SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1038-22T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Monmouth County.
KADER S. MUSTAFA,	:	
Defendant-Appellant.	:	Indictment No. 18-07-0959-I
	:	Sat Below:
	:	Hon. Vincent N. Falcetano, J.S.C., and a Jury

REDACTED BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

JENNIFER N. SELLITTI
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
(973)877-1200

KEVIN S. FINCKENAUER
Assistant Deputy
Public Defender
Attorney ID: 301802020

Of Counsel and
On the Brief
Kevin.Finckenauer@opd.nj.gov

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS (CONT'D.)

PAGE NOS.

TABLE OF CONTENTS (CONT'D.)

PAGE NOS.

INDEX TO APPENDIX

PAGE NOS.

JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

PAGE NOS.

CASES

TABLE OF AUTHORITIES (CONT'D.)

PAGE NOS.

CASES (CONT'D.)

TABLE OF AUTHORITIES (CONT'D.)

PAGE NOS.

CASES (CONT'D.)

STATUTES

TABLE OF AUTHORITIES (CONT'D.)

PAGE NOS.

STATUTES (CONT'D.)

RULES

TABLE OF AUTHORITIES (CONT'D.)

PAGE NOS.

RULES OF EVIDENCE

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PROCEDURAL HISTORY

On July 30, 2018, Monmouth County Indictment No. 18-07-0959 was filed, charging defendant-appellant, Kader S. Mustafa, with: first-degree murder under N.J.S.A. 2C:11-3(a)(1) and/or (2) (Count One); second-degree possession of a handgun for an unlawful purpose under N.J.S.A. 2C:39-4(a) (Count Two); two counts of second-degree unlawful possession of a handgun without a permit under N.J.S.A. 2C:39-5(b) (Counts Three and Four); and two counts of third-degree endangering another person under N.J.S.A. 2C:24-7.1 (Counts Five and Six). (Da1-4).[1]

Mr. Mustafa was tried before the Honorable Vincent N. Falcetano, J.S.C., and a jury over several dates in September and October 2021. (3T; 4T; 5T; 6T; 7T; 8T; 9T; 10T). On October 12, 2021, the jury convicted Mr. Mustafa of every count in the indictment. (10T9-13 to 12-23).

---

[1] Da = defendant-appellant's appendix

1T = motion transcript dated February 9, 2021
2T = motion transcript dated August 20, 2021
3T = trial transcript dated September 27, 2021
4T = trial transcript dated September 28, 2021
5T = trial transcript dated September 29, 2021
6T = trial transcript dated September 30, 2021
7T = trial transcript dated October 4, 2021
8T = trial transcript dated October 5, 2021
9T = trial transcript dated October 7, 2021
10T = trial transcript dated October 12, 2021
11T = sentencing transcript dated May 5, 2022

On May 5, 2022, Judge Falcetano heard and denied Mr. Mustafa's motion for a new trial. (11T3-23 to 31-25). Judge Falcetano then sentenced Mr. Mustafa to life in prison, subject to the No Early Release Act (NERA), for the murder conviction, ten years in prison on Counts Two and Three to run concurrently to the murder conviction, four years in prison on Counts Five and Six to also run concurrently, and ten years in prison on Count Four to run consecutively to the other sentences, for an aggregate sentence of life plus ten years. (11T61-25 to 65-13). Judge Falcetano also imposed restitution in the amount of $24,886.57. (Da12).

Mr. Mustafa filed his notice of appeal as within time on December 5, 2022. (Da15-18).

STATEMENT OF FACTS

In May of 2018, Kader Mustafa was homeless and had been living out of his car—a white Chevrolet Impala—for about a year. (7T64-6 to 65-10). He had been suffering from worsening mental health issues for which he had recently been hospitalized, and he had been unable to hold a steady job for five years. (4T85-19 to 23; 7T63-8 to 64-5, 94-8 to 95-5). Specifically, Mr. Mustafa was suffering from paranoid delusions that he was constantly being followed and that people were "out to get him," what he referred to as "gang stalking." (7T94-8 to 95-5). Under these delusions, Mr. Mustafa believed that people were trying

to beam him with lasers, electromagnetic frequencies, radiation, and concentrated microwaves to such an extent that he at one point went to the hospital because he believed the beams were destroying his kidneys. (7T187-2 to 190-5). To try and avoid the "beams," he placed aluminum foil over his car antenna and would wear a tin foil hat covered by a helmet throughout the day. (7T191-23 to 192-19). These delusions were made worse by Mr. Mustafa's Adderall use, which enhanced his paranoia and erratic behavior. (7T220-25 to 221-10). Also living out of his car with him at the time was his long-term girlfriend, Nicole Fiore. (7T62-8 to 10, 64-15 to 17). Ms. Fiore was an opioid addict who also suffered from mental health problems and had similarly been recently hospitalized for mental health treatment. (7T75-25 to 78-12).

On the night of May 3, 2018, Mr. Mustafa and Ms. Fiore were driving on Route 33. (7T125-11 to 16). According to Ms. Fiore, Mr. Mustafa was ranting "[a]bout people that were trying to hit him with radiation, and trying to 'fuck with him,' mess with him, following him, recording him." (7T125-17 to 24). At some point, the couple came across another car on the road that was driving with its high beams on. (7T126-12 to 127-1). Mr. Mustafa started screaming at Ms. Fiore that this is "what I was talking about . . . this is what I mean, this is what's going on." (7T126-24 to 127-1). The car noticed by Mr. Mustafa was being driven by Sciasia Calhoun. (3T77-24 to 79-24). Also in the car were Ms.

Calhoun's boyfriend, Herve Michel, in the front passenger seat, and their baby daughter in the back. (3T77-24 to 80-19). Ms. Calhoun had borrowed the car from her mother, but the headlamps did not work, so they were using the high beams to compensate since it was late at night. (3T77-24 to 79-24).

After Mr. Mustafa saw the car with the high beams, he pulled over to let the car pass, then began tailgating Ms. Calhoun's car closely, flashing his car's high beams at them and occasionally hitting the car with his bumper. (7T127-2 to 17). Ms. Fiore stated that during this time, Mr. Mustafa "wasn't saying anything, but he was just, he was visibly, like, freaking out, like just angry, breathing really heavy, just really, really high anxiety, flipping out, pretty much." (7T127-6 to 17). Then, Mr. Mustafa started screaming that "he couldn't take it anymore. This is why his life is so messed up. This is why he couldn't get a job. This is why everything was so messed up in his life . . . and he had to fight back." (7T128-11 to 16). According to Ms. Fiore, Mr. Mustafa pulled up along the left side of Ms. Calhoun's car, pulled out a gun, used his elbow to roll down the windows, placed the car in neutral, leaned across the car through the outside of the passenger window while continuing to drive down the highway, and fired a shot at Ms. Calhoun's car. (7T128-17 to 129-15). Ms. Calhoun's car veered off the road, and Mr. Mustafa and Ms. Fiore continued to drive down the highway. (7T129-21 to 25).

Ms. Calhoun had been struck in the head by a bullet but had managed to pull the car over to the side of the road. (3T87-7 to 88-22). Mr. Michel and his daughter were unharmed. (3T87-7 to 88-22). About five minutes after the incident, Mr. Michel called 911 and told police what had happened. (3T90-6 to 21). When asked to give a description of the car, Mr. Michel initially said it was a white Malibu, but later stated that it was an Impala. (3T97-15 to 98-22).

As Mr. Mustafa and Ms. Fiore continued to drive, they passed a police officer, Officer Chris Makwinski, near a gas station in Manalapan. (3T119-17 to 122-22). The officer did a license plate scan of their car but decided not to immediately pull them over, and Mr. Mustafa drove off. (3T119-17 to 122-22). However, once the dispatch about the shooting went out with the description of the car, Officer Makwinski provided the other departments with Mr. Mustafa's information obtained by the license plate scan. (3T124-25 to 125-4, 135-21 to 25).

Police made contact shortly thereafter with Mr. Mustafa's brother, who eventually told police he had heard Mr. Mustafa was parked outside of their cousin's house, sleeping. (4T65-3 to 66-11, 69-11 to 71-1, 72-15 to 73-20). Officers responded to the home and found Mr. Mustafa parked partially behind a horse trailer on the large property. (4T73-21 to 74-11). Officers found Mr. Mustafa and Ms. Fiore in the Impala and placed them under arrest. (4T99-5 to

101-15). Mr. Mustafa was wrapped in a foil blanket and wearing his tin foil hat. (4T102-1 to 8). A search of the car found: two handguns (a revolver and a semi-automatic pistol) in the trunk, various bullets and shell casings, knives, a speed loader (i.e., an item used to quickly load a handgun), brass knuckles, a mask, marijuana, Adderall, a completely disassembled cell phone, and a firearm purchaser's identification card in someone else's name. (4T147-10 to 25; 5T102-15 to 103-25; 6T55-16 to 58-8).

An autopsy of Ms. Calhoun and an analysis of the car concluded that she died from a gunshot wound to the head fired from outside of the car. (5T79-3 to 6; 7T50-7 to 51-3). An analysis of the bullet fragment recovered from Ms. Calhoun deemed it "unsuitable for comparison to any firearm," meaning it could not be determined that the lethal bullet came from one of the guns recovered from Mr. Mustafa's car. (6T169-2 to 170-1).

While in jail following his arrest, Mr. Mustafa spoke with Ms. Fiore over the phone and stated that he did not mean to kill anyone in the car but was only trying to scare them:

> It was, it was an accident, though. It was, it was an accident, okay? I didn't mean to, but I did it out my window, like, to scare them. I didn't know it was going to hit. You think I wanted to actually hit something? Like, I did it out my window just to make a noise, you know what I mean?
>
> [(7T166-9 to 17).]

The State played the jail call—which also included lengthy statements by Ms. Fiore accusing Mr. Mustafa of having affairs—for the jury at the trial. (7T152-8 to 168-25).

As his defense, Mr. Mustafa's counsel argued, alternatively: (1) that the gunshot could not have come from Mr. Mustafa's car, (2) that if it did, it was likely Ms. Fiore who fired the gun, and (3) that even if it was Mr. Mustafa, his mental health issues precluded him from possessing the requisite mental state for purposeful murder. (3T54-4 to 55-15).

LEGAL ARGUMENT

POINT I

MR. MUSTAFA'S CONVICTION FOR PURPOSEFUL MURDER MUST BE REVERSED BECAUSE THE JURY ALSO RENDERED UNANIMOUS VERDICTS ON EACH OF THE LESSER-INCLUDED OFFENSES OF MURDER. (Not Raised Below)[2]

Given the statements by Mr. Mustafa that he never intended to actually hit the car but only to scare the occupants, the improbable circumstances of the shooting, and the testimony surrounding Mr. Mustafa's mental health issues, the

[2] For a discussion on the authenticity of the verdict sheet relied on for this argument point, and counsel's attempts to authenticate the verdict sheet, please see counsel's certification attached in this appendix as (Da31-35).

jury was required to be instructed on the various manslaughter lesser-included offenses of murder. Accordingly, the judge properly instructed the jury on aggravated and reckless manslaughter as lesser-included offenses of murder but told it several times that if it found beyond a reasonable doubt that Mr. Mustafa committed purposeful murder, it could not render any verdicts on the manslaughter offenses. Likewise, the verdict sheet properly instructed the jury to skip to Count Two and not consider the manslaughter offenses if it found beyond a reasonable doubt that Mr. Mustafa committed purposeful murder. (Da5-7). Nonetheless, the jury's completion of the verdict sheet indicated that not only did it find him guilty of purposeful murder, it also unanimously (and contradictorily) found he committed each lesser-included manslaughter offense.

If the jury unanimously believed Mr. Mustafa committed either reckless or aggravated manslaughter, he cannot have been convicted of purposeful murder. The verdict returned by the jury was irreconcilable and establishes that, at minimum, the jury did not understand the law surrounding the lesser-included offenses. Because this issue was never addressed with the jury at the time, the only remedy now available is to vacate Mr. Mustafa's murder conviction and have a new trial where a jury can properly assess whether he committed either reckless or aggravated manslaughter rather than purposeful murder. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

Pursuant to N.J.S.A. 2C:1-8(e), juries may be instructed on what are called "lesser-included offenses" of those listed in the indictment when there exists a "rational basis" for such an offense. The principle underlying the lesser-offenses statute is that "no defendant should be convicted of a greater crime or acquitted merely because the jury was precluded from considering a lesser offense." State v. Canfield, 470 N.J. Super. 234, 270 (App. Div.) (citations and internal quotations omitted), aff'd as modified, 252 N.J. 497 (2022). With respect to murder offenses in particular, our Supreme Court has "consistently held that all forms of homicide rationally supported by the evidence, whether they be lesser-included or alternative offenses, should be placed before the jury." State v. Purnell, 126 N.J. 518, 530 (1992).

Two such lesser-included offenses of purposeful murder are aggravated manslaughter and reckless manslaughter. State v. O'Neil, 219 N.J. 598, 603 (2014). Although related offenses, each offense has a distinct mens rea element. To convict a defendant of purposeful murder, the State must prove that he "purposely" or "knowingly" "cause[d] death or serious bodily injury resulting in death[.]" N.J.S.A. 2C:11-3(a), (b). To establish aggravated manslaughter, the State must show that the defendant "recklessly cause[d] death under circumstances manifesting extreme indifference to human life[.]" N.J.S.A.

2C:11-4(a)(1). And finally, reckless manslaughter requires the State to prove that the defendant "recklessly" caused the death of another. N.J.S.A. 2C:11-4(b)(1).

Because of their distinct mental-state elements, it is not possible for a person who has killed another to have committed all three; if a person committed purposeful murder, he cannot be said to have committed a form of reckless manslaughter because the various mental states are incompatible. See State v. Fowler, 239 N.J. 171, 187 (2019) (observing that purposeful murder conviction is "incompatible" with accidental killing); see also State v. Duncan, 796 N.E.2d 1006, 1010 (Ohio Ct. App. 2003) ("A person cannot be convicted of both murder and voluntary manslaughter for the same killing.").

Relatedly, it is well established that, "[a]s an essential component of an accused's right to a jury trial, the right to a unanimous verdict is firmly rooted in our rules of procedure and our decisional law." State v. Milton, 178 N.J. 421, 431 (2004). A unanimous verdict "must stand as an abiding assurance of carefully considered deliberations and a faithfully rendered verdict." Id. at 432. In safeguarding this right and establishing the soundness of the jury's verdict, the need for "clear verdict sheets" is as important as clear jury instructions. State v. Nelson, 173 N.J. 417, 449 (2002). When the oral instructions are over, the jury is left in a room with the verdict sheet that is "the primary road map [it] will use to direct [its] deliberative path." Ibid. Accordingly, "[t]he completed

verdict sheet" is understood to "evidence[] the jury's understanding" of the law governing the case and its reasoned decision in accordance with that law. State v. DiFrisco, 137 N.J. 434, 492 (1994).

Review and control of a completed verdict sheet is primarily the domain of the trial court judge. See R. 3:19-1(b) (stating that, once the trial is complete, "[t]he verdict sheet shall be marked as a court exhibit and retained by the court pursuant to Rule 1:2-3."). When the jury discloses its verdict to the trial court, "[p]recautions must be taken to eliminate any doubt as to the precise nature of the verdict." State v. Butler, 27 N.J. 560, 607 (1958).

Again, there was a more than adequate basis here for charging the manslaughter offenses as lesser-included offenses of murder. Although Mr. Mustafa did not testify, the State introduced a jail call in which Mr. Mustafa stated that "it was an accident," he was only "trying to scare them," and he "didn't know it was going to hit." (7T166-9 to 17). Moreover, the improbable nature of the incident as described by Ms. Fiore—that Mr. Mustafa grabbed a gun with one hand while driving on the highway, rolled down the front passenger window with his elbow, placed the car in neutral, got out of his seat and leaned out of the passenger window on the opposite side of the car, and fired from his car going approximately fifty miles per hour into another moving car also going around fifty files per hour—further suggests that there was no actual intent to

shoot and kill anyone in the car because no reasonable person would believe he would actually hit someone.[3] Lastly, there was substantial testimony about Mr. Mustafa's mental health struggles and paranoid delusions, further suggesting he might not have acted with intent to kill but as a more reckless response to the delusions. Accordingly, there was legitimate basis for charging the various manslaughter offenses, and a real chance that a reasonable jury may have convicted Mr. Mustafa on one of those offenses over purposeful murder.

In its final jury instructions, the trial court carefully explained the differences between murder and the manslaughter offenses and explained several times that if the jurors did not find Mr. Mustafa guilty of murder beyond a reasonable doubt, only then would they consider rendering a verdict on the lesser offenses. (9T137-18 to 146-12, 150-11 to 152-4). The verdict sheet itself clearly instructed the jury only to move on to consideration of the lesser-included offenses if it did not find Mr. Mustafa guilty of murder, and the trial court went over the verdict sheet in detail with the jury. (Da5-7; 9T170-18 to 172-11).

Despite these clear instructions, the jury returned unanimous verdicts on its verdict sheet for murder and both lesser-included manslaughter offenses. (Da5-7). In questioning the jury about its verdict, the trial court only asked if it

[3] Defense counsel made this point during summation. (9T39-12 to 41-11).

found Mr. Mustafa guilty of murder, but never questioned it about the lesser-included offenses. (10T9-20 to 11-19). The trial court then collected the verdict sheet and polled the jurors to confirm that the sheet accurately reflected their verdicts, to which they unanimously replied yes. (10T11-20 to 12-23).[4] Once the jury exited the trial court stated, "All right, I have reviewed the verdict sheet. It is accurate as announced by the Foreperson. The verdict sheet has been marked C-2, as a court exhibit. I'll also indicate that the juror handed the court officer a note which reads, we have a unanimous verdict. Nothing else." (10T16-2 to 7). Despite saying it reviewed the verdict sheet, the trial court made no mention of the fact that the jury had also rendered verdicts on the lesser-included offenses. Neither party noted the issue with the verdict.

It bears noting that the inability of this particular jury to follow instructions is not surprising. At several points, the jury had to be admonished for using cell phones during the trial and wandering the hallways when they were supposed to be in the jury room. (4T106-14 to 107-17; 6T22-8 to 22-25, 106-12 to 107-6). Several jurors also complained about how much they would be paid for participating in the trial. (5T210-15 to 215-7; 7T223-1 to 226-2). At the close of trial, when the judge was considering asking if any jurors were unavailable to deliberate the Friday before the holiday weekend, the judge

[4] Except for one juror who erroneously replied "here." (10T11-20 to 12-23).

expressed his fear that this jury would take the opportunity "to come up with a reason why they can't sit on Friday," saying he "just [has] a gut feeling about this jury." (8T71-6 to 72-12).

After the trial court finished its final instructions on the Thursday before the holiday weekend, the judge gave the jury the option to come in the next day to start deliberations or to put it off until the following Tuesday. (9T177-3 to 18). The jury of course took the latter offer and started its deliberations five days after receiving the lengthy instructions. (9T18-3 to 6). The jurors then deliberated for only about an hour and a half before finding Mr. Mustafa guilty in a trial that lasted seven full days. (10T7-23 to 8-10). While the apparent lack of rigor with which this jury approached its function might not necessarily rise to the level of a reversible issue in and of itself, it does warrant a greater scrutiny of the verdict sheet issue because it casts further doubt on whether the jury effectively understood the nature and purpose of the lesser-included offenses.

Ordinarily, inconsistent verdicts are accepted provided it is not clear why the jury came out the way it did and there were not errors in the court's instructions. State v. Grey, 147 N.J. 4, 11 (1996). But that principle only applies where the defendant received one or more acquittals, and thus, has potentially already received the windfall of a lenient jury. Id. at 9-10. That principle has never been applied where a jury rendered an excessive number of legally

inconsistent convictions. Again, it was impossible for Mr. Mustafa to have committed both purposeful murder and a form of reckless manslaughter in the same killing—it must have been one or the other. The jury selected both, which was improper, demonstrating at best a complete inability to understand the concept of lesser-included offenses. The opportunity to clarify or rectify that issue with the jury has now passed. It cannot be, especially for an offense that has resulted in a lifelong prison sentence, that we simply assume the jury meant to convict only on the greater offense. Mr. Mustafa had valid grounds for his jury to consider manslaughter as an alternative, and constitutional protections demand that he be afforded a jury trial in which the jury appropriately considers and responds to those offenses.

It is true that trial counsel did not object to this issue. But the trial court should have noticed the incompatible verdict returned by the jury and made an inquiry into this issue. Indeed, review and control of the verdict sheet is something that is distinctly the trial court's domain, not defense counsel's. See R. 3:19-1. So too is ensuring that the jury's verdict is accurately reflected by the verdict sheet a province of the trial court. Butler, 27 N.J. at 608. The trial court here even explicitly stated that it had reviewed the verdict sheet right after polling the jury, and so should have been well-alerted to this issue. Accordingly,

there is nothing about trial counsel's failure to note the issue that amounts to waiver or invited error.

