SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1239-21T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court,
v.	:	Law Division, Monmouth County.
LEONARD J. MAZZARISI, 3rd,	:	Indictment. 18-11-01421-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. Joseph W. Oxley, J.S.C.
	:	Hon. Lourdes Lucas, J.S.C., and a Jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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[1] This brief is included pursuant to Rule 2:6-1 to establish that Mazzarisi's invocation of his right to counsel was raised below, although it is not directly addressed in the trial court's Miranda order.

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5T: 8/13/20 hearing
6T: 10/22/20 hearing
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PROCEDURAL HISTORY

Monmouth County Indictment No. 18-11-01421 charged Leonard J. Mazzarisi, 3rd, with two counts of second-degree aggravated arson, N.J.S.A. 2C:17-1a (counts 1 and 2); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a (count 3); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b (count 4). (Da 1-3)

Prior to trial, the State moved to admit statements made by Mazzarisi during custodial interrogation. (Da 1-3) Following an evidentiary hearing, on November 21, 2019, the Honorable Joseph W. Oxley, J.S.C., admitted the statements. (1T, 2T, 3T, 4T, Da 18-27)

The Honorable Lourdes Lucas, J.S.C., presided over a jury trial beginning on July 12, 2021. Judge Lucas denied Mazzarisi's request to redact the portions of his statements in which he invoked his rights under Miranda v. Arizona, 384 U.S. 436 (1966). (16T:84-25 to 111-14) On July 30, 2021, the jury acquitted Mazzarisi of count one, and convicted him of counts two, three, and four. (Da 28-30) Mazzarisi filed a motion for a new trial, which Judge Lourdes denied on September 29, 2021. (23T)

On November 5, 2021, after appropriate mergers, Judge Lourdes sentenced Mazzarisi to five years of incarceration on count two, consecutive to

five years of incarceration with a forty-two month period of parole ineligibility on count three. (Da 31-33)

On December 28, 2021, Mazzarisi filed a notice of appeal. (Da 34-39)

FACTUAL BACKGROUND

Mazzarisi was tried for three separate incidents that occurred at the offices of Neuhaus Realty in Holmdel on August 17, 2017, January 27, 2018, and May 29, 2018. Mazzarisi lived in Virginia during this period, as confirmed by telephone, toll, and credit card records obtained by police, which did not place him in New Jersey on any of the dates in question. No witnesses testified to seeing Mazzarisi in New Jersey on or around the dates in question.

The State's theory was that Mazzarisi committed these acts because he believed that his grandmother owed him $25,000 due to how his mother negotiated the sale of the building containing Neuhaus Realty to his grandmother when divorcing his father, Leonard Mazzarisi the 2nd.[2] Neuhaus Realty was owned by Mimi Neuhaus and Carl Neuhaus, who are, respectively, the mother and brother of Mazzarisi's mother Lorraine Neuhaus. (15T:95-23 to

[2] Given they share the same name, defendant Mazzarisi's father will be referred to throughout this brief as "Leonard Mazzarisi the 2nd," whereas defendant will be referred to as "Mazzarisi." First names are used for other witnesses who share the same last names.

97-6) At the time of the August 2017 and January 2018 incidents, Neuhaus Realty was located at 51 East Main Street in Holmdel. (15T:134-21 to 25)

Until 2011, Leonard Mazzarisi the 2nd and Lorraine owned the building at 51 East Main Street and rented it to Neuhaus Realty. (15T:78-3 to 10; 135-11 to 136-13) In 2011, they sold the building to Carl for $475,000. (15T:137-7 to 15; 159-5 to 18) Although Neuhaus Realty had initially agreed to pay $500,000 to buy it, Lorraine insisted on reducing the sale price to make up for money her mother loaned her when she got married. (15T:136-18 to 138-12) Lorraine testified that her husband had refused to let her pay back the $25,000 loan during their marriage. (15T:109-4 to 10; 120-5 to 10) To make sure the money was paid back, Lorraine insisted that repayment of the loan was a condition of their divorce decree. (15T:119-14 to 120-20)

Lorraine testified that Leonard Mazzarisi the 2nd was "controlling," "verbally and emotionally abusive," and had created problems for her with her two sons, Mazzarisi and his brother Christopher. (15T:98-18 to 25; 107-5 to 15) Mazzarisi's father's dissatisfaction about the terms of the divorce decree led to a rift between Lorraine and her sons because their father "would incite anger into them." (15T:101-10 to 12; 111-3 to 9) Lorraine had not seen Mazzarisi since "at least" 2011 and saw Christopher "very little." (15T:111-6 to 17)

August 17, 2017

Around noon on August 19, 2017, Homdel Police Officer Patrick Weimer went to 51 East Main Street in response to a report of burn damage. (13T:36-5 to 38-9) Weimer saw "burn damage to the rear of the building above the patio pavers" and saw what looked like "a burnt piece of plastic and a bottlecap" on the ground under the area burned. (13T:39-15 to 24)

Weimer watched black and white footage from a surveillance camera owned by Neuhaus Realty. (13T:40-20 to 41-13) According to Weimer, the footage showed that, on August 17 around 8:30 pm, "a gray or silver sedan" parked in the rear lot and a person walked toward the building. The video showed the person then run from a "fireball" at the back of the building. Weimer described the person as "[a]pproximately 6 foot tall male, white, bald, wearing jeans and a loose fitting white T-shirt." (13T:41-9 to 42-2)

Lorraine could not identify the person in the video, but testified that the "body size" and "shape" "reminded" her of Mazzarisi. (15T:91-12 to 92-11) Mimi "couldn't see anything" in the video. (15T:144-12 to 21; 171-10 to 172-4) Carl could not recognize the person in the video, but testified that "coupled with the information that I knew at the time," the person "reminded me of my nephew, Lenny Mazzarisi, Jr." (15T:189-13 to 190-5) Carl's wife, Maureen Neuhaus, was unable to identify the person in the video. (15T:203-19 to 204-6)

Detective Theodore Sigismondi was the lead detective investigating the August 2017 fire. (14T:209-13 to 20; 216-18 to 217-4) Although he could not identify the person in the video and did not think he "had enough to prove the case," he considered Mazzarisi a "suspect." (14T:212-11 to 213-2)

January 27, 2018

On Saturday, January 27, 2018, Patrolman John Maguire went to 51 East Main Street because it was "engulfed in flames." (13T:118-19 to 120-5) Fire trucks began to arrive "a few minutes" after he did. (13T:124-16 to 125-2)

Maguire was ordered by his sergeant to check the driveway of 16 Burgundy Drive, where Leonard Mazzarisi the 2nd lived, for a red Hyundai Elantra. (13T:127-6 to 15; 131-18 to 132-12) He did not see the car at the address, which was less than a mile away. (13T:141-13 to 18) He did not knock on the door of the house to see if anyone was home. (13T:141-6 to 12)

The fire destroyed the building. (14T:214-13 to 17) Deputy Fire Marshal Christopher Tuberion, investigated the fire's cause and origin. (14T:76-7 to 21) He concluded the fire began in the corner of the building near the secretary's office. (14T:152-20 to 153-5) Tuberion was "unable to rule out" two potential causes of the fire: an intentional fire began with an ignitable liquid or an electrical fire. (14T:98-11 to 99-16)

Sigismondi watched surveillance footage from 55 Main Street that showed the fire begin at around 10:10 pm on January 27. (14T:221-6 to 222-20) Neither Lorraine, Mimi, Carl, nor Maureen was able to identify anyone in the video, which Mimi described as "very foggy." (15T:92-18 to 21; 154-24 to 155-3; 190-22 to 24; 204-10 to 13)

May 29, 2018

After the January fire, Neuhaus Realty moved to 4 South Holmdel Road. (13T:110-3 to 17) On May 29, 2018, Maria Jarvis was working in the Neuhaus Realty office when she heard noises that sounded "[l]ike pops" and something "hit the back of the building," breaking glass. (13T:110-18 to 111-24) Jarvis went to look and "noticed little holes in the vinyl siding and the window was shot out." (13T:112-9 to 16) Jarvis saw a red car leaving the driveway, but did not see the license plate or driver. (13T:112-25 to 113-9)

After learning of the incident, Holmdel Police Officer Jake Savage drove to 16 Burgundy to check for a red car. (14T:174-10 to 175-14) It was not there. (14T:175-12 to 14) Savage then went to 4 Holmdel Road, where he saw the damage to the glass and siding and found BBs in the window sill. (14T:176-3 to 9) Savage watched surveillance video that showed a red sedan pull into the driveway, and someone in the car take "a black handgun-style BB gun" from the glove compartment and shoot it out the driver's side window of the car at

the building. (14T:176-8 to 177-6) Savage returned to 16 Burgundy again, where he met and spoke with Christopher. (14T:193-19 to 194-15)

"Based on this surveillance footage," Savage filed charges against Mazzarisi. (14T:187-17 to 22) The registration for the 2017 red Hyundai Elantra matching the license plates on the video listed Leonard Mazzarisi the 2nd as the owner, residing at 16 Burgundy Drive. (14T:219-17 to 220-24)

Lorraine testified the person in the video "looks like my son," Mazzarisi, but said that she would be unable to identify him in court because she had not seen him since 2011. (15T:93-2 to 25) When the prosecutor nonetheless asked Lorraine to identify Mazzarisi and instructed him to take his mask down, Lorraine responded, "Vaguely." (15T:93-2 to 25)

Although she had not seen him in twelve years, Mimi testified she recognized Mazzarisi as the person in the video and identified him as sitting at the defense table in the courtroom. (15T:155-6 to 156-7; 161-12 to 162-18)

Carl said he recognized the person in the video as Mazzarisi, but admitted he "couldn't say for sure" whether he was in the courtroom because he had not seen him in twelve years. (15T:193-7 to 24; 197-16 to 23) When the prosecutor nonetheless asked Carl to try to make an identification, Carl asked another individual in the courtroom to take down their mask before admitting he was not positive. (15T:193-25 to 194-11) Moments later, Carl claimed to

recognize Mazzarisi at the defense table, explaining that the defense attorney had previously been blocking his view. (15T:194-15 to 197-15) Maureen, who viewed the video at the same time as Carl, identified Mazzarisi in the video. (15T:205-1 to 9) She also had not seen him since 2009. (15T:208-22 to 209-5)

Arrest and Interrogation of Mazzarisi

On May 30, 2018, Deputy Ryan Plunkett of the Spotsylvania County Sheriff's Office in Spotsylvania, Virginia, got a notification from New Jersey law enforcement that Mazzarisi was wanted for the charges. (16T:7-10 to 9-14) Using a "cell phone ping," Plunkett found Mazzarisi in the parking lot of the Hampton Inn in Spotsylvania and took him into custody. (16T:7-10 to 8-22) Plunkett found two BB guns in a computer bag in Mazzarisi's hotel room. (16T:12-11 to 17-15) The BB guns were operable and were legal to own and possess in Virginia. (16T:69-6 to 16, 123-17 to 128-2) It could not be determined whether the BB's found at 4 South Holmdel Road had come from either of the BB guns. (16T:134-1 to 10)

Two days after the arrest, Sergeant Brian Weisbrot of the Monmouth County Prosecutor's Office drove to Spotsvylvania with Sigismondi to interview Mazzarisi. (17T:18-20 to 19-10) Weisbrot told Mazzarisi that he was charged with three counts relating to his possession of a firearm in Holmdel. (17T:27-15 to 28-5) Even though Mazzarisi was the primary suspect in the two

arsons at Neuhaus Realty, the detectives did not tell Mazzarisi that he was suspected in connection with the arsons prior to seeking his Miranda waiver. (17T:196-9 to 197-17) Sigismondi had instructed Deputy Plunkett "not to let Mr. Mazzarisi know that he is being investigated for the arsons" prior to the interview. (17T:7021 to 71-1)

Mazzarisi asked extensive questions about the process for invoking his Miranda rights before signing the waiver form and then invoked his right to silence in response to certain questions during the interrogation.[3] (Da 40; 17T:29-18 to 126-3)

Text Messages to Lorraine Neuhaus

Lorraine, who was living in Vermont throughout this period, received text messages from an unknown number around the date of each incident. (15T:109-11 to 22; 173-2 to 14) Although the messages arrived near the date of each event, they did not mention the actions taken against Neuhaus Realty.

On August 18, 2017, Lorraine received the first message, which said, "It's time to pay the 25,000 you owe. You have 72 hours. I'll send you the account number Monday morning." (15T:72-18 to 73-4; 80-7 to 12) A later text from that number told Lorraine that because she had not paid, she "now

[3] Mazzarisi's questions and the detectives' responses will be discussed in more detail in Points I and II.

owe[s] the 50,000 from the sale of the building plus interest." (15T:80-13 to 16) The texts did not come from Mazzarisi's phone number, however Lorraine "believed" the messages were from him because there had been "a lot of contention towards that money over the years." (15T:73-1 to 8; 83-12 to 84-15; 112-7 to 11) Although she testified that Leonard Mazzarisi the 2nd was angry about the terms of the divorce and had incited anger into both sons, Lorraine claimed that Mazzarisi was the "only person" who had ever referenced the $25,000 amount to her. (15T:86-11 to 17; 101-10 to 12; 111-3 to 9)

Two days after 51 East Main Street caught fire on January 27, 2018, Lorraine received a message that read, "Are you or your mother ready to give me my 25,000 as we agreed to?" (15T:86-24 to 87-4) The message did not reference the fire. On May 29, 2018, Lorraine received another message asking, "Has [Mimi] recanted yet about not giving me my money? Has [Mimi] decided its in her best interest to pay me?" (15T:88-23 to 89-5) The message did not reference the BBs shot at Neuhaus Realty.

Weisbrot subpoenaed TD Bank for records for the account referenced in the messages, which showed the account belonged to a business named 360 Entertainment of New York, L.L.C.. (17T:12-1 to 15-14) The business's listed mailing address was 16 Burgundy Drive in Holmdel. (17T:15-15 to 18) The account records listed Mazzarisi. (17T:16-9 to 12)

Lack of Proof of Mazzarisi's Presence in New Jersey

Mazzarisi was arrested in Virginia, where he told police he had been living since July of 2017. (17T:43-22 to 44-24) No witness testified to seeing Mazzarisi in Holmdel or the State of New Jersey at any point around the three incidents at Neuhaus Realty. Police made numerous attempts to establish his presence in New Jersey during this period, all of which were unsuccessful.

