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Date: May 31, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-941-22T1

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior
v.	:	Court of New Jersey, Law
	:	Division, Mercer County
HAMILTON MORGAN,	:	Ind. No. 19-07-0387
	:	
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Darlene J. Pereksta, J.S.C.,
	:	and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

TABLE OF CONTENTS

Page Nos.

PROCEDURAL HISTORY 1

STATEMENT OF FACTS 3

LEGAL ARGUMENT 12

POINT I

THE TRIAL JUDGE UNDULY RESTRICTED DEFENDANT'S DUE-PROCESS AND SIXTH-AMENDMENT-BASED RIGHT TO PRESENT A COMPLETE DEFENSE WHEN SHE: (1) EXCLUDED DEFENSE PHOTOS OF MUNICIPAL SURVEILLANCE CAMERAS ON ELLSWORTH AVENUE THAT POLICE SHOULD HAVE CHECKED IN THEIR INVESTIGATION, BECAUSE THE JUDGE INCORRECTLY BELIEVED THE PHOTOS WERE NOT PROPERLY AUTHENTICATED AND LACKED RELEVANCE, AND (2) PREVENTED DEFENSE COUNSEL FROM INTRODUCING PHOTOS OF ADJACENT PROPERTIES ON EDGEMERE AVENUE AND FROM ARGUING THAT THE ACTUAL PERPETRATOR COULD HAVE RUN THROUGH THOSE PROPERTIES ON THE WAY FROM ELLSWORTH TO EDGEMERE WHEN POLICE BRIEFLY LOST SIGHT OF HIM. (RULINGS AT 14T 115-3 TO 14; 14T 142-4 TO 6; 15T 11-4 TO 9; 15T 51-7 TO 53-19; 14T 142-6 TO 161-20) 12

POINT II

THE JUDGE COMMITTED REVERSIBLE ERROR BY REFUSING TO SUPPRESS STATEMENTS BY DEFENDANT THAT WERE MADE IN RESPONSE TO POLICE QUESTIONING THAT OCCURRED AFTER DEFENDANT HAD INVOKED HIS RIGHT TO SILENCE. (RULING AT 4T 16-4 TO 17-15)..... 22

POINT III

THE JUDGE ABUSED HER DISCRETION UNDER N.J.R.E. 609(B) WHEN SHE RULED THAT SIX PRIOR CONVICTIONS OF DEFENDANT'S -- THAT WERE ALL MORE THAN 18 YEARS OLD AND FOR WHICH THE SENTENCES HAD ALL BEEN SERVED FOR MORE THAN TEN YEARS -- WOULD BE ADMISSIBLE TO AFFECT DEFENDANT'S CREDIBILITY IF HE TESTIFIED. (RULING AT 14T 10-6 TO 11-24) 28

CONCLUSION 34

INDEX TO APPENDIX

Page Nos.

Indictment ..... Da 1 to 4

Verdict Sheet ..... Da 5 to 6

Judgment of Conviction ..... Da 7 to 9

Notice of Appeal ..... Da 10 to 13

As Within Time Order ..... Da 14

Transcript of Defendant's Interrogation ..... Da 15 to 19

Flash Drive Containing: Video of Defendant's Statement, Video From Surveillance Cameras, and Photos D-111, D-112, D-115, and D-116 Offered by Defense Into Evidence ..... Da 20

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Judgment of Conviction ..... Da 7 to 9

Rulings on Point I ..... 14T 115-3 to 14; 14T 142-4 to 6; 15T 11-4 to 9; 15T 51-7 to 53-9; 14T 142-6 to 161-20
Ruling on Point II ..... 4T 16-4 to 17-15

Ruling on Point III ..... 14T 10-6 to 11-24

TABLE OF TRANSCRIPTS

1T – motion dated 6/28/21
2T – motion dated 7/13/21
3T – motion dated 7/14/21
4T – motion dated 7/26/21
5T – jury selection dated 7/28/21
6T – jury selection dated 7/29/21
7T – jury selection dated 7/30/21
8T – jury selection dated 8/2/21
9T – jury selection dated 8/4/21
10T – trial dated 8/5/21
11T – trial dated 8/6/21
12T – trial dated 8/9/21
13T – trial dated 8/10/21
14T – trial dated 8/11/21
15T – trial dated 8/12/21
16T – trial dated 8/13/21
17T – motion dated 2/10/22
18T – sentencing dated 2/17/22

TABLE OF AUTHORITIES

CASES

In re Blair's Estate, 4 N.J. Super. 343 (App. Div. 1949)..... 15

Rhode Island v. Innis, 446 U.S. 291 (1980)..... 27

State v. Brunson, 132 N.J. 377 (1993)..... 29

State v. Cole, 229 N.J. 430 (2017). 17

State v. Fort, 101 N.J. 123 (1985) 12

State v. Hedgespeth, 249 N.J. 234 (2021) 20, 25, 32

State v. Higgs, 253 N.J. 333 (2023) 31

State v. Hockett, 443 N.J. Super. 605 (App. Div. 2016) 16, 18

State v. Joseph, 426 N.J. Super. 204 (App. Div.), certify. den. 212 N.J. 462 (2012) 15

State v. Lodzinski, 249 N.J. 115 (2021) 25

State v. Marrocelli, 448 N.J. Super. 349 (App. Div. 2017) 16, 17

State v. Mays, 321 N.J. Super. 619 (App. Div.), certif. den. 162 N.J. 132 (1999) 15

State v. R.J.M., 453 N.J.Super. 261 (App. Div. 2018) 33

State v. Sands, 76 N.J. 127 (1978) 29

State v. Santamaria, 236 N.J. 390 (2019) 16

State v. Scott, 229 N.J. 468 (2017)..... 20, 32

State v. Ward, 240 N.J. Super. 412 (App. Div. 1990) 27

State v. Williams, 190 N.J. 114 (2007) 25

State v. Wright, 444 N.J. Super. 347 (App. Div. 2016)..... 27

STATUTES

N.J.S.A. 2C:11-3a..... 1

N.J.S.A. 2C:11-3a (1) 1

N.J.S.A. 2C:11-3a (2) 1

N.J.S.A. 2C:39-4d 1

N.J.S.A. 2C:39-5d 1

N.J.S.A. 2C:39-7b 1

RULES

N.J.R.E. 401 .....16, 17, 19

N.J.R.E. 402 ..... 16, 19

N.J.R.E. 609 30

N.J.R.E. 609(b)..... 28, 29

N.J.R.E. 609(b)(2)(ii) 29

N.J.R.E. 901 15

PROCEDURAL HISTORY

The Mercer County Grand Jury returned Indictment 19-07-0387 charging defendant Hamilton Morgan with: purposeful or knowing murder, contrary to N.J.S.A. 2C:11-3a (1) or N.J.S.A. 2C:11-3a (2) (Count One); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4d (Count Two); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b (Count Three); and second-degree certain persons not to have weapons, contrary to N.J.S.A. 2C:39-7b (Count Four) (Da 1 to 4)[1]

In August 2021, trial was held on the first three counts before the Honorable Darlene J. Pereksta, J.S.C. and a jury, and defendant was convicted of all of those counts, followed by an immediate second trial on Count Four in front of the same judge and jury at which he was convicted of that count as well. (Da 5 to 6)

On February 17, 2022, after merging the conviction for Count Two into the conviction for Count One, Judge Pereksta sentenced defendant to serve the following concurrent prison terms: an extended three-strikes term of life without parole for murder, and terms of ten years, five without parole, on Counts Three and Four. (Da 7 to 9) Defendant was also ordered to pay the usual fees and penalties. (Da 7 to 9)

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[1] Da – defendant's appendix to this brief
PSR – presentence report

On November 28, 2022, defendant filed his notice of appeal, and this Court permitted him to do so as within time. (Da 10 to 14)

STATEMENT OF FACTS

Defendant was convicted of murder and related offenses for causing the shooting death of Maurice Rowe in front of the D & A Market on the corner of Hoffman and Stuyvesant Avenues in Trenton. Rowe died of multiple gunshot wounds, including five to the head. (11T 166-14 to 22) The defense was misidentification because while the crime was on videotape, via security cameras (Da 20), the identity of the perpetrator could not be determined from those videos, and the perpetrator quickly ran out of the view of those cameras in a direction toward where police eventually arrested defendant minutes later. The State presented the following evidence at trial.

Detective Stephen Szbanz testified that on May 7, 2019, at about 6:03 p.m., he and his partner John Carrigg were in an unmarked vehicle when a dispatch went out on the radio regarding a domestic-violence incident at 118 Hoffman Avenue, and they decided to respond to the scene to offer assistance because they were nearby. (12T 131-8 to 133-17) But on the way, while "going down the wrong way on Hoffman," a one-way street, they heard eight or nine shots and then saw a man -- wearing black sweatpants and a black hooded sweatshirt with the hood up, despite warm temperatures -- running "across Hoffman Avenue into Wilmot Alley," and they followed in their car. (12T 133-18 to 136-18) As Carrigg turned the car down Wilmot, Szbanz testified, Szbanz saw a "black handgun" in the man's right hand. (12T 136-15 to 23) The man

turned left onto Ellsworth Avenue and then crossed Ellsworth, with Szbanz having exited the patrol car at the corner of Wilmot and Ellsworth in foot pursuit. (12T 137-4 to 9) The man then ignored orders to stop and ran between the houses at 22 and 24 Ellsworth, where, Szbanz admitted, Szbanz lost sight of the suspect briefly. (12T 137-21 to 138-4; 12T 185-2 to 20) Szbanz claimed that he then saw a person whom he believed to be the suspect in the rear yard of 22 Ellsworth and that man scaled the fence into the rear yard of 20 Ellsworth after Szbanz drew his firearm and after the man ignored his command to stop. (12T 138-6 to 11) However, Szbanz did not see a gun in that man's hand. (12T 139-1 to 3) Szbanz opted not to climb that fence between the 20/22 yards, and so, when he saw the man go toward the side yard of 20 Ellsworth – i.e., the walkway between 20 and 18 Ellsworth, back toward Ellsworth -- Szbanz opted to go back to Ellsworth himself, but did so by using the walkway between 22 and 24, thereby losing sight of that man. (12T 139-1 to 8; 12T 181-9 to 182-20) When Szbanz got back to Ellsworth, he pursued and tackled defendant, who was running toward Stuyvesant at the time, and whom Szbanz believed to be the person that he had originally seen running down Wilmot Alley from Hoffman. (12T 139-13 to 25) A handgun was found in front of 18 Ellsworth, not far from where defendant was tackled, and Szbanz claimed that one of defendant's sneakers flew off when he tackled him on Ellsworth. (12T 187-12 to 188-20) Szbanz admitted that the defendant's clothing, which did not include gloves, also did

not contain any pockets, which could make a juror wonder how defendant could have climbed the eight-foot fence between the yards at 22 and 20 Ellsworth if he was the actual suspect who had a handgun in his possession. (12T 162-16 to 164-13; 12T 175-14 to 16; 12T 190-22 to 191-15) Indeed, Szbanz had cited the fact that he had already drawn his own weapon as the reason that he did not climb that same fence ("I had my weapon drawn. . . . Climbing over a fence one-handed is kind of hard"). (12T 139-1 to 8) Szbanz also noted that the "pullover" that defendant was wearing when arrested was red, not black. (12T 191-16 to 22)

Detective Carrigg testified that the Glock 9-mm. handgun that was found was lying on the ground about ten feet from where defendant was tackled. (13T 186-3 to 6) He also testified that the fleeing suspect that they first saw was wearing "all black" with his hood up. (13T 171-4 to 12) But he claimed that defendant, when tackled, was wearing the same clothes. (13T 174-16 to 17) Carrigg admitted that he did not see a gun in the running suspect's hands when he turned initially onto Wilmot Alley. (13T 187-16 to 20) He also testified that when the suspect ran into the walkway between 22 and 24 Ellsworth, he lost sight of that man and that person "could have went [sic] anywhere," which caused Carrigg to back up his vehicle all the way onto Stuyvesant Avenue between Ellsworth and Edgemere Avenue, the next street over. (13T 189-14 to 194-3) From that spot, he could no longer see the area near 18 Ellsworth and did

not see Szbanz tackle defendant. (13T193-18 to 194-12) Szbanz was already on top of defendant when Carrigg returned to Ellsworth Avenue. (13T 194-13 to 18)

Sergeant Luis Nazario testified that he helped process the crime scene, recovering the gun, magazine, and sunglasses from the grass in front of 18 Ellsworth. (11T 49-2 to 6; 11T 78-5 to 6) Also on Ellsworth, he recovered a black and blue Nike Air Jordan sneaker for a left foot. (11T 54-17 to 55-5) Later a matching right-foot sneaker was given to him by Detective Scott Peterson, and neither had blood stains on them. (11T 129-5 to 23; 11T 133-14 to 15) While defendant's clothing was seized, none of it was tested for blood despite the close-range nature of the shooting. (11T 128-11 to 130-3; 11T 74-23 to 76-20) Additionally, multiple spent shell casings and projectiles were recovered from the area at Hoffman and Stuyvesant where the victim was shot. (11T 60-1 to 64-14; 11T 71-6 to 7) The magazine and live rounds in the gun were tested for fingerprints, but none were found. (11T 99-10 to 100-18)

Stephen Deady, a ballistics expert, confirmed that 12 recovered shell casings, and nine of the 18 recovered projectiles (or projectile fragments) from the scene and the autopsy were fired from the 9-mm. Glock that was recovered, while the other nine projectiles or fragments were inconclusive. (14T 66-10 to 13; 14T 82-1 to 21; 14T 88-1 to 8; 14T 92-23 to 94-20) However, on cross-examination, Deady admitted that of all the shells and projectiles that he tested,

he only took photos of two to demonstrate the alleged ballistic matches. (14T 104-13 to 23)

Detective Edward Hughes testified that he downloaded surveillance video from the time of the shooting from both the D & A Market and from Home Liquors, next door to D & A on Stuyvesant. (10T 99-8 to 107-3) Those videos and videos from pole cameras maintained by the police (Da 20) were played at trial and depict the shooting committed by an unidentifiable hooded figure. (10T 110-18 to 115-5; 10T 156-11; 10T 160-21) Hughes admitted on cross-examination that police did nothing to recover video from Ellsworth or Edgemere Avenues and made no effort to enhance the videos that they did retrieve. (10T 131-18 to 132-11)

