5T245-8 to 246-8). The clip was played, and Rodriguez pointed out the person she was referring to and stated her "belie[f]" that the person was defendant. (5T246-10 to 24). Defendant did not object, but before the prosecutor could ask her next question, Judge Deitch issued a curative instruction telling the jury that the determination of whether defendant was in the video was their determination to make:

> You just heard the detective's opinion as the person who's worked on the case. Ladies and gentlemen, whether or not that is or is not the defendant is a question for you to answer. That's something that you have to decide independently yourself based upon all

information that is presented in this case.

[(5T247-4 to 9).]

The judge correctly gave this instruction because Detective Rodriguez was not familiar with defendant. See e.g. State v. Sanchez, 247 N.J. 450 (2021) (holding parole officer's identification of defendant in a photograph was proper given parole officer's many in-person meetings with the defendant); State v. Lazo, 209 N.J. 9 (2012) (excluding officer's testimony about including defendant's photo in array because Lazo's similarities to suspect, because officer was unfamiliar with defendant).

And because this stray comment was quickly corrected by the judge, it did not prejudice defendant. In Singh, "the officer's reference to the suspect in the video as 'the defendant' was improper in light of the dispute about the identity of the suspect," but because the reference was "fleeting," it did not amount to plain error. Allen, 254 N.J. at 545 (quoting Singh, 245 N.J. at 17-18). "In assessing whether an error is harmless or requires reversal, [courts] 'determine whether the error was 'of such a nature as to have been clearly capable of producing an unjust result.'" Allen, 254 N.J. at 549 (quoting State v. Trinidad, 241 N.J. 425, 451 (2020)). To be clearly capable of producing an unjust result means the error "led the jury to a result it otherwise might not have reached." Ibid. (quoting Mandel, N.J. Appellate Practice § 34:3-2 (2023).

Here, the reference to defendant was one fleeting comment immediately

corrected by the judge. And "[o]ne of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions." State v. Burns, 192 N.J. 312, 335 (2007). Thus, the passing remark did not amount to plain error. And the two comments made among the fifty clips played did not sway the jury to reach a verdict it might not have otherwise reached. Before these comments, the defendant's girlfriend had already identified him in the same video. Furthermore, Judge Deitch promptly instructed the jury that, despite Rodriguez giving her opinion on the identity of the person in clip thirty-eight, the ultimate decision rested with them to determine whether it was the defendant. Thus, this Court should find Rodriguez's testimony did not lead to unjust result.

POINT II

THE JURY WAS PROPERLY INSTRUCTED THAT THE STATE HAD TO PROVE DEFENDANT WAS THE ONE WHO COMMITTED THE CRIMES BEYOND A REASONABLE DOUBT.

Taking the jury charge as a whole and considering the arguments presented by counsel, the jurors were appropriately guided in determining whether defendant was responsible for Carlos's death. The instructions explicitly outlined that the State carried the burden of proving the defendant's guilt beyond a reasonable doubt. Consequently, the omission of a specific third-party guilt charge, in the absence of a request for that instruction by defendant was not capable of producing an unjust result. R. 2:10-2.

"Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial. The trial court has an absolute duty to instruct the jury on the law governing the facts of the case." State v. Concepcion, 111 N.J. 373, 379 (1988). Thus, "an appellate court must first 'determine whether the trial court erred' and, if so, must proceed to determine 'if the mistake was clearly capable of producing an unjust result such that a reasonable doubt is raised as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Canfield, 470 N.J. Super. 234, 269 (App. Div. 2022), aff'd as modified, 252 N.J. 497 (2023) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)). But the review is not done "in isolation

[of] those statements alleged to be obscure or ambiguous, but looks to the charge as a whole.'" Concepcion, 111 N.J. at 376 (quoting State v. Freeman, 64 N.J. 66, 69 (1973)).

