SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1013-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Hudson County.
v.	:	
MICHAEL T. WEATHERSBEE,	:	
Defendant-Appellant.	:	Indictment No. 18-12-1104-I
	:	Sat Below:
	:	Hons. Sheila A. Venable, Patrick J. Arre, J.S.C.; and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: August 31, 2023

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

On December 19, 2018, Michael Weathersbee was charged in a Hudson County indictment with first-degree murder, N.J.S.A. 2C:11-3(a)(1), (a)(2) (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count two); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1) (count three); and being a certain person not to possess a firearm, N.J.S.A. 2C:39-7(b)(1) (count four). (Da 1-2)[2]

Weathersbee moved to exclude an audio- and video-recorded statement he made to police. On June 28, 2019, Judge Sheila A. Venable, J.S.C., held an evidentiary hearing, and on July 12, 2019, she issued a written decision denying his motion and admitting his entire statement. (3T; Da 110-28)

Between January 30 and February 10, 2020, bifurcated jury trials were held before Judge Patrick J. Arre, J.S.C. -- the first on counts one through three and the second on count four. (7T to 13T) The jury returned two verdicts finding Weathersbee guilty on all counts. (13T 6-2 to 7-8, 20-1 to 20; Da 179-80)

On June 24, 2021, Judge Arre heard argument on the State's motion to sentence Weathersbee to an extended term. (14T) On August 5, 2021, Judge Arre denied the State's motion and sentenced Weathersbee to an aggregate term

[2] "Da" refers to defendant's appendix. "PSR" refers to the presentence report. The transcript abbreviations are set forth above in the Index to Transcripts.

of thirty-five years in prison, all to be served without parole. (15T 4-12 to 16-23, 34-20 to 41-8; Da 194-96) On August 24, 2021, Judge Arre issued a written decision amplifying his sentencing decisions. (Da 181-93)

On December 2, 2022, Weathersbee filed a notice of appeal, which this Court ordered filed as within time. (Da 197-201)

STATEMENT OF FACTS

The State alleged that Weathersbee shot Laquan Clark for disclosing his cooperation in a prior police investigation. (12T 56-13 to 100-8) No weapon was recovered. No DNA, fingerprints, or other forensic evidence implicated him. No surveillance video captured the actual shooting. And no eyewitnesses testified. Weathersbee presented a mistaken-identity defense. (12T 14-21 to 55-24)

A. Alleged Pretrial Identification[3]

Before trial, the police twice interviewed Eva Reid, a resident of 10 New Street in Jersey City, who claimed to have seen the shooter from across the street. (Da 171) In her first interview on September 26, 2018, at 11:25 a.m., she gave a general description of the shooter as a tall, thin man with "wavy" hair and no dreadlocks; she was not asked to make an identification during that first interview. (Da 129-54, 171-76) During her second interview the same day at

[3] The facts and procedural history regarding the alleged identification are combined for clarity.

9:22 p.m., the detectives showed her surveillance video of a man with dreadlocks but otherwise matching her description who had been walking in the neighborhood on the night of the shooting; Reid said she recognized the man as the shooter. (Da 155-67, 171-78) In a separate interview conducted the same day between 3:29 and 10:40 p.m., Weathersbee identified himself as the man walking around. (Da 4-108; Da 171-72) However, the police never administered a lineup or photo array to Reid using a known photo of Weathersbee.

The defense challenged that identification procedure as impermissibly suggestive and moved for an evidentiary hearing under Wade/Henderson.[4] On June 10, 2019, Judge Venable held argument on the motion, and on July 12, 2019, she issued a written decision finding prima facie evidence of suggestiveness and granting an evidentiary hearing. (2T; Da 168-78) However, it is unclear whether the Wade/Henderson hearing was ever held or whether the court issued a final ruling.[5] Reid did not testify at trial.

B. Trial

At 2:13 a.m. on September 23, 2018, police responded to a 911 call reporting a shooting at 10 New Street near a bar called Brenda's Place in Jersey

[4] United States v. Wade, 388 U.S. 218 (1967); State v. Henderson, 208 N.J. 208 (2011).

[5] No such order appears on the docket, and no record was found for the motion dates shown in Promis/Gavel. (Da 202)

City. (7T 46-2 to 54-17) Clark was found "slumped over" across the front driver and passenger seats of a gold Lexus, which was double-parked in the middle of New Street in front of the bar. (7T 55-16 to 59-19; 10T 12-19 to 15-24) A crowd of thirty to forty people surrounded the car. (7T 54-18 to 55-15) Clark's death was ruled a homicide caused by five gunshot wounds. (7T 60-19 to 62-14; 11T 83-17 to 106-13) Five bullets were recovered from his body, and a sixth was found in the front passenger seat of the Lexus; a ballistics expert testified that all six were fired from the same gun. (10T 62-9 to 63-5; 11T 49-5 to 59-10, 90-17 to 105-9) Two hooded sweatshirts were found near the Lexus, one of which was found just outside the front passenger door and contained cash, a marijuana cigarette, and three glassine bags of heroin and fentanyl. (10T 23-16 to 30-18, 74-20 to 80-6, 130-3 to 131-4) The police never tested that sweatshirt for DNA or identified the person to whom it belonged. (10T 80-13 to 81-15)

The police collected numerous fingerprints from the Lexus; seventeen prints were deemed suitable for comparison, but none matched Weathersbee. (10T 38-21 to 25, 109-12 to 118-2 to 6) Around 12:20 a.m. that night, a bar fight broke out between Clark's ex-girlfriend and the sister of another man, Larry Johnson; both Clark and Johnson helped break up the fight, but Johnson was later ruled out as a suspect. (7T 164-5 to 169-25; 9T 41-25 to 44-2, 112-3 to 130-2, 138-6 to 165-17) Weathersbee was not at the bar that night and had

nothing to do with the fight. (9T 43-17 to 44-2)

The police obtained several surveillance videos from Brenda's Place and nearby properties. (7T 74-19 to 122-4; 11T 20-8 to 32-18; Da 207) Video from the bar showed that between 2:11 and 2:12 a.m., people in the crowd outside the bar "duck[ed]" and "ran in different directions." (9T 45-16 to 47-2) Just after the shooting, a man wearing a hooded sweatshirt could be seen running east on New Street away from the area near where Clark's Lexus was parked; the police never identified that man. (9T 47-3 to 49-10) Also at 2:12 a.m., a different man ran east on New Street through an intersection towards the block on which the bar was located and, about fourteen seconds later, ran back west through the intersection and up New Street. (8T 97-20 to 102-25; 10T 150-19 to 152-10)

At trial, the State introduced a Facebook post that Clark uploaded on September 5, 2018, which accused Weathersbee of being a police informant and included photos of police records. (8T 17-8 to 18-25) The State also played the video of Weathersbee's interrogation conducted by Detective Lamar Nelson and others.[6] (1T; 7T 175-17 to 241-6; 8T 24-11 to 107-22; 9T 5-16 to 34-25) Throughout the interrogation, the detectives accused him of the murder, asserting their theories of how and why he did it. (1T; 7T 214-17 to 241-6; 8T

[6] The trial transcripts of the interview contain many "indiscernible" markings, so parallel citations are provided to the Hudson County Prosecutor's Office (HCPO) transcript, (1T; Da 4-108), which was admitted at trial, (7T 253-22).

24-11 to 107-22; 9T 5-16 to 34-25) Although Reid did not testify at trial, on the interrogation video, the detectives claimed that an eyewitness had identified Weathersbee, and they also accused him of shooting at Clark two days earlier, though no one testified about such an incident. (1T 65-19 to 74-3; 8T 68-24 to 79-16) The jury also heard him repeatedly ask to "go home" and say that he had "nothing else to say." (1T 93-9 to 98-19; 9T 17-20 to 34-11)

During the interview, Weathersbee said he had been drinking that night and did not recall precise times but that he went to Brenda's Place around "11:00 something" p.m., walked around for a while to "sober up," and then drove to the nearby home of the mother of his children, Ashley McKnight, where he retired. (1T 5-25 to 18-17; 7T 186-18 to 203-4) The detectives displayed surveillance videos and video stills showing a Jeep driving past the bar at 1:25 a.m., circling the block, and parking on a nearby street at 1:30 a.m.; and then a man with dreadlocks exiting the Jeep, walking around, reentering the Jeep, and driving west away from the block of the bar at 1:46 a.m. (1T 18-18 to 28-13, 75-9 to 76-9; 7T 202-23 to 232-4; 8T 85-8 to 95-4) Weathersbee said he was the one driving the Jeep and walking in the videos; he also said he knew of Clark but did not have any issues with him.[7] (1T 5-23 to 30-6; 7T 186-14 to 234-23)

[7] Other videos for which he did not self-identify showed a man walking on New Street until 2:04 a.m. and then walking toward the block of the bar; and a Jeep driving on a further street at 2:13 a.m. (9T 31-23 to 39-23; 11T 20-16 to 32-19)

The detectives also confronted Weathersbee about the Facebook post. (1T 30-7 to 34-7; 7T 234-24 to 240-24) He acknowledged giving a police statement in 2015, Clark confronting him about it in 2016, and seeing the post; but he said he told Clark in 2016 that it was not true, the post did not really bother him because the news of his cooperation was already out, and he did not believe that Clark was the person who first posted it online. (1T 30-7 to 43-1; 7T 234-24 to 241-6; 8T 17-8 to 39-9) He later agreed that the post jeopardized his life and that he did not go into the bar that night because he saw that Clark was there. (1T 43-2 to 75-16; 8T 39-10 to 55-23) When asked what time he arrived at McKnight's, he initially said he "wasn't really paying attention to the time," but after the they pressed him, he agreed that it was before 2:00 a.m. (1T 15-1 to 15, 79-11 to 23; 7T 198-4 to 199-2; 8T 99-4 to 18) He denied that he was the man in the videos running west at 2:12 a.m. or that he had anything to do with Clark's death. (1T 56-20 to 101-14; 8T 56-25 to 107-22; 9T 5-16 to 28-22)

On cross-examination, Nelson admitted that there were "many people in the area" at the time of the shooting, including up to twenty people outside the bar as well as the unidentified man who ran east, and that Clark was known for publicly exposing other police informants who could have had the same motive. (9T 49-16 to 58-25) The police did not identify or interview "anybody" in the crowd after the shooting. (9T 86-14 to 25) In addition, Weathersbee's father and

McKnight lived only about one-and-a-half and three blocks away, respectively. (9T 51-4 to 54-8) According to McKnight and phone records, Weathersbee called her at 1:40 a.m. to say he was coming over and at 2:40 a.m. when she let him in, and she called him at 3:16 a.m.; when he arrived at her place, he did not have a gun or any blood on him. (7T 40-8 to 44-16; 11T 17-23 to 19-1) Police searched the Jeep and a Honda driven by Weathersbee, but they did not find a gun, blood, or any trace of Clark's DNA. (10T 65-10 to 71-8, 84-9 to 94-8)

Weathersbee did not present any witnesses and stipulated that he did not have a permit to own a firearm. (10T 128-17 to 130-2) At the second trial, he stipulated that he had previously been convicted of offenses making it unlawful for him to possess a firearm. (13T 10-6 to 15)

LEGAL ARGUMENT

POINT I

THE ADMISSION OF DEFENDANT'S POLICE STATEMENT VIOLATED HIS RIGHTS AGAINST SELF-INCRIMINATION AND TO DUE PROCESS. (Da 110-28)

The detectives who obtained Weathersbee's statement flagrantly violated numerous settled principles of Miranda[8] law and due process. While holding him for over seven hours, they contradicted the Miranda warnings and

[8] Miranda v. Arizona, 384 U.S. 436 (1966).

affirmatively misled him about his suspect status. They threatened his life and exploited his children. They minimized the offense, promised leniency, falsely urged him to "help" himself, and fabricated eyewitness evidence. They swore and shouted at him; called him a "motherf***er"; and physically intimidated him by pointing at him, leaning toward him, and slapping the table. And they repeatedly ignored his invocations of his right to silence and twice conditioned his freedom on him cooperating. As a result of those psychologically coercive tactics, his Miranda wavier and statement as a whole were involuntary and should have been suppressed in full. Because the admission of his statement was not harmless beyond a reasonable doubt, his convictions must be reversed. See U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶ 1; N.J.S.A. 2A:84A-19; N.J.R.E. 503.

A. Defendant's Statement and Motion Court's Decision

1. Defendant's Statement

On September 26, 2018, three days after the shooting, two to four members of the HCPO Gang Unit picked up twenty-five-year-old Weathersbee from his place of work and transported him in a police car, uncuffed, to the HCPO Homicide Unit. (3T 7-2 to 8-13, 25-10 to 36-2) At some point before he was interviewed, the police took his cell phone. (1T 5-12 to 13, 80-4) Nelson was not present then and admitted that he "d[id]n't know" what the Gang Unit

officers said to Weathersbee to convince him to go with them or whether they told him that he did not have to go, but Nelson nonetheless "believe[d]" that they "asked" him to go, though he did not explain the basis of that belief. (3T 8-16 to 18, 26-23 to 35-17) The motion court did not make any finding on whether Weathersbee went voluntarily to the station or on Nelson's general credibility.

At the station, Nelson "told" Weathersbee to go into a "[c]ramped" interview room and to "[s]it" in a chair near the wall, while the detectives sat between him and the only exit. (1T 1-13; 3T 36-3 to 46-18) The interrogation was primarily conducted by Detectives Nelson and Green, but two other detectives alternatively participated later. (1T; 3T 11-20 to 12-7) The detectives never told Weathersbee that he could leave. (3T 27-14 to 28-7) He remained at the station for over seven hours from 3:29 to 10:40 p.m. until he was formally arrested; in that time, he was questioned for over two and a half hours. (3T 12-25 to 21-21; Da 109, 00:00:30 to 06:49:05) Although they took breaks and provided water and coffee, he was confined to the interview room the whole time except to use the bathroom.[9] (3T 22-20 to 23-11, 36-12 to 19)

[9] The video suggests that Weathersbee was actually locked inside the room during the breaks, as he at one point got up and knocked on the door to try to be let out; moments later, a noise can be heard that sounds like a latch being unlocked before a detective answers; Weathersbee then says he needs to use the bathroom, and he is permitted to leave; a detective later tells him to "knock if you need anything" and the latch sound is heard again. (Da 109, 05:53:17 to 05:58:54) The court did not make any finding on whether the door was locked.

At the start of the interrogation, after briefly collecting biographical information, Nelson said, "All right. Just like, you know, anybody else that come down here, we gotta read you your rights and things like that." (1T 3-20 to 21) However, Nelson admitted at the Miranda hearing that they do not read the Miranda rights to every witness at the station; they did not do so in this case for the eyewitness Eva Reid; and their particular interest in Weathersbee was "a little bit different than if he were simply brought in as a witness." (3T 41-15 to 45-8) Nelson denied that Weathersbee was a "target" and claimed that they did not decide to arrest him until later that evening when McKnight did not confirm his alibi and Reid said she recognized the shooter on surveillance video, but Nelson conceded that Weathersbee was already a "person of interest as a shooter." (3T 40-21 to 45-5) Before asking Weathersbee to waive his rights, the detectives did not inform him that they suspected him of committing the murder based on what they already knew at the time: that (1) Clark had publicly exposed Weathersbee as a police informant on Facebook; (2) surveillance videos showed him circling the area in his father's Jeep and walking back and forth near the time of the shooting; and (3) videos showed a man wearing similar clothing running west away from the scene at 2:12 a.m. just after the shooting.[10]

[10] As the motion court found, in addition to having already obtained the videos and Facebook post, the police had already traced the Jeep to Weathersbee's father and interviewed him, during which he confirmed that Weathersbee was

Nelson read the Miranda rights from a waiver form, and Weathersbee said he understood them; when asked if he wished to answer questions, he quietly said, "Mm, cool." (1T 3-23 to 4-18; Da 109, 00:03:10 to 00:04:01) After he signed the form, Nelson said they had "a couple" questions about Clark's death and wanted him to "help [them] out," to which he agreed. (1T 4-19 to 5-22)

The detectives immediately began questioning him in detail about his whereabouts on the night of Clark's death, including what time he went to and left Brenda's Place, which door he used, who he talked to, how much he drank, what he wore, what car he drove, where he parked, where he went after the bar, what route he took, and when he went to McKnight's. (1T 5-23 to 18-16) Even though he said he had been drinking and could not give precise times, they kept pressing him to do so. (1T 6-7 to 16-10) They confronted him with the videos of the Jeep, but even after he told them, "that don't really look like me," they continued to show videos until he conceded; then they asserted that the videos "[c]learly" contradicted his alibi, until he again agreed. (1T 18-18 to 26-11)

The detectives then directly questioned him about Clark's death, confronting him with Clark's Facebook post and repeating their theory that the

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driving his Jeep that night and identified in the videos both the Jeep and Weathersbee walking. (Da 112-13; 3T 5-5 to 7-2) The detectives also already believed that the man running west at 2:12 a.m. was the "same male that we see walking around," who Weathersbee's father already identified. (1T 78-11 to 15)

post had "put[] [his] life in jeopardy." (1T 29-18 to 48-4) Weathersbee tried to deny their theory, but Nelson continuously cut him off; waived his hands at him; slapped the table; shouted, "No, no, no"; "Whoa, whoa, whoa"; and "Timeout. Timeout. Timeout"; and swore at him and accused him of lying, stating, "Now you gonna bullsh*t me," "that's bullsh*t," and "don't sit here and lie" -- until Weathersbee eventually agreed. (1T 30-7 to 48-4; Da 109, 00:45:45 to 00:58:48)

At that point, the detectives announced "a problem here" and began to empathize with his plight, stating that Clark was "totally wrong" for exposing him and had affected his father's affection and endangered his family. (1T 48-5 to 60-11) But then Nelson called him a "motherf***er"; repeatedly clapped his hands, knocked and slapped the table, pointed and shouted at him; and declared his guilt as fact, saying, "when opportunity knocks, you took it"; "you did get him"; and "you shot him." (1T 60-12 to 67-11; Da 109, 01:03:08 to 01:31:04)

Nelson also falsely claimed that an eyewitness had identified him, stating, "How do you think we found you?"; "You might have almost snuck away with this one. But that good ol' witness right there on New Street"; "So somebody just clearly just made you up outta the blue[?]"; "they were able to assume it was you . . . and they pick you?"; and, "They seen you do it." (1T 66-3 to 74-3; Da 109, 01:21:17 to 01:24:58) However, by that time (about 4:50 p.m.), the eyewitness from New Street, Reid, had only given a general description of the

shooter and had not yet even been asked to make an identification, which did not occur until her second interview hours later.[11] (Da 113, 155)

They did not take the first break until after about an hour and a half of questioning. (Da 109, 01:31:10) Upon resuming, they continued to accuse him and reject his explanations; empathized that he "had no choice" but to kill Clark because his "kid's life was in jeopardy"; and implied that he had to cooperate: "You can't run from it. You can't run from this. This is where we are right now. There's no hiding. There's no[] going back. You did it, now it's time to change that and say, listen man, I had to." (1T 74-22 to 77-11) Weathersbee did not respond, so Nelson twice asked him what he was thinking, and he replied, "I'm thinking nothing." (1T 77-11 to 13) They asserted that he had both the "motive" and the "opportunity" to murder Clark and insisted he explain, but Weathersbee, now looking away, did not respond for over thirty seconds -- but they continued to question him. (1T 77-14 to 79-22; Da 109, 02:13:28 to 02:14:00)

After another break, they disclosed that they previously spoke with his father who was "real concerned" about him and "d[id]n't want [him] down that road," and Nelson empathized that he had heard Weathersbee was "a good kid,

[11] As the State recognized at the Wade/Henderson argument, even in Reid's later interview, "she never identifie[d] the defendant." (2T 11-2 to 12-25) She only recognized the shooter as a man in the surveillance videos; she did not "pick" Weathersbee in a lineup or photo array. (Da 113)

just caught up in the wrong situations." (1T 82-21 to 84-2) But then Nelson directly threatened that Clark's friends would kill him if he left police custody:

> NELSON: My man, you gotta understand something. I, I, I hope you understand, but at this point you probably -- your safest place is right now with me.
>
> WEATHERSBEE: Why is that?
>
> NELSON: So if I know it's you, eventually they gonna find out it's you.
>
> . . . .
>
> NELSON: (Unintelligible) five children, five beautiful kids and you made a mistake. You made a mistake that night. But now it's time to own up to it and accept it. It's what it is. You had no choice. I get it. You had to do it. They put you on blast. They put they gave you -- no, I know. That was it. That was your only out. You wanna die? You want [to] go on the streets and die?
>
> [1T 84-5 to 19 (emphasis added).]