Detective Edward Cunningham testified that he maintained the 60 to 80 "pole cameras" in use in Trenton at the time, but that no one was live-monitoring those cameras, and that the system overwrites itself in a period of about two weeks. (10T 148-17 to 152-23) He admitted that there is a pole camera, at Oakland and Hoffman, a long block north of the site of the shooting, but he does not know if it was functioning at the time. (10T 170-25 to 171-6) He also admitted that there are "skips" in the footage -- i.e., actual missing footage -- from the cameras at Stuyvesant and Hoffman where the shooting occurred. (10T 173-2 to 174-19) When asked if there were pole cameras near 33 and 35 Ellsworth, near where defendant was arrested, Cunningham first said he did not

know, but then, when shown a photo of those cameras (defense exhibit D-111; Da 20) which was never admitted into evidence because of an incorrect evidentiary ruling that is addressed in Point I, infra), Cunningham said that even if he "guessed" that there were such cameras there, those cameras were not "operational" in 2019 and that he cannot recall if anyone in law enforcement requested footage from those cameras. (10T 175-1 to 179-2)

Detective Jennifer Eyster testified that a search of firearm records revealed no gun permit for defendant, and that defendant's last known address was 45 Edgemere Avenue, which is the next street past from Ellsworth if one is headed east away from Hoffman. (12T 29-19 to 30-2; 12T 31-10 to 23) Eyster also testified that she noticed defendant to be right-handed, just like the shooter, when he was writing in the courtroom, but she said she was unaware that only ten percent of people are left-handed. (12T 42-7 to 24; 12T 65-8 to 10) Eyster also testified that she assembled the various video footage that was played in the courtroom into a synchronized four-panel version that was in evidence. (12T 22-1 to 12; Da 20)

Detective Roberto Reyes testified that when defendant was transported to the Homicide Task Force after first being taken to Trenton police headquarters, defendant was wearing one sneaker, on his right foot, but when he arrived at Homicide, defendant was not wearing any sneakers. (13T 71-8 to 74-12; 13T 86-18 to 21) Reyes testified that he searched inside the car in which defendant

had been transported and found the sneaker under the rear passenger seat. (13T 75-5 to 76-6) Reyes then placed defendant in an interview room and left the sneaker in that room. (13T 76-9 to 24) When the interrogation began, as detailed further in Point II, infra, defendant declined to speak to police, but, after so declining, Detective Scott Peterson nevertheless asked aloud, "Whose sneaker?" and when Reyes said, "That's his," defendant said, "Mine." (Da 17; Da 20, video of statement) Then Reyes directly asked defendant, "This is your sneaker?" and defendant said, "Yeah," and, "They took the other one. The other one at the station." (Da 17 to 18; Da 20, video of statement; 13T 93-10 to 94-11)

When Detective Patrick Holt testified, mostly to matters covered by other witnesses, he was cross-examined extensively regarding the fact that there were a lot of people present in the videos of the shooting but that there is no indication that police spoke to any of them when investigating the crime. (13T 124-21 to 126-19) Holt also admitted that police did not take any photos of the back yards of the houses at 18, 20, or 22 Ellsworth Avenue. (13T 128-6 to 129-10) Holt also claimed to be unaware of any pole cameras near 33 Ellsworth. (13T 136-16 to 18) Police also did not knock on any doors on Ellsworth or Edgemere Avenues to find out if residents had observed anything -- such as a running suspect -- at the time of the shooting and arrest of defendant. (13T 138-1 to 8) Moreover, Holt admitted, police never tested defendant's clothing for gunshot residue, bloodstains or DNA despite the close-range nature of the shooting, and never

sought to enhance videos from the shooting. (13T 141-9 to 142-24; 13T 154-2 to 6) Additionally, despite Detective Peterson having denied being present at the crime scene (13T 97-5 to 10), Holt admitted that the crime-scene log showed that Peterson was at the scene. (13T 156-1 to 157-10)

Additionally, New Jersey State Police forensic scientist Andrea McCormack, an expert in serology, testified that her lab never received any of defendant's clothing, nor the sunglasses recovered at the scene, for testing. (10T 145-2 to 22) Moreover, the State's DNA expert, forensic scientist Risa Ysla, testified that no DNA was found on the ammunition magazine that was recovered, and that one swabbing from the gun revealed contributions from three different people, at least one of whom was male, but that swabbing was otherwise too small to test further. (11T 24-19 to 23; 11T 26-9 to 11; 11T 31-15 to 19)

The defense presented only one witness, because of evidentiary rulings discussed in further detail in Points I and III, infra. That witness was defense investigator Anarish Rivera, who testified that she took photos for the defense on Ellsworth Avenue on July 14, 2021, but the evidentiary ruling discussed in Point I, infra, prevented any of those photos from going into evidence. (14T 110-16 to 111-19) Rivera further testified that 37 Edgemere Avenue, across Edgemere from the back yards of the 22/24 Ellsworth Avenue walkway into which the suspect initially ran, is a vacant lot, but a ruling by the trial judge that

is also discussed in more detail in Point I, infra, prevented defense counsel from presenting photos D-115 and 116 (Da 20) or making any argument to the jury about the significance of that fact. (15T 27-25 to 29-23)

LEGAL ARGUMENT

POINT I

THE TRIAL JUDGE UNDULY RESTRICTED DEFENDANT'S DUE-PROCESS AND SIXTH-AMENDMENT-BASED RIGHT TO PRESENT A COMPLETE DEFENSE WHEN SHE: (1) EXCLUDED DEFENSE PHOTOS OF MUNICIPAL SURVEILLANCE CAMERAS ON ELLSWORTH AVENUE THAT POLICE SHOULD HAVE CHECKED IN THEIR INVESTIGATION, BECAUSE THE JUDGE INCORRECTLY BELIEVED THE PHOTOS WERE NOT PROPERLY AUTHENTICATED AND LACKED RELEVANCE, AND (2) PREVENTED DEFENSE COUNSEL FROM INTRODUCING PHOTOS OF ADJACENT PROPERTIES ON EDGEMERE AVENUE AND FROM ARGUING THAT THE ACTUAL PERPETRATOR COULD HAVE RUN THROUGH THOSE PROPERTIES ON THE WAY FROM ELLSWORTH TO EDGEMERE WHEN POLICE BRIEFLY LOST SIGHT OF HIM. (RULINGS AT 14T 115-3 TO 14; 14T 142-4 TO 6; 15T 11-4 TO 9; 15T 51-7 TO 53-19; 14T 142-6 TO 161-20)

It is clear that a defendant has a right -- under the Sixth and Fourteenth Amendments -- to present a defense, and to exercise that right by presenting evidence, calling witnesses, and arguing appropriately to the jury to support his version of events. State v. Fort, 101 N.J. 123, 128-129 (1985). In this case that right was significantly violated by two rulings of the trial judge. First, the judge prevented defendant from introducing into evidence two 2021 photos (D-111 and 112; Da 20) of a surveillance camera on Ellsworth Avenue -- with

appropriate testimony about the photos -- because, in the judge's estimation, the photo was unauthenticated and irrelevant because no one could testify that the camera was there in 2019 or that it was operational at that time. (14T 115-3 to 14; 14T 142-4 to 6; 15T 11-4 to 9; 15T 51-7 to 53-19) Secondly, the judge precluded defense counsel from introducing photos (D-115 and 116; Da 20) of a walkway leading from the backyards on Ellsworth Avenue to the next street over -- Edgemere Avenue -- and from arguing to the jury what was intended to be counsel's very line of defense: that when the perpetrator ran between 22 and 24 Ellsworth and left the line of sight of police, that person could have run through a backyard onto, or across Edgemere, thereby evading police, who instead mistakenly tackled defendant in front of a house on Ellsworth Avenue. (14T 142-6 to 161-20)

Defendant urges on appeal that by refusing both to admit this evidence and to allow that argument, the judge usurped the role of the jury, denied defendant his Sixth Amendment-based right to present a defense as well as his rights to due process and a fair trial under the Fourteenth Amendment and the corresponding provisions of the state constitution. Consequently, the defendant's convictions should be reversed, and the matter remanded for retrial.

The photos of the surveillance cameras on Ellsworth were offered for a simple purpose: to show that police should have gotten footage from that camera, if available, because the cameras -- positioned near 33 Ellsworth, i.e.,

across Ellsworth Avenue and just a few houses down from the 22/24 walkway where the perpetrator exited the view of police -- could have shown where the perpetrator ran when police lost sight of him in the 22/24 Ellsworth walkway. The photos of the walkways between houses on Edgemere Avenue -- that were almost directly behind the 22/24 Ellsworth backyards -- were offered for a similar, related reason: to show how easily the perpetrator might have run out onto (or across) Edgemere from that 22/24 Ellsworth walkway (and through the walkways on Edgemere) after police lost sight of him. But the judge, as noted, denied the admission of any of that evidence and forbade defense counsel from making an argument to the jury that the real perpetrator might have escaped onto Edgemere. Her reasoning was dead wrong.

First, the judge's initial ruling that the photos were not properly authenticated, or not "relevant," because no one could testify that the Ellsworth surveillance cameras (photos D-111 and 112 at Da 20) were present in 2019 distorted the standards for "authentication" and "relevance" by raising those standards too high. (14T 111-20 to 115-17; 14T 141-14 to 142-6) Second, the same can be said of the judge's secondary ruling regarding relevance of those photos of the surveillance cameras on Ellsworth -- that even if the defense could call a resident of Ellsworth Avenue named Shanita Williams to testify that the cameras were present in 2019, no one could say that the cameras were operational at that time. (15T 11-4 to 9; 15T 51-7 to 53-19) That latter ruling

similarly misstated the standard for determining the "relevance" of evidence, making it a far greater barrier to the admission of evidence than the evidence rules intend. Finally, the rulings on the photos of the walkways onto Edgemere Avenue (photos D-115 and 116 at Da 20) -- and the related ruling regarding the intended argument of defense counsel -- similarly required too much to meet the standard of "relevance" to the case. (14T 142-6 to 161-20)

Authentication is governed by N.J.R.E. 901, which states that a piece of evidence will be regarded as authenticated "as a condition precedent to admissibility" if there is simply "evidence sufficient to support a finding that the matter is what its proponent claims." (Emphasis added). The key phrase is the one that is underscored above: "sufficient to support a finding"; the rule requires merely "a prima facie showing that the instrument is genuine and authentic," In re Blair's Estate, 4 N.J. Super. 343, 351 (App. Div. 1949), not "absolute certainty or conclusive proof." State v. Mays, 321 N.J. Super. 619, 628 (App. Div.), certif. den. 162 N.J. 132 (1999); see also State v. Joseph, 426 N.J. Super. 204, 220 (App. Div.), certif. den. 212 N.J. 462 (2012). "Once a prima facie showing is made, the writing or statement is admissible and the ultimate question of authenticity of the evidence is left to the jury." Mays, 321 N.J. Super. at 628 (emphasis added).

Evidence such as photographs are "authenticated" under N.J.R.E. 901 merely if they "appear[] to be what they [a]re purported to be," and the judge

should "leave to the factfinder a more intense review of the photos and the credibility" of the defense (or State) claims regarding that evidence. State v. Hockett, 443 N.J. Super. 605, 615 (App. Div. 2016). A trial judge improperly "depart[s] from that well-established rule" when she enters the province of the jury and determines the admissibility of evidence under the guise of "authentication" by actually weighing its credibility -- "a determination that we have consistently held is within the jury's, rather than the judge's, province." State v. Marrocelli, 448 N.J. Super. 349, 365-366 (App. Div. 2017).

Similarly, evidence is "relevant" under N.J.R.E. 401, and hence admissible under N.J.R.E. 402, unless barred by another rule, if it merely has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." State v. Santamaria, 236 N.J. 390, 405 (2019). Indeed, defense counsel made that very argument to the judge, but to no avail. (14T 112-17 to 115-2) She even argued that the court's contrary ruling was "precluding me from putting forth a defense on behalf of my client." (14T 115-15 to 17)

Here, the photographs of the cameras and of the yards and walkways plainly appear to be what they are "purported" to be -- photos taken in 2021 of those areas. As defense counsel argued to the judge, the fact that no one can say for certain that in 2019 the cameras were there, or operational, or that the yards were exactly the same as they were in 2021 is not a matter of "authentication"

or "relevance" but rather simply one of the appropriate weight to be ascribed to that evidence by the jury, not by the judge. It is certainly logically relevant to -- i.e., "having a tendency in reason to prove," N.J.R.E. 401 -- a claim that a surveillance camera was present in 2019, or that a yard or walkway appeared a particular way in 2019, that that camera (or yard or walkway) appeared that way two years later in 2021. It is not conclusive proof of that fact, but relevant evidence "need not be dispositive or even strongly probative in order to clear the relevancy bar." State v. Cole, 229 N.J. 430, 447 (2017).

The decisions in Marroccelli and Hockett point directly to the correct result here. The judge had no business overplaying her role as "gatekeeper" to the evidence as she did. The judge's only job regarding these photos was to decide authentication and relevance, both of which were easy calls in the defendant's favor. In Marroccelli, the defendant proffered a handwritten note that she claimed was an admission by her husband that he, not she, was the driver of the car that killed the victim in that case. 448 N.J. Super. at 362-363. The trial court deemed the note to be inadmissible, ruling that it was not authenticated because no one but the defendant said it had been written by her husband, and because the defendant's obvious bias on the issue robbed the note of any credibility and relevance. Id. This Court reversed that ruling and the resulting convictions, holding that the judge overstepped his bounds as evidentiary gatekeeper. Id. at 365-367. The trial judge in Marroccelli improperly entered the

"province" of the jury, usurping the jury's constitutionally-based role, when he required more authentication than necessary and failed to let the jury determine the credibility of what was plainly a relevant piece of evidence. Id.

Likewise, in Hockett, this Court reversed and remanded for retrial when, in a murder prosecution, the trial judge improperly barred certain photographic evidence because he deemed it to be unauthenticated and lacking credibility because the photographer was biased toward the defendant and appeared to have taken the photos in question merely to aid the defense, while claiming otherwise in her testimony. 443 N.J. Super. at 611-612. But this Court held that the "authentication" issue was simple: the photos depicted what they were purported to depict, and were relevant and admissible. Id. at 614-615. Moreover, the credibility issue was for the jury, not the judge: "[E]ven if there was some legitimate reason for questioning the witness's veracity about what the photographs depicted, the better course was for the judge, in his gatekeeping role, to acknowledge the photographs appeared to be what they were purported to be and leave for the factfinder a more intense review of the photographs and the credibility of the authenticating witness." Id. (internal quotation marks omitted).

Similarly, here, the photos depicted what they purported -- what the cameras and walkways nearby looked like in 2021. They were relevant for the simple reason that they tended to prove what the area looked like two years

earlier. N.J.R.E. 401. Thus, they were admissible, N.J.R.E. 402, and were the proper subject of argument by counsel, which was also improperly barred by the court below. The only remaining question is whether the judge's exclusion of that evidence and argument was harmless error. It clearly was not.