In short, there was a more than adequate basis for a reasonable jury to conclude that Mr. Mustafa did not commit purposeful murder but a lesser form of manslaughter. Because the jury indicated it unanimously believed he committed those lesser forms, his murder conviction cannot stand because it is irreconcilable with such a verdict. Accordingly, Mr. Mustafa's conviction for murder must be reversed and the matter remanded for a new trial in which the jury appropriately considers the lesser-included offenses.

POINT II

THE JUDGE REVERSIBLY ERRED IN REFUSING TO INSTRUCT THE JURY ON DIMINISHED CAPACITY WHERE SUFFICIENT EVIDENCE IN THE RECORD EXISTED TO DEMONSTRATE THAT MR. MUSTAFA SUFFERED FROM SIGNIFICANT MENTAL HEALTH PROBLEMS. (9T18-22 to 22-1)

It is uncontested that, if Mr. Mustafa committed the underlying offenses, his severe mental health issues played a significant role. It is no doubt partly for this reason that the trial court had Mr. Mustafa explicitly place on the record his waiver of the insanity defense before the trial. (3T10-3 to 13-6). Despite that waiver, however, it was always understood by all parties and the court that Mr. Mustafa would be making an issue of his psychological problems at the trial

with an eye towards a diminished capacity defense. Although electing not to call a doctor or admit psychological records at the trial, defense counsel did elicit substantial lay testimony with regards to Mr. Mustafa's delusions, erratic behavior, and hospitalizations. Nonetheless, at the close of trial, the trial court erroneously refused to provide a diminished capacity charge to the jury. Because the trial court erred in foreclosing one of Mr. Mustafa's most important defenses, his convictions must be reversed, and the matter remanded for a new trial where the jury is appropriately instructed on diminished capacity. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

Diminished capacity evidence, admissible under N.J.S.A. 2C:4-2, allows for evidence of a defendant's mental health disorder to be admitted at trial when it supports negating an essential mental element of a particular offense. State v. Delibero, 149 N.J. 90, 98 (1997). Specifically, N.J.S.A. 2C:4-2 states:

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense.

Such evidence is considered by the jury in relation to the State's general burden to prove every element beyond a reasonable doubt. Delibero, 149 N.J. at 98.

This stands in contrast to an affirmative not-guilty-by-reason-of-insanity ("NGRI") defense, which the defendant bears the burden of proving. Id. at 99.

Our Supreme Court has noted with respect to diminished capacity arguments that "the allocation of responsibility between judge and jury requires that competent reliable evidence be submitted to the jury and that a diminished capacity charge be given to the jury when competent reliable evidence has been offered." State v. Breakiron, 108 N.J. 591, 617 (1987) (emphasis added). "[O]nly when the evidence is viewed in the light most favorable to the defendant, and still no suggestion appears that the defendant's faculties had been so affected as to render the defendant incapable of purposeful and knowing conduct, may the trial court deny the diminished-capacity defense." State v. Galloway, 133 N.J. 631, 648-49 (1993) (citing Breakiron, 108 N.J. at 617).

Most recently, in State v. Baum, 224 N.J. 147 (2016), our Supreme Court held that a defendant can receive a charge on diminished capacity if: "(1) he or she 'has presented evidence of a mental disease or defect that interferes with cognitive ability sufficient to prevent or interfere with the formation of the requisite intent or mens rea[,]' and (2) 'the record contains evidence that the claimed deficiency did affect the defendant's cognitive capacity to form the mental state necessary for the commission of the crime.'" Id. at 160 (quoting Galloway, 133 N.J. at 647). "When such evidence is presented, the trial court is

required to give a diminished capacity charge to the jury." Id. at 161 (emphasis added).

Here, ample evidence supporting Mr. Mustafa's diminished capacity defense was presented at trial. As all parties understood would be the case, Mr. Mustafa's mental health problems were a recurring theme in the trial. The prosecutor discussed Mr. Mustafa's mental health issues at length during his opening, (3T33-23 to 34-14, 41-2 to 8), and concluded by saying: "You may also end up considering some mental health defense of a diminished capacity because I've talked to you about some of the issues that were going on with the defendant during the weeks before this horrible event[,]" (3T49-9 to 13). Likewise, in defense counsel's opening he noted that one of Mr. Mustafa's primary arguments would be that his mental health issues made the offense not purposeful murder, but some lesser offense. (3T54-12 to 55-15).

At trial, defense counsel had made the decision not to include any expert testimony or medical records regarding Mr. Mustafa's mental health issues. However, both the prosecutor and defense counsel elicited substantial lay testimony covering similar ground. Detective Kevin Condon testified that Mr. Mustafa's brother told him that Mr. Mustafa suffered from mental health problems and had recently been hospitalized for psychological treatment. (4T85-19 to 23, 87-5 to 9). There was repeated mention of the fact that Mr. Mustafa

was found wrapped in foil with a tin foil hat, and that he would wear these articles often. (4T102-1 to 8, 117-2 to 11, 130-19 to 132-3, 154-14 to 17; 7T191-23 to 192-19). Ms. Fiore testified at great length about the specific details of Mr. Mustafa's paranoid-delusional behavior and noted that his behavior was similar to that of a schizophrenic uncle of hers. (7T186-20 to 187-25, 190-6 to 196-1).

When it came time to finalize the jury charges, however, the trial court stated that the issue of whether to include a diminished capacity instruction was unresolved. (9T4-17 to 21). Defense counsel went over all the relevant evidence presented, and stated that, while there was no "DSM[5] psychiatric diagnosis of a permanent mental illness, it's obvious he was laboring under a mental disorder at the time." (9T11-18 to 20). The State countered that, while defendant's bizarre behavior was "part of the case. . . . does it rise to a mental disease or defect? Is it mental illness and I would submit to you there's no evidence in the case to support that." (9T16-7 to 11). The trial court ultimately refused to include a diminished capacity charge in the final instructions, holding (1) expert testimony and medical records were required for such a charge to be included, (2) it might confuse the jurors into thinking Mr. Mustafa was asserting an insanity defense, and (3) the murder charge adequately instructed the jury about the requisite mens rea. (9T18-22 to 22-1).

[5] DSM refers to the Diagnostic and Statistical Manual of Mental Disorders.

Taking the trial court's three points in turn, none of them are adequately grounded in the applicable law. As to the expert testimony point, there is no requirement in either the statute or caselaw that expert testimony is a prerequisite for a diminished capacity charge. First, the model charge on diminished capacity makes clear that no explicit diagnosis is needed because it gives the option to use either the phrase evidence of a general "mental disease or defect" or to reference a specific diagnosis, obviously contemplating that a specific diagnosis is not necessary. Model Jury Charges (Criminal), "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" (rev. June 5, 2006) (hereinafter "'Diminished Capacity' Charge"). Moreover, no case has ever held that expert testimony is required for a diminished capacity charge. Rather, the cases state that the presentation of diminished capacity evidence should not be "unduly restricted," and that in evaluating whether a diminished capacity charge is appropriate it must be viewed in a light most favorable to the defendant. Galloway, 133 N.J. at 647-48. Here, the trial court essentially did the opposite, creating per se hurdles for the defense that did not exist, and viewing the cumulative evidence in a light that was most favorable to the opposing viewpoint. Any ordinary person would understand that an individual who behaved in the manner Mr. Mustafa did suffered from some kind of mental health problem. Indeed, the State and trial court never even argued that Mr.

Mustafa did not suffer from mental health problems, but only that expert testimony was necessary for the charge, which was legally erroneous.

Notably, there was no expert testimony as to the intoxicating effects of Adderall, but that did not preclude the trial court from giving a requested voluntary intoxication defense charge or prevent the State from arguing that Adderall intoxication caused Mr. Mustafa to commit the shooting.[6] Our caselaw has called the diminished capacity charge conceptually similar to the voluntary intoxication charge. State v. R.T., 411 N.J. Super. 35, 61-62 (App. Div. 2009) (discussing similarities between voluntary intoxication and diminished capacity). Counterintuitively, the trial court even stated, "the facts underlying the intoxication charge are far less compelling than the defendant's bizarre behavior with respect to any diminished capacity charge." (9T16-12 to 19). If the record was sufficient to charge a voluntary intoxication defense, clearly it should likewise have been sufficient for the much more "compelling" diminished capacity defense.

As to the fact that no insanity defense was asserted, there was no basis in the law to support the trial court's holding that the lack of an insanity defense weighed against instructing the jury on diminished capacity. Diminished

[6] For an in-depth discussion on the State's improper arguments about Mr. Mustafa's Adderall use, see Point III(B) of this brief.

capacity and insanity defenses are distinct concepts, see Delibero, 149 N.J. at 98-99, and there is no requirement that a defendant cannot receive a diminished capacity charge if he is not asserting an insanity defense. It is possible that a jury might find the idea of distinguishing between the two difficult, but that is what careful jury instructions are for. The risk of confusion was not a reasoned basis for depriving Mr. Mustafa of his defense or denying the jury an opportunity to deliberate on what had been framed as one of the most important issues in the case.

Finally, it was also erroneous for the trial court to hold that the general murder instructions adequately dealt with this issue. Without a specific instruction on diminished capacity, the admission of all the mental-health-related evidence was grossly prejudicial and worked only to significantly benefit the State. It allowed the perverse result of letting the State argue at length that Mr. Mustafa was the one who committed the act because he was suffering from paranoid delusions yet not allowing the jury to consider those delusional episodes as potentially mitigating Mr. Mustafa's state of mind at the time of the incident. Had the jury been provided the appropriate diminished capacity charge, it would have been firmly told that, in considering whether the State had reached its burden, it "must give the defendant the benefit of any reasonable doubt about whether his[] mental functioning was such as to render him[] incapable of acting

with the required state of mind . . . .” “Diminished Capacity” Charge. The murder/manslaughter instructions of course contained no such language.

If the trial court truly believed such evidence did not support diminished capacity, then it never should have been admitted. Once it was admitted, it was incumbent on the trial court to provide a diminished capacity instruction. At that point, it should have been left to the jury to decide whether or not the evidence warranted convicting Mr. Mustafa of a lesser offense or no offense at all.

Mr. Mustafa’s mental health issues played a key role in his case and served as the basis for defense counsel’s argument that, at most, he was guilty of a lesser-included manslaughter offense because his diminished capacity negated the purposeful mens rea necessary to substantiate a murder conviction. The trial court’s refusal to allow an instruction on diminished capacity therefore functionally foreclosed one of Mr. Mustafa’s key defenses. When a defendant’s mental health issues are “the heart of the case,” it is reversible error for a trial court to refuse a diminished capacity instruction. State v. Nataluk, 316 N.J. Super. 336, 347 (App. Div. 1998). Because the refusal to charge on diminished capacity foreclosed a key defense that was a substantial part of the trial, Mr. Mustafa’s convictions must be reversed and the matter remanded for a new trial.

POINT III

MR. MUSTAFA'S CONVICTIONS MUST BE REVERSED BECAUSE THE STATE PRESENTED A SUBSTANTIAL AMOUNT OF IRRELEVANT AND PREJUDICIAL EVIDENCE DESIGNED TO DENIGRATE MR. MUSTAFA AND ADVANCED NUMEROUS IMPROPER ARGUMENTS SIMILARLY DESIGNED TO PORTRAY HIM AS A DISTURBED LONER. (6T78-24 TO 81-5; 7T73-12 TO 74-25, 172-4 TO 180-11)

Mr. Mustafa undoubtedly had an extremely troubled personal life, plagued by significant mental health issues, substance abuse issues, extended periods of unemployment, homelessness, hospitalizations, and more. At trial, the State improperly capitalized on these facts to grandiosely depict Mr. Mustafa as a disturbed, psychopathic personality. This was done by extensively eliciting unflattering testimony about Mr. Mustafa's life during his homelessness and through the admission into evidence of numerous possessions found in his car that were irrelevant to the underlying incident and only served to portray Mr. Mustafa in an unduly negative light. Additionally, the State advanced arguments founded on denigrating Mr. Mustafa both for his Adderall use and his homelessness, arguments our courts have explicitly held are improper. Because the trial court refused any remedy for the State's improper admissions and arguments, and Mr. Mustafa was substantially prejudiced as a result, his

convictions must be reversed, and the matter remanded for a new trial. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. The State Improperly Admitted into Evidence a Significant Number of Irrelevant but Highly Prejudicial Personal Items from Mr. Mustafa's Car to Paint Him as a Violent and Disturbed Person.

At trial, the State introduced a litany of personal items found in Mr. Mustafa's car that were highly prejudicial and entirely irrelevant to the offense, then used those items to make denigrating arguments about him.

To be admitted at a criminal trial, any proposed evidence must be "relevant," meaning it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401; see also N.J.R.E. 402 ("All relevant evidence is admissible" unless otherwise excluded by the rules of evidence). Even relevant evidence, however, may be inadmissible if its "probative value is substantially outweighed by the risk of[] [u]ndue prejudice, confusion of issues, or misleading the jury[.]" N.J.R.E. 403(a). Evidence is considered unduly prejudicial if "it would divert jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence." State v. Wilson, 135 N.J. 4, 20 (1994). N.J.R.E. 401 and 403 together form the basis of the trial court's gatekeeping powers to assure that misleading and unhelpful evidence is not placed before the jury. State v. Chen, 208 N.J. 307, 318-19 (2011).

When Mr. Mustafa was arrested, his car, out of which he lived, was filled with numerous personal items. Almost none of them had any material relation to the case, but many were significantly prejudicial. Specifically, the State elicited the following evidence: that Mr. Mustafa had a flare gun on his lap when he was discovered, (4T99-24 to 100-6, 101-16 to 20); that police found shotgun shells, a speed loader, brass knuckles, knives, and "assorted other items" in the trunk of his car, (5T103-8 to 25); and that a mask, security badge, gun holster, marijuana, and a firearm purchaser identification card in someone else's name were also recovered from the car, (6T55-9 to 18, 57-25 to 58-1, 74-15 to 20).

Although there was not an initial objection, when much of the prejudicial evidence from the car was being discussed for the second time, defense counsel interposed an objection to the continued harping on that evidence, saying: "Judge we're (indiscernible) evidence that has no relevance on these charges. All this seems to be is like piling on to show he's a bad guy because he's got shotgun [a]mmunition and other kinds of [a]mmunition that have nothing to do with this case. So I'm objecting (indiscernible)." (6T64-23 to 65-3). The trial court overruled, finding that discussion of the ammunition and guns potentially owned by Mr. Mustafa but likely unrelated to the shooting were nonetheless relevant to proving he was the shooter. (6T65-16 to 66-5).

Then later, when the State was eliciting testimony about the marijuana found in the car, defense counsel made another evidentiary objection:

> . . . what we have just witnessed is a trial by character smearing. And (indiscernible) trying to tie all these non-relevant objects as evidence of guilt of one shot from one gun by one person.
>
> I would respectfully submit that to admit these items into evidence would deprive Mr. Kader Mustafa of a fair trial by an impartial jury.
>
> [(6T78-24 to 79-5).]

In clarifying what his objection was referring to, defense counsel stated:

> I'm not objecting to the guns or any ammunition from the guns. But everything else that is not pertinent to these charges. They're just piling on by irrelevant evidence.
>
> . . .
>
> The flare gun. (indiscernible) shot gun ammunition. There's no indication there was a shot gun. Suspected marijuana. And all the other non-ammunition (indiscernible).
>
> [(6T80-21 to 81-5).]

The trial court disagreed, finding the evidence probative, and denying Mr. Mustafa's request for a mistrial. (6T82-2 to 16).

As anticipated, the State used the items found in the car to argue during its closing that Mr. Mustafa was a "secretive" (i.e., disturbed) person of the kind who would commit the crime alleged:

> Nicole Fiore, we'll talk about her in a little bit. And secretive, secretive. We heard from Nicole Fiore that the defendant, which is not an unusual trait, but the defendant didn't want to let anyone who was a part of his life or even tangentially in his life, to know about his unhappy circumstances at the time, unemployed and homeless. Well, secretive. I submit to you, ladies and gentlemen, that that is a corroboration that picture, the trunk of his Chevy Impala after it was searched by Sgt. Cattelona and the other members of the crime scene unit on Friday morning, May 4th, of 2018 that's an example of the secretive Kader Mustafa.
>
> [(9T64-21 to 65-8).]

The State also referenced the firearm purchaser identification card in someone else's name (9T64-15 to 20), and Mr. Mustafa's marijuana use (9T73-4 to 10), for similar purposes during summation.

In short, the State introduced a litany of highly prejudicial and entirely irrelevant evidence to portray Mr. Mustafa as a disturbed loner, which defense counsel accurately characterized as "a trial by character smearing." (6T78-24). None of it had any relation to the material issue in dispute, and its only function was to inflame the jury against Mr. Mustafa. The State then, of course, used the evidence for exactly that purpose, arguing the inflammatory items found corroborated that Mr. Mustafa was a disturbed person who would have likely committed such a crime. Even if the trial court did not believe that a mistrial was proper, it could have nonetheless issued a limiting instruction that the jury should not consider the items found in the car as evidence that Mr. Mustafa

would have been more likely to commit the shooting. Instead, the jury was invited to make exactly that improper inference.

This improper evidence and arguments, in conjunction with the other issues discussed below, improperly tainted Mr. Mustafa's trial such that his convictions should be reversed and a new trial had.

B. The State Advanced Improper Arguments That Mr. Mustafa Committed the Shooting Because of His Adderall and Marijuana Use.

Next, the State improperly advanced arguments that Mr. Mustafa's Adderall and marijuana use drove him to delusion and caused him to commit the shooting.

"In representing the State in a criminal action, the prosecutor is endowed with a solemn duty -- to seek justice, not merely to convict." State v. Garcia, 245 N.J. 412, 435 (2021) (internal quotations and citation omitted). Although trials are a competitive atmosphere, and prosecutors are afforded wide leeway in making arguments, they must nonetheless "stay within the orbit of strict propriety and adhere to the high ethical standards of their office." Ibid. (internal quotations and citation omitted). If a prosecutor's comments substantially undermine a defendant's right to have the jury fairly evaluate the merits of the case, the convictions must be reversed and remanded for a new trial. Id. at 436. When determining whether prosecutorial misconduct warrants reversal,

appellate courts should evaluate (1) whether defense counsel made timely and proper objections to the improper remarks, (2) whether the remarks were withdrawn promptly, and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. State v. Jones, 364 N.J. Super. 376, 384 (App. Div. 2003).

One such example of misconduct occurs when the State seeks to argue to a jury that a defendant has a greater propensity for committing crimes because of his drug use. State v. Mazowski, 337 N.J. Super. 275, 287-88 (App. Div. 2001). In Mazowksi, the State elicited substantial evidence of the defendant's drug addiction in a robbery case and argued in summation that his addiction contributed to the commission robbery. Id. at 280-81. This Court ruled that the admission of the addiction evidence and arguments by the State were improper. Id. at 287-88. Specifically, this Court noted that, "It is difficult to conceive of anything more prejudicial to a defendant than presenting him to the jury as a drug addict--a description which one court termed 'catastrophic.'" Id. at 287 (quoting People v. Cardenas, 184 Cal. Rptr. 165, 647 P.2d 569, 574 (Cal. 1982)). Likewise, this Court noted that the State's arguments as to the addiction's relation to the underlying crime were "premised on the State's a priori assumption that all drug addicts need money," and not founded on any actual evidence presented in the case. Ibid.

Here, the State devoted a significant amount of its summation to the forbidden theme that Mr. Mustafa's marijuana and Adderall use made him the kind of person who would commit the kind of offenses alleged. In the beginning of its summation, the prosecutor discussed Mr. Mustafa's Adderall use and said: "And the demons that created inside the defendant I submit to you is what lead to the tragedy of Thursday, May 3rd, of 2018." (9T46-2 to 4). Later, the State included Mr. Mustafa's Adderall and marijuana use alongside things such as his use of aliases to visit Ms. Fiore in the hospital and his homelessness as evidence of him being the kind of disturbed person who would commit the shooting. (9T63-5 to 16). At another point, the State referenced the fact that Mr. Mustafa's use of Adderall appeared to exceed the recommended dose.[7] (9T71-4 to 21). The State also harped on the fact that "there are days that from Nicole Fiore's testimony [Mr. Mustafa was using] Adderall and marijuana together, marijuana every day, Adderall every day," saying it was "incumbent upon each one of you individually and collectively to talk about the impact of using that drug in a way not prescribed." (9T73-4 to 18). In arguing what Mr. Mustafa's state of mind would have been at the time of the incident, the State said that Mr. Mustafa must

[7] The testimony showed Mr. Mustafa barely took more than the recommended dosing, seeming to average 4.78 tablets a day instead of the recommended 4. (6T129-6 to 130-2). That calculation excludes the possibility that Ms. Fiore—who was addicted to prescription medication and living out of Mr. Mustafa's car—took any of the pills.

have been "in control of the situation that he felt based upon too much Adderall, too many conspiracy theories." (9T81-4 to 8). Finally, the State argued towards the end of its closing that "the defendant that night was an angry player. He had intensity. He had focus that was fueled by Adderall abuse but it was there." (9T85-24 to 86-2).