"Where there is a failure to object, it may be presumed that the instructions were adequate." State v. Morais, 359 N.J. Super. 123, 134-35 (App. Div. 2003). Thus, "[w]hen a defendant fails to object to an error or omission at trial, [appellate courts] review for plain error." State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2). When applied to jury instructions, "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Belliard, 415 N.J. Super. 51, 66 (App. Div. 2010) (quoting State v. Hock, 54 N.J. 526, 538 (1969)).

In State v. Cotto, regarding a failure to provide an identification charge, the Supreme Court noted that "the trial court instructed the jury on the State's burden of proving beyond a reasonable doubt that defendant was the individual that committed the crime." 182 N.J. 316, 326–27 (2005). Thus, the instruction given in that case "emphasize[d] the same common denominator: the State bears the burden of proving beyond a reasonable doubt that the defendant is the wrongdoer." Id. at 327. As a result, the Court found [a]lthough the court .

. . did not use the word "identification" in charging the jury, and could have given a more detailed instruction, it nonetheless clearly explained the State's burden to the jury," and there was no error "much less plain error, when it instructed the jury on identification." Ibid.

Here, defendant did not request a third-party guilt instruction and has not met his burden of demonstrating that the absence of this charge possessed a clear capacity to bring about an unjust result. Judge Deitch's charge, as a whole, adequately assured defendant a fair trial in which the jury was obligated to determine, by proof beyond a reasonable doubt, that defendant was the person who shot Carlos.

Opening jury instructions were not included in the transcripts provided. Still, during final jury instructions, Judge Deitch explained that "[t]he burden of proving each element of the charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant." (7T97-15 to 20). He essentially informed the jury of third-party guilt when he explained to the jury that "[defendant] as part of his general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense." (7T107-9 to 13). And that the "burden of proving the identity of the person who committed the crime is upon the State." (7T107-13 to 15). Thus, to find defendant guilty, he explained the State "must prove beyond a reasonable doubt that this person

is the person who committed the crime." (7T107-15 to 17). Specifically, the judge instructed that the jury "must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that [defendant] is the person who committed it." (7T107-21 to 25). And "[i]f, after considering all of the evidence, you determine that the State has not proven beyond a reasonable doubt that the defendant was the person who committed this offense, then you must find him not guilty." (7T113-12 to 16).

Read as a whole, the jury instruction repeatedly informed the jurors they could convict defendant only if the State had established beyond a reasonable doubt that defendant was, in fact, the person who shot Carlos. A third-party guilt charge essentially serves to underscore these broader instructions provided to jurors, emphasizing that the State consistently bears the burden of proof in a criminal trial, and the defense is not obligated to prove anything or present evidence. See Model Jury Charges (Criminal), "Third Party Guilt Charge" (approved Mar. 9, 2015). Those specific instructions were given to the jury in this case. Hence, even if this court determined that not providing the third-party guilt charge was an error, the comprehensive instructions explicitly informed the jury about the State's responsibility to prove that

defendant was indeed the person who committed the crimes. There was thus no error, let alone plain error.

Furthermore, the defendant explicitly presented the third-party guilt theory to the jury by consistently emphasizing that Darrion Pierce should have been considered a suspect throughout the trial. "Although arguments of counsel can by no means serve as a substitute for instructions by the court the prejudicial effect of an omitted instruction must be evaluated 'in light of the totality of the circumstances—including all the instructions to the jury, and the arguments of counsel.'" State v. Marshall, 123 N.J. 1, 145 (1991) (quoting Kentucky v. Whorton, 441 U.S. 786, 789 (1979) (citation omitted)).

The focus of defendant's theory at trial was that police conducted substandard work, concentrating on the wrong individual. He consistently contended that the police overlooked eyewitness testimony indicating the shooter was black and that an individual fitting that description was associated with the "vehicle of interest."

In his opening, defendant stated that the State's "whole case is based on guesswork and speculation" and that "there will be evidence in the case that other people have driven that car," but the State was arguing that it "can prove to you beyond a reasonable doubt that that person, who nobody can identify as [defendant] is the one who entered the vehicle." (2T14-24 to 15-5).