Weathersbee claimed that he was "not worried," but Green later added, "Hate for you to walk out of here and have something happen to you," and "You may not be [worried] but I am." (1T 84-20 to 92-19) At the Miranda hearing, Nelson disclaimed the label "ultimatum" but admitted that he stated only "two possibilities": "stay safe in the interview room with [the police]" or "go out on the street and possibly die." (3T 49-5 to 52-25)

The detectives continued to accuse him uninterrupted for over two minutes, but he remained silent and shook his head, so Nelson said, "you're not

saying nothing . . . . [Y]ou're not telling me anything else," prompting him to again deny their accusations. (1T 85-12 to 86-4; Da 109, 03:26:50 to 03:29:10) They continued to press him to "explain," but he sat silently and looked away for another thirty seconds, so Nelson insisted, "What? No? Yes?" and kept questioning him. (1T 86-5 to 13; Da 109, 03:29:10 to 03:30:11) He again sat silently for eighty-four seconds until Nelson leaned in and said, "[Y]ou're not telling me anything." (1T 87-6 to 17; Da 109, 03:31:48 to 03:33:12) After yet another minute of silence from Weathersbee, Green accused him of "lying since [he] walked in the door"; repeatedly told him to "[m]an up"; said he was "in the way" of Green doing his job; and then launched into a 110-second-long period of uninterrupted accusations. (1T 88-11 to 91-1; Da 109, 03:35:02 to 03:41:50)

After an unidentified detective entered, Weathersbee asked and repeated, "Can I go home to my kids?" but the detective replied, "You may not be going home" and continued to question him. (1T 93-9 to 94-3) The detectives repeatedly urged him to help himself, stating, "You gotta tell your story before it's just too late"; "you don't wanna help yourself. So you may not be going home"; "Don't sit here and waste people time. They trying to help you. So help yourself"; and "It's your opportunity, Mike. There's so much we can do" -- but he again did not respond. (1T 93-6 to 94-4; Da 109, 03:47:27 to 03:48:34) The unidentified detective promised to "change [his] life"; told him to "grow up";

and threatened that he could be removed from his children's lives and another man could raise them, stating, "Stop thinking about yourself. You got five kids and you sitting here being selfish?" and, "You don't want some other cat raising your kids . . . . Four months, they real impressionable. Let some dude start giving that baby toys when they get six or seven months. That's gonna be daddy to them . . . . You're a fool if you let that happen." (1T 94-1 to 95-9)

Weathersbee asked a third time if he could "go home" but the unidentified detective said, "Nah. You ain't give me a reason for you to go home. I haven't heard one thing. I heard a bunch of lies earlier. That's not enough for you to go home. Give me a reason."[12] (1T 95-12 to 17; Da 109, 03:50:35 to 03:51:20) After more accusations, more silence from Weathersbee, and another break, Detective Infantes, who knew Weathersbee from his prior cooperation, entered, and Weathersbee quickly said, "I don't got nothing else to say, man. Just get in contact with [McKnight] so I can get outta here." (1T 95-19 to 98-20; 3T 21-22 to 22-3; Da 109, 03:52:32 to 03:55:31, 04:43:17 to 04:43:50) But Infantes continued, invoking their prior relationship and telling him to "look at me" as he sat silently and looked away; that their questions "have to be answered"; and

[12] The HCPO transcript reported, "(Unintelligible) go home?" but the motion court found that he was asking "if he can go home." (Da 126) Weathersbee also immediately clarified that he was asking to go home when the detective asked him, "You asking me?" and he responded, "Yeah." (1T 95-12 to 14) The trial transcript similarly reported that he asked, "Can I go home?" (9T 20-5)

that the police wanted to help him, stating, "I'm not gonna treat you like I would treat other people"; "If we don't get out in front of this now, Mike, it's gonna hurt you worse later on"; "we don't only put people in jail . . . . [W]e try to save some people too"; and "I wanna help you. Like, that's 100 percent man to man, no cop sh*t. . . . I wanna help you. We all wanna help you." (1T 98-21 to 100-4; Da 109, 04:43:30 to 04:50:00) Weathersbee said he was "t[ir]ed as hell. Ready to go the f**k home," prompting another break; indeed, during every break, he rested his head in his hands and on the table. (1T 101-15 to 22; Da 109, 01:31:28 to 07:11:25) Upon resuming, the detectives continued to challenge his alibi and asked what he had to say; when he again replied, "Nothing," they showed him another video and kept accusing him. (Da 109, 06:38:45 to 6:48:00) They again asked what he had to say, and he repeated for the third and fourth time, "Nothing. Got nothing [else] to say," but they continued to accuse him and to ask about gunshots until he said for the fifth time, "I got nothing [else] to say" -- after which questioning finally ceased and he was formally arrested. (Da 109, 06:48:00 to 07:11:52; Da 127-28)[13]

[13] The HCPO transcript did not record the portion of the interview from about 06:38:45 to 06:50:40. The court found that the last three "nothing" responses occurred based on its review of the video. (Da 127) The court omitted the word "else" from two of those statements, which is clearly audible on the video, but that word does not change the analysis. (Da 109, 06:48:00 to 06:49:05) The court also omitted his second reply that he had "nothing" to say, which is clearly audible on the video. (Da 109, 06:40:02 to 6:40:20) The trial transcripts

2. Motion Court's Decision

The motion court denied Weathersbee's motion to exclude his statement in its entirety. (Da 110-28) Although the State did not contest that Weathersbee was in custody during the stationhouse interrogation, the court sua sponte held that he was not in custody until his third request to "go home." (Da 121, 125-26) The court nonetheless found his Miranda waiver valid, but it analyzed that issue as a question of whether his "reply of 'Mm, cool,' constituted an indication that [he] wished to remain silent" and an "invocation of the right against self-incrimination," rather than a question of affirmative, voluntary waiver. (Da 123)

The court next held that his statement overall was not coerced. (Da 123-25) It found that the "police impliedly threatened that he would be retaliated against" and made "a promise that [he] would be safer if he cooperated," but it believed they were not coercive because the detectives would not be committing the retaliation themselves. (Da 123-25) The court also found that they pressed him to cooperate because it was "best for his children," but it did not analyze that pressure as coercive. (Da 126) The court said it considered the totality of circumstances, but besides the threat of retaliation, it mentioned only the water, breaks, and his prior experience talking to police as a witness. (Da 125)

Finally, the court held that all three of his requests to "go home" and his

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similarly report that the second "nothing" response occurred. (9T 31-17 to 20)

first assertion that he had "nothing else to say" were not even ambiguous invocations of his right to silence because he did not "specifically request[] that the questioning cease"; he continued to respond, "albeit curtly"; and, after the latter assertion, he asked them to call McKnight so he could leave. (Da 125-27) The court held that only his last three assertions that he had "nothing" to say constituted an unambiguous invocation, but because nothing substantive was said thereafter, it admitted his entire statement. (Da 127-28)

On appeal, the only factual finding that Weathersbee challenges is that the court missed his second reply that he had "nothing" to say, which was clearly mistaken based on the objective video showing that it occurred. (Da 109, 06:40:02 to 6:40:20) However, the court committed multiple legal errors by holding that he was not in custody for most of the interview; that he did not invoke his right to silence until the very end; and that both his Miranda wavier and statement overall were voluntary -- all of which this Court reviews de novo. State v. Rivas, 251 N.J. 132, 152-53 (2022); State v. Gonzalez, 249 N.J. 612, 628 (2022); State v. Hubbard, 222 N.J. 249, 263, 270-72 (2015). Although deference is ordinarily owed to a trial court's reasonable factual inferences drawn from a video, State v. S.S., 229 N.J. 360, 379-81 (2017), "if the trial court does not make any factual finding on a given topic, no deference is due the conclusions it reaches on that subject," State v. Ahmad, 246 N.J. 592, 609

(2021); accord State in re M.P., ___ N.J. Super. ___, ___ (App. Div. 2023) (slip op. at 67-70) (considering facts apparent from video of police statement not addressed by motion court).

B. Defendant Was in Custody Throughout the Stationhouse Interrogation.

The state and federal Miranda protections apply where a suspect is both in custody and subject to police interrogation. Hubbard, 222 N.J. at 265-66. Here, it is undisputed that the detectives interrogated Weathersbee, so the only threshold issue is whether he was in custody.

"Custody" under Miranda law "does not necessitate a formal arrest, nor does it require physical restraint . . . , nor the application of handcuffs." Id. at 266. Rather, it is an objective inquiry that focuses on "whether there has been a significant deprivation of the suspect's freedom of action" based on "how a reasonable [person] in the suspect's position would have understood his situation." Id. at 266-70. Relevant factors include "the time and place of the interrogation, the status of the interrogator, [and] the status of the suspect." Id. at 266-67. Custody is thus more likely where the questioning occurs in a police station and the defendant is objectively treated as a suspect. E.g., id. at 271-72 (finding custody where defendant was isolated in a police interview room); State v. O'Neill, 193 N.J. 148, 169 (2007) (finding custody where "defendant was a suspect on a potential gun charge and a person of interest in a murder

investigation"); State v. Pearson, 318 N.J. Super. 123, 133-35 (App. Div. 1999) (finding custody where defendant was questioned in "the inherently coercive physical environment of the prosecutor's office" and treated as a suspect); cf. State v. Erazo, 254 N.J. 277, 299-301 (2023) (finding no custody where defendant was questioned at a police station but treated like other witnesses).

Other indications of custody include transporting the defendant to the station in a police car, e.g., Hubbard, 222 N.J. at 271-72 (finding custody where "[a]lthough not handcuffed, defendant rode in the backseat of the [police] vehicle"); Ahmad, 246 N.J. at 614 (finding custody where defendant "was placed in the back of a patrol car -- where arrestees are normally held -- and taken to the police station"), and interrogating him about a serious crime under investigation, e.g., Hubbard, 222 N.J. at 271-72 (finding custody where the questioning's "substance" was about an injured-child investigation, including defendant's alibi); O'Neill, 193 N.J. at 169 (finding custody where "detectives did not come to have a casual chat with defendant, but to question him concerning his whereabouts at the time of the driver's killing"); State v. Bullock, 253 N.J. 512, 538 (2023) (finding custody where police "ask[ed] [defendant] questions about the alleged threats"); cf. Erazo, 254 N.J. at 299-301 (finding no custody where defendant "was not asked about [the victim]'s death").

For example, in Hubbard, our Supreme Court held that the defendant was

in custody where the police transported him to a police station and questioned him about their investigation into his child's injuries. 222 N.J. at 271-72. Even though the detective "asked" him to go voluntarily; he was not handcuffed; and the questioning lasted for only forty minutes and included three breaks, the Court found custody because the police transported the defendant themselves; isolated him in an interrogation room for a total of three hours; sat between him and the only door; questioned him about the incident and asked for an alibi; and never affirmatively "advised defendant that he was free to leave." Id. at 256-59, 271-72. The Court also rejected the detective's subjective claims that he did not consider the defendant a suspect because an objective review of "the targeted questions reflect[ed] a clear attempt on the part of the detective to cause defendant to incriminate himself." Id. at 257, 271-72; accord Ahmad, 246 N.J. at 613-14 (explaining a detective's subjective belief that the defendant is not a suspect is "of no moment" where the objective circumstances indicate custody); Pearson, 318 N.J. Super. at 133-35 (same).

The same is true here. Two to four Gang Unit officers transported Weathersbee in a police car to the prosecutor's office, where multiple homicide detectives told him to sit in a small interrogation room and blocked his only exit.[14] The police seized his cell phone and never told him that he could leave.

[14] The State failed to prove that the Gang Unit transportation was voluntary, but

See Sutton v. Metro. Gov't Nashville & Davidson Cnty., 700 F.3d 865, 875-78 (6th Cir. 2012) (holding police seizure of suspect's phone indicates de facto arrest (citing Florida v. Royer, 460 U.S. 491, 494, 501 (1983) (plurality op.))). He was questioned for over two-and-a-half hours and held for over seven hours. Though he was permitted water and coffee, he was evidently not provided food despite being held during dinner hours between 3:29 and 10:40 p.m.

Although Nelson claimed that Weathersbee was only a "person of interest," the facts known to the detectives and their questions show that he was objectively treated as a suspect. The detectives interrogated him for hours about every detail of his alibi, including where he had been and why. They confronted him with evidence -- both real and fabricated -- that they said implicated him as the shooter, including the surveillance videos, the Facebook post, and the false eyewitness identification. They repeatedly accused him of the murder and urged him to confess. They threatened him; shouted, swore, and pointed at him; leaned toward him; and clapped, knocked, and slapped the table. And they ignored his multiple requests to "go home" and numerous silent responses. As in Hubbard, their objective conduct and "targeted questions reflect[ed] a clear attempt on the part of the detective[s] to cause defendant to incriminate himself." 222 N.J. at 272. Finally, the video suggests that Weathersbee was in fact locked inside the

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even if it had, Hubbard shows that any police transportation indicates custody.

room during the breaks, which this Court may consider de novo because the motion court made no factual finding either way. In all, a twenty-five-year-old in Weathersbee's position -- isolated for seven hours in a police interrogation room and berated by multiple homicide detectives -- would not have felt free to leave. Therefore, Weathersbee was in custody for the entirety of the interrogation, and the Miranda protections applied throughout.

C. The Detectives Repeatedly Ignored Defendant's Invocations of His Right to Silence.

Under both state and federal Miranda law, "where an individual [unambiguously] indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Gonzalez, 249 N.J. at 628 (citations omitted). But under state law, even an "ambiguous" invocation requires that the police "cease questioning" and either "(1) terminate the interrogation or (2) ask only those questions necessary to clarify whether the defendant intended to invoke his right to silence." S.S., 229 N.J. at 382-83. "Unless the suspect makes clear that he is not invoking his right to remain silent, questioning may not resume." Id. at 383. Thus, "[w]here the invocation of the right to remain silent is followed by no interruption in questioning, and where the interrogation continues as if nothing had happened, the right is not scrupulously honored." Id. at 384. Although a suspect may reinitiate questioning himself, such re-initiation must be entirely "of his or her

own volition," State v. Kucinski, 227 N.J. 603, 622 (2017), and "a suspect does not 'reinitiate' discussions when the suspect's comments are made during the course of an ongoing interrogation" that never stopped in the first place, Rivas, 251 N.J. at 156-57 (discussing re-initiation after invoking the right to counsel).

The right to silence may be invoked by "[a]ny words or conduct that reasonably appear to be inconsistent with defendant's willingness to discuss his case with the police." S.S., 229 N.J. at 382 (citation omitted). In particular, "[a] suspect who has 'nothing else to say,' . . . has asserted the right to remain silent." Id. at 383-84 (collecting cases holding variations of "I got nothing else to say" were invocations and unambiguous invocations). Also, "[s]ilence itself has been interpreted as an invocation of the right to remain silent." State v. Johnson, 120 N.J. 263, 281-82 (1990) (citation omitted). For example, in Johnson, the Supreme Court held that officers were required to clarify whether a suspect invoked his right to silence where "[h]e persisted, for well over an hour, in a pattern of prolonged silences and unresponsiveness." Id. at 284. Finally, the Supreme Court has called a suspect's request to "go home" an "assertion about wanting to leave" and suggested that it would constitute an invocation of silence if communicated to the interrogators. State v. Diaz-Bridges, 208 N.J. 544, 571-72 (2012) (disagreeing with this Court's conclusion that "go home" was an invocation of silence only because it was said while detectives were not inside

the interview room), overruled on other grounds by S.S., 229 N.J. at 379-81.