On January 30, 2018, Sigismondi sent a preservation letter to Verizon requesting information on a cell phone. The results did not show the phone registered to Mazzarisi having been present in New Jersey. (15T:46-24 to 47-21; 16T:167-20 to 168-4) One day after the BB gun shooting on May 29, 2018, police located Mazzarisi in Virginia based on his phone "pinging in the area." (16T:66-9 to 25) No evidence indicated that the phone, which was with Mazzarisi at the time of his arrest, had ever been present in New Jersey. (17T:102-1 to 3)

Police also subpoenaed records for a credit card used by Mazzarisi that showed purchases made at hotels and restaurants in Virginia, but did not show Mazzarisi ever having made any purchases in New Jersey. (15T:49-15 to 21; 17T:173-19 to 175-12)

On November 8, 2017, Sigismondi contacted the Turnpike Authority and Mazzarisi's EZ-Pass came back "negative" for toll violations in New Jersey.

(15T:41-22 to 43-8) On February 2, 2018, Weisbrot again subpoenaed the Turnpike Authority for records of Mazzarisi's car using EZ-Pass in New Jersey during this period, which came back negative. (15T:49-4 to 14)

LEGAL ARGUMENT

POINT I:

MAZZARISI'S STATEMENT MUST BE SUPPRESSED BECAUSE DETECTIVES DID NOT CLARIFY WHETHER HE WAS INVOKING HIS RIGHT TO COUNSEL WHEN HE ASKED A SERIES OF QUESTIONS ABOUT WHAT COUNSEL WAS AVAILABLE TO HIM, WHICH THEY FAILED TO ANSWER. THE STATE CANNOT SHOW THAT THE SUBSEQUENT WAIVER WAS KNOWING AND VOLUNTARY. (Da 4-27)[4]

When detectives told Mazzarisi that he had the "right to consult with an attorney at any time and have him present during questioning," Mazzarisi asked a series of follow up questions about the kind of attorney he could access. (1T:41-22 to 46-23) Mazzarisi expressed concern that an attorney based in Virginia, where the interview was taking place, may not be able to practice in New Jersey, where he was charged. (1T:42-1 to 19) The detectives

[4] Pursuant to Rule 2:6-1, Mazzarisi's brief in connection with the Miranda motion is included in the appendix. Although Judge Oxley's written order does not address Mazzarisi's argument that his questions regarding the availability of counsel were an ambiguous invocation of his right to counsel, Mazzarisi's brief raised that issue below.

leading the interrogation repeatedly expressed uncertainty about what kind of attorney was available and never asked him if he was invoking his right to counsel. Under our State's law, even a defendant's "ambiguous assertion" of the right to counsel triggers a duty for the interviewing officer "to cease questioning and clarify whether defendant was requesting counsel during the interview." State v. Gonzalez, 249 N.J. 612, 620 (2022). Because Mazzarisi's questions about the availability of counsel were at least an ambiguous invocation of his right to counsel, detectives' failure to clarify if he wanted to speak to an attorney compels suppression of his statement. U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶ 1; N.J.R.E. 503; N.J.S.A. 2A:84A-19.

It is well-established that a suspect must be advised of her right to have a lawyer present, and if that right is asserted, it must be "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 104 (1975); State v. Hartley, 103 N.J. 252, 262-67 (1986). A suspect who has expressed her desire to deal only with the police through counsel may not be interrogated further until counsel is present, "unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). If a suspect's invocation of her rights is not scrupulously honored, an inculpatory statement must be suppressed notwithstanding its voluntariness. Mosley, 423 U.S. at 104.

Although federal law does not require police to cease questioning in response to a suspect's "ambiguous" statements regarding the right to counsel, New Jersey law does. Gonzalez, 249 N.J. at 628-30. Our Supreme Court has repeatedly stressed that "a suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel." State v. Alston, 204 N.J. 614, 622 (2011) (quoting State v. Reed, 133 N.J. 237, 253 (1993)). "[I]f the statements are so ambiguous that they cannot be understood to be the assertion of a right, clarification is not only permitted but needed." Id. at 624. "Because the right to counsel is so fundamental, an equivocal request for an attorney is to be interpreted in a light most favorable to the defendant." Gonzalez, 249 N.J. at 632 (quoting State v. Chew, 150 N.J. 30, 63 (1997)).

In Alston, our Supreme Court demonstrated how police can fulfill their duty to clarify whether a suspect's equivocal reference to counsel is meant to be an invocation of his right to such counsel. Immediately after the defendant in that case acknowledged and waived his rights, he asked two questions about an attorney, which the interrogating officer answered and followed up on. Specifically, the defendant asked, "Should I not have a lawyer in here with me?" and the officer immediately clarified, asking, "You want a lawyer?" Alston, 204 N.J. at 618. In response to this clarifying question, the defendant

responded, "No, I am asking you guys . . . ." Ibid. Shortly thereafter, the defendant asked another question about a lawyer: "Sir, if I did want a lawyer in here with me how would I be able to get one in here with me?" Ibid. Again, the detective immediately answered that question, reaffirmed the defendant's right to counsel, and tried to clarify whether the defendant was invoking his right to counsel: "That's on -- that's on you. If you want a lawyer, then we -- stop and you going to get your lawyer. That's why he read that clearly to you and your waiver. If you want to stop at this time then we stop at this time. It's either yes or no. . . ." Ibid. When the defendant's answers were not sufficiently clear, the detective again directly asked if the defendant "want[ed] a lawyer" or "want[ed] to continue answering questions," and the defendant responded that he would continue the interview. Ibid.

In reviewing this colloquy, our Supreme Court held that the defendant's responses to the officer's clarifying questions showed that the defendant was not, in fact, invoking his right to counsel. But the Court reaffirmed that it is critically important for an officer to ask clarifying questions to determine whether a suspect is invoking her rights or not. When "a suspect's statement 'arguably' amount[s] to an assertion of Miranda rights, . . . the officer must clarify with the suspect in order to correctly interpret the statement." Id. at 622 (emphasis added). This obligation to clarify applies to ambiguous or equivocal

requests for counsel: if the suspect's "words amount to even an ambiguous request for counsel, the questioning must cease, although clarification is permitted." Id. at 624. Indeed, when a suspect's "statements are so ambiguous that they cannot be understood to be the assertion of a right . . . clarification is not only permitted but needed." Ibid. (emphasis added).

Last year, in Gonzalez, our Supreme Court reviewed a situation, like here, where detectives failed to cease questioning and clarify a defendant's ambiguous invocation of his right to counsel. 249 N.J. at 631. In that case, "defendant's first mention of counsel, '[b]ut what do I do about an attorney and everything?' was an ambiguous invocation of her right to counsel that required the detective to cease all questioning and seek clarification." Ibid. The Court distinguished Alston, 204 N.J. at 626, where the suspect had asked police "should I not have a lawyer?," explaining that the suspect in Alston had sought the detectives' "opinion about whether she should have a lawyer present," whereas Gonzalez had "inquired about the availability of counsel." Ibid. Additionally, the Court explained that the detectives in Alston had immediately taken the proper step of seeking clarification, "by asking 'You want a lawyer[?],'" and explaining the questioning would stop if defendant requested counsel, whereas the detectives in Gonzalez "failed to clarify what defendant meant." Ibid. Because Gonzalez made "an equivocal invocation of

the right to counsel and, since the detective made no further inquiry, all portions of defendant's statement made thereafter . . . should have been excluded at trial." Id. at 632.

As in Gonzalez, Mazzarisi asked detectives a series of questions about "the availability of counsel," and police failed to clarify whether he was invoking his right to counsel. Instead of asking whether Mazzarisi wanted an attorney, detectives engaged in a lengthy exchange in which they disavowed any knowledge of what kind of lawyer would be made available to him if he invoked his rights:

> DETECTIVE WEISBROT: Number 3: You have the right to consult with an attorney at any time and have him present before and during questioning. Do you understand that?
>
> MR. MAZZARISI: My question to you is, an attorney in the State of Virginia where you're asking me these questions, or are you talking about an attorney from New Jersey needing to come here right now for these questions? Because an attorney from Virginia isn't necessarily able to practice law in the State of New Jersey.
>
> DETECTIVE WEISBROT: That's correct.
>
> MR. MAZZARISI: And vice versa.
>
> DETECTIVE WEISBROT: So, the answer to your question is, you have the right to have an attorney, any attorney that you want, present with you at the time during -- that we're asking you questions. So, that decision would be yours, whether or not you would want an attorney from Virginia or you would want an attorney from New Jersey, or both or another state. Any attorney, you have the right to have present here when we talk to you.

MR. MAZZARISI: Like, my Legal Aid attorney for the extradition?

DETECTIVE WEISBROT: I don't know anything about that.

MR. MAZZARISI: No, no, no. That was an example question. I'm not -- I'm not saying that that's what I'm looking for. I'm saying as an example, --

DETECTIVE WEISBROT: Okay.

MR. MAZZARISI: -- is that the type of attorney that you would be talking about?

DETECTIVE WEISBROT: I don't know what the Legal Aid is in the State of Virginia. I don't -- I don't know anything about that. You just need to know that you have the right to have an attorney present, whether it's a Legal Aid as you're using or an attorney from Virginia.

MR. MAZZARISI: No. I'm not using the Legal Aid. What I have is when I went to court yesterday concerning the extradition, --

DETECTIVE WEISBROT: Okay.

MR. MAZZARISI: -- that I had an attorney provided by the state –

DETECTIVE WEISBROT: Right.

MR. MAZZARISI: -- to represent me strictly on the extradition hearing. That's what I was asking you, is whether or not you were talking about, for example, a Legal Aid, like if we were to go to New Jersey, and then a lawyer that might be Legal Aid would come in and would have to pick this up there at that point with that type of attorney.

DETECTIVE WEISBROT: I don't know if a Legal Aid is an attorney, so...

MR. MAZZARISI: That's what they were -- Legal Aid is what they were referring to, the court provided attorneys as here in Virginia.

DETECTIVE WEISBROT: Okay. I don't know -- I don't know what that is. Is it an attorney?

MR. MAZZARISI: When they say an attorney will be provided to you, that would be the attorney that they would be talking about.

DETECTIVE WEISBROT: They -- they –

MR. MAZZARISI: I don't know if that's maybe just a slang word that's used here. Maybe they refer to it as something different, like a court-appointed New Jersey [sic].

DETECTIVE WEISBROT: In New Jersey we refer to that as a court-appointed attorney.

MR. MAZZARISI: A court-appointed attorney.

DETECTIVE WEISBROT: That would be a public defender.

MR. MAZZARISI: A public defender.

SERGEANT SIGISMONDI: Yes.

MR. MAZZARISI: Okay. Then yes, I would have been talking about a public defender.

DETECTIVE WEISBROT: Yes.

[(1T:41-22 to 44-24)]

Mazzarisi was clearly concerned about what type of counsel would be made available to him and whether they would be familiar with the law of New Jersey, where he had been told he was criminally charged. Mazzarisi asked whether a New Jersey attorney would "need[] to come here right now" to assist him or if he would be provided a Virginia attorney, such as the Legal Aid

attorney at his extradition hearing, who "isn't necessarily able to practice law in the State of New Jersey." (1T:42-1 to 8) Mazzarisi worried that, if he were provided a Virginia-based attorney and then extradited to New Jersey, a New Jersey attorney "would have to pick this up there." (1T:43-20 to 25) Mazzarisi's detailed questions were attempts to understand what would happen if he invoked, broadcasting to detectives that he was considering doing so. These questions were therefore at least "an ambiguous request for counsel" that triggered the detectives' duty to clarify whether he wished to invoke. Alston, 204 N.J. at 622, 624 (explaining that "if the statements are so ambiguous that they cannot be understood to be the assertion of a right, clarification is not only permitted but needed").

Detectives both failed to answer Mazzarisi's questions and failed to clarify whether he wished to invoke. In response to four different questions from Mazzarisi about the type of counsel he would be provided, Detective Weisbrot said that he did not know the answer. If Detective Weisbrot did not know the answer to the questions -- which were of clear concern to Mazzarisi as he considered whether to agree to speak to police --, then he should have paused the interview and contacted the prosecutor's office to obtain accurate information about the counsel that would be made available to Mazzarisi if he were to invoke. Detective Weisbrot should have made clear that, even if an

attorney was not immediately available, detectives would have to cease questioning until such an attorney was present if Mazzarisi requested. Edwards, 451 U.S. at 484-85. After sharing this information, Detective Weisbrot should have clarified if Mazzarisi wished to invoke. Gonzalez, 249 N.J. at 631. Instead, by repeatedly expressing ignorance in response to Mazzarisi's questions about the type of counsel available and failing to clarify if he was seeking to invoke, the detectives communicated to Mazzarisi that clarification about the type of counsel available was not forthcoming, discouraging him from exercising his right to counsel.

Because detectives barreled ahead in asking Mazzarisi to waive his rights without answering his questions about the availability of counsel or clarifying if he wished to invoke, the State cannot carry its "heavy burden" of establishing that Mazzarisi "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda, 384 U.S. at 444-45; State v. O.D.A.-C., 250 N.J. 408, 425 (2022). The trial court's decision admitting Mazzarisi's statement must be reversed.

The trial court's error in failing to suppress the statement was not harmless. Although Mazzarisi did not confess, his statement was critical to the State's circumstantial case. The State failed to present any evidence showing Mazzarisi was ever present in New Jersey on or near the dates of the incidents;

in fact, all credit card, cell phone, and toll records collected by the State established Mazzarisi was not present in New Jersey during this time. The State's case rested entirely on the claim that Mazzarisi had a motive to commit the crimes because of his anger at his mother and her family, although the State's own witnesses established that Mazzarisi's father and brother -- who actually lived in New Jersey at the time -- both shared this motive. The video of the statement, which showed Mazzarisi discussing his estrangement from his mother's family and his belief that they owed him money, was a critical piece of the State's tenuous case. (17T:84-14 to 88-24)

Because detectives did not answer Mazzarisi's questions about the availability of counsel or clarify if he wished to invoke his right to counsel, his statement "should have been excluded at trial" and his convictions must be reversed. Gonzalez, 249 N.J. at 632.