The whole point of the defense was that police chased the wrong person -- defendant -- once they lost sight of the perpetrator when that person ran between 22 and 24 Ellsworth. The credibility of that defense was for the jury to decide and this photographic evidence would have furthered that defense in two ways: (1) calling further into question the refusal (or failure) of police to seek out additional evidence, such as video from the Ellsworth surveillance cameras (or interviews with residents of that area), to bolster the State's theory that defendant was the perpetrator, not a hapless person who happened to be in the back yard of 22 Ellsworth and ran when Detective Szbanz, with his gun drawn, finally looked into that backyard; and (2) providing direct photographic evidence of a physical path that the perpetrator could have taken to run from those backyards onto the next street -- Edgemere Avenue. Indeed, with respect to the latter point, not only was it a question for the jury, which the judge forbade as too speculative, barring argument or photographic evidence to support it, but Detective Carrigg had acknowledged that very possibility -- the perpetrator's possible escape onto Edgemere -- in his testimony. Carrigg testified that when the suspect ran into the walkway between 22 and 24 Ellsworth, he lost sight of

that man and that person "could have went [sic] anywhere," which caused Carrigg to back up his vehicle all the way onto Stuyvesant Avenue between Ellsworth and Edgemere Avenue in order to thwart the perpetrator's escape from either of those streets. (13T 189-14 to 194-3) Apparently, Carrigg thought more of the notion of an escape onto Edgemere than the judge did. This was a "real" theory of defense and the judge had no business thwarting it with these rulings.

Reversal of the resulting convictions is necessarily required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 252-253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). The State will likely tell this Court that defendant's defense was implausible and attempt to argue that no reasonable juror would have accepted it, but Hedgespeth and Scott are clear that such an appellate argument must be rejected, every time. It is not for a reviewing court to determine implausibility of a defense when evaluating harmless error. "Determining implausibility 'is in the sole province of the jury. Judges should not intrude as the thirteenth juror.'" Hedgespeth, 249 N.J. at 253, quoting Scott, 229 N.J. at 485. The jury could have accepted this defense, and

the judge was wrong to preclude evidence and argument that supported it. Defendant's resulting convictions should be reversed, and the matter remanded for retrial.

POINT II

THE JUDGE COMMITTED REVERSIBLE ERROR BY REFUSING TO SUPPRESS STATEMENTS BY DEFENDANT THAT WERE MADE IN RESPONSE TO POLICE QUESTIONING THAT OCCURRED AFTER DEFENDANT HAD INVOKED HIS RIGHT TO SILENCE. (RULING AT 4T 16-4 TO 17-15)

When police read defendant his rights prior to interrogation, they then asked him if he wished to make a statement. He stated clearly that he did not: "Absolutely not." (Da 17; 1T 10-9 to 10) Detective Peterson said, "Okay," and Detective Reyes said, "All right," and told defendant to "just sit tight," implying that they were respecting his assertion of his right to silence. (Da 17; 1T 17-20 to 22) But then, immediately, Detective Peterson noticed that there was a sneaker, which he assumed was defendant's, on the floor of the interrogation room. (1T 11-1 to 4) He testified that he learned later that Reyes had found that sneaker in the police car in which defendant -- who at the time of the interview was wearing no sneakers -- had been transported. (1T 20-17 to 20). Peterson asked, "Whose sneaker?" to which Reyes said, "That's his," referring to defendant, and defendant said, "Mine." (Da 17; Da 20, video of statement) Reyes then asked defendant, point-blank, "This is your sneaker?" and defendant said, "Yeah." (Da 17; Da 20, video of statement; 1T 17-24 to 18-1). Peterson then asked defendant, "You don't want it on?" and defendant said, "Nah," which caused Peterson to repeat the question, and then defendant said, "Nah. Throw it

in the garbage." (Da 18; Da 20, video of statement) Peterson said, "You want the sneaker in the garbage?" and defendant replied, "They took the other one. The other one at the station." (Da 18; Da 20, video of statement) (emphasis added) That was a lie. The other sneaker had been found at the scene on Ellsworth Avenue, not taken at the station, and Detective Peterson knew that at the time of the interview. (1T 20-23 to 25)

Despite the fact that defendant's admissions about the sneaker came in response to police questioning after he asserted his right to silence, the State moved to admit into evidence the defendant's statements about the sneaker. The defense objection was clear: that the post-silence questioning was "clearly interrogation" that improperly followed the assertion of silence (3T 22-7 to 9) But the judge nevertheless ruled most of the statement to be admissible. (4T 16-4 to 17-15) Specifically, she admitted an eight-second video clip (Da 20, video of statement) of most of the exchange about the sneaker. The judge excluded from the video the few questions about what to do with the sneaker -- i.e., regarding throwing it in the garbage -- so the clip went: from Peterson's initial question (Whose sneaker?") through the responses of Reyes and defendant that it was defendant's, through Reyes' question to defendant ("This is your sneaker?") and defendant's affirmative response, straight to defendant's claim that the other sneaker was taken at the station. (Da 20, video of statement). The judge's reasoning for admitting the video was utterly bizarre: that despite the

fact that questions were asked by both Peterson and Reyes about who owned the sneaker, defendant's statements about it were "spontaneous" because Peterson was not looking directly at defendant when he asked his initial question ("Whose sneaker?"). (4T 16-11 to 18) The judge skipped right over the fact that Reyes directly asked defendant about the sneaker right after Peterson. She then held that the questions about what to do with the sneaker were interrogation, and needed to be suppressed, along with the defendant's answers that were given to throw out the sneaker (4T 17-6 to 9), but she then strangely ruled the defendant's statement that followed that improper questioning -- the lie that police had taken the other sneaker at the station -- to have been "spontaneous," and thus admissible, as if it occurred in a vacuum away from the other questioning. (4T 17-10 to 15)

Because none of this video statement should have been admitted because it was taken in direct violation of defendant's asserted right to remain silent, the defendant's Fifth Amendment right to silence, his Fourteenth Amendment right to due process, and his state common-law right against self-incrimination, and because admission of that video clip was not harmless beyond a reasonable doubt, defendant's convictions should be reversed and the matter remanded for a retrial in which the statement is excluded from evidence.

Because the judge's Miranda-related error is so obvious, defendant will begin his legal analysis not with the error, which is discussed infra in this point,

but with the harm it caused his defense, or -- more specifically -- why the erroneous admission of the video of this statement was not "harmless beyond a reasonable doubt." The answer why the admission of the video was not harmless error is simple: it was not harmless merely because the video contained an admission by defendant that the sneaker was his, but rather, because it also contained evidence of consciousness of guilt -- i.e., defendant's lie that police took the other sneaker from him at the station before his transport to Homicide for interrogation. That was plainly a lie that the jury could use against defendant because a suspect's lying to police who are investigating a crime is always evidence of consciousness of guilt. State v. Lodzinski, 249 N.J. 115, 151 (2021); State v. Williams, 190 N.J. 114, 129 (2007) ("lying to police" is "classic consciousness of guilt evidence"). Thus, the admission of this video could be used by the jury to specifically rebut the defense claims that defendant was a hapless victim of misidentification by police, by proving defendant's consciousness of guilt.

As noted in Point I, reversal of the resulting convictions is necessarily required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); State v. Hedgespeth, 249 N.J. 234, 252-253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017). This was by no means harmless error, and

certainly was not harmless beyond a reasonable doubt.

As for the error itself, that could be no more crystal clear. "As an independent source of protection, New Jersey common law has accorded its citizens their right against self-incrimination since colonial times." State v. A.G.D., 178 N.J. 56, 67 (2003). That right is "an integral thread in the fabric of New Jersey common law since our beginnings as a state." State v. Hartley, 103 N.J. 252, 286 (1986). New Jersey has "thus, 'actively embraced'" the opportunity to interpret that right as greater and more protective of New Jersey citizens than its federal Fifth Amendment counterpart. State v. Reed, 133 N.J. 227, 252 (1993), quoting Hartley, 103 N.J. at 301.

Once a person invokes the right to silence in New Jersey, the police cannot reinitiate interrogation without first giving new Miranda warnings. Hartley, 103 N.J. at 256 (1986). When defendant invoked his right to silence, therefore, any subsequent interrogation could take place only if preceded by new warnings. Id. But here, it is clear that the police initiated the renewed conversation by waiting until defendant had invoked his right to silence and then asking questions about the sneaker, which was clearly a piece of evidence. They did not precede that reinitiation of interrogation with new warnings. Defendant did not spontaneously indicate he wanted to speak to police. Rather, he did it in response to questions about the sneaker after defendant had invoked his right to silence. The judge's approach below was legally absurd and untenable. She was

attempting the impossible: splitting the encounter into questions followed by allegedly spontaneous statements -- that were actually in response to the questions -- and then followed by more questions which were followed, in the judge's estimation, by more spontaneous statements, that were actually responses to questions.

Plain and simple, the police were interrogating defendant about the sneaker. The test for whether police conduct constitutes "interrogation" is "whether 'a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.'" State v. Ward, 240 N.J. Super. 412, 417 (App. Div. 1990), quoting Rhode Island v. Innis, 446 U.S. 291, 303 (1980). Police conduct constitutes interrogation when officers "ask questions or make statements which open up a more generalized discussion relating directly or indirectly to the investigation." Ward, 240 N.J. Super. at 419; State v. Wright, 444 N.J. Super. 347, 366-67 (App. Div. 2016). That is obviously what was done here, without new Miranda warnings, in direct violation of Hartley. Because the error of admitting this statement is obvious and was not harmless beyond a reasonable doubt, the defendant's convictions should be reversed and the matter remanded for a retrial at which this statement is excluded from evidence.

POINT III

THE JUDGE ABUSED HER DISCRETION UNDER N.J.R.E. 609(B) WHEN SHE RULED THAT SIX PRIOR CONVICTIONS OF DEFENDANT'S -- THAT WERE ALL MORE THAN 18 YEARS OLD AND FOR WHICH THE SENTENCES HAD ALL BEEN SERVED FOR MORE THAN TEN YEARS -- WOULD BE ADMISSIBLE TO AFFECT DEFENDANT'S CREDIBILITY IF HE TESTIFIED. (RULING AT 14T 10-6 TO 11-24).

Defendant has nine prior indictable convictions.[2] When the issue arose at trial regarding which of those convictions would be admissible under N.J.R.E. 609(b) to affect his credibility if he testified, the parties agreed on two things: (1) that three first-degree robbery convictions from 2002 would be admissible to affect credibility because the 17- and 18-year sentences imposed on those expired within the ten-year period from trial in this case in which such convictions are more likely to be admissible under Rule 609 (13T 49-14 to 19), and (2) that the sentences on the other six convictions, also from 2002, had all been fully served outside of that ten-year period. (13T 49-14 to 19; 13T 56-22

[2] As listed in the presentence report, those convictions are, in chronological order: second degree conspiracy to commit carjacking (5/24/02); fourth-degree possession of CDS with the intent to distribute (9/20/02); third-degree possession of CDS with the intent to distribute (9/20/02); second-degree possession of a weapon for an unlawful purpose (9/20/02); third-degree unlawful possession of a BB gun (9/20/02); third-degree resisting arrest (9/20/02); and three first-degree robberies (two from 9/20/02 and one from 6/13/03). (PSR 6 to 11)

to 24) The parties also disagreed strongly on the remaining issue: whether the six convictions for which the sentences had been served outside of the Rule 609 ten-year period were admissible to affect defendant's credibility. (13T 51-21 to 22; 13T 49-13 to 51-4)

The judge sided with the State. Despite the fact that none of those six convictions involved "dishonesty, lack of veracity, or fraud," N.J.R.E. 609(b)(2)(ii), and despite the fact that the rules on admitting such convictions to affect credibility have become remarkably tougher against doing so since the days of State v. Sands, 76 N.J. 127 (1978), when all such convictions were almost always admissible, the judge ruled that one of the factors listed in N.J.R.E. 609(b)(2) -- the seriousness of those prior six convictions -- warranted admission of all of them against defendant if he testified. (14T 10-6 to 11-24) The judge cited only the wildly outdated decision in Sands to support her ruling. (14T 10-19 to 11-24) She also made clear that her ruling was to admit those convictions in a "sanitized" form under State v. Brunson, 132 N.J. 377 (1993), i.e., only telling the jury the degree of crime, date of sentence, and length of sentence imposed. (14T 8-15 to 19) When it came time for defendant to decide whether to testify, defense counsel made it clear that it was the judge's ruling on the admissibility of these six convictions which caused defendant to decide not to testify in his own behalf, and defendant agreed with that statement. (15T 48-23 to 49-15)

Because the judge's ruling to admit those six disputed convictions against defendant if he testified was an abuse of discretion under Rule 609 that was not harmless beyond a reasonable doubt, the defendant's convictions should be reversed and the matter remanded for retrial.

As noted, for many years, under Sands, most prior convictions were admissible to impeach a defendant if the defendant testified. 76 N.J. at 144-145. Then, in 1993, Brunson restricted that approach slightly, by requiring the sanitization of prior convictions if any of them were similar to the charged crimes, but otherwise not changing the general Sands bias toward admissibility. 132 N.J. at 391-392. But in 2014, N.J.R.E. 609 was amended to bring the New Jersey rule far closer to the federal approach, severely tightening the admissibility of such priors, particularly those older than ten years for which the sentence had been served more than ten years prior to trial.

Rule 609(b) provides:

> (b) Use of Prior Conviction Evidence After Ten Years.
>
> (1) If, on the date the trial begins, more than ten years have passed since the witness's conviction for a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof.
>
> (2) In determining whether the evidence of a conviction is admissible under subparagraph (b)(1) of this rule, the court may consider:
>
> (i) whether there are intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses,

(ii) whether the conviction involved a crime of dishonesty, lack of veracity or fraud,
(iii) how remote the conviction is in time,
(iv) the seriousness of the crime.

The principal decision interpreting that amended rule is the recent one in State v. Higgs, 253 N.J. 333 (2023). Notably, as Higgs acknowledges, it is the State's burden of proof under subsection (b)(1) to show that the probative value of the remote prior convictions outweighs their prejudicial effect. Id. at 368. In that case, most of the remote priors were 24 years old and one was 14 years old. Id. at 369. Those remote convictions were for aggravated assault, CDS offenses, and weapons offenses – very similar to the 19-year-old and 18-year-old remote convictions here for conspiracy to commit carjacking, CDS offenses, and weapons offenses. Id. at 370. In Higgs, when addressing the seriousness of those priors -- which was the only factor that the judge cited in the instant case to support the admission of defendant's remote priors (14T 10-6 to 11-24) -- the Supreme Court said clearly that while the remote priors were "all serious crimes," their probative value for impeachment cannot outweigh "the prejudicial effect of remote convictions that have nothing to do with dishonesty." Id. at 370.