Defendant emphasized that the police "ignored the fact that one of their own eyewitnesses had made a 9-1-1 phone call at the time of it and when asked to describe the person who did the shooting said it was a black individual." (2T12-23 to 13-3). And he highlighted that the police ignored that several days after the shooting, "the police stopped the very car that they're saying was the get-away vehicle in New York City," and defendant was not in the vehicle, but the driver of the "that car was a black individual named Darrion Pierce." (2T13-4 to 13). Then, on cross-examination, defendant asked several witnesses about the shooter being described as a black male, including Officer George Tovar, Quashana Epps, and Detective Rodriguez. (2T31-19 to 21; 3T35-4 to 7; 5T254-15 to 256-19). But even with the knowledge that Darrion was pulled over in the car of interest and matched the description of a black male, the police did not interview him until two to three weeks before the trial. (4T199-1 to 200-18). He repeated these arguments in his closing, emphasizing Darrion's connection to the car. (7T58-11 to 59-8).

Defendant's arguments during the trial argued that Darrion Pierce better matched the description provided by eyewitnesses. This, coupled with the court's detailed instructions, effectively conveyed to the jury their responsibility to find the defendant guilty only if they were convinced beyond a reasonable doubt that he was the shooter.

POINT III

DEFENDANT RECEIVED A FAIR TRIAL, AND THERE WERE NO CUMULATIVE ERRORS TO WARRANT A NEW ONE.

"When legal errors cumulatively render a trial unfair, the Constitution requires a new trial." State v. Weaver, 219 N.J. 131, 155 (2014). "[T]he predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair." State v. Wakefield, 190 N.J. 397, 538 (2007). "If a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." State v. T.J.M., 220 N.J. 220, 238 (2015) (quoting Weaver, 219 N.J. at 155).

As discussed, defendant has not demonstrated any prejudicial error that occurred at trial. The principle of cumulative error, thus, does not apply here.

POINT IV

JUDGE DEITCH PROPERLY SENTENCED DEFENDANT FOR THE MURDER OF CARLOS RODRIGUEZ BASED ON AN APPROPRIATE WEIGHING OF THE AGGRAVATING AND MITIGATING FACTORS.

Appellate review of sentencing is deferential[.]" State v. Case, 220 N.J. 49, 65 (2014). "[A]n appellate court should not second-guess a trial court's finding of sufficient facts to support an aggravating or mitigating factor if that finding is supported by substantial evidence in the record." State v. O'Donnell, 117 N.J. 210, 216 (1989). A sentence should then be affirmed 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)).

"[F]indings of any aggravating or mitigating 'factor must be supported by competent, credible evidence in the record' to ensure that a defendant is not sentenced based on '[s]peculation and suspicion.'" Rivera, 249 N.J. at 302 (quoting Case, 220 N.J. at 64). The State agrees that "a defendant's refusal to acknowledge guilt following a conviction is generally not a germane factor in

the sentencing decision." State v. Marks, 201 N.J. Super. 514, 540 (App. Div. 1985). But lack of remorse is a proper consideration in finding aggravating factor three—risk that the defendant will commit another offense. See Rivera, 249 N.J. at 300; N.J.S.A. 2C:44-1(a)(3). It was also correct to consider defendant's lack of remorse since it was not the sole justification for the judge's application of aggravating factor three. See Marks, 201 N.J. Super. at 540 ("[T]he trial judge's brief allusion to [the] defendant's failure to candidly admit his guilt does not require a reversal").

First, Judge Deitch merged defendant's conviction for possession of a weapon for an unlawful purpose, count two, into the murder charge, count one. (9T20-5 to 9). Then, he noted that he found aggravating factors three, six, and nine, along with mitigating factor fourteen. (9T20-12 to 14). Judge Deitch then went through his findings for each factor.