POINT II:

THE ADMISSION OF VIDEO SHOWING MAZZARISI REPEATEDLY ASKING ABOUT THE SCOPE OF HIS MIRANDA RIGHTS AND INVOKING HIS RIGHT TO SILENCE DURING HIS INTERROGATION VIOLATED HIS RIGHT TO A FAIR TRIAL. (16T:84-25 to 111-14)

After erroneously admitting Mazzarisi's statement, the trial court denied defense counsel's request to redact the statement to avoid showing the jury Mazzarisi's repeated attempts to invoke his Miranda rights. Considering the

reality that many jurors are likely to draw a negative inference from a defendant's unwillingness to speak with police, our Supreme Court has repeatedly held that "'[t]rial courts should endeavor to excise any reference to a criminal defendant's invocation of his right to counsel' from the statement the jury hears." State v. Clark, 251 N.J. 266, 292 (2022) (quoting State v. Feaster, 156 N.J. 1, 75-76 (1998)). Here, the jury saw Mazzarisi asking detectives about the scope of his rights at length prior to signing the waiver form and repeatedly invoking his right to silence in response to particular lines of inquiry from detectives about his recent visits to New Jersey and communications with his mother. Given the nature of the State's circumstantial case, the erroneous inclusion of these prejudicial portions of his statement plainly "could have led the jury to a result it otherwise might not have reached," compelling reversal. Clark, 251 N.J. at 298.

"The privilege against self-incrimination . . . is one of the most important protections of the criminal law." State v. Presha, 163 N.J. 304, 312 (2000). Our law protects the right to silence, and the guarantee "that silence will carry no penalty" is "implicit to any person who receives the warnings.'" Clark, 251 N.J. at 293 (quoting Doyle v. Ohio, 426 U.S. 610, 618 (1976)).

The State therefore may not use a person's invocation of their Miranda rights against them at trial. Id. at 292-93. Trial courts should "'excise any

reference to a criminal defendant's invocation of his right to counsel' from the statement that the jury hears." Id. at 292 (quoting State v. Feaster, 156 N.J. 1, 75-76 (1998)). Redaction of a defendant's invocation of his Miranda rights is required because, on hearing a defendant's invocation, the jury may draw "impermissible inferences" about his guilt "that could undermine a defendant's fundamental right to a fair trial." Feaster, 156 N.J. at 76. After all, as Miranda itself recognized, it is widely understood that "silence in the face of accusation is itself damning and will bode ill when presented to a jury." 384 U.S. at 468.

Last year, in Clark, our Supreme Court unanimously reversed a defendant's murder conviction where the State played video of the defendant's police interview that showed him repeatedly asking for an attorney. 251 N.J. at 273-75. In the interview, the defendant told the police to "call my attorney" and twice said, "go get my attorney." Id. at 278-79. The Court held that "it was error to play for the jury the portion of the statement wherein defendant invoked his right to counsel," finding that there was "no question that . . . that portion of the recording should have been excised." Id. at 293-94.

Because Mazzarisi's interrogation was played unredacted, the jury saw Mazzarisi attempt to invoke his rights both before signing the waiver form and then throughout the course of the interview. First, the jury saw Mazzarisi ambiguously invoke his right to counsel by asking the questions discussed in

Point I, supra, regarding the type of counsel that was available to him. Second, the jury saw Mazzarisi invoke his right to silence by establishing prior to signing the waiver form that he would be able to invoke his right to silence on a question-by-question basis and then invoking his right to silence to decline to answer certain questions, or in his own words, "us[ing] my Miranda to not answer that question." (17T:95-20 to 22; 96-18 to 97-4)

There was no need for the jury to review the pre-waiver portion of the interview as it contained no probative evidence relating to the charges at issue. Instead, it carried a clear danger that the jury would draw a negative inference that Mazzarisi was initially resistant to speak to police or interested in speaking to counsel because he had something to hide. Mazzarisi's repeated attempts to clarify the import of his waiver bore on the validity of that waiver – a legal question the court resolved prior to trial – and not on the factual issue of his guilt, which was the question before the jury. Showing Mazzarisi's questions about the waiver was in no way "essential to the complete presentation of the witness's testimony" and its omission would in no way have confused the jury. Feaster, 156 N.J. at 76. The pre-waiver portion should have been redacted. This error was particularly harmful because no curative instruction was given telling the jury that it should not consider Mazzarisi's questions about the availability of counsel as evidence of his guilt.

Additionally, the court should have redacted the portions of the interview in which Mazzarisi referenced his Miranda rights in refusing to answer certain categories of questions. In concluding that such redaction was not warranted, the trial court relied on State v. Kucinski. 227 N.J. 603 (2017). There, our Supreme Court held that defendant did not invoke his right to remain silent by responding "[a]h, let's not talk about that part," "we'll forget about that part," "it doesn't matter," and "I don't remember" in response to certain questions. Id. at 623. The Court explained that the defendant had "waived his right to remain silent" at the outset of the interview, and that these responses were "not an attempt to end the dialogue, but rather [] part of an ongoing stream of speech." Id. at 622-23 (citation omitted). Therefore, the Court held it was permissible for the State to play the defendant's entire interrogation and to cross-examine him about inconsistencies between his statement to police and testimony at trial. Id. at 624.

The trial court reasoned that Mazzarisi had similarly indicated his willingness to speak to police generally and to give "an affirmative narrative of what he felt he wanted to talk about." (16T:108-13 to 109-10) The court found Mazzarisi's invocations of his right to silence were "not an attempt to end the dialogue, but rather was part of an ongoing stream of speech." (16T:109-12 to 110-10 (quoting Kucinski, 227 N.J. at 623)) The court also

found that redaction would "mislead the jury as to the statement as a whole" and lead to questions about why detectives did not ask defendant about certain issues in the case. (16T:110-11 to 111-7)

The trial court was wrong. Unlike the defendant in Kucinski, who validly waived his right to remain silent and began an "ongoing stream of speech," id. at 622-23, Mazzarisi did not agree to speak to police until he received assurance that he could selectively invoke his Miranda right to remain silent in response to certain questions throughout the interview. Before agreeing to sign the waiver form, Mazzarisi asked detectives a series of questions about his ability to later invoke his right to remain silent during questioning. (17T:29-18 to 32-15; 38-4 to 41-16) Mazzarisi made clear that he would only speak to detectives if they would allow him to invoke his right to silence in response to questions he did not wish to answer. When Detective Weisbrot told Mazzarisi he had "the right to remain silent and refuse to answer any questions," Mazzarisi asked "does that include the entire time or just that particular question? Because if I use my right to remain silent, does that mean that I no longer have the right to answer your questions?" (1T:38-18 to 24) The detectives told Mazzarisi he could invoke his right to silence in response to particular questions without ending the conversation, before explaining the other Miranda rights. (1T:38-25 to 40-9)

When presented with the Miranda form, Mazzarisi returned to the subject of his right to silence, telling detectives that he had a "problem with" signing the form if it would mean that he could not subsequently invoke his right to silence as to particular questions, as had been established earlier. Before signing the form, Mazzarisi made sure that detectives confirmed again that he would retain the ability to exercise his right to remain silent on a question-by-question basis:

> MR. MAZZARISI: Here's my problem with this. [Quoting the form:] Having these rights in mind, I wish to waive or give up these rights and make a knowing and voluntary statement and answer the questions. To me, that conflicts with right number 5.[5]
>
> SERGEANT SIGISMONDI: It does not. I understand why -- I understand why you're reading it that way, but it doesn't conflict. That number 5 stands throughout the entire interview if you waive your rights right now.
>
> MR. MAZZARISI: But if I were to sign this, sign what this says, I wish to waive or give up these rights.
>
> SERGEANT SIGISMONDI: Correct.
>
> MR. MAZZARISI: That's my problem with signing that.
>
> SERGEANT SIGISMONDI: If you read number 5, though, it says, at any time during the questioning. So, that means signature or not, if you choose to not talk to us anymore, you don't have to. So, if you sign that and waive your rights for now, you want to talk to us. If at some point you change your mind and don't anymore, the

[5] Right number 5, as detectives explained to Mazzarisi, provided that: "A decision to waive these rights is not final, and you may withdraw your waiver whenever you wish, either before or during questioning." (1T:46-24 to 47-2)

waiver still applies. You can still say, you know what, I don't want to talk to you anymore.

MR. MAZZARISI: Okay. I understand what you're saying. Now I have initialed here that I understand these rights. Okay? My problem here is signing that I wish to waive or give up these rights, is the problem that I have.

DETECTIVE WEISBROT: So, Leonard, what that's saying is, if you are going to talk to us today, if you agree to talk to us, in order to do that, you need to sign that saying that you're waiving those rights. However, at any point when we talk today, you can invoke and say, you know what, I no longer want to talk to you guys. Okay?

MR. MAZZARISI: I understand what you're saying. I'm just –

DETECTIVE WEISBROT: Sure. Read it over. We need to ensure that you understand it completely.

MR. MAZZARISI: I understand what my rights are.

DETECTIVE WEISBROT: Okay.

MR. MAZZARISI: My problem is signing away my rights. Do you understand?

SERGEANT SIGISMONDI: I totally understand, but like I said, if it's -- by signing away your rights, you're not actually signing away your rights because at any point, you could bring your – your rights are able to be invoked at any point during our conversation.

MR. MAZZARISI: Like, if I –

SERGEANT SIGISMONDI: They're always available to be invoked.

MR. MAZZARISI: I understand that, but what I'm saying is that if I invoke these rights, you could say, but you signed away your rights.

> SERGEANT SIGISMONDI: The moment you invoke, we're done talking. You don't have to talk to us anymore.
>
> MR. MAZZARISI: Oh, no, no. But we said in the beginning that I could invoke my right for a part of the question, like a question, and then we could continue talking. That's what we had all agreed to.
>
> DETECTIVE WEISBROT: Here's an example. If you waive your rights, okay, and say we talk for three minutes and you decide you no longer want to talk to us, you -- although you waived your rights for three minutes, you can then invoke and say, I don't want to talk to you anymore. So –
>
> SERGEANT SIGISMONDI: And like he told you with number 1, at any point you say, look, I don't want to answer that question, you don't have to answer that question. That's your right.
>
> [(1T:47-24 to 50-23) emphases added]

Mazzarisi therefore only agreed to speak with detectives after securing their assurance that he would be able to invoke his right to silence as to "a part of the question, a question, and then we could continue talking." (1T:50-10 to 23) During the interrogation, when Mazzarisi declined to speak with detectives about certain subjects during the interrogation, he referenced "Miranda" specifically, making clear he meant to invoke the right to silence that detectives assured him he would not compromise by agreeing to speak with them. (17T:59-10 to 12; 95-20 to 22; 96-18 to 97-4; 115-3 to 10)

This case is therefore not like Kucinski, where the defendant waived his right to silence and never indicated a wish to invoke it in response to particular questions. Before signing the waiver form, Mazzarisi secured a guarantee from

detectives that he could invoke the right to silence on a question-by-question basis. Unlike the defendant in Kucinski, who merely claimed to not remember certain things or asked to "not talk about that part" in response to questions, 227 N.J. at 623, Mazzarisi expressly invoked his right to remain silent and referenced "Miranda" when he declined to answer certain questions during the interview. (17T:95-20 to 22; 96-18 to 97-4; 114-20 to 115-10)

The court was also wrong to conclude that redacting these portions of the interview would have misled the jury by implying the detectives had not asked Mazzarisi questions about when he had been in New Jersey. (16T:110-11 to 111-7) In cases where a defendant's statement concerns "substantial evidence" about "the underlying crime" such that a jury might speculate about "why testimony regarding subsequent events was not offered," a trial court may "permit testimony explaining why an interview or interrogation was terminated." Feaster, 156 N.J. at 76. But this is only appropriate "if the testimony is essential to the complete presentation of the witness's testimony and its omission would be likely to mislead or confuse the jury." Ibid. (emphasis added). Here, the court could have told the jury it could not speculate or draw an inference about questions the police did not ask. Showing Mazzarisi's repeated invocations of his right to silence was highly prejudicial and not at all "essential." Feaster, 156 N.J. at 76.

Mazzarisi's understanding that he could invoke his right to silence in response to particular topics -- the very understanding on which he premised his decision to speak to police -- was not honored at trial. The implied guarantee that his decision to exercise his right to silence would not be used against him was breached by the State's presentation of his unredacted statement. See Clark, 251 N.J. at 293 (explaining that "it would be counterintuitive for suspects to be told that they have the right to not speak . . . if at the same time their invocation of th[is] right[] could be used against them at trial"). The jury heard Mazzarisi repeatedly decline to answer questions about how recently he had been in New Jersey, a refusal that led to a clear inference of guilt. The admission of his invocation of his right to silence in response to questions violated his Fifth Amendment right against self-incrimination. Ibid.[6]

[6] Although New Jersey has not expressly recognized the right to selective invocation of the right to silence during an interrogation, many other jurisdictions have. See, e.g., Bartley v. Commonwealth, 445 S.W.3d 1, 11 (Ky. 2014) (collecting cases throughout the country holding that a defendant's "selective silence" in response to questioning "is protected by the Fifth Amendment" and cannot be used against a defendant at trial.) Regardless of whether New Jersey recognizes such a right, Mazzarisi conditioned his waiver on the promise that he could selectively invoke his right to silence. The failure to honor that agreement by playing the unredacted statement at trial would render the waiver not knowing and voluntary, requiring suppression of his entire statement. See O.D.A.-C., 250 N.J. at 424-26 (finding waiver not knowing and voluntary where defendant was falsely told statements would remain "confidential").