Here, Weathersbee unambiguously invoked his right to silence eight times before questioning ceased -- three times by directly asking to "go home" and five times by saying he had "nothing" else to say:

1. WEATHERSBEE: "Can I go home to my kids?"

   (1T 93-9; Da 109, 03:46:09 to 03:46:11; Da 125)

2. WEATHERSBEE: "Said, can I go home to my kids?"

   (1T 93-11; Da 109, 3:46:19 to 03:46:22)

3. WEATHERSBEE: "[Can I] go home?"
   UNIDENTIFIED DETECTIVE: "You asking me?"
   WEATHERSBEE: "Yeah."

   (1T 95-12 to 14; Da 109, 03:50:52 to 03:50:58; Da 126)

4. WEATHERSBEE: "I don't got nothing else to say, man. Just get in contact with [McKnight] so I can get outta here."

   (1T 98-19 to 20; Da 109, 03:50:52 to 03:50:58; Da 127)

5. DETECTIVE NELSON: "What do you say now?"
   WEATHERSBEE: "Nothing."

   (Da 109, 06:40:02 to 6:40:20)

6. DETECTIVE NELSON: "What do you have to say now?"
   WEATHERSBEE: "Nothing."

   (Da 109, 06:48:00 to 6:48:05; Da 127)

7. WEATHERSBEE: "Got nothing [else] to say."

(Da 109, 06:48:10 to 6:48:16; Da 127)

8. WEATHERSBEE: "I got nothing [else] to say."

(Da 109, 06:49:00 to 6:49:05; Da 127)

Every one of those unambiguous invocations should have ended the interview, but the detectives ignored or rejected all but the last one.[15]

Even before then, he ambiguously invoked his rights numerous times by repeatedly declining to verbally respond, which the motion court failed to consider. His silence itself constituted an ambiguous invocation at least by his fifth silent response, which lasted a full eighty-four seconds, ending at 03:33:12 into the interrogation (7:01 p.m. real time). (1T 87-6 to 17; Da 109, 03:31:48 to 03:33:12) The detectives themselves even recognized his silence by demanding verbal answers, but they failed to clarify any of those invocations.

Nor did he voluntarily reinitiate questioning. Rather, it was the detectives who ignored his invocations and "continue[d] as if nothing had happened." S.S., 229 N.J. at 384. The motion court thus erred by holding that his invocations were invalid merely because he begrudgingly responded as the detectives unlawfully persisted in questioning him.[16] The court also erred by disregarding

[15] His fourth statement about going home -- that he was "[r]eady to go the f**k home" -- referred back to his three prior requests and was at least ambiguous.

[16] The court thus wrongly relied on State v. Faucette, 439 N.J. Super. 241, 258-

his third request to "go home" because it was in response to a detective's comment about Weathersbee wanting to go home, and his first statement that he had "nothing" to say because he also told them to contact McKnight "so I can get outta here." Neither of those statements diminished his clear intent to end the interrogation; to the contrary, they further evinced that he wanted to leave and that the detectives actually knew so. Thus, questioning should have ceased after his invocation by silence just over three-and-a-half hours into the seven-hour-long interrogation. Because it did not, the remaining three-and-a-half hours (about forty minutes of questioning) should have been excluded.

D. Defendant's Miranda Waiver and Statement as a Whole Were Not Voluntary.

To admit a defendant's custodial statement at trial, the State must establish beyond a reasonable doubt that he knowingly, intelligently, and voluntarily waived his Miranda rights. State v. L.H., 239 N.J. 22, 42 (2019). Due process separately requires the State to prove beyond a reasonable doubt that the statement itself was voluntary and not the product of coercion.[17] Id. at 42; State

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59 (App. Div. 2015). That case does not hold that a suspect's response to continued police questioning after invoking his rights constitutes reinitiating, nor that he must make a specific request to "cease questioning." Unlike here, the suspect in Faucette "never invoked his right" in the first place. Id. at 258-59.

[17] Because Weathersbee's voluntariness challenge is also based in due process, suppression is required regardless of his custody status for Miranda purposes.

v. O.D.A.-C., 250 N.J. 408, 421 (2022). Both inquiries are based on the totality of the circumstances and include such overlapping factors as the suspect's age, education, and intelligence; advice concerning constitutional rights; length of detention; length and nature of questioning; extent of physical and "psychological pressures"; "sign[s] of exhaustion or fatigue"; and prior encounters with police. L.H., 239 N.J. at 42-43; State ex rel. Q.N., 179 N.J. 165, 179 (2004). Even a single factor can render a statement involuntary and thus inadmissible "regardless of its truth or falsity." L.H., 239 N.J. at 43.

Psychological tactics by police can overbear a suspect's will and render his statement involuntary. Id. at 43-46. Although some forms of police deception, such as lying about evidence, do not automatically mandate suppression, they remain a factor in the voluntariness analysis. State v. Baylor, 423 N.J. Super. 578, 588-89 (App. Div. 2011); cf. Gonzalez, 249 N.J. at 639-42 (Albin, J., concurring) (explaining police lies are currently "weighed" but suggesting they should be outlawed entirely). However, the police may not make statements that contradict or minimize the Miranda warnings. O.D.A.-C., 250 N.J. at 420-21; L.H., 239 N.J. at 44. For example, the police cannot refer to the warnings as a mere "formality"; imply that a suspect's statements "will not be used against" him or will "remain confidential"; or falsely say that "the truth would be helpful," "could only help," or "would actually benefit" the suspect.

O.D.A.-C., 250 N.J. at 420-23 (citing, e.g., State v. Puryear, 441 N.J. Super. 280 (App. Div. 2015); State in re A.S., 203 N.J. 131 (2010)); L.H., 239 N.J. at 44, 47-48. Other important factors include whether the police "ignored a request to leave," State v. Sims, 250 N.J. 189, 217 (2022), made "promises of leniency," or "minimize[d]" the seriousness of the offense, L.H., 239 N.J. at 44-49.

In addition, although the police are not required to automatically disclose to an uncharged defendant that he is a suspect, their failure to do so remains a factor. Sims, 250 N.J. at 212-17; State v. Cotto, 471 N.J. Super. 489, 514-19 (App. Div. 2022). That factor is particularly "important" where the police "affirmatively misled" the defendant about his "true status" to secure a waiver. State v. Diaz, 470 N.J. Super. 495, 503, 518-27 (App. Div. 2022) ("[A]ny evidence that the accused was . . . tricked . . . into a waiver will, of course, show that the defendant did not voluntarily waive his [or her] privilege." (quoting Miranda, 384 U.S. at 476)); Bullock, 253 N.J. at 539 (invalidating waiver where police "affirmative[ly] misrepresent[ed]" defendant's status as a suspect).

Most importantly, a "free and voluntary" statement may not be "extracted by threats." L.H., 239 N.J. at 44-45; Diaz, 470 N.J. Super. at 516 ("[E]vidence that the accused was threatened . . . will render the waiver involuntary."); e.g., Arizona v. Fulminante, 499 U.S. 279, 286-88 (1991) (statement coerced where defendant was promised protection from "rough treatment" by other inmates

because it was "a credible threat of physical violence"). Similarly, the police may not invoke a suspect's children and communicate "the notion that a jail term would be incompatible with the needs of his daughter, who required a father in her life." L.H., 239 N.J. at 48-49; accord, e.g., State v. Carrion, 249 N.J. 253, 281-82 (2021) (recognizing the "coercive" nature of threats about a suspect's children); United States v. Tingle, 658 F.2d 1332, 1335-37 (9th Cir. 1981) (statement involuntary where police implied "if [defendant] failed to cooperate, she would not see her young child for a long time").

Finally, aggressive police conduct -- such as shouting, swearing, name-calling, and table-banging -- can contribute to a coercive atmosphere. See, e.g., State v. Camey, 239 N.J. 282, 315-16 (2019) (Albin, J., dissenting) (where majority did not address voluntariness issue, explaining trial court properly suppressed statement where police "verbally abused" defendant by calling him a "motherf***ing liar"); Niemann v. Whalen, 911 F. Supp. 656, 671-72 (S.D.N.Y. 1996) (denying summary judgment on coerced-confession claim where plaintiff alleged security officer "yelled at her and slammed his fists on the table"); Vargas v. Brown, 512 F. Supp. 271, 277 (D.R.I. 1981) (remanding for hearing on voluntariness where suspect alleged "the detectives banged on the table and swore at him"); cf. Q.N., 179 N.J. at 179 (statement voluntary where officer "did not raise his voice at any stage of questioning"); Rogers v.

Quarterman, 555 F.3d 483, 494-95 (5th Cir. 2009) (statement not coerced where trial court found police did not "curs[e], yell[], or bang[] on the table").

Here, the detectives violated all of the above prohibitions. To begin with, the motion court wrongly analyzed the waiver issue as a question of whether Weathersbee invoked his right to end questioning, rather than whether he knowingly, intelligently, and voluntarily waived his rights in the first place. See State v. Hartley, 103 N.J. 252, 260-61 (1986) (explaining those are "separate" inquiries and that courts "must" not "blur[]" the lines of analysis). From the start, his waiver was obtained through affirmative deception and minimization. The detectives falsely told him, "Just like, you know, anybody else that come down here, we gotta read you your rights and things like that." But Nelson admitted that that was a lie. In fact, the detectives do not Mirandize just "anybody" at the station; they did not do so for the eyewitness Reid; and Weathersbee was not "simply brought in as a witness" but was, according to Nelson, a "person of interest as a shooter." In reality, the objective facts known to the detectives show that he was already a true suspect: They already knew (1) Clark publicly exposed him as an informant just eighteen days earlier (what they called his "motive"); his father identified him as the man driving and walking back and forth in the area within the forty-six minutes leading up to the shooting (what they called his "opportunity"); and (3) they believed that he was the actual

perpetrator running away just after the shooting based on the men's similar clothing in the videos. Either way, he was not a mere witness, but the police affirmatively misled him into believing that he was "[j]ust like . . . anybody else" to trick him into waiving his rights. Not only was that statement an affirmative lie designed to mask his true exposure in a homicide investigation, but it also diminished the importance of the Miranda warnings by implying they were just a formality, given to "anybody" that "come[s] down" to the station.

The deception and minimization here was critically worse than the waiver comment in Erazo. There, the Court made clear that it was improper for a detective to imply that he was Mirandizing the suspect "because we're in the police department," but the Court found that comment fleeting and cured because the detective clarified before the waiver that he was Mirandizing the suspect in order to talk "about this," referring back to an earlier interview with the suspect the same day. 254 N.J. at 287, 304-05. Here, unlike Erazo, there was no prior interview to provide context before the waiver. And more importantly, the detectives did not merely reference the police station but directly misled him about his suspect status by saying that he was "[j]ust like . . . anybody else," which was admittedly false. Thus, the deception here was not fleeting but "affirmatively misled defendant as to his 'true status.'" Diaz, 470 N.J. Super. at 518; Bullock, 253 N.J. at 539. Even if that deception alone does not require

reversal, it still weighs heavily against a finding of voluntariness when considered together with the detectives' other coercive tactics.

Among them, the detectives repeatedly contradicted the Miranda warnings in ways that violated black-letter law. They continuously urged Weathersbee to "help [him]self"; falsely claimed they were "trying to help [him]" and would not "treat [him]" like "other" suspects; and pressured him to "man up" and "grow up." While cloaked in state authority, they directed that their questions "have to be answered" and implied that he had no choice but to talk. They falsely implied that his words would remain confidential, stating they were speaking "100 percent man to man, no cop sh*t." They promised him leniency, saying, "There's so much we can do," and, "I will change your life." And not only did they ignore his eight unambiguous and numerous ambiguous invocations, but they (falsely) conditioned his physical liberty on him cooperating, refusing to let him go home because, "[Y]ou you don't wanna help yourself. So you may not be going home," and, "You ain't give me a reason for you to go home. . . . Give me a reason."

In addition, the detectives repeatedly lied about having an eyewitness who identified him. And throughout the interrogation, they falsely empathized with him; exploited his children's safety and his father's love; and minimized the offense, stating, for example, that Weathersbee was "a good kid, just caught up in the wrong situations"; he only "made a mistake"; and, "You had no choice. I

get it." See L.H., 239 N.J. at 48-49 (finding language "psychologically coercive" that minimized the offense, such as that defendant was "not a bad guy"). As they alternated between empathizing and accusing, their aggressive shouting, swearing, pointing, leaning, table-slapping, and name-calling (most coercively, calling him a "motherf***er") further contributed to the coercive atmosphere. Together, those manipulative tactics physically and mentally exhausted Weathersbee, as objectively shown by his contemporaneous statement that he was "t[ir]ed as hell" and the clear footage of him trying to rest in between sessions. The motion court did not consider any of the above factors.

Most coercive of all, the detectives directly threatened both his life and his relationship with his children. The court correctly found as fact that both threats occurred, though it termed only the one to his life a "threat[]," but it erred by failing to recognize their legal significance. See Carrion, 249 N.J. at 280-82 (deferring to trial court's finding that threat was made, though "not called such," but not its legal coerciveness). The court believed that it was not coercive for the detectives to threaten that Clark's friends might kill him in retaliation, and to promise that he was "safest" with them, because the retaliation would not be committed directly by the detectives. But that was legally erroneous because any credible threat of violence -- whether by police hand or not -- is inherently coercive. Fulminante, 499 U.S. at 286-88 ("rough treatment" by other inmates).

Here, Nelson himself made clear that the threat was credible, stating, "So if I know it's you, eventually they [Clark's friends] gonna find out it's you," and he twice emphasized the real possibility that Weathersbee could "die" if he left police custody. That threat of death and promise of safety, reiterated again by Green, was objectively coercive.[18] So too was the threat that Weathersbee could be removed from his children's lives and that another man could become "daddy to them," which was graphically conveyed to psychologically manipulate him.

Finally, the detectives' extreme coercion was not cured by Weathersbee's prior experience with police or the fact that he was provided basic necessities like water and bathroom breaks. See O.D.A.-C., 250 N.J. at 424-25 (even where adult defendant has experience with police and demonstrates some familiarity with his rights, courts "cannot isolate and minimize [a] string of misrepresentations"); Puryear, 441 N.J. Super. at 297-98 (misleading Miranda comments were "not cured" by defendant's prior experience with police because "the State showed only that [defendant] had been arrested in 2005 and pled guilty in 2008, but did not offer proof that such prior experience enabled him to

[18] The court again wrongly relied on Faucette, 439 N.J. Super. at 260-61. That case does not hold that the police may credibly threaten a suspect with violence or death. In fact, in Faucette, the Court found that the comment at issue was not a threat at all. Id. at 259-60. Here, the motion court found as fact that Weathersbee was "threatened" -- a finding amply supported by the record -- so the only issue is its legal significance. In any event, the controlling decision is the U.S. Supreme Court's in Fulminante, which was not even cited by Faucette.

understand his Miranda rights"). Here, the State submitted even less evidence than in Puryear. At the Miranda hearing, the State offered no official record of arrests or convictions and failed to establish the recency of any encounters. Nelson testified only that Weathersbee had been "arrested in the past"; that at some point he had "given a statement" (evidently when he cooperated as a witness in 2015); and that Nelson "believe[d]" he had been Mirandized before that statement. (3T 22-4 to 19) But the court found only that he had previously "talk[ed] to police as a witness" and made no finding on whether he had been Mirandized then. (Da 114, 125 (emphasis added)) That vague experience was insufficient to cure the vastly coercive and manipulative tactics employed here.[19]

In sum, the State failed to carry its heavy burden to prove beyond reasonable doubt the voluntariness of both Weathersbee's waiver and his statement as a whole. Because his statement "began with a misleading remark" -- the affirmative lie that he was "[j]ust like . . . anybody else" -- "and that error was reinforced by yet more misrepresentations throughout the questioning," his "statement must be suppressed in full." O.D.A.-C., 250 N.J. at 425.

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[19] In fact, his prior experience as a witness actually undermined the voluntariness of his waiver because the detectives knew that, this time, he was not merely a witness, but they exploited his experience by falsely assuring him that he was "[j]ust like . . . anybody else." Indeed, the State even recognized that the "last time" he provided a statement "[h]e ended up being just a witness," so this time "[h]e probably thought he was going to be able to do the same thing . . . which was why he voluntarily agreed to speak with the detectives." (3T 58-21 to 59-4)

E. The Erroneous Admission of Defendant's Statement Was Not Harmless.

The improper admission of Weathersbee's involuntary statement was not harmless for three reasons: (1) It was the only identification evidence at trial; (2) he made key inculpatory admissions; and (3) the State used his inconsistencies to argue consciousness of guilt. See State v. Wade, 252 N.J. 209, 220 (2022) ("[W]e rarely find an error to be harmless when the State violates a defendant's right against self-incrimination."). To begin with, the State's case was "circumstantial" and far from "overwhelming." Id. at 221 (finding statement harmful for those reasons). No physical evidence or eyewitnesses implicated him at trial; no weapon was found; and no video captured the shooting. Thus, the State's case rested entirely on circumstantial inferences based on the Facebook post and videos of the supposed perpetrator in the surrounding area.

In that context, Weathersbee's self-identification in the pre-shooting videos served as damning evidence. Indeed, the State in summation repeatedly emphasized his self-identification both to show his presence in the area and to contradict his alibi. (12T 56-15 to 98-10) See Wade, 252 N.J. at 221 (holding statement harmful where defendant identified himself in video footage, which "eliminated" "[a]ny doubt about whether defendant was the man on the surveillance tape"). Although he denied that he was the man shown running west at 2:12 a.m., both the State and the detectives used his prior identification to

argue that the man running away was the same man because they were wearing the "same exact clothing." (8T 97-20 to 98-14; 12T 91-8 to 14) His self-identification was thus critical.

Second, he made inculpatory admissions that bolstered the State's evidence of both motive and opportunity. He admitted not only that he saw the Facebook post but also, after extreme police pressure, that it jeopardized his life. He admitted that Clark previously confronted him about being an informant. And, as the State repeatedly emphasized, he admitted that he saw Clark outside the bar less than an hour before the shooting. (12T 56-15 to 98-20) See Carrion, 249 N.J. at 284 ("[I]nculpatory remarks by a defendant have a tendency to resolve jurors' doubts about a defendant's guilt to his detriment.").