Although defense counsel did not object to these specific remarks, he did object to the prosecutor eliciting certain relevant parts of Ms. Fiore's testimony. Specifically, he objected to testimony that Mr. Mustafa had manipulated his doctor into prescribing him the Adderall, (7T72-12 to 13), and objected to the State eliciting testimony about Mr. Mustafa's daily marijuana use, (7T73-12 to 14). In responding to the objection on the marijuana use, the State argued it was interested in pursuing an argument that the shooting was caused by Mr. Mustafa's combined Adderall and marijuana use. (7T73-19 to 74-8). Defense counsel countered that there was no doctor testimony on that point, (7T74-9 to 10), but the objection was ultimately overruled, (7T74-23 to 25).

There are several significant problems with the State's arguments about Mr. Mustafa's drug use. First, the argument that Mr. Mustafa's Adderall and marijuana use made him a kind of drug-crazed maniac who would have been more likely to commit a shooting is the exact kind of argument that this Court said was not permissible in Mazowski. 337 N.J. Super. at 287-88. Arguments

that Mr. Mustafa committed the shooting must be based on evidence tending to show he was the person who did it, not inflammatory speculation based on the notion that drug abuse generally makes someone deranged to the point of murder. Second, the State's arguments were not reasonable inferences based on the evidence but rather complete inventions by the prosecutor. There was no doctor testimony that Mr. Mustafa's taking of Adderall (medication he was legally prescribed) could not be mixed with marijuana (a legal drug at the time of the offense). While the State has leeway to make reasonable inferences, it cannot be such an unfounded and denigrating leap that lacks any meaningful support in the record. Ibid. Lastly, this issue was not fleeting and was dwelled on heavily by the State in summation, further weighing in favor of this being reversible error. Id. at 288.

It is true that defense counsel did try to pursue to some extent a voluntary intoxication defense at trial based on Mr. Mustafa's Adderall use, but that still did not open the door to the kinds of arguments the State was making. The proper retort to that argument is that Mr. Mustafa was not so substantially inebriated that it amounted to a voluntary intoxication sufficient to provide an absolute defense to the crime. It did not in any way allow the State to baselessly argue that the Adderall and marijuana use made Mr. Mustafa delusional to the point of him committing a murder.

There was some testimony by Ms. Fiore that Mr. Mustafa's Adderall use exacerbated his mental health issues. (7T221-6 to 8). But again, Adderall use worsening to some extent his existing delusions is far different from the State's characterization in summation that Mr. Mustafa was a drug-crazed psychotic maniac. In fact, Ms. Fiore specifically emphasized that Mr. Mustafa was already fully delusional before the Adderall. (7T220-25 to 221-5). Nor was there any testimony by Ms. Fiore that mixing marijuana and Adderall specifically exacerbated his issues.

The State's argument, conclusively improper under Mazowski and one of the State's main theories of the case, substantially undermined Mr. Mustafa's right to a fair trial and, in combination with the other similar errors, warrants reversal of his convictions and a remand for a new trial.

C. The State Elicited Irrelevant and Prejudicial Testimony About Mr. Mustafa's Life While Homeless and Made Denigrating Comments About His Homelessness and Poverty.

In addition to the above issues, the State engaged in further impropriety by eliciting irrelevant and prejudicial testimony about Mr. Mustafa's life while homeless and by using that testimony to make denigrating comments about his homelessness and poverty.

As with making improper arguments about a defendant's drug addiction, the State is generally not permitted to argue someone is more likely to have

committed a crime simply because he is poor. See State v. Mathis, 47 N.J. 455, 471 (1966) ("the practical result of such a doctrine would be to put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes . . . ."); State v. Sherman, 230 N.J. Super. 10, 19 (App. Div. 1988) (reversing defendant's convictions where prosecutor used summation "to suggest that defendant committed the crimes with which he was charged because he was without funds"); State v. Stewart, 162 N.J. Super. 96, 100 (App. Div. 1978) ("it is generally improper to use a defendant's poverty to establish a criminal motive"); State v. Copeland, 94 N.J. Super. 196, 202 (App. Div. 1967) ("[W]here evidence of impecuniosity of a defendant may tend to prove motive or willingness to commit a crime . . . it should not be admitted and, as naturally follows, it should not be commented upon.").

At the trial, the State made much of Mr. Mustafa's homelessness and poverty, again using those facts as part of its tableau of presenting Mr. Mustafa as disturbed and deranged. The prosecutor elicited testimony from witnesses that Mr. Mustafa was homeless, was living out of his car, that he worked out in parks every day, that he had trouble finding work and maintaining a job, and that he would often drive around aimlessly. Then, when it directly addressed the jury, the State repeatedly dwelled on these facts to denigrate Mr. Mustafa by painting

him as a disturbed person more likely to commit the shooting because he was homeless and living in poverty.

In its opening, after discussing the facts of the tragic incident, the State said, "Now why would a person do such a thing. Well the life of Kader Mustafa at that point in time was certainly not going that well. . . . " (3T32-21 to 23). The State then went on to go into detail about how Mr. Mustafa was homeless, had difficulty holding jobs, and suffered from paranoid delusions. (3T21 to 34-20). Later in its opening, the State discussed Mr. Mustafa's homelessness in disparaging terms, saying, "Well the defendant's car may be typical of a person who is living out of it, is cluttered with liter [sic], debris and items of clothing in the passenger compartment as well as in the trunk." (3T46-22 to 25).

In closing, the State covered similar grounds:

> we've heard testimony that he drove and he drove and he drove some more. Unfortunately for him at that point in time that was his life. He was a road warrior. He was in his car all the time. And unfortunately for him at that time he was unemployed and he was homeless. A sad thing to have to say. We learned from him through Nicole Fiore, we'll talk about her in a bit, he exercised daily. He used marijuana daily and he ended up after the summer of 2017 using Adderall daily. He had aliases. He used them.
>
> [(9T63-5 to 16).]

Continuing, and as quoted previously in subsection A of this Point, the prosecutor made a disparaging theme of Mr. Mustafa as a "secretive" person, building on the idea of his troubled personal life. (9T 64-21 to 65-8)

As with Mr. Mustafa's substance abuse issues, the State's arguments that Mr. Mustafa was more likely to be the kind of person who would commit murder because of his homelessness and poverty were grossly improper and warrant a new trial. It is well understood that there is a general public perception that homeless people are derelicts who are more likely to be violent, dangerous, and engage in criminal activity. See State of Washington Department of Commerce, Homelessness Myths and Facts (criticizing public perception "myth" that "[p]eople who are homeless are violent, dangerous, and/or are lawbreakers."). This principle is intimately related to the rule that the State is generally not permitted to advance an argument that a defendant was more likely to commit a crime because he was poor. See Stewart, 162 N.J. Super. at 100.

A defendant should not be convicted because he was demonized by the State based on his status as a homeless person; instead, a conviction must be grounded on competent evidence that the defendant committed the crime alleged. Because the State's arguments may have pushed the jury to render a conviction based on the inappropriate stereotype that, as a homeless person

living in poverty, Mr. Mustafa had a propensity to commit crimes, his convictions must be reversed and the matter remanded for a new trial.

D. Much of the Jail Call Admitted by the State Was Irrelevant and Extremely Prejudicial.

Lastly, the State also admitted a jail call that consisted almost entirely of irrelevant and severely prejudicial statements by Ms. Fiore denigrating Mr. Mustafa.

The portion the call the State ostensibly considered relevant was a brief moment where Mr. Mustafa stated he shot at the car because he was only trying to scare the passengers. (7T166-9 to 17). However, that statement made up a tiny fraction of the jail call, about a half-page from a call that lasted over sixteen transcript pages. Much of the rest of the call consists of Ms. Fiore repeatedly calling Mr. Mustafa a liar and accusing him of having affairs. (7T152-9 to 168-25). For instance, in one such exchange Mr. Mustafa asks her, "Lying about what? Tell me what I'm lying about? About what? A girl?" to which Ms. Fiore replied, "Everything that you fucking did. Yeah. Yeah. You are. And if you're going to keep lying, then just go fuck yourself." (7T161-10 to 20). Defense counsel moved for a mistrial based on the extensive irrelevant and prejudicial conversation contained in the call, which was denied. (7T172-4 to 180-11).

The jail call presents two significant issues. The first is the irrelevant and prejudicial discussion of Mr. Mustafa having affairs, visiting sex stores, and

other assorted references made by Ms. Fiore to denigrate him. Clearly that discussion bore no relevance to any material issue in the case, and its only function was to improperly make Mr. Mustafa look like generally disreputable. Second, the statements in the call that Mr. Mustafa was a liar were inadmissible and should have been redacted or stricken with a limiting instruction. As noted by this Court, a statement by a witness calling a defendant a "liar" "should never [be] admitted. It is within the sole and exclusive province of the jury to determine the credibility of the testimony of a witness. We do not allow one witness to comment upon the veracity of another witness." State v. Vandeweaghe, 351 N.J. Super. 467, 481-82 (App. Div. 2002).

The prejudicial aspects of the jail call compounded with the rest of the errors discussed in this point to create a substantial risk that the jury would render a conviction based on a generally negative perception of Mr. Mustafa as a disturbed or "bad" person rather than dispassionately reviewing the evidence presented.

E. Conclusion

In short, there was significant evidence adduced at trial that bore no relation to any material issue in the case, and whose function was only to disparage Mr. Mustafa. Additionally, the State advanced arguments about Mr. Mustafa's homelessness and substance use that our courts have explicitly

deemed to be improper. The improper evidence and arguments presented by the State at trial significantly undermines confidence in the jury verdict such that Mr. Mustafa's rights to a fair trial were infringed, and his convictions should be reversed and the matter remanded for a new trial.

POINT IV

MR. MUSTAFA'S SECOND-DEGREE FIREARM POSSESSION CONVICTIONS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE ELEMENTS FOUND UNDER N.J.S.A. 2C:39-5(D), FOURTH-DEGREE UNLAWFUL POSSESSION OF A WEAPON (NON-FIREARM) INSTEAD OF THE ELEMENTS FOUND UNDER N.J.S.A. 2C:39-5(B), SECOND-DEGREE UNLAWFUL POSSESSION OF A FIREARM. (Not Raised Below)

When Mr. Mustafa was arrested, two handguns were recovered from the trunk of his car. Accordingly, Mr. Mustafa was charged with two counts of second-degree possession of a handgun without a permit in violation of N.J.S.A. 2C:39-5(b). In its final jury charges, however, the trial court mistakenly instructed the jury on the form of possession found in N.J.S.A. 2C:39-5(d), fourth-degree unlawful possession of a weapon, for which he was not indicted and which contains different elements. There is no way to reconcile this significant error with Mr. Mustafa's convictions: he cannot be convicted of a form of possession that is completely different from the one he was indicted on,

nor can he be convicted of a kind of possession that the jury was not instructed on. Accordingly, Mr. Mustafa's convictions for second-degree unlawful possession of a weapon must be vacated and the matter remanded for a new trial where the jury is appropriately instructed on the elements of the correct offense. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

N.J.S.A. 2C:39-5(b) makes it a second-degree offense for "[a]ny person [to] knowingly [have] in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S. 2C:58-4 . . . ." In order to convict a defendant of this offense, the State must prove: (1) that there was a handgun, (2) that the defendant knowingly possessed the handgun, and (3) that the defendant did not have a permit to possess such a weapon. Model Jury Charges (Criminal), "Unlawful Possession of a Handgun (Second Degree) (N.J.S.A. 2C:39-5b)" (rev. June 11, 2018).

N.J.S.A. 2C:39-5(d), by contrast, is a fourth-degree offense dealing with any weapon other than a firearm. Under that statute, a person commits an offense if he "knowingly has in his possession any other weapon [meaning a non-firearm weapon] under circumstances not manifestly appropriate for such lawful uses as it may have . . . ." To convict someone of that offense, the State must prove: (1) that there was a weapon, (2) that the defendant knowingly possessed the weapon, and (3) that the defendant's possession of the weapon was under circumstances

not manifestly appropriate for a lawful use. Model Jury Charges (Criminal), "Unlawful Possession of a Weapon (N.J.S.A. 2C:39-5d)" (rev. Apr. 18, 2018).

In Mr. Mustafa's indictment, he was charged with two counts of second-degree unlawful possession of a handgun in violation of N.J.S.A. 2C:39-5(b) (Counts Three and Four) with language that parroted that subsection of the statute. (Da3). Nowhere was Mr. Mustafa charged with the fourth-degree version of the offense pertaining to non-firearms found in N.J.S.A. 2C:39-5(d).

For whatever reason, the parties and the trial court included the incorrect model charge in the final instructions, instructing the jury on the fourth-degree offense found under subsection (d) rather than the second-degree offense under subsection (b):

> Counts three and four of the indictment each charge the defendant, Kader Mustafa with the crime of the knowing unlawful possession of a weapon. The statute on which this count of the indictment is based reads in pertinent part.
>
> Any person who knowingly has in his possession any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime. In order to convict the defendant of this crime, the State must prove the following elements beyond a reasonable doubt. That S-9 4 and/or S-10 is a weapon that the defendant possessed the weapon knowingly and that the defendant's possession of the weapon was under circumstances not manifestly appropriate for unlawful use. . . .
>
> [(9T158-15 to 159-11).]

Accordingly, Mr. Mustafa's jury was instructed on a completely different offense from the one he was indicted for and convicted of.

It is well-established that "accurate jury instructions are essential in a criminal trial[,]" and "the failure to charge the jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel[.]" State v. Hodde, 181 N.J. 375, 384 (2004) (internal quotations and citations omitted); see also State v. Rhett, 127 N.J. 3, 7 (1992) ("We have consistently held that incorrect charges on substantive elements of a crime constitute reversible error."). These principles remain true even where the essential element at issue appears beyond dispute. State v. Vick, 117 N.J. 288, 290-93 (1989).

Our Supreme Court was faced with a somewhat similar situation in State v. Vick. In that case, a person involved in a "tavern brawl" who had disarmed an officer and kept the gun was charged with possession of a handgun without a permit. 117 N.J. 288, 290 (1989). At trial, the court failed to charge the jury that the absence of a permit was an essential element of the offense. Ibid. Vick appealed, and this Court affirmed, finding that because it was never contested that Vick did not have a permit, the error was harmless. Id. at 290-91. The Supreme Court reversed, finding that a jury must be the one to find all essential elements of an offense. The Supreme Court explained, "We realize that it is

difficult to explain why juries should be required to make a finding of what seems to be the obvious. The short answer is that there is simply no substitute for a jury verdict." Id. at 291. The Court concluded by holding, "we see no way to conclude that a trial can be constitutionally fair when the State is not required to prove . . . the essential elements of the offense charged. The requirement is so basic and so fundamental that it admits of no exception no matter how inconsequential the circumstances." Id. at 293.

In this case, the situation was even worse than Vick. Every element was different from the appropriate possession offense and the jury was not instructed on any of the proper elements of a N.J.S.A. 2C:39-5(b) offense. Put simply, convictions cannot be sustained when the jury was not charged on the essential elements. Although no objection was lodged it cannot be that the need for a jury to find each essential element beyond a reasonable doubt—the entire purpose of a criminal trial—is deemed dispensable because the defense attorney, along with the trial court and the prosecutor, failed to catch the error. Indeed, the Supreme Court has made clear that the failure to charge the jury on an essential element of the offense is nearly always reversible, even where defense counsel does not object. Hodde, 181 N.J. at 384.

Accordingly, because the jury was not instructed on the essential elements of second-degree unlawful possession of a handgun, Mr. Mustafa's possession convictions must be reversed and the matter remanded for a new trial.

POINT V

THE TRIAL COURT REVERSIBLY ERRED IN REFUSING TO ISSUE A LIMITING INSTRUCTION ON THE STATE'S MISLEADING DUI HYPOTHETICAL MADE WITH RESPECT TO MANSLAUGHTER DURING ITS SUMMATION. (9T104-13 to 105-25)

One of Mr. Mustafa's main arguments at trial was that, if he did fire the bullet that killed Ms. Calhoun, it constituted a form of manslaughter, not murder. In countering that argument, the State made misleading statements about the law by discussing a hypothetical wherein someone hits and kills another while driving under the influence. The State's arguments in this respect distorted the law around manslaughter and significantly prejudiced the jury's ability to deliberate on the lesser-included offenses. Because the trial court reversibly erred in refusing defense counsel's request to strike the hypo and give a curative instruction, his murder conviction must be reversed and the matter remanded for a new trial. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

As noted earlier in Point III(B), if a prosecutor's comments substantially undermine a defendant's right to have the jury fairly evaluate the merits of the

case, his convictions must be reversed and remanded for a new trial. Garcia, 245 N.J. at 436. When determining whether prosecutorial misconduct warrants reversal, appellate courts should evaluate (1) whether defense counsel made timely and proper objections to the improper remarks, (2) whether the remarks were withdrawn promptly, and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Jones, 364 N.J. Super. at 384. In this vein, our courts have made clear that "[p]rosecutors should not make inaccurate legal or factual assertions during a trial." State v. Frost, 158 N.J. 76, 85 (1999); see also State v. Whitaker, 402 N.J. Super. 495, 515 (App. Div. 2008) (holding inaccurate statements about accomplice liability were reversible error). "[Prosecutors] are duty-bound to confine their comments to facts revealed during the trial and reasonable inferences to be drawn from that evidence." Ibid.

By way of example, in State v. Rivera, 437 N.J. Super. 434 (App. Div. 2014), a defendant was on trial for attempted murder and had claimed self-defense. Id. at 441-42. During summation, the State used a PowerPoint presentation that had statements about the law of self-defense that were, in this Court's view, "so oversimplified as to be misleading." Id. at 463. The phrases included: "CANNOT BRING A KNIFE TO A FIST FIGHT," "NO SELF-DEFENSE TO USE DEADLY FORCE" repeated several times, and "CANNOT

KILL AS FIRST CHOICE." Id. at 464. This Court found that, although the judge properly instructed the jury on the law, the prosecutor's confusing and misleading statements about the defendant's primary argument sufficiently undermined the integrity of the verdict to require reversal. Ibid.

Similarly, one of Mr. Mustafa's primary arguments was that, if he did fire the fatal bullet, it constituted a lesser offense of aggravated or reckless manslaughter. To counter that argument in summation, the prosecutor began discussing why he did not believe manslaughter fit the facts of the case:

> But a conscious disregard of a substantial and unjustifiable risk, I suggest to you that this is a pertinent example of manslaughter. That the defendant was driving his 2005 white Chevy Impala under the influence of too much Adderall, drove through a red light and collided with another car, killing the driver. That's reckless. Under the influence of a substance, he got behind the wheel of a car and then didn't properly drive, didn't obey the traffic laws and killed someone. Did he start out with a purpose to do that? Was that his intent at the time that the collision happened? No. No, it wasn't. That's an example of reckless manslaughter.
>
> That's not this case. Under any circumstances that's not this case.
>
> [(9T90-11 to 25).]

At the close of the State's summation, defense counsel made an objection to the DUI hypothetical, saying,

> I object to the comparison of this case to a DUI in arguing that it would not be reckless manslaughter just

> because a gun was used but if it was a DUI, that would be a lesser offense than the gun so if it was a DUI, then it would be reckless but since it's a gun, it can't be reckless. I think that was an improper statement to argue to the jury.
>
> [(9T104-13 to 19).]

The trial court, although intimating the prosecutor should not have presented the hypo, ultimately held, "whether it was artful or inartful, I don't think there's anything inappropriate about it to rise to the level of requiring a mistrial or any kind of a curative instruction. I'll leave it at that." (9T105-20 to 24). Accordingly, the State's improper remarks were not stricken, and no curative instruction was given.

To be sure, the State's comments were grossly misleading and inaccurate. First, the kind of scenario the State was talking about would generally be covered by N.J.S.A. 2C:11-5, which explicitly covers situations where someone recklessly kills another by striking them in a car while under the influence. That statute is distinct and separate from the kinds of manslaughter found in N.J.S.A. 2C:11-4. Indeed, our caselaw has repeatedly dwelled on the distinctions between a death caused in the course of committing a DUI and manslaughter. In State v. Jiminez, 257 N.J. Super. 567 (App. Div. 1992), this Court noted the "subtle and sophisticated distinctions between the concept of recklessness envisioned by the Legislature in death by auto as distinguished from the recklessness envisioned

in the manslaughter statute." Id. 583. In State v. Choinacki, 324 N.J. Super. 19 (App. Div. 1999), this Court elaborated on those distinctions in greater detail:

> The mental element of 'recklessness' required for manslaughter is greater than that required for death by auto. . . . While driving under the influence may alone satisfy the recklessness required by the death by auto statute, more is required for reckless manslaughter. When the State relies on the extent of drinking as an additional act constituting recklessness which caused death, the drinking must be more than casual drinking and more than mere intoxication, rather, it would have to be exceptional drinking to a marked extent. . . . The deviation from reasonable care must be gross so to satisfy the element of recklessness in a reckless manslaughter case.
>
> [Id. at 48.]

The prosecutor's descriptions in summation completely confused and distorted these principles, moving the goalposts for what constitutes reckless manslaughter in a manner that did not comport with the law in order to try and convince the jury that it could not possibly apply to the facts of this case.