The same is clearly true here, and the error of ruling to admit those convictions was clearly harmful, not harmless beyond a reasonable doubt. Yes, the three robberies were going to be admitted to impeach anyway, because their sentences were not finished until closer than ten years to the trial, but even the

judge herself admitted that admitting merely those three convictions -- versus admitting those three plus the additional six -- "is a big difference." (14T 11-19 to 24) Where she went so wrong was in finding a relevant "pattern" of lawbreaking to satisfy the State's burden of proof when that "pattern" was so remote -- 18-plus years earlier; indeed, the same exact "pattern" existed in Higgs, but was not enough to carry the State's burden under Rule 609(b). 253 N.J. at 370.

Moreover, while harmless-error analysis is proper in such a situation, it will rarely result in a finding of harmlessness when the defendant's testimony – had it happened – would have resulted in a much better explanation of the facts relevant to defense claims than what the jury heard. State v. Hedgespeth, 249 N.J. 234, 252-253 (2021). As noted in Point I, reversal of the resulting convictions is necessarily required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995). In Hedgespeth, 249 N.J. at 252-253, citing State v. Scott, 229 N.J. 468, 484-485 (2017) , the Court made clear that when a Rule 609 error is made regarding the defendant's remote prior convictions, that error will not be harmless if the defendant's testimony could have affected the weight the jury would give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal. The State

will likely tell this Court that defendant's defense was implausible and that any testimony in favor of that implausible defense would not have been accepted by a reasonable juror, but Hedgespeth and Scott are clear that such an appellate argument must be rejected, every time. It is not for a reviewing court to determine implausibility of a defense when evaluating harmless error. "Determining implausibility 'is in the sole province of the jury. Judges should not intrude as the thirteenth juror.'" Hedgespeth, 249 N.J. at 253, quoting Scott, 229 N.J. at 485; see also State v. R.J.M., 453 N.J.Super. 261, (App. Div. 2018). The jury could have accepted this defense, and, as in Hedgespeth, where that defendant's testimony could have "cast doubt" on the State's version of the facts, 249 N.J. at 252, the defendant's testimony here certainly could have helped the jurors rule in his favor by clarifying factual claims like, for instance, how he got into the backyard of 22 Ellsworth and why he ran when he saw a detective brandishing a gun. The Rule 609 error was, thus, not harmless. The judge should not have admitted the six prior remote convictions to impeach defendant, and, therefore, defendant's resulting convictions should be reversed, and the matter remanded for retrial.

CONCLUSION

For all of the reasons set forth in Points I through III, the defendant's convictions should be reversed and the matter remanded for retrial.

Respectfully submitted,

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Attorney for Defendant-Appellant

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Date: May 31, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-941-22T1

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a judgment of Conviction of the Superior Court of New Jersey, Law Division, Mercer County
v.	:	Ind. No. 19-07-0387
HAMILTON MORGAN	:	
Defendant – Appellant.	:	Sat Below: Hon. Darlene J. Pereksta, J.S.C., and a jury

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SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF APPELLANT

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DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES..... iii.

TABLE OF JUDGMENTS, RULINGS AND ORDERS..... ii.

PROCEDURAL HISTORY..... 1.

STATEMENT OF FACTS ..... 1.

LEGAL ARGUMENT..... 2.

POINT I.

THE COURT ERRED FOR LIMITING THE CROSS EXAMINATION OF DETECTIVE SZBANZ WHEN HE DID NOT ALLOW THE DEFENDANT TO PRESENT THE 9-1-1 CAD REPORT DURING HIS TESTIMONY; THE COURT ERRONEOUSLY RULED THAT THE CAD REPORT WAS HEARSAY; THUS VIOLATING DEFENDANT'S RIGHTS TO CONFRONTATION AND TO PRESENT A COMPLETE DEFENSE. THEREFORE A NEW TRIAL IS WARRANTED. U.S. CONST. AMENDS V XIV, N.J. CONST. ART. I PAR. 10 (ruling 13T:21-6 to; 24-23)..... 2.

POINT II

THE COURT ABUSED ITS DISCRETION FOR NOT ALLOWING THE DEFENSE TO PRESENT EVIDENCE OF UNTRUTHFULNESS ON THE PART OF ARRESTING OFFICER CAPTAIN ASTBURY. FAILURE TO DO SO INFRINGED ON DEFENDANTS RIGHT TO CONFRONT HIS ACCUSER AND COMPLETE DEFENSE. THUS VIOLATING DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY. A NEW TRIAL IS WARRANTED. U.S. CONST. AMENDS VI, XIV N.J. CONST. ART. I PAR. 10 (ruling 13T:25-7 to; 40-7)..... 8.

POINT III

THE JUDGE ABUSED HIS DISCRETION WHEN HE RECONSIDERED HIS OWN RULING THAT PROHIBITED THE STATES EXPERT STEPHEN DEADY TO TESTIFY THAT THE BULLETS IN MAGAZINE (CLIP) FOUND ON DEFENDANT WAS FIRED FROM THE SAME WEAPON RECOVERED FROM THE SCENE; AND THE STATE FAILED TO ESTABLISH THAT THE PREVIOUS RULING WAS PALPABLY DEFICIENT. THUS A NEW TRIAL IS WARRANTED. U.S. CONST. AMEND VI, XIV N.J. CONST. ART. I PAR. 10 ..... 16.

CONCLUSION ..... 20.

INDEX TO APPENDIX (Addendum)

CAD report ..... Da. 21

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Rulings on Point I .... 12T:193-3 to 24; 12T:211-6 to 21916; 13T:21-6 to 24-23

Rulings on Point II ..... 13T:25-7 to 40-7

Rulings on Point III... 3T:48-12 to 60-11; 12T:4-5 to 15-6; 12T:15-25 to 18-19; 13T:5-1 to 8-14

TABLE OF AUTHORITIES

FEDERAL CASES

California v. Green, 399 U.S. 149,158 (1970)..... 6,9
Chambers v. Mississippi, 410 U.S. 284 (1973) 8,9
Crane v. Kentucky, 476 U.S. 683,698 (1986)..... 6.
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)..... 18,19
Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)..... 5,6.
Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)..... 17,18,19
U.S. v. Shipp, 392 F. Supp. 3d 300, 2019 U.S. Dist. LEXIS 117407, 2019 WL 3082484 (E.D.N.Y., 2019)..... 16,17
U.S. v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004)..... 14,15

STATE CASES

State v. Alston, 2010 WL 4068528 decided July 21, 2010; 2010 N.J. Super Unpub. LEXIS 1694..... 3,4,5,6
State v. Buda, 195 N.J. 278, 293 (2008)..... 4.
State v. Cope, 224 N.J. 530 (2016)..... 6.
State v. Cotto, 182 N.J. 316, 328 (2005)..... 4.
State v. Funderburg, Mercer County Law Division, Ind. No. 07-02-0240, decided November 29, 2010 (Judge Ostrer J.S.C.)..... 9,10,12,15
State v. Garron, 177 N.J. 147, 169 (2003)..... 6, 8, 9
State v. Ghigliotty, 463 N.J. Super. 355 (2020)..... 18,19
State v. Pickett, 466 N.J. Super 270 (2021) 18,19
State v. Scott, 229 N.J. 469. 487 (2017)..... 14

RULES AND STATUTES

Fed. R. Evid. 608(b)..... 14
Fed. R. Evid. 403..... 14
N.J.R.E. 403..... 13
N.J.R.E. 608(b)..... 13,14,15
N.J.R.E. 609..... 13, 15
N.J.R.E. 803 (c)(2)..... 3, 4.
N.J.R.E. 803 (c)(6)..... 3

PROCEDURAL HISTORY

Appellant shall rely on the procedural history incorporated in his counseled brief.

STATEMENT OF FACTS

Appellant shall rely on the statement of facts incorporated in his counseled brief.

1T – motion dated 6/28/21
2T – motion dated 7/13/21
3T – motion dated 7/14/21
4T – motion dated 7/26/21
5T – jury selection dated 7/28/21
6T – jury selection dated 7/29/21
7T – jury selection dated 7/30/21
8T – jury selection dated 8/2/21
9T – jury selection dated 8/4/21
10T – trial dated 8/5/21
11T – trial dated 8/6/21
12T – trial dated 8/9/21
13T – trial dated 8/10/21
14T – trial dated 8/11/21
15T – trial dated 8/12/21
16T – trial dated 8/13/21
17T – trial dated 2/10/22
18T – sentencing dated 2/17/22

LEGAL ARGUMENT

POINT I

THE COURT ERRED FOR LIMITING THE CROSS EXAMINATION OF DETECTIVE SZBABZ WHEN HE DID NOT ALLOW THE DEFENDANT TO PRESENT THE 9-1-1 CAD REPORT DURING HIS TESTIMONY; THE COURT ERRONEOUSLY RULED THAT THE CAD REPORT WAS HEARSAY. THUS VIOLATING DEFENDANT'S RIGHTS TO CONFRONTATION AND TO PRESENT A COMPLETE DEFENSE. THEREFORE A NEW TRIAL IS WARRANTED. U.S. CONST. AMENDS V XIV, N.J. CONST. ART. I PAR. 10 (ruling 13T:21-6 to; 24-23)

The trial court abused his discretion for not allowing the defense to introduce the 9-1-1 CAD report during the cross-examination of detective Szbanz. Appellant's primary argument is the CAD report falls within the exception to the hearsay rules. Therefore its entry should have been admissible. Instead the court's rejection limited the cross-examination of detective Szbanz. Thus violating defendant's confrontation rights as well as his right to present a complete defense. A new trial is the remedy for this constitutional violation.

During the cross examination of Detective Szbanz, the following occurred:

> Q. Detective, are you familiar with computer aided dispatch, CAD reports?
> A. Just on my end of it, yeah.

> Q. Well, let's talk about that system.
> Q. Essentially when you call something in there's a dispatcher that records the information into the system, correct?
> A. That is correct.
> Q. Okay. I'm going to show you what's been marked as D-15 for ID. Detective, could you tell what that is?
> A. Trenton Police and Fire Event Report.
> Q. And going onto - could you turn to the last page?
> A. The last page? seven of seven?
> Q. Yeah. The last -- from the bottom, the last four to eight lines, do you see where it says defendant was arrested on -- in front of 17 Ellisworth? (12T:191-22 to 192-14).

The state objected. The defense argued to the court that the CAD report is admissible as "business records" -- "excited utterance" in light of State v. Alston, 2010 N.J. Super Unpub. LEXIS 1694. The court stated among other things, he would not allow the defense to use the CAD report during cross-examination. (12T:193-3 to 25). Following detective Szbanz testimony, defense counsel averred to the court that his cross-examination was limited. (12T:211-14 to 17)

This court ruled in a unpublished case that CAD reports summaries of 9-1-1 dispatch calls fall within hearsay exception(s) N.J.R.E. 803(c)(6), "business records" and N.J.R.E. 803(c)(2), "excited utterance". See. Alston, slip op. at. 3. In Alston, this court held, admission of CAD report summaries of 9-1-1 calls are not inadmissible hearsay and do not violate a defendant's right to confrontation. slip op. at.

Here, the opposite scenario took place. The trial judge ruled that the CAD report is "hearsay and unpersuaded by anything in Alston" (12T:23-4 to 5).

Statements are admissible under N.J.R.E. 803(c)(2) as excited utterances. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate."

The plain reading of this rule warrants admissibility in this matter. Appellant's matter involves a foot pursuit where detectives were calling in to dispatch as the events were unfolding.

"Consistent with the rationale for excited utterance exception . . . when deciding whether there was an opportunity to fabricate or deliberate, a court should consider the element of time, the circumstances of the incident, the mental and physical condition of the declarant, and the nature of the utterance." see. State v. Buda, 195 N.J. 278, 293 (2008) (quoting State v. Cotto, 182 N.J. 316, 328 (2005))

The trial courts application of Alston and the hearsay exceptions was unreasonable. In Alston, this court said,

> "The most important factor is the presence of a continuing state of excitement that contraindicates fabrication and provides trustworthiness . . . A spontaneous declaration will be admissible, even if not concomitant or coincident with the exciting stimulus

> provided that in the light of all the circumstances it may be said reasonable that the exciting influence had not lost its sway or had not been dissipated in the interval."
> slip op. at. 4 (citations omitted)

Like Alston, this matter deals with a series of 9-1-1 calls, placed from different locations and at different times, but very close in time to one another. Ibid. They all have a unifying theme. The 9-1-1 calls gives insight on the foot chase, that led to the arrest of the defendant. Defense counsel tried arguing this to the court when he stated,

> "I ask that this be recorded as a present sense impression, because the person, and an excited utterance because in my case defendant being arrested, they are reporting it to the police dispatch, so it's present sense impression. They are reporting it to the police dispatch, so it's present sense impression. They are reporting it as it's happening, and an excited utterance. I'm sure, you know, catching a suspect in a homicide case causes excitement in a police officer, so I think the Court erroneously limited my cross-examination and precluded my client's right to confront witnesses against him under the Sixth Amendment." (12T:212-1 to 12).

In Davis v. Washington, 547 U.S. 813 (2006), the United States Supreme Court was presented with the question whether a 9-1-1 call should be considered testimonial or non-testimonial; it concluded the determination rested on whether the caller was describing a presently unfolding situation, as opposed to reporting a past event. at. 827.

Further in Davis, an individual placed a call to 9-1-1, reporting an ongoing domestic disturbance and seeking emergency assistance. Ibid. The Court found this call to be non-testimonial because it was plainly a call for help against a bona fide physical threat was made while the emergency was on-going and was made with the purpose of resolve that emergency. at 827.

Clearly, the 9-1-1 calls were non-testimonial according the case above. Here, the bona fide physical threat was suspected to be the defendant, during an on-going foot pursuit. The threat was substantiated through the fact a homicide occurred and active shooter was in flight. Moreover, defendant was found with a magazine (clip) on him and a gun in the area he was apprehended. The CAD report importance to the defense during cross-examination was critical.

First, the CAD report takes defendant out of the "flight-zone" rout taking by the suspect, which detectives John Craigg, Patrick Holt and Szbanz testified too. Next, page seven (7) of the CAD report shows that a "suspect [not defendant] was taken into custody [05/07/19 18:08:44 54631]". see. Da. 21. Although, defendant was arrested on 17 Ellisworth. Which is depicted in the CAD report and the testimony of Szbanz. Ibid.

