SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1549-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law
DEVON K. WOODS,		Division, Burlington County.
	:	
Defendant-Appellant.		Indictment No. 20-01-0021
	:	
	:	Sat Below:
	:	Hon. Christopher J. Garrenger, J.S.C. and a jury
	:	

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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DATED: November 20, 2023

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PRELIMINARY STATEMENT

Defendant Devon Woods's convictions for murder and related offenses should be reversed because the trial court unfairly restricted the defense from presenting evidence of third-party guilt. The parties agreed that the proposed third-party defense was based on a statement from Willie Hargrove that Derique Ballard, the father of the son of the victim's girlfriend, had previously shot at the victim and Hargrove weeks or months before the murder. This evidence was admissible under the Rules of Evidence and had the capacity to engender a reasonable doubt that Woods was the culprit. The trial court therefore deprived Woods of his constitutional right to present a complete defense by barring defense counsel from arguing third-party guilt.

Reversal is also required because the State's expert offered an inadmissible net opinion that Woods's cell phone was near areas associated with the State's theory of the case. As in State v. Burney, 255 N.J. 1 (2023), the detective relied on nothing more than his "training and experience" to estimate the coverage areas of cell towers, rather than supporting his opinions with factual evidence or data. Lacking direct evidence to place him at the crime scene, the State relied heavily on this inadmissible net-opinion testimony to connect Woods to the crime scene.

These errors, individually and cumulatively, require reversal.

PROCEDURAL HISTORY

On January 7, 2020, a Burlington County grand jury returned an indictment charging defendant Devon K. Woods with first-degree murder by his own conduct while engaged in the commission of robbery, N.J.S.A. 2C:11-3(a)(1), (a)(2), (b)(4)(g) (counts two); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count three); second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1); N.J.SA. 2C:15-1(a)(1) (count four); first-degree robbery, N.J.SA. 2C:15-1(a)(1) (count five); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count six), second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1) (count seven); and second-degree certain persons not to possess a weapon, N.J.S.A. 2C:39-7(b)(1) (count eight). (Da1-8).[1] Codefendant Sam T. Gore was

[1] Da = appendix to defendant's appellant brief
PSR = Presentence Report
1T = September 6, 2022 (motion)
2T = September 27, 2022 (motion)
3T = September 27, 2022 (jury selection)
4T = September 28, 2022 (preliminary jury instructions)
5T = September 28, 2022 (jury selection)
6T = September 29, 2022 (preliminary jury instructions)
7T = September 29, 2022 (jury selection volume 1)
8T = September 29, 2022 (jury selection volume 2)
9T = October 6, 2022 (jury selection and in limine rulings)
10T = October 6, 2022 (trial)
11T = October 12, 2022 (trial)
12T = October 13, 2022 (trial)

charged in counts three through eight and was separately charged with first-degree murder in count one. (Da1-8). The codefendants' matters were severed for separate trials.

Woods was tried before a jury on counts two through seven on non-consecutive days between October 6 and 20, 2022. (9T to 15T). During jury selection, the State made an oral motion in limine to bar "any argument with regard to a third-party guilt in this matter and objecting to any third-party guilt charge being provided." (9T64-16 to 22). The trial court ruled that the defense had not presented sufficient evidence of third-party guilt and barred defense counsel from mentioning third-party guilt in his opening statement. (9T74-22 to 78-1).

The jury convicted defendant of all counts. (Da8-11; 15T4-6 to 6-25). Following a second trial, the same jury convicted Woods of certain persons not to possess a weapon as charged in count eight. (15T7-1 to 19-22).

On January 6, 2023, the trial court sentenced Woods to mandatory life without parole on count two, a concurrent term of thirty years with thirty years

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13T = October 18, 2022 (trial)
14T = October 19, 2022 (trial)
15T = October 20, 2022 (verdict)
16T = January 6, 2023 (sentencing)

of parole ineligibility on count three, a concurrent term of nineteen years subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on count five, a concurrent term of seven years with forty-two months of parole ineligibility on count six, and a consecutive term of five years with five years of parole eligibility on count eight. (16T32-14 to 35-20; Da12).[2] The court merged count four into count three and count seven into count six. (Da12). The court also imposed $9,710 in restitution without conducting an ability-to-pay hearing. (16T35-21 to 36-16; Da12).

A notice of appeal was filed on defendant's behalf. (Da16-19).

[2] During its pronouncement of the sentence, the trial court followed the numbering for the counts used on the verdict sheet rather than the numbering contained in the indictment. The judgment of conviction appropriately reflects the numbering used in the indictment. (Da12).

STATEMENT OF FACTS

The State alleged that shortly after 3:00 a.m. on September 18, 2019, Woods shot Deaisia Ayers while she was in the driver's seat of her Green Dodge Durango, as part of a conspiracy with codefendant Sam Gore to steal Ayers's handgun. (10T5-13 to 24; 13T156-3 to 19). The State presented the following circumstantial evidence to support its theory of the case.

Nadelka Spady, Ayers girlfriend, testified that at 2:47 p.m. on September 17, 2019, Ayers texted Spady and said that she was "talking to Sammy" and "you all got something crazy and I got to move on it like tonight, 250,000." (1042-9 to 47-11; 12T70-19 to 71-7). Spady testified that she did not know the meaning of that text message. (10T47-4 to 8). Spady did know that Ayers was referring to Sam Gore, Ayers's cousin. (1T46-9 to 14). At 3:54 p.m., Ayers texted Spady a picture of a .380 caliber handgun. (10T49-6 to 50-7; 12T73-23 to 75-7). Spady claimed she had no idea why Ayers sent her that picture. (10T50-11 to 12).

Williams Ayers, the victim's brother, testified that during the afternoon of September 17, his sister video-called him via FaceTime as she was driving Spady's car. (10T77-5 to 11). On the video chat, William Ayers saw that his sister's Durango was following behind Spady's car. (10T77-5 to 11). Deasia Ayers told her brother that Sam Gore was driving the Durango. (10T77-10 to

13). Deasia Ayers was holding a gun during the FaceTime call. (10T77-14 to 18).

Around 6 p.m. on September 17, Deasia Ayers and Spady attended a Chris Brown concert in Philadelphia. (10T50-19 to 51-15). Ayers and Gore exchanged several text messages between 8:55 p.m. and 11:06 p.m., including Ayers indicating that she would "be back in boro in like an hour." (12T89-2 to 90-12). After the concert, Spady dropped Ayers off at Garfield Park Academy in Willingboro for Ayers's shift as a janitor. (10T51-16 to 52-9). Records indicated that Ayers's key fob to access the building was swiped at 11:46 p.m. (12T35-1 to 36-23). Surveillance video from outside Garfield Park Academy, admitted as S-56, shows a white sedan pull up to school and an individual enter the building at 11:46 p.m. (13T79-21 to 85-20; Da22). Ayers texted Gore that she was at work at 12:08 a.m. and shared her location with Gore via her iPhone's application at 1:24 a.m. (12T90-15 to 91-17).

At 1:44 a.m., the surveillance video from Garfield Park Academy shows the same individual exit the building and approach a dark-colored sedan. (12T92-22 to 94-21; Da22). GPS information from Gore's cell phone reflected that the phone was at Garfield Park Academy at this time. (12T93-11 to 94-6). The individual went back inside the school a few minutes later. (12T94-16 to 95-5). At 2:41 a.m., Ayers texted Gore, "Yo, cuz. You can come get me and

I'll just come back and finish this up." (12T96-16 to 18). Gore responded that he was on his way and then texted "out here" at 2:58 a.m. (12T96-18 to 97-5). The surveillance video shows a Green Durango arrive at the school at that time. (12T97-6 to 18; 12T101-12 to 101-12). The GPS data from Gore's cell phone also reflected that his phone was at Garfield Park Academy at 2:58 a.m. (12T97-19 to 101-6). The same individual exited the school and got into the driver's side door of the Durango. (12T102-13 to 25; Da22). The Durango then drove off from the school. (12T103-1 to 2).