By contrast, our caselaw shows that in circumstances similar to the instant matter, defendants have been convicted of reckless manslaughter. In State v. Cabbell, 207 N.J. 311 (2011), for instance, a group of people were driving home in a pickup truck late at night in the rain and crashed into the back of the defendants' car. Id. at 318-19. The defendants fired their handguns into the pickup truck in response to the crash, killing one of the occupants, and then fled

the scene. Id. at 319. The defendants were ultimately acquitted of murder but convicted of manslaughter. Id. at 325. Cabbell illustrates that it would have been well possible for a reasonable jury to conclude the facts of the instant case amounted to a form of reckless manslaughter and not murder.

In summary, the prosecutor's remarks and hypothetical were both legally inaccurate and substantially undermined the jury's ability to adequately assess whether Mr. Mustafa was guilty of a lesser-included manslaughter offense. Had the trial court stricken the statements and issued a curative instruction, the situation may have been different, but it declined defense counsel's requests to do so. Accordingly, Mr. Mustafa's murder conviction must otherwise be reversed on this basis and remanded for a new trial.

POINT VI

SEVERAL ERRORS IN THE SENTENCING COURT'S ANALYSIS RESULTED IN THE ERRONEOUS IMPOSITION OF A SENTENCE THAT WAS THE FUNCTIONAL EQUIVALENT OF LIFE WITHOUT THE POSSIBILITY OF PAROLE. (11T53-10 to 65-13)

Even if this Court does not reverse Mr. Mustafa's convictions, this matter must be remanded for a resentencing because the trial court: (A) failed to merge offenses as required, (B) failed to apply mitigating factor four when it was adequately supported by the record, (C) failed to conduct the mandatory

Yarbough/Torres analysis in imposing consecutive sentences, and (D) imposed thousands of dollars in restitution without conducting an ability to pay hearing.

A. The Trial Court Failed to Merge the Possession of a Weapon for an Unlawful Purpose Conviction with the Murder Conviction.

Mr. Mustafa was convicted of possession of a weapon for an unlawful purpose, murder, and two counts of endangering—the offenses that were the object of that unlawful purpose. The trial court imposed a life sentence subject to NERA on the murder conviction, four-year prison terms on the endangering convictions, and a ten-year sentence for the weapons offense.

"The failure to merge convictions results in an illegal sentence for which there is no procedural time limit for correction." State v. Romero, 191 N.J. 59, 79 (2007). With respect to a conviction for possession of a handgun for an unlawful purpose, "when the only unlawful purpose in possessing the gun is to use it to commit the substantive offense, merger is required." State v. Tate, 216 N.J. 300, 312 (2013) (quoting State v. Diaz, 144 N.J. 628, 636 (1996)). Accordingly, "[i]n the absence of a special verdict by the jury finding that the unlawful purpose was broader than the substantive offenses for which the defendant was convicted, possession of [a] firearm with a purpose to use it unlawfully must merge into one of the substantive offenses." State v. Loftin, 287 N.J. Super. 76, 112 (App. Div. 1996).

Here, the trial court instructed the jury that "the State contends that the defendant's unlawful purpose in possessing the firearm was the shooting of Sciasia Calhoun and/or the firing a handgun in the direction of the vehicle that Sciasia Calhoun was driving," referring to the murder and endangering charges. (9T156-25 to 157-10). Thus, because there was no unlawful purpose beyond the substantive charges for which Mr. Mustafa was convicted, the ten-year term on Count Two is an illegal sentence, and the matter must be remanded so that Count Two can be merged with Count One.

B. The Trial Court Erred In Refusing To Apply Mitigating Factor Four When It Was Uncontested That Mr. Mustafa Suffered From Mental Health Issues That Contributed To The Commission Of The Offense.

The trial court further erred in refusing to give any weight to mitigating factor four ("There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense," N.J.S.A. 2C:44-1(b)(4)) at sentencing.

Our courts have been clear that even where mental illness may not rise to the level of an affirmative defense or negate an element of an offense, evidence of mental illness that would relate to the defendant's actions still requires the application of mitigating factor four. See State v. Nataluk, 316 N.J. Super. 336, 349 (App. Div. 1998) (holding that although the defendant's insanity defense was rejected at trial, "[i]t is difficult to understand how defendant's condition

could not have constituted a mitigating factor"); accord State v. Nayee, 192 N.J. 475 (2007) (case summarily remanded where trial court failed to consider the defendant's mental health in mitigation under factor four); see also State v. Hess, 207 N.J. 123, 149 (2011) (evidence that the defendant suffered from Battered Women's Syndrome was found relevant in support of mitigating factor four).

In Mr. Mustafa's case, it was virtually uncontested that he was suffering from some kind of mental health problems during the time of the incident. As discussed in Point II of this brief, all parties understood that those issues would be a focal point at trial. At sentencing, defense counsel noted how several witnesses testified about Mr. Mustafa's mental health issues. Defense counsel also provided the sentencing court with hospital records from the time Mr. Mustafa was briefly committed for those issues. (11T46-19 to 47-8). Likewise, in arguing for the application of mitigating factor four, defense counsel described how Mr. Mustafa had been receiving medication and mental health treatment while in prison (services he obviously would not be receiving if he did not in fact suffer from some kind of condition), and how those treatments seemed to be significantly improving his mental health and behavior. (11T47-23 to 48-16).

In ultimately refusing to apply the factor, the trial court stated:

> As far as mitigating factor 4, there are ground[s] tending to excuse or justify his conduct. I don't know

> what that could be. The fact that he engaged in bizarre behavior, any of us could commit acts of bizarre behavior, it wouldn't shield us from criminal liability. And what sin did she commit, other than driving home with her high beams on, that set something off in this man's mind. So I do not find that mitigating factor 4 applies.
>
> [(11T60-7 to 15).]

Clearly, the judge's statements here amounted to an unfounded rejection of credible support for this mitigating factor in the record. Although at other points in the proceedings the trial court seemed to acknowledge Mr. Mustafa had mental health problems, in discussing mitigating factor four the judge dismissed the possibility of a mental health issue contributing to the commission of the underlying offense without any basis. Despite the judge's statement that "any of us" could do what the defendant did, most people who do not suffer from a legitimate delusional disorder do not live their lives wrapped in tin foil for fear of being stalked by imaginary figures trying to beam deadly radiation into their bodies. Although a sentencing court is entitled to give a mitigating factor less weight in its discretion for credible reasons, it is not entitled to reject a mitigating factor outright when it is supported by the record. State v. Dalziel, 182 N.J. 494, 504-05 (2005). To the contrary, when there is support in the record for a mitigating factor, "[it] must be part of the deliberative process." Id. at 505.

Accordingly, because the trial court failed to apply mitigating factor four when it was requested and adequately supported by the record, the matter must be remanded for a resentencing where that factor is considered.

C. The Trial Court Failed to Engage in the Required Yarbough/Torres Analysis Before Imposing Consecutive Sentences.

Additionally, the trial court erred by making the ten-year term on Count Four consecutive to the life-term imposed on Count One without first engaging in the required analysis. It is well-established that when a court imposes consecutive or concurrent sentences, it is required to thoroughly explain that decision by analyzing certain factors. See State v. Yarbough, 100 N.J. 627, 643-44 (1985). Those factors include whether:

> (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; [and]
>
> (e) the convictions for which the sentences are to be imposed are numerous[.]
>
> [Ibid.]

In addition to analyzing the enumerated Yabrough factors, "[a]n explicit statement[] explaining the overall fairness of a sentence imposed on a defendant for multiple offenses" is essential to a proper Yarbough sentencing assessment. State v. Torres, 246 N.J. 246, 268 (2021). When a trial court fails to consider the overall fairness of an aggregate sentence, such failure "not only undermines Yarbough's goal of promoting predictability and uniformity in sentencing, but also risks deviating from the Legislature's command that the Code be construed so as to 'safeguard offenders against excessive, disproportionate or arbitrary punishment.'" Id. at 272-73 (citing N.J.S.A. 2C:1-2(b)(4)).

Here, in imposing the consecutive term, the sentencing court did not conduct an analysis of the Yarbough factors or consider the overall fairness of the sentence imposed under Torres. The only mention of Yarbough dealt with the imposition of certain concurrent terms, where the trial court stated:

> I do find that just for purposes of the record, although Counts 5 and 6 involve different victims, it was in fact the same act of firing the weapon. And in reviewing the elements of State v[.] Yarbough[,] 100 NJ 627 (1985), this defendant, for these two counts, should not be made to run consecutively.
>
> [(11T64-25 to 65-5).]

The trial court then went on to say that it was making Count Four consecutive to the murder count for an aggregate minimum sentence of 63.75 years. Because this sentence is the functional equivalent of life without the possibility of parole,

it is especially imperative that an appropriate analysis be conducted before imposing it.

For this reason too, then, Mr. Mustafa's sentence must be vacated and remanded for a reevaluation of the imposition of consecutive terms.

D. The Trial Court Imposed An Extraordinarily Significant Restitution Without Conducting An Ability To Pay Hearing.

Lastly, the restitution imposed on Mr. Mustafa must also be reversed and remanded because the trial court did not conduct the required ability to pay hearing.

Pursuant to N.J.S.A. 2C:44-2(b), the court shall impose restitution where the victim, or the victim's family, suffered a loss, and "[t]he defendant is able to pay or, given a fair opportunity, will be able to pay restitution." Accordingly, before imposing restitution at a criminal sentencing, a trial court "must conduct at least a summary hearing" to determine the ability to pay." RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 477 (2018) (internal quotations and citations omitted). At that hearing, a sentencing court "shall take into account all financial resources of the defendant, including the defendant's likely future earnings, and shall set the amount of restitution so as to provide the victim with the fullest compensation for loss that is consistent with the defendant's ability to pay." N.J.S.A. 2C:44-2(c)(2). "When a sentencing court has not conducted a meaningful evaluation of a defendant's ability to pay, appellate courts routinely

vacate restitution orders and remand for reconsideration." RSI Bank, 234 N.J. at 478.

Here, the sentencing court imposed restitution in the amount of $24,886.57, but never conducted an ability to pay hearing. Had a hearing been held, it would have been abundantly made clear that Mr. Mustafa would have no realistic ability to pay back this fine. It is uncontested that he was homeless and living out of his car for a significant period of time before being imprisoned, and the pre-sentence report shows no assets and significant outstanding debts. (PSR14). Nor does Mr. Mustafa have any significant future earning potential because, unless he is successful in some other aspect of his appeal, he will be in prison for the rest of his life. Thus, along with his custodial sentence, the significant restitution imposed must be vacated and the matter remanded so an ability to pay hearing can be conducted before any restitution is imposed.

CONCLUSION

For the foregoing reasons, Mr. Mustafa's convictions should be vacated and remanded to the Law Division for a new trial, or, alternatively, his sentence must be vacated and remanded for a reduced sentence.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: 
KEVIN S. FINCKENAUER
Assistant Deputy
Public Defender
ID# 301802020

Dated: December 3, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1038-22T4

INDICTMENT NO. 18-07-0959-I
CASE NO. 18001842

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	ON APPEAL FROM A FINAL
	:	JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF NEW
	:	JERSEY, LAW DIVISION
KADER S. MUSTAFA,		(CRIMINAL), MONMOUTH COUNTY
Defendant-Appellant.	:	

SAT BELOW: Honorable, Vincent N. Falcetano, J.S.C., and a Jury

---

REDACTED BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR
132 JERSEYVILLE AVENUE
FREEHOLD, NEW JERSEY 07728-2374
(732)431-7160

Melinda A. Harrigan, 062102014
Assistant Prosecutor
Of Counsel and
On the Brief
email: mharrigan@mcponj.org

TABLE OF CONTENTS

TABLE OF APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Court Rules

Statutes

Rules of Evidence

COUNTERSTATEMENT PROCEDURAL HISTORY [1]

On July 30, 2018, a Monmouth County Grand Jury handed down Indictment No. 18-07-0959, charging defendant, Kader S. Mustafa, with first-degree murder, in violation of N.J.S.A. 2C:11-3(a) and/or (2) – with a sentencing enhancer (Count One); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a) (Count Two); two counts of second-degree unlawful possession of a weapon (handgun) without a permit (Counts Three and Four); and two counts of third-degree endangering another person, in violation of N.J.S.A. 2C:27-7.1 (Count Five and Six).

On September 27, 2021, trial commenced before the Honorable Vincent N. Falcetano, J.S.C. and a jury. (3T; 4T; 5T; 6T; 7T; 8T; 9T; 10T). On October 12, 2021, the jury returned a unanimous verdict, convicting defendant on every charge within the indictment. (10T:8-8 to 12-22).

On May 5, 2022, defendant moved for a new trial. After a thorough analysis placed on the record, the motion was denied. (11T:3-21 to 31-25).

---

[1] 1T – Transcript of Motion, dated February 9, 2021;
2T – Transcript of Motion, dated August 20, 2021;
3T – Transcript of Trial, dated September 27, 2021;
4T – Transcript of Trial, dated September 28, 2021;
5T – Transcript of Trial, dated September 29, 2021;
6T – Transcript of Trial, dated September 30, 2021;
7T – Transcript of Trial, dated October 4, 2021;
8T – Transcript of Trial, dated October 5, 2021;
9T – Transcript of Trial, dated October 7, 2021;
10T – Transcript of Trial, dated October 12, 2021;
11T – Transcript of Sentence, dated May 5, 2022;
Db – Defendant's Brief in Support of Appeal;
Da – Defendant's Appendix;
Pa – State's Appendix.

Thereafter, the parties moved to sentencing. For Count one – first-degree murder – Judge Falcetano sentenced defendant to life in prison, subject to the No Early Release Act (NERA). As to Count Two – second-degree possession of a weapon for an unlawful purpose (for the 38 caliber revolver used in the murder), defendant was sentenced to a term of 10 years, with a five-year parole indelibility, to run concurrent to Count One. For Count Three, unlawful possession of a weapon (the same handgun used in the murder), defendant was sentenced to a term of 10 years, also with a five-year parole ineligibility and concurrent to Count One. With respect to Count Four, second-degree unlawful possession of a weapon (the 40 caliber Taurus handgun recovered in the trunk of defendant's car), defendant was sentenced to 10 years, with a five-year parole ineligibility, to run consecutive to the sentences imposed on Counts One, Two, and Three. On Count Five, third-degree endangering (victim H.M.), defendant was sentenced to four years flat; and for Count Six – third-degree endangering (victim A.M – the child), another four-year flat term – both to run concurrent to Count One. (11T:61-25 to 64-24). On December 5, 2022, defendant filed the instant appeal. (Da 15-18).

COUNTERSTATEMENT OF FACTS

On May 3, 2018, Herve Michel, his girlfriend of four years, Sciasia Calhoun and their baby, A.M. went to Sciasia's mother's house in Freehold Borough for some family time and barbecuing with Sciasia's whole family. (3T:75-7 to 76-13). Later that night, Herve told Sciasia that he needed to leave because he had traffic matter in Asbury Park municipal court the next day. Herve planned to take a bus to his father's house, who lived in Asbury Park;

however, Sciasia insisted on giving him a ride. (3T:76-25 to 77-23). Sciasia did not have a car, so she borrowed her mother's Mazda Protégé. The Protégé had a headlight that was out on the right side, but when the high beams were on, both lamps worked. (3T:78-3 to 13; 79-17 to 24; 66-6 to 20).

At around 11:00 p.m., Herve, Sciasia and A.M. left Freehoold Borough and took Route 33 towards Neptune heading to Asbury. Sciasia was driving, Herve was in the passenger's seat and little A.M. was in the back seat behind Herve, strapped in her car seat. During their drive, Herve decided he did not want to go to his dad's house in Asbury, but instead just wanted to "back home" to Sciasia's house in Freehold. So, they turned around. (3T:78-11 to 79-9; 80-12 to 19).

As they were driving down Route 33, they noticed the car in front of them pull over to the side of the road. Sciasia slowed down, drove passed the car and kept driving. Due to the right headlight being out, Sciasia was driving with the high beams on in order to have two working headlights. (3T:79-12 to 24). As they were talking softly about what they were going to do when they got home because A.M. was sleeping in the back seat, the same car that had pulled over raced up behind them flashing its high beams. The car continued to get very close and then "bumped" their car a couple of times. (3T:82-2 to 85-2; 110-14 to 111-9). Herve, in shock over what was transpiring, but also observing the concern on Sciasis's face, told her to "stay left" on Route 33 – to "stay straight" – instead of exiting off to the right because if they did, Herve knew they would have to stop at a red light. (3T:83-23 to 85-14). Sciasis stayed on Route 33; however, when she came upon the next exit to her right – Halls Mills Road – she exited off of Route 33 in order to get away from the car

behind them. When Sciasis exited, the car behind them did not follow, but continued straight on Route 33. (3T:85-15 to 87-4).

Once they exited, Herve "heard a big noise, boom" and ducked his head down. (3T:87-5 to 9). As their car came to a stop, Herve noticed that Sciasis had leaned to the right and onto his shoulder. Herve looked back to A.M., whose eyes were wide. He smelled smoke, but could not figure out what type of smoke he was smelling because they had not hit anything. He then pushed Sciasis's head up and off of his shoulder because she seemed to be trying to talk. Herve then noticed she was not talking, but was actually making groaning sounds, like "ah, ah." (3T:88-12). Herve got out of the car and grabbed A.M. out of her car seat. He went around to the driver's side, set A.M. down in the street and tried to aid Sciasis. At that point, blood was "bubbling and coming out hard" from a hole – a wound in her head. (3T:88-5 to 25).

When his aid did not work, Herve picked up A.M. and began running towards the road signs to see where on Route 33 he was located. In shock at this point, all Herve could think to do was call family, so he called Sciasis's mom, but she did not answer. He then called his sister and then his mother and spoke to them for about five minutes. After he hung up, Herve called 9-1-1. [2]

While Herve was speaking with the 9-1-1 operator, Sciasis was still alive and groaning. (3T:89-3 to 91-2). Herve told the operator that Sciasis had been shot in the head and that he did not know what to do. When asked where he was located, Herve told the operator he was on Route 33 in Freehold. The

---

[2] It was stipulated by the parties that the 9-1-1 call was placed at 11:44 p.m. (3T:101-6 to 7).

operator tried to calm Herve, but he was pleading, "help me, help me," "please hurry up," and "I'm losing her." After getting his location, the operator told Herve that help was on the way. (3T:94-5 to 97-4).

Around this same time, Patrolman Christopher Makwinski, an eight-year veteran of the Manalapan Township Police Department, was on patrol and positioned on Route 33 westbound. At approximately 11:41 p.m., he observed occupants in a white Chevy Impala. He observed that they appeared to react to his presence. They looked startled and that caught his attention. (3T:117-20 to 25; 120-22 to 122-12). As Patrolman Makwinski focused in on the Impala, it approached a gas station and abruptly turned into its parking lot. Patrolman Makwinski was unable to safely pull into the same gas station parking lot due to the speed he was traveling, so he continued on down the road. After driving approximately three quarters of a mile, Patrolman Makwinski pulled to the side of the road to wait for the Impala to leave the gas station. Meanwhile, he ran the license plate on his MDT system. The search retuned information that the car was registered to Kader Mustafa. (3T:119-5 to 16; 122-13 to 124-21; 132-1 to 134-14; 139-19 to 25).

At 11:48 p.m. and while he was still parked on the side of the road, a dispatcher came over the radio and advised that there was a shooting in Freehold and that a Chevy Malibu was identified as being involved. At approximately 11:51 p.m., another call came over the radio advising that the vehicle leaving the scene of the shooting was not in fact a Chevy Malibu, but was actually an "older" Impala. (3T:124-20 to 126-3; 129-1 to 12).

Patrolman Makwinski responded back to the gas station where he had last observed the Impala he had come in contact with. He saw two other

Manalapan police officers in the parking lot; however, the Impala was gone. Patrolman Makwinski advised the other officers that he had just encountered an Impala that dispatch had just advised was suspected of being involved in a shooting in Freehold and how that vehicle had turned into the gas station parking lot. After briefly speaking with the gas station attendant, advising other officers in Manalapan and Freehold, along with any other responding officers of the necessary information regarding the Impala, Patrolman Makwinski and the officers left the gas station and continued their search for the Impala, but were ultimately unable to locate it. (3T:134-15 to 137-16).

Patrolman Adam Nimick of the Freehold Police Department was on patrol when he received a radio communication that there was a victim with a gunshot wound to the head on Route 33, westbound. (4T:7-1 to 12). When he arrived on scene, he observed a male subject, he would later identify as Herve Michel, holding a baby in his arms, extremely frantic. He also observed a female in the driver's seat of a car – Sciasis Calhoun – with a what appeared to be a gunshot wound to the back-side of her head. Inside the car, he observed blood and brain matter. (4T:9-2 to 15).

Patrolman Nimick took Herve off to the side, and away from the vehicle and Sciasis. He and two other officers who had arrived on scene – Officer Lasky and Officer Galaydick – then tried to administer aid to Sciasis. They tried to bandage her head and give her oxygen. They continued to give her aid until the ambulance and EMS arrived. (4T:9-17 to 10-23).