Third, the State argued that his inconsistencies were lies to the police intended to hide his guilt, and it invoked the "false in one, false in all" rule to argue that he must also be lying about his innocence. (12T 58-15 to 88-2) See Ahmad, 246 N.J. at 615 (holding statement's admission "cannot possibly be viewed as harmless" where the State used it to show defendant "told untruths to detectives" and to "cast defendant as a liar"); Wade, 252 N.J. at 221 ("[W]here the State's theory hinges on circumstantial evidence of a defendant's location at a particular time -- a self-identifying, self-inculpatory statement that colors the defendant as a liar is not harmless beyond a reasonable doubt.").

Finally, the deterrence rationale underlying Miranda is particularly strong here.[20] Police detectives who routinely interact with members of the public must know that the kind of flagrant violations of settled law that occurred here will not be tolerated -- particularly because such tactics can and do produce false confessions that send innocent people to prison.[21] For all those reasons, the erroneous admission of Weathersbee's statement was not harmless beyond a reasonable doubt. Therefore, all of his convictions must be reversed.

POINT II

THE TRIAL COURT DENIED DEFENDANT A FAIR TRIAL BY FAILING TO REDACT OR CORRECT SEVERAL INADMISSIBLE PORTIONS OF HIS POLICE STATEMENT. (9T 70-12 to 72-16) (Partially Raised Below)[22]

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[20] Alarmingly, Nelson testified that he has conducted "worse interviews than that. . . . Louder. . . . [S]ometimes it happens," (9T 74-19 to 75-2), and "[i]t's possible" he has told other suspects "they were gonna die," (3T 55-10 to 14).

[21] See, e.g., Gonzalez, 249 N.J. at 640-42 (Albin, J., concurring); DNA Exonerations in the U.S. (1989-2020), Innocence Project (2020), https://innocenceproject.org/dna-exonerations-in-the-united-states (reporting that by 2020, false confessions were involved in 29% of all wrongful convictions overturned by DNA and in a shocking 61% of wrongful murder convictions).

[22] Point II.A was partially raised below by defense counsel's attempt during cross-examination to impeach Eva Reid's partial identification, though counsel did not cite the correct rule. (9T 70-12 to 72-16) It is unclear whether counsel sought redactions beyond references to Weathersbee's prior police encounters, as such discussions were evidently held off the record prior to playing his statement. (8T 32-16 to 35-14) That said, each error was plain error. R. 2:10-2.

Even if Weathersbee's entire statement was not inadmissible, the trial court still erred by permitting the jury to hear several inadmissible portions of it. First, the court violated his confrontation rights by failing to redact the detectives' claims that a non-testifying eyewitness identified him and by preventing defense counsel from cross-examining those claims. Second, the court permitted the jury to hear his multiple invocations of his right to silence, on which the prosecutor impermissibly commented. Third, the court failed to redact the detectives' improper lay opinions on the ultimate issue of his guilt. Those errors, individually and collectively, were plain error and require reversal. See U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 10; R. 2:10-2.

A. The Detectives' False Claims that a Non-Testifying Eyewitness "Picked" Defendant -- and the Trial Court's Refusal to Permit Him to Impeach that Identification -- Violated His Confrontation Rights.

The State may not admit against a defendant testimonial statements by a non-testifying witness unless (1) the witness is unavailable and (2) the defendant had a prior opportunity to cross-examine her. Sims, 250 N.J. at 223. Thus, "both the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." State v. Branch, 182 N.J. 338, 350-51 (2005) ("[A] police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the

defendant."); accord State v. Bankston, 63 N.J. 263, 268-71 (1973) (same).

In addition, even where hearsay is admitted, the opposing party is permitted through cross-examination to impeach the out-of-court declarant. N.J.R.E. 806; accord Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. on N.J.R.E. 806 (2023). Indeed, a criminal defendant's right to cross-examine the evidence against him and "test [its] reliability" is "at the very core of the right of confrontation." State v. Cabbell, 207 N.J. 311, 328-29 (2011). Thus, "the denial of effective cross-examination when it should have been allowed would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." State v. Higgs, 253 N.J. 333, 362 (2023); e.g., Cabbell, 207 N.J. at 330-39 (reversing convictions where court denied cross-examination on eyewitness identification); State v. Jackson, 243 N.J. 52, 69-74 (2020) (reversing conviction where court denied cross-examination on witness bias); State v. Bass, 224 N.J. 285, 305-11 (2016) (same).

Here, the trial court violated both of those rules. Reid, the alleged eyewitness, did not testify at trial. And her identification was riddled with system and estimator variables undermining its reliability. See Henderson, 208 N.J. at 248-93 (setting forth variables affecting reliability of identification). Indeed, the motion court, in granting the defense's motion for a Wade/Henderson hearing, found prima facie evidence of suggestiveness. (Da

168-78) Most significantly, Reid initially said the shooter had "wavy" hair -- and she specifically said the hair was not dreadlocks -- and she identified the man in the video with dreadlocks only after what the court found were "leading" and "suggestive" tactics by the detectives. (Da 176-78) For example, the detectives tried to "undermin[e]" Reid's initial account that the shooter's hair was "wavy"; and at the precise moment that they asked for her identification, they repeated her initial description back to her -- except for her description that the hair was "wavy." (Da 177-78) In addition, Reid admitted that her vision was "blurry" that night because she had been drinking and smoking when, from across the street, she saw the perpetrator for at most fourteen seconds in the dead of night at 2:12 a.m.; she did not see "his face"; she was not asked to make an identification until three days after the shooting; the identification procedure was similar to a show-up with only one suspect shown in the videos; and it was not blind but conducted by the investigating detectives. (Da 138-66, 171)

However, during Nelson's direct testimony at trial, the court permitted the jury to hear -- through the detectives' double-hearsay claims in Weathersbee's recorded statement -- that a "good ole witness, right there on New Street" had "picked" him as the shooter. (8T 69-10 to 72-14) Because Reid did not testify, the detectives' claims, which they repeated seven times, violated his

confrontation rights.[23] Although defense counsel's opening statement also referenced Reid's partial identification, the court significantly magnified the error by preventing him from impeaching her identification during his cross-examination of Nelson. (7T 31-11 to 33-9; 9T 70-12 to 72-16) The defense proffered that impeachment was proper in part because of Reid's initial description that the shooter did not have dreadlocks -- a fact significantly undermining her identification's reliability because Weathersbee did have dreadlocks -- but the court sustained the State's hearsay objection, disallowing such cross-examination. (9T 71-2 to 72-16) Because the State on direct had already introduced Reid's out-of-court identification, the court's ruling plainly violated N.J.R.E. 806 and denied Weathersbee his right to confront the hearsay identification that was erroneously admitted against him in the first place.

Those errors were particularly harmful for four reasons. First, the identity of the shooter was the critical issue at trial, so the detectives' unexamined claims unfairly undercut his only defense. See State v. Dehart, 430 N.J. Super. 108, 113-16 (App. Div. 2013) (reversing where officer disclosed that non-testifying witness identified defendant because identity was the "main issue at trial"). Second, the detectives' claims that Reid "picked" him, as if directly out of a

[23] The State failed to establish that Reid was unavailable or previously cross-examined, but even if it had, the court's denial of cross-examination independently requires reversal.

lineup or photo array, were false. Third, the court failed to give any curative instruction. Fourth and most importantly, the denial of cross-examination prevented the jury from hearing exculpatory evidence that significantly undermined the identification's reliability. See Cabbell, 207 N.J. at 330-39 (reversing where denial of cross-examination prevented defense from exposing that eyewitness had been high and from "prob[ing] into any other area that might have affected her credibility in the eyes of the jury"). Not only did the court prevent the defense from exposing that Reid originally described a man with "wavy" hair, but its erroneous ruling also likely discouraged cross-examination on the other system and estimator variables undermining her reliability, such as her "blurry" vision that night. In all, the confrontation errors left the jury with the untested and false impression that an undisclosed eyewitness, who the police believed, had not only identified Weathersbee but had done so reliably.

Finally, the court separately violated Weathersbee's confrontation rights by admitting the detectives' hearsay claims that Weathersbee had previously "shot at" and "tried to get" Clark two days before his murder. (8T 68-24 to 69-5, 79-12 to 16) No evidence was submitted at trial to prove that such an incident even occurred, let alone that Weathersbee was connected to it. Those unproven allegations thus implied that the detectives had "superior knowledge, outside the record, that incriminate[d] the defendant." Branch, 182 N.J. at 351. Together,

those errors had the clear capacity to influence the jury and thus require reversal.

B. Permitting the Jury to Hear Defendant's Multiple Invocations of His Right to Silence -- and the Prosecutor's Comments on His Silence -- Denied Him a Fair Trial.

A prosecutor may not comment on a defendant's silence arising "'at or near' the time of arrest, during official interrogation, or while in police custody." State v. Muhammad, 182 N.J. 551, 569 (2005). And where a defendant's statement is admitted, "any reference" to an invocation of his rights should be "excise[d]." State v. Clark, 251 N.J. 266, 292-94 (2022) (citation omitted). Such redaction is necessary because otherwise the jury may draw "impermissible inferences" about the defendant's guilt "that could undermine a defendant's fundamental right to a fair trial." State v. Feaster, 156 N.J. 1, 76 (1998).

Our courts have frequently found plain error where the jury was permitted to hear that the defendant invoked his Miranda rights when confronted by the police -- particularly through the defendant's own words in a recorded interview. E.g., Clark, 251 N.J. at 278-79, 293-94 (reversing conviction where jury saw recorded interview in which defendant asked for counsel three times); State v. Tung, 460 N.J. Super. 75, 93-95 (App. Div. 2019) (reversing conviction in part because jury twice heard that defendant requested counsel -- once in his own words in recorded interview); State v. Hyde, 292 N.J. Super. 159, 162-67 (App. Div. 1996) (reversing conviction where officer testified that defendant invoked

his right to silence, on which prosecutor commented); cf. Feaster, 156 N.J. at 73-77 (finding error but not plain error where single reference to invocation during officer's testimony was fleeting and not commented on by prosecutor).

Many cases have similarly held that it is reversible error for the prosecutor to comment during summation on the defendant's silence. E.g., Muhammad, 182 N.J. at 563, 572-74; State v. Lyle, 73 N.J. 403, 409-11 (1977); State v. Pierce, 330 N.J. Super. 479, 491-92 (App. Div. 2000); Hyde, 292 N.J. Super. at 162-67; State v. Aceta, 223 N.J. Super. 21, 26-32 (App. Div. 1988); accord State v. Black, 380 N.J. Super. 581, 592-95 (App. Div. 2005) (cumulative error).

Here, both errors occurred. During the recording of Weathersbee's interview, the jury heard all eight of his unambiguous invocations -- his three requests to "go home" and his five statements that he had "nothing" to say -- and the jury also saw the numerous instances in which he literally remained silent in the face of police accusations. (Da 109, 02:10:45 to 07:11:52; 1T 93-9 to 98-19; 9T 17-20 to 34-11) As explained in Point I.C, all of those verbal and nonverbal assertions were invocations that should have ended questioning but were ignored. Permitting the jury to hear and see them thus created a "strong negative inference" that he was guilty and unfairly punished him for simply exercising his constitutional rights. United States v. Hale, 422 U.S. 171, 180 (1975); Clark, 251 N.J. at 293-94. That is particularly true of his second, third,

fourth, and fifth statements that he had "nothing" to say, which came just after the detectives spoke to McKnight and confronted him for the first time with the fact that she did not confirm his alibi; and of the latter three, which immediately followed the detectives confronting him with the surveillance video of the alleged perpetrator running away at 2:12 a.m. and pressing him, "What do you have to say to that?" (9T 31-2 to 34-11) Permitting the jury to see that Weathersbee did not speak up in his defense after those damning accusations created the precise type of prejudice that the law is designed to prevent.

Those errors were compounded by the prosecutor's improper comments on his silence during summation:

> You saw the defendant's statement, two-and-a-half hours. He's asked directly by the detectives, "Did you run because you heard gunshots?" He doesn't even respond. He doesn't respond, because he knows the evidence is there. He knows that you can see it with your own eyes. He doesn't want to admit that this is him. Don't worry about it; the evidence does that for us.
>
> [(12T 91-23 to 92-5) (emphasis added).]

That reference was to the following portion of Weathersbee's statement in which he expressly invoked his rights just after the detectives confronted him with the video of the alleged perpetrator running away:

> DETECTIVE: When the homicide happened, you just happened to be outside running on that block. At the time there was quite a bit of chaos, you're on the block,

> (indiscernible) you're there, pretty much. But you're running away. Did you hear shots? Did you hear shots? You didn't hear no shots?
>
> DETECTIVE: Mr. Weathersbee, we're speaking to you.
>
> DEFENDANT: I have nothing else to say.
>
> [(9T 34-2 to 10) (emphasis added).]

That portion of his statement should never have been admitted in the first place because it came after all but the last of his invocations. Clark, 251 N.J. at 275 (reversing where trial court's failure to redact defendant's invocations "was compounded when the prosecutor commented on that portion of the statement that should have never been before the jury in the first place"). But even after it was admitted, the prosecutor was not permitted to argue that Weathersbee "d[id]n't even respond" in the face of police accusations "because he kn[e]w[] the evidence [wa]s there." Those were textbook unlawful comments on silence. See Hyde, 292 N.J. Super. at 162-67 (reversing where prosecutor said of defendant's silence after being confronted with charges, "What's his reaction? No reaction whatsoever. He knew what he did."). And those comments were particularly prejudicial because they exploited his silence to argue that he tacitly admitted -- "he kn[e]w[]" -- that it was "him." See State v. Greene, 242 N.J. 530, 553 (2020) ("Because prosecutors hold a position of great prestige with jurors, [t]heir statements . . . have a tendency to be given great weight by jurors.").

Considered together, the trial court's failure to redact any of Weathersbee's invocations, and the prosecutor's comments on his silence, were plain error -- especially because the court failed to provide any curative instruction. See Clark, 251 N.J. at 298-99 (finding plain error where, as here, both errors occurred, and the State's case was "circumstantial" with "no eyewitnesses," "no murder weapon," and "defendant never confessed"); Tung, 460 N.J. Super. at 93-95 (finding plain error in part because the trial court failed to "excise[]" defendant's invocations or "provide[] a cautionary instruction"). As a result, Weathersbee's convictions must be reversed.

C. The Detectives' Improper Lay Opinions -- on Defendant's Guilt, Credibility, Motive, Opportunity, and Premeditation -- Usurped the Jury's Exclusive Role to Decide the Ultimate Issue.

Every witness must have personal knowledge of the events to which he or she testifies. N.J.R.E. 602. And lay witnesses may not offer opinions unless they are based on their own perception and are helpful to the jury. N.J.R.E. 701. Thus, lay police officers are absolutely barred from opining on the ultimate issues of a defendant's "truthfulness [or] guilt." State v. C.W.H., 465 N.J. Super. 574, 593-94 (App. Div. 2021) (citing, e.g., State v. McLean, 205 N.J. 438, 461 (2011)). Such opinions by police are "particularly prejudicial because [a] jury may be inclined to accord special respect to such a witness" and give such testimony "almost determinative significance." Id. at 593 (citation omitted).

Where police opinions are admitted via a recorded interview, "[a]t a minimum" courts should instruct that the opinions "should not be deemed testimony and may be considered only in the context of understanding how the interrogation was conducted and how defendant responded." Cotto, 471 N.J. Super. at 540.

For example, in C.W.H., this Court reversed the defendant's sexual-assault convictions where, during playback of the defendant's police interview, the interrogating detective accused him of "not being 'honest' or 'truthful,'" and the detective testified that he believed the defendant was being deceptive. C.W.H., 465 N.J. Super. at 589-93. Despite a timely curative instruction, this Court found plain error because the detective "conveyed the impression to the jury that defendant was being deceptive during questioning, [which] impermissibly colored the jury's assessment of defendant's credibility" and because the final jury charge did not address the detective's accusations "during the interrogation." Id. at 595-98. Similarly, in Tung, this Court reversed a murder conviction in part because, during playback of the defendant's police interview, the interrogating detectives "expressly stated they knew defendant was lying and firmly believed in his guilt," and one detective testified that he believed the defendant was not telling the truth. 460 N.J. Super. at 102-04; cf. State v. Howard-French, 468 N.J. Super. 448, 458-65 (App. Div. 2021) (not plain error where officer's interview comments did not directly opine on

defendant's guilt and only "implied" he was lying).

Here, the trial court failed to redact the detectives' constant accusations that Weathersbee was guilty and lying and their theories of how and why he did it. First, the detectives directly and repeatedly accused him of the murder (e.g., "You did it"; "you ran to that car, you shot him"; "You went there, you said I'm God tonight, shot through the window of his car"; "You went back around the corner, shot him, then left again. . . . Clear as day"; "you did get him"; "you did do it and they did see you. That's clear"; "when opportunity knocks, you took it." (8T 61-21 to 96-3; 9T 11-24 to 17-17) Second, they repeatedly called his explanations and denials "bullsh*t" and "lies" and opined that such lies meant he had "something to hide." (7T 238-2 to 24; 8T 27-17 to 95-16; 9T 9-15 to 33-19) And third, they asserted in explicit detail their theories of his motive, opportunity, and premeditation. They declared that he "had a motive": that Clark "came for blood" by outing him as a "snitch" on Facebook, which "put[] [him] on blast in front of everybody"; created a "problem" for him; "affect[ed] [him] . . . . [his] kids . . . . [his] father"; and "put [him] in a different mind state." (8T 27-14 to 97-14; 9T 14-12 to 19) They asserted that he "ha[d] the opportunity": that he was "in the area, walking around, for no reason" and was "the only one there"; he was not sobering up as he claimed because he was "clearly not drunk"; his alibi was "not true. [McKnight] just told us otherwise"; and "there's no other

explanation for [him] to be there." (8T 45-14 to 97-20; 9T 31-2 to 34-5) And they opined that he "plan[ned]" the murder and his "get away" because the videos showed him "circling the block," "walking up and down," and "moving the car," which were "not steps of somebody . . . [who is] gonna get a drink" but evidence that he was "scoping the area" and "plotting." (8T 58-2 to 86-1; 9T 8-16 to 13-2) Those speculative opinions -- on his guilt, credibility, motive, opportunity, and premeditation -- went directly to proving the elements of the offenses and thus violated N.J.R.E. 602 and 701.