The Durango was next seen on surveillance video in front of Gore's grandmother's house at 61 Bloomfield Lane in Willingboro at 3:07 a.m.[3] (12T103-6 to 108-7; Da23). Two unidentifiable people get out of the car and walk to the side of the house at 61 Bloomfield Lane. (12T108-8 to 109-6; Da23). At 3:08 a.m., Ayers called Spady and said that she was still at work and would be off soon and that Gore was going to take her home. (10T53-16 to 54-9; 12T109-7 to 25; 12T112-7 to 113-3). The brake lights on the Durango went on and off at this time. (12T109-116 to 20; Da23). The two people returned to the Durango shortly thereafter. (12T110-7 to 111-23). The Durango then drove away. (12T111-24 to 112-4; Da23). Surveillance video

[3] The video, admitted as S-62, was taken from a neighbor's house across the street at 72 Bloomfield Lane. The time stamps on this video were one hour slower than actual time. (12T107-23 to 25).

from the Willingboro MUA on Baldwin Lane, admitted as S-29, shows the Durango driving on Baldwin Lane at 3:12 a.m. (12T113-11 to 116-2; Da24).

The surveillance video from 72 Bloomfield Lane shows two unidentifiable people entering the front door of 61 Bloomfield at 3:18 a.m. (12T116-7 to 119-3). After they entered, a light turned on in the window corresponding to Gore's bedroom. (12T119-7 to 14; 12T138-22 to 140-5). Data extracted from Gore's cell phone reflected that there was no activity on his phone from 3:09 a.m. to 3:19 a.m., and the phone registered that it ascended approximately one flight of stairs that at 3:20 a.m. (12T119-7 to 122-8; 12T137-18 to 138-18). At 3:22 a.m., Gore texted Ayers "I love you, Cuz. Let me know when you get to the house." (12T124-2 to 11). This message was not opened on Ayers's phone. (12T124-16 to 22).

Around 6:30 a.m. on September 18, Spady realized that Ayers had not returned home from her shift and unsuccessfully tried to call and text Ayers (10T54-24 to 56-13). Spady called Ayers's niece and brother, but neither of them had heard from Ayers. (10T56-16 to 58-23). Ayer's brother had woken up at about 4:00 a.m. and realized that he had a missed call from the victim at around 3:00 a.m. (10T79-1 to 18). When Spady reached out to the brother, he became concerned and tried to figure out where his sister was. (10T80-1 to 81-10). The brother reached out to Willie Hargrove, but he had not seen her.

(10T81-11 to 82-14). The brother also went to 61 Bloomfield Lane to try to talk to Sam Gore, but no one answered the door. (10T82-25 to 83-25). As the brother was leaving 61 Bloomfield Lane and turned around the block, he noticed the victim's Durango parked on Baldwin Lane and found her deceased in the driver's seat. (10T85-6 to 90-13). Police officers subsequently found two .380 caliber spent shell casing on the front passenger seat. (12T48-25 to 51-10).

Sashell Williams, Woods's former girlfriend, also testified for the State. In September 2019, Williams and Woods were living at 14 Vine Street in Trenton, and she was a few weeks pregnant with Woods's child. (11T67-22 to 69-1; 11T99-25 to 101-18). On September 17, Sam Gore and his sister Anada Gore came to 14 Vine Street in Ayers's Durango. (11T103-15 to 24). All four of them drove around in the Durango for a while before returning to 14 Vine Street. (11T103-25 to 104-25). At some point, Gore showed them a gun and said that he had Ayers's gun and car until she got out of work. (11T106-12 to 107-2). Gore said that he wanted to keep the gun and that he would kill Ayers if she would not let him keep it. (11T107-3 to 8). According to Williams, Woods said that instead Gore should let Woods kill Ayers. (11T107-13 to 18).

Eventually, Gore and Woods drove off in a Kia Sedan owned by Gore's girlfriend Jianna Cezar, and Cezar drove off in Ayers's Durango. (11T105-1 to 106-1; 11T109-1 to 110-16).[4] Before leaving, Woods told Williams that he would not be back until tomorrow morning. (11T109-3 to 109-9; 11T110-19 to 22). At 1:06 a.m. on September 18, Woods texted Williams, "I'm excited," to which Williams responded "OMG be safe stank . . . I'm not GTS until it's done." (12T159-9 to 21). Woods responded, "Get some sleep, though. Ima be all right. This ain't my first," to which Williams responded, "Boy stay and STFU." (12T159-22 to 2). At 1:11 a.m., Williams texted Woods, "I hate that you left me for the night," to which he responded, "It's only for the night." (12T160-16 to 161-10; 11T117-18 to 118-2). At 2:47 a.m., Woods texted Williams, "Cuz, we about to get old girl, dike." (12T161-11 to 23; 11T118-3 to 118-15).[5]

Williams woke up around 7:00 or 8:00 a.m. on September 18, at which point Woods was not back at 14 Vine Street. (11T119-12 to 25). She went to

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[4] Gore and Cezar exchanged text messages between 12:16 a.m. and 1:24 a.m. about meeting at 14 Vine Street and parking Ayers's Durango at Gore's grandmother's house. (12T127-10 to 129-2).

[5] Defense counsel emphasized that these were two separate text messages: (1)"Cuz, we about to get old girl" and (2) "dike." (11T225-5 to 10). Counsel argued that the second message was likely a different word that had been autocorrected. (13T145-22 to 147-3; 11T225-20 to 226-16; 12T213-13 to 214-23).

the hospital because she was not feeling well. (11T119-17 to 23). Woods and Gore met her at the hospital. (11T120-12 to 120-18). Gore received a call from a family member about them finding the victim's body. (11T122-15 to 23). When Williams and Woods returned to 14 Vine Street from the hospital, her mother came over. (11T123-22 to 124-8). According to Williams, while her mother was downstairs, Williams and Woods spoke alone in their bedroom in the attic. (11T124-9 to 23). Williams claimed that Woods told her that he shot Ayers and gave a detailed confession. (11125-21 to 126-12).

According to Williams, Woods said that he and Gore had planned a verbal signal – Gore would say "that shit's crazy" – for Woods to shoot Ayers. (11T126-19 to 127-9). When Gore asked Ayers to keep the gun, she said that she had borrowed it from someone else. (11T127-10 to 19). Gore gave the signal and got out of the car. (11T127-20 to 128-2). Woods then shot Ayers in the head, and Ayers started shaking. (11T128-8 to 16). Woods then shot her again in the neck. (1T128-17 to 23). Gore took the victim's phone to try to delete messages but then put it back in the car. (11T129-4 to 21). They then ran to Gore's grandmother's house. (11T130-24 to 131-8). Williams claimed that Woods confessed all this information first while they were alone in their upstairs bedroom, but later repeated the same information to Williams's mother and two younger sisters. (11T132-16 to 133-1).

Sasha Hedgespeth, Williams's mother, also testified that Woods confessed to her that day after the murder (11T70-1 to 14), but her account of where the confession took place and who was present differed from that of Williams. Hedgespeth said that Woods confessed in the kitchen of her "youngest daughter's father house," – not at 14 Vine Street – and that her sixteen-year-old-daughter and Sashell Williams were both present for the confession. (11T84-12 to 85-15). The police did not attempt to interview either of Sashell Williams's sisters about Woods's confession. (13T90-10 to 19). According to Hedgespeth, Woods told her that he and Gore picked up the victim; Woods shot her twice in the back of the head; they ran back to Gore's grandmother's house; and then they texted the victim's phone. (11T71-22 to 77-13). Hedgespeth claimed that Woods told her he shot Ayers because she wanted her gun back. (11T77-14 to 78-1). Hedgespeth told a friend about Woods's confession, and the friend contacted the police. (11T70-15 to 24). Hedgespeth admitted that she was not happy that Woods had gotten her daughter pregnant, that he was unemployed, and that he was planning to move with her and her daughter to live in Section 8 housing in Florida. (11T89-20 to 90-18).

On September 24, 2017, police officers questioned Williams at 14 Vine Street, and she told them that Woods was home with her on the night of the

murder. (11T134-5 to 135-3). The officers told her that they knew she was lying and that she would get arrested and have her baby in jail if she kept lying. (11T140-13 to 23). During the trial, Williams said that she lied about Woods being home with her because she feared Gore and Woods and was afraid of being a single mother. (11T134-16 to 135-5).