Regarding aggravating factor three, N.J.S.A. 2C:44–1(a)(3) (risk of defendant committing another offense), Judge Deitch noted that defendant had "not shown a scintilla of remorse for his actions." (9T20-20 to 21-3). But he stated that he was "independently" finding aggravating factor three, "because [defendant] has an extensive juvenile record." He gave it substantial weight "because it evinces . . . in him an ingrained disregard for the law starting an at early age." (9T21-4 to 6; 9T21-15 to 17). He also gave defendant's "chronic unemployment" moderate weight, noting that "it appears [defendant] has no

legitimate means of supporting himself and is involved in criminal activities to support himself." (9T21-18 to 23). Thus, defendant's lack of remorse was only one consideration of Judge Deitch in finding aggravating factor three applied. And the State's request for a finding of lack of remorse did not stem solely from defendant maintaining his innocence but also because he refused to come to sentencing twice, despite family coming from out of state. (9T13-13 to 14-4). Defendant also agreed greed that aggravating factors three and nine were present. (9T6-1 to 4). As a result, there was no error in finding that factor.

Judge Deitch gave substantial weight to aggravating factor six, N.J.S.A. 2C:44-1(a)(6) (extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted), "as it appears that the defendant has been involved in significant criminal activities for a substantial period of time." (9T22-13 to 16). He then gave moderate weight to aggravating factor nine, N.J.S.A. 2C:44–1(a)(9) (the need for deterring the defendant and others from violating the law), "because there is without a question the need to deter [defendant] from engaging in criminal behavior and deter others similarly situated." (9T22-17 to 21).

Judge Deitch gave "minuscule weight" to mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), the defendant was under 26 years of age at the time of the commission of the offense, noting that defendant "was certainly entitled

to it because he was under the age of 26 at the time of this event" but acknowledged that "he was three months away from being 26 years of age." . . . (9T22-22 to 23-10). But when determining the overall length of the sentence, Judge Deitch considered his age and its potential impact on the sentence. (9T23-11 to 16). As a result, defendant received proper consideration of his age during sentencing, and there was no error.

Ultimately, Judge Deitch found that the aggravating factors "preponderate[d] over the mitigating factors." (9T24-2 to 14). Thus, for count one, Judge Deitch properly sentenced defendant to fifty-five years in a New Jersey State Prison subject to NERA, and for count three, an eight-year concurrent State Prison term with forty-eight months of parole ineligibility under the Graves Act. (9T24-15 to 25-6). This sentence represented a fair balancing of the aggravating and mitigating factors.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to affirm defendant's convictions and sentence.

Respectfully submitted,

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LETTER REPLY ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0692-22
Indictment No. 19-12-00794-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From A Judgment Of Conviction Entered In
v.	:	The Superior Court, Law Division, Union County.
ANTHONY RECIOFIGUEROA,	:	
Defendant-Appellant.	:	Sat Below: Hon. John M. Deitch, J.S.C., and a jury.
	:	DEFENDANT IS CONFINED

Honorable Judges:

This letter is submitted in lieu of a formal reply brief pursuant to R. 2:6-2(b).

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant Anthony RecioFigueroa relies on the procedural history and statement of facts set forth in his opening brief.[1]

LEGAL ARGUMENT

Mr. RecioFigueroa relies on his appellate briefing already submitted in this matter, as well as the following, in response to a few specific arguments made by the State in its response brief.

POINT I

THE DETECTIVE'S NARRATION TESTMIONY WAS ESSENTIAL TO THE STATE'S CASE, IT WAS BASED UPON INFERENCES, AND IT PROVIDED HER OPINION AS TO DISPUTED FACTS. ACCORDINGLY, HER ESSENTIAL TESTIMONY VIOLATED FACTORS THREE AND FOUR OF WATSON, DEPRIVING DEFENDANT OF A FAIR TRIAL, AND REQUIRING REVERSAL OF HIS CONVICTIONS.