Both Patrolman Nimick and Officer Galaydick had their mobile video recorders (MVR) activated when they arrived at the scene.[3] On that footage,

---

[3] The footage from both officer's MVR's was played for the jury. See (4T:12-5

Herve is heard identifying a white Malibu as the car he observed chasing them. However, as he continues to describe the events that transpired, Herve – mid sentence – says, "Officer, a Malibu, a (indiscernible) Malibu, ***a white, a white, not Malibu, Impala***, followed, and it shot through this car." (4T:23-18 to 24-7) (emphasis added).

At approximately 12:02 a.m., EMS arrived on scene and removed Sciasis from the driver's seat and onto a stretcher to be transported to the hospital. She had a weak pulse, but was not breathing on her own. (4T:50-7 to 54-17). At 12:13 a.m., her pulse slowed down even further. At 12:16 a.m., EMS lost all signs of life. EMS continued CPR and contacted the hospital seeking a TRE – termination of resuscitative efforts – due to the extensive brain injury. At 12:16 a.m., EMS received authorization to discontinue lifesaving efforts and Sciasis Calhoun died as a result of her injury. (4T:58-7 to 59-7).

Detectives from the Monmouth County Prosecutor's Office (MCPO) became involved in the investigation at around 2:00 a.m. and were seeking information regarding the suspect vehicle, a white Chevy Impala. They were assigned to check transient areas, places such as hotels, gas stations or any other location where someone driving around the county could be found. (4T:93-9 to 23; 140-1 to 141-4). Detectives were also trying to gather information about the Impala's suspected registered owner, defendant, Kader Mustafa. They located defendant's brother, Ali Mustafa, who lived in Freehold. (4T:64-13 to 18; 65-5 to 66-14).

At approximately 5:30 a.m., detectives went to Ali Mustafa's home. At that time, he did now know the whereabouts of his brother. However, at

---

to 8; 13-6 to 30-8).

approximately 6:30 a.m., Ali Mustafa contacted detectives and informed them that his brother was at a cousin's house in Manalapan, and gave police the address. (4T:69-9 to 71-1; 72-7 to 73-15). Detectives immediately went to that location. Upon arrival, police observed a long driveway leading up to the residence and protruding from behind a horse trailer was a white Impala. Police believed this was the Impala they were looking for. (4T:73-19 to 74-3; 95-2 to 98-5). Detectives contacted the owner of the residence and told him to remain inside. (4T:81-1 to 14).

Due to the seriousness of the investigation, officers from surrounding jurisdictions, such as Manalapan and Freehold, along with officers from the New Jersey State Police arrived to provide backup to MCPO detectives. Dressed in full tactical gear, including raid vests with bold lettering saying "POLICE," ballistic shields, and in formation, officers carefully approached the Impala from the rear and observed two individuals asleep inside the vehicle. Officers yelled, "I want to see your hands." (4T: 98-6 to 99-19; 115-2 to 119-7; 124-2 to 7). A female, later identified as Nicole Fiore, who was in the passenger's seat, immediately raised her hands in the air upon the command. Defendant, seated in the driver' seat, did not follow the command, even after it was announced numerous times. Since defendant would not follow any of the police instructions or commands, they were forced to use a ram to break the driver's side window. Police then pulled defendant out of the vehicle. While doing so, a flare gun was recovered from between defendant's legs. Once on the ground, defendant was handcuffed and searched for weapons to ensure police safety. (4T:99-18 to 101-25; 125-2 to 22).

Defendant was wearing a baseball hat and also a hard hat. In between

each hat was tin foil. He also had a "runners" type blanket, which was a silver garbage bag type material, wrapped around him and was fully clothed. When asked about the type of clothing he was wearing, defendant responded he was trying to lose weight. (4T:102-1 to 12). Defendant was given Miranda[4] warnings and was calm and cooperative. Police transported him to the Monmouth County Prosecutor's Office. (4T:102-16 to 103-25; 143-9 to 144-4). The outside of the Impala was photographed and items that were located outside the vehicle were processed. Defendant's vehicle was then towed to a secured facility at the Prosecutor's Office. (4T:104-1 to 17; 5T:88-15 to 99-4).

Once at the Prosecutor's office, defendant was searched again and items from his person removed. More specifically, a black wallet containing defendant's New Jersey Driver's License and a New Jersey Firearms Purchaser Identification Card, in the name of John Franolich III. (4T:144-5 to 8; 147-5 to 18).

The passenger found in the vehicle with defendant was identified as Nicole Fiore. She was also taken from the scene for questioning. A freelance hairdresser, Ms. Fiore was defendant's girlfriend for five years, but most importantly, she was a passenger in the Impala on the night of the shooting, his flight from the scene immediately afterward, and was found asleep with defendant in the vehicle when discovered by police. In fact, prior to the shooting, Ms. Fiore and defendant were actually living in his Impala. (7T:64-9 to 24).

Ms. Fiore struggled with addiction stemming from prescribed pain killers and was seeing a doctor who prescribed her Suboxone to help with her

---

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

cravings for other drugs. Ms. Fiore had previously been admitted to the hospital crisis unit, but she eventually landed in a short-term rehab facility because she was "coming off" her dosage of Suboxone. When defendant told her wanted a prescription for Adderall because he liked the way it made him feel and he no longer wanted to purchase it on the street, Ms. Fiore introduced defendant to her doctor, who had given her prescriptions for Adderall and Suboxone. Nevertheless, defendant researched the doctor prior to seeing him in order to make sure he could be easily manipulated. Along with taking Adderall, Ms. Fiore also witnessed defendant's daily use of marijuana (7T:68-25 to75-7; 76-1 to 78-12). Despite his drug use, defendant physically worked out daily – either at a Planet Fitness Gym, or outside at a park doing calisthenics or something similar. (7T:100-12 to 24).

As his constant companion, Ms. Fiore also witnessed defendant's various rantings and conspiracy theories regarding law enforcement, government, history and "things of that nature." To further his theories, defendant would often conduct Internet searches and do research on either his smart phone or by going to a local library to use the computer. (7T:75-8 to 24). Defendant believed that people were out to hurt or harm him, cause an upheaval in his life, or possibly try and kill him. As a result, defendant believed he was the subject of "gang stalking." So much so that while driving around in his Impala, defendant required Ms. Fiore to take her phone apart so he could not be "tracked" and frequently made her change her telephone number. Importantly, defendant was very familiar with firearms. Ms. Fiore, who had only been to a firing range with her dad and defendant a sum total of two times, was not. (7T:91-12 to 93-96-5; 187-23 to 187-21; 191-3 to 22; 193-

15 to 17).

On May 2, 2018 – the day before the shooting – defendant and Ms. Fiore went to a park in Jackson so defendant could work out. Typically, while defendant exercised, Ms. Fiore would edit pictures on her phone, draw, paint or listen to music. On that particular day, they ended up sleeping in the park. (7T:101-100-25 to 101-12). The following morning, they got up, went to get food, and then decided to go to the beach in Asbury Park. The arrived at the beach around lunch-time and spent the day there. They left the beach around 5:30 p.m. and went to the laundromat in Neptune City. They left the laundromat at approximately 8:30 p.m. and then drove around for a while.

Defendant needed to use the bathroom, so he parked at the boardwalk in Asbury Park to use a Port-a-John. Ms. Fiore stayed inside the car. (7T:121-11 to 124-18). Notably, Ms. Fiore observed defendant take Adderall when they were leaving the beach. He took more when they were doing laundry and then even more prior to getting out of the car to go to the bathroom. At one point, Ms. Fiore observed defendant take two pills at once. (7T:125-2 to 10).

They continued to drive around. Defendant was talking, sometimes yelling, that people (other drivers on the road) were trying to "hit him" with radiation and trying to "fuck with him," follow him, and record him. Ms. Fiore tried to block him out by listening to music through her earbuds, but to no avail. At some point in time, after they had left the bathroom, defendant got upset and ripped her earbuds out. He yelled for her to "look at a specific vehicle," to "look at what they were doing," "they were high-beaming him." (7T:125-21 to 126-24). The specific vehicle defendant was yelling about was in fact the Mazda Protégée, driven by Sciasis Calhoun, who had the high

beams on because she knew one of the headlights were out.

In his fit of anger, defendant pulled over to the shoulder of the road to let Sciasis's vehicle pass by. Ms. Fiore, confused, asked defendant what he was doing? Defendant did not respond and she noticed he was breathing very heavy and exhibiting very high anxiety. He was "flipping out." When defendant pulled back out onto the road, he sped up to Sciasis's bumper and began flashing his high beams. Ms. Fiore had resumed listening to her music, but defendant was screaming so loud she could hear him over the music that was playing directly in her ears. He was screaming that he could not take it anymore and the this is why his life was so messed up. This was why he could not get a job and how he had to fight back. (7T:127-1 to 128-16).

Ms. Fiore, who was very focused on defendant at this point and staring right at him, observed defendant reach down on the left side of his seat and pull out a gun. At first, defendant pointed the gun at Ms. Fiore's face and she began to scream, "what the fuck are you doing? Are you going to try and shoot me?" Defendant then switched hands and with his elbow he put his window down. He then put the car in neutral. When the car began to slow down, Ms. Fiore screamed at defendant, "Why are we slowing down? What are you doing? Like do you want to get arrested? What the fuck is wrong with you? Why are you driving like this? We're going to get pulled over." To which, defendant responded, "I'm sorry. I just can't take it. I have to fight back. I'm not dealing with this anymore." (7T:128-18 to 129-11).

Defendant then physically took himself out of his seat, sat on the window sill and using his left hand, he fired a shot over the windshield. Ms. Fiore saw the spark as he fired the gun. She screamed, "What the fuck are you

doing? You're going to get arrested." When she turned around, she saw Sciasis's vehicle veering to the side and thought she was pulling over to call the police. At this point, defendant "took off" and told her to take the battery out of her phone or he was going to blow her brains out. (7T:129-12 to 130-2). Ms. Fiore was shocked by the events that transpired because she had no idea that defendant had a loaded handgun in the passenger compartment of their vehicle. (7T:130-12 to 21).

After defendant fled the scene and as he was traveling down Route 33, Ms. Fiore noticed a police officer was behind them. Her first thought was defendant was going to get arrested. She called him a psycho and he told her to shut up. Defendant then made a left turn into a gas station. When the attendant came up to the car, defendant told him, "never mind." After the police officer drove passed them, defendant drove to the other side of the gas station and exited. Defendant drove to his cousin's house and parked behind a horse trailer. Both he and Ms. Fiore fell asleep until they were awakened by police the next morning. (7T:130-24 to 132-10; 134-5 to 8).

After been startled awake, Ms. Fiore fully complied with police. When asked by police where was the gun that was fired, Ms. Fiore told them she did not fire a gun. When asked if anyone else fired a gun – if he [defendant] fired the gun, Ms. Fiore responded, "yes." (7T:135-3 to 12). It was at the Freehold Township Police Department that Ms. Fiore learned that the shot defendant fired killed somebody. (7T:136-2 to 21).

While defendant and Ms. Fiore were being questioned, an MCPO forensic unit was dispatched to the scene of the shooting on Route 33 to process the crime scene. All medical personnel had left. The Mazda Protégée

was positioned to the extreme left of the exit ramp and there was a clear skid mark that went from the passenger side tires straight back 52 feet. (66-6 to 22). The driver's door and the passengers front and rear doors were open and located on the rear passenger side was a child safety seat. The rear driver's side window had a bullet hole. There was broken glass throughout the inside of the car, as well as on the outside of the car. (5T:56-4 to 57-8; 62-13 to 16; 68-16 to 69-7). Blood, biological staining and brain matter were observed on the rear seat and the front passenger seat. The exterior of the vehicle was photographed and forensically processed. (5T:58-17 to 59-20; 68-16 to 81-18). Afterwards, it was towed from the scene to the evidence garage at the Monmouth County Prosecutor's Office. (5T:85-15 to 87-24). The bullet that entered the car through the rear passenger window was not recovered inside the vehicle, nor located within the surrounding area. (5T:79-13 to 19).

At approximately 10:36 a.m. on the morning of May 4, 2018, search warrants were obtained for both the Mazda Protégé and defendant's Chevy Impala. (5T:99-13 to 25). Four detectives were assigned to search the Impala. Two detectives were assigned to the interior compartment, one detective assigned to the trunk and a fourth assigned as the photographer who would determine what items of evidence would be collected and packaged. (5T:100-6 to 13).

In general, there were a significant number of personal items inside the Impala. Inside the trunk, on the very top, was a big blue bag filled with laundry. Underneath the laundry bag was more clothing. Everything in the trunk was removed and the items were placed on craft paper on the floor of the garage. As commonly found in most vehicles, there was a liner inside the

trunk with voids that are built into those areas. When the liner was removed and the voids inspected, two handguns were recovered. One was a silver revolver wrapped up in a t-shirt and the other one was a semi-automatic pistol inside of a case. (5T:101-5 to 102-25).

Other items found within trunk and passenger compartment of the car were a silver and black box filled with ammunition, various other bullets, discharged cartridges, a speed loader for the revolver, a .38 Special federal cartridge found in the front center arm rest, brass knuckles found in the driver's door pocket, a black knife with a sheath, a box of shotgun shells, also with discharged shells, and an empty beige handgun case found behind the driver's side rear passenger seat, and a disassembled STE smart phone on the front passenger floor, Sega game system, headphones, a work shirt with an EMS patch, a sandwich bag with suspected marijuana, and a Walgreens prescription bottle with defendant's name containing the generic drug for Adderall, which had 53 pills out of 120 pills remaining. All these items were photographed and placed into evidence. (5T:103-4 to 25; 108-13 to 117-2; 113-4 to 20; 114-14-115-13; 199-12 to 209-2; 6T:44-10 to 58-4; 76-10 to 13).

The revolver found wrapped inside the t-shirt was a Smith and Wesson .38 special six shot revolver. Inside the chamber were five bullets. Upon further examination of the handgun, it was determined that the sixth bullet had been fired because there was a depression in the primer indicating that that the primer had ignited the gun powder, causing an "explosion" that propelled the bullet out of the cartridge. (5T:109-12 to 111-4). The second handgun recovered was a Taurus International PT 140 pro, which was loaded, charged (magazine was inside the gun and a bullet was loaded inside the chamber) and

found inside a gun case. (5T:111-19 to 112-18).

Ms. Fiore was victim to defendant's very abusive behavior throughout their five-year relationship. After witnesses the shooting, she broke off the relationship. (7T:90-15 to 23; 193-20 to 22). Despite the breakup and while incarcerated pending trial, defendant sent Ms. Fiore a letter. This type of sentiment was not the normal during their relationship. (7T:137-22 to 139-23; 141-24 to 142-11). On July 3, 2018, defendant called Ms. Fiore from jail. (7T:149-14 to 20). After saying hello, defendant told her "there's a speculation that my bullet wasn't the bullet that hit that girl." Defendant claimed there was a "second shot fired." He asked, "Remember...you heard something while we were driving away, right? Ms. Fiore unequivocally stated, "No." Defendant then immediately changed the subject and asked her how she was doing and where she was living. (7T:153-4 to 154-24; see also; 169-7 to 21). Ms. Fiore tried to hang up, but went on to accuse defendant of cheating and lying to her. Defendant denied he did either. (7T:154-23 to 157-25; 160-1 to 162-25). When defendant mentioned his letter and that he wanted to marry her, Ms. Fiore replied, "Marrying me is, is a joke. That's a joke." When defendant asked why she thought it was a joke, Ms. Fiore responded, "Because it's not fucking true." Defendant told her "to just stop and tell me what's going on." (7T:160-10 to 19).

In between telling Ms. Fiore he loved her, he would interject his own theories about the shooting. He emphasized that gang members were following them that they were planning to shoot him. Ms. Fiore listened, but accused him of lying. When Ms. Fiore told defendant that "she [Sciasis Calhoun] didn't deserve to die." Defendant responded that it was an accident,

"[b]ut I did it out my window like, to scare them. I didn't know it was going to hit." He further tried to justify his actions. (7T:163-23 to 166-13). When he failed to convince her of his version of events, he changed gears and begged Ms. Fiore to answer his future calls and asked her if the Prosecutor had called her. He stated again that he loved her and that he would tell her the truth tomorrow when he called around the same time. The call ended. (7T:166-23 to 168-25).

The parties stipulated to certain facts. Pursuant to an affidavit from New Jersey State Trooper II, James Hern, a search of the New Jersey State Police Firearm Records was conducted to determine if defendant had a permit to carry a handgun, a permit to purchase a handgun, a firearms purchaser identification card, or permit for an assault weapon. He had none of the above. (8T:54-7 to 17). The parties also stipulated that if Delores Coniglio Rivera, a Forensic Scientist II, with the New Jersey State Police Office of Forensic Science were called to testify as a witness, she would be qualified as an expert and would testify that that on October 19, 2018, she compared the buccal swabs taken separately from inside the cheeks of Nicole Fiore and defendant to the swabs taken from the trigger and grip and all other areas of the .38 caliber Smith and Wesson revolver found in the truck of defendant's car. Neither were of sufficient quality and/or quantity for comparison purposes. Both stipulated affidavits were moved into evidence. (8T:55-10 to 56-11).

LEGAL ARGUMENT

POINT I

THE JURY VERDICT WAS NOT INCONSISTENT.

Despite the clear record announcing the verdict in this case, defendant

first argues that "the jury's completion of the verdict sheet indicated that not only did it find him guilty of purposeful murder, it also unanimously (and contradictorily) found he committed each lesser-included manslaughter offense." (Db 8). This entire argument centers upon appellate counsel's "belief" that a copy of the verdict sheet attached to a motion for new trial by trial counsel following the verdict – who is now deceased and cannot confirm or deny his post-conviction supposition – is the true copy of the verdict sheet filled out by the jury. (Da 34). This argument, supported only by a self-authenticating certification with admittedly no personal or direct knowledge as to who filled out the verdict sheet appended to his appeal, is wholly contradictory to the verdict announced in open court and thereafter confirmed by polling the jury. A verdict that was clearly stated on the record, thus leaves no room for confusion. As such, this argument is simply without merit.

The right to a unanimous verdict is firmly rooted in our rules of procedure and our decisional law. See R. 1:8-9 (providing that "[t]he verdict shall be unanimous in all criminal actions"); State v. Milton, 178 N.J. 421, 431, (2004); State v. Lipsky, 164 N.J. Super. 39, 45, 395 A.2d 555 (App. Div.1978) (explaining that New Jersey's "constitutional guarantee of a jury trial in criminal causes ... is violated unless the verdict is the product of 12 jurors ... who have deliberated together to reach a unanimous decision") (internal citations omitted). The fundamental nature of the right to a unanimous verdict demands that the verdict be more than a perfunctory tally. It must stand as an abiding assurance of carefully considered deliberations and a faithfully rendered verdict.

To ensure that no uncertainty remains about the verdict and its

unanimity, our court rules afford all parties the right to poll the jury after the foreperson has announced the verdict, but before the verdict has been officially recorded. Milton, 187 N.J. at 432 (citing R. 1:8-10.). Polling is a "'practice of long standing [that] requires each juror to answer for himself, thus creating individual responsibility, ***eliminating any uncertainty as to the verdict announced by the foreman***.'" State v. Vaszorich, 13 N.J. 99, (quoting State v. Cleveland, 6 N.J. 316, 322 (1951)), cert. denied, 346 U.S. 900, (1953); see R. 1:8-10 (emphasis added). Polling permits detection and resolution of confusion and disagreement and clarification of the precise nature of verdict. Milton, 178 N.J. at 433.

In the instant case, defendant's argument centers upon a copy of a verdict sheet he believes was submitted by trial counsel in his motion for new trial, as proof of an inconsistent verdict. (Da 28-30). However, there is overwhelming evidence on this record negating defendant's theory. First, the forewoman – in open court – announced the jurors had come to a unanimous verdict. (10T:9-13 to 17). Then, reading from the very verdict sheet defendant takes issue with in this appeal, the court asked how the jury found as to Count 1 of the indictment, "murder by purposefully and knowingly causing the death of Sciasia Calhoun," to which the forewoman responded, "Guilty." (10T:20 to 25). The court then specifically stated: "Okay, and following the instructions, you go to question 4." (10T:10-1 to 2). In doing so, the record clearly reflects not only that the jury followed the clearly delineated instructions on the verdict sheet and skipped over the questions related to the lesser-included offenses of aggravated manslaughter (question 2) and the lesser-included offense of reckless manslaughter (question 3) because they had found him guilty of

purposeful murder, but also that there was a complete understanding among all the jurors, parties, and the judge that based on their finding of guilt for purposeful murder, the jury did not convict defendant on the lesser-included charges.

The judge then continued down the verdict sheet. The forewoman pronounced defendant guilty as to question number 4 regarding count 2 – possession of a weapon for an unlawful purpose (10T:10-3 to 8); question 5 regarding count 3 – unlawful possession of a weapon (Smith & Wesson .38 revolver) (10T:10-9 to 16); question 6 regarding count 4 – unlawful possession of a weapon (Taurus 40 semiautomatic handgun) (10T:17 to 24); question 7 regarding count 5 – endangering another person (Herve Michel) (10T:10-25 to 11-5); and question 8 regarding count 6 – endangering another person (A.M.) (10TL11-6 to 11). The court then realized it skipped question 1A, following the verdict for purposeful murder and went back to ask if the jury believed the defendant committed the murder by his own conduct. The forewoman answered "Yes." (10T:11-12 to 19).