Although the court did provide curative instruction, the instruction was unclear, contradictory, and ineffective in remedying the prejudicial impact of showing the jury Mazzarisi's repeated invocation of his rights. Courts generally "courts presume juries follow instructions," however, not all improperly admitted evidence can be remedied by an instruction. State v. Herbert, 457 N.J. Super. 490, 505 (App. Div. 2019). "The adequacy of a curative instruction necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached." Ibid. (quoting State v. Winter, 96 N.J. 640, 647 (1982)). Courts cannot "assume compliance with an instruction that fails to clearly and sharply address the prejudicial aspect of the inadmissible evidence." Id. at 508.

First, the nature of the evidence, viewed in context of the State's weak case, made the curative instruction unlikely to be effective. As defense counsel argued, by playing the full video, the jury was put "in a situation where they're hearing that he doesn't want to answer a particular question to a particular key fact." (16T:90-19 to 24) Mazzarisi invoked his right to silence on topics that were central issues in the case: when he had been present in New Jersey and when he had communicated with his mother. (16T:90-5 to 13) No witness testified to seeing Mazzarisi in Holmdel or the State of New Jersey at any point around the incidents at issue and cell phone, credit card, and toll records

all established Mazzarisi was not present in the state on the dates in question. Thus, the jury may have put great weight on Mazzarisi's refusal to answer questions about when he had been in New Jersey or contacted his mother.

Second, the instruction itself did not clearly prohibit the jury from considering Mazzarisi's silence. While the court correctly told the jury it could not "infer guilt" from "defendant's invocation of his right to remain silent," it incorrectly told the jury that it could consider defendant's invocations "for purposes of assessing credibility and voluntariness of the statement." (17T:7-18 to 8-2) The court's instruction that Mazzarisi's invocation of his right to silence could bear on his credibility directly contradicted the instruction that it could not bear on his guilt. The jury may have believed the instruction that his silence could be used to evaluate his credibility allowed them to infer that his selective silence was an attempt to deceive police or not be forthcoming about his criminal acts – effectively the same as using the silence to infer his guilt. "An instruction can be curative only if the judicial medicine suits the ailment." State v. Herbert, 457 N.J. Super. 490, 508 (App. Div. 2019). This instruction did not.

Because the State's case was far from overwhelming, the error cannot be found harmless beyond a reasonable doubt. See State v. J.R., 227 N.J. 393, 417 (2017) (explaining that "[a]n evidentiary error will not be found 'harmless' if

there is a reasonable doubt as to whether the error contributed to the verdict"). The jury struggled to reach a verdict, communicating at one point it was at an intractable impasse, see Point V, and may have placed improper weight on Mazzarisi's questions about the availability of counsel and selective silence in reaching its decision. The improper admission of these portions of Mazzarisi's interview compels reversal of the convictions. Clark, 251 N.J. at 298-99.

POINT III:

THE STATE'S ELICITATION OF EXTENSIVE INADMISSIBLE LAY OPINION BY SIX WITNESSES -- INCLUDING AN OFFICER WHO HAD NEVER SEEN MAZZARISI PRIOR TO TRIAL AND FOUR RELATIVES WHO HAD NOT SEEN HIM IN A DECADE -- PURPORTING TO IDENTIFY MAZZARISI IN THE CRITICAL SURVEILLANCE FOOTAGE INVADED THE JURY'S PROVINCE AND COMPELS REVERSAL. (not raised below)

The State paraded a series of witnesses, including a police officer, a detective, and four of Mazzarisi's relatives, before the jury who purported to identify him as the person shooting a BB gun in surveillance video from the May 2018 incident. (Da 41) However, none of the witnesses had sufficient familiarity with Mazzarisi to identify him as the person in the video. The detective met Mazzarisi for the first time only after viewing the video and the police officer had never seen Mazzarisi in person before identifying him in the video during trial. None of Mazzarisi's relatives who identified him had seen

him in a decade. The police witnesses and Mazzarisi's long estranged relatives were in no better position to identify him as the person shown in the video than the jury was. See State v. Sanchez, 247 N.J. 450, 472 (2021) ("Even a witness who has some familiarity with the defendant may be barred from providing lay opinion if he or she lacks information about the defendant's appearance at the time of the alleged offense.") Given the central role the video played in the State's otherwise circumstantial case, this cumulative inadmissible lay opinion testimony on the ultimate issue impermissibly "invaded the fact-finding province of the jury" and was clearly capable of producing an unjust result. R. 2:10-2; State v. McLean, 205 N.J. 438, 443 (2011).

Under N.J.R.E. 701, a witness may offer a lay opinion if the opinion is (1) "rationally based on the perception of the witness," and (2) "assist[s] in understanding the witness' testimony or in determining a fact in issue." Under the first prong, "lay opinion testimony is limited to what was directly perceived by the witness[.]" McLean, 205 N.J. at 460. A lay witness may only opine about what he perceives "through use of [his] sense of touch, taste, sight, smell or hearing." Id. at 457. Under the second prong, a lay opinion must actually assist the trier of fact by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Id. at 458.

A lay opinion can only be admitted if "it falls within the narrow bounds of testimony" that meets both of these requirements. Id. at 456. A lay witness is not allowed to opine on something not within his "direct ken" or something "as to which the jury is as competent as he to form a conclusion." Id. at 459. Opinion testimony is simply "not a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself or an opportunity to express a view on guilt or innocence." Id. at 462.

In Sanchez, our Supreme Court recently addressed the permissible bounds of lay opinion testimony by a witness identifying a suspect in surveillance video. There, the Court permitted a parole officer who "had met with defendant more than thirty times" to identify him as the person in footage, finding her opinion met both prongs under N.J.R.E. 701. 247 N.J.at 469. Under the first prong, the officer's identification was "rationally based on [her] perception" because those meetings showed she had "bec[o]me familiar with defendant's appearance" during the relevant period. Ibid.

Under the second prong, the Court held her testimony would "assist the trier of fact," identifying four factors courts should consider in analyzing that prong. First, "the nature, duration, and timing of the witness's contacts with the defendant are important considerations" in determining if it will assist the jury." Id. at 470. Second, where "there has been a change in the defendant's

appearance since the offense at issue," a witness with knowledge of the defendant's appearance at the time of the offense may assist the jury. Id. at 472. Third, whether witnesses other than law enforcement are available to identify a defendant. Ibid. Finally, "the quality of the photograph or video recording at issue may be a relevant consideration" because jurors are "as capable as any witness of determining whether the defendant appears in" a clear photo. Id. at 473. "Conversely, if the photograph or video recording is of such low quality that no witness -- even a person very familiar with the defendant -- could identify the individual who appears in it, lay opinion testimony will not assist the jury, and may be highly prejudicial." Ibid.

Applying these factors, the Court explained that the witness's "contacts with the defendant were more than sufficient to enable her to identify him in the surveillance photograph more accurately than a jury could." Id. at 474. She "met with defendant at least twice per month in the fifteen months preceding her review of the photograph" and was therefore "familiar with his appearance over that period, which included the date of the alleged offenses." Ibid.

In contrast, the testimony of the six witnesses who purported to identify Mazzarisi in the surveillance video in this case failed to satisfy either prong of Rule 701. Their testimony was not "rationally based on [their] perception" because they admitted to being unfamiliar with Mazzarisi's appearance at the

time of the offense, as none of them had seen him in over a decade beforehand. Indeed, Officer Jake Savage, the first witness to identify Mazzarisi in the BB gun video, had never seen Mazzarisi in person prior to trial. (14T:202-20 to 203-7; 227-15 to 229-9) Detective Sigismondi met Mazzarisi for the first time when he interrogated him after viewing the video. (14T:227-6 to 229-6; 15T:20-20 to 22-7)

Three of Mazzarisi's relatives who identified him in the surveillance footage from the BB gun incident all admitted to not having seen him since 2009 -- nearly a decade before the date of the footage and twelve years prior to trial. (15T:161-12 to 162-18; 197-8 to 198-1; 208-22 to 209-8) After identifying Mazzarisi in the video, his own mother Lorraine predicted she would not be able to identify him in the courtroom, before claiming she "vaguely" recognized him when the prosecutor asked him to remove his mask. (15T:93-2 to 25) After purporting to identify Mazzarisi in the video, his uncle Carl identified someone else in the courtroom as Mazzarisi, before realizing his mistake after direct examination had concluded. (15T:194-15 to 197-15)

Given the remote or nonexistent nature of these witnesses' past interactions with Mazzarisi, their testimony also could not "assist the jury" under the second prong of Rule 701. Under the first Sanchez factor, "the nature, duration, and timing of the witness[es'] contacts" weighed

overwhelmingly against admission of the identifications because none of the witnesses had contacts with Mazzarisi in the decade prior to the incident and Officer Savage had no contact with Mazzarisi prior to trial. Under the second Sanchez factor, none of the witnesses had knowledge of his appearance at the time of the offense. Id. at 472. The video was taken in 2018 -- much closer in time to the date of trial than to any of the witnesses' prior interactions with Mazzarisi. The jury was fully capable of looking at Mazzarisi and determining if he resembled the person in the video. Regardless of whether other witnesses were available, under the third Sanchez factor, police witnesses should not have been used to identify defendant because those witnesses had no independent knowledge of his appearance and "law enforcement lay opinion identifying a defendant in a photograph or video recording is not to be encouraged." Id. at 472 (citation and quotation omitted). Under the final Sanchez factor, given the quality of the footage and the witnesses' lack of familiarity with Mazzarisi, there was no reason they were "more likely to correctly identify the defendant from the [video] than the jury." Id. at 473.

The State's presentation of the six witnesses' purported identifications of Mazzarisi from the critical video and in court invaded the jury's province. State v. Cain, 224 N.J. 410, 427 (2016) (holding that "ultimate-issue testimony" regarding a defendant's guilt "intrudes on the exclusive domain of

the jury as factfinder"). Whether Mazzarisi was the person firing the BB gun at Neuhaus Realty in the video was the ultimate issue at trial. Therefore, viewing the video and determining whether it depicted Mazzarisi was the jury's independent responsibility. The jury's exposure to extensive inadmissible lay opinion on the ultimate issue of identification violated Mazzarisi's right to due process and a fair trial, compelling reversal of his convictions. U.S. Const. amends. V, VI and XIV; N.J. Const. art. 1, ¶¶ 1 and 10.

POINT IV:

THE STATE ELICITED INADMISSIBLE HEARSAY TESTIMONY FROM DETECTIVE WEISBROT THAT CHRISTOPHER MAZZARISI'S NAME "NEVER CAME UP" AND THAT "ALL THE INFORMATION AND EVIDENCE . . . RECEIVED INDICATED HE WAS NOT INVOLVED AND THAT [DEFENDANT] WAS," IN VIOLATION OF MAZZARISI'S RIGHTS UNDER THE CONFRONTATION CLAUSE. (not raised below)

The State's case was circumstantial and hinged on the prosecution's ability to prove that Mazzarisi had a motive to commit the crimes at issue because he felt he was owed money by his mother and her family. The defense presented a theory of third-party guilt by showing throughout trial that Mazzarisi's brother and father, who lived minutes from the incidents, shared the same motive and were never investigated. In support of its theory, the State elicited highly prejudicial testimony from Detective Weisbrot implying that

evidence outside the record debunked Mazzarisi's third-party guilt defense and implicated him. (17T:224-7 to 16) This testimony violated hearsay rules, Confrontation Clause principles, and Mazzarisi's fundamental right to due process. U.S. Const. amend. XIV; N.J. Const. (1947), art. I, pars. 1, 9, 10; State v. Bankston, 63 N.J. 263, 265-67 (1973); State v. Branch, 182 N.J. 338, 342 (2005). His convictions must be reversed.

Our federal and state Constitutions guarantee a criminal defendant "the right . . . to be confronted with the witnesses against him." U.S. Const. amends. VI, XIV; N.J. Const. art. I, par. 10. Because the opportunity to cross-examine witnesses who testify in court is the "greatest legal engine ever invented for the discovery of truth," confrontation is "essential" to a "fair opportunity to defend against the State's accusations." State v. Medina, 242 N.J. 397, 412-13 (2020). The Confrontation Clause "prohibits the introduction of testimonial hearsay that does not meet an established and recognized exception to the hearsay rule, and cannot be challenged by a defendant through cross-examination." Id. at 413 (citing Crawford v. Washington, 541 U.S. 36, 43-59 (2004)).

Our Supreme Court has long applied the hearsay rule and Confrontation Clause "to protect criminal defendants from the incriminating statements of a faceless accuser who remains in the shadows and avoids the light of court."

Medina, 242 N.J. at 413. "When the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." Bankston, 63 N.J. at 271.

In Bankston, a detective testified that he and other officers approached the defendant because an informer told them an individual wearing certain clothing was at a tavern and was in possession of drugs. Id. at 266-67. Even without a specific reference to what the informant said, the Court found that the logical inference of the testimony was that he had provided the police with evidence of defendant's guilt, and therefore, reversed the conviction. Id. at 272-73. The Court observed that, even when "the police officers never specifically repeat[] what the informer . . . told them, the inescapable inference . . . [is] that an unidentified informer, who was not present in court and not subjected to cross-examination, had told the officers that defendant was committing a crime." Id. at 271.

"Subsequent decisions have held that the Bankston rule is violated when the logical implication to be drawn from a witness' testimony is that a nontestifying witness has given the police evidence of the accused's guilt." State v. Harris, 298 N.J. Super. 478, 489 (App. Div. 1997) (quotations omitted). In State v. Branch, 182 N.J. 338, 342 (2005), the Court held that

testimony that the police included defendant's photograph in an array because the police "had developed defendant as a 'suspect based on information received'" violated the Confrontation Clause. Despite the absence of an objection, the Court held that such testimony "was inadmissible hearsay that violated defendant's right of confrontation" and compelled reversal. Ibid. As the Court concluded, this testimony led the jury "to speculate that the detective had superior knowledge through hearsay information implicating defendant in the crime." Id. at 348. In reaching this conclusion, the Court reviewed Bankston and its progeny, explaining the "common thread . . . is that a police officer may not imply to the jury that he possessed superior knowledge, outside the record, that incriminates the defendant." Id. at 351.