The State agrees that lead detective Sonia Rodriguez did not witness any of the actual events depicted on camera, and therefore qualified as an "investigator" for purposes of providing narration testimony as defined under State v. Watson, 254 N.J. 558 (2023). (Sb13 – 15) Accordingly, Rodriguez was

[1] Db = defendant's appellant brief
Dra = defendant's reply brief appendix
Sb = State's respondent brief

only permitted to provide narration testimony if her testimony fell within the limitations as defined under Watson. Id. at 603-604. Namely, Rodriguez was prohibited from providing narration testimony concerning the surveillance videos that presented (1) "continuous commentary," (2) "subjective interpretations," (3) personal "views on factual issues that are reasonably disputed" or (4) beliefs about what is "depicted in a video based on inferences or deductions, including any drawn from other evidence." Ibid. (Sb13)

As Defendant-Appellant RecioFigueroa argued in his original briefing, Rodriguez's testimony violated factor three under Watson by routinely identifying "the shooter" and the Chevy in surveillance videos that were blurry, pixelated, and unclear. (Db19-28) These videos – many of which were essential to the State's case – were too blurry to reliably discern any of the images on screen, making Rodriguez's identification of the shooter and the Chevy reasonably disputed. (Db21-25) And Rodriguez's testimony for those blurry videos likewise violated factor four under Watson. Id. at 604. Rodriguez had not witnessed any of the events on video firsthand, and she had no prior knowledge of the shooter or Mr. RecioFigueroa. (Db19) Accordingly, her testimony describing the images on the unclear videos must have been based upon inferences she drew from other facts in evidence. Namely, that the light-colored image on the screen depicted the person observed wearing grey near the victim,

and that such person was, in fact, the shooter. (Db21) Such narration testimony is prohibited by factor four of Watson. 249 N.J. at 604.

The State does not rebut the fact that Rodriguez's narration testimony was based upon inferences from other facts in evidence. Nor does the State rebut that Rodriguez testified as to issues that were reasonably in dispute. Instead, the State offers an all-together different characterization of Rodriguez's narration testimony. According to the State, Rodriguez's statements were analogous to the narration testimony at issue in State v. Allen, 254 N.J. 530 (2023). There, the Supreme Court found that a police officer's narration testimony was admissible only where it was limited to the purpose of explaining "the manner in which the surveillance video informed his processing of the crime scene," such as his explanation that he relied on the video to try and find empty cartridges at the crime scene itself. Id. at 548. In drawing an analogy to Allen, the State argues that Detective Rodriguez's narration testimony was likewise offered for the purpose of "detailing the investigative steps she undertook regarding the 'vehicle of interest.'" (Sb 15) Rodriguez's discussion of the overall investigation, according to the State, happened to include "testimony regarding her perception from reviewing numerous and extensive videos." (Sb15)

Contrary to the State's argument, however, Detective Rodriguez's narration testimony went far beyond the limited narration testimony deemed

lawful in Allen. The State's reliance on Allen does not include discussion of the Court's finding that part of the narration testimony at issue was in fact violative of Watson. Specifically, the Court found that even though the officer's testimony was offered for a legitimate purpose – explaining how the surveillance informed his investigation – it was nonetheless inadmissible where it presented the officer's opinion on a disputed fact. 254 N.J. at 548-49.

It was thus proper for the officer to explain that he looked for muzzle flashes on screen in order to find ballistic evidence, but it was improper for the officer to testify that: the "'white blip' on the video indicated 'the defendant firing the handgun'; that a particular frame depicted the suspect 'turning towards the officer;' that another view of the first muzzle flash showed 'where the suspect has turned and discharged the first round'; and that the video showed 'where [the suspect] was standing when he fired the round.'" Ibid. The key fact that made this latter testimony improper was that, in each, the officer had opined on a disputed fact: because the officer had no firsthand knowledge of the events on screen, and because the actions of the defendant were in dispute, it was improper for the officer to testify "in support of the State's position as to sharply disputed facts." Id. at 549 (emphasis added).

A generic example from Watson further illustrates this distinction. An investigator is permitted to "draw a jury's attention to particular spots[.]"

Watson, 254 N.J. at 601. An investigator can, for example, "draw attention to a distinctive shirt or a particular style of car that appear[s] in different frames[.]" Id. at 604. However, such objective "drawing attention" testimony becomes improper as soon as it provides the officer's opinion as to a disputed fact, or renders a belief based upon an inference drawn from other facts in evidence. An investigator is thus prohibited from saying "'that's the same blue car'" or 'that's the defendant,' if those facts were disputed." Ibid.