Although in some cases a detective's interview comments might add context to the defendant's responses, here, context was entirely unnecessary where Weathersbee simply denied the accusations and, in many cases, did not even respond. (E.g., 8T 95-10 to 97-20; 9T 8-21 to 9-8, 32-10 to 33-21) Those accusations were thus long diatribes, in the guise of admissible evidence, which unfairly "provided a 'road map' for the State's theory of the case" in a "neatly packaged summary." State v. Patton, 362 N.J. Super. 16, 40 (App. Div. 2003). Indeed, many of their accusations tracked the State's summation nearly verbatim. (E.g., 12T 57-25 to 58-3, 73-1 to 77-11 (prosecutor arguing Clark's Facebook post was his "motive," which "escalated" his exposure as a "snitch," "change[d] his life," and made Clark "a problem"); 12T 56-17 to 98-20 (arguing he saw Clark as his "opportunity" and was not "sober[ing] up"); 12T 56-18 to

98-23 (arguing he "plan[ned]" the shooting because he "circle[d] the block," "[s]cop[ed] out the area," and "[m]ove[d] his car, so that he c[ould] escape"); 12T 58-15 to 88-2 (arguing his explanations and denials were "lie[s]"))

Finally, even apart from the recorded statement, like in C.W.H. and Tung, Nelson improperly volunteered on cross-examination that Weathersbee's responses were "[l]ies. . . . I call them lies. . . . I call it lies. . . . He's been lying the whole time." (9T 77-7 to 80-21)[24] Because the detectives' accusations were not fleeting but constant, and because the court failed to offer any curative instruction, they usurped the jury's exclusive role to determine Weathersbee's guilt and credibility and thus denied him a fair trial and require reversal. C.W.H., 465 N.J. Super. at 598 ("[A]ny improper influence on the jury that could have tipped the credibility scale was necessarily harmful and warrants reversal.").

[24] For that reason, this case is far worse than Cotto, 471 N.J. Super. at 533-41. There, the Court found "error" but not plain error from a court's failure to give a limiting instruction after the jury heard a recorded interview in which the officers confronted the defendant with video and accused him of arson. Ibid. Cotto declined to apply N.J.R.E. 701's bar on ultimate-issue opinions because the opinions all occurred on a recording; however, Cotto did not cite C.W.H. or Tung and thus may not have been aware of those contrary cases, which clearly held that N.J.R.E. 701 applies equally to accusations "during the interrogation" and "during the playback." C.W.H., 465 N.J. Super. at 598; Tung, 460 N.J. Super. at 102. In any event, this case also involved improper live testimony and the recorded opinions here were much worse than in Cotto, which involved only eight challenged excerpts; "strong" evidence of guilt, including a recorded confession; and the officers there, unlike here, did not reference "incriminating facts outside the record." 471 N.J. Super. at 533-34, 540-41 & 540 n.14.

POINT III

DEFENDANT'S CERTAIN-PERSONS CONVICTION MUST BE REVERSED DUE TO ERRONEOUS JURY INSTRUCTIONS AND IMPROPER ARGUMENT. (Not Raised Below)

The trial court erroneously instructed the jury on the certain-persons offense (count four) in two separate ways. First, the court wrongly charged two elements of the crime by instructing that N.J.S.A. 2C:39-7(b)(1) prohibits a certain person from possessing any "weapon," when in fact it prohibits only possessing a "firearm." Second, even though Weathersbee stipulated that he had been convicted of qualifying predicate offenses, the court and the prosecutor disclosed the nature of those offenses, contrary to well-established law. Both of those errors were plain and require reversal of his certain-persons conviction. See U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9; R. 2:10-2.

A. The Trial Court's Erroneous Jury Instructions on Two Elements of the Certain-Persons Offense Require Reversal.

The state and federal rights to due process and trial by jury "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." State v. Bailey, 231 N.J. 474, 483 (2018) (citation omitted). Where the State fails to prove an essential element of an offense, the "defendant's conviction cannot stand." Id. at 490. Thus, "incorrect charges on substantive

elements of a crime constitute reversible error." State v. Koskovich, 168 N.J. 448, 508 (2001) (quoting State v. Rhett, 127 N.J. 3, 7 (1992))); accord State v. Vick, 117 N.J. 288, 291-93 (1989) (holding the requirement that the jury be properly instructed on the elements of an offense "is so basic and so fundamental that it admits of no exception no matter how inconsequential the circumstances"); Bailey, 231 N.J. at 489 ("When the jury is not given an opportunity to decide a relevant factual question, it is not sufficient to urge that the record contains evidence that would support a finding of guilt even under a correct view of the law." (citation omitted)).

Here, the trial court improperly charged two elements of the certain-persons offense. In count four, Weathersbee was charged with violating N.J.S.A. 2C:39-7(b)(1). (Da 2, 194) Under that statute, a person who has been previously convicted of an enumerated predicate offense and "who purchases, owns, possesses or controls a firearm is guilty of a crime of the second degree." Ibid. (emphasis added). Under N.J.S.A. 2C:39-1, a "firearm" is defined differently than a "weapon." A "weapon" includes "firearms" but is much broader: "Weapon" means "anything readily capable of lethal use or of inflicting serious bodily injury." N.J.S.A. 2C:39-1(r). By contrast, a "firearm" is limited to various types of guns or firing devices -- for example, "any handgun." N.J.S.A. 2C:39-1(f); accord Model Jury Charges (Criminal), "Certain Persons Not to Have any

Firearms (N.J.S.A. 2C:39-7(b)(1))" (rev. Feb. 12, 2018).

But here, for both the first and second elements of the certain-persons offense, the trial court instructed that Weathersbee must be convicted if (1) "there was a weapon" and (2) he knowingly possessed "the weapon." (13T 12-14 to 18-10) And, in addition to defining "firearm," the court also charged the broader definition of "weapon." (13T 13-7 to 14-2) Those charges were legally incorrect.[25] Because the court charged the wrong substantive elements, and because the elements that it did charge (existence and possession of a "weapon") were broader than the conduct actually proscribed by the statute (existence and possession of only a "firearm"), his certain-persons conviction must be reversed.

B. The Trial Court's and Prosecutor's Disclosure of the Nature of Defendant's Predicate Convictions Denied Him a Fair Trial on the Certain-Persons Count.

Where a defendant is charged with violating the certain-persons statute and does not stipulate to the predicate offense, the State must prove the predicate offense by producing the qualifying prior judgment of conviction (which should be redacted to leave only the name, date, and degree of the offense). Bailey, 231 N.J. at 490-91. However, where the defendant does stipulate to the predicate offense, the jury may not be told the name or nature of the predicate conviction.

[25] It appears that the court entirely charged the wrong subsection of the offense statute. See N.J.S.A. 2C:39-7(a); Model Jury Charges (Criminal), "Certain Persons Not to Have any Weapons (N.J.S.A. 2C:39-7(a))" (rev. Feb. 12, 2018).

Id. at 488; State v. Brown, 180 N.J. 572, 585 (2004), abrogated on other grounds by Bailey, 231 N.J. at 488-91; State v. Alvarez, 318 N.J. Super. 137, 150-54 (App. Div. 1999); State v. Harvey, 318 N.J. Super. 167, 170-73 (App. Div. 1999); accord Model Jury Charges (Criminal), "Certain Persons Not to Have any Firearms (N.J.S.A. 2C:39-7(b)(1))," at 1 n.3 & n.6 ("If defendant is stipulating to the predicate offense, do not read the crime listed in the Certain Persons count." (emphasis added)). That is so because, where the defendant stipulates, the nature of the predicate conviction has "no evidentiary significance" but "a high risk of prejudice." Alvarez, 318 N.J. Super. at 153-54; accord Old Chief v. United States, 519 U.S. 172, 190-91 (1997) ("The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that . . . bar a convict from possessing a gun . . . .").

Here, both the trial court and prosecutor violated that prohibition. During the certain-persons trial, Weathersbee "stipulated" that he had previously been twice convicted of possession with intent to distribute a controlled dangerous substance within 1,000 feet of a school, N.J.S.A. 2C:35-7 (PWID/1,000ft.) -- which is a predicate offense under the certain-persons statute, N.J.S.A. 2C:39-7(b)(1) -- and the parties jointly admitted the corresponding judgments of conviction, which, though apparently unredacted, were not read to the jury. (11T 131-6 to 8; 13T 10-6 to 22) However, the court in its opening instructions read

aloud the unredacted indictment, which specifically named the PWID/1,000ft. conviction; the State in summation again highlighted that Weathersbee had been twice convicted of PWID/1,000ft. and identified the dates as 2014 and 2015; and the court in its final instructions again repeated that he had been convicted of PWID/1,000ft. (13T 8-1 to 16-24) Those references plainly violated multiple binding decisions and the model charge and served no other purpose than to prejudice the jury against Weathersbee. See State v. Scharf, 225 N.J. 547, 580 (2016) ("It is the independent duty of the court to ensure that the jurors receive accurate instructions on the law . . . irrespective of the particular language suggested by either party."). His certain-persons conviction must be reversed.

POINT IV

THE CUMULATIVE EFFECT OF THE NUMEROUS TRIAL ERRORS REQUIRES REVERSAL. (Not Raised Below)

Even if the above errors do not individually warrant reversal, reversal is required under the fundamental-fairness and cumulative-error doctrines. See N.J. Const. art. I, ¶ 1; State v. Weaver, 219 N.J. 131, 155 (2014); State v. Melvin, 248 N.J. 321, 347-48 (2021). The numerous errors here -- permitting the jury to hear Weathersbee's self-identification and admissions; the untested out-of-court identification; his invocations of his right to silence, exploited by the State; and the detectives' opinions on his guilt -- collectively denied him a fair trial.

POINT V

DEFENDANT'S CONSECUTIVE SENTENCES VIOLATE YARBOUGH[26] AND REQUIRE A RESENTENCING. (15T 4-12 to 16-23, 34-20 to 41-8; Da 181-96)

The court sentenced Weathersbee to an aggregate term of thirty-five years of prison, all to be served without parole. Specifically, the court merged count two (second-degree possession of a weapon for an unlawful purpose) into count one (first-degree murder) and sentenced him on count one to a thirty-year term without parole; on count three (second-degree unlawful possession of a weapon) to a concurrent ten-year term; and on count four (certain-persons not to possess a firearm) to a consecutive five-year term without parole. (15T 4-12 to 16-23, 34-20 to 41-8; Da 181-96) The court's imposition of consecutive terms on the murder and certain-persons counts, and its weighing of the aggravating and mitigating factors, violated Yarbough and its progeny. Therefore, should this Court disagree with Points I through IV, a remand for resentencing is required.

Under Yarbough, courts imposing sentences for multiple offenses must first consider whether: (1) "the crimes and their objectives were predominantly independent of each other"; (2) "the crimes involved separate acts of violence or threats of violence"; (3) "the crimes were committed at different times or

[26] State v. Yarbough, 100 N.J. 627 (1985), superseded in part by L. 1993, c. 233, § 1.

separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior"; (4) "any of the crimes involved multiple victims"; and (5) "the convictions for which the sentences are to be imposed are numerous." 100 N.J. at 643-44. A sentencing court must "consider all of the Yarbough guidelines," State v. Rogers, 124 N.J. 113, 121 (1991) (emphasis added), and expressly "place on the record its statement of reasons," State v. Torres, 246 N.J. 246, 267 (2021). A court's failure to do so requires a resentencing. Rogers, 124 N.J. at 121; State v. Carey, 168 N.J. 413, 424 (2001).

Here, the court in its oral and written decisions failed to consider all the Yarbough factors and improperly weighed the only two it did consider. (15T 39-11 to 20; Da 188-93) First, the offenses stemmed from the same criminal event: using a gun to shoot Clark. The court believed that the objectives were independent based on a thousand-foot view of the elements rather than the facts of this case. (Da 191) But the only evidence of gun possession at trial was that Clark was shot; the State did not prove that a gun was possessed hours, minutes, or even seconds before then.[27] Thus, the objectives were the same: possessing the gun only to use it in the same moment. See State v. Lester, 271 N.J. Super. 289, 293 (App. Div. 1994) ("Where separate crimes grow out of the same series

[27] The court's speculation that "Defendant possessed a firearm prior [to] murdering the Victim" and "Defendant arrived at the scene of the crime, already possessing a loaded revolver" was not supported by any evidence. (Da 191)

of events or from the same factual nexus, consecutive sentences are not imposed."). For the same reason, the offenses occurred at the same time and place; they did not involve separate instances of violence; and they also involved only one victim -- all factors the court failed to consider. Although this case involved multiple offenses, the court properly merged and ran concurrent the two other weapon-possession offenses. But it improperly relied on the pre-Yarbough merger case, State v. Wright, 155 N.J. Super. 549 (App. Div. 1978), not just to decline to merge the certain-persons offense but to run it consecutively based on faulty "no free crimes" logic that would always require consecutive sentences. (Da 190-91) But as the Supreme Court recently held in Torres, the "no free crimes" factor must not be "seized upon by sentencing courts" as a "blanket mandate" to impose consecutive sentences. 246 N.J. at 269. It is thus not enough to say that the Legislature made the certain-persons offense a separate crime -- that is always true when applying Yarbough. Here, nothing distinguished the certain-persons offense from the other weapons offenses that could fairly justify increasing Weathersbee's real prison time for the same possessory conduct. In all, every Yarbough factor favored concurrent sentences.

So did the aggravating and mitigating factors. See Torres, 246 N.J. at 271-72 (holding the Yarbough fairness assessment includes considering aggravating and mitigating factors). First, the court wrongly denied the defense's request for

mitigating factor fourteen (defendant was under twenty-six at the time of the offense). (15T 11-2 to 16-14, 20-12 to 18, 35-18 to 38-14; Da 188) That factor plainly applied because Weathersbee was twenty-five at the time of the offense; he was "sentenced on or after its effective date"; and that factor is mandatory, not discretionary as the court believed. N.J.S.A. 2C:44-1(b)(14) (eff. Oct. 19, 2020); State v. Lane, 251 N.J. 84, 97 (2022); State v. Morente-Dubon, 474 N.J. Super. 197, 215 (App. Div. 2022) (instructing mitigating factor fourteen "shall be applied" where defendant was under twenty-six).

Second, the court erred in denying his requests for mitigating factors three (defendant acted under strong provocation) and four (substantial grounds tending to excuse or justify defendant's conduct, though failing to establish a defense). (15T 16-5 to 8, 35-18 to 36-20; Da 188) Those factors were clearly supported by the State's own asserted motive in this case: that Clark publicly outed him as a police informant. Even the detectives recognized that Clark's actions endangered his life and that he acted out of self-preservation, which, though not establishing a legal defense, still lessened his culpability as compared to killings motivated by, for example, pecuniary gain, organized crime, or hate.

Third, the court failed to sua sponte find or consider mitigating factor eleven (excessive hardship to defendant's dependents). That factor was "amply based in the record," as Weathersbee had five children (ages one, two, three,

seven, and eight) -- two of whom were living with him -- and he "ha[d] a relationship and contact with all his children and was financially supporting them on his own." (PSR 15) State v. Case, 220 N.J. 49, 64 (2014) (holding "amply based" factors "must be found" and all factors "supported by credible evidence are required to be part of the deliberative process" (emphasis added)); State v. Mirakaj, 268 N.J. Super. 48, 51 (App. Div. 1993) (recognizing "[h]ardship to children" as a "significant mitigating sentencing factor").[28]

Finally, aggravating factor three (risk of reoffense) was not supported by the record, and aggravating factors six (extent of criminal history) and nine (need for deterrence) should have received little weight, if any. (15T 13-12 to 25, 37-17 to 38-8; Da 186-88) Weathersbee's five prior convictions were all drug-related, non-violent offenses for which he received only probation and which were likely caused by his "significant substance abuse history." (PSR 5-8, 11-12) And the court failed to "qualitative[ly] assess[]" or explain the basis for aggravating factors six and nine "beyond the simple finding of [his] criminal history." State v. Thomas, 188 N.J. 137, 153-54 (2006); Case, 220 N.J. at 65

[28] Social science shows children with incarcerated parents have significantly worse outcomes in education, behavioral development, and physical and mental health. See, e.g., Joseph Murray et al., Campbell Collab., Effects of Parental Imprisonment on Child Antisocial Behaviour and Mental Health: A Systematic Review 8 (2009), https://www.ojp.gov/pdffiles1/nij/grants/229378.pdf; Leila Morsy & Richard Rothstein, Econ. Pol'y Inst., Mass Incarceration and Children's Outcomes 9-12 (2016), https://files.epi.org/pdf/118615.pdf.

(explaining courts "must explain how they arrived at a particular sentence" including "the factual basis supporting a finding of particular aggravating or mitigating factors"). For all those reasons, consecutive sentences were entirely inappropriate. In any event, the court's failure to consider all the Yarbough factors requires a resentencing. See Rogers, 124 N.J. at 121.

CONCLUSION

For the reasons stated in Points I, II, and IV, all of Weathersbee's convictions must be reversed. For the reasons stated in Point III, his certain-persons conviction (count four) must be reversed. Alternatively, for the reasons stated in Point V, a resentencing is required.

Respectfully submitted,

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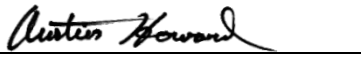
BY: 
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Dated: August 31, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1013-22T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL T. WEATHERSBEE,

Defendant-Appellant.

Criminal Action

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

Sat Below:
Hon. Sheila A. Venable, J.S.C.
Hon. Patrick J. Arre, J.S.C., and a Jury.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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Dated: February 28, 2024

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

The State adopts and incorporates by reference the procedural history set forth in defendant's brief on appeal. (Db1-2).[1]

COUNTERSTATEMENT OF FACTS

The State adopts and incorporates by reference the statement of facts set forth in defendant's brief on appeal. (Db2-8).

[1] "Db" refers to defendant's brief on appeal. Other references to the record are abbreviated consistent with his brief.

LEGAL ARGUMENT

POINT I

DEFENDANT'S STATEMENT WAS PROPERLY ADMITTED BY JUDGE VENABLE.