Most importantly, after the verdict was announced, the judge asked the forewoman to hand up to verdict sheet and asked that the jury be polled to confirm their verdict. (10T:11-20 to 23). When asked if the verdict announced was their verdict, each juror responded in the affirmative. And while juror number 5 and juror number 8 responded "here" instead of "yes," this does not indicate – in any way – that they were uncertain as to the verdict the forewoman announced, nor that there was any lack of unanimity in the verdict. (10T:12-1 to 22); see Milton, 178 N.J. at 433 (reasoning that "by asking whether the juror still agrees with the verdict, the trial court gives each juror

an opportunity to express his or her decision freely, unrestrained by pressure that may have beset the prior deliberations"). The judge then specifically stated: "***I have reviewed the verdict sheet. It is accurate as announced by the Foreperson.*** The verdict sheet has been marked as C-2, as a court exhibit. I'll also indicate that the juror handed the court officer a note which reads, we have a unanimous verdict. Nothing else." (10T:16-2 to 7) (emphasis added). The fact that the judge stated he reviewed the verdict sheet and it was "accurate as announced by the Foreperson" completely negates defendant's claim that his appended verdict sheet was the one filled out by the jury. It simply belies logic to believe that a seasoned criminal trial judge would allow a verdict sheet with every offense checked off to be admitted into evidence without any type of colloquy with the jury or the parties, especially in light of the judge's specific comments that he reviewed the verdict sheet handed to him. It is equally unbelievable that defendant's attorney would have glossed over such an issue following trial. On appeal, defendant finds support in the fact that the verdict sheet he asserts is the true copy was appended to trial counsel's brief for his motion for new trial. Yet, trial counsel made no mention of any issue with the verdict sheet the entirety of his argument to the court during that motion. (See 11T:3-15 to 9-11).

As the record makes abundantly clear, the jury convicted defendant of purposeful murder and did not render additional verdicts for the lesser-included offenses. The announcement of the verdict by the forewoman followed by the immediate polling of each juror – all recorded on CourtSmart and made part of this record – refutes defendant's argument entirely. In fact, contrary to defendant's assertions, once the jury announced that defendant was

guilty under question 1, he was not required to question the jurors regarding the lesser-included offenses in questions 2 and 3 since the finding of guilty on the more serious charge necessarily negated the need to do so. (See Db 12-13).

In that same vein, defendant's unsupported assertion that "a reasonable jury" may have convicted [defendant] of one of the lesser-included offenses based on "the statements by [defendant] that he never intended to actually hit the car but only scare the occupants, the improbable circumstances of the shooting, and the testimony surrounding [defendant's] mental health issues" is equally negated by the record. To be sure, this jury heard the testimony of defendant's violent behavior in the years, days and minutes before the shooting. They heard testimony and viewed the evidence as to his odd behavior (not mental illness – in fact there was no actual testimony that defendant suffered from any mental illness, nor did the State concede defendant suffered from any mental health issues). They heard testimony of his Adderall abuse leading up to the day of the shooting. They heard testimony of his abusive and controlling relationship with Ms. Fiore not only in the words of Ms. Fiore, but confirmed by his own words during his call to her from jail. Along with that evidence, the jury also heard powerful evidence from Ms. Fiore recounting the horrific events of the shooting where an innocent family was simply driving down the road and encountered defendant. The jury heard that in an unprovoked rage, defendant grabbed a gun, and fired a single shot out the window, which based on the sheer unfortunate circumnutates of the location, speed of the vehicles and the trajectory of the

bullet fired, struck the temple of Sciasia Calhoun and lodged inside her brain, ultimately killing her.

The record in this case demonstrates the verdict was based on the overwhelming evidence presented and does not, in any way, support an argument that this jury was confused and rendered an inconsistent verdict. There is simply no "adequate basis" to now look behind the jury verdict and infer, without a shred of viable evidence, that they jury believed defendant committed one of the lesser crimes. (Db 16). As such, defendant's conviction must stand.

POINT II

A JURY INSTRUCTION ON DIMINISHED CAPACITY WAS NOT REQUIRED.

Defendant next argues that the trial judge committed error by failing to charge diminished capacity because defendant's "severe mental health issues" were "uncontested" as "it was understood by all parties and the court that [defendant] would be making an issue of his psychological problems at trial with an eye towards a diminished capacity defense." He further contends that the basis for the instruction was clearly indicated in the record. (Db 16-17). First, defendant's understanding of the record misplaced. The State never agreed, nor ever stipulated that defendant suffered from any type of mental health issues. And while the State recognized that defendant may present evidence that he suffered from a mental illness at trial, this in no way equates to a concession that he had a mental illness. Second, defendant wholly failed to present a single shred of reliable evidence that he suffered from a mental disease or defect that caused the inability to form the required mental state –

purposeful – as required by law. As such, this argument has no merit.

A diminished capacity defense, recognized in N.J.S.A. 2C:4-2, provides in pertinent part that "[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense." For diminished capacity to go to the jury, the record must contain competent, reliable evidence of the predicates for diminished capacity. State v. Breakiron, 108 N.J. 591, 617 (1987). Thus, a defendant asserting diminished capacity must present a diagnosis of an underlying mental disease or disorder. State v. Reyes, 140 N.J. 344, 364-365 (1995). Further, the mental disease or disorder must be of a kind that can prevent or interfere with the ability to form the mental state required for the offense. State v. Galloway, 133 N.J. 631, 647 (1993). Not every mental disease or disorder affects the ability to form the required state of mind. State v. Nataluk, 316 N.J. Super. 336, 344 (App. Div. 1998).

A jury instruction on diminished capacity is required only when (1) the defendant "has presented evidence of a mental disease or defect that interferes with cognitive ability sufficient to prevent or interfere with the formation of the requisite intent or mens rea," and (2) "the record contains evidence that the claimed deficiency did affect the defendant's cognitive capacity to form the mental state necessary for the commission of the crime." State v. Baum, 224 N.J. 147, 160 (2016) (quoting Galloway, 133 N.J. at 647). "[A]ll mental deficiencies, including conditions that cause a loss of emotional control," entitle a defendant to a jury instruction on diminished capacity "if the record

shows that experts in the psychological field believe that [the defendant's] kind of mental deficiency can affect a person's cognitive faculties...." Galloway, 133 N.J. at 647. Moreover, since the criminal code does not define "mental disease or defect," the New Jersey Supreme Court has determined that "whether 'a condition constitutes a mental disease or defect is one to be made in each case by the jury after the court has determined that the evidence of the condition in question is relevant and sufficiently accepted within the psychiatric community to be found reliable for courtroom use.'" Baum, 224 N.J. at 161 (quoting Galloway, 133 N.J. at 643).

Defendant's argument that the trial court committed reversable error by not instructing the jury on diminished capacity is both factually and legally without merit. First – as an initial matter – defendant's assertion that his "severe mental health issues" went uncontested is factually incorrect. At no time did the State concede or stipulate to the fact that defendant suffered from any type of mental illness. While the State, in its opening statement, addressed the fact that defendant had seen a psychiatrist *to get a prescription for Adderall* (3T:34-10 to 14); the fact that *based defendant's continued use of the internet*, he drove around Monmouth County believing people on the roadways were invading his space, tailing him and he became increasingly preoccupied with that narrative (3T:34-21 to 35-12); and that his brother told police that defendant "*had some issues* and was in Monmouth Medical Center the past weekend" (3T"41-2 to 8), these statements – in no way – were a concession by the State that defendant suffered from any type of mental illness, even in the most general sense.

What is more, the State alluding to the fact that jurors "may end up

considering some mental health defense of a diminished capacity because I've talked to you about some of the issues that were going on with defendant during the weeks before this horrible event" simply addressed the possibility – at the outset of any evidence being presented – that such evidence may be forthcoming by the defense and certainly was not a concession that defendant actually suffered from a mental illness. Indeed, the State followed up that statement by telling the jurors, "But, I'm going to ask you when you consider seriously and diligently as I know you will, considered all the evidence in this case, I submit that you'll be firmly convinced beyond a reasonable doubt that the defendant, Kader Mustafa, shot and killed knowingly and purposefully Sciasia Calhoun, a complete stranger, on that fateful night of May 3, 2018." (3T:49-14 to 20); (Db 19). As such, the State clearly recognized in its opening that defendant may bring forth evidence of diminished capacity, but certainly never conceded it existed. To be sure, an opening statement is not evidence, only a roadmap of possible evidence presented.

Contrary to defendant's assertion as to the "understanding of the parties," the actual understanding of the parties is clear from the record. Defendant prior to trial even commencing, made it clear that he had instructed his counsel to withdraw the insanity defense, thereby taking his defense for "severe mental health issues" off of the table. (See Db 16). As the judge stated on the record prior to opening statements, "It was indicated ***quite clearly going back for some time*** that [defendant] instructed his counsel that he did not want to pursue an insanity defense and that insanity defense was withdrawn...You'll recall our previous conversations in Court on prior occasion when Mr. Venturi had indicated that you have instructed him to

withdraw any insanity defense, is that right? To which defendant responded, "Yes, Judge." (3T:10-8 to 22) (emphasis added).

With respect to a diminished capacity defense, the "understanding" from everyone – the jurors, the parties and the court – at the outset and to which the record makes clear, was that jurors might hear about, and be presented with, evidence of diminished capacity. And while they were put on notice of this, defendant made a strategic decision to forego any expert testimony or admit any documentary evidence to support the assertion that he suffered from a mental illness, or a mental disease or defect. Rather, defendant rested his case and then argued that information of his mental illness was "organically" within the record and that was sufficient to support a diminished capacity charge to the jury. (9T:14-17 to 15-1). Defendant is incorrect.

In reviewing this matter, this Court must look at the obvious record and not at the indication's defendant suggests. As the trial court properly decided, diminished capacity cases – like insanity defense cases – have their genesis in expert testimony or at best, some documentary medical evidence indicating a diagnosis or naming a mental condition the defendant is or was suffering from at the time of the crime. Defendant presented no such evidence. (9T:19-23 to 20-4). No psychiatric expert ever testified, nor was there any documentary medical evidence admitted at trial. See N.J.S.A. 2C:4-2 (stating, defendant has the initial burden to introduce evidence of a mental disease or defect tending to show that he or she was incapable or forming the requisite intent – while the burden of proof to establish the mens rea of the offense remains with the State); see also, Baum, 224 N.J. at 161. As this record reflects, the only testimony elicited was that of defendant's bizarre behavior, which as properly

held by the trial court, did not rise to the level of demonstrating defendant suffered from a mental disease or defect. (10T:18-25 to 21-20).

In addition, defendant's assertion that the trial court's decision not to give the diminished capacity instruction because there was no "expert testimony" was error completely ignores the Court's analysis and decision in Baum, thus is legally misplaced. (Db 21). In Baum, the New Jersey Supreme Court reiterated its pervious holding in Galloway, that "despite the lack of a definition in the Code...whether a condition constitutes a 'mental disease or defect' is one to be made in each case by the jury *after the court has determined that the evidence of the condition in question is relevant and sufficiently accepted within the psychiatric community to be found reliable for courtroom use.*'" Baum, 224 N.J. at 161 (quoting Galloway, 133 N.J. at 643). Following its own recitation in Galloway, the Court also cited to N.J.R.E. 702 – the rule of evidence dealing with expert testimony. Notably, the rule of evidence the Court in Baum did not cite to was N.J.R.E. 701 – the rule of evidence dealing with lay person testimony. Therefore, the Supreme Court specifically mandating that evidence of a condition needs to be one that is sufficiently accepted within the psychiatric community and one to be found reliable in courtrooms is significant language that something more than lay testimony is necessary. (Db 19; 4T:85-19 to 23).

As such, defendant's brother telling a detective that defendant had mental health problems and had recently been hospitalized does not amount to evidence that would be sufficiently accepted by the psychiatric community to diagnose a mental illness. In fact, it is hearsay evidence that would not be admissible in the first place. Likewise, a "repeated mention" by detectives that

defendant was wrapped in tin foil with a tin foil hat and that he did this often is also not the type of evidence that would be sufficiently accepted by the psychiatric community to diagnose a mental illness. (Db 19-20). To be sure, there was also lay testimony explaining defendant's behavior. Ralph Fiore testified regarding defendant's extreme weight loss (5T:15-17 to 23). Nicole Fiore testified to defendant's obsessive exercise regimen. (7T:14 to 24). Further, testimony from Nicole Fiore – a self-employed hair stylist – opining that defendant's behavior was similar to that of her schizophrenic uncle is certainly not definitive evidence that defendant suffered from schizophrenia or any other similar mental health condition. It is simply her own observation of her boyfriend's behavior. (Db 20; 7T:194-25 to 195-3). Simply because a mental health condition was mentioned does not mean defendant suffered from it, nor does it mean the record is replete with evidence. More is required than opinions about bizarre behavior. As the trial court properly decided, charging the jury would on diminished capacity on a mental disease or defect that undiagnosed and for which there is no testimony would only serve to confuse the jury. (9T:18-22 to 22-1).

Similarly, defendant's attempt to liken the need for expert testimony necessary for a diminished capacity charges to that which is necessary to charge voluntary intoxication is also legally misplaced. The standard to charge a jury on voluntary intoxication is not whether a defendant is actually intoxicated, but rather whether a reasonable juror might so find." State v. R.T., 411 N.J. Super. 35, 46-47 (App. Div. 2009) (citing State v. Polk, 164 N.J. Super. 457, 462, (App.Div.1977) (citing State v. Frankland, 51 N.J. 221, (1968)). For diminished capacity, our case law makes it clear that a specific

finding of an actual mental disease or defect is a prerequisite that a court must determine prior to such information going to the jury. The two standards are not comparable.

Finally, the "heart of the case" was not his mental illness, but how the life of an innocent woman was cut short by a random single bullet to the head, fired by a complete stranger who was angry because the car behind him was "high beaming him." (See 7T:126-13 to 127-1). To be clear, defendant fully admitted to making the conscience decision to fire a shot out of his car window to "make some noise...because you seen [sic] how they were driving. They tried to cut me off when I went right. And then they stayed in front of me." (7T:166-9 to 17). But more importantly, defense counsel, in his opening and closing statements, did not argue that defendant's mental health issues were the "heart of the case." Rather defense counsel's arguments – under no uncertain terms – pointed the finger directly at Nicole Fiore as the shooter. (3T:50-22 to 51-5; 52-19 to 21; 53-21 to 54-3; 9T:29-23 to 30-24; 33-15 to 25; 37-14 to 25). Diminished capacity was not a key defense strategy.

For these reasons, the court was not required to charge the jury on diminished capacity. The jury was properly instructed on the mens rea, not only for murder, but also for the lesser included offenses. As such, there is no reversible error.

POINT III

THE EVIDENCE PRESENTED AT TRIAL WAS RELEVANT, THUS PROPERLY ADMITTED.

Under this point, defendant makes various arguments asserting that irrelevant, thus prejudicial evidence was allowed in front of the jury to

"portray him as a disturbed loner" (Db 25), "a violent and disturbed person" (Db 26), whose use of Adderall "drove him to delusions and caused him to commit the shooting" (Db 30), was degenerated by the State because he lived in his car (Db 35), and was prejudiced by his own words in a recorded jail call (Db 39). However, none of these arguments have any substantive merit.

A. The Items Recovered from Defendant's Vehicle were Relevant to the Crime Committed, Thus Properly Admitted into Evidence.

Relevant evidence, as defined by N.J.R.E. 401, is evidence that has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." See also State v. Williams, 190 N.J. 114, 122-23 (2007); State v. Bakka, 176 N.J. 533, 545 (2003). Determination of whether evidence is relevant centers on "the logical connection between the proffered evidence and a fact in issue, i.e. whether the thing sought to be established is more logical with the evidence than without it." State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990); State v. Koskovich, 168 N.J. 448, 480 (2001); State v. Darby, 174 N.J. 509, 519 (2002). In short, relevant evidence must have probative value – a "tendency ... to establish the proposition that it is offered to prove." Darby, 174 N.J. at 520; Hutchins, 241 N.J. Super. at 358. Pursuant to N.J.R.E. 402, "all relevant evidence is admissible."

N.J.R.E. 403 provides an exception to N.J.R.E. 402, authorizing exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury, or (b) undue delay, waste of time, or needless presentation of cumulative evidence." The burden rests with the party seeking exclusion of evidence to "convince[e] the court that the factors favoring exclusion

substantially outweigh the probative value of the contested evidence." State v. Medina, 201 N.J. Super. 565, 580 (App. Div.), certif. denied, 102 N.J. 298 (1985); State v. Morton, 155 N.J. 383, 543 (1998), cert. denied, 532 U.S. 931, 121 S.Ct. 1380 (2001) (quoting State v. Carter, 91 N.J. 86, 106 (1982)). Keeping in mind that while "[t]he mere possibility that evidence could be prejudicial does not justify its exclusion," where the evidence's "probative value 'is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of jurors from a reasonable and fair evaluation' of the basic issues of the case," exclusion is appropriate. Morton, 155 N.J. at 453-54; State v. Bowens, 219 N.J. Super. 290, 296-97 (App. Div. 1987); State v. Covell, 157 N.J. 554, 568 (1999) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)); State v. E.B., 348 N.J. Super. 336, 345 (App. Div.), certif. denied, 174 N.J. 192 (2002).

The determination of admissibility under N.J.R.E. 403 falls within the broad discretion of the trial court. State v. Carter, 91 N.J. 86, 106 (1982); State v. Covell, 157 N.J. 554, 568-69 (1999); see also N.J.R.E. 104(a). It is the burden of the party seeking exclusion of evidence under N.J.R.E. 403 to convince "the court that the factors favoring exclusion substantially outweigh the probative value of the contested evidence." State v. Medina, 201 N.J. Super. 565, 580 (App. Div.), certif. denied, 102 N.J. 298 (1985); State v. Morton, 155 N.J. 383, 543 (1998), cert. denied, 532 U.S. 931, 121 S.Ct. 1380 (2001) (quoting Carter, 91 N.J. at 106). The trial court should consider undue prejudice to the State, "whose rights and those of the people it represents are also entitled to protection," when evaluating evidence under N.J.R.E. 403. State v. Wilbely, 122 N.J. Super. 463, 467 (App. Div.), rev'd on o.g., 63 N.J.

420 (1973); State v. Scherzer, 301 N.J. Super. 363, 468 (App. Div.), certif. denied, 151 N.J. 466 (1997). In fact, it is the duty of the trial court "to prevent the jury from considering evidence or information that would unduly prejudice either the State or the defense with respect to the central responsibility of the jury: determining criminal culpability." State v. Short, 131 N.J. 47, 61 (1993). See also State v. Blanton, 166 N.J. Super. 62, 72-73 (App. Div.), certif. denied, 81 N.J. 265 (1979).

Here, defendant asserts that the items removed from his vehicle had no material relation to the case and so he was significantly prejudiced. Defendant is incorrect. First and foremost, defendant committed this homicide from his vehicle. He fired the fatal shot from the driver's seat while chasing the victim down in her vehicle. Defendant was ultimately apprehended in his vehicle. The suspected handgun used to murder Sciasia Calhoun was found in the trunk of his vehicle. Therefore, as the trial court properly determined, defendant's vehicle was at the center of this investigation and was an integral part of the crime scene and all the items found within were relevant and material. (6T:65-16 to 23).

Second, the suspected murder weapon, along with another handgun was recovered in defendant trunk. It was located under piles of clothing and secreted under a hard liner, in a built-in void within the trunk, and found wrapped in a t-shirt. (5T:101-12 to 17; 102-17 to 25). Connected to those guns were complete and discharged bullets, discharged cartridges, a speed loader (a device that helps load a revolver entirely all at one time), more ammunition belonging to a shot gun consisting of a box of shotgun shells and spent ones, as well. Other weapons, such as brass knuckles and knives were also found

among the guns and ammunition. (5T:103-1 to 25) (emphasis added). The fact that all of these weapons and ammunition were found in defendant's vehicle where he fired a handgun that killed a woman is relevant and material evidence to the basic issues of the case. (6T:65-17 to 21). More specifically, defendant could have just placed the gun inside a door pocket, the center console, thrown in the backseat or on the floorboards – like the food wrappers and other personal items found inside the vehicle were found. But, defendant took the time to wrap his guns in a t-shirt and bury them under piles of clothes underneath a liner in a hole within the trunk. This evidence was very probative to defendant's knowing and purposeful actions the State was required to prove. Short, 131 N.J. at 61.

Third, defense counsel, in his opening statement, asserted it was impossible for defendant to have fired the shot that killed Sciasia Calhoun, so the fatal shot could only have come from the other person in the vehicle – Nicole Fiore. (3T:52-19 to 54-11). So, as the trial court properly decided, the fact that there are additional firearms and ammunition attributed to the defendant, including the flare gun found in defendant's lap when he was extracted from his vehicle by police, was relevant to disprove the assertion that Nicole Fiore was the shooter. (6T:66-1 to 5; 81-17 to 82-5).