The State also presented information they obtained from cell phones they seized. The GPS location data from Gore's phone reflected that his phone was in the following areas: 14 Vine Street at 12:51 a.m.; Bloomfield Lane from 1:34 to 1:41 a.m.; Garfield Park Academy at 1:41 a.m.; Bloomfield Lane at 1:54 a.m.; Bloomfield Lane at 2:48 a.m.; Garfield Park Academy at 2:58 a.m.; and Bloomfield Lana at 3:09 a.m. (12T129-3 to 130-15; 12T133-1 to 135-7). Location data from Jianna Cezar's phone reflected that the phone was near the following locations: 14 Vine Street between 12:45 and 1:08 a.m.; 61 Bloomfield Lane between 1:33 and 1:42 a.m., and 61 Bloomfield Lane between 1:55 a.m. to 7:07 a.m. (12T149-23 to 153-21). The police also recovered three images from Gore's phone of Gore holding a handgun that he had deleted at 3:41 a.m. on September 18. (12T140-14 to 145-8). The police did not find the cell phone Woods had been using at the time of the murder. (12T157-12 to 20). Williams testified that a few days after the murder, Woods

tossed his cell phone out of a car window and said he had forgotten his pin. (11T133-9 to 25).

Without objection, Detective-Sergeant David Kohler was qualified as an expert in cell phone mapping and cell phone forensics. (12T163-24 to 168-7). As described in detail in Point II below, Kohler created two maps using "call detail records" from Woods's cell phone provider and opined that his phone was in the general area of 14 Vine Street at 11:04 p.m. on September 17 and in the general area of 61 Bloomfield Lane at 2:25 a.m. on September 18. (12T170-2 to 178-22).

Detective-Seargent Anthony Luber, the lead detective on the case (11T198-24 to 199-18), testified that the police "ran out other leads," but "[t]hey all turned out to be dead ends. Those leads -- the people that were running out those other leads determined they did not kill Deasia Ayres." (11T229-16 to 22).

In summation, defense counsel contended that while the State had substantial evidence of Gore's involvement in the murder, it lacked sufficient evidence to convict Woods beyond a reasonable doubt. (13T118-11 to 119-2). Counsel argued that Woods's supposed confessions to Sashell Williams and Sasha Hedgespeth should not be believed because the details differed as to where the confessions took place and who was present during the confessions.

(13T126-23 to 128-5; 13T134-2 to 122). Furthermore, the witnesses offered inconsistent accounts of the details of Woods's confession both during their testimony and previous statements to the police, including: whether the victim was shot in the face, neck, or the back of the head; whether the codefendants used their own gun or the victim's gun; how many times they stopped at Gore's grandmother's house; and what the verbal signal was for Woods to shoot the victim. (13T129-12 to 134-1). Counsel also emphasized that Hedgespeth was unhappy that Woods had gotten her eighteen-year-old daughter pregnant, was unemployed, and was planning to move with them to live in Section 8 housing in Florida. (13T119-6 to 119-14).

Moreover, defense counsel argued that while the GPS location data and text messages clearly reflected that Gore was with Ayers throughout the day and at the time of the murder, the State's evidence did not establish that Woods was with Gore and Ayers. (13T129-23 to 142-24). Counsel argued that the historical cell site data from Wood's phone reflected only that the phone was in a large portion of Willingboro, not precise enough to establish that he was with Gore at the time of the murder. (13T142-20 to 144-12).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY RESTRICTED THE DEFENSE FROM ARGUING THIRD-PARTY GUILT. (9T74-22 to 78-1)

During jury selection, the State made an oral motion in limine to bar "any argument with regard to a third-party guilt in this matter and objecting to any third-party guilt charge being provided." (9T64-16 to 22). The parties agreed that the proposed third-party defense was based on a statement from Willie Hargrove that Derique Ballard,[6] the father of Nadelka Spady's son, had previously shot at the victim and Hargrove. (9T65-18 to 66-10; 9T68-17 to 69-5; 9T73-7 to 25). But the State contended that because was "no direct casual link" between the previous incident and the murder, the defense should be barred from presenting third-party guilt. (9T65-13 to 67-4). Adopting the State's argument, the trial court ruled that the defense had not presented sufficient evidence of third-party guilt and barred defense counsel from mentioning third-party guilt in his opening statement. (9T74-22 to 78-1).

The trial court's ruling was erroneous because no direct causal link is required for a defendant to present third-party guilt. A defendant is entitled to present any admissible evidence of third-party guilt that engenders a

[6] The transcript erroneously spells the name as "Tareek Ballard."

reasonable doubt that the defendant is the culprit. And the allegation that Ballard had previously shot at the victim could lead the jury to conclude that Ballard had a motive to kill the victim, thus casting reasonable doubt that Woods was the perpetrator. The trial court therefore abused its discretion, infringed Woods's constitutional right to present a complete defense, and deprived him of due process and a fair trial. See U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10. As a result, Woods's convictions should be reversed.

In arguing that the defense should be entirely precluded from presenting third-party guilt, the prosecutor made the following proffer about the evidence that he understood the defense wished to present:

> Now, I anticipate that there's an individual by the name of [Derique] Ballard that is the father of the baby of the victim's girlfriend. There may have been a problem with him. And there may have even been reference from a Willie Hargrove that there was an incident involving a firearm in the past, and involving Mr. Hargrove and the victim.
>
> However, there is no link to this date. Nobody saw [Derique] Ballard in the area. Nobody saw [Derique] Ballard with a firearm, nobody saw him stalking the victim. No one could say that.
>
> So to allege that he is the perpetrator in this case would be completely inappropriate. There is no direct causal link. The best we have is some incident that he, Mr. Hargrove in his statement doesn't even know when

> that happened. It was some weeks or months before; doesn't even know the exact date.
>
> [(9T65-18 to 66-10) (emphasis added).]

Defense counsel similarly proffered that Hargrove discussed a situation where Ballard shot at Ayers and noted that the police had investigated this allegation and interviewed Ballard. (9T68-17 to 69-5; 9T73-7 to 25). The prosecutor argued that whether "Ballard committed some acts or that something happened in the past there's still no link to the September 18th incident link to this crime. We can't allege some incident that happened a month ago, two months ago and then say, aha, so there's that act there, so there's your link, I'm allowed to argue third-party guilt." (9T72-13 to 20). The prosecutor suggested that "[i]f they had seen [Derique] Ballard, or some sketchy individual hanging around the scene, and they can identify that person, then [the defense] can argue third-party guilt. Without that direct connection, he can't argue a specific person is responsible other than him." (9T72-21 to 73-1).

The trial court ruled that "there really has been no proffered information at this juncture by [defense counsel] that would provide a sufficient nexus."

(9T75-24 to 76-1).[7] The court believed it "ha[d] no information for any post of this juncture that might have a rational tendency to engender a reasonable doubt with respect to an essential element of the State's case, an essential feature of the State's case." (9T76-13 to 17). The court therefore barred defense counsel from making "any reference specifically to any third-party guilt in his opening statements." (9T76-18 to 20). The court noted that it would have to consider the State's objections to "the emergence of any proofs that a third person committed the act during testimony." (9T77-2 to 8). But it made clear that it was barring the defense from mentioning third-party guilt in opening statements because it viewed the proffered evidence to be insufficient, stating that "there is really no evidence" to support third-party guilt. (9T77-9 to 78-1).

Later during the trial, the defense sought to recall Detective-Sergeant Luyber in its case-in-chief. The prosecutor expressed that he had "some concerns -- and I guess this is by way of motion in limine -- if Detective-Sergeant Luyber were to be called, evidence of third-party guilt has been deemed not admissible in this case. And I don't want us to be going back through the issues of third-party guilt in front of the jury." (13T3-24 to 4-4).

[7] The trial court rejected the State's argument that the defense had provided insufficient notice of its intent to argue third-party guilt. (9T76-10 to 12; 9T77-10 to 12).

The trial court noted its previous ruling barring defense counsel from referencing third-party guilt in opening statement and reiterated that "there must be some evidence of third-party guilt to permit a defense to argue that point. There needs to be an evidential link and some offer of proof which has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case." (13T5-19 to 23). The trial court noted that it remembered that Detective-Seargent Luyber testified that "all of the leads turned out to be dead ends. And that he people that were being run out, as colloquially meaning investigated by those investigative entities led them to determine that they did not kill Deasia Ayres." (13T6-11 to 17). The trial court, therefore, viewed any questions regarding third-party guilt "to be asked and answered." (13T6-12 to 17). Defense counsel indicated that he did not plan to ask any questions about third-party guilt, and counsel did not ask any questions of this nature when Luyber was recalled. (13T5-3 to 7).