As argued in RecioFigueroa's original briefing, the question of what could or could not be seen on certain videos was highly disputed. (Db22 – 25) At trial, the State attempted to prove that videos S-37 through S-41 depicted the shooter parking the Chevy Malibu, exiting the car, walking to the scene of the shooting, and later returning. (Db10) And RecioFigueroa's defense counsel disputed the State's characterization, challenging Rodriguez's ability to reliably identify anything on a video that was so unclear and blurry. (5T241-4 to 244-15) The question of what those videos actually depicted, and whether the video depicted the Chevy, the shooter, or Mr. RecioFigueroa were thus all "sharply disputed" facts. Allen, 254 N.J. at 549. Accordingly, Detective Rodriguez was prohibited from providing testimony that presented her opinion as to any of these facts. Ibid. Despite this prohibition, she did just that.

As the State summarized it, in nearly half of the 50 surveillance videos, Rodriguez "would point out when the Chevy Malibu appeared on screen" as part of her explanation of the police investigation into the "vehicle of interest." (Sb17 -19) Because many of the videos were too blurry to discern the images on screen, whether the Chevy was, in fact, on screen was in dispute. It was thus precisely the type of testimony the Court deemed inadmissible in Watson, prohibiting an "an investigator [from] say[ing] 'that's the same blue car," on screen, when that fact is disputed. Watson, 254 N.J. at 604 (emphasis added) And, contrary to the State's argument, this inadmissible testimony cannot be redeemed by the mere fact that it involved discussion of the broader investigative context. As the Court held in Allen, narration testimony is improper wherever it provides an opinion as to a disputed fact or is based upon an inference, regardless of whether it was otherwise offered for a lawful purpose. 254 N.J. at 548-49. Rodriguez clearly opined upon a disputed fact by identifying the Chevy in unclear videos. Such identification testimony violated Watson factor three, and was therefore improper.

As for Rodriguez's testimony identifying both the shooter and Mr. RecioFigueroa on screen, the State does not directly dispute RecioFigueroa's argument that such comments violated Watson. Rather, the State argues that any "potentially inappropriate remarks" from Rodriguez constituted only harmless

error because they were followed by corrective instructions from the trial court. (Sb10, 20-24) However, only one of the numerous improper identifications was addressed by the Court, following video S-38. For the remainder of the videos where Rodriguez identified the shooter, there was no corrective instruction. As discussed in RecioFigueroa's original briefing, several of those videos – S-37, S-39, and S-41 – were critical to the State's case. (Db10) Video S-37 in particular was essential because it was the only video that purported to show the shooter entering and exiting the Chevy. (Db26) The court provided no corrective instruction when Rodriguez explained that she was pointing to the portion of S-37 that showed "the individual getting out of the vehicle…wh[om I] believe to be the shooter. (5T245-3 to 22) That fact was in dispute, and could only have been based upon an inference drawn from other facts in evidence, in violation of Watson factors three and four. (Db20-22)

And because there were significant evidentiary gaps in the State's case, Rodriguez's uncorrected, improper narration testimony constituted plain error requiring reversal. As discussed, the State offered no firearm, no motive, and no eyewitness to the shooting itself, and the only consistent description of the suspected shooter was that he wore some type of gray clothing. (Db25 – 26) Accordingly, the video footage was needed in order to fill these evidentiary gaps by purporting to connect the shooter to the Chevy Malibu. But even then, the

video was too blurry and indistinct for it to speak for itself. The State thus needed Rodriguez to provide her own interpretation of the video: that it showed the shooter exiting the Chevy. Because the detective's interpretation of the video was both essential to the case and improperly admitted, it deprived RecioFigueroa of a fair trial, requiring reversal.