As to the evidence of marijuana, defense counsel also used his opening statement to speak directly to defendant's mental capacity while also accusing Nicole Fiore of being a drug addict. (3T:50-19 to 51-2). As such, the admission of the marijuana found in the car was probative and relevant to the combat those assertions made by the defense. Likewise, the firearms purchaser identification card in someone else's name went specifically to

support the stipulation that defendant did not have, nor did he ever have, his own permit to carry a handgun, a permit to purchase a handgun, a purchaser identification card, or a permit for an assault weapon in the State of New Jersey. (8T:54-7 to 17).

In sum, the items recovered from defendant's vehicle were not improper evidence; therefore, did not facilitate improper arguments by the State. They were relevant and probative to material issues regarding state of mind and defendant's purposeful actions – like hiding the guns so they would not be in plain view and in the hopes that no one would find them, as well as proper evidence necessary to refute defendant's third-party guilt allegations. The fact that the evidence has the possibility to be prejudicial does not require its exclusion especially when the evidence was necessary for the jury to determine the culpability of the defendant. Accordingly, there is no reversible error. Morton, 155 N.J. at 453-54; Short, 131 N.J. at 61; see also Blanton, 166 N.J. Super. at 72-73.

B. The Arguments Made by the State in Summation were Proper, Thus There was No Prosecutorial Misconduct.

Defendant claims that the prosecutor made improper remarks in summation which infringed on his constitutional rights to due process and a fair trial. Defendant's argument is negated by the record. The prosecutor's remarks were fair comments on the evidence and were proper responses to defense counsel's summation remarks. Additionally, defendant did not object to all of the comments he now claims were improper, so the plain error standard applies to some of his claims. Defendant bears the burden of demonstrating plain error - i.e., error that was "clearly capable of producing an

unjust result." R. 2:10-2. The possibility of injustice must be so substantial as to "raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971). If a timely objection is not interposed, the remarks will generally be deemed harmless. State v. Timmendequas, 161 N.J. 515, 576 (1999), cert. denied, 534 U.S. 858 (2001); State v. Irving, 114 N.J. 427, 444 (1989).

In considering issues of prosecutorial misconduct, the reviewing court must first determine whether misconduct occurred. State v. Frost, 158 N.J. 76, 83 (1999). Where misconduct is identified, it does not constitute grounds for reversal unless it was so egregious that it deprived the defendant of a fair trial. State v. DiFrisco, 137 N.J. 434, 474 (1994), cert, denied, 516 U.S. 1129 (1996). Thus, to warrant reversal, a prosecutor's misconduct must constitute a clear infraction and "substantially prejudice the defendant's fundamental right to have a jury fairly evaluate the merits of his [or her] defense." State v. Roach, 146 N.J. 208, 219, cert. denied, 519 U.S. 1021 (1996).

Whether a prosecutor's misconduct denied defendant a fair trial requires consideration of both the "tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred." Timmendequas, 161 N.J. at 575. A reviewing court will consider: (1) whether defense counsel made time and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Id. at 575-76.

Prosecutors must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence. State v.

Mahoney, 188 N.J. 359, 376, (2006), cert denied, 549 U.S. 995 (2006); State v. R.B., 183 N.J. 308, 330 (2005); State v. Smith, 167 N.J. 158, 178 (2001). Nonetheless, prosecutors, like defense attorneys, are afforded "considerable leeway, within limits, in making" their closing arguments. State v. Chew, 150 N.J. 30, 84 (1997), cert denied, 528 U.S. 1052 (1998); State v. Purnell, 126 N.J. 518, 540 (1992). Accord State v. Koskovich, 168 N.J. 448, 489 (2001). Indeed, a prosecutor is "entitled to sum up the State's case graphically and forcefully." State v. Feaster, 156 N.J. 1, 58 (1998), cert denied sub nom., Kenney v. New Jersey, 532 U.S. 932 (2001); See also State v. Chew, 150 N.J. at 84. If a prosecutor's arguments are based on the facts of the case and reasonable inferences therefrom, what is said in discussing them, by way of comment, denunciation or appeal will afford no grounds for reversal. Id. Additionally, remarks made during closing arguments must be judged in relation to the entire summation and the trial as a whole. State v. Johnson, 31 N.J. 489, 513 (1960).

In summation, the prosecutor properly outlined the evidence presented and made appropriate arguments based on that evidence, including defendant's use – and abuse – of Adderall mixed with his daily use of marijuana. This argument was especially proper when taken in context with defense counsel's argument to the jury accusing Nicole Fiore of being the drug-addicted, violent shooter. Defense counsel began with warning the jury not to let the State shift the burden of proof to the defense and then went on to say:

> The burden is theirs to prove that it wasn't Ms. Fiore and you all saw Ms. Fiore testify. She was hostile. She was antagonistic. She was angry. She has a history of violence. She has a history of drug abuse. She has a history of acting out violently. She has a

> history of having violent ideas and wanting to hurt people that were irritating her which made me glad that the Plexiglas shield was between us when I handed her the papers that she denied knowing about, she snatched them out of my hand. Because I wouldn't have been surprised if she came after me at that point. She goes into the Dollar Store and is irritated by a woman and slugs her. She kicks out the window of Kader's car and has to be forcibly removed. She's stealing from her parents to buy drugs and to the point where they have to kick her out. And she wants us to believe that all she was doing was taking change. So, I would suggest that she's the violent, abusive person in the relationship, not Kader as she claims without any proof whatsoever. Not Kader. [9T:30-3 to 24].

Then, later in his summation, defense counsel argued, "But the better shot, the clearer shot, and she shot at ranges too. She knows how to shoot a gun. And she's the one with the angry, violent temper. She has the cleaner or clearer shot of the two of them." (9T:33-22 to 25).

Since the defense strategy was to not only blame Nicole Fiore as the shooter, but to also characterize her as the drug addicted, violent abuser and "Not Kader," the State's response in summation was pointed at dispelling that argument and focusing the jury's attention on the actual testimony. The State countered, "You heard testimony that on the street [defendant] tried a drug that he liked, Adderall and he wanted it. He wanted it as part of his life." (9T:45-9 to 12). The State continued by pointing to specific testimony:

> And you heard testimony about the research that he did to try and get what he wanted. And he did. He ended up getting exactly what he sought from that doctor, Adderall. Adderall. ... But I submit to you, ladies and gentlemen, that a reasonable view of the evidence in this case show that the Adderall, but more importantly, the abuse of Adderall, the use of it in ways that no one contemplated and no one should. And the demons that created inside the defendant, I submit to you is what lead to the tragedy of

Thursday May 3rd, of 2018. [9T:45-9 to 46-4].

As part of their burden, the State necessarily argued to the jury who defendant was on the day of the shooting. In other words, what was his state of mind prior to, during and after the shooting? The State argued, based solely on the testimony presented, that he drove around constantly in his Chevy Impala. The State explained how unfortunately that was his life because he was unemployed and living in his car. (9T:63-3 to 11). The State pointed to Nicole Fiore's testimony about defendant's daily habits. He exercised daily, used marijuana daily and used Adderall daily. Regarding defendant's Adderall use, the State recounted the testimony of Nicole Fiore – his constant companion – who detailed how much Adderall defendant took the day of the shooting. The State pointed to the bottle of Adderall found in his car, which listed the actual dosage defendant was to take and how the testimony of Ms. Fiore made clear that he took in more than he was prescribed on the day of the shooting. He took too many tablets at one time. He was abusing Adderall. The State reminded the jury that they heard no expert testimony about Adderall, but in any event, it was their job to talk and deliberate about how the impact that using drugs in a way that are not prescribed played a role in what happened. (9T:71-4 to 21; 72-19 to 73-10).

Importantly, the judge instructed the jury on voluntary intoxication, but clearly that defense was rejected by the jury. (Db 34). Defendant can hardly argue that he was denied a fair trial by the State's arguments regarding his use and abuse of Adderall and daily use of marijuana in summation, which were firmly supported by the testimony at trial, when the very existence of that evidence allowed for the jury to decide if he was voluntarily intoxicated.

Defendant's displeasure with the fact that the jury did not believe in that defense does not now equate to an unfair trial.

All of the State's arguments in summation were centered upon the testimony presented, the evidence admitted at trial, and reasonable inferences therein. Contrary to defendant's incorrect interpretation of this record, the State's arguments were not "complete inventions by the prosecutor." (Db 34); compare, Mahoney, 188 N.J. at 376; R.B., 183 N.J. at 330; Smith, 167 N.J. at 178. At no time during the State's summation did the prosecutor suggest, or describe the defendant as a "drug crazed maniac or a drug crazed psychotic maniac." (Db 33; 35). Such melodramatic characterization of the State's summation finds no support in this record.

Finally, defendant's citation to State v. Mazowski, 337 N.J. Super. 275 (App. Div. 2001), to stand for the proposition that the State first elicited testimony and then later argued during summation that defendant was a drug addict and that is why he committed murder is both factually and legally misplaced. First, the State never argued that defendant was a drug addict. The State argued that defendant took too much of his prescription. This was supported and based on the testimony of Nicole Fiore, who was with defendant that entire day and observed how many pills he took along with evidence of the actual prescription bottle with his left-over pills recovered from his vehicle. The State further argued that on the day of the shooting, defendant mixed his over-use of Adderall with marijuana. (9T:71-4 to 73-18). The only party to label someone a drug addict was defense counsel referencing Nicole Fiore in his summation. (9T:30-5 to 8). The State made no such argument about defendant.

Second, the issue in Mazowski was that the prosecutor made the improper argument (and improper assumption) that "all drug addicts need money," so necessarily that was the motive for the robbery. However, that court found there was no evidence presented at trial to support that argument in summation. Id. at 287. In the instant case, the State never argued that because defendant was a drug addict, he committed murder. Rather, the State recounted the testimony of defendant's over-use of Adderall throughout the day and his resulting escalation of paranoid and violent behavior. By doing so, the State directly countered defendant's assertion that Nicole Fiore was the out of control culprit in the Chevy Impala that fateful day. As such, the State's arguments and reasonable inferences therein were all factually supported by the evidence in the case. The State's arguments, judged in relation to the entire summation and the trial as a whole, was proper. Thus, there is no basis for reversal. State v. Johnson, 31 N.J. 489, 513 (1960).

C. The State did not Engage in Misconduct Regarding Defendant's Homelessness and Poverty.

Defendant, once again, mischaracterizes the record, only this time he asserts the State engaged in misconduct regarding his homelessness and exploited his poverty. In other words, defendant asserts the State told the jury that defendant committed murder because he was poor. This argument too, finds no support in this record.

To be sure, the State never elicited any testimony from any witness stating or even suggesting that defendant shot and killed Sciasia Calhoun because he was poor and living out of his vehicle. The State never elicited any testimony, nor did it make any arguments that defendant's poverty made him

"more likely to be violent, dangerous and engage in criminal activity." (Db 38). The fact that defendant was living in his vehicle was a necessary fact because the crime was committed from his vehicle. As such, it was elicited as a circumstance, not as a motive for the crime or to suggest that due to his homelessness, he had a propensity to commit the crime.

His passenger, Nicole Fiore, was a necessary witness because she was his constant companion, his girlfriend, and in the passenger's seat as a witness when he committed the crime. Importantly, as angry and accusatory as she was towards defendant in her testimony, she never once commented on their poverty or disparaged defendant for their living situation. Throughout the entire trial, at no time was defendant "demonized based on his status as a homeless person." (Db 38); See State v. Mathis, 47 N.J. 455, 471 (1966); State v. Stewart, 162 N.J. Super. 96, 100 (App. Div. 1978).

In its summation, the prosecutor properly confined his arguments regarding to the facts and evidence presented at trial. Mahoney, 188 N.J. at 376; R.B., 183 N.J. at 330; Smith, 167 N.J. at 178. Like his arguments above regarding the State labeling defendant as a "drug addict," defendant's arguments regarding poverty are a distorted characterization which find no support in this record. Accordingly, there is no basis for reversal.

D. The Jail Call was Properly Admitted.

Lastly under this point, defendant argues the jail call was "irrelevant and contained severely prejudicial statements by Ms. Fiore denigrating [defendant]." However, as the trial court properly determined, this argument has no merit for several reasons.

As an initial matter, defendant never requested the State, nor filed a motion to the court, to have the jail call redacted until the morning it was to be played to the jury. The call was part of discovery for three years, so it was "known to the defense for quite some time." (7T:177-4 to 17). Although defense counsel was not defendant's original attorney, he nevertheless had all the discovery in the case in plenty of time to make any necessary motions regarding this jail call. Defense counsel's failure to do so does not now equate to reversable error. In any event, the call was relevant and material to prove that defendant fired the shot that killed Sciasia Calhoun. As defense counsel opened his case accusing Nicole Fiore as the shooter, and continued with that assertion throughout the entire trial, the jail call, and defendant's admissions therein, directly rebutted this claim. As such, the call was probative to negate defendant's third-party allegations. N.J.R.E 401.

Second, except for defendant's admission to firing the shot that killed Sciasia Calhoun, nothing said in the call admitted to or alleged any violations of the law. (9T:178-1 to 18). The fact that Nicole Fiore was upset with defendant for various alleged indiscretions and accused him of not telling the truth did not constitute other crimes evidence. N.J.R.E. 404(b); (9T:178-10 to 18). Indeed, Ms. Fiore had already alluded to her troubled five-year relationship with defendant during direct examination, even testifying that after the shooting she was planning to leave him. (9T:134-17 to 21). Thus, this was not new or surprising information for the jury amounting to anything even remotely prejudicial.

Third, Ms. Fiore did not call defendant a liar to disparage him. To the contrary, Ms. Fiore called defendant a liar twice, each time after he tried to

change the facts and circumstances of the shooting in a failed attempt to convince her he was "scared for his life," that "those people were gang members," and how "they were probably going to shoot me and you," so it was basically not his fault. (See 9T:163-25 to 164-14; 165-22 to 166-22). Ms. Fiore responded, "You better start telling the mother fucking truth, man" (9T:164-11 to 14). Then, when defendant tried to convince her that "the car was following us. That car was following me. From Neptune. You had your headphones on," Ms. Fiore responded, "I don't know what's going on with you. You're lying so much. I mean (indiscernible) but my heart is broken for that girl that lost her life. I'm, my heart breaks for her." (9T:165-7 to 25).

Finally, the jail call was played during the State's direct examination. Therefore, Ms. Fiore was still on the witness stand and was subject to cross-examination regarding everything she said in the call. Defense counsel had ample opportunity to test the reliability and counter of all statements she made during the call regarding their relationship and his version of the events that evening. State v. Weaver, 219 N.J. 131, 151 (2014). (stating, "underlying a criminal defendant's 'right to confront his accusers' is the belief that subjecting testimony to cross-examination enhances the truth-discerning process and the reliability of the information"); State v. Branch, 182 N.J. 338, 348 (2005) (quoting California v. Green, 399 U.S. 149, 158 (1970) ("Cross-examination has frequently "been described as the 'greatest legal engine ever invented for the discovery of truth'")); State v. Hockett, 443 N.J. Super. 605, 619 (App. Div. 2016) (stating, "Cross-Examination necessarily includes the right to impeach or discredit a witness"). As all evidence is prejudicial, the admission of this particular evidence – the jail call – did not cause reversible error.

POINT IV

BASED ON THE FACTS AND CIRCUMSTANCES OF THIS CASE AND REVIEWING THE JURY INSTRUCTION AS A WHOLE, ANY ERROR IN THE INSTRUCTION WAS HARMLESS, THUS NOT CAPABLE OF PRODUCING AN UNJUST RESULT.

"Not every trial error in a criminal case requires a reversal of the conviction. If it is not of constitutional dimensions, it shall be disregarded by the appellate court 'unless it is of such a nature as to have been clearly capable of producing an unjust result . . . .'" State v. McKinney, 223 N.J. 475, 496-497 (2015) (citing State v. LaPorte, 62 N.J. 312, 318-19 (1973) (quoting R. 2:10-2)). "The test of whether an error is harmless depends upon some degree of possibility that it led to an unjust verdict. The possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." Id. (citing State v. Bankston, 63 N.J. 263, 273 (1973)). "When the evidence of guilt is overwhelming, that evidential error may be found harmless beyond a reasonable doubt." State v. Burton, 309 N.J. Super. 280, 289 (App. Div.), certif. denied, 156 N.J. 407 (1998).

In a case where, as here, the trial judge correctly instructed the jury in other components of the charge, "[t]he test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." State v. Jackmon, 305 N.J. Super. 274, 299 App. Div. 1997) (alteration in original) (quoting State v. Sette, 259 N.J. Super. 156, 190-91 (App. Div.), certif. denied, 130 N.J. 597, 617 (1992)), certif.

denied, 153 N.J. 49 (1998). "[T]he key to finding harmless error in such cases is the isolated nature of the transgression and the fact that a correct definition of the law on the same charge is found elsewhere in the court's instructions." Ibid.

For example, in State v. Smith, a panel of this Court concluded that the judge "fully and accurately instructed the jury on the elements of attempt" even though the instruction was given "during an explanation of the law relating to another offense." 322 N.J. Super. 385, 399 (App. Div.), certif. denied, 162 N.J. 489 (1999). This Court held that, based on the defendant's testimony, the overwhelming evidence that established his guilt, and the "appearance elsewhere in the jury instructions of a proper charge[,] . . . the failure to define attempt in the robbery charge did not prejudice defendant's rights." Id. at 400.

Contrary to defendant's assertions, the jury received full and accurate instructions on the necessary definitions and elements for unlawful possession of a firearm, despite the court using the "other weapons" template. The use of a model jury charge does not equal a proper charge. A proper instruction requires the jury be told the elements of the crime the State must prove, the requisite mental state and all appropriate definitions. That is exactly what the jury was told in this case.

Under N.J.S.A. 2C:39-5(b) – Unlawful Possession of a Handgun – the first element the jury must be instructed on is that the State's exhibit – marked into evidence – is a handgun, or there was a handgun. (Pa 1); compare (Pa 5). The jury was properly instructed as to this element. In fact, the court specifically told the jury the State alleged that defendant possessed two

weapons, marked into evidence as S-9 and S-10, and then described those particular exhibits as "a Smith & Wesson 38 caliber revolver and a Taurus 40 caliber semi-automatic handgun..." (9T:159-1 to 21). This instruction fully comports with the first element under N.J.S.A. 2C:39-5(b). Also under this element, the court must instruct the jury as to the definition of a handgun. See (Pa 1). That definition was given to this jury. More specifically, immediately prior, in the instruction for possession of a weapon for an unlawful purpose, the court fully defined a firearm. (9T:153-5 to 12); compare (Pa 1). The fact that the definition appeared "elsewhere in the instructions of a proper charge" does not mean the instruction was improper or that the defendant was prejudiced. Smith, 322 N.J. Super. at 400.

The second element is that the defendant knowingly possessed the handgun. (Pa 1); compare (Pa 5). This jury was fully instructed on acting "knowingly," as well as complete definitions as to the types of possession. See (9T:154-11 to 155-7; 159-22 to 160-14; 160-25 to 162-1); (Pa 1-2); compare (Pa 5-6). In fact, inside the definition of knowingly, the court specifically identified the weapon to be a firearm, stating, "Thus, the person must know or be aware that he possesses the item, here ***two firearms*** and he must know what it is that he possesses or controls, in other words ***that they were firearms***." (9T:160-20 to 24) (emphasis added).

The full instruction for the final element, that the defendant did not have a permit to possess such a weapon, was also given. The parties stipulated to the fact that defendant did not have a permit. The stipulation was read to the jury at the time it was introduced into evidence. (8T:54-7 to 55-19). Then, in its final instructions and in describing the types of evidence the jury could

consider, the court referenced this earlier instruction, reiterated the exhibit number, and told the jury that they should treat stipulated facts as true, but "as with all evidence undisputed facts can be accepted or rejected by the jury in reaching a verdict." (9T:130-6 to 14).

Since this Court must look at the instruction, not in isolation, but as a whole, the fact that some of the explanation of the law occurred in other portions of the instruction does not equate to reversible error. Jackmon, 305 N.J. Super. at 299; (quoting Sette, 259 N.J. Super. at 190-91. In sum and substance, this jury was properly instructed on every element and necessary definition for second-degree possession of a weapon. The fact that the fourth-degree model jury charge template was used instead of the second-degree template amounts to nothing more than harmless error because the instructions – as given – were not capable of producing an unjust result, nor did they provide an avenue for the jury to come to a verdict they would not have otherwise come to. McKinney, 223 N.J. at 496-497 (citing LaPorte, 62 N.J. at 318-19 (quoting *R.* 2:10-2)). To be sure, it is undisputed that Sciasia Calhoun died from a gunshot wound to the head. To that end, there was overwhelming evidence of defendant's guilt, including defendant's own admission that he fired a shot from a handgun that killed Sciasia Calhoun. In other words, there was no question or possible confusion as to what type of "weapon" killed Sciasia Calhoun or that defendant was the one who possessed it.

However, even if this Court were to deem the instruction given was error, only the two charges for possession for a weapon would need to be reversed. See State v. Kille, 471 N.J. Super. 633, 648 (App. Div. 2022) (holding that reversal of the two weapons offenses due to a difference in the

written jury instructions and the verbal instructions given do not affect defendant's other conviction for aggravated manslaughter, which was affirmed); see also, State v. R.P., 233 N.J. 521 (2013) (holding that guilty verdict can be molded when defendant was given his day in court, all of the elements have been properly established and defendant has not established prejudice).

POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE A LIMITING INSTRUCTION FOLLOWING THE STATE'S SUMMATION.

As stated under POINT III (B) above, reversal of a conviction based on the prosecutor's conduct is appropriate only if that conduct was "'so egregious that it deprived [the] defendant of a fair trial.'" State v. DiFrisco, 137 N.J. 434, 474 (1994) (quoting State v. Pennington, 119 N.J. 547, 565 (1990)), cert. denied, 516 U.S. 1129 (1996). Likewise, whether a prosecutor's misconduct denied defendant a fair trial requires consideration of both the "tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred." State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 534 U.S. 858 (2001). Defendant's argument that the lack of a limiting instruction following the State's summation deprived defendant of a fair trial is simply without any substantive merit.

Here again, the Prosecutor's remarks in summation were appropriately responsive to defense counsel's summation. More specifically, defense counsel, in speaking directly to aggravated manslaughter, stated that it requires "number one, that the person who did the shooting acted recklessly. Well,

that's an easy one. We can all agree on that. No if's, and's or but's, its reckless." (9T:40-11 to 18). He then went on to the "second element" being the extreme indifference to the value of human life and stated that death in this case was "highly improbable" and "there was much less than a 50 plus one percent chance that death would ensue." He went on to opine that it was "obviously reckless to go firing a gun in the direction of anything" and "so that would be reckless manslaughter on the part of whomever the shooter was." (9T:40-19 to 41-11).

In response to defense counsel's overly simplistic and matter-of-fact description of the crime committed in this case, the Prosecutor argued that manslaughter was not applicable to this case and focused the jury's attention on what it means to be reckless or engage in reckless conduct. First, the Prosecutor stated defendant could only be reckless if he was "aware of and consciously disregarded a substantial and unjustifiable risk that death will result from his conduct and that the death of Sciasia Calhoun was a mere possibility." (9T:90-1 to 10). Although he continued on using an example of Driving While Intoxicated (DWI), the context here is important because the Prosecutor then clarified, "That's not this case....[defendant] didn't consciously disregard anything. He consciously decided, not disregarded, he consciously decided that he was going to shoot the person who had the temerity to flash their brights [sic] in his rearview mirror. That's what he planned on doing. That's what he wanted to do. That's what he did." (9T:30-23 to 91-5). Placed in its proper context within the entire argument and with the fact that the jury was well aware of the jail call where defendant admitted to Nicole Fiore that he actually meant to shoot at Sciasia Calhoun's car

because it was following him – a call that was also played by the Prosecutor during summation (see 9T:95-12 to 20; see also, 7T:166-5 to 17) – this argument was a proper rebuttal to the defense suggestion that were "no if's and's or but's about it this case being "obviously reckless." (9T:40-19 to 41-11).

To be clear, the defense counsel's reckless manslaughter argument was not his linchpin argument. It was merely a failsafe argument in the event his previous arguments pointing the finger at Nicole Fiore failed. As such, the State's example of recklessness certainly did not deprive defendant of a fair trial. As the trial court stated in denying defendant's request for a limiting instruction, the Prosecutor's "artful or inartful" argument did not require a mistrial, nor a curative or limiting instruction. (9T:105-20 to 24). More importantly, after closing arguments, the judge fully instructed the jury on the law of manslaughter. (9T:142-12 to 147-1). The jury is presumed to have understood and followed those instructions, State v. Feaster, 156 N.J. 1, 65 (1998); See also State v. T.J.M., 220 N.J. 220, 237 (2015) (appellate courts "act on the belief and expectation that jurors will follow the instructions given them by the court"). The jury rejected manslaughter and convicted defendant of purposeful murder. His displeasure does not now amount to reversible error.

POINT VI

A LIMITED REMAND IS REQUIRED TO CORRECT ISSUES RELATED TO MERGER AND A YARBOUGH/TORRES ANALYSIS ONLY. A REMAND IS NOT REQUIRED TO ADDRESS AN ABILITY TO PAY HEARING, NOR THE COURT'S REFUSAL TO APPLY MITIGATING FACTOR FOUR.

In its instruction to the jury regarding Count Two of the indictment – second-degree possession of a weapon for an unlawful purpose, the trial court stated defendant's unlawful purpose in possessing the firearm was "[t]he shooting of Sciasis Calhoun and/or the firing a handgun in the direction of the vehicle that Sciasis Calhoun was driving." (9T:156-25 to 127-4). As such, the jury charge instructed that the purpose in possessing the handgun was to use it against the victim in the substantive offense. Accordingly, defendant's conviction for Count Two should have merge with the substantive offense of murder in Count One because there was no other evidence in the case that supported a separate unlawful purpose for the weapon. State v. Tate, 216 N.J. 300, 312-313 (2013) (citing State v. Diaz, 144 N.J. 628, 641 (1996)). Therefore, a limited remand is required to effectuate the merger and amend the judgment of conviction.

Likewise, in sentencing defendant to a consecutive term of imprisonment for Count Four – unlawful possession of a weapon, pursuant to N.J.S.A. 2C:39-5(b), the trial court did not engage in the required Yarbough analysis as required when imposing consecutive sentences. (See 9T:63-19 to 64-5); State v. Yarbough, 100 N.J. 627, 643-44 (1985). The trial court also did not analyze the fairness of the consecutive term imposed under the required Torres

analysis. Therefore, a limited remand is required in order to analyze the consecutive sentence under the required factors.

However, a remand is not required to conduct an ability to pay hearing. True that N.J.S.A. 2C:44-2(b) and (c)(2) requires a court to consider a defendant's ability to pay restitution before deciding whether to impose it, and its amount and method of payment. However, N.J.S.A. 2C:11-3c eliminates consideration of ability to pay where the defendant is convicted of murder, stating defendant "shall be required to pay restitution to the nearest surviving relative of the victim." (emphasis added). Moreover, "[t]he court shall not reduce a restitution award by any amount that the victim has received from the Violent Crimes Compensation Board, but shall order the defendant to pay any restitution ordered for a loss previously compensated by the Board to the Violent Crimes Compensation Board." N.J.S.A. 2C:44-2(c)(2) (emphasis added). Defendant did not dispute the amount of restitution, an amount of $24,886.57 confirmed by a lien letter from the Violent Crimes Compensation Office (11T:62-8 to 12), and this amount is a sum well within the $200,000 cap set by N.J.S.A. 2C:43-3(a)(1). The restitution order was correct and non-discretionary under applicable statutes, and an ability-to-pay hearing was not required.

Finally, the court did not err in refusing to give any weight to mitigating factor four. Once again, defendant's assertion that his alleged mental health issues were "undisputed" is a complete mischaracterization of this record. (Db 54). As argued a length above in POINT II, defendant's "focal point" was actually not his mental health because he outright instructed his attorney that there was to be no insanity defense and thereafter did not present a shred of

testimonial or documentary evidence that he suffered any type of mental illness or a diagnosis of any sort by any doctor or mental health expert. (See Db 54; compare 3T:10-8 to 22). Instead, defendant's strategy throughout the trial was to point the finger at Nicole Fiore as the shooter or at best, rely on being convicted of a lesser charge, as he argued in his closing.

Contrary to defendant's argument, the State's anticipation that the defense may introduce evidence of mental health issues does not equate to a concession that it existed. As the trial court stated in its analysis of mitigating factor four, defendant's bizarre behavior, in and of itself, was not evidence of a mental disease or defect that would excuse or justify his conduct in this case. Indeed, anyone can exhibit bizarre behavior and that alone is not a shield to criminal liability. (11T:60-7 to 15). For these reasons, the court properly determined that mitigating factor four simply did not apply to this defendant, nor was it supported by the record. A remand to reconsider this factor is not necessary or required.

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully submits defendant's conviction and sentence should be affirmed.

Respectfully submitted,

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR

By: Melinda A. Harrigan, 062102014
Assistant Prosecutor
Of Counsel and
On the Brief
email: mharrigan@mcponj.org

MAH/mc
Date: January 5, 2024

c: Kevin S. Finckenauer, Esq.
Assistant Deputy Public Defender

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
ALISON PERRONE
Assistant Public Defender
Appellate Deputy
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973-877-1200 · Fax 973-877-1239
Kevin.Finckenauer@opd.nj.gov

JOSEPH E. KRAKORA
Public Defender

January 16, 2024

KEVIN S. FINCKENAUER
ID. NO. 301802020
Assistant Deputy Public Defender

Of Counsel and
On the Letter-Brief

REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1038-22T4
INDICTMENT NO. 18-07-0959-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Monmouth County.
KADER S. MUSTAFA,	:	
		Sat Below:
Defendant-Appellant.	:	
		Hon. Vincent N. Falcetano, J.S.C.
	:	and a Jury
		DEFENDANT IS CONFINED

Your Honors:

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

TABLE OF CONTENTS

PAGE NOS,

TABLE OF CONTENTS (CONT'D.)

PAGE NOS.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Kader Mustafa respectfully refers this Court to the procedural history and statement of facts set forth in his brief previously submitted in this matter.

LEGAL ARGUMENT

In reply to the State's brief, Mr. Mustafa relies on the arguments made in his previously filed brief and adds the following:

POINT I

THE STATE DOES NOT CONTEST THAT RENDERING UNANIMOUS VERDICTS ON EVERY LESSER-INCLUDED OFFENSE OF MURDER REQUIRES REVERSAL OF THE MURDER CONVICTION, BUT ONLY BALDLY ASSERTS THAT THE VERDICT SHEET RELIED ON IS NOT THE TRUE VERDICT SHEET.

First, it should be noted that, in responding to Point I of Mr. Mustafa's appellant brief, the State does not argue against the conclusion that if the jury rendered unanimous verdicts on every lesser-included manslaughter offense, Mr. Mustafa's murder conviction must be reversed. Rather, the State only argues that the verdict sheet relied on by Mr. Mustafa is not the correct verdict sheet.

To that end, the State asserts that this argument is "supported only by a self-authenticating certification[,]" but that is not true. The now-deceased trial counsel certified that this was the jury's verdict sheet in his motion for a new

trial, and the trial court responded to a formal records request with this version of the verdict sheet. On the contrary, it is the State's contention that this is not the verdict sheet that is completely unsupported by any contradictory documentary evidence.

The State relies substantially on the jury's reading of the verdict at the end of the trial in support of its contention, but nothing about it actually negates that the jury additionally marked off every lesser-included offense. The trial court never questioned the jury about the lesser-included offenses because it erroneously believed it did not reach them. When the trial court says, "Okay and following the instructions you go to question 4," it was not reviewing the verdict sheet filled out by the jury, but simply assuming they had done it properly, which obviously they did not. Likewise, the final poll does not prove anything because, again, it is not contended that the jury did not render a verdict for murder, but that the jury also rendered inconsistent unanimous verdicts on every lesser-included offense of murder, which is improper.

The State simply asserts that it is "unbelievable" that the attorneys and the trial judge would have missed such an issue, (Pb21),[1] but that is the only plausible explanation for what happened. It is far more likely that the attorneys

[1] Pb = plaintiff-respondent's brief
11T = sentencing transcript dated May 5, 2022

and trial court simply overlooked the issue or did not think it was a problem than the alternative theory that defense counsel filled out a verdict sheet himself to attach and certify as the correct verdict sheet in the motion for a new trial. It is also in line with the lack of seriousness with which the jury approached its duty, as discussed in more detail in the appellant brief.

Lastly, the State argues that no reasonable jury would have convicted Mr. Mustafa of a lesser-included manslaughter offense. (Pb22). Without reiterating the litany of reasons why a jury could have convicted Mr. Mustafa of a lesser form of manslaughter as discussed in the appellant brief, it suffices to say that the trial judge and prosecutor already conceded this point since everyone agreed to charge the jury on those offenses, meaning there was no dispute that a reasonable jury could in fact convict Mr. Mustafa of a lesser-included offense based on that record.

Accordingly, Mr. Mustafa's conviction for murder must be reversed and the matter remanded for a new trial where the jury appropriately considers the lesser-included offenses.

POINT II

THERE IS NO EXPERT TESTIMONY REQUIREMENT FOR DIMINISHED CAPACITY, AND THE TRIAL COURT'S REASONING FOR DENYING THE INSTRUCTION WAS AN ABUSE OF DISCRETION.

In responding to Point II, the State declines to rely on two of the trial court's faulty reasonings for failing to include a diminished capacity charge: (1) that the murder model charge sufficiently covered the mens rea issue and (2) that the failure to invoke a not-guilty-by-reason-of-insanity defense precluded instructing on diminished capacity. As discussed in the appellant brief, those reasons were unequivocally improper. Instead, the State relies largely on the argument that expert testimony is required in order to receive a charge on diminished capacity.

Again, there is no such requirement in N.J.S.A. 2C:4-2, the model charge, or caselaw. Notably, N.J.S.A. 2C:4-2 initially required defendants to prove diminished capacity by a preponderance of the evidence, but that provision was deemed unconstitutional in Humanik v. Beyer, 871 F.2d 432, 440 (3d Cir. 1989) and ultimately removed. In other words, although there must be some evidence in the record of a mental defect for the instruction, there is no onus on the defendant to prove diminished capacity. It is impossible to square that fact with

a requirement that a defendant conclusively demonstrate diminished capacity with expert testimony.

Moreover, caselaw is rife with examples of courts taking into consideration erratic behavior as part of the constellation of evidence supporting a diminished capacity charge, meaning the kinds of evidence relied upon here have been considered, at least in part, valid bases for a diminished capacity instruction in the past. State v. Moore, 113 N.J. 239, 285-86 (1988); State v. Juinta, 224 N.J. Super. 711, 714-15 (App. Div. 1988). In short, once the jury heard substantial evidence about Mr. Mustafa's mental health issues, it was imperative to allow the jury to consider whether those mental health problems precluded the mens rea necessary to commit the offenses.

Finally, the State does not address the fact that the trial court inexplicably refused to charge diminished capacity while instructing on voluntary intoxication despite the trial court believing that the proofs for intoxication were "far less compelling" than those for diminished capacity. (9T16-12 to 19). Certainly, it must be an abuse of discretion to instruct an unsupported defense and irreconcilably refuse to instruct on a much more supported one.

For these reasons, Mr. Mustafa's convictions must otherwise be reversed and remanded so that a jury can properly consider diminished capacity.

POINT III

THE LITANY OF IMPROPER ARGUMENTS AND EVIDENCE PRESENTED WITH AN AIM TO DENIGRATE MR. MUSTAFA IN THE EYES OF THE JURY SUBSTANTIALLY UNDERMINED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

With respect to Point III, the State has offered no cogent explanations for why the evidence and arguments pointed to were proper and not unduly prejudicial. Mr. Mustafa relies on his appellant brief with respect to why those evidence and arguments were legally improper and significantly harmful.

POINT IV

THE FAILURE TO CHARGE THE JURY ON THE ELEMENTS OF SECOND-DEGREE UNLAWFUL POSSESSION OF A WEAPON REQUIRES REVERSAL OF THOSE CONVICTIONS.

There is no dispute that the jury was charged on the incorrect form of unlawful possession. Instead, the State tries to cobble together a proper charge for those convictions based on other parts of the judge's overall instructions.

In that vein, it is notable that, with respect to the element that the State must prove the defendant did not have a valid permit, the State relies not on an actual instruction, but only on the stipulation submitted with respect to that issue. Our Supreme Court has already held that the failure to instruct the jury on that element alone, even where it is uncontested, is reversible error. State v. Vick,

117 N.J. 288, 290-93 (1989). Here, of course, none of the proper elements were instructed, because the incorrect instruction was given.

Accordingly, those convictions, at a minimum, must be vacated.

POINT V

THE STATE'S LEGALLY ERRONEOUS DUI HYPOTHETICAL SIGNIFICANTLY UNDERMINED THE JURY'S CONSIDERATION OF THE RECKLESS MANSLAUGHTER OFFENSE, AND THE FAILURE TO PROVIDE A LIMITING INSTRUCTION WAS REVERSIBLE ERROR.

Again, with respect to the State's argument in Point V, it is important to note what the State does not contest. The State does not significantly argue against the fact that the DUI example the prosecutor made in summation with respect to reckless manslaughter was an erroneous statement of the applicable law. Indeed, this Court has made clear that the State's example involved an entirely different form of recklessness than the kind required for reckless manslaughter. State v. Choinacki, 324 N.J. Super. 19, 48 (App. Div. 1999); State v. Jiminez, 257 N.J. Super. 567, 583 (App. Div. 1992).

Rather, the State argues that placed in the context of the entire summation the example was not harmful because the prosecutor elsewhere did not make legally erroneous statements when talking about reckless manslaughter. Such an argument has no merit. Again, the lesser-included offense of reckless

manslaughter was one of Mr. Mustafa's primary defenses against the charge of murder, and the prosecutor's improper DUI hypothetically substantially undermined the jury's ability to evaluate that issue, especially with no limiting instruction by the trial court. That risk does not evaporate because elsewhere the State did not misrepresent the law. See State v. Rivera, 437 N.J. Super. 434, 463-65 (App. Div. 2014) (misstatements on self-defense law by prosecutor harmful error in spite of proper judicial instructions on the issue).

Accordingly, Mr. Mustafa's conviction for murder must otherwise be reversed on this basis as well.

POINT VI

ON REMAND, THE SENTENCING HEARING MUST BE A WHOLESALE RESENTENCING THAT ADDRESSES MR. MUSTAFA'S ABILITY TO PAY ANY RESTITUTION AND TAKES INTO ACCOUNT MITIGATING FACTOR FOUR.

Finally, in its sentencing point, the State concedes that the matter must be remanded for the merger and consecutive sentence issues if the convictions are not reversed. However, the State contests the necessity of an ability to pay hearing and the application of mitigating factor four.

With respect to the ability to pay hearing, our statutes are unequivocally clear that it is required for the imposition of any fine or restitution. Beyond that, our Supreme Court has held that, even where fines or restitution is mandatory,

an ability to pay hearing is still required to assess the exact amount to be imposed. State v. Bolvito, 217 N.J. 221, 229-32 (2014). Indeed, the statute requiring an ability to pay hearing for restitution, N.J.S.A. 2C:44-2(b), explicitly encompasses restitutions imposed following a conviction for a homicide offense. Thus, any sentencing remand must include a hearing on that issue.

As to mitigating factor four, the State's arguments are similarly unavailing. The State avers that Mr. Mustafa "did not present a shred of testimonial or documentary evidence that he suffered any type of mental illness[,]" but this is untrue. While no documentary evidence was presented at trial, defense counsel did present mental health records at the sentencing hearing. (11T46-19 to 47-8). The trial court's conclusion that "any of us" could have engaged in Mr. Mustafa's erratic behavior is simply not a valid basis for rejecting a supported mitigating factor. Accordingly, on remand, that factor must be taken into account.

Finally, if this Court does not agree with the disputed sentencing arguments, any remand for the consecutive sentence and merger issue must nonetheless be a wholesale resentencing hearing. As the Supreme Court explained in State v. Torres, 246 N.J. 246 (2021), where a sentencing court fails to assess the overall fairness of a sentence, a full resentencing is required because,

> although the evaluation of aggravating and mitigating factors occurs when setting the sentence within the range applicable to each offense, sentencing is a holistic endeavor. A court performing the Yarbough fairness assessment must be mindful that aggravating and mitigating factors and Yarbough factors, as well as the stated purposes of sentencing in N.J.S.A. 2C:1-2(b), in their totality, inform the sentence's fairness. All are relevant to the overall fairness of the aggregate sentence imposed on the sole defendant before the court.
>
> [246 N.J. at 271-72 (citation omitted).]

The Supreme Court went on to explain that "the fairness of a sentence cannot be divorced from consideration of the person on whom it is imposed," and explicitly held that, in assessing fairness, "the court sentences the defendant as the defendant appears before the court on the occasion of sentencing." Id. at 273 (citation omitted).

Under Torres, then, a full resentencing is required for the sentencing court to consider not only the Yarbough factors but also the aggravating and mitigating factors as Mr. Mustafa stands on the day of the resentencing. Ibid. That case makes clear that the consideration of "overall fairness" is a holistic endeavor that implicates the entirety of Mr. Mustafa's circumstances. Indeed, in Torres itself the trial court's failure to comply with its dictates resulted in a "remand for meaningful review and resentencing," which the Court explained requires "a new resentencing proceeding." Id. at 274 (emphasis added). Mr. Mustafa, then,

is similarly entitled to a holistic reevaluation if the matter is remanded for resentencing.

In sum, any remand on the sentencing issues must be a wholesale resentencing that takes into account who Mr. Mustafa is on the day he is sentenced, including the application of mitigating factor four and any ability to pay restitution.

CONCLUSION

For the reasons expressed herein, Mr. Mustafa's convictions must be vacated and the matter remanded for a new trial, or, alternatively, the matter must be remanded for the imposition of a reduced sentence.

Respectfully submitted,
JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: 

KEVIN S. FINCKENAUER
Assistant Deputy
Public Defender
ID# 301802020

Dated: January 16, 2024