Contrary to the trial court's misplaced reasoning, the proffered evidence that Ballard had shot at the victim and Willie Hargrove in the weeks or months before the murder was clearly sufficient to raise a reasonable doubt that Woods was the shooter and was admissible under the Rules of Evidence. The trial court deprived Woods of his constitutional right to present a complete defense

by restricting Woods from presenting this evidence and arguing third-party guilt to the jury.

"The Compulsory Process Clause in the United States and New Jersey Constitutions gives the accused in a criminal prosecution the right to call 'witnesses in his favor.'" State v. Cope, 224 N.J. 530, 551 (2016) (quoting U.S. Const. amends. VI; N.J. Const. art. I, ¶ 10). Thus, "[a] defendant has a constitutional right to present a complete defense, including the 'right to introduce evidence of third-party guilt.'" State v. Hannah, 248 N.J. 148, 180, (2021) (quoting Cope, 224 N.J. at 551). Evidence of third-party guilt is admissible "if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case." State v. Fortin, 178 N.J. 540, 591 (2004). "That standard does not require a defendant to provide evidence that substantially proves the guilt of another, but to provide evidence that creates the possibility of reasonable doubt." State v. Cotto, 182 N.J. 316, 333 (2005).

The connection between the proffered evidence and the crime cannot be based on mere conjecture. Ibid. "Rather, a defendant's proofs must be capable of demonstrating 'some link between the third-party and the victim or the crime.'" Ibid. (quoting State v. Koedatich, 112 N.J. 225, 301 (1988)). The defendant's proffered evidence must also be admissible under the Rules of

Evidence. State v. R.Y., 242 N.J. 48, 67 (2020). "Although a trial court retains broad discretion in determining the admissibility of evidence, that discretion is abused when relevant evidence offered by the defense and necessary for a fair trial is kept from the jury." Cope, 224 N.J. at 554-55.

The trial court abused its discretion in erroneously reasoning that the defense had made an insufficient proffer to present the potential third-party guilt of Derique Ballard. The fact that someone else had previously shot at the victim had the clear capacity to engender reasonable doubt that Woods was the shooter. This fact could easily lead the jury to conclude that someone else had a motive to kill the victim, particularly if the State did not adequately investigated Ballard. Contrary to the State's misguided argument, a direct link – such as eyewitness testimony placing Ballard at the crime scene – was not required. See Cotto, 182 N.J. at 333 ("That standard does not require a defendant to provide evidence that substantially proves the guilt of another, but to provide evidence that creates the possibility of reasonable doubt."). The proposed evidence regarding Ballard clearly demonstrated "some link between the third-party and the victim or the crime" and "create[d] the possibility of reasonable doubt." Ibid. (quotation omitted). Thus, the jury was entitled to hear this evidence and evaluate whether it raised a reasonable doubt that

Woods was the shooter. See Cope, 224 N.J. at 555 ("Ultimately, the jury, not the judge, is the arbiter of the truth in reaching its verdict.").

Moreover, Willie Hargrove's testimony about the previous shooting incident would have been admissible under the Rules of Evidence, as he could have testified to Ballard shooting at him and the victim without offering any inadmissible hearsay. The defense also could have cross-examined officers about their investigation into Ballard without relying on inadmissible hearsay. Accordingly, the trial court erroneously prevented defense counsel from referring to this evidence during opening statements. See State v. Wakefield, 190 N.J. 397, 442 (2007) ("The scope of . . . opening statement is limited to the facts [counsel] intends in good faith to prove by competent evidence." (internal quotation omitted)).

For all these reasons, the trial court unfairly restricted Woods's constitutional right to present a complete defense. Had the jury been presented with the testimony of Hargrove and heard about the State's investigation into Ballard, it would have been able to fairly evaluate whether the State had sufficiently proven beyond a reasonable doubt that Woods, and not Ballard, was the shooter. Indeed, the jury would have received the model jury charge explaining that "[t]he defendant does not have to produce evidence that proves the guilt of another, but may rely on evidence that creates a reasonable doubt.

In other words, there is no requirement that this evidence proves or even raises a strong probability that someone other than the defendant committed the crime." Model Jury Charge (Criminal), "Third Party Guilt Jury Charge" (approved Mar. 9, 2015). Instead, due to the trial court's erroneous rulings, the jury heard only conclusory testimony from the lead detective in the case that all the other leads the police had investigated "turned out to be dead ends." (11T229-16 to 22). This highly restricted presentation of the evidence was unfair.

Ultimately, "the issue is not whether the State presented sufficient evidence for the jury to return a guilty verdict, but whether [defendant] was denied the opportunity to present a full defense -- to present evidence that would have allowed the jury to return a not-guilty verdict." Hannah, 248 N.J. at 190. The erroneously excluded evidence of third-party guilt could have influenced the jury to find reasonable doubt in the State's case. Consequently, the trial court's erroneous deprivation of Woods's constitutional right to present a complete defense requires reversal of his convictions.

POINT II

THE STATE'S EXPERT OFFERED AN IMADMISSIBLE NET OPINION ON THE LOCATION OF WOODS'S CELL PHONE. (Not Raised Below)

In State v. Burney, the Supreme Court held that an expert offered an improper net opinion when he relied on only "his training and experience" and a "rule of thumb" to estimate that a cell tower had a one-mile coverage area that included the crime scene. 255 N.J. 1, 21-25 (2023). The same error occurred here. Detective-Seargeant Kohler relied on nothing more than his training and experience to offer a net opinion that a phone would "not hit off a tower that is several miles away" in Trenton and Willingboro. (12T171-25 to 172-12). He improperly used this unsupported assumption to create maps that showed that Woods's cell phone was near 14 Vine Street and 61 Bloomfield Lane at times consistent with the State's theory of the murder. (Da20; Da21). The admission of Kohler's impermissible net opinion on the location of Woods's phone, which was repeated during the testimony of another detective and emphasized by the prosecutor in opening and summation, was clearly capable of producing an unjust result and deprived defendant of due process and a fair trial. See U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.; R. 2:10-2. Because the State relied heavily on this inappropriate

testimony to connect Woods to the crime, Woods's convictions should be reversed.

"For an opinion to be admissible under N.J.R.E. 702, the expert must utilize a technique or analysis with 'a sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of the truth.'" State v. J.R., 227 N.J. 393, 409 (2017) (quoting State v. Kelly, 97 N.J. 178, 210 (1984)). Furthermore, "[t]he net opinion rule, a corollary of N.J.R.E. 703, 'forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Burney, 255 N.J. at 23 (quoting Townsend v. Pierre, 221 N.J. 36, 53-54 (2015)). "The rule requires that an expert give the why and wherefore' that supports the opinion, rather than a mere conclusion." Ibid. (quotations omitted).

As part of its gatekeeping function, "[a] court must ensure that the proffered expert does not offer a mere net opinion." Ibid. (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011)). "The failure of a defendant to object to expert testimony does not relieve the trial court of its gatekeeper responsibilities . . . ." State v. Nesbitt, 185 N.J. 504, 515 (2006). When expert testimony clearly runs afoul of the Rules of Evidence, a court commits plain error by allowing its admission. See, e.g., State v. Reeds, 197 N.J. 280, 298-301(2009) (finding plain error where prejudicial expert

testimony was admitted on the central issue); State v. Pasterick, 285 N.J. Super. 607, 622-23 (App. Div. 1995) (finding plain error where the expert's "testimony was so prejudicial to [the] defendant that, even if it were marginally relevant and otherwise admissible, failing to exclude it under N.J.R.E. 403 was a mistaken exercise of the trial judge's discretion").

In Burney, the Supreme Court considered whether it was error for the State's expert on historical cell-site location analysis to testify that the defendant's cell phone must have been within a one-mile radius of a cell tower based on a "'rule of thumb' for the area -- a 'good approximation' based on his training and experience." 255 N.J. at 5; see also id. at 12 (the expert testified, "So just based on my training and experience, one mile is a good estimate of the tower range for Sprint in this area."). The expert

> candidly admitted that he did not review the height of the Parkway Tower, did not review its rated power, did not calculate the estimated absorption of radio energy by nearby buildings or hills, did not review the specific angle of the tower's antenna, and did not review any diagnostic data from the tower on December 25. Special Agent David similarly did not perform any tests of the Parkway Tower's area of signal coverage.
>
> [Id. at 24-25.]