Detective Weisbrot's testimony directly violated the rules set forth in Bankston and its progeny, when he testified as follows on direct:

> THE STATE: All right. Now, my question for you is did you ever suspect Christopher Mazzarisi in any of these three charges?
>
> DETECTIVE WEISBROT: No, I didn't.
>
> THE STATE: And why not?
>
> DETECTIVE WEISBROT: Christopher Mazzarisi's name never came up in this investigation. He was never reported to be involved in the investigation. And all the information and evidence that we had received indicated that he was not involved, and that his brother, Leonard Mazzarisi was.
>
> [(17T:224-7 to 16)]

The undeniable implication of this testimony was that Detective Weisbrot possessed "superior knowledge, outside the record, that incriminate[d] defendant [Mazzarisi]" and cleared his brother Christopher, who shared his same motive and lived closer to the location of the incidents. Branch, 1832 N.J. at 351. Detective Weisbrot did not disclose the source of this information, but categorized it as the total sum of "all the information and evidence" he had received. This characterization implied there were non-testifying witnesses that supported Detective Weisbrot's belief in Mazarrisi's guilt and his brother Christopher's innocence.

Given the weaknesses of the State's case and the critical importance of the third-party guilt defense to Mazzarisi's case, the erroneous admission of this testimony was clearly capable of producing an unjust result and compels reversal. U.S. Const. amend. XIV; N.J. Const., art. I, pars. 1, 9, 10; Branch, 182 N.J. at 342.

POINT V:

THE COURT'S RESPONSE TO THE JURY'S REPORT THAT IT HAD BEEN AT AN IMPASSE FOR "A GOOD LENGTH OF TIME" AND THAT "IT SEEMS LIKE WE WILL NOT MAKE ANY

PROGRESS ON REACHING A UNANIMOUS DECISION" WAS COERCIVE. (23T:31-4 to 34-17)

Toward the end of its third day of deliberations, the jury sent a note stating that it had reached a "unanimous decision on some questions on the verdict sheet" but had been at impasse on other questions "for a good length of time" and did not believe it would "make any progress on reaching a unanimous decision." (21T:17-7 to 14) Although the jury clearly stated that it did not believe further deliberations would be fruitful, the trial court sent the jury back with the same instruction on deliberations it had already received at the close of trial. (21T:17-23 to 18-20) The court's failure to address the jury's report that they had a partial verdict but did not believe further deliberations would yield a unanimous decision on the remaining counts left the jury with the clear "impression that they would be required to continue to deliberate for as long as it might take to reach unanimity" on all counts. State v. Figueroa, 190 N.J. 219, 242 (2007). The court's actions impermissibly coerced the jury into reaching a verdict, compelling reversal. U.S. Const. amends. VI and XIV; N.J. Const. art. I, ¶¶ 1 and 10.

"The sanctity of the jury role and the integrity of jury deliberations are crucial aspects of a criminal prosecution." State v. Corsaro, 107 N.J. 339, 346 (1987). Our Supreme Court has therefore sought to "insulate[]" jury deliberations from any "influences that could warp or undermine the jury's

deliberations and its ultimate determination." Ibid. Even a judge's "subtle behaviors" can coerce jurors into reaching a verdict they would not have otherwise. State v. Adim, 410 N.J. Super. 410, 428 (App. Div. 2009).

"The appropriate course when a juror indicates that the jury is deadlocked is to inquire of the jury whether further deliberation will likely result in a verdict." State v. Valenzuela, 136 N.J. 458, 469 (1994). Although a "judge has discretion to require further deliberations after a jury has announced its inability to agree," a judge's "exercise of that discretion is not appropriate if the jury has reported a definite deadlock after a reasonable period." Adim, 410 N.J. Super. at 423-24 (citing Figueroa, 190 N.J. at 221; State v. Czachor, 82 N.J. 392, 407 (1980)). To decide if the period of deliberations has been "reasonable," "a judge should weigh all the relevant circumstances including the length and complexity of the trial" and "whether the jurors are of the view that continued deliberations will be helpful." Ibid.

In Adim, the jury sent a note on its second day of deliberations stating that, "We are not in agreement on any of the counts. Each of the jurors are firm in their decision. We do not feel further discussions will be helpful." Id. at 420-21. This Court explained that, because the jury's note made clear it was definitely deadlocked, "the judge was required to discharge the jury unless he

concluded that the period of deliberations was unreasonably short given the nature of the trial evidence and other relevant circumstances." Id. at 424.

More recently, in State v. Harris, this Court found it was a "close question" whether the judge had forced a verdict by sending the jury back to deliberate further after it reported a deadlock in three separate notes after deliberating for four days. 457 N.J. Super. 34, 51 (App. Div. 2018). The trial in that case was exceptionally complex, as it "went on for approximately six weeks" and "included close to two hundred exhibits, seven experts, numerous witnesses, and playback of prior witness statements." Ibid. A jury note said that it did not believe viewing a critical video again would "change anyone's mind," but never predicted further deliberations would not be fruitful. Ibid.

If Harris was a "close question," this case is not. Here, the jury's report that it had been "at impasse on some questions for a good length of time" and "[i]t seems like we will not make any progress on reaching a unanimous decision" was a definite deadlock. (21T:17-7 to 14) The note did not just report an existing deadlock, but told the court the jury's view that further deliberations would not be fruitful. The jury sent this note in the afternoon of its third day of deliberations in a case where testimony spanned five trial days. This was plainly a "reasonable period" of deliberations.

Because the jury "reported a definite deadlock after a reasonable period of deliberations," forcing them to deliberate further was error. Adim, 410 N.J. Super. at 423-24. The court should have either taken a partial verdict or asked the jury whether further deliberations would be useful. See Model Jury Charges (Criminal), "Judge's Inquiry When Jury Reports Inability to Reach Verdict" (approved June 2013). Just telling the jury to keep deliberating implied that a partial verdict would not be accepted and the jury would not be dismissed until reaching "a full verdict on all the questions." (21T:18-17 to 20)

The court's response to the jury's report of a definite deadlock created an impermissible risk that the jurors felt coerced into reaching a verdict on counts over which they were intractably split. Figueroa, 190 N.J. at 241. Mazzarisi's convictions must be reversed.

POINT VI:
THE CUMULATIVE EFFECT OF THE AFOREMENTIONED ERRORS DENIED MAZZARISI A FAIR TRIAL. (Not raised below)

Even if this Court does not agree that the errors merit reversal individually, Mazzarisi's convictions must be reversed because their cumulative effect fundamentally obstructed the jury's ability to assess the evidence at trial. See, e.g., State v. Sanchez-Medina, 231 N.J. 452, 469 (2018) ("[E]ven if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial").

The State's case against Mazzarisi was tenuous. Mazzarisi's cell phone, credit card, and toll records all showed no signs of him being present in New Jersey during the period at issue. No witness testified to having seen Mazzarisi in New Jersey around these dates. Evidence established that Mazzarisi was living in Virginia at the time and a ping of the same cell phone that showed no signs of being used in New Jersey during this time was used by police to locate Mazzarisi in Virginia the day after the BB gun incident. The State's case depended on the claim that Mazzarisi harbored anger toward his mother and her family, but the State's own witnesses established that this motive was shared by Mazzarisi's father and brother, both of whom actually lived in New Jersey minutes away from the incidents, but were never seriously investigated.

All the aforementioned errors distracted the jury from serious and independent consideration of whether the evidence that the State introduced amounted to proof beyond a reasonable doubt. These errors were thus "clearly capable of producing an unjust result," and Mazarisi's convictions must be reversed. See R. 2:10-2; Frisby, 174 N.J. at 591.

CONCLUSION

For all these reasons, Mazzarisi's convictions must be reversed.

Respectfully submitted,

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Dated: March 29, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1239-21T4

INDICTMENT NO. 18-11-1421
CASE NO. 18002412

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	ON APPEAL FROM A FINAL
v.	:	JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF
LEONARD J. MAZZARISI, 3RD,	:	NEW JERSEY, LAW DIVISION (CRIMINAL), MONMOUTH COUNTY
Defendant-Appellant.	:	

SAT BELOW: Honorable Joseph W. Oxley, J.S.C.,
Honorable Lourdes Lucas, J.S.C.,
and a Jury

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT PROCEDURAL HISTORY

The defendant, Leonard J. Mazzarisi, 3rd, was charged by way of Indictment Number 18-11-1421 with second-degree Aggravated Arson, N.J.S.A. 2C:17-1(a) (Counts One and Two); second-degree Possession of a Weapon for an Unlawful Purpose, N.J.S.A. 2C:39-4(a) (Count Three); and third-degree Unlawful Possession of a Weapon, N.J.S.A. 2C:39-5(b) (Count Four). Da1-3.

Defendant filed a pretrial motion to suppress statements, see Da4-16; (1T:4-7 to 4-13)[1], testimony and evidence on which was received by the Honorable Joseph W. Oxley, J.S.C., on October 17 and 18, 2019, and October 22, 2019. See generally (1T, 2T, 3T). Following argument from counsel, Judge Oxley reserved decision. (3T:49-17 to 50-11). By way of a November 21, 2019 order and accompanying written opinion, Judge Oxley denied defendant's motion. Da17-26.

Trial on this indictment took place before the Honorable Lourdes Lucas, J.S.C., from July 12, 2021 through July 30, 2021. (13T though 22T). On July 30, 2021, the jury returned its verdict, finding defendant guilty on Counts

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[1] The State's transcripts citations will generally conform to the defendant's Table of Abbreviations, Dbviii, with the following additions necessitated by defendant's failure to include in his table five transcripts that were provided to this Court and which document corrections made to what defendant has identified as 20T, the return of the jury's verdict, defendant's post-verdict motion for a judgment of acquittal, defendant's sentence, and corrected sentence. The citation for these five additional transcripts are as follows:

21T refers to Transcript of Trial (Corrected), July 29, 2021.
22T refers to Transcript of Trial, July 30, 2021.
23T refers to Transcript of Motion, September 29, 2021.
24T refers to Transcript of Sentence, November 5, 2021.
25T refers to Transcript of Sentence, November 12, 2021.

Two, Three and Four, and not guilty on Count One. (22T:4-13 to 4-19); Da27-29.

Following the denial of his post-trial motion for judgment of acquittal and/or a new trial, see (23T:23-14 to 42-2), defendant appeared before Judge Lucas for sentencing on November 5, 2021. (24T). After evaluating all applicable aggravating and mitigating factors, see (24T:19-24 to 42-4; 43-14 to 46-25), Judge Lucas sentenced defendant to an aggregate custodial terms of 10 years New Jersey State Prison, subject to 42 months of parole ineligibility, along with all mandatory fines and penalties. (24T:42-10 to 43-12; 25T:4-10 to 5-17); Da30-33.

Defendant thereafter filed an appeal with this Court. Da34-39. The State opposes defendant's appeal and submits the following in support of its opposition.

COUNTERSTATEMENT OF FACTS[2]

On January 27, 2018, Patrolman John McGuire of the Holmdel Police Department responded to 51 Main Street, for a report of a structure fire to the commercial building located there. 51 Main Street specifically was the location of Neuhaus Realty, which was once owned by Lorraine Neuhaus and her ex-husband Leonard Mazzarisi, Jr., and was currently owned by Lorraine's brother, Carl Neuhaus. When Office McGuire arrived, the building was engulfed in flames. No one was inside the business as it was a Saturday evening. Fire trucks responded minutes after Officer McGuire's arrival and

[2] Because defendant was found not guilty on County One, the sole charge related to events occurring in August 2017, the State has omitted any reference to those events from its Counterstatement of Facts.

within a few hours, the fire had been suppressed. (13T:117-19 to 143-10; 15T:77-23 to 79-9; 135-9 to 136-13).

Deputy Fire Marshall Christopher Tuberion and his team of investigators responded to the 51 Main Street fire, with Deputy Tuberion overseeing the investigation and determine the origin and cause of this fire. While the fire was still active upon his arrival, it had by then been "mostly extinguished." Once the fire was fully extinguished, Deputy Tuberion's origin and cause investigation included visual examinations of the inside and outside of 51 Main Street and use of a combustible gas meter. (14T:69-6 to 97-25).

The combustible gas meter provided a reading of 486 parts per million, "a high," dangerous level. Deputy Tuberion's visual inspection located a "V pattern," indicating the lowest burn location of the fire, and possible fire origin, at the back of the 51 Main Street building, as well as a "particular sill plating ... basically the bottom of a room or the foundation of the house" that was "heavily, heavily charred." It was determined that this location at the rear of the building, specifically the secretary's office, was the origin point of the fire. (14T:69-6 to 97-25; 100-2 to 101-4; 152-20 to 153-3; 168-11 to 168-25).

After this initial investigation, Deputy Tuberion and his team were unable to rule out two potential causes for this fire: "ignitable liquid" or "energized electrical equipment." However, the team did find the following:

> Inside the room, just inside the window, we did see that the flooring had burned completely away as well as the floor beams. So you're talking minimal 2 by 6, 2 by 8 pieces of wood that were burned completely away. And the flooring, the wood sheathing, three-quarter inch plywood or greater were gone. The floor also gave us an indication of a pour pattern, which is why the ... combustible gas meter was utilized and determined that there was

486 parts per million[.]
(14T:98-1 to 102-7; 144-6).

A digital recorder was located in the basement of 51 Main Street, that contained surveillance camera recordings for the building. This video recording appeared to connect a 2017 red Hyundai Elantra to the setting of the fire. Additionally found at the back of 51 Main Street was a broken glass bottle and broken glass shards from a back room. (13T:171-4 to 185; 14T:214-24 to 216-12; 221-13 to 226-15; 15T:18-14 to 19-19; 66-19 to 66-22; 203-5 to 203-18).

Detective Stephen Vogt of the Crime Scene Unit of the Monmouth County Prosecutor's Office also responded to the scene of this fire at approximately 12:25 a.m., because arson was suspected. When photographically documenting the scene once the fire was out at the direction of the Fire Marshall's Office, Detective Vogt observed that the majority of the damage was to the rear of the building, away from the street and that the fire significantly compromised several walls and otherwise damaged the building's structure. Detective Vogt took additional photographs of the damaged building the following day. (13T:144-8 to 170-21; 185-20 to 190-21).