POINT II

THE TRIAL COURT'S GENERAL INSTRUCTIONS FAILED TO PROVIDE THE JURY WITH THE SPECIFIC INSTRUCTIONS REQUIRED BY THE THIRD-PARTY GUILT MODEL JURY CHARGE. THIS OMISSION CONSTITUTED PLAIN ERROR.

The State agrees that RecioFigueroa's trial strategy relied in substantial part on his argument that a third party – a man named Darrion Pierce – may have been the person who actually committed the shooting. (Sb29 – 30) Accordingly, third-party guilt was a material issue in the case, and the court was required to provide proper instruction to the jury as to how they ought to consider the possibility of Pierce's guilt when weighing the strength of the State's evidence. State v. Green, 86 N.J. 281, 288 (1981) ("The trial court's instructions should cover all essentials and counsel may justifiably assume that fundamental matters will be covered in the charge."); State v. Collier, 90 N.J. 117, 122-23 (1982) (holding that inaccurate or incomplete charges on a material issue "are presumed to be reversible error"). The trial court, however, failed to provide the jury with the model jury charge governing "Third Party Guilt." See Model Jury Charges (Criminal), "Third Party Guilt Jury Charge" (approved Mar. 9, 2015). (Dra1) That model charge contains specific instructions as to the question of third-party guilt which are not included in any other instruction. Accordingly, the jury was

not sufficiently charged on a material issue, requiring reversal. Collier, 90 N.J. at 122-23.

The State does not dispute that the jury was required to receive adequate instruction as to how to interpret RecioFigueroa's defense raising the possibility that Darrion Pierce had been the shooter. Rather, the State argues that, even though the jury did not receive the Third-Party Guilt model charge, it was nonetheless adequately instructed by the trial court's generic instructions. Specifically, the State argues that the jury received all the guidance it needed for third-party guilt when the court instructed them that the "burden of proving the identity of the person who committed the crime is upon the State" and that the State must prove beyond a reasonable doubt that RecioFigueroa "is the person who committed" the crime. (Sb27-28)

In support of this argument, the State cites to State v. Cotto, where the Supreme Court held that although a jury was not provided with the model jury charge on "identification" they nonetheless had received sufficient instruction through the court's generic jury instructions. 182 N.J. 316, 326-27 (2005). (Sb26) Specfifically, the omitted model jury charge and the given generic instructions both "emphasize[d] the same common denominator: the State bears the burden of proving beyond a reasonable doubt that the defendant is the wrongdoer." Id. at 327. The Court thus found that the failure to provide the

model "identification" jury charge was rendered harmless by the nearly synonymous language included in the generic charge. Ibid.

The State's reliance on Cotto is misplaced for several reasons. First of all, Cotto was concerned only with the model jury charge on identification, not on third-party guilt. And quite unlike the centrality of Darrion Pierce in RecioFigueroa's case, the Court in Cotto excluded proffered evidence of third-party guilt, finding the proffered evidence to be speculative, and full of conjecture and hearsay. Id. at 332. Moreover, the opinion in Cotto predates the publication of the third-party guilt model jury instruction, which was first introduced in 2015 – ten years after Cotto was published.[2] The Supreme Court's finding in Cotto that the generic jury instructions were sufficient to instruct on the issue of identification thus has no bearing on the question of whether the generic jury instructions can sufficiently instruct a jury on the question of third-party guilt, particularly where that model charge did not even exist yet.

[2] The "Third Party Guilt Jury Charge" includes a note in the top-right corner that the instruction was "Approved 3/9/2015." (Dra 1) And in July of 2015, the Supreme Court Committee on Model Criminal Jury Charges issued a "Notice to the Bar" detailing all the recent changes to jury instructions. (Dra 2-3) (available at https://www.njcourts.gov/notices/notice-updates-model-criminal-jury-charges-and-criminal-sample-verdict-sheets-0). The notice lists "Third Party Guilt Jury Charge (3/9/15)" with an accompanying note, "This is a new charge." (Dra 2)