Relying on the one-mile approximation based on his training and experience, the expert created a map to illustrate the coverage area for the cell tower and opined that it was highly unlikely that the crime scene fell outside of the

coverage area, thus suggesting that the defendant's phone was near the crime scene. Id. at 25.

The Supreme Court noted that although less precise than the data provided by a GPS, "state and federal courts have accepted expert testimony about cell site analysis for the purpose of placing a cell phone within a 'general area' at a particular time." Id. at 21-22. Nevertheless, the Supreme Court agreed with the Northern District of Illinois that an "expert's estimates of the ranges of different cell towers were unreliable because they were based solely on the expert's training and experience." Id. at 24 (citing United States v. Evans, 892 F. Supp. 2d 949, 956 (N.D. Ill. 2012)). This is because "[e]stimating the coverage area of radio frequency waves [of a cell tower] requires more than just training and experience, . . . it requires scientific calculations that take into account factors that can affect coverage." Ibid. (alterations in original) (quoting Evans, 893 F. Supp 2d at 956). Accordingly, the Court held that the "rule of thumb" approximation offered by State's expert in Burney was an improper net opinion "because it was unsupported by any factual evidence or other data." Id. at 25. Although an expert need not necessarily consider all the factors affecting a cell tower's coverage area, "because the testimony was based on nothing more than Special Agent David's

personal experience, the trial court erred in allowing the jury to hear this testimony." Ibid.

Here, the testimony offered by the State's expert suffered from the same fundamental flaws as in Burney. Detective-Sergeant Kohler created a map, admitted as S-85, that depicted the approximate location of Woods phone at 11:04 p.m. on September 17, 2019. (12T170-20 to 22; Da20). Kohler stated that he "physically reviewed [the call detail records] and then . . . ingested them into software to map the call tower location for the calls in question." (12T170-17 to 19). The top of the map contains "information from the call itself from the provider showing the tower, the location of the tower and GPS coordinates and the orientation or azimuth, which is the direction that the middle of that base that the call was placed off of faces. In this case, it was 210 degrees." (12T171-6 to 11).

Kohler stated that this information "would give you a face, a rough -- rough area depending upon a lot of environmental factors, such as, where somebody is in a building or if there is a large building next to them, as to how far out the tower may go." (12T171-16 to 20). He opined that in an urban area like Trenton, a phone generally would not hit off a tower that was "several miles away." (12T171-25 to 172-6). He also opined that in Willingboro, "Roughly, the same thing. It could be a little bit further.

Willingboro is not as urban, but I know, based on my training and experience, that Willingboro has several towers throughout the different park areas that Willingboro is made up of." (12T172-8 to 12 (emphasis added)).

Kohler opined that the call that Woods placed at 11:04 would have originated from the area on the map depicted within the angle depicted by two pinks lines. (12T174-24 to 175-15, Da20).[8] Kohler added a red dot to show that 14 Vine Street was within the area from which the call could have originated. (12T176-1 to 8). Kohler created a similar map, admitted as S-86, that showed that Woods's phone was near the area of 61 Bloomfield Lane when a call was made at 2:25 a.m. (12T176-5 to 178-22; Da21).

In addition, without being qualified an expert, Detective-Sergeant Luyber testified, "Cell site tower information, cell phone extraction information . . . puts both Mr. Gore and Mr. Woods in Willingboro at the time of the homicide" and that "the evidence that Mr. Woods was in [the victim's] car was based on cell phone locations because he was in Willingboro[.]" (11T220-7 to 9; 11T227-22 to 25). Luyber further stated that Woods's phone was "hitting off of the cell tower, that one third of a pie which is in the area of Sam Gore's house along with the homicide scene." (2T229-5 to 7).

[8] Kohler clarified that the coverage area of the cell tower is not confined to the shaded portion of the arc. (12T175-4 to 175-15; 12T194-1 to 194-17)

As in Burney, the conclusory testimony offered by Kohler and Luyber failed to present any facts or reliable data from which the range of the cell towers could be calculated. In fact, the testimony here was even more lacking than in Burney. In Burney, the expert "testified that each of the lines [on the maps he created] had an approximate length of one mile." 255 N.J. at 12. In this case, by contrast, Kohler did not even appraise the jury of the specific length of the pink lines on the maps. He simply answered "no" when the prosecutor asked if "in general, will a phone that is several miles away?" (12T171-25 to 171-1). He stated that in Trenton, "[i]t's going to be consistent -- especially in more of an urban area, it is going to be a close tower." (12T172-3 to 6). And in Willingboro, "Roughly, the same thing. It could be a little bit further. Willingboro is not as urban, but I know, based on my training and experience, that Willingboro has several towers throughout the different park areas that Willingboro is made up of." (12T172-7 to 8-12). As such, these extremely rough estimates of the cell towers' coverage areas were based on nothing more than Kohler's training and experience.

As in Burney, that was insufficient. Kohler did not consider any of the factors that could affect the coverage area or perform any tests to measure the specific coverage areas of the towers. See Burney, 255 N.J. at 13, 24-25 (discussing factors and tests). Thus, as in Burney, the testimony was "an

improper net opinion because it was unsupported by factual evidence or other data," and "the trial court erred in allowing the jury to hear this testimony." Id. at 25.

Even under plain error review, this improper net-opinion testimony was clearly capable of producing an unjust result. See R. 2:10-2. In the absence of direct evidence that Woods was with Gore at the time of the murder, the State relied heavily on the historical cell-site testimony to place Woods with Gore at the time of the murder. In his opening statement, the prosecutor argued, "At 2:25 a.m. a search of Devon Woods' call detail records for his phone number show that he is in the area of the Buckingham neighborhood in Willingboro. Buckingham neighborhood is where Bloomfield Lane is. Bloomfield Lane is where Sam Gore is. It's the same exact neighborhood. They're in the same exact location at approximately the same time." (10T25-11 to 17 (emphasis added)). Similarly, in summation, the prosecutor argued that the cell site location information showed that Woods was in the Buckingham neighborhood in Willingboro, so Woods must have been with Gore because "[i]t's 2:25 in the morning. He's not going to Shop Rite. He's going to visit his friend." (13T154-3 to 5). The prosecutor similarly argued, "We know from [Woods]'s call detail records he was with Sam Gore. He

didn't just magically pop up at Bloomfield at 2:25 in the morning, you know, randomly. He was there with his best friend." (13T175-10 to 14).

The prosecutor's repeated emphasis on the importance of this testimony, combined with the fact that the jury heard about the location data both from an expert and the lead detective, makes it likely that the jury relied on this improper testimony to convict Woods. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993) ("Expert evidence can be both powerful and quite misleading."); United States v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004) (stating that "expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse"). The State had GPS location data that strongly implicated Gore in the murder, placing him specifically at Garfield Park Academy and at 61 Bloomfield Lane during the relevant time frames. Without similar strong evidence to place Woods at these locations, the State needed to rely on the historical cell site analysis to prove its case against Woods. But this crucial testimony should not have been presented to the jury because it was a foundationless net opinion. As a result, Woods's convictions should be reversed.

POINT III

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

Each error raised above independently warrants reversal. Even if this Court does not find that any one error alone warrants a new trial, "the cumulative impact of the errors casts doubt on the fairness of defendant's trial and on the propriety of the jury verdict that was the product of that trial." State v. Jenewicz, 193 N.J. 440, 474 (2008). Both errors affected whether the jury would convict Woods despite the lack of direct evidence to place him at the crime scene. Although the State presented testimony about Woods's alleged confession, the defense highlighted inconsistencies in the statements of Sashell Williams and Sasha Hedgespeth and argued to the jury that their testimony was unreliable due to Hedgespeth's bias against Woods. Considered together, therefore, the aforementioned errors undermined Woods's right to due process and a fair trial and warrant the reversal of all the convictions. See State v. Gibson, 219 N.J. 227, 241 (2014) ("A single error or a combination of errors in a pre-trial proceeding or a trial or both may require an appellate court to reverse the conviction and to remand for a new trial."); U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

POINT IV

THE JUDGMENT OF CONVICTION MUST BE AMENDED TO MERGE COUNT THREE INTO COUNT TWO AND TO REFLECT 1,119 DAYS OF JAIL CREDITS. (Not Raised Below).