On May 29, 2018, Marie Jarvis was working alone at Neuhaus Realty, located at 4 South Holmdel Road, when she heard pops, something hit the building five to six times and then glass braking. When she went to check on the noise, Ms. Jarvis saw a red car exiting the business's driveway; Ms. Jarvis had never seen the red car before. Ms. Jarvis also noticed several little holes in the building's vinyl siding and a broken window. (13T:110-3 to 114-4).

Officer Jake Savage of the Holmdel Police Department responded to Neuhaus Realty for a "call of a white male subject in a red vehicle that shot the back of 4 South Holmdel Road." Once on scene, Officer Savage observed broken glass and shattered windows in a conference room, as well as damage outside to the building's vinyl siding and BBs on the window sill. Officer Savage also located and reviewed surveillance video, which confirmed what had been reported: a "red sedan pull in the north driveway from South Holmdel Road, pull around the back of he building The subject reached into the glove compartment, pulled out a black handgun-style BB gun and reached ... out the window, and lean out the driver's side window and shoot the building multiples times." The license plate on this vehicle connected the vehicle to the defendant's father. (14T:171-10 to 203-7; 219-2 to 220-24; 17T:127-11 to 128-17).

Before both the fire and the shooting, defendant sent text messages to his mother, Lorraine Neuhaus. The text messages all referenced defendant's belief that Lorraine and the Neuhaus family owed him $25,000, plus interest, from the sale of 51 Main Street and her divorce from defendant's father. Some messages directed Lorraine to a bank account into which the owed money could be deposited; this bank account was associated with defendant's businesses, e.g., 360 Entertainment. While Lorraine did not recognize the telephone numbers associated with these messages, one of which was a prepaid Virginia telephone number[3], the content of the messages made clear to her that her son Leonard was behind them because over the years no one but her

[3] Defendant later provided this telephone number to police. (17T:131-23 to 132-4).

Leonard had mentioned $25,000 specifically to her. Contrary to defendant's beliefs, no one in the Neuhaus family believed the defendant was owed $25,000. In addition to these messages referring to this alleged $25,000 debt, they also referred to members of the Neuhaus family by the names defendant would use for them, e.g., referring to Lorraine's mother as Mimi. (15T:72-2 to 94-14; 119-14 to 120-20; 136-17 to 142-9; 17T:14-24 to 16-12; 129-1 to 130-11).

Deputy Ryan Plunkett of Spotsylvania County Sheriff's Office in Virginia arrested defendant on May 30, 2018 at a Hampton Inn in connection with a warrant issued for defendant's arrest in connection with the May 29th shooting incident. Following the arrest, Deputy Plunkett searched defendant's hotel room and located, among other things, two BB guns and cellular telephones. Testing on these two guns by Lieutenant Ryan Muller of the Monmouth County Prosecutor's Office determined both were operable. (16T:5-18 to 62-18; 120-10 to 128-9).

Following defendant's arrest, he provided a statement to detectives from the Monmouth County Prosecutor's Office and the Holmdel Police Department. During the statement, defendant declined to answer some questions about his family and Holmdel, but nonetheless, he did acknowledge previously living in Holmdel with his father and brother, driving a red Hyundai Elantra, being familiar with the Holmdel location of Neuhaus Realty, being owed $25,000 by Mimi in connection with the sale of a Main Street building that had been rented to Neuhaus Realty as part of a "real estate scam," knowing about the fire at Neuhaus Realty from Facebook, to being in possession of numerous cell phones and electronics, and to owing the business

Entertainment 360. (17T:18-11 to 125-20; 207-1 to 208-10).

Also following defendant's arrest, Detective Vogt was again called upon to take photographs and process a scene, though this time it was defendant's person, bags, and his red Hyundai Elantra. Inside these bags and this vehicle, Detective Vogt located, among other items, Ronsonol lighter fluid, lighters, CO2 cartridges boxes of Daisy, Bear River, and Premier BBs, and loose BBs. (13T:192-1 to 199-14; 14T:8-18 to 29-13).

LEGAL ARGUMENT

POINT I

DETECTIVES APPROPRIATELY RESPONDED TO DEFENDANT'S REQUESTS FOR LEGAL ADVICE

When reviewing the Miranda form with detectives, defendant was an active participant, asking many questions, which the detectives answered. No right contained on the form was abandoned; detectives spoke with the defendant until he told them he understood the right being explained to him. Right "[n]umber three" – "You have the right to consult with an attorney at any time and have him present before and during questioning?" – was treated no different. Pa6-8; (1T:41-22 to 45-15).

Defendant's immediate response to being read this right and asked if he understood it was, "I do understand what it is that you have just read to me." Pa6; (1T:42-1 to 42-2). Defendant then asked the detectives if the hypothetical attorney would be the Virginia Legal Aid attorney that had been appointed to represent him on his extradition or a New Jersey attorney. Pa6-8; (1T:42-1 to 45-10). Defendant told the detectives that this "was an example question, I'm

not I'm not saying that that's what I'm looking for I'm saying as an example." Pa7; (1T:42-24 to 43-5).

The detectives were candid with defendant that they did not know about how court-appointed counsel in Virginia worked, and that court-appointed counsel in New Jersey was via the Public Defender's Office. Pa6-8; (1T:41-22 to 45-15). However, the detectives made clear to the defendant that he had "a right to have an attorney, any attorney that you want, present with you, at the time … that we're asking you questions" and that the decision to speak with or without counsel was defendant's. Pa6-7; (1T:42-11 to 42-19). Discussion of this right concluded with the detective going back to the form and again asking the defendant, "you have the right to consult with an attorney at any time and have him present before and during questioning, do you understand that?" Pa8; (1T:45-11 to 45-14). Defendant responded, "Yeah, totally." Pa8; (1T:45-15).

Discussion of counsel continued with question "number four," which asked defendant if he understood that, "[i]f you cannot afford an attorney one will be provided if you so desire prior to any questioning." Pa8; (1T:45-16 to 45-19). Defendant acknowledge that this was "an extension off of what we were all just talking about" and meant that he "can speak to you without an attorney," but had the right to consult with an attorney." Pa8-9; (1T:45-20 to 46-12). Defendant confirmed that he was "making sure that [the detectives] understand that I understand" his right to counsel. Pa9; (1T:46-17 to 46-23). Before waiving his rights and speaking with the detectives, defendant told the detectives that he "underst[ood] what my rights are," and was "going to sign" the Miranda Waiver Form and speak with detectives. Pa10, 12; (1T:49-15 to 49-16; 51-9). See also Da40.

After hearing the "clear, candid, [] convincing," and "uncontroverted" testimony of the detectives, see (1T:5-6 to 116-13; 2T:3-15 to 95-24)(Detective Sergeant Brian Weisbrot); (3T:5-2 to 28-18) (Sergeant Theodore Sigismondi), and reviewing the video recording of defendant's statement, Judge Oxley found "that Detectives properly advised defendant of his Miranda rights, and that Defendant's waiver was knowing, intelligent, and voluntary." Da21-26. Defendant now asks this Court to find to the contrary and reverse. In support of this request, defendant recharacterizes the above questions and answers as "at least an ambiguous invocation of his right to counsel" – specifically "the availability of counsel" – and that detectives failed to "clarify if he wanted to speak to an attorney." Db13, 17.

Defendant's self-serving, unsupported recharacterization is wholly unsupported by uncontroverted testimony of the detectives and the clear video recording of the statement. Both do not depict detectives "barrel[ing] ahead in asking [defendant] to waive his rights without answering his questions." Db21. Both do depict detectives answering defendant's questions to the best of their ability and ensuring defendant understood he could have counsel present. Both do depict defendant understanding his rights and knowingly and voluntarily waiving them, just as the lower court found. This Court can and should affirm.

An appellate court reviewing a lower court's grant of suppression need not defer to the trial court's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Township Comm. Of Twp. Of Manalapan, 140 N.J. 366, 378 (1995); State v. Stott, 335 N.J. Super. 611, 620-21 (App. Div. 2000), rev'd o.g., 171 N.J. 343 (2002); State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div.), certif.

denied, 182 N.J. 148 (2004). "Whether the facts found by the trial court are sufficient to satisfy the applicable legal standard is a question of law subject to plenary review on appeal." Cleveland, 371 N.J. Super. at 295 (citing State v. Sailor, 355 N.J. Super. 315, 320 (App. Div. 2001)); State v. Gandhi, 201 N.J. 161, 176 (2010).

The standard governing the review of factual finding is different, requiring this Court "uphold the trial court's factual findings ... 'so long as those findings are supported by sufficient credible evidence in the record.'" State v. Hagans, 233 N.J. 30, 37 (2018)(quoting State v. Gamble, 218 N.J. 412, 424 (2014)); State v. S.S., 229 N.J. 360, 374 (2017). This high standard accords substantial deference "to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007)(quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Deference likewise is owed to lower court's factual findings that are based upon video evidence; "[v]ideo-recorded evidence is reviewed under the same standard." Hagans, 233 N.J. at 38; S.S., 229 N.J. at 379-81; State v. A.M., 237 N.J. 384, 395-96 (2019).

"Miranda sets forth a balance between the rights of the government and those accused of criminal activity." State v. M.L., 253 N.J. Super. 13, 20 (App. Div. 1991), certif. denied, 127 N.J. 560 (1992). This balance requires a defendant be advised of the specific rights set forth by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, 444 (1966), prior to custodial interrogation. See also State v. Nyhammer, 197 N.J. 383, 400-01 (2009); M.L., 253 N.J. Super. at 20.

A valid waiver requires a knowing, voluntary and intelligent decision not to exercise the right to remain silent or to an attorney. State v. Burris, 145 N.J. 509, 534 (1996); State v. Burno-Taylor, 400 N.J. Super. 581, 588 (App. Div. 2008); State in the Interest of A.S., 203 N.J. 131, 146 (2010). In determining whether a defendant made a valid waiver and provided a voluntary statement, a "court must look at the totality of the circumstances, including both the characteristics of the defendant and the nature of the interrogation." State v. Timmendequas, 161 N.J. 515, 613-14 (1999), cert. denied, 534 U.S. 858 (2001); Nyhammer, 197 N.J. at 402 (citing State v. Dispoto, 189 N.J. 108 (2007); State v. O'Neil, 193 N.J. 148 (2007)); A.S., 203 N.J. at 146.

Factors to be considered include: "'the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved,' 'as well as the suspect's previous encounters with the law.'" A.S., 203 N.J. at 146 (quoting State v. Presha, 163 N.J. 304, 313 (2000); State v. Miller, 76 N.J. 392, 402 (1978)); Nyhammer, 197 N.J. at 402; State v. Carpenter, 268 N.J. Super. 378, 385 (App. Div.), certif. denied, 135 N.J. 467 (1994).

Waiver of one's Miranda rights is, of course, revocable. Invocation by a suspect of the right to silence or counsel at any time during a custodial interrogation must be "scrupulously honored" if the invocation is "clear and unambiguous." State v. Diaz-Bridges, 208 N.J. 544, 565 (2012); State v. Maltese, 222 N.J. 525, 545 (2015), cert. denied, 136 S. Ct. 1187 (2016); State v. Chew, 150 N.J. 30, 61 (1997), cert. denied, 528 U.S. 1052 (1999); State v. Melendez, 423 N.J. Super. 1, 29 (App. Div.), certif. denied, 210 N.J. 28

(2012); State v. Gonzalez, 249 N.J. 612, 628 (2022). In such situations, "interrogation must cease." Maltese, 222 N.J. at 545; Chew, 150 N.J. at 61.

Where the invocation is "ambiguous" – it "leav[es] the investigating officer 'reasonably unsure whether the suspect was asserting that right'" or is "susceptible to two different meanings" – clarifying questions "narrowly directed to determining whether defendant [is] willing to continue" are necessary before interrogation can continue. Maltese, 222 N.J. at 545 (quoting State v. Johnson, 120 N.J. 263, 284 (1990)); Diaz-Bridges, 208 N.J. at 5691; S.S., 229 N.J. at 382-83; Gonzalez, 249 N.J. at 629-31. The "[w]ords used by a suspect are not to be viewed in a vacuum, but rather in 'the full context in which they were spoken.'" S.S., 229 N.J. at 382 (quoting State v. Roman, 382 N.J. Super. 44, 64 (App. Div.), certif. dismissed, 189 N.J. 420 (2007)).

To that end, our courts have consistently distinguished between invocations of one's rights, which must be clarified, from requests for advice, which does not need to be provided. Compare Gonzalez, 249 N.J. at 631 (finding "[b]ut what do I do about an attorney and everything?" to be "an ambiguous invocation of [defendant's] right to counsel that required the detective to cease all questioning and seek clarification") with State v. Alston, 204 N.J. 614, 625-26 (2011)(finding "should I not have a lawyer?" not to be even an ambiguous assertion of right, but "[r]ather ... a question[] posed to the investigating officer[] that amounted to defendant's request for advice about what the detective thought the defendant should do"). Defendant's logistical "question" about whether the attorney who hypothetically would represent him during the interrogation would be from Virginia's Legal Aid or New Jersey's Public Defender's Office was a request for advice like in Alston, and not an

ambiguous invocation of counsel like in Gonzalez. See Pa7 ("No, no, no, that was an example question, I'm not saying that that's what I'm looking for. I'm saying as an example"); (1T:42-24 to 43-5).

Ultimately, however, this Court need not decide which characterization is correct because, like the detective in Alston, and dissimilar from the detective in Gonzalez, the detectives here did respond to defendant's query and did so in a manner approved by our courts. Specifically, the detectives did not speculate on areas of law with which they were not familiar, e.g., the structure of Virginia's publicly-funded attorneys, extradition, etc., or provide incorrect or misleading advice with regard to which state's bar the attorney who would be appointed to represent the defendant would be a member. Cf. State v. Francisco, 471 N.J. Super. 386, 417-19 (App. Div.), certif. denied, __ N.J. __ (2023). Instead, and as first advised in Alston, 204 N.J. at 628, the detectives relied on "the more prudent course" and "re-read[]" the portion of the Miranda warnings about the appoint of counsel."