The Third-Party Guilt model charge provides significantly more guidance than a mere reiteration that the State bears the burden to prove that RecioFigueroa is the person that committed the crime. Specifically, the model charge puts the jury on notice that "the defendant contends that there is evidence before you indicating that someone other than he or she may have committed the crime or crimes, and that evidence raises a reasonable doubt with respect to the defendant's guilt." See Model Jury Charges (Criminal), "Third Party Guilt Jury Charge" (approved Mar. 9, 2015). (Dra1) The charge goes on to note that "[t]he defendant does not have to produce evidence that proves the guilt of another, but may rely on evidence that creates a reasonable doubt. In other words, there is no requirement that this evidence proves or even raises a strong probability that someone other than the defendant committed the crime. You must decide whether the State has proven the defendant's guilt beyond a reasonable doubt, not whether the other person or persons may have committed the crime(s)." Ibid. (Dra1)

These instructions go well beyond the State's summary of the model charge as simply "emphasizing that the State consistently bears the burden of proof in a criminal trial, and the defense is not obligated to prove anything or present evidence." (Sb28) First, the model charge explicitly calls attention to the fact that the defense is arguing that "someone other than [he] may have

committed the crime." (Dra1) The charge thus instructs the jury not only to be mindful of the State's burden in general, but how to understand that burden when applied to the specific context of a third-party guilt defense.

Second, the charge permits the jury to acquit the defendant based upon only limited evidence suggesting that a third-party committed the crime: even evidence that falls short of a "strong probability that someone other than the defendant committed the crime" can serve as the basis for an acquittal. That is a crucial detail that is not covered in the generic instructions. Phrased differently, there is no "common denominator" between the generic instructions that were given and the model jury charge on Third Party Guilt that was omitted – the model charge contains unique guidance not covered elsewhere.

The importance of the model charge can be illustrated through a potential confusion that the jury in RecioFigueroa's case may have experienced. When deliberating, the jury may have asked themselves: did the overall evidence provide a strong probability to believe that Darrion Pierce was the person who committed the crime? The jury could have found, hypothetically, that there was only a reasonable probability that Darrion Pierce was the one that committed the crime, but not a strong probability that he did so. With proper instruction from the model charge, the jury would have relied on this basis to acquit: the reasonable probability of Darrion Pierce's guilt constituted reasonable doubt as

to RecioFigueroa's guilt. Without proper instruction, however, the jury would not have known that they were permitted to acquit on such a basis. There was thus a substantial risk that they mistakenly believed that if the State's evidence did not prove Pierce's guilt beyond a reasonable doubt, then they could not acquit RecioFigueroa under the theory of third-party guilt. The model charge corrects for this potential misunderstanding. And nothing within the given instructions corrected for this misunderstanding.

And because, as the State has agreed, the possibility of Darrion Pierce's guilt played a substantial role in RecioFigueroa's defense strategy, the failure to instruct on third-party guilt constituted an incomplete instruction on a material issue. As RecioFigueroa argued at trial, there was, at the very least, a reasonable probability that Pierce was the one that committed the crime, perhaps even a strong probability that he did so. (7T57-18 to 58-25) All of the descriptions of the shooter provided immediately after the shooting described the suspect as a black man; many described him as tall; and all described him as wearing grey sweatpants. (Db37 – 40) Darrion Pierce is a 6'2" black man who was pulled over driving the "vehicle of interest" wearing "grey sweats." (Db37 – 40) The jury was never instructed that if they believed this evidence suggested even a reasonable probability of Pierce's guilt, they could acquit RecioFigueroa on that

basis. Because they were not properly instructed on this material issue, reversal is required. Collier, 90 N.J. at 122-23.

CONCLUSION

For the foregoing reasons, and the reasons stated in Mr. RecioFigueroa's initial brief, the convictions must be reversed. Alternatively, RecioFigueroa's sentence must be vacated and remanded for resentencing, for the reasons detailed in his original briefing.

Respectfully submitted,

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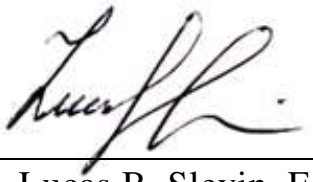
BY: 

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