When felony murder provides an alternative theory of liability for the homicide of a victim and the jury convicts the defendant of the underlying felony, felony murder, and murder, the felony murder conviction merges into the murder conviction and the underlying felony survives the merger. State v. Bellamy, 468 N.J. Super. 29, 41-42 (App. Div. 2021). Accordingly, the judgment of conviction in this case must be amended to reflect that count three (felony murder) merges into count two (purposeful murder). Correspondingly, the judgment of conviction must be amended to remove the $100 VCCO assessment and $75 Safe Neighborhoods Assessment imposed on count three. (16T34-14 to 15; Da13).

In addition, the judgment of conviction must be amended to reflect 1,119 days of jail credits. A defendant is entitled to jail credits "against all sentences 'for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence' on each case." State v. Hernandez, 208 N.J. 24, 28 (2011) (quoting R. 3:21-8(a)). As reflected on the Presentence Report, Woods was arrested and held in jail for 1,199 days from September 9,

2019 to January 5, 2023. (PSR1). The trial court failed to award these credits. The judgment of conviction must be amended to correct this error.

POINT V

THE MATTER MUST BE REMANDED FOR A HEARING ON WOODS'S ABILITY TO PAY RESTITUTION. (16T35-21 to 36-16)

To impose restitution, the sentencing court must find (1) that the victim "suffered a loss," and (2) that the defendant "is able to pay or, given a fair opportunity, will be able to pay restitution." N.J.S.A. 2C:44-2(b). "In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose." N.J.S.A. 2C:44-2(c). Due process requires that a defendant receive a hearing to determine his or her ability to pay restitution. State v. Martinez, 392 N.J. Super. 307, 322 (App. Div. 2007); State v. Topping, 248 N.J. Super. 86, 90 (App. Div. 1991).

Here, the trial court imposed $9,710 in restitution but "recognize[d] that Mr. Woods may not have the ability to pay that." (16T36-13 to 14). Consequently, the matter should be remanded for the trial court to conduct an adequate ability-to-pay hearing before ordering Woods to pay restitution.

CONCLUSION

For the reasons set forth in Point I through III, the convictions should be reversed and the matter remanded for a new trial. As argued in Point IV, the judgment of conviction must be amended to merge count three into count two and to reflect 1,119 days of jail credits. And as argued in Point V, the matter must be remanded for a hearing on Woods's ability to pay restitution.

Respectfully submitted,

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Dated: November 20, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-1549-22

STATE OF NEW JERSEY	:	CRIMINAL ACTION
Plaintiff,	:	On Appeal from a Judgment of
	:	Conviction of the Superior Court
-vs-		of New Jersey, Law Division,
	:	Burlington County.
DEVON K. WOODS,		
	:	Indictment No. 20-01-0021
Defendant-Appellant.		
	:	Sat Below:
	:	Hon. Christopher J. Garrenger, J.S.C. and jury
	:	

PRO SE BRIEF ON BEHALF OF DEFENDANT-APPELLANT

Devon K. Woods
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DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

Defendant Devon Woods conviction for murder and related offenses should be reversed because the defendants rights to Confrontation have been violated when the jury was informed that a face-less accuser named "Angel" provided a 9-1-1 anonymous call incriminating defendant, the night of the murder. This anonymous tip from Angel was the first lead for the investigators, which made a defendant a suspect to begin with. During trial, lead detective Sgt. Anthony Luyber testified that "Angel" was a friend of Sasha Hedgepeth and she was calling on behalf of Sasha.

Although at a prior hearing, he testified that Sasha Hedgepeth was the anonymous caller. However, when this witness was called by the defense, admitted that "Angel" was the anonymous caller. Defendant was deprived of his right to Confront "Angel" about her accusations of the defendant and his right to call "Angel" as a witness due to the surprising nature of how the anonymous caller was revealed. The fatal error requires reversal.

PROCEDURAL HISTORY

Defendant shall rely on the Procedural History as set forth by counsel.

Da = appendix to defendant's appellant brief
PSR= Presentence Report
1T= September 6, 2022(motion)
2T= September 27, 2022(motion)
3T= September 27, 2022 (jury selection)
4T= September 28, 2022 (preliminary jury selection)
5T= September 28, 2022 (jury selection)
6T= September 29, 2022 (preliminary jury selection)
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10T= October 6, 2022 (trial)
11T= October 12, 2022 (trial)
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13T= October 18, 2022 (trial)
14T= October 19, 2022 (trial)
15T= October 20, 2022 (verdict)
16T= January 6, 2023 (sentencing)

STATEMENT OF FACTS

Defendant shall rely on the statement of facts set forth by counsel

LEGAL ARGUMENT

POINT I.

THE DEFENDANT'S RIGHTS TO CONFRONTATION WAS VIOLATED WHEN THE LEAD DETECTIVE ANTHONY LUYBER TESTIFIED THAT A ANONYMOUS 9-1-1 CALLER "ANGEL" PROVIDED INFORMATION TO AUTHORITIES THAT DEFENDANT COMMITTED THE CRIMES. HOWEVER ANGEL WAS NOT SUBJECT TO CROSS-EXAMINATION. FOR THIS CONSTITUTIONAL VIOLATION; A NEW TRIAL IS MANDATED. U.S. CONST. AMENDS V, VI, XIV; N.J. CONST. ART. 1 PAR. 10 (not raised below)

Anthony Luyber, lead detective testified that on the night of the homicide an "anonymous" caller provided a tip that identified defendant as the perpetrator in the crimes. Initially defendant was led to believe that the anonymous caller was Sasha Hedgpeth because of the way that Luyber testified previously -- at the grand jury. (13T:13-16 to 19). Sasha Hedgpeth is the defendant's girl friends' (Sashell Williams) mother who testified favorably for the state -- corroborating the anonymous caller, "Angel".

For the first time during trial, defendant learned that the anonymous caller was not Sasha Hedgpeth. In fact, it was Sahsa's friend "Angel" who placed the anonymous 9-1-1 call, implicating defendant in the crimes. Moreover, it was Angel's anonymous call that instantly made defendant a suspect.

In the instant matter defendant was denied the opportunity to cross-examine "Angel" to test the veracity of the prejudicial information she provided. Defendant was also denied the opportunity to cross-examine Nicholas Villano, detective that reported the anonymous call. For this fatal flaw, a new trial is warranted.

During direct examination of Sahsa Hedgpeth, she told the jury that after defendant had confessed to her, she told a friend. That friend called the police. (11T:70-15 to 23)

Lead detective, Sgt. Anthony Luyber testified on the evening of September 18, 2019 "they" received an anonymous phone call through the tip line from an "individual" that had information in regards to the homicide. (11T:199-21 to 200-5). It was this anonymous tip that led detectives to Sasha Hedgpeth -- approximately a week later. (11T:204-12 to 17). The 9-1-1 call was the first lead for the investigation – that turned defendant to an instant suspect.

On cross-examination, Sgt. Luyber was asked about the identity of the anonymous caller. He testified that the anonymous caller was <u>not</u> Sasha Hedgpeth -- but a friend of Sasha. The anonymous call was placed on the behalf of Sasha Hedgpeth. (11T:211-11 to 212-13).

Sgt. Luyber was re-called to testify again before the jury -- by the defense. The crux of his testimony was for clarification surrounding the anonymous caller. The testimony he provided went as follows:

> Q. So you testified on I believe it was Thursday that the anonymous caller -- I had asked you the question, I said was the anonymous caller Sahsah Hedgpeth.
>
> And you said no, it wasn't.
>
> And I said, are you sure.
>
> And you said no, the anonymous caller was not Sasha Hedgpeth. (13T:10-23 to 11-9).