Defendant argues that his Miranda[2] waiver "and statement as a whole were involuntary and should have been suppressed in full." (Db9). For the reasons discussed below, this argument lacks merit and should be rejected.

In reviewing a trial court's ruling on the admissibility of a defendant's statement, an appellate court "defer[s] to the trial court's factual findings that are supported by sufficient credible evidence in the record and will not disturb those findings unless they are 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Rivas, 251 N.J. 132, 152 (2022) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). This deferential standard of appellate review applies "even when the trial court's findings are premised on a recording or documentary evidence." State v. Tillery, 238 N.J. 293, 314 (2019). In contrast, "the interpretation of law 'and the consequences that flow from established facts' are not entitled to deference and are reviewed de novo." State v. Carrion, 249 N.J. 253, 279 (2021) (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

"The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and this state's common law, now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503." State v. Bullock, 253 N.J. 512, 532 (2023) (quoting State v. Nyhammer, 197 N.J. 383, 399 (2009)). In Miranda, "the United States Supreme Court imposed procedural safeguards to try to dispel the inherent pressures of custodial interrogations and protect the right against self-incrimination." State v. O.D.A.-C., 250 N.J. 408, 419-20 (2022) (citing Miranda, 384 U.S. at 467, 478-79). The Miranda Court held that before law enforcement can interrogate a person in custody, the person must be advised

> 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.]

Thus, "[t]he protections provided by Miranda apply only when a person is both in custody and subjected to police interrogation." Hubbard, 222 N.J. at 270.

"'Custody' for the purposes of Miranda requires a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" State v. Erazo, 254 N.J. 277, 298 (2023) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). Determining whether a person is in

custody "is a fact-sensitive inquiry" that turns on "'whether there has been a significant deprivation of the suspect's freedom of action based on the objective circumstances, including the time and place of the interrogation, the status of the interrogator, the status of the suspect, and other such factors.'" State v. Ahmad, 246 N.J. 592, 611 (2021) (quoting State v. P.Z., 152 N.J. 86, 103 (1997)). But "simply because someone is questioned at a police station, by police officers, does not mean they are 'in custody.' Nor is it dispositive whether police consider someone a 'suspect,' 'person of interest,' or 'witness.'" Erazo, 254 N.J. at 299 (citations omitted). "The inquiry is an objective one, determined by 'how a reasonable [person] in the suspect's position would have understood his situation.' The inquiry is not based 'on the subjective views harbored by either the interrogating officers or the person being questioned.'" Bullock, 253 N.J. at 533 (alteration in original) (quoting Hubbard, 222 N.J. at 267).

Here, defendant was advised of and waived his Miranda rights at the outset of his interview with police, thus rendering largely superfluous any question of when during the interview his presence rose to the level of custody. Indeed, even if he was in custody from the moment he sat down -- or even on his way to the stationhouse, as he contends -- all that was asked of him before he was properly advised of and waived his rights was basic ministerial

information that did not constitute interrogation requiring a prior waiver of his rights. And as Judge Venable properly found, once defendant was advised of his rights, he voluntarily, knowingly, and intelligently waived those rights.

"[A]fter an individual is given Miranda warnings and apprised of the rights, that person 'may waive effectuation of [those] rights, provided the waiver is made voluntarily, knowingly and intelligently.'" Bullock, 253 N.J. at 533-34 (second alteration in original) (quoting Miranda, 384 U.S. at 444). The State shoulders the burden of "prov[ing] beyond a reasonable doubt that the individual knowingly, intelligently, and voluntarily waived those rights 'in light of all the circumstances.'" O.D.A.-C., 250 N.J. at 420 (quoting State v. Sims, 250 N.J. 189, 211 (2022)). "A waiver may be express or implied -- '[a]ny clear manifestation of a desire to waive is sufficient.'" Bullock, 253 N.J. at 534 (alteration in original) (quoting Tillery, 238 N.J. at 316).

"Under the totality-of-the-circumstances test, courts commonly consider a number of factors to determine if a Miranda waiver is valid." O.D.A.-C., 250 N.J. at 421. Those factors "include the suspect's 'education and intelligence, age, familiarity with the criminal justice system, physical and mental condition, . . . drug and alcohol problems,' how explicit the waiver was, and the amount of time between the reading of the rights and any admissions." Ibid. (citations omitted); see also Erazo, 254 N.J. at 301 (noting that additional

considerations include "statements and behaviors by the police which tend to contradict the Miranda warnings, or otherwise render them ineffective"); State v. A.M., 237 N.J. 384, 398 (2019) (listing additional factors such as "advice as to constitutional rights, length of [the] detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved" (quoting State v. Miller, 76 N.J. 392, 402 (1978))). The factors are evaluated "qualitatively, not quantitatively." Erazo, 254 N.J. at 301 (quoting State v. Hreha, 217 N.J. 368, 384 (2014)).

Here, defendant was properly advised of his Miranda rights and replied, "Mm, cool" when asked if he wished to answer questions. (Da7). He then read the waiver form out loud on his own and, when he apparently struggled with the word "coercion," the detective correctly explained what the word meant and confirmed that defendant fully understood his rights by asking him to sign the waiver form only if he fully agreed with all of the statements it contained, which he did. And defendant again confirmed his willingness to talk to police immediately thereafter, after being told exactly why he was being questioned, by his response, "Not a problem." (Da8). Put simply, defendant was a twenty-six-year-old man with multiple prior interactions with the criminal-justice system in the form of both prior arrests and cooperation with police, was questioned in the middle of the afternoon, showed no

indications of exhaustion or intoxication, was capable of listening to his rights and reading aloud the waiver form, and was properly advised of his rights, and immediately waived those rights. All of these factors support Judge Venable's finding that defendant's waiver of his rights was entirely valid.

The detective's prelude to advising defendant of his Miranda rights -- his explanation that "[j]ust like . . . anybody else that come down here, we gotta read you your rights and things like that" -- did not render defendant's waiver invalid. This single statement by the detective -- the only factor defendant complains of that occurred prior to the waiver itself -- was not improper, and certainly was not enough to outweigh the numerous factors supporting the knowing, intelligent, and voluntary nature of defendant's waiver in the totality-of-the-circumstances analysis. The detective did not suggest that the Miranda warnings were "just a formality" or "downplay[] their significance" as a constitutional requirement. O.D.A.-C., 250 N.J. at 422. Nor did the detective "directly contradict, out of one side of his mouth, the Miranda warnings just given out of the other." State v. L.H., 239 N.J. 22, 44 (2019) (quoting State v. Pillar, 359 N.J. Super 249, 268 (App. Div. 2003)). And police certainly are not required to advise someone of their status as a suspect prior to a custodial interrogation for the suspect's Miranda waiver to be valid. Rather, as the judge

correctly found under the totality of the circumstances, defendant was properly advised of and validly waived his Miranda rights.

"Beyond the issue of waiver, there are separate due process concerns related to the voluntariness of a confession. Due process requires the State to 'prove beyond a reasonable doubt that a defendant's confession was voluntary and was not made because the defendant's will was overborne.'" O.D.A.-C., 250 N.J. at 421 (quoting L.H., 239 N.J. at 42). Voluntariness is also evaluated under the totality of the circumstances, "and '[t]here is a substantial overlap [with] the factors that' apply to a waiver analysis." Ibid. (alterations in original) (quoting Tillery, 238 N.J. at 316-17).

"An involuntary confession can result from physical or psychological coercion." State v. Cook, 179 N.J. 533, 562 (2004). But in contrast to "the use of physical coercion, use of psychologically oriented interrogation techniques is not inherently coercive." Ibid. "Because a suspect will have a 'natural reluctance' to furnish details implicating himself in a crime, an interrogating officer may attempt 'to dissipate this reluctance and persuade the [suspect] to talk.'" L.H., 239 N.J. at 43-44 (alteration in original) (quoting Miller, 76 N.J. at 403). For example, an officer may appeal to the suspect's "sense of decency and urg[e] him to tell the truth for his own sake." Id. at 44 (quoting Miller, 76 N.J. at 405).

Moreover, "[o]ur jurisprudence . . . gives officers leeway to tell some lies during an interrogation." Ibid. (citing State v. Galloway, 133 N.J. 631, 655 (1993); Miller, 76 N.J. at 403-04); see also State v. Baylor, 423 N.J. Super. 578, 588-89 (App. Div. 2011) (recognizing that "officers may employ deception or trickery in an interrogation of a suspect unless such deception or trickery was calculated to produce an untruthful confession or was offensive to due process"), certif. denied, 210 N.J. 263 (2012). Therefore, "[t]he fact that the police lie to a suspect does not, by itself, render a confession involuntary." Galloway, 133 N.J. at 655. "Certain lies, however, may have the capacity to overbear a suspect's will and to render a confession involuntary." L.H., 239 N.J. at 44. These include "[f]alse promises of leniency -- promises 'so enticing' that they induce a suspect to confess." Id. at 27 (quoting Hreha, 217 N.J. at 383). It is also improper for an officer to minimize the severity of a crime under investigation or falsely promise help "as a substitute for jail." Id. at 52.

Here, the detective's words and conduct during the interview did not overbear defendant's will, such that any part of defendant's statement was involuntary. As the video and transcript of defendant's interview show, the detective's challenges to defendant's story were not as aggressive as the words cherry-picked from the transcript by defendant may suggest. Law enforcement

is not required to sit back quietly while a suspect lies or downplays their involvement in events during an interview. And it is well established that police are free to mislead a suspect during an interview, so long as they do not cross the line into fabricating evidence or otherwise impermissibly overbearing the defendant's will. And waving hands, slapping tables, and pointing out ways in which defendant's story is inconsistent with his own statements and with normal human behavior is not impermissibly overbearing. Nor is the use of curse words or shouting. Indeed, defendant's claim that he -- a twenty-six-year-old man who grew up in a rough area in Jersey City, whose own criminal behavior began when he was a juvenile, and who himself cursed multiple times during the interview -- had his will overborne by the detective's cursing, raised voice, and gesticulating is beyond belief. Certainly his sensibilities were not so delicate. Nor is defendant's claim supported by his own words or actions during the interview. He did not startle or cower; he did not weep or plead with the detective to calm down or let him go. Indeed, he did not react at all. And when he said he was "tired as hell" and "[r]eady to go the f**k home," (Da104), shortly after the only time he said he has "nothing else to say" (Da101), the interview ended. The detectives did not press on in an attempt to overbear his will.

Likewise, defendant's behavior and responses showed that he was in no way coerced by what he now claims were the detective's threats against his life and relationship with his children. As the judge properly found, the detectives were not threatening to harm defendant, and their reference to the risk to his safety back out on the street did not even rise to the level of the references to a defendant's safety this court found permissible in State v. Faucette, 439 N.J. Super. 241, 260-61 (App. Div.), certif. denied, 221 N.J. 492 (2015), and fell far short of the "'very substantial psychological pressure' necessary for finding a defendant's will was overborne." (Da124-125).

The detectives also did not impermissibly contradict the Miranda warnings defendant waived. They did not promise him that his cooperation would result in him being able to go home or imply that he had no option but to continue the interview, nor did they promise him leniency they could not guarantee.

As the judge properly found, none of the detectives' actions throughout the course of defendant's interview crossed the line, and when assessed under the totality of the circumstances as they must be, it is clear that they did not overbear defendant's will and that defendant's statement was voluntary beyond a reasonable doubt.

Finally, defendant's statement was not rendered inadmissible by any failure to terminate questioning. Under federal law, "the police are required to stop a custodial interrogation when a suspect unambiguously asserts his right to remain silent." S.S., 229 N.J. at 382 (citing Berghuis v. Thompkins, 560 U.S. 370, 381-82 (2010)). Conversely, "under our state law privilege against self-incrimination, 'a request, however ambiguous, to terminate questioning . . . must be diligently honored." Ibid. (quoting State v. Bey, 112 N.J. 123, 142 (1988)).

"Words used by a suspect are not to be viewed in a vacuum, but rather in 'the full context in which they were spoken.'" Ibid. (quoting State v. Roman, 382 N.J. Super. 44, 64 (App. Div. 2005), certif. dismissed, 189 N.J. 420 (2007)). A defendant need not use any "talismanic words" or phrases to invoke the right to remain silent. Id. at 383. In fact, "[a]ny words or conduct that reasonably appear to be inconsistent with [the] defendant's willingness to discuss his case with the police are tantamount to an invocation of the privilege against self-incrimination." Bey, 112 N.J. at 136. "[I]f the police are uncertain whether a suspect has invoked his right to remain silent, two alternatives are presented: (1) terminate the interrogation or (2) ask only those questions necessary to clarify whether the defendant intended to invoke his right to silence." S.S., 229 N.J. at 383.

However, officers are not required to accept "any words or conduct, no matter how ambiguous, as a conclusive indication that a suspect desires to terminate questioning." Bey, 112 N.J. at 136-37. Thus, our courts use a "totality of the circumstances approach that focuses on the reasonable interpretation of [the] defendant's words and behaviors" to determine if he invoked his right to remain silent. State v. Diaz-Bridges, 208 N.J. 544, 564 (2011).

Using that approach, our Supreme Court has held that, without more, a suspect's pause, request for additional time, or request for "an opportunity to 'lie down and think about it' before responding" to a question, does not constitute a request for the "police [to] terminate questioning through the invocation of the right to remain silent." Id. at 566-67 (quoting Bey, 112 N.J. 136-37). Similarly, a suspect's "emotional reaction" after recognizing "the enormity of a crime" charged, without more, is not "a sufficient indication of a decision to invoke the right to silence [so] that the immediate cessation of the interrogation must follow." Id. at 568-69.

Here, neither defendant's requests to go home to his children nor his statement that he had nothing to say constituted an invocation of his right to terminate questioning and remain silent. Defendant's questions as to whether he could go home to his children did not suggest an unwillingness to continue

talking to police, or a willingness to continue answering questions only if he was first allowed to see his children, as was the case in Diaz-Bridges, 208 N.J. at 551, 572. Thus, as the judge properly found, defendant asking to go home to see his children was not an invocation -- ambiguous or otherwise -- of his right to remain silent. (Da126).

Moreover, defendant first said he had "nothing else to say" only in the context of telling the detectives to contact his girlfriend to corroborate his story. In this context, as the judge properly found, the totality of the circumstances did not indicate that defendant's statement that he had nothing else to say was an invocation of his right to remain silent. (Da101, 127). It was not until a later portion of the interview that defendant's statements that he had nothing else to say indicated an unwillingness to continue talking to police, in that they were not accompanied by further information from the defendant, and were thus an invocation of his right to remain silent. And, as the judge properly noted, the police ended the interview and, after a short break, returned to arrest defendant. (Da127). Thus, even if his statements were an invocation of his right to remain silent, the police properly ended the interview. And even if they could have done so a minute sooner, any such error did not preclude the admission of defendant's statement as a whole, only those portions after his statement that he had "nothing else to say." Notably,

nothing of substance was gleaned from defendant's responses thereafter, rendering any error in the admission of such portions of his interview "harmless beyond a reasonable doubt." Tillery, 238 N.J. at 319.

POINT II

DEFENDANT WAS NOT DENIED A FAIR TRIAL BY THE ADMISSION OF HIS STATEMENT.

Defendant further argues that he was denied a fair trial because the judge did not redact portions of his statement he claims were inadmissible. As there was no error in the admission of the complained-of portions of his statement, his argument should be rejected.

Because defendant did not object to the admission of the now-complained of portions of his interview on any of the grounds now raised or request a curative instruction, the plain error standard of review applies. State v. Johnson, 421 N.J. Super. 511, 521 (App. Div. 2011). Under the plain-error standard, a conviction will not be reversed unless "the error was 'clearly capable of producing an unjust result.'" Ibid. (quoting R. 2:10-2). "That determination must be made in the context of the entire record." State v. Sowell, 213 N.J. 89, 108 (2013). "The absence of an objection suggests that trial counsel perceived no error or prejudice, and, in any event, prevents the trial judge from remedying any possible confusion in a timely manner." State v. Green, 318 N.J. Super. 361, 373 (App. Div. 1999), aff'd o.b., 163 N.J. 140 (2000); see also State v. Ross, 229 N.J. 389, 415 (2017) (viewing defense "counsel's failure to object as an indication that counsel perceived no prejudice"). Defendant has the burden of establishing plain error. State v.

Chew, 150 N.J. 30, 81-82 (1997). For the following reasons, defendant has not sustained his burden here.

Defendant first claims that his confrontation rights were violated by the court permitting the jury to hear the portion of his interview in which the detective referenced a witness, Eva Reid, "pick[ing]" defendant.

"[B]oth the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." State v. Branch, 182 N.J. 338, 350 (2005) (citing State v. Bankston, 63 N.J. 263, 268-69 (1973)). The "common thread" running through the Confrontation Clause jurisprudence "is that a police officer may not imply to the jury that he [or she] possesses superior knowledge, outside the record, that incriminates the defendant." Id. at 351. Accordingly, "testimonial statement[s] against a defendant by a non-testifying witness [are] inadmissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him or her." State v. Wilson, 227 N.J. 534, 545 (2017) (citing Crawford v. Washington, 541 U.S. 36, 59 (2004)). Moreover, "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police

evidence of the accused's guilt, the testimony should be disallowed as hearsay." Bankston, 63 N.J. at 271.

Here, defendant's claim fails on its most basic premise: that the admission of this portion of the detective's questioning constituted a testimonial hearsay statement requiring compliance with the hearsay rules and the Confrontation Clause. The questions asked by a detective during the course of an interview are not testimonial hearsay, as they are not admitted for the truth of the matter asserted. Indeed, police are permitted to lie to and mislead the suspects they are questioning.

The detective was not testifying about Eva Reid's identification at all, and thus was not through his testimony conveying information to incriminate the defendant. Rather, the only reference to her identification was contained in the detective's questions during his interview of defendant. And significantly, it was defendant, not the State, that told the jury there was a witness who identified defendant, and it was defendant, not the State, that suggested that there was any truth behind the detective's interview questions, in that there was any such witness regardless of the accuracy of her identification. He cannot now be heard to complain about the improper references to a non-testifying witness he himself made and the attention he himself drew to this non-testifying witness in both his opening and his improper attempt to cross-

examine the detective about Reid's identification. As the detective's reference during the interview to a witness picking defendant was not a hearsay statement, defendant had no right under N.J.R.E. 806 to attack Reid's credibility through his questioning of the detective at trial. The judge's ruling sustaining the State's hearsay objection thus did not violate N.J.R.E. 806 or deny defendant his rights under the Confrontation Clause.