The CAD report's use during trial would have given the defendant the opportunity to explore who the other suspect in custody was, providing foundation for third-party guilt defense. Lastly, Captain Astbury made several entries to CAD

report and was the arresting officer who found the magazine (clip) on defendant. However, Astbury did not testify in this trial. The jury was left void of this information. Which negatively impacted the defense.

A defendant exercise his right of confrontation through cross-examination, which has been described as the greatest legal engine ever invented for discovery of the truth." California v. Green 399 U.S. 149, 158 (1970). A defendant's confrontation right must accommodate "legitimate interests in the criminal trial process, "such as established rules of evidence and procedure designed to ensure the efficiency, fairness, and reliability of criminal trials." State v. Garron, 177 N.J. 147, 169 (2003).

The Constitution guarantees criminal defendant's a meaningful opportunity to present a "complete defense." State v. Cope 224 N.J. 530 (2016)(quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986). That would be a empty one if the state were permitted to exclude competent, reliable evidence is central to the defendant's claim of innocence." Crane, at. 690. The state was permitted to exclude central evidence to defendant's innocence with excluding the CAD report.

In any event the defendant was denied his right to confrontation as the CAD report was not inadmissible. Even if this court does not find Alston, persuasive, fair application of the exceptions to the hearsay rule, should. Furthermore,

defendant's right to present a complete defense was hampered in the process. A new trial is warranted.

POINT II.

THE COURT ABUSED ITS DISCRETION FOR NOT ALLOWING THE DEFENSE TO PRESENT EVIDENCE OF UNTRUTHFULNESS ON THE PART OF ARRESTING OFFICER CAPTAIN ASTBURY. FAILURE TO DO SO INFRINGED ON DEFENDANTS RIGHT TO CONFRONT HIS ACCUSER AND COMPLETE DEFENSE. THUS VIOLATING DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY. A NEW TRIAL IS WARRANTED. U.S. CONST.AMENDS VI, XIV N.J. CONST. ART. I PAR. 10 (ruling 13T:25-7 to; 40-7)

The defense sought to call Captain Astbury to impeach his credibility with prior untruthful testimony. The court denied the motion. The denial of the motion led to Astbury not testifying at all in this matter. Failure to allow such evidence impacted the outcome of the trial. Appellant argues that such evidence was admissible pursuant to N.J.R.E. 608. Moreover, denying defendant his right to confront the arresting officer. A new trial is warranted.

The Sixth Amendment to the United States Constitution and Art. I paragraph 10 of the New Jersey Constitution guarantee a criminal defendant the right to confront "the witness against him" U.S. Const. Amend VI, N.J. Const. Art. I Par. 10. The right of confrontation is an essential attribute of the right to a fair trial, requiring that a defendant have a fair opportunity to defend against the States

accusations." State v. Garron, 177 N.J. 147, 169 (2003) (quoting) Chambers v. Mississippi, 410 U.S. 284, 194, 93 S.Ct. 1038, 1045, 35 L. Ed. 2d 297, 308 (1973).

A defendant exercises his right of confrontation through cross-examination, which has been described as the "greatest legal engine ever invented for discovery of the truth." California v. Green 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L. Ed. 2d 489, 497 (1970). A defendant's confrontation right must accommodate "legitimate interest in the criminal trial process, "such as established rules of evidence and procedure designed to ensure the efficiency, fairness, and reliability of criminal trials." Garron, supra, 177 N.J. at 169 (quoting Chambers, supra, 410 U.S. at 295)

Captain Jason Astbury was subpoenaed by the defense (13T:25-7 to 9). It is without question that Astbury was central to this case. First and foremost, he was the arresting officer in this case. He discovered defendant in possession of a clip with live ammunition, which really tie defendant to the gun and the scene. (13T:38-23 to; 39-6). The defense sought a ruling that if Astbury were to take the stand, he wanted to impeach his credibility with Judge Ostrer's granting of a motion to suppress in, State v. Funderburg, which was decided November 29, 2010.

This case coming out of Mercer County's Law division, defendant, Funderburg, according to the trial judge:

> [Fundeburg] was charged with drug distribution or possession with intent to distribute, that type of crime, because Astbury claims he – got a tip, and he was doing surveillance by a certain property, an apartment that Funderburg lived at or was abandoned and Funderburg was using to distribute drugs or to stash the drugs. And Astbury claims that in doing the surveillance he saw him put a back pack or a bag on the fire escape."
> (13T:26- 3 to 16).

The trial court was in disagreement with the defense over the nature of Astbury's testimony in Funderburg case. That disagreement was over whether Judge Ostrers' ruling implied Astbury was untruthful.

Defendant pointed out that on page 15, the Funderburg court was unable to credit by a preponderance of the evidence any of three versions given by Astbury. (13T:36-23 to; 37-2). The court took issue with whether Judge Ostrer actually said Astbury lied. (13T:36-15 to 19). Defendant responded, "first and foremost, each version is at odds with the two other versions [given by Astbury] that to me, is saying he called him a liar. (13T:37-4 to 6).

Defendant is right. In the Funderburg decision, the court ruled in the following versions pertinent to Astbury:

> The court is unable to credit by a preponderance of the evidence any of these three versions of events. First and

foremost, each version is at odds with the two other versions. As noted above, the witness's demeanor does not help the court resolve the inconsistencies. Moreover, at the hearing, the two detectives' recollections differed. For example, Det. Burger still recalled a telephone call "while on patrol." However, Det. Astbury abandoned that claim.

Also Det, Astbury claimed that he explained to Det. Burger that he had received information from Det. Sgt. Zappley that was also imparted to Det. Stefano, and that he shared with him the details of the investigation. By contrast, Det. Burger testified that Det. Astbury never mentioned Det. Sgt. Zappley or Det. Stefano

As for the second version, the alleged conversation between the informant and Det. Sgt. Zappley is, ultimately, uncorroborated by Det. Sgt. Zappley himself. One would think that Det. Sgt. Zappley had such a conversation he would have recalled it, particularly inasmuch as it involved a substantial amount of cocaine that officers ultimately seized. It was also unclear why Astbury apparently, for days, did nothing to follow up on this information.

Nor is the court persuaded by the third version of events. The court finds it difficult to conclude that a confidential informant would have been willing to meet a TAC unit officer in the public lobby of the police headquarters, and run the risk of being seen as cooperating with an officer. Also, Det. Astbury does not explain why he failed to mention, in his affidavit of probable cause, or in his IA interview, that he suveilled 12 Atterbury Avenue two consecutive nights before the night of the actual arrest. He provided details at the 2010 hearing that were missing from his almost-contemporaneous affidavit of probable cause and his IA interview. It also is implausible that the detective was able to surveil the location unnoticed three nights in a row, for hours at a time, from the bushes in front of the house. As reflected in the surveillance spot is close to public sidewalk and the entrance to number 10 Atterbury

> Avenue. It is also difficult to accept that the witness mentioned nothing of his investigation to his partner until minutes before arriving at 12 Atterbuty Avenue.
>
> Det. Astbuty's testimony at the hearing is also inconsistent with this IA testimony. According to his hearing testimony, the confidential information was provided to him three days before the arrest of Mr. Funderburg – which would mean Thursday, October 26, 2006. He then spoke to the witness by phone the next two nights and met him at headquarters on Sunday, October 29, 2006. He testified that he surveilled the house Friday and Saturday as well as the date of defendant's arrest. However, the date of the informant's arrest as set forth in the IA interviews, but which the court has redacted, is inconsistent with this testimony at the hearing.
>
> In the final analysis, the court cannot determine with sufficient confidence why the two detective appeared at 12 Atterbury Avenue on October 29, 2006. Moreover, the inconsistencies create doubt about the reliability of their version of what happened next. The court rejects the State's argument, presented orally and in its post-hearing brief, that witnesses' credibility should not be affected by these inconsistencies because they do not directly relate to the ultimate issues."
>
> (internal citations omitted). Slip op. at. 15-16.

Judge Oster concluded the following:

> "As a result of the inconsistencies in testimony and the inherent implausibility of certain aspects of the states version if events, this court is unable to find it more likely true than not that the defendant placed the bag containing cocaine on the fire escape in view of the officers. Consequently, the State has failed to meet its burden to prove the circumstances under which the detectives were authorized to conduct a warrantless search and seizure . Given that failure, the state has not met its burden of establishing on exception to the

> warrant requirement. Therefore, the motion to suppress shall be granted." Slip op. at. 34

The judge in the Funderburg decision, did not say, yet implied that Astbury was untruthful. In denying defendant's motion to introduce this information to impeach Captain Astbury, the court applied the wrong rule for this matter. The Court herein relied on N.J.R.E. 609 B and N.J.R.E. 403 to make her decision. The trial court ruled as follows:

> "I'm looking at the rule now exactly. And it says -- this is N.J.R.E. 609, Impeachment by Evidence of Conviction of Crime, (b): "If, on the date the trial begins, more than ten years have passed since the witnesses conviction for a crime or release from confinement, whichever is later" – and this is conviction of a crime, but it also applies to prior bad acts, and I think that's what you're saying as well – "then the evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect with the proponent of that evidence having the burden of proof."
>
> You have the burden of proof. I'm finding the probative value does not outweigh the prejudicial effect. I gave my reasons. It's not even clear that – as it was in the other cases – that it's a lie. And I don't know how else to say it.
>
> So it would have a prejudicial effect . We would have a whole mini trial, and the jurors would have to decide do they agree with Judge Ostrer." (13T:39-13 to; 40-8).

N.J.R.E. Rule 609 B does not apply in this matter. N.J.R.E. 609B deals with the use of prior convictions after ten years, which expressly says:

"if, on the date the trial begins, more than ten years have passed since the witness' conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence have the burden of proof." This rule is not applicable to the circumstances here.

The defense relied on U.S. v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004) to support the argument that they were permitted to use evidence of Astburys' untruthfulness. In Whitmore, the court held, the district court erred in prohibiting defendant from cross-examining the officer about certain instances of past conduct under Fed. R. Evid. 608 (b). In doing so, the court deprived the defendant of any realistic opportunity to challenge the credibility of the witness.

Fed. R.Evid. 608 (b) is closely related to N.J.R.E. 608 (B), which says:

"(b) The credibility of a witness in a criminal case may be attacked by evidence that the witness made a prior false accusation against any person of a crime . . ."

Many states adopted the version of Rule 608 in the Uniform Rules of Evidence, which tracks the essence of the federal rule with slightly different language:

> "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided by Rule 609, may not be proved by extrinsic evidence. However, in the discretion of the court, if probative of truthfulness or untruthfulness, they may be inquired into cross-examination of the witness (i) concerning the witness's character for truthfulness or untruthfulness, or (ii) concerning the character for truthfulness or

> untruthfulness of another witness as to which character the witness being cross-examined has testified."

See Also. State v. Scott, 229 N.J. 469, 489 (2017)

Defense counsel herein, pointed out to the judge, "there's an exception when it deals with untruthfulness." (13T:38-23 to; 39-2). Counsel's argument implicates N.J.R.E. 608(B). Defendant disagrees with the courts notion that you would need a "trial within a trial". The defendant also disagrees that the jury would then have to determine whether Astbury lied or was untruthful, in the Funderburg decision. (13T:30-5 to 22).

Like in Whitmore, defendant avers that the proposed cross-examination was strongly probative of Astbury's character for untruthfulness, given the critical nature of Astbury's evidence against defendant. at. 619- 620. The Whitmore court agreed that the district court should have allowed it. Ibid. The Court furthered, "Nothing could be more probative of a witness's character for untruthfulness than evidence that the witness has previously lied under oath. Ibid. Defendant also disagreed with the courts interpretation of Funderburg.

In any event, the prior instances of untruthfulness of Astbury should have been admissible. Defendant's limited cross-examination of Detective Szbanz violated defendant's rights to confrontation. A new trial is warranted in this matter.

POINT III

THE JUDGE ABUSED HIS DISCRETION WHEN HE RECONSIDERED HIS OWN RULING THAT PROHIBITED THE STATE EXPERT TO TESTIFY TO THE BULLETS FROM THE MAGAZINE WHICH WAS FOUND ON DEFENDANT WAS FIRED FROM THE SAME GUN RECOVERED ON THE SCENE, WHICH WAS THE MURDER WEAPON. THUS DEPRIVING DEFENDANT OF A FAIR TRIAL BY IMPARTIAL JURY. A NEW TRIAL IS WARRANTED. U.S. CONST. AMEND VI; XIV, N.J. CONST. ART. I PAR.10. (ruling at 13T:5-1 to 8-14)

During pretrial motion to bar ballistic expert testimony, defendant moved to limit the testimony of states expert, Stephen Deady. Defense argued, Mr. Deady's opinions concerning bullet comparisons, are purely subjective. Mr. Deady did not try to match bullet fragments and the shell casings to any other weapons. (3T:48-12 to 49-7) Defense counsel stated Mr. Deady's report is deficient and deprives the defendant from adequately confronting Mr. Deady. (3T:51-14 to 21)

On August 9, 2021, relying on U.S. v. Shipp, 422 F. Supp. 3d 762 (E.D.N.Y., 2019), primarily, the trial court granted the defendant's motion to limit, "in some respect the opinion to not saying that with any degree of certainty that there was match that the expert is – you know, as much as reasonably certain that the bullet come from the gun . . ." (12T:5-1 to 20).

The state responded,

> "in his report the witness stated that the cartridges were compared microscopically against the test standards and they were identified as having been discharged in the submitted pistol. So, we had the opportunity to speak with him, and he stated that this is – he will not say the word match. He did not use the word match in his report, but he will use the word that he -- that he had in his report, which is identified as having been discharged in the submitted pistol." (12T:9-1 to 10).

Mr. Deady was adamant about testifying to his report and not with the courts ruling. It seemed that Mr. Deady was dictating to the court, his terms of testifying. (12T:13-2 to 15). Stephen Deady was brought to the stand so the court could verbally explain his ruling to Mr. Deady. The court told the witness,

> "based on the reasoning in Shipp, he made a ruling that because the court acts as gate keeper to ensure that expert testimony is both relevant and reliable, and based on what I have been told in terms of submissions by counsel as far as this expert's background, first off I find his testimony would be relevant, and I'm not saying it would not be reliable. Again, nothing personal to this expert, and I don't even know if the defense is going to question his qualifications.
>
> But the issue becomes, as I've said, the report's indication that unlike in other areas of scientific testing the errors for false positives, or is -- I think it was -- I'm looking for the exact page here. I can't find it. As I recall it as, like, one in 46 as opposed to in other areas of scientific testing they mentioned for the DNA one and ten billion, that there would be an error in saying that DNA came from that person. Instead, this was -- and that

> sticks out in my head, although I still can't find it, one in 46, much different.
>
> So, the issue is not with this particular expert. The issue is with the reliability of the testing, and from that perspective Limited -- granted the defense's motion to limit the testimony to not being -- saying with any degree of certainty that bullet came from that gun, or that shell cartridge, or fragment came from that gun." (12T:17-3 to 18-19)

Defense counsel went on to argue,

> "I looking at the states brief, and on this specific issue as to being able to testify to, you know, being identified as coming from the firearm versus being consistent with language that I'm asking, I'm the only one who provided case law on this issue. Ghigliotty does not deal with that specific issue. Ghigliotty deals with having a Frye[1] hearing for bullet tracks. And the Judge says hold off until making a determination that you can say, yes, it's a match, the bullet and the gun are matches, until you have the Frye hearing.
>
> I don't understand the basis of the reconsideration here other than the fact that the state did not like Your Honor's decision." (13T:17-4 to 18).