Then the witness revealed the identity of the anonymous caller as "Angel" -- Sahsas' friend. (13T:11-14 to 15). The jury was apprised that "Angel" provided incriminatory information to police about defendant, yet she was not subject to cross-examination. On cross, Det. Luyber told the jury that the anonymous call was placed before the victim's body was discovered. (13T:71-15 to 22). According to the detective, Angel was told the details of the crime from Sasha Hedgpeth. (13T:72-3 to 8)

He was asked by the prosecution, "did [you] follow up on [Angel]?" Det. Luyber said he specifically directed detective "Nicholas Villano" to locate Angel. Det. Villano received a voice mail from Angel which led them to Sahsa Hedgpeth. (13T:72-12 to 73-17). Detective Villano too, was not subject to cross-examination. Angel's anonymous call bolstered the testimony of det. Luyber and Sasha Hedgpeth. The admission of "Angels'" anonymous call, which was repeated by the testimony of Luyber and Sasha -- emphasized by the prosecution in summation, was clearly capable of producing an unjust result and deprived defendant of due process and a fair trial. See. U.S. Const. amends V, VI, XIV; N.J. Const. art. I Par

1, 9 10. Moreover, detective Luyber vouched for the credibility of det. Nicholas Villano and Angel.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront "the witness against him" U.S. Const. Amend VI, N.J. Const. art. I Par. 10. The right of confrontation is an essential attribute of the right to a fair trial, requiring that a defendant have a "fair opportunity to defend against the State's accusations." State v. Garron, 177 N.J. 147, 169 (2003) (quoting) Chambers v. Mississippi, 410 U.S. 284, 194 (1973).

A defendant exercises his right of confrontation through cross-examination, which has been described as the "greatest legal engine ever invented for discovery of truth." California v. Green 399 U.S. 149 (1970).

A defendant's confrontation right must accommodate "legitimate interests in the criminal trial process, "such as established rules of evidence and procedure designed to ensure the efficiency, fairness, and reliability of criminal trials." Garron, at 169.

It has long been the law in New Jersey that the police may not suggest to the jury that they possess superior knowledge, outside the record, that incriminates the defendant. The Confrontation Clause contained in the Sixth Amendment, which applies to the states by way of the Fourteenth Amendment, provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with

the witnesses against him [.]" The Supreme Court of the United States held that the Confrontation Clause bars the admission of "[t]estimonial statements of witnesses absent from trial "except" where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 59 (2004).

"The mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." Favre v. Henderson, 464 F.2d 359, 364 (5th Cir. 1972) (quoting California v. Green, 399 U.S. 149, 161 (1970)).

For this reason, it has been recognized that so-called "inferential hearsay" may be every bit as violative of the right to confrontation as an express assertion of fact. See. Farve v. Henderson, 464 F.2d at 364 (right to confrontation was violated where "testimony was admitted which led to the clear and logical inference that out-of-court declarant believed and said that Favre was guilty of the crime charged."); Keen v. State, 775 So. 2d 263, 272 (Fla. 2000) ("Where the inescapable inference from testimony [concerning a tip received by police] is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is

defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated. '")

The early seminal New Jersey case dealing with inferential hearsay is State v. Bankston, 63 N.J. 263 (1973). There, a detective testified that shortly before defendant was arrested, the officers had been talking to an informer and that based on the information they received, they went to a particular tavern. The detectives testified that inside the tavern, officers saw four black males, including one "fitting the description that we had obtained." at. 266-67. The jury learned that police arrested defendant for possessing drugs, discovered in a pair of gloves found on the bar near where defendant had been seated. at 265.

The court observed, generally, that:

> It is well settled that the hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so "upon information received." at. 268 (citations omitted).

Such testimony may be admissible to show that the officer was not acting in an arbitrary manner or to explain his subsequent conduct. Ibid. However, the court continued,

> When the officer becomes more specific by repeating what some other person told him concerning a crime by the accused the testimony violates the hearsay rule . . . and the accuser's Sixth Amendment right to be confronted by witnesses against him. Bankston, 63 N.J. at 268 (citations omitted).

Notably, the court further elaborated that the propriety of the testimony is not dependent on its specificity, but rather its context. Thus, "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accuser's guilt, the testimony should be disallowed as hearsay. Id. at. 271.

And although the police witness did not specifically relate the content of the informants statement, the "inescapable inference" of testimony was that "the informer had given information that defendant would have narcotics in his possession." Ibid. Because Bankston was denied an opportunity to confront his accuser, the court found that the error required reversal on the facts of that case. Id. at 272-73.

It is the creation of the inference, not the specificity of the statements made that determines whether the hearsay rule was violated. State v. Irving, 114 N.J. 427, 447 (1989). Testimony relating to inculpatory information supplied to a co-defendant or to other non-testifying witness identifying the defendant as the perpetrator of a crime deprives the accused of his or her constitutional rights. State v. Farthing, 331 N.J. Super 58, 75 (App. Div. 2000).

A police officer may not imply to the jury that he possesses superior knowledge, outside the record that incriminates the defendant. State v. Branch, 182 N.J. 338, 351 (2005); *Cf.* State v. Kemp, 195 N.J. 136, 154 (2008) ("all of the

sources who led [the detective] to focus on defendant's trial, hereby obviating defendant's Confrontation Clause claim.")

In the case at bar, the "logical implication" of Sgt. Luyber testimony was that he spoken to Angel who implicates defendant in the charged offense. Indeed, his testimony went well beyond "logical implications" or even "inescapable inferences"; Luyber implied that Sasha's, Sashell and detective Villano's version of events are corroborated by Angel -- Sasha's friend. Detective Villanos' investigative work was vouched for by Luyber, even though Villano -- did not testify -- furthering the harm. We can only speculate about what Angel's testimony would have revealed about the veracity of Sasha and Sashells testimony.

Especially considering defendant's attack on the veracity of Sasha Hedgpeth and Sashell Williams testimony surrounding defendant's alleged confessions. Detective Luybers testimony suggests that the anonymous caller "Angel" was telling the truth. This was patently unfair because defendant cannot confront an unknown accuser, thereby compounding the hearsay violation with a violation of defendant's right to confrontation.

The state did not seek to introduce the anonymous call as an exception to the hearsay rule. Det. Luyber did not say that he spoke with Sasha Hedgpeth because of "information received" – he became more specific about the anonymous caller,

"Angel" and the information she provided. This is what the Court in Bankston warned against. at. 268

Clearly, the anonymous call was the sole reason defendant became a suspect. This is evident because the anonymous call came a week before investigators obtained a statement from Sasha Hedgpeth. This was a trial by ambush. See. State v. Roach, 146 N.J. 208, 224-26 (1996) (relying on Bankston and Irving to find that an officer's testimony - that information from [witnesses] made the defendant a suspect -- was improper even though the officer did not repeat what he learned).

The anonymous caller, "Angel" explained that "they" were told by a friend, who heard from their friend's daughter, that [defendant] admitted to shooting De'Asia. See. (Da. 25).

According to Angel's statement, had she testified would have put Sasha and Sashell's credibility into question before the jury. According to Angel, "they" were told by a friend. That friend revealed to be Sasha Hedgpeth -- yet Angel states that the friend heard it from her daughter. This would have showed the jury that defendant never confessed to Sasha as she testified too.

If this is true, that Sahsha heard about the crimes only through her daughter, than her admissions that defendant confessed to her was untrue. However, the defendant was deprived of getting the jury to make that determination.

There is no possible claim here that defendant's right to confrontation was respected. For the fatal flaw here, defendant is entitled to a new trial because this error clearly had the capacity to produce an unjust result. As stated in State v. Slaughter, 219 N.J. 104, 116 (2014), where a trial court commits a constitutional error, that error is to be considered a fatal error mandating a new trial unless we (the Appellate Court) are able to declare a belief that it was harmless beyond a reasonable doubt. Such is not the case here. Lastly, the state compounded the prejudice by there mention of the anonymous caller in summations. The prosecutor said,

> There was never, never ever one single person who testified there was more than one anonymous caller. There was one anonymous caller. There was a call into 9-1-1. The anonymous caller was Sasha hedgpeth's friend. Sasha had heard the confession from the defendant on the 18th of September. She told her friend that. Later that night the friend called anonymously into the police. Detective Luyber told you that they tracked back, through the anonymous caller, and got to Sasha Hedgpeth.
>
> Now, this isn't a traffic ticket. This is a murder case. Sasha Hedgpeth didn't want to come forward. She didn't give her name. She had somebody else call the police. Why do you think that happened? (13T:151-5 to 18)

The state bolstered the account of a face-less accusers. Clearly Mr. Woods' right of confrontation was violated mandating a new trial.

CONCLUSION

For the reasons set forth in Point I, the convictions should be reversed and the matter remanded fro a new trial.