Defendant next claims that the trial judge erred in permitting the jury to hear defendant invoke his right to remain silent during his interview and in permitting the prosecutor to comment on defendant's silence.

While the prosecutor in a criminal case is expected to make vigorous and forceful closing arguments to a jury, a prosecutor must avoid comments that invade the rights bestowed on defendants, including the right to remain silent. State v. Muhammad, 182 N.J. 551, 568-69 (2005) (holding that a prosecutor may not use at trial a defendant's silence when that silence arises "at or near" the time of arrest, during official interrogation, or while in police custody). "[T]rial courts should endeavor to excise any reference to a criminal defendant's invocation of his [constitutional] right[s]." State v. Clark, 251 N.J. 266, 292 (2022) (quoting State v. Feaster, 156 N.J. 1, 75-76 (1998)).

Here, as discussed in Point I, there were no such invocation of defendant's right to remain silent, such that permitting the jury to hear the

statements claimed to be invocations was reversible error. And to the extent any such statements were ambiguous invocations, they do not risk creating the same negative inference in the minds of jurors not trained in the law as might a clear invocation of the right to remain silent, such that defendant would be punished for exercising his constitutional right. Significantly, defendant did not object to the admission of these portions of his interview on these grounds, suggesting he too recognized that their admission was not improper. Nor did he object to the prosecutor's single fleeting reference to an instance in which defendant refused to answer a single question during his interview as to whether he ran because he heard gunshots -- a comment fairly made in response to defense counsel's own speculation during his summation that defendant was running just like everyone else because he heard gunshots. There was no error in the admission of the now-complained of portions of defendant's interview or the prosecutor's single comment during summation, and certainly neither rose to the level of plain error.

Finally, defendant claims that the trial judge erred in permitting the detective to introduce improper lay opinion testimony regarding defendant's guilt, credibility, motive, opportunity, and premeditation, thereby usurping the role of the jury to decide the ultimate issue.

Lay opinion testimony may be admitted under N.J.R.E. 701 "in the form of opinions or inferences" if "it: (a) is rationally based on the witness' perception; and (b) will assist in understanding the witness' testimony or determining a fact in issue." However, our courts have not permitted lay opinion testimony "on a matter 'not within [the witness's] direct ken . . . and as to which the jury is as competent as he to form a conclusion." State v. McLean, 205 N.J. 438, 459 (2011) (alterations in original) (quoting Brindley Firemen's Ins. Co., 35 N.J. Super. 1, 8 (App. Div. 1955)). Moreover, witnesses may not "intrude on the province of the jury by offering, in the guise of opinions, views on the meaning of facts that the jury is fully able to sort out" or "express a view on the ultimate question of guilt or innocence." Id. at 461.

For interrogating police officers, "observations that [a] defendant appeared aggravated . . . and was 'clearly upset' . . . were . . . opinions based on first-hand perception of defendant's appearance, demeanor, and reactions, which fall within the lay opinion rule." Tung, 460 N.J. Super. at 101. However, an "[officer's] opinions as to defendant's truthfulness and guilt . . . [are] not admissible as either demeanor evidence or lay opinion." Ibid.

That being said, here, unlike in each of the cases cited by defendant, the comments defendant now complains of came from the detectives' comments during the interview, not in their testimony. The only exception is the

comments on the truthfulness of defendant's interview responses offered by the detective in response to the questions of defense counsel, not the State. Defendant cannot elicit testimony on the detective's impression of his honesty and then complain about it on appeal. And again, significantly, defendant did not object to the detective's testimony at trial, and it certainly does not rise to the level of plain error on appeal.

POINT III

ANY ERROR BY JUDGE ARRE IN INSTRUCTING THE JURY AT THE CERTAIN-PERSONS TRIAL WAS HARMLESS.

Defendant argues -- for the first time on appeal -- that Judge Arre erred in instructing the jury on the certain-persons offense by incorrectly stating that N.J.S.A. 2C:39-7(b)(1) prohibits a person from possessing any "weapon" and by disclosing the nature of his two predicate offenses -- both possession of a controlled dangerous substance with intent to distribute within 1000 feet of a school. As discussed below, because any error by the judge in instructing the jury was harmless, defendant's certain-persons conviction should be affirmed.

The State acknowledges that Judge Arre should have instructed the jury that the certain-persons statute prohibited the possession of a "firearm," not a "weapon," and should have refrained from disclosing that the two predicate offenses were for possession of a controlled dangerous substance with intent to distribute within 1000 feet of a school. See Model Jury Charges (Criminal), "Certain Persons Not to Have Any Firearms (N.J.S.A. 2C:39-7(b)(1)" (rev. Feb. 12, 2018); State v. Bailey, 231 N.J. 474, 488 (2018) ("If a defendant chooses to stipulate, evidence of the predicate offense is extremely limited: '[t]he most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that . . . bar a convict from

possessing a gun[.]' A defendant who stipulates can therefore prevent the State from presenting evidence of the name and nature of the offense. Provided that the stipulation is a knowing and voluntary waiver of rights, placed on the record in defendant's presence, the prosecution is limited to announcing to the jury that the defendant has committed an offense that satisfies the statutory predicate-offense element." (alteration in original) (citation omitted)).

But defendant never interposed an objection to the jury instructions he now challenges for the first time on appeal. "If a defendant, as here, does not object or otherwise preserve an issue for appeal at the trial court level," an appellate court "review[s] the issue for plain error." State v. Santamaria, 236 N.J. 390, 404 (2019) (citing R. 2:10-2). "Under that standard, an unchallenged error constitutes plain error if it was 'clearly capable of producing an unjust result.'" State v. Clark, 251 N.J. 266, 287 (2022) (quoting R. 2:10-2). "Such an 'error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached.'" State v. Gonzalez, 249 N.J. 612, 633 (2022) (quoting State v. Singh, 245 N.J. 1, 13 (2021)). Our Supreme Court has made clear that "[p]lain error is a high bar," and has further "cautioned that 'rerun[ning] a trial when the error could easily have been cured on request[] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal.'" Singh, 245 N.J. at 13

(alterations in original) (quoting Santamaria, 236 N.J. at 404-05). "To determine whether an alleged error rises to the level of plain error, it 'must be evaluated in light of the overall strength of the State's case.'" Clark, 251 N.J. at 287 (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)).

Defendant's failure to object "permits an inference that any error . . . was not prejudicial." State v. Cotto, 471 N.J. Super. 489, 537 (App. Div.), certif. denied, 252 N.J. 166 (2022); see also State v. Green, 318 N.J. Super. 361, 373 (App. Div. 1999) ("The absence of an objection suggests that trial counsel perceived no error or prejudice, and, in any event, prevents the trial judge from remedying any possible confusion in a timely manner."), aff'd o.b., 163 N.J. 140 (2000). Significantly, defendant's failure to raise this issue before the trial court "denied the State the opportunity to confront the claim head-on; it denied the trial court the opportunity to evaluate the claim in an informed and deliberate manner; and it denied any reviewing court the benefit of a robust record within which the claim could be considered." State v. Robinson, 200 N.J. 1, 21 (2009).

Defendant has failed to meet his burden of establishing plain error. In light of the stipulations by defense counsel and the fact that the jury was repeatedly told that the weapon in this case was a firearm, any error by the judge in instructing the jury was harmless. This is particularly so because

defendant's two predicate offenses were non-violent and involved only the possession of a controlled dangerous substance with intent to distribute within 1000 feet of a school and because this case did not similarly involve drugs. Accordingly, defendant's certain-persons conviction should be affirmed.

POINT IV

THE ERRORS ALLEGED BY DEFENDANT DID NOT INDIVIDUALLY OR CUMULATIVELY DEPRIVE HIM OF A FAIR TRIAL.

Defendant argues that the cumulative effect of the above alleged errors deprived him of a fair trial. (Db60). It is true that "[e]ven if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." Sanchez-Medina, 231 N.J. at 469. "However, this principle does not apply 'where no error was prejudicial and the trial was fair.'" Cotto, 471 N.J. Super. at 547 (quoting State v. T.J.M., 220 N.J. 220, 238 (2015)). As previously discussed, no error was prejudicial and the trial was fair, so this court should affirm defendant's convictions.

POINT V

JUDGE ARRE DID NOT ABUSE HIS DISCRETION IN SENTENCING DEFENDANT.

Defendant argues that Judge Arre's "imposition of consecutive terms on the murder and certain-persons counts, and [his] weighing of the aggravating and mitigating factors, violated Yarbough[3] and its progeny." (Db61). For the reasons discussed below, this argument lacks merit and should be rejected.

A trial court's "sentencing determinations are entitled to substantial deference" on appeal. State v. Jaffe, 220 N.J. 114, 124-25 (2014) (quoting State v. Pagan, 378 N.J. Super. 549, 558 (App. Div. 2005)). "Appellate review of a criminal sentence is limited; a reviewing court decides whether there is a 'clear showing of abuse of discretion.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)); see generally State v. Kiriakakis, 235 N.J. 420, 443 (2018) (underscoring "the highly discretionary nature of the sentencing process"). The reviewing court may "not substitute its judgment for the judgment of the sentencing court," State v. Lawless, 214 N.J. 594, 606 (2013), and

> must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the

[3] State v. Yarbough, 100 N.J. 627 (1985).

> record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [State v. Miller, 237 N.J. 15, 28 (2019) (alteration in original) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)).]

See also Tillery, 238 N.J. at 323 (reiterating that the focus of the reviewing court's inquiry "is on whether the basic sentencing determination of the [trial] court was 'clearly mistaken'" (quoting State v. Jarbath, 114 N.J. 394, 401 (1989))).

In determining an appropriate sentence to impose within the prescribed statutory range, the trial court "first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case. The finding of any factor must be supported by competent, credible evidence in the record" and cannot be based on speculation and suspicion. State v. Case, 220 N.J. 49, 64 (2014) (citation omitted). But the court is not bound by the rules of evidence. See N.J.R.E. 101(a)(3)(C). Indeed, the court "exercises 'a far-ranging discretion as to the sources and types of evidence used to assist [it] in determining the kind and extent of punishment to be imposed.'" Tillery, 238 N.J. at 325 (quoting State v. Davis, 96 N.J. 611, 619-20 (1984)).

"The sentencing court is required to consider evidence of a mitigating factor and must apply mitigating factors that 'are amply based in the record.'" State v. Grate, 220 N.J. 317, 338 (2015) (quoting State v. Dalziel, 182 N.J. 494, 504 (2005)). A mitigating factor that is "suggested in the record or brought to the court's attention should not be ignored." State v. Rivera, 249 N.J. 285, 298-99 (2021). In short, "where the evidence supports a finding of a mitigating factor, [it] must be part of the court's 'deliberative process.'" Jaffe, 220 N.J. at 121 n.1 (quoting Dalziel, 182 N.J. at 505).

"Whether a sentence should gravitate toward the upper or lower end of the range depends on a balancing of the relevant factors." Case, 220 N.J. at 64. "[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." Kiriakakis, 235 N.J. at 442 (quoting State v. Natale, 184 N.J. 458, 488 (2005)). "The balancing process, however, is more than counting whether one set of factors outnumbers the other. Rather, the court must qualitatively assess the relevant aggravating and mitigating factors, assigning each factor its appropriate weight." Case, 220 N.J. at 65 (citation omitted).

Here, after denying the State's motion for imposition of a discretionary extended-term sentence and merging count two into count one, Judge Arre

sentenced defendant to an aggregate prison term of thirty-five years, consisting of a thirty-year term without parole on count one, a concurrent ten-year term on count three, and a consecutive five-year term without parole on count four. (Da181-193; 15T4-12 to 16-23, 34-20 to 41-8). In imposing this sentence, the judge qualitatively assessed the relevant aggravating and mitigating factors, finding that aggravating factors three, six, and nine applied, that no mitigating factors applied, and that those "aggravating factors substantially outweigh[ed] the [nonexistent] mitigating factors." (Da186). The judge found aggravating factor three "because rehabilitative efforts, such as the Defendant's enrollment in Drug Court, and prior convictions have failed at deterring new offenses." (Da186). The judge found aggravating factor six "because the Defendant's criminal history includes five prior indicatable offenses." (Da187). The judge found aggravating factor nine "because there is a strong need to deter this Defendant, based on the seriousness and the extent of the Defendant's criminal record." (Da187). The judge declined to find mitigating factors three and four because "the Defendant has not established substantial grounds tending to excuse or justify his conduct." (Da188).

The judge's assessment of the aggravating and mitigating factors was proper. A sentencing court's "predictive assessment" of the risk of recidivism "involve[s] determinations that go beyond the simple finding of a criminal

history and include an evaluation and judgment about the individual in light of his or her history." State v. Thomas, 188 N.J. 137, 153 (2006). Therefore, a finding of aggravating factor three "can be based on [an] assessment of a defendant beyond the mere fact of a prior conviction, or even in the absence of a criminal conviction." Id. at 154; see also Fuentes, 217 N.J. at 80 ("We also decline to find that aggravating factor nine is inappropriate in a case in which the defendant had no prior record, and the sentencing court accordingly applies mitigating factor seven." (citation omitted)); State v. Varona, 242 N.J. Super. 474, 491 (App. Div.) (concluding that the sentencing court's finding that the defendant was likely to reoffend "was clearly justified" despite "the fact that [he] had no prior record"), certif. denied, 122 N.J. 386 (1990). Applying these principles here, Judge Arre's assessment of the aggravating factors was proper. And, as the judge found, nothing in the record supported finding mitigating factor three or mitigating factor four. As to mitigating factor eleven, the judge was not required to find it sua sponte. See State v. Hyman, 451 N.J. Super. 429, 460 (App. Div. 2017) (ruling that the record did not support the claim that mitigating factor eleven should have been found where the defendant did not show either that his five "children would experience 'excessive' hardship from his absence" or that he was a significant source of support for them), certif. denied, 232 N.J. 301 (2018). Although the judge should have found mitigating

factor fourteen, the failure to do so constitutes harmless error, as made clear by the judge's other appropriate findings.

Furthermore, trial courts "have discretion to decide if sentences should run concurrently or consecutively." State v. Miller, 205 N.J. 109, 128 (2011) (citing N.J.S.A. 2C:44-5(a)). "'[W]hen determining whether consecutive sentences are warranted,' a court is required 'to perform the well-known assessment of specific criteria' commonly referred to as the Yarbough factors." State v. Vanderee, 476 N.J. Super. 214, 238 (App. Div.) (alteration in original) (quoting State v. Randolph, 210 N.J. 330, 353 (2012)), certif. denied, 255 N.J. 506 (2023). Those factors include the following:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;
> >
> > (c) the crimes were committed at different times or separate places, rather than being committed

> so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims;
>
> (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors; [and]
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.
>
> [State v. Torres, 246 N.J. 246, 264 (2021) (quoting Yarbough, 100 N.J. at 643-44).]

Since these criteria are to "be applied qualitatively, not quantitatively," a "court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences." State v. Liepe, 239 N.J. 359, 374 (2019) (quoting State v. Carey, 168 N.J. 413, 427-28 (2001)). Ultimately, the court's focus in making this determination "should be on the fairness of the overall sentence." State v. Sutton, 132 N.J. 471, 485 (1993); see also Liepe, 239 N.J. at 378 (noting that a sentencing court's "primary obligation" is "to craft a sentence warranted by the offenses"); State v. Cuff, 239 N.J. 321, 352 (2019) (explaining that courts should consider "the fairness of the aggregate sentence imposed for the [various] offenses"). An explanation of the "overall fairness" is necessary "to 'foster[] consistency in . . . sentencing in that

arbitrary or irrational sentencing can be curtailed and, if necessary, corrected through appellate review.'" Torres, 246 N.J. at 272 (alteration in original) (quoting State v. Pierce, 188 N.J. 155, 166-67 (2006)).

Judge Arre thoughtfully and cogently applied the Yarbough factors, concluding that minimum-term consecutive sentences on the murder and certain-persons counts, respectively, was appropriate, and imposing a thirty-five-year aggregate term. (Da189). Specifically, the judge properly found that consecutive sentences were warranted because there shall be no free crimes and the crimes and their objectives were predominantly independent of each other. Contrary to defendant's assertion on appeal, "every Yarbough factor" did not favor concurrent sentences. (Db63). Far from it. The judge did not abuse his discretion in imposing the sentence, which he correctly determined was fair. Accordingly, this court should affirm defendant's sentence.

CONCLUSION

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

Respectfully submitted,

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BY: 
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Dated: February 28, 2024

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1013-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Hudson County.
v.	:	
MICHAEL T. WEATHERSBEE,	:	Indictment No. 18-12-1104-I
Defendant-Appellant.	:	Sat Below:
	:	Hons. Sheila A. Venable, Patrick J. Arre, J.S.C.; and a Jury.
		DEFENDANT IS CONFINED

Your Honors:

Please accept this letter-brief on behalf of defendant-appellant in lieu of a formal brief pursuant to Rule 2:6-2(b).

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REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant Michael T. Weathersbee relies on the procedural history and statement of facts set forth in his opening brief. (Db 1-8)[1]

LEGAL ARGUMENT

Defendant relies on the arguments in his opening brief and the following.

POINT I

THE POLICE INTERROGATION OF DEFENDANT VIOLATED NUMEROUS WELL-ESTABLISHED PROHIBITIONS AGAINST AFFIRMATIVE POLICE DECEPTION, PSYCHOLOGICAL COERCION, AND THREATS. (Response to State's Point I)

For the reasons stated in Weathersbee's opening brief, he maintains that the motion court erroneously admitted his statement to police because (1) he was in custody and subject to interrogation, so the Miranda[2] protections applied; (2) the police repeatedly ignored his invocations of his right to remain silent; and (3) his Miranda waiver and statement as a whole were involuntary due to overwhelming police coercion. This reply brief responds to several claims by the State that are not supported by the factual record or the law.