Defendant was right on two aspects. First, Ghigliotty deals with having a Frye hearing for BULLETTRAXX. The court agreed, that the primary focus in Ghigliotty does not match defendant's scenario. (13T:18-4 to 11). The court said, "he didn't know if the Ghigliotty decision is on point." (13T:19-9 to 15). The trial

[1] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)

court also hinted at overruling Shipp for Ghigliotty because the latter is New Jersey authority. (13T:19-9 to 15).

The courts reasoning rest on the fact that he applied the Daubert[2] standard found in Shipp over the Frye standard. The court furthered that the Frye standard is correct because it was used in State v. Pickett, 466 N.J. Super 270 (2021). Even if this is the case, the trial court reconsidered his ruling without conducting Frye hearing to establish the reliability and admissibility of Stephan Deady's testimony, consistent with Ghigliotty[3]. In applying what the judge called the correct Frye standard, allowed Mr. Deady to testify without limitations. (14T:5-21 to 8-9). Although, the court stated she found Shipp persuasive. (14T:76 to 10). Thus the trial court abused its discretion and a new trial is warranted. On remand, the judge should conduct the proper Frye hearing.

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[2] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

[3] State v. Ghigliotty 463 N.J. Super 355 (2020)

CONCLUSION

For all of the reasons set forth in Points I through III, the defendant's conviction should be reversed and the matter remanded fro retrial.

Respectfully submitted,

/s/ **HAMILTON MORGAN**, Appellant, *pro se*
Hamilton Morgan, Appellant, Pro se

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-000941-22

STATE OF NEW JERSEY
PLAINTIFF-RESPONDENT

v.

HAMILTON MORGAN,
DEFENDANT-APPELLANT

CRIMINAL ACTION

ON APPEAL FROM A FINAL JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF NEW JERSEY,
LAW DIVISION,
MERCER COUNTY
SAT BELOW:
HON. DARLENE J. PEREKSTA, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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TABLE OF CONTENTS

COUNTERSTATEMENT OF PROCEDURAL HISTORY 6

COUNTERSTATEMENT OF FACTS 7

LEGAL ARGUMENT 14

POINT I 14

THE TRIAL COURT PROPERLY EXCLUDED PHOTOS OF SURVEILLANCE CAMERAS WHICH COULD NOT BE PROPERLY AUTHENTICATED AND LACKED RELEVANCE AND THE TRIAL COURT ALSO PROPERLY GUIDED THE ADMISSION AND USE OF PHOTOS OF ADJACENT PROPERTIES ON EDGEMERE AVENUE

POINT II 22

THE TRIAL COURT PROPERLY ADMITTED SPONTANEOUS STATEMENTS MADE BY THE DEFENDANT THAT WERE NOT IN RESPONSE TO ANY QUESTION ADDRESSED TO THE DEFENDANT

POINT III 27

THE JUDGE WAS WITHIN HER DISCRETION WHEN SHE RULED THAT SIX PRIOR CONVICTIONS OF DEFENDANT'S WOULD BE ADMISSIBLE AS WEIGHING ON DEFENDANT'S CREDIBILITY IF HE TESTIFIED

POINT IV 32

THE JUDGE DID NOT VIOLATE DEFENDANT'S DOUBLE JEOPARDY RIGHTS BY CLARIFYING THE PROPER AND LAWFUL SENTENCE OF THE DEFENDANT

CONCLUSION 35

TABLE OF TRANSCRIPTS

1T – motion dated 6/28/21

2T – motion dated 7/13/21

3T – motion dated 7/14/21

4T – motion dated 7/26/21

5T – motion dated 7/28/21

6T – jury selection dated 7/29/21

7T – jury selection dated 7/30/21

8T – jury selection dated 8/2/21

9T – jury selection dated 8/4/21

10T – trial dated 8/5/21

11T – trial dated 8/6/21

12T – trial dated 8/9/21

13T – trial dated 8/10/21

14T – trial dated 8/11/21

15T – trial dated 8/12/21

16T – trial dated 8/13/21

17T – motion dated 2/10/22

18T – sentencing dated 2/17/22

TABLE OF AUTHORITIES

CASES

Furst v. Einstein Moomjy, Inc., 182 N.J. 1 (2004).……16

Illinois v. Perkins, 496 U.S. 292 (1990).……24

Miranda v. Arizona, 384 U.S. 436 (1966).……22, 23, 24, 25

Rhode Island v. Innis, 446 U.S. 291 (1980).……24

Saldana v. Michael Weinig, Inc., 337 N.J.Super 35 (App. Div. 2001).……16

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)……26

State v. Barnes, 54 N.J. 1 (1970)……25

State v. Brunson, 132 N.J. 377 (1993)……30

State v. Camacho, 218 N.J. 533 (2014)……21

State v. Chew, 150 N.J. 30 (1997)……25

State v. Daniels, 182 N.J. 80 (2004)……21

State v. Davis, 96 N.J. 611 (1984)……16

State v. Deatore, 70 N.J. 100 (1976)……16

State v. Elysee, 159 N.J.Super. 380 (App. Div. 1978)… ……25

State v. Fuller, 118 N.J. 75 (1990)……25

State v. Gallicchio, 51 N.J. 313 (1968)……25

State v. Galloway, 133 N.J. 631 (1993)……25

State v. Garcia, 245 N.J. 412 (2021)……..15

State v. Gosser, 50 N.J. 438 (1968)……..25

State v. Harris, 181 N.J. 391 (2004)……..24, 30

State v. Hedgespeth, 249 N.J. 234 2021)……..29

State v. Higgs, 253 N.J. 333 (2023)…….……30, 31, 32

State v. Hockett, 443 N.J.Super. 605 (App. Div. 2016) ……..…15, 18, 19

State v. Hutson, 211 N.J.Super. 49 (App. Div. 1986)……..29

State v. Joseph, 122 N.J.Super. (App. Div. 2012) ……15

State v. J.R., 227 N.J. 393 (2017) ……20

State v. Macon, 57 N.J. 325 (1971)…….…….…….…….…….…21

State v. Mann, 171 N.J.Super. 173 (App. Div. 1979)…….…….…….…25

State v. Marroccelli, 448 N.J.Super. 567 (App. Div. 2017)…….……18, 19

State v. Miller, 76 N.J. 392 (1978)…….…….…….…….…….……26

State v. Morris, 242 N.J.Super. 532 (App. Div. 1990)…….……29, 30

State v. Nyhammer, 197 N.J. 383 (2009)…….…….…….…….…….…24

State v. Paige, 256 N.J.Super. 362 (App. Div. 1992)…….…….…….…….…29

State v. Pohlabel, 40 N.J.Super. 416 (App. Div. 1956)…….…33, 34

State v. Prall, 231 N.J. 567 (2018)…….……15

State v. R.B.,183 N.J. 308 (2005)…….……21

State v. Reininger, 430 N.J.Super. 517 (App. Div. 2013)…….……24

State v. Sands, 76 N.J. 127 (1978)…….……29

State v. Sessions, 172 N.J.Super. 558 (App. Div. 1980)…….……25

State v. Slobodian, 57 N.J. 18 (1970)…….……21

State v. Walker, 322 N.J.Super. 535 (App. Div. 1999) ……33, 34

State v. Wilson, 135 N.J. 4 (1994) ……16, 18

RULES

N.J.R.E. 401..……..……...16, 19

N.J.R.E. 609……27, 28, 29, 31

N.J.R.E. 901……..…15, 19

STATUTES

N.J.S.A. 2C:43-7.1..……..…..…….....32

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On July 2019, 2020, a Mercer County Grand Jury returned Indictment Number 19-07-0387, charging defendant Hamilton Morgan with first-degree murder, in violation of N.J.S.A. 2C:11-3a(1), (Count I); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 39-4a, (Count II); second-degree unlawful possession of a handgun, in violation of N.J.S.A. 2C:39-5b(1), (Count III); and second-degree certain person not to possess a weapon, in violation of N.J.S.A. 2C:39-7b (Count IV).

Defendant subsequently filed a notice of motion to suppress his statement. On June 28, 2021, and July 14, 2021, the Honorable Darlene J. Pereksta, J.S.C., held a hearing on defendant's motion. (1T and 3T).[1] On July 26, 2021, the trial court partially denied defendant's motion. (4T:16-7 to 17-15).

In August 2021, defendant was tried on the first three counts of the indictment before Judge Pereksta and a jury. The jury convicted defendant of all three counts. The State then immediately proceeded with a trial on Count IV certain person not to possess a weapon. The jury convicted defendant on that count as well. Da5-6.

On February 17, 2022, after merging the conviction for Count II into the conviction for Count I, Judge Pereksta sentenced defendant to serve the following concurrent prison terms: an extended three-strikes term of life without parole on

[1] The State adopts the transcript designations as set forth in defendant's brief.

Count I, first-degree murder, and two ten-year terms of incarceration with five-year periods of parole ineligibility on Counts III and IV. The trial court also imposed all mandatory fines and penalties. Da7-9.

On November 28, 2022, defendant filed a notice of appeal with the Superior Court, Appellate Division. Da10-14.

Additionally, on July 7, 2023, the trial court issued a new judgement of conviction, modifying defendant's sentence to an ordinary term of life subject to an 85% period of parole ineligibility pursuant to NERA, N.J.S.A. 2C:43-7.2. Dsa1-3.

The State opposes defendant's appeal for the reasons that follow.

COUNTERSTATEMENT OF FACTS

Detective Stephen Szbanz testified at trial that on May 7, 2019, at about 6:03 p.m., he and his partner, Detective John Carrigg, were in an unmarked vehicle when a dispatch went out on the radio regarding a domestic-violence incident at 118 Hoffman Avenue, and they decided to respond to the scene to offer assistance because they were nearby. (12T: 131-8 to 133-17). But on the way, while "going down the wrong way on Hoffman," a one-way street, they heard eight or nine shots, and then saw a black male dressed in all black, with a black hoodie and black sweat pants, running "across Hoffman Avenue into Wilmot Alley," and they followed in their car. (12T:133-18 to 136-18). As Detective Carrigg turned the car down Wilmot,

Detective Szbanz testified that he saw a "black handgun" in the man's right hand. (12T:136-15 to 23). The man turned left onto Ellsworth Avenue and then crossed Ellsworth, with Szbanz having exited the patrol car at the corner of Wilmot and Ellsworth in foot pursuit. (12T:137-4 to 9). The man then ignored orders to stop and ran between the houses at 22 and 24 Ellsworth, where, Detective Szbanz stated that he lost sight of the suspect "for a split second". (12T:137-21 to 138-4; 12T 185-2 to 20). Detective Szbanz then saw the man scale the fence into the rear yard of 20 Ellsworth after Detective Szbanz drew his firearm and after the man ignored his command to stop. (12T: 138-6 to 18). Detective Szbanz did not jump the fence, because he could not see if the man still had a gun and so he did not want to holster his own weapon and so he chose to exit the yard where he had come in. (12T: 139-1 to 8).

When Detective Szbanz got back to Ellsworth, he saw the suspect exiting the yard of 20 Ellsworth and then running towards Stuyvesant Avenue and he was able to catch up to the man and tackle him to the ground. (12T:139-13 to 25). Detective Szbanz identified the defendant as the person that he pursued and arrested. (12T:142-6 to 19). He also witnessed the search incident to arrest of the defendant, which revealed that he had a black ammunition magazine in his pocket. (12T:143-11 to 16). A handgun was found in front of 18 Ellsworth, near where the defendant was tackled,

the magazine was still in the gun and the slide was in a locked position indicating that the gun had been fired until all ammunition had been used. (12T: 144-3 to 20).

Detective Carrigg also testified that the fleeing suspect that they first saw was wearing black sweatpants and a black hoodie. (13T: 171-7 to 9). He stated that when he turned onto Wilmot Alley, he saw the suspect halfway down the alley and his partner, Detective Szbanz, indicated that the man was carrying a gun in his hand. (13T: 171-16 to 24). Detective Carrigg said he continued down the alley and saw the suspect make a left on Ellsworth Avenue and run alongside a house. (13T: 172-2 to 11). He said he lost sight of the suspect for two or three seconds after the suspect entered the alley. (13T: 172-12 to 16). He also said that he had not seen anyone else in the alley. (13T: 172-25 to 173- 2). Detective Carrigg stayed in the car while Detective Szbanz pursued so that he could wait and see which direction the suspect would go so that he could try to cut off the suspect's avenue of escape. (13T: 173-6 to 16). Shortly afterwards, he heard Detective Szbanz radio that the suspect was coming back out the way he had gone in, and then Detective Carrigg got out of the car to assist and saw that his partner had already tackled the suspect. (13T: 173-19 to 174-13). He indicated that the man he had helped to pursue was the defendant. (13T: 175-7 to 12). Detective Carrigg also testified that the Glock 9-mm. handgun that was found was lying on the ground about ten feet from where defendant was tackled. (13T 186-3 to 6).

Sergeant Luis Nazario testified that he helped process the crime scene, recovering the gun, magazine, and sunglasses from the grass in front of 18 Ellsworth. (11T: 49-2 to 6; 11T: 77-21 to 78-6). Also on Ellsworth, he recovered a black and blue Nike Air Jordan sneaker for a left foot. (11T: 54-17 to 55-5). Later a matching right-foot sneaker was given to him by Detective Scott Peterson (11T: 76-19 to 20). Additionally, multiple spent shell casings and projectiles were recovered from the area at Hoffman and Stuyvesant where the victim was shot. (11T: 60-1 to 64-14; 11T: 71-6 to 7).

Stephen Deady, a ballistics expert, confirmed that 12 recovered shell casings, and nine of the 18 recovered projectiles (or projectile fragments) from the scene and the autopsy were fired from the 9-mm. Glock that was recovered from the scene near the defendant, while the other nine projectiles or fragments were inconclusive. (14T:66-10 to 13; 14T: 82-1 to 21; 14T:88-1 to 8; 14T:92-23 to 94-20).