The detectives' first "answer" to defendant's "question" was to remind him that he had "the right to have an attorney, any attorney that you want, present with you, at the time ... that we're asking you questions," whether that attorney be from Virginia or New Jersey. Pa6; (1T:42-11 to 42-19). This colloquy ended with the detectives again reminding defendant of his right to counsel, "Okay, so going back to that right Leonard ... you have the right to consult with an attorney at any time and have him present before and during questioning." Pa8; (1T:45-11 to 45-14). Defendant indicated he understood this advice and his right to counsel and to court-appointed counsel, see Pa8-9; (1T:45-15 to 46-23).

The record here leaves no room for a finding of an ignorance of his rights, like in Gonzalez, 249 N.J. at 631-32. The "final analysis" here should mirror that from Alston, 204 N.J. at 628:

> defendant's understanding of his rights was clear and complete; the words he chose were not an ambiguous assertion of any of those rights but instead were a series of requests for advice from the detective. The words the detectives used in an effort to clarify whether defendant was attempting to assert any of his rights were neither inaccurate nor misleading.

Like in Alston, this Court can and should "conclude ... that defendant's waiver of his rights was knowing, voluntary and intelligent." Ibid. This Court can and should affirm.

POINT II

ADMISSION OF DEFENDANT'S ENTIRE MIRANDA STATEMENT WAS LAWFUL

Prior to waiving his Miranda rights, defendant took pains to ensure that his general waiver of the right to remain silent would not preclude him from not answering specific, individual questions:

> Oh, I'm not saying that I would no longer want to talk to you, what I'm saying to you is that if in the course of you asking me these questions, if a particular question is a question that I didn't want to answer and I wanted to use that right [to silence] ... [d]oes that stop the questioning, because that's not what I would be looking to do, I wouldn't be looking to say from this point forward, I don't wish to be speaking to you, I would just not wish to be answering that particular question.

Pa4-5; (17T:29-21 to 31-3). The interrogating detectives assured the defendant that they would respect his decision to not answer specific questions, see Pa5-

6; (17T:31-6 to 32-15), and did so throughout the interrogation, see, e.g., Pa16, 24-25, 29, 32, 34, 35, 43, 48, 49, 54, 58, 59-69; (17T:47-20 to 47-22; 59-5 to 61-15; 66-22 to 68-6; 72-2 to 72-7; 76-3 to 76-4, 78-11 to 78-12; 88-10 to 89-22; 94-16 to 95-16; 96-4 to 97-10, 103-10 to 103-15, 108-17 to 108-18, 110-6 to 124-14).

Prior to the video recording of defendant's interrogation being played for the jury, see Da41, (17T:24-1 to 124-14), defendant moved to redact from the video recording – and to hide from the jury – all portions of the interrogation in which defendant refused to answer the detectives' question, arguing that the failure to do so would amount to commentary on his invocation of his right to silence. (16T:84-24 to 114-1). While the State objected to any redactions that could make the statement unclear or lead to speculation as to the quality of the investigation, it made clear that it did not intend to cross-examine defendant with regard to his decision not to answer specific questions, nor would any such commentary appear in its closing presentation to the jury, statements to which the State abided. (16T:96-18 to 98-18; 98-25 to 99-4).

The trial court denied defendant's request for redactions:

> A review of defendant's statement here clearly indicates ... a willingness of defendant to speak. That is undisputed as far as the Court's own review of the statement ... a review of the statement indicates that like [State v.] Kucinski[, 227 N.J. 603 (2017)], the defendant certainly seems interested in giving an affirmative narrative of what he felt he wanted to talk about. He discusses again, his movements from New Jersey through Virginia. He talks about his coffee. He talks about the divorce. He talks about family issues. He talks about his brother Christopher. So ... from a review of the statement, there were clearly areas that the defendant felt that he wanted to share with the police officer, that he wanted them to know his version of certain facts. And then he clearly

> indicated those areas and those questions where he did not want to address.
>
> Yes, to the extent that some of those areas were specifically about the instances that are in question here, then that's certainly ... the defendant's right to say he does not want to address those. But again, he clearly, voluntarily wanted to speak to the police, and clearly indicated that he was in control ... it is an example, and it is probative of the voluntariness of the statement and the fact that the defendant was in control during the interview.
>
> Also, again, as guided by [State v.] Feaster,[156 N.J. 1 (1998)], it would be a bit misleading to redact those portions of the statement, given where they are in the stream of conversation, which again, was another characteristic that the court referred to in Kucinski.
>
> ...
>
> And I find that ... this is exactly the situation we have in this case where it was certainly the Defendant's invocation of his right not to want to answer certain questions as part of a stream of speech.
>
> And as guided in Feaster to redact those would certainly lead ... could potentially mislead the jury as to the statement as a whole as to how the questioning went about, and certainly could be, again, raise questions in the jury's mind as to if ... the defendant was providing these statements, you know, why were there not questions about -- why was the defendant not asked questions about this specific instance. The defense here has already argued that there were various investigatory steps that the State failed to do when ... investigating this case, such as not running certain reports, not checking certain EZ-Passes. And again, having raised those questions, to redact those portions of the statement would leave gaps in the discussion with the defendant that ... I think would be misleading to the jury and would withhold from the jury valuable information that the jury could use. Again, not to determine guilt or anything like that, but rather for the voluntariness of the statement, the context of the statement ...

(16T:106-5 to 111-7); see also (23T:34-18 to 36-15).

Prior to the playing of defendant's statement, the trial judge read the following instruction:

> ...it is expected that shortly, you will hear evidence of a statement given by the defendant. I have instructed you, and I am reminding you again, that the defendant has an absolute right to remain silent. In fact, it is his constitutional right to remain silent. The State has the burden of proving the offenses beyond a reasonable doubt. The defendant does not have to prove his innocence, or offer any proof relating to his innocence.
>
> To the extent the defendant invokes his right not to answer certain questions, again, it is his right to do so. You are not to infer guilt from the invocation of that right, nor are you permitted to consider that invocation as evidence of guilt. You may consider defendant's invocation of his right to remain silent only for purposes of assessing credibility and voluntariness of the statement, and for no other purpose. Again, you may not consider his silence as evidence of guilt.

(17T:7-8 to 8-2; 23T:40-14 to 41-22). See also (17T:202-21 to 206-22)(cross-examination of Sergeant Weisbrot regarding defendant's refusal to answer specific questions and Miranda).

Defendant argues that this ruling constitutes reversible error. According to defendant, the failure to redact his refusals to answer specific questions, as well as his request to have this ability honored at the beginning of the statement, before it was played to the jury constituted improper commentary on his invocation of the right to silence that improperly allowed the jury to infer his guilt. Defendant further rejects the sufficiency of the instruction provided to the jury. Contrary to defendant's arguments, the lower court's handling of his request for redactions fully comported with Kucinski and Feaster and, therefore, should be affirmed by this Court.

In Kucinski, 227 N.J. at 621-22, specifically address "whether defendant invoked his right to remain silent by refusing to answer certain questions posed by police." During his statement, Kucinski "exhibited hesitation to provide police with some details about" the crime under investigation." Id. at 623. Kucinski made statements during his interrogation like, "Ah, well let's not talk about that part," "Like I said, we'll forget about that part," and "I really can't talk about stuff like that," but never stopped talking with police or answering other questions. Id. at 608-10.

The Court found that, "considered in context, defendant's refusal to answer certain questions was not an attempt to end the dialogue, but rather was 'part of an ongoing stream of speech,' which included information" about the crime and the defendant's familial relationship with the victim. Id. at 623 (quoting Bradley v. Meachum, 918 F.2d 338, 342 (2d Cir.), cert. denied, 501 U.S. 1221 (1991)). "If defendant elects to speak to the police and offers an account of what happened, then he has not remained silent – he has spoken." Id. at 624 (citing State v. Tucker, 190 N.J. 183, 189 (2007)). Because defendant had not remained silent, the Kucinski Court found it wholly appropriate that the defendant be questioned about, and the jury consider, facts "omitted" from the defendant's statement to police. Id. at 623.

In Feaster, 156 N.J. at 73-77, our Court addressed how a trial court should address an actual invocation of a constitutional right in a recorded statement to be played before a jury. The Feaster Court held that "trial courts should endeavor to excise any reference to a criminal defendant's invocation of his right to counsel," with a caveat. Id. at 75-76.

If redaction of the invocation would cause the jury "to question why testimony regarding subsequent events was not offered, a trial court may in its discretion permit testimony explaining why an interview or interrogation was terminated." Id. at 76. This exercise of discretion is proper where "the testimony is essential to [a] complete presentation" and "its omission would be likely to mislead or confuse the jury." Ibid. Where an invocation is permitted to go before the jury, a cautionary instruction is required. Ibid. The instruction explain "that people decline to speak with police for many reasons" and emphasize that an invocation "may not in any way be used to infer guilt." Ibid.; State v. Clark, 251 N.J. 266, 292 (2022).

The lower court's ruling permitting defendant's statement to be played to the jury unredacted represents a fair application of both Kucinski and Feaster. Like in Kucinski, the defendant here did not invoke his right to silence. As the lower court found, defendant spoke to the detectives about a myriad of topics relevant to the investigation, while retaining the right and ability to control the interrogation by refusing to answer specific questions. Defendant's refusal to answer specific questions was simply part of his stream of speech

While the trial court correctly found that defendant's statement did not contain an actual invocation of counsel, the trial court also recognized that defendant often framed his refusal to answer questions in the terminology of invocation. To address this, the lower court correctly relied upon Feaster. Redaction of defendant's refusals to answer questions – and defendant's setting up of the terms of his interrogation, which the detectives honored – could render defendant's statement misleading, particularly in the face of

defendant's attacks on the sufficiency of the State's investigation. The lower court appropriately balanced the needs of defendant, the State and the jury. The jury was permitted to hear defendant's statement in full; the State did not overemphasize the contents of the statement via cross-examination or closing arguments; and the jury was instructed not to impermissibly use the statement. Defendant suffered no harm. His trial was fair. His conviction should be affirmed.

POINT III

THE IN-COURT IDENTIFICATIONS OF DEFENDANT DID NOT CAUSE PLAIN ERROR

Defendant asks this Court to reverse his conviction based upon the admission of several in-court identification requests and/or identifications made by law enforcement and his estranged family members. However, at the time that these identification requests were made, defendant lodged no objection. To the contrary, defendant chose to counteract these lines of questioning via vigorous cross-examination, highlighting deficiencies in these identifications, the estrangement between defendant and his family, and the family members potential motivation to incriminate the defendant. See, e.g., (14T:203-2 to 203-7) (Officer Savage); (15T:20-20 to 22-7) (Sergeant Sigismondi); (15T:111-6 to 114-23) (Lorraine Neuhaus); (15T:161-21 to 162-18; 168-21 to 175-12) (Mimi Neuhaus); (15T:196-19 to 198-16) (Carl Neuhaus); (15T:206-20 to 209-8) (Maureen Neuhaus). To the extent that the admission of any of these identifications/requests for in-court identifications ran afoul of State v. Sanchez, 247 N.J. 450 (2021) or State v. Watson, __ N.J. __ (2023), any such error does not rise to the level of plain error sufficient to

warrant reversal of defendant's conviction.

Plain error review, conducted when no objection is lodged below, requires that any error be overlooked unless it prejudicially affects the substantial rights of the defendant and is "sufficiently grievous" to convince the court it possessed a "clear capacity to bring about an unjust result." State v. Ingram, 196 N.J. 23, 42-43 (2008); R. 2:10-2. The test is whether the possibility of injustice is "sufficient 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). "[N]ot 'any' possibility can be enough for a rerun of the trial. The possibility must be real." Ibid. The burden rests on defendant to prove "that the error was clear and obvious and that it affected his substantial rights." State v. Koskovich, 168 N.J. 448, 529 (2001).

As our Court has noted, "inadmissible evidence frequently, often unavoidably, comes to the attention of the jury." State v. Winter, 96 N.J. 640, 646 (1984); State v. Vallejo, 198 N.J. 122, 132 (2009). It is, therefore, "axiomatic that '[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error ...; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently.'" Winter, 96 N.J. at 646 (quoting Bruton v. United States, 391 U.S. 123, 135 (1968)); Vallejo, 198 N.J. at 132.

"Only those trial errors that are deemed to be of such a nature as to have been clearly capable of producing an unjust result require reversal." State v. Alston, 312 N.J. Super. 102, 114 (App. Div. 1998); Macon, 57 N.J. at 335; see also R. 2:10-2. This possibility of an unjust result must "raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not

have reached." Alston, 312 N.J. Super. at 115; Macon, 57 N.J. at 336. Errors that do not meet this standard "will [be] disregard[ed]." Kemp, 195 N.J. at 150, 156 (quoting State v. Castagna, 187 N.J. 293, 312 (2006)).

The now-complained of testimony was not sufficiently grievous and did not have the capacity to bring about an unjust result. The evidence of defendant's guilt as to the May 29, 2018 shooting incident, irrespective of this identification related testimony, was compelling. Cf. State v. Allen, __ N.J. __ (2023). The color video recording of the incident included clear documentation not only of the perpetrator, which the jury could rely upon to form its own opinion as its depiction of the defendant, but also of the vehicle used by the perpetrator. The make, model, and license plate number of this vehicle were all clear from the video and connected the vehicle to defendant's father. During his interrogation, defendant admitted to being the driver of this vehicle leased by his father and, in fact, had the vehicle with him in Virginia at the time of his arrest. Significantly, defendant's arrest provided further connections between the defendant and the May 29th incident. Searches of defendant's hotel room, vehicle and bag post-arrest revealed defendant to be in possession of BB guns and BB gun accoutrements – various boxes of BB pellets and CO2 cartridges.