As an initial matter, just as the State did not contest custody below, on

[1] "Db" refers to defendant's opening brief. "Pb" refers to the State's brief. All other abbreviations are set forth in defendant's opening brief. (See Db 1 n.2)

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

appeal it offers no argument to defend the motion court's sua sponte finding that Weathersbee was not in custody until late into the interrogation. (Pb 4-5) In fact, he was in custody the whole time. The police themselves brought him to a small interrogation room in the prosecutor's office, blocked his exit, seized his cell phone, kept him confined for over seven hours, aggressively interrogated him for two and a half hours, and objectively treated him as their prime suspect. They confronted him with inconsistencies, demanded explanations, shouted and swore at him, slapped the table, pointed at him, fabricated evidence against him, ignored his pleas to "go home," and threatened him and his family. Just as in State v. Hubbard, 222 N.J. 249, 271-72 (2015), the aggressive police questioning and stationhouse environment make clear that a similarly situated twenty-five-year-old[3] would not have felt free to leave. Because the State also does not dispute that Weathersbee was subject to interrogation, the Miranda protections applied throughout the entire interrogation. Hubbard, 222 N.J. at 265-66.

Next, the State argues that Weathersbee properly waived his Miranda rights, claiming that he had "multiple prior interactions with the criminal-justice system in the form of both prior arrests and cooperation with police." (Pb 6) But as explained in Weathersbee's opening brief, the State did not submit any

[3] The State said Weathersbee was twenty-six, (Pb 6, 10), but his date of birth is November 18, 1992, and the interview occurred on September 26, 2018, making him twenty-five, as the motion court found, (Da 119, 194; 3T 6-7 to 7-2).

official records of arrests or police cooperation; it did not establish the recency of any such encounters; and, crucially, it did not prove that he had previously understood and knowingly waived his Miranda rights during those encounters. See State v. Puryear, 441 N.J. Super. 280, 297-98 (App. Div. 2015) (discounting prior arrest and conviction where the State "did not offer proof that such prior experience enabled him to understand his Miranda rights").

To the contrary, the motion court found only that Weathersbee had previously "talk[ed] to police as a witness" and made no finding on whether he had even been Mirandized before, let alone waived those important legal rights. (Da 114, 125 (emphasis added)) Thus, Weathersbee's prior cooperation as a witness cuts against the State's position because rather than demonstrate a shrewd familiarity with his legal rights as an accused, his prior experience at best suggested that he expected to be treated similarly again -- as a witness. Indeed, during the Miranda motion argument, the prosecutor herself recognized that Weathersbee likely agreed to waive his rights only because the "last time" he gave a statement "[h]e ended up being just a witness," so this time "[h]e probably thought he was going to be able to do the same thing." (3T 58-21 to 59-4) In any event, any limited prior experience with police could not cure the string of coercive police tactics used here. State v. O.D.A.-C., 250 N.J. 408, 424-25 (2022) (holding courts should not "isolate" an adult defendant's prior police

experience where the totality of circumstances indicates an invalid waiver).

Most harmfully, the police took advantage of Weathersbee's prior experience as a witness by affirmatively deceiving him into believing that he was again merely a witness, prefacing the crucial waiver moment with, "Just like, you know, anybody else that come down here, we gotta read you your rights and things like that." (1T 3-20 to 21 (emphasis added)) But, as Detective Nelson later admitted at the Miranda hearing, that was an affirmative lie. According to Nelson, the police did not routinely Mirandize witnesses, and Weathersbee was not "simply brought in as a witness" but was already at least a "person of interest as a shooter." (3T 40-21 to 45-8) In fact, the detectives' questioning and nonstop accusations objectively indicated that he was a true suspect.

The State claims that that police trickery was "not improper" and "not enough to outweigh" Weathersbee purported waiver, (Pb 7), but the State fails to engage with any of our state's modern cases on affirmative police deception, which make clear that affirmative lies by the police at the critical waiver moment are improper. See, e.g., State v. Bullock, 253 N.J. 512, 539 (2023) (invalidating waiver where police "affirmative[ly] misrepresent[ed]" defendant's status as a suspect); State v. Diaz, 470 N.J. Super. 495, 503, 518-27 (App. Div. 2022) (invalidating waiver where police "affirmatively misled defendant as to his 'true status'" as a suspect, which "strikes at the heart of the waiver decision"); State

v. Cotto, 471 N.J. Super. 489, 521 n.11 (App. Div. 2022) ("[A]ffirmatively and deliberately misleading an interrogee as to why he or she is being interrogated, as occurred in Diaz, would fall under the rubric of bad faith conduct . . . ."). Thus, although the police are not required to preemptively disclose an interrogee's suspect status, they cannot affirmatively mislead him into believing that he is merely a witness to trick him into waiving his constitutional rights. State v. Sims, 250 N.J. 189, 212-17 (2022); Diaz, 470 N.J. Super. at 525 ("[A]ny evidence that the accused was . . . tricked . . . into a waiver will, of course, show that the defendant did not voluntarily waive his [or her] privilege." (quoting Miranda, 384 U.S. at 476)). Here, the detectives affirmatively lied by saying that Weathersbee was "[j]ust like . . . anybody else" when the exact opposite was true, and then they proceeded to aggressively interrogate him for two and a half hours to try to pressure him into admitting his guilt to murder. That kind of affirmative police deception is not lawful in New Jersey. Therefore, his purported Miranda waiver was not voluntary, and suppression was required.

The State next argues that his statement as a whole was voluntary, but it misconstrues key facts in the record and misapplies this state's case law preventing psychological coercion. First, the State dismisses the detectives' repeated aggressive shouting, swearing, name-calling, table-slapping, pointing, and waiving as merely "normal human behavior." (Pb 10) But police detectives

interrogating an isolated, unrepresented suspect are not normal disinterested parties in a private quarrel; they are agents of the State exercising enormous power with an incentive to cross the line to solve crime and, for that reason, they have a constitutional duty to refrain from employing psychological coercion. State v. L.H., 239 N.J. 22, 41-47 (2019); Miranda, 384 U.S. at 442-67. The State fails to engage with the numerous cases cited in Weathersbee's opening brief demonstrating that judges routinely consider whether interrogating police "verbally abused" a defendant by calling him a "motherf***ing liar," State v. Camey, 239 N.J. 282, 315-16 (2019) (Albin, J., dissenting); whether they "curs[ed], yell[ed], or bang[ed] on the table," Rogers v. Quarterman, 555 F.3d 483, 494-95 (5th Cir. 2009); whether they "yelled at her and slammed his fists on the table," Niemann v. Whalen, 911 F. Supp. 656, 671-72 (S.D.N.Y. 1996); whether they "banged on the table and swore at him," Vargas v. Brown, 512 F. Supp. 271, 277 (D.R.I. 1981); or whether an officer "did not raise his voice at any stage of questioning, State ex rel. Q.N., 179 N.J. 165, 179 (2004). All of those aggressive tactics are important factors in the totality of the circumstances.

The State next argues that those tactics could not have mattered because Weathersbee "grew up in a rough area," had a "criminal" history, and also cursed. (Pb 10) But although a suspect's background is relevant, as explained above, the State -- which had the burden of proof at the Miranda hearing -- failed

to submit proof of any criminal history besides prior cooperation as a witness and Detective Nelson's vague recollection that Weathersbee had been arrested at some time "in the past." (3T 22-5 to 6) That non-specific prior experience did not give the police license to disregard the Constitutions and unleash insult after insult against an isolated twenty-five-year-old. The State likewise failed to prove to what extent, if any, his childhood neighborhood was crime-ridden, but even if it had, "[j]ust because a location to which police officers are dispatched is a high-crime area does not mean that the residents in that area have lesser constitutional protection." State v. Goldsmith, 251 N.J. 384, 400 (2022). The State's justification here -- that it was fine for multiple seasoned detectives to harass an uncounseled young adult because they believed he was a criminal -- offends the basic constitutional guarantee of equal protection under the law.

Similarly, the State's contention that the detectives' aggressive tactics do not matter because Weathersbee "did not startle or cower; he did not weep or plead with the detective to calm down or let him go" is both not true and not the legal standard. (Pb 10) As the State later admits, Weathersbee did ask the detectives to let him go multiple times. (Pb 13-14) He repeatedly asked, "Can I go home to my kids?"; "can I go home to my kids?"; and "[can I] go home?" (1T 93-9, 93-11, 95-12 to 14; Da 109, 03:46:09 to 03:50:58; Da 125-26) And he told them he had "nothing" else to say five more times before they finally

relented. (1T 98-19 to 20; Da 109, 03:50:52 to 03:50:58, 06:40:02 to 6:40:20, 06:48:00 to 6:49:05; Da 127) The State's claim -- that Weathersbee said he had "nothing" else to say only once and that the detectives immediately ended the interrogation -- is thus factually incorrect. (Pb 10) The same is true of the State's claim that one of his statements about having "nothing" to say was not an invocation because it occurred "in the context of telling the detectives to contact his girlfriend to corroborate his story." (Pb 14) First, that claim is factually misleading because the "context" was Weathersbee first unambiguously telling the detectives that he had nothing more to say about their investigation and then immediately telling them to call his girlfriend so he could leave. His full statement was: "Yeah, I'm listening, but I don't, I don't got nothing else to say, man. Just get in contact with [McKnight] so I can get outta here. F**k." (1T 98-19 to 20 (emphasis added)) Nothing about that "context" minimized his clear intent to end the interrogation and go home. Second, legally, our courts have already held that a statement about having "nothing" else to say is a clear invocation. See State v. S.S., 229 N.J. 360, 383-84 (2017) ("[A] suspect who has 'nothing else to say,' . . . has asserted the right to remain silent.").

Thus, in total, Weathersbee unambiguously invoked his right to silence eight times -- three times by asking to "go home" and five times by saying he had "nothing" more to say -- before the detectives finally ceased questioning.

His statement about going home quoted by the State -- that he was "[r]eady to go the f**k home" -- was admittedly less direct than the others, but that was his fourth such statement and ninth verbal invocation. (Pb 10) Each of those required the police to cease questioning, or at the very least clarify his intentions, but they did neither. See S.S., 229 N.J. at 383-84; State v. Diaz-Bridges, 208 N.J. 544, 571-72 (2012) (calling a request to "go home" an "assertion about wanting to leave" and suggesting it would be an invocation if actually communicated). The detectives' blatant disregard for Weathersbee's legal rights impermissibly undermined the voluntariness of his statement. Sims, 250 N.J. at 217 (considering whether police "ignored a request to leave").

In addition, Weathersbee's repeated prolonged silences, visible attempts to rest between breaks, and verbal assertion that he was "tired as hell" further demonstrated that the detectives' seven-hour-long interrogation mentally and physically exhausted him. See State v. Johnson, 120 N.J. 263, 281-84 (1990) ("Silence itself has been interpreted as an invocation of the right to remain silent."); Q.N., 179 N.J. at 179 (considering "sign[s] of exhaustion or fatigue"). Therefore, this Court should reject the State's assertion that the police dutifully respected Weathersbee's attempts to end their aggressive interrogation.

The State also claims that the detectives "did not promise him that his cooperation would result in him being able to go home or imply that he had no

option but to continue the interview, nor did they promise him leniency." (Pb 11) But in fact they did all three. When Weathersbee asked to go home, one detective directly told him that he could do so only if he cooperated, stating, "Nah. You ain't give me a reason for you to go home. I haven't heard one thing. I heard a bunch of lies earlier. That's not enough for you to go home. Give me a reason." (1T 95-12 to 17) Another time that he asked to go home, they told him, "you don't wanna help yourself. So you may not be going home." (1T 93-11 to 15) Those statements, considered together with their disregard for his other invocations, clearly communicated that they were not going to relent until he cooperated. The detectives also implied that he had no option but to cooperate, telling him they had a "lot of questions that have to be answered" and that he "c[ould]n't run from this." (1T 77-4 to 7, 99-15 to 16 (emphasis added)) And they repeatedly promised false leniency, stating, "we don't only put people in jail . . . . [W]e try to save some people too"; "I'm not gonna treat you like I would treat other people"; "It's your opportunity, Mike. There's so much we can do"; and "I will change your life." (1T 94-1 to 4, 100-1 to 3, 100-12 to 13)

The State likewise claims that "[t]he detectives also did not impermissibly contradict the Miranda warnings." (Pb 11) But in fact they did so repeatedly. Our courts have held that the police cannot falsely imply that "the truth would be helpful"; that making a statement "could only help" or "would actually

benefit" the suspect; or that such statements will "remain confidential." O.D.A.-C., 250 N.J. at 422-23; L.H., 239 N.J. at 44, 47-48. But the detectives here did each of those. Over and over, they urged him to help himself, stating, "They trying to help you. So help yourself"; "They trying to help you but you ain't willing to help yourself"; "I wanna help you. Like, that's 100 percent man to man, no cop sh*t. . . . I wanna help you. We all wanna help you"; "this is probably a situation where it's better for you to get out in front of it"; "If we don't get out in front of this now, Mike, it's gonna hurt you worse later on"; and "You gotta tell your story before it's just too late." (1T 93-6 to 94-3, 99-16 to 17, 100-5 to 6, 101-1 to 4) And the "man to man" comment further implied that his statements would be confidential, in direct contravention of Miranda.

Finally, the State minimizes the detectives' direct threats to Weathersbee's life and his relationship with his children, relying solely on State v. Faucette, 439 N.J. Super. 241, 260-61 (App. Div. 2015). But as explained in his opening brief, Faucette is an outlier among New Jersey's modern Miranda case law, which has increasingly recognized the power of psychological police coercion; the grave risk of false confessions; and, specifically, the coercive nature of threats about a suspect's children. See L.H., 239 N.J. at 48-49; State v. Carrion, 249 N.J. 253, 281-82 (2021); Diaz, 470 N.J. Super. at 516 ("[E]vidence that the accused was threatened . . . will render the waiver

involuntary."); Gonzalez, 249 N.J. at 640-42 (Albin, J., concurring). In addition, Faucette failed to distinguish the controlling case, Arizona v. Fulminante, 499 U.S. 279 (1991), in which the United States Supreme Court suppressed a statement where an agent of the police promised the defendant protection from "rough treatment" by other inmates because, even though the threatened harm was from a third party, it was "a credible threat of physical violence" made by a government agent to coerce a suspect into confessing. Id. at 286-88; accord State v. Hickman, 335 N.J. Super. 623, 632 (App. Div. 2000) ("[A] confession extracted by a credible threat of physical violence is considered involuntary and thus violative of due process." (citing Fulminante, 499 U.S. at 286-87)).

The threats in this case were even worse. First, the threats to Weathersbee's relationship with his children, like those in L.H. and Carrion, were specifically calculated to pressure him into doing what the police wanted -- and what was not in his best interest -- because, they said, it was best for his children. The detectives directly told him to "[s]top thinking about yourself. You got five kids and you sitting here being selfish?" and then threatened that another man could raise his children unless he cooperated: "You don't want some other cat raising your kids . . . . Four months, they real impressionable. Let some dude start giving that baby toys when they get six or seven months. That's gonna be daddy to them . . . . You're a fool if you let that happen." (1T 94-1 to 95-9) That

threat served no other purpose than to psychologically manipulate Weathersbee into cooperating at his own expense. See L.H., 239 N.J. at 48-49 (holding "psychologically coercive" comments that "a jail term would be incompatible with the needs of [defendant's] daughter, who required a father in her life").

Second, the detectives directly threatened his life. They told him that Laquan Clark's friends were "eventually . . . gonna find out it's you"; that therefore his "safest place is right now with [the detectives]"; that he should think of his "five children, five beautiful kids"; then threatened, "You wanna die? You want go on the streets and die?"; and again reiterated, "Hate for you to walk out of here and have something happen to you." (1T 84-5 to 19, 92-16 to 19 (emphasis added)) Just like in Fulminante, that credible threat of death unless he cooperated -- made by seasoned detectives -- was highly coercive.

In sum, the interrogation in this case violated nearly every rule on the books. The overbearing tactics employed here are the precise type that have been shown to produce false confessions that send innocent people to prison.[4] The detectives' flagrant disregard for Weathersbee's constitutional rights requires suppression of his entire statement. For the reasons stated in his opening brief, its admission was not harmless, and his convictions must be reversed.

[4] DNA Exonerations in the U.S. (1989-2020), Innocence Project (2020), innocenceproject.org/dna-exonerations-in-the-united-states.

POINT II

DEFENDANT WAS DENIED A FAIR TRIAL BY THE TRAIL COURT'S FAILURE TO REDACT NUMEROUS IMPROPER REFERENCES FROM HIS POLICE INTERROGATION AND BY THE COURT'S PRECLUSION OF PROPER CROSS EXAMINATION. (Response to State's Point II)

Weathersbee relies on his opening brief and adds only the following regarding Point II.A. The State argues that it was not error for the trial court to permit the jury to hear the portions of the police interrogation in which the detectives repeatedly referenced a positive out-of-court identification because, the State says, those references were not admitted for the truth of the matter asserted and were not hearsay. (Pb 18-19) First, they were used for their truth because the detectives repeatedly asserted that Weathersbee was in fact guilty because an eyewitness identified him; the State -- the proponent of the evidence -- failed to offer any alternative purpose. Second, even if they were not intended for their truth, given the significant risk that the jury would use them for that improper purpose, the court's failure to give a limiting instruction was plain error. State v. Reddish, 181 N.J. 553, 610 (2004). Third, the State's focus on the detectives' comments misses the point. The primary harm was not solely the court's admission of Eva Reid's out-of-court identification but its denial of proper cross examination to impeach the reliability of her identification once it came in. The unfairness in this case was that the State was permitted to admit a

damning out-of-court identification but then objected to the defense's attempt to provide context for that identification. For the reasons stated in Weathersbee's opening brief, the admission of that half-truth was extremely misleading and violated his right to confrontation and the rule of completeness. See N.J.R.E. 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time."). For the same reason, although defense counsel mentioned the identification in his opening, invited error does not apply because he in no way urged the court to exclude the proper cross examination that he attempted.

CONCLUSION

For the reasons stated above and in Points I, II, and IV of Weathersbee's opening brief, his convictions must be reversed. For the reasons stated in Point III of his opening brief, count four must be reversed. Alternatively, for the reasons stated in Point V of his opening brief, a resentencing is required.

Respectfully submitted,

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