Detective Edward Hughes testified that he downloaded surveillance video from the time of the shooting from both the D&A Market and from Home Liquors, located next door to D&A on Stuyvesant. (10T:99-8 to 107-3). Those videos and videos from pole cameras maintained by the police were played at trial. (10T:110-18 to 115-5; 10T: 156-11 to 160-21).

Detective Edward Cunningham testified that he maintained the 60 to 80 “pole cameras” in use in Trenton at the time, but that no one was live-monitoring those

cameras, and that the system overwrites itself in a period of about two weeks. (10T:148-17 to 152-23). He testified that there is a pole camera, at Oakland and Hoffman, a long block north of the site of the shooting, but he does not know if it was functioning at the time. (10T:170-25 to 171-6). He also noted that there are "skips" in the footage from the cameras at Stuyvesant and Hoffman where the shooting occurred. (10T:173-2 to 174-19). When asked if there were pole cameras near 33 and 35 Ellsworth, near where defendant was arrested, Detective Cunningham first said he did not know, but then, when shown a photo of those cameras, Cunningham said that even if he "guessed" that there were such cameras there, those cameras were not "operational" in 2019 and that he could not recall if anyone in law enforcement requested footage from those cameras. (10T:175-1 to 179-2).

Detective Jennifer Eyster testified that a search of firearm records revealed no gun permit for defendant, and that defendant's last known address was 45 Edgemere Avenue, which is the next street past Ellsworth if one is headed east away from Hoffman. (12T: 29-19 to 30-2; 12T: 31-10 to 23). Detective Eyster also testified that she noticed defendant to be right-handed, just like the shooter, when he was writing in the courtroom. (12T:42-7 to 24). Detective Eyster also testified that she assembled the various video footage that was played in the courtroom into a synchronized four-panel version that was in evidence. (12T:22-1 to 12).

Detective Roberto Reyes testified that when defendant was transported to the Homicide Task Force after first being taken to Trenton police headquarters, defendant was wearing one sneaker, on his right foot, but when he arrived at the task force location, defendant was not wearing any sneakers. (13T:71-8 to 74-12; 13T:86-18 to 21). Detective Reyes testified that he searched inside the car in which defendant had been transported and found the sneaker under the rear passenger seat. (13T:75-5 to 76-6). Detective Reyes then placed defendant in an interview room and left the sneaker in that room. (13T:76-9 to 24). When the interrogation began, defendant declined to speak to police. Detective Scott Peterson then asked aloud, "Whose sneaker?" and when Detective Reyes said, "That's his," defendant said, "Mine." (13T:93-12 to 19). Then Detective Reyes asked defendant, "This is your sneaker?" and defendant said, "Yeah," and, "They took the other one. The other one at the station." (13T:93-20 to 22).

Detective Scott Peterson testified to his involvement with the attempt to interview defendant. (13T:90-20 to 25). Detective Peterson stated that at the time that he asked, "whose sneaker?" he was unaware of what had happened with the defendant's other sneaker. (13T:93-20 to 94-11).

Detective Patrick Holt testified about recovering pole camera footage, and explained why some footage was recovered while other footage was not. (13T:115-2 to 22). He also explained the photos that were taken of the scenes of the incident,

and why some parts of the route of pursuit were not photographed. (13T:116-13 to 117-9). He also testified that he took photos of defendant's clothes once he was back at HTF headquarters because the clothing was extremely similar to what could be seen on the surveillance footage from the incident. (13T:117-10 to 118-13). He stated that clothing had been held in evidence but had not been submitted to the lab for any analysis. (13T:118-14 to 119-5).

The defense presented only one witness, defense investigator Anarish Rivera. Riverea testified that she took photos for the defense on Ellsworth Avenue on July 14, 2021. (14T:110-16 to 21). Some of the photos were prevented from going into evidence, because the defense's witness could not establish that the pole camera in the defense's picture was there at the time of the incident on May 7, 2019, as opposed to just on July 14, 2021 when the photos were taken. (14T:111-22 to 115-14). Rivera further testified that 37 Edgemere Avenue, across Edgemere from the back yards of the 22/24 Ellsworth Avenue walkway into which the suspect initially ran, is a vacant lot, and the defense was able to publish photos to the jury of the area over the State's objections. (15T:26-22 to 30-8).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY EXCLUDED PHOTOS OF SURVEILLANCE CAMERAS WHICH COULD NOT BE PROPERLY AUTHENTICATED AND LACKED RELEVANCE AND THE TRIAL COURT ALSO PROPERLY GUIDED THE ADMISSION AND USE OF PHOTOS OF ADJACENT PROPERTIES ON EDGEMERE AVENUE

Defendant argues the trial court erred by preventing the defense from admitting certain photographs at trial: photographs, taken in 2021, of a pole camera that he claimed was present at the scene of the murder in 2019; and photographs of a walkway leading from the backyards on Ellsworth Avenue to Edgemere Avenue to show that when the police lost sight of the perpetrator, he could have used that walkway to evade police, thus resulting in defendant's wrongful identification as the actor in this crime. Defendant argues that by refusing to admit this "evidence," the trial court usurped the jury's function and denied defendant his constitutional rights to due process, a fair trial, and to present a defense.

The trial court was correct in determining that the two 2021 photos of the surveillance camera on Ellsworth Avenue were irrelevant and not properly authenticated since nobody could testify that they were present and functional at the time of the incident. (14T: 115-3 to 14; 14T: 142-4 to 6; 15T: 11-4 to 9; 15T: 51-7 to 53-19). Thus, they were inadmissible under the Rules of Evidence, as they were

not relevant nor properly authenticated. Accordingly, defendant's claims to the contrary should be dismissed and his convictions affirmed.

An appellate court defers to a trial court's evidentiary rulings absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021) (citing State v. Nantambu, 221 N.J. 390, 402 (2015)). Appellate courts review the trial court's evidentiary rulings "under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under that deferential standard, an appellate court "will not substitute [its] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" Garcia, 245 N.J. at 430 (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

A photograph is a "writing" under N.J.R.E. 801(e) and it must therefore be properly authenticated in order to be admissible as evidence. See State v. Hockett, 443 N.J.Super. 605, 613 (App. Div. 2016). A proponent of such evidence is required to make a "prima facie showing of authenticity." State v. Joseph, 426 N.J.Super. 204, 220 (App. Div. 2012). It is enough that the record contains "evidence sufficient to support a finding that the matter is what its proponent claims." N.J.R.E. 901.

To authenticate a photograph, testimony must establish that: (1) the photograph is an accurate reproduction of what it purports to represent; and (2) the

reproduction is of the scene at the time of the incident in question, or, in the alternative, the scene has not changed between the time of the incident in question and the time of the taking of the photograph. State v. Wilson, 135 N.J. 4, 15 (1994). In Saldana, the court ruled in a products liability case that the trial judge erred in admitting a photograph of a machine in question when there was no testimony that a warning sticker depicted in the photograph was actually on the machine at the time of the plaintiff's accident. Saldana v. Michael Weinig, Inc., 337 N.J. Super. 35, 46-47 (App. Div. 2001).

Relevant evidence is defined as any evidence that has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401; see also State v. Deatore, 70 N.J. 100, 116 (1976) (stating that test, which "favors admissibility," nonetheless must include evaluation of evidence's probative value in respect of point in issue). In relevance determinations, the analysis focuses on "the logical connection between the proffered evidence and a fact in issue." Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004) (quoting State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990)). The standard for the requisite connection is generous: if the evidence makes a desired inference more probable than it would be if the evidence were not admitted, then the required logical connection has been satisfied. State v. Davis, 96 N.J. 611, 619 (1984).

Both authentication and relevance were considered by the trial court in

determining the admissibility of D-111 and D-112. The State objected to the admission of photographs offered by the defense that showed the area of 31 Ellsworth Avenue taken on July 14, 2021 with a pole camera in the picture. (14T:111-12 to 19). The trial court then clarified that the objection was based on lack of relevance, since no witness could establish that the camera shown in the photograph from July 14, 2021 was also at that location on the date of the incident, May 7, 2019. (14T:112-4 to 115-14). The defense later sought to bring in a witness who was expected to testify that she was a resident of an address near the camera's location, and that the camera displayed in the photograph had been there since February of 2018. (15T:3-20 to 4-10).

The trial court inquired whether the witness could testify as to whether the camera was operational. (15T: 4-15 to 16). The defense proffered that someone had told the witness something that would suggest the camera was working at that time. (15T:5-7 to 12). The defense requested a second adjournment in order to locate the proposed witness, but since only hearsay would be offered to show that the camera was operable at the time, the trial court determined that the evidence would not be admissible, and the trial would proceed. (15T: 46-22 to 48-16; 15T: 49-25 to 53-19).

The crucial thing to consider here is that the photographs were taken on July 14, 2021 and the incident took place on May 7, 2019. The photographs could have been shown to be a fair and accurate representation of the scene on the later date, but

the question remained whether they were also such a representation of the scene more than two years earlier. In order to properly admit the photographs, as the trial court properly found, the defense needed to show that the scene had not changed in any crucial respect. See Wilson, 135 N.J. at 15. They could not and did not do so.

The defense misunderstands the import of Marroccelli and Hockett to this case. While both cases involved a finding that a trial judge intruded on the province of the jury, they dealt with situations that are very different from this case. In Marroccelli, the court was considering whether the trial court improperly required the defense to produce "a handwriting expert, "known exemplars of [Bradbury's] handwriting, signatures of ... Bradbury from known reliable sources, or any other means or method by which to support the assertion that the note is authentic[ ] and, therefore, trustworthy." State v. Marroccelli, 448 N.J. Super. 349, 365 (App. Div. 2017). The court found that it should have been sufficient to provide testimony from someone who was familiar with the handwriting of the note. Id. at 312. This case has nothing to do with the authentication requirements for handwriting, and Marroccelli has little relevance to photographs that were taken years after an incident.

In Hockett, the court considered whether the trial court improperly excluded photographs that showed a key witness for the State using narcotics the day before being called as a witness at the trial. Hockett, 443 N.J. Super. at 610-13. The court

found that the trial judge should not have based the decision to exclude the photographs on the credibility of the witness who was authenticating the photographs. Id. at 614-15. For the defense's purpose, to discredit the State's witness, all that was necessary was that the photographs supported the contention that the witness was not truthful when she claimed she had not used narcotics since March 23, 2007. Id. at 614. The photographs stood for exactly what the jury would be able to see in them.

This case is different, because what the defense purported to show with their photographs was much less direct than what was considered in either Marroccelli or Hockett. The defense wanted to admit the photographs to show that the police failed to access available surveillance that could have shown something relevant to the murder. The trial court understood that purpose and rightly determined that, in order for the photographs to be relevant, there must be some evidence that the camera was in fact there and functioning. (15T: 51-7 to 52-14). Absent that evidence, the picture merely showed part of an area near the scene two years later. Everything about the photograph's relevance hinged on the camera's presence and operability. The trial court rightly determined that more was required than a two-year-removed photograph and a witness who could only testify about hearsay. See N.J.R.E. 401; 901. That decision was clearly not an abuse of discretion.

Defendant also submitted D-115 and D-116, which depicted a walkway

leading from the backyards on Ellsworth Avenue to the next street over at Edgemere Avenue. (14T:142-9 to 12; 14T:149-1 to 9). Defendant is alleging that he was not allowed to present photographs that showed the walkway, and that he was also unable to argue that someone other than him could have been the real perpetrator who evaded detection when police briefly lost sight of the suspect. The trial court detailed many photographs that the defense sought to admit, and ultimately determined that some of them were admissible for the purposes of "location of the buildings, location of the walkway". (15T:14-19 to 17-10). After discussing the ruling, the defense then admitted D-117 and D-118 – over the State's objection – which were said to depict the vacant lot in the area of the police pursuit. (15T:26-13 to 29-25).

As the record shows, defendant was also not actually precluded from arguing to the jury that police may have tackled someone who was not the actual perpetrator in front of Ellsworth Avenue. This exact argument was made in the defense's summation. (16T: 24-12 to 25-12). The defense clearly argued that Detective Szbanz lost sight of the suspect and then later apprehended defendant, who the defense argued was a different person wearing similar clothing. (16T: 24-12 to 25-12).

Ultimately, any error made by the trial court would only warrant reversal if it was more than harmless error. State v. J.R., 227 N.J. 393, 417 (2017). That is so because "[t]rials, particularly criminal trials, are not tidy things. The proper and

rational standard is not perfection; as devised and administered by imperfect humans, no trial can ever be entirely free of even the smallest defect. Our goal, nonetheless, must always be fairness. "A defendant is entitled to a fair trial but not a perfect one."" State v. R.B., 183 N.J. 308, 333-34 (2005) (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)). Although there may be plain error during a jury trial, an error will be found "harmless" if the error did not contribute to the jury's verdict. That is "the error must be 'sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached.'" State v. Daniels, 182 N.J. 80, 95 (2004) (alteration in original) (quoting State v. Macon, 57 N.J. 325, 338 (1971)). This is true even if the error is of constitutional dimension. Macon, 57 N.J. at 338; State v. Slobodian, 57 N.J. 18, 23 (1970). "The Supreme Court has emphasized that 'most constitutional errors can be harmless,' and are therefore not subject to automatic reversal." State v. Camacho, 218 N.J. 533, 547 (2014) (quoting Arizona v. Fulminante, 499 U.S. 279, 306 (1991)).

The trial court ruled properly and well within their discretion in all the rulings mentioned in this point. Should the opposite be believed, however, any error would still clearly be harmless in light of the overwhelming evidence that was presented in this case. The doctrine of harmless error is intended for just this type of case. The alleged errors would be wholly outweighed by the vast evidence that identified defendant as the shooter, including a clear video showing someone appearing exactly

as defendant appeared when he was apprehended near the scene of the crime, in an area where the shooter could be seen running right before officers apprehended defendant. (16T:27-16 to 43-10). The shooter could be seen emptying a full magazine of bullets into the victim, and after the defendant was apprehended, a gun was recovered nearby with the slide back and all rounds discharged. (16T: 39-18 to 40-3). Even if the trial court's rulings are found to have been less than perfect, none of them should be seen as affecting the jury's verdict in any way. Defendant's convictions should, therefore, be affirmed.