Also important was the connections between the May 29th incident, along with prior fire-related incidents, and text messages received by defendant's mother suggestive of a motive for the attacks on defendant's maternal relatives: the perceived $25,000 debt. Defendant himself corroborated that his perceived the $25,000 debt to be owed to him in his statement to police. That defendant (and not his brother) was the author of the

messages sent to Lorraine from that telephone number was corroborated by the Virginia telephone exchange and the contents of the messages, inclusive of the provision of a bank account number associated with defendant's business.

The State therefore submits that this record – which includes a jury acquittal on one count – does not provide a sufficient reasonable doubt as to whether the admission of this line of questioning lead the jury to a result it otherwise would not have reached. There simply is no doubt as to defendant's guilt based on the totality of the evidence against him. This Court can and should affirm defendant's conviction.

POINT IV

SERGEANT WEISBROT'S REDIRECT TESTIMONY DOES NOT PROVIDE A BASIS FOR REVERSAL OF DEFENDANT'S CONVICTION

Defendant's theory of the case was that others, specifically his brother Christopher, had a similar financial motivation for the attacks on Neuhaus Realty, but that police, in their rush to judgment against him, never investigated alternative suspects. See Db41. To advance this theory, during cross examination of Sergeant Weisbrot, the following questioning took place:

> Q: ... You didn't speak to the brother right?
>
> A: We did not, no.
>
> ...
>
> Q: Did you ever meet the brother?
>
> A: No.
>
> Q: Never met him during the course of this investigation, correct, personally?

A: No, I didn't.

Q: You did know through this investigation that this supposed money – this 25,000 and a motive – I guess it's a motive, maybe, was something that was related to the grandmother or the mother, correct? It went back to them, right?

A: That's correct.

Q: And you do know that the 25,000 was also supposed to have – other that the theory of the motive – it was supposed to have been sent to, not only Mr. Mazzarisi, but Mr. Mazzarisi's brother, correct?

A: That's correct.

...

Q: Oh. So, bottom line is the brother was never spoken to, correct?

A: No, sir.

Q: He wasn't even spoken to after ... Leonard was talking about his brother on this tape that we heard before, right?

A: Again, we never spoke to Lenny's brother, Chris Mazzarisi.

(17T:169-15 to 171-9).

The assistant prosecutor revisited this line of questioning on re-direct:

Q: ... And there were some questions on cross about you speaking to – whether or not you ever spoke to Christopher Mazzarisi. Do you recall those?

A: Yes, I do.

Q: All right. Now, my question for you is did you ever suspect Christopher Mazzarisi in any of these three charges?

A: No, I didn't.

> Q: And why not?
>
> A: Christopher Mazzarisi's name never came up in this investigation. He was never reported to be involved in the investigation. And all of the information and evidence that we received indicated that he was not involved, and that his brother, Leonard Mazzarisi was.

(17T:224-3 to 224-16).

Re-cross of Sergeant Weisbrot focused solely on the investigation, or lack of investigation into Christopher, with defense counsel asking the sergeant, "So you have two people that had motives here, but you chose to ignore Chris for whatever reason. You didn't interview him, you didn't check on what car he had, you didn't see where he was, and you just concentrated on this one person here, correct?" (17T:225-25 to 226-4). This question elicited the following response from the sergeant, "Yes. There was no information received indicating that Chris was involved." (17T:226-4 to 226-5). Sergeant Weisbrot's re-cross ended with him identifying the "information received" that directed the investigation's attention to the defendant and not his brother – the text messages sent to defendant's mother, about which she testified and which were moved into evidence. (17T:226-17 to 227-15).

Despite having not objected these four redirect questions at the time they were asked, defendant argues before this Court that these questions were objectionable as they "directly violated the rules set forth in Bankston and its progeny." Db44. To create plain error warranting relief from this Court, defendant recharacterizes the questions as having been asked on "direct" and not redirect, excises from his quotation of the allegedly offensive questions the introductory question which highlights the responsiveness of these questions to

questions asked on cross examination, and wholly ignores the totality of the sergeant's answers to this entire line of questioning from both defendant and the State, as quoted above. Review of everything, and not the soundbite excised for review by defendant, demonstrate no plain error worthy of this Court's intervention or correction. See POINT III, supra (setting forth the law regarding the plain error standard).

The principles of Bankston, upon which defendant relies, "protect criminal defendants 'from the incriminating statements of a faceless accuser who remains in the shadows and avoids the light of court.'" State v. Medina, 242 N.J. 397, 413 (2020)(quoting State v. Branch, 182 N.J. 338, 348 (2005)). To that end, officers can neither lawfully "disclose incriminating information obtained from a non-testifying witness," nor "create an 'inescapable inference' that an unavailable source has implicated the defendant." Id. at 415 (quoting State v. Bankston, 63 N.J. 263, 271 (1973)).

This is so because "'[t]he vice Bankston and its progeny seek to eradicate'" is "'the implication that a testifying police officer somehow is in possession of superior knowledge than what is presented to the jury and hence, his testimony is worthy of greater weight.'" Id. at 416 (quoting State v. Kemp, 195 N.J. 136, 155 (2008)). It is "the creation of the inference, not the specificity of the statements made" that is the "critical factor in determining" whether Bankston is violated." State v. Irving, 114 N.J. 427, 446 (1989) Medina, 242 N.J. at 415. Thus, testimony that does not create this unfair inference, but instead uses neutral language "to show 'the officer was not acting in an arbitrary manner or to explain his subsequent conduct" is "admissible." Bankston, 63 N.J. 268; Irving, 114 N.J. at 446; Medina, 242 N.J.

at 413-17.

This exception to Bankston, and not its general prohibition, is applicable here, demonstrating that the now-objected-to testimony was not admitted in error. Review of the entirety of the questioning of Sergeant Weisbrot demonstrates that the thrust of defendant's questioning was to suggest that the police had acted arbitrarily in focusing on only the defendant when his brother was possessed of the same motive. It is without dispute that the now-objected-to testimony was explicitly framed as being responsive to the implications made by defense counsel's cross-examination question, with this line of redirect starting with the prosecutor asking, "And there were some questions on cross about you speaking to – whether or not you ever spoke to Christopher Mazzarisi." (17T:224-3 to 224-16). Thus, it is clear that Sergeant Weisbrot's testimony was not geared on prejudicing the defendant by implying the police had superior information to that presented to the jury; it was geared solely to rebutting the implication already made by the defendant that the investigation was deficient and arbitrarily focused on him.

Furthermore, review of the entirety of cross, redirect and re-cross makes clear that the sergeant's testimony did not in substance imply to the jury that the police were in possession of information not presented to the jury. To the contrary, Sergeant Weisbrot admitted – in response to questioning from defense counsel – that the basis for law enforcement's suspicion of the defendant, and not Christopher, was the text messages received by defendant's mother and her report to the police:

> Q: And that was already in everybody's heads, every investigator ... But it was always – from August when the mother called up the

> first time, it was always based upon what the mother told you to start with, or the investigative team, correct, that it was Lenny?
>
> ...
>
> Q: It was always Lenny as a suspect, correct?
>
> A: Yes. It was never ... Chris.
>
> Q: And nothing was done with Chris. Now, these texts, by the one that you were first shown with no – that you couldn't make out the date, you say you could tell from what the mother told you, but that's based solely upon what the mother told you, correct?
>
> A: That's based upon when Lorraine had reported to the police.
>
> Q: Right. What the mother told the police, correct?
>
> A: Correct. Or what the police told us.

(17T:226-17 to 226-15)(emphasis added). Neither defendant's mother, nor the text messages she received were "faceless" to this jury. Defendant's mother testified before this jury and was subject to cross examination. The text messages were moved into evidence.

Sergeant Weisbrot's testimony did not subject the defendant to prosecution by the incriminating statements of a faceless accuser who remained in the shadows and avoided the light of court. Because the evils of Bankston and its progeny were not wrought upon the defendant through Sergeant Weisbrot's cross examination, redirect, or re-cross, the remedy of Bankston and its progeny is not available to him. Defendant's conviction should be affirmed.

POINT V

THE TRIAL COURT DID NOT COERCE THE JURY'S VERDICT

On July 27, 2021, the jury started deliberating following the conclusion of the jury charge at 10:30 a.m. (23T:28-5 to 28-10). The jury continued deliberating on July 28th and July 29th, while also receiving requested readback/playback. See (20T; 21T); (23T:28-5 to 28-10; 37-25 to 38-5). At 3:12 p.m. on July 29th, the jury sent out a note, C-9, that stated: "We have unanimous decision on some questions on the verdict sheet. We are at impasse on some questions for a good length of time. It seems like we will not make any progress on reaching a unanimous decision. Please instruct." (21T:17-8 to 17-14; 23T:32-4).

After receiving this note, "the Court conferred with counsel, both counsel, as to what would be the appropriate charge" in response: Model Jury Charge (Criminal), "Judge's Instruction on Further Jury Deliberations" (approved 1/14/13) or Model Jury Charge (Criminal), "Judge's Inquiry When Jury Reports Inability to Reach Verdict" (approved 6/10/13). (23T:32-6 to 33-16). Since the latter charge "was not requested by either party," and this "was the only one note from the jury regarding an impasse," the trial court gave the jury the former charge (with the "agreement" of counsel), and instructed them to continue deliberation. (21T:17-15 to 18-22; 23T:32-2 to 34-4). The jury deliberated until 4:30 p.m. that day, began deliberations at 9:00 a.m. on July 30th, and rendered its unanimous verdict – finding defendant guilty on three counts and not guilty on one count – at 9:59 a.m. that day. (22T:4-13 to 4-19; 23T:34-4 to 34-6).

Defendant objected to the above for the first time in a post-verdict motion for judgment of acquittal/new trial. (23T). The trial court rejected this as a basis for reversal of the jury's verdict, relying upon factors such as that this was the first indication of an impasse from the jury, that the note requested instruction, the length of trial, and the length of deliberation to that point, which included significant playback/readback. (23T:34-7 to 34-17; 36-16 to 38-5). Defendant asks this Court to come to a contrary conclusion and find that the trial court abused its discretion in providing a continued deliberation instruction. According to defendant reversal of his conviction is needed in order to correct this coerced verdict. Because there was no abuse of discretion by the trial court, this Court should affirm.

"A judge has discretion to require further deliberations after a jury has announced its inability to agree." State v. Adim, 410 N.J. Super. 410, 423 (App. Div. 2009)(citing State v. Figueroa, 190 N.J. 219, 221, 235 (2007); State v. Harris, 457 N.J. Super. 34, 49-50 (App. Div.), certif. denied, 238 N.J. 510 (2019). "A trial judge "may send a jury back for further deliberations when [she] is not satisfied that all possibilities of reaching a verdict have been exhausted," and may do so without first inquiring "of the jury whether further deliberation will likely result in a verdict." Harris, 457 N.J. Super. 50 (quoting Figueroa, 190 N.J. at 240; State v. Carswell, 303 N.J. Super. 462, 478 (App. Div. 1997)).

Forcing a jury to continue deliberation after the "jury has reported a definite deadlock after a reasonable period of deliberation" would constitute an abuse of discretion. Harris, 457 N.J. Super. at 50 (quoting Adim, 410 N.J. Super. at 423-24; State v. Johnson, 436 N.J. Super. 406, 422 (App. Div.

2014)). "[W]hat constitutes a reasonable length of time" requires the trial court to "weigh all the relevant circumstances, including 'such factors as the length and complexity of [the] trial and the quality and duration of the jury's deliberations.'" Ibid. (quoting Figueroa, 190 N.J. at 235); Adim, 410 N.J. Super. at 424.

Because "[t]he decision by a judge to send a jury back for further deliberations after it has announced a deadlock is discretionary," this Court will reverse such a decision "only if the judge has abused [her] discretion." Harris, 457 N.J. Super. at 48; Figueroa, 190 N.J. at 235. In Harris, 457 N.J. Super. at 49-51, this Court found no abuse of discretion – "[a]lthough" noting this was "a close question" – in the trial judge's direction that the jury continue to deliberate after the submission of three deadlock notes where the six-week trial was relatively complex and the five days of deliberation only amounted to 10 to 12 hours of actual deliberation due to extensive readbacks/playbacks.

The facts before the trial court here are not even close to those in Harris and, therefore, not even close to a close question. The totality of the relevant circumstances demonstrate that the lower court's properly exercised its discretion in electing to read the jury the Czachor charge, see Model Jury Charge (Criminal), "Judge's Instruction on Further Jury Deliberations" (approved 1/14/13); (21T:17-7 to 18-22), and directing them to continue deliberations. As the trial court noted, and the record bears out, despite having been in deliberations for approximately three days, these were not three full days of deliberation as a significant percentage of that time had been dedicated to the readback/playback requested by the jury. Moreover, and significantly,

this was the jury's first report of a potential partial deadlock and, therefore, requiring the jury to continue to deliberate one time was not inappropriate. This is especially true as the jury's note specifically asked for instruction from the trial court. Finally it bears mentioning that defendant did not think that the provision of the Czachor charge was inappropriate at the time of the jury's note as he agreed with the provision of the Czachor charge then. Defendant's post-verdict change of heart does not an abuse of discretion make. In the absence of any such abuse, this Court should affirm the trial court's appropriate exercise of discretion here.

POINT VI

CUMULATIVE ERROR IS NOT PRESENT

"[I]ncidental legal errors" necessarily "creep into" proceedings. State v. Orecchio, 16 N.J. 125, 129 (1954); see also State v. Marshall, 123 N.J. 1, 169 (1991), cert. denied, 507 U.S. 929 (1993). Where they do so in a manner that does "not prejudice the rights of the accused or make the proceedings unfair," "an otherwise valid conviction" will not be disturbed. Ibid. Only where "the legal errors are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the [proceedings] unfair," do "fundamental constitutional concepts dictate" the grant of relief. Ibid.

Despite having failed to establish that any alleged error detailed in POINT I through V, supra, were, in fact, errors, defendant argues this Court should aggregate these non-errors into a "cumulative effect" that together render his conviction reversible. Db49. There is no basis in law or fact to do as defendant requests. The individual alleged errors complained of by the

defendant do not alone rise to the level of error, see supra, and, for that reason, cannot aggregate to cumulative error warranting reversal of defendant's conviction.

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,

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