POINT II

THE TRIAL COURT PROPERLY ADMITTED SPONTANEOUS STATEMENTS MADE BY DEFENDANT THAT WERE NOT IN RESPONSE TO ANY QUESTION ADDRESSED TO HIM

Defendant declined to be interviewed after he was read his Miranda rights and the detectives then moved to end the interview and take the defendant out of the room. (1T:10-9 to 10; 1T:17-17 to 22). Detective Peterson then noticed a sneaker on the floor of the interview room and he asked "Whose sneaker?" and Detective Reyes responded, "That's his. This is your sneaker?" indicating that it belonged to defendant, and asking him to confirm that. (1T:17-23 to 25). Defendant responded "Yeah," and Detective Peterson then asked "All right. Do you want it on? Do you want your sneaker on?" and defendant responded, "Throw it out." (1T:18-1 to 4).

Defendant then indicated that his other shoe had been taken at the station. (13T:93-20 to 22). This interaction was relevant, because defendant was not telling the truth about the other shoe, which had actually been recovered at the scene. (1T:20-23 to 21-4).

There was a dispute about whether Detective Peterson had asked the initial question to the defendant or to Detective Reyes, but ultimately trial court found that not only was there no evidence that this whole interaction over the shoe was a set-up by police, but also that Detective Peterson was in fact directing the question to Detective Reyes. (4T:16-7 to 15). The trial court noted that Detective Reyes was in fact the first person to respond, and found that defendant's statement right afterwards was admissible as a spontaneous statement. (4T:16-16 to 18). The trial court then described that it believed the whole interaction, including what followed, was not intended to elicit an incriminating response, but nonetheless, the trial court indicated it would exclude anything that defendant said that was in response to a direct question. (4T:16-19 to 17-15).

Defendant now claims that his Miranda rights were violated such that the entirety of this interaction should have been excluded. Defendant's argument clearly misunderstands the protections of Miranda. As spontaneous statements are not the product of custodial interrogation, the trial court properly admitted only the statements that were not responses to any questions directed to him.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court established prophylactic rules to protect the right assured by the Fifth and Fourteenth Amendments against self-incrimination during the "in-custody interrogation of persons suspected or accused of crime." These rules and requirements do not apply until the moment "when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." Id. at 477; State v. Nyhammer, 197 N.J. 383, 400 (2009) (quoting Miranda, 384 U.S. at 477); see also Illinois v. Perkins, 496 U.S. 292, 296(1990); State v. Harris, 181 N.J. 391, 420-21 (2004); State v. Reininger, 430 N.J. Super. 517, 537 (App. Div. 2013). Specifically, the person must be told that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Miranda, 384 U.S. at 479.

In Rhode Island v. Innis, 446 U.S. 291, 302–303 (1980), the United States Supreme Court reaffirmed the principle originally noted in Miranda that a freely volunteered statement is admissible notwithstanding the failure to advise the suspect of his constitutional rights. There, the Court stated "that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."

Miranda, 446 U.S. at 300. As conceptualized in Miranda, interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself." Id. See also State v. Gallicchio, 51 N.J. 313, 321 (1968); State v. Gosser, 50 N.J. 438, 445–446 (1967); State v. Elysee, 159 N.J. Super. 380, 387 (App. Div. 1978).

While officers must scrupulously honor a suspect's invocation of his or her rights, they have no obligation to re-Mirandize if statements are made spontaneously by a defendant. State v. Fuller, 118 N.J. 75, 85 (1990) ("[I]n defendant-initiated conversation following the exercise of the right to silence, the police need not readminister the Miranda warnings as an indispensable element of their duty scrupulously to honor that right."). In the absence of interrogation, a spontaneous statement is admissible in evidence and is not the product of custodial interrogation. Cf. State v. Barnes, 54 N.J. 1, 6, 252 A.2d 398 (1969), *cert. den.* 396 U.S. 1029 (1970); State v. Sessions, 172 N.J. Super. 558, 563, 412 A.2d 1325 (App. Div. 1980); State v. Mann, 171 N.J. Super. 173, 177–178 (App. Div. 1979).

"If an accused does initiate a conversation after invoking his rights, that conversation may be admissible if the initiation constitutes a knowing, intelligent, and voluntary waiver of the accused's rights." State v. Chew, 150 N.J. 30, 61 (1997). A court must look at the totality of the circumstances, including both the characteristics of the defendant and the nature of the interrogation. State v. Galloway, 133 N.J. 631, 654 (1993). Relevant factors to be considered include the

suspect's age, education and intelligence, advice concerning constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature, and whether physical punishment and mental exhaustion were involved. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); State v. Miller, 76 N.J. 392, 402 (1978).

Here, after invoking his right to counsel, defendant voluntarily spoke to the officers. While Detective Cunningham did ask "whose sneaker?", the trial court properly determined, based on the testimony of the officers, that the question was not directed to defendant and was instead directed to Detective Reyes, making defendant's statement right afterwards a spontaneous statement. (4T:16-11 to 18). The trial court then differentiated between times when the detectives were speaking to the defendant, and times where they were not, and excluded the statements that were in response to any direct questions. (4T:16-19 to 17-15). The only statements admitted were those that were not in response to any questions. (4T:16-11 to 17-15). Such unprompted statements are clearly spontaneous.

There is also no doubt that defendant's initiation of conversation constituted a knowing, intelligent, and voluntary waiver of his rights. The interrogation constituted nothing more than a reading of defendant's rights and, after the invocation, defendant was just about to be removed from the room. (1T: 10-9 to 10; 1T: 17-17 to 22). There is absolutely no indication that the factors from Bustamonte

would point to a lack of voluntariness here. The interview was a short process, and it was just about to end when defendant made his spontaneous statements. Therefore, the trial court properly admitted these statements. That admission should be affirmed.

POINT III

THE TRIAL COURT WAS WITHIN IT'S DISCRETION WHEN SHE RULED THAT SIX PRIOR CONVICTIONS WOULD BE ADMISSIBLE AS WEIGHING ON DEFENDANT'S CREDIBILITY IF HE TESTIFIED

Defendant has an extensive criminal history that includes several very serious offenses. The parties agreed that three first-degree robbery convictions from 2002 would be admissible since he finished serving the sentences within the 10-year period allowed for in N.J.R.E. 609; and also that the sentences on the other six convictions, also from 2002, had all been fully served outside of that ten-year period. (13T:49-14 to 19; 13T:56-22 to 24). The State argued that the other six convictions were admissible due to the seriousness of the offenses, and the fact that defendant's extensive criminal history shows contempt for the bounds of behavior placed on all citizens. (13T: 21-21 to 52-12). The trial court properly determined that all of defendant's nine prior convictions would be admissible to affect his credibility should he decide to testify. The judge ruled that defendant's prior convictions would be admissible only in their sanitized form. (14T: 8-15 to 19).

Defendant argues the trial court's ruling that the other six convictions would be admissible for impeachment purposes in the event he chose to testify was an abuse of discretion under N.J.R.E. 609 that was not harmless beyond a reasonable doubt. As the trial court properly ruled that the convictions would be admissible, defendant's convictions should be affirmed.

N.J.R.E. 609(a) provides that, "[f]or the purpose of attacking the credibility of any witness, the witness' conviction of a crime, subject to [N.J.R.E.] 403, shall be admitted unless excluded by the court pursuant to [N.J.R.E. 609(b)]." N.J.R.E. 609(b)(1), in turn, provides that if, at the time of trial, over 10 years have passed since the conviction or the witness's release from confinement for that conviction, whichever is later, the conviction "is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof."

In determining whether evidence of a conviction that occurred over 10 years prior to the start of trial is admissible under N.J.R.E. 609(b)(1), courts may consider the following:

> (i) whether there are intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses,
>
> (ii) whether the conviction involved a crime of dishonesty, lack of veracity or fraud,
>
> (iii) how remote the conviction is in time, [and]
>
> (iv) the seriousness of the crime.

[N.J.R.E. 609(b)(2)].

In State v. Sands, 76 N.J. 127 (1978) the Court addressed the predecessor to this evidence rule, and held that a trial judge may exclude a remote conviction, especially if the crime involved was not a serious offense or did not involve "lack of veracity, dishonesty, or fraud." Evidence of prior convictions should be admitted, and the burden of proof to justify exclusion rests on the party seeking exclusion. Id. at 144. A court must "balance the lapse of time and the nature of the crime to determine whether the relevance with respect to credibility outweighs the prejudicial effect to the defendant." Id. at 144-45.

The decision to admit a prior conviction of a defendant to impeach his credibility "rests within the sound discretion of the trial judge," and cannot be reversed unless it is determined that it constituted an abuse of that discretion. State v. Hutson, 211 N.J. Super. 49, 53 (App. Div. 1986), *aff'd* 107 N.J. 222 (1987), see also State v. Hedgespeth, 249 N.J. 234, 250 (2021). Accordingly, no error was found in a trial judge's decision to permit the State to use a 16-year-old murder conviction in a defendant's robbery trial. State v. Paige, 256 N.J. Super. 362, 371-373 (App. Div.), *certif. den.* 130 N.J. 17 (1992). Similarly, the introduction of a ten-year-old murder conviction in a defendant's trial for escape has been found proper and not remote. State v. Morris, 242 N.J. Super. 532, 543-545 (App. Div. 1990). Intervening crimes between a remote offense and the present one may "bridge the gap" of

remoteness and renew the relevance of older crimes. State v. Harris, 209 N.J. 431, 444-445 (2012); See also, Morris, 242 N.J. Super. at 543-545.

To impeach the credibility of a testifying defendant, the State may introduce into evidence only the number, degree, and date of the defendant's prior similar convictions. State v. Brunson, 132 N.J. 377, 394 (1993). When a defendant has multiple prior convictions, some of which are similar to the charged offense and some of which are dissimilar, the State may introduce evidence only of the date and degree of crime of all of the defendant's prior convictions, but cannot specify the nature of the offenses. Id. Alternatively, the State may introduce without limitation evidence of only the dissimilar convictions. Id.

The Supreme Court recently considered the analysis for older convictions in State v. Higgs, 253 N.J. 333 (2023). In that case, the Court considered whether "defendant's June 2009 disorderly persons offense was sufficient to "bridge the gap" and admit the 24- and 14-year-old convictions." Id. at 369-70. The Court found that seriousness alone could not outweigh the prejudicial impact of remote convictions that have nothing to do with dishonesty, but they were also considering "convictions sought to be admitted [that] were certainly remote in time, as one conviction was 14 years old, and the others, as the trial court noted, were "almost a quarter century old." Id. at 370.

In this case, the trial court considered both the remoteness and the seriousness of defendant's criminal record, not just the seriousness. (14T:10-6 to 11-23). The judge highlighted that she believed there was a "pattern" established by defendant's history. (14T:11-19 to 24). While seriousness was undoubtedly a factor, it was not the only factor the trial court considered. A crucial difference between this case and Higgs also exists due to the convictions that both sides had agreed would be admissible. (13T:49-13 to 19). These convictions included a 17-year NERA sentence with 5 years of parole supervision, which resulted in defendant still being on parole supervision at the time he committed the murder, just two years after his release. (14T 9-4 to 11).

That conviction was properly considered to be "intervening", as it was crucial to understanding the period between all the convictions that the State and defense disagreed over and the date of this incident. The trial court thus properly used her discretion to decide that the sentences which themselves fell outside of the ten-year period were not remote, when defendant had only spent two years outside of prison after receiving those convictions, and had spent zero time outside of parole supervision after those convictions. Whether considered under remoteness or as an intervening conviction, the long sentence for that NERA offense was clearly relevant to the N.J.R.E. 609 analysis.

Defendant relies on Higgs, but the facts of Higgs were completely different. There, the defendant "was released from confinement on these convictions 21 years before trial. The final conviction was 14 years old at the time of trial." Higgs, 253 N.J. at 369. Higgs did not deal with a situation where, as here, defendant was released for a NERA conviction only about two years before the current offense was committed. As the trial court properly ruled on the admissibility of defendant's prior convictions to impeach his credibility, his convictions should be affirmed.

POINT IV

THE JUDGE DID NOT VIOLATE DEFENDANT'S DOUBLE JEOPARDY RIGHTS BY CLARIFYING THE PROPER AND LAWFUL SENTENCE

On February 17, 2022, the trial court sentenced defendant to life-without-parole pursuant to the Three Strikes extended term for murder as set forth in N.J.S.A. 43-7.1a. Then, on July 7, 2023, the trial court signed an amended Judgment of Conviction clarifying the sentence in response to an inquiry from the parole board. DSa1-3. The trial court also submitted a letter clarifying its intention in the prior sentencing and explained that it had been the intention, and still was, to sentence defendant to a life in prison without the possibility of parole due to his "atrocious" record. DSa4-8. The trial court further clarified "Essentially, I intended to sentence Defendant to the maximum sentence he could receive under the law – life (which equals seventy-five years), subject to NERA (85% which must be served before

parole) pursuant to N.J.S.A 2C:43-7.2. DSa7. Finally, the trial court asserted "the fact that the "three strikes" law applies to Defendant should not, in my opinion, result in a lesser sentence than that which could hypothetically be imposed on another defendant convicted of murder who is not eligible under "three strikes." DSa8.

The sentence is in fact a clarification of confusion that resulted from the trial court referencing a variety of different bases for sentencing defendant to a life term. The judge ran through the options for sentencing, stating, "And there are really three ways or three bases to impose a life sentence in this case… There's also a legal basis to sentence to an extended term under you being a persistent offender… Under three strikes it's life without parole mandatory. Under the other extended terms, it's life with a 35-year minimum parole ineligibility." (18T: 28-12 to 29-5). The trial court went on to say "The issue then becomes parole eligibility. And again my intention and what I think is just and warranted, ***is that you not be eligible for parole***." (emphasis added) (18T: 32-6 to 9). While the JOC that followed this sentencing hearing caused confusion, the trial court's intent to impose maximum parole ineligibility is unmistakable.

The sentencing transcript, rather than the judgment of conviction, should be considered the true source of the sentence. See State v. Walker, 322 N.J. Super. 535, 556 (App. Div. 1999); State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956). When the JOC and the sentencing transcript conflict, "[i]t is firmly established that

the sentencing transcript is 'the true source of the sentence.'" State v. Walker, 322 N.J. Super. 535, 556 (App. Div. 1999) (quoting State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956)).

Ultimately, the issue is whether this was a new sentence or it was in fact a clarification of the sentence imposed on February 17, 2022. The trial court submitted a letter that she believes this was simply a clarification. The sentencing transcript bolsters that view as objectively correct. Although the citation to Three Strikes in the JOC did cause confusion, the trial court was clear that it intended defendant to receive the minimum parole eligibility. The clear intention in the sentencing transcript should govern, and the new JOC should not be vacated.

CONCLUSION

For all the above-stated reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

Respectfully submitted,

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Mercer County Prosecutor

BY: Peter W. Rhinelander

Assistant Prosecutor

DATED: November 30, 2023

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