Respectfully submitted,

/s/ DEVON K. WOODS
Devon K. Woods

Dated: December 12, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1549-22

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, V. DEVON K. WOODS, DEFENDANT-APPELLANT.	CRIMINAL ACTION On Appeal from an Judgment of the Superior Court of New Jersey, Law Division, Burlington County. Sat Below: Hon. Christopher J. Garrenger, J.S.C., and a jury.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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Order Denying without Prejudice Defendant's Motion to Transfer from Morris County Jail to the Burlington County Jail, dated September 13, 2021……Pa8

PROCEDURAL HISTORY

On January 07, 2020, the Burlington County Grand Jury returned Indictment 2020-01-0021-I, charging defendant, Devon Woods, with the following: first-degree Murder, in violation of N.J.S.A. 2C:11-3a(1) and N.J.S.A. 2C:11-3a(2) (Count Two); first-degree Felony Murder, in violation of N.J.S.A. 2C:11-3a(3) (Count Three); second-degree Conspiracy to Commit Robbery, in violation of N.J.S.A. 2C:5-2a(1) and N.J.S.A. 2C:15-1a(1) (Count Four); first-degree Robbery, in violation of N.J.S.A. 2C:15-1a(1) (Count Five); second-degree Possession of a Weapon for an Unlawful Purpose, in violation of N.J.S.A. 2C:39-4a(1) (Count Six); second-degree Unlawful Possession of a Weapon, in violation of N.J.S.A. 2C:39-5b(1) (Count Seven); and second-degree Certain Persons Not to Have Weapons, in violation of N.J.S.A. 2C:39-7b(1) (Count Eight). [Da1-8].[1]

[1] "Da" refers to defendant's appendix.
"1T" refers to the motion hearing transcript dated September 6, 2022.
"2T" refers to the motion hearing transcript dated September 27, 2022.
"3T" refers to the jury selection transcript dated September 27, 2022.
"4T" refers to the preliminary jury instructions transcript dated September 28, 2022.
"5T" refers to the jury selection transcript dated September 28, 2022.
"6T" refers to the preliminary jury instructions transcript dated September 29, 2022.
"7T' refers to the jury selection transcript dated September 29, 2022, Volume I
"8T" refers to the jury selection transcript dated September 29, 2022, Volume II.
"9T" refers to the jury selection and in limine rulings, dated October 6, 2022.
"10T" refers to the trial transcript dated October 6, 2022.
"11T" refers to the trial transcript dated October 12, 2022.
"12T" refers to the trial transcript dated October 13, 2022.

On October 19, 2020, the State filed a Notice of Motion to Admit Evidence of Other Crimes pursuant to N.J.R.E. 404(b). [Pa1-4]. On February 5, 2021, the Honorable Christopher J. Garrenger, J.S.C., denied the State's motion without prejudice. [Pa5].

On August 11, 2021, defendant filed a Notice of Motion to be Transferred from Morris County Jail to Burlington County Jail. [Pa6-7]. On September 13, 2021, Judge Garrenger denied defendant's motion without prejudice. [Pa8].

A trial was held in front of the Honorable Christopher J. Garrenger, J.S.C. and a jury on the following dates: October 6, 12, 13, 18, 19, and 20, 2022. [9T; 10T; 11T; 12T; 13T; 14T]. Nedelka Spady, William Ayers, Kevin Briggs, Willingboro Township Police Department Officer Joseph Devlin, Willingboro Township Police Department Officer Michael Cammarota, Willingboro Township Police Department Detective Elijah Hart, Sasha Hedgepeth, Sashell Williams, Susan Johnson, Burlington County Prosecutor's Office Detective Sergeant Timothy Horne, Burlington County Prosecutor's Office Detective Sergeant Anthony Luber, Burlington County Medical Examiner Dr. Ian Hood, Terry Minix, Burlington County Prosecutor's Office Detective Brian Lloyd and Burlington County

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"13T" refers to the trial transcript dated October 18, 2022.
"14T" refers to the trial transcript dated October 19, 2022.
"15T" refers to the trial transcript dated October 20, 2022.
"16T" refers to the sentencing transcript dated January 6, 2023.

Prosecutor's Office Detective Sergeant David Kohler testified on behalf of the State.[2] Burlington County Prosecutor Detective Sergeant Anthony Luber also testified on behalf of defendant. [10T; 11T; 12T; 13T; 14T].

After the State rested, the court denied defendant's motion for a judgment of acquittal pursuant to Rule 3:18-1. [12T222-8 to 223-13]. Prior to charging the jury, a conference was held. [13T104-12 to 109-21].

The jury was charged on October 19, 2022, and deliberated on October 20, 2022. [14T; 15T]. On October 20, 2022, the jury found defendant guilty of Counts Two through Seven. [15T4-6 to 6-25].

Next, the jury was instructed regarding Count Eight. [15T7-1 to 13-4]. The court took judicial notice of three judgments of conviction from Mercer County, detailing defendant's prior convictions for third-degree Possession of CDS with Intent to Distribute, third-degree Distribution of CDS and third-degree Aggravated Assault. [15T13-9 to 14-23]. The jury found defendant guilty of Count Eight. [15T18-6 to -12].

Defendant was sentenced on January 6, 2023. [16T]. The State asked that defendant be sentenced to the statutory mandated term of life in prison without parole. [16T6-24 to 7-5]. The State argued for the application of aggravating factors

[2] At the time of trial, Detective Brian Lloyd was employed at the Gloucester County Prosecutor's Office.

3, 6, and 9. [16T7-6 to 8-22]. Defendant argued for the application of mitigating factors 11 and 14. [16T23-14 to 24-8]. Defendant directly addressed the court. He alleged that his counsel advised him it was better to not file motions and he challenged the credibility of the witnesses' testimony. [16T24-24 to 26-22]. Defendant denied being in the Willingboro area at the time of the murder and denied any responsibility or involvement in the crime. [16T27-6 to 28-2].

The court found aggravating factors 3, 6 and 9. [16T32-21 to 33-6]. For Count Two, pursuant to N.J.S.A. 2C:11-3(b)(4)(g), Judge Garrenger sentenced defendant to life in prison without the possibility of parole. [Da12]. Defendant was ordered to pay the following fines and penalties: $100 Victims of Crime Compensation Board, $75 Safe Neighborhood Fund, and $30 Law Enforcement Officer Training penalty. [16T34-5 to -7].

For Count Three, defendant was sentenced to 30 years in New Jersey State Prison, of which 30 years must be served before parole eligibility. [Da12]. The sentence was to run concurrent to his sentence on Count Two. [Da12]. Defendant was ordered to pay the same fines and penalties as Count Two. [Da12].

Count Four was merged with Count Five. [Da12]. On Count Five, defendant was sentenced to 19 years in New Jersey State Prison, subject to the No Early Release Act and to run concurrent to his sentence on Count One. [Da12]. Defendant

was ordered to pay $50 VCCB and $75 Safe Neighborhood Fund. [16T34-25 to 35-1].

The court merged Counts Six and Seven. [Da12]. Defendant was ordered to serve seven years in New Jersey State Prison, with 42 months served before parole eligibility. [Da12]. The sentence was ordered to run concurrent to Count Two. The court ordered defendant pay $50 VCCB and $75 Safe Neighborhood Services Fund. [Da12].

For Count Eight, defendant was ordered to serve five years in New Jersey State Prison without parole eligibility, to run consecutive to the life sentence imposed on Count Two. [16T35-13 to -20]. Defendant was ordered to pay $50 VCCB and $75 Safe Neighborhood Fund. [16T35-13 to -20].

The court acknowledged that defendant may not have the ability to pay restitution but ordered that he pay $9,710.00. [16T36-13 to -16]. Prior to concluding the hearing, defendant confirmed that he reviewed his appeal rights. [16T36-17 to 37-12]. This timely appeal followed.

STATEMENT OF FACTS

On September 18, 2019, at 10:26 a.m., William Ayres placed a call to 9-1-1 and reported that he located his sister, Deasia Ayres, in her vehicle on Baldwin Lane in Willingboro, New Jersey, and believed she was deceased. [11T14-22 to 16-14].

Willingboro Township Police Department Patrolman Joseph Devlin responded to Baldwin Lane within 5 minutes of the 9-1-1 call. [11T23-10 to -19]. He observed a green Dodge Durango parked in front of a playground area and near the water pumping station, and Nedelka Spady, the victim's girlfriend, pacing near the vehicle. [11T24-1 to 25-1; 11T41-4 to 13]. Spady was distraught and reported that she found her girlfriend unresponsive in her vehicle. [11T25-5 to -12]. A Burlington County Sheriff's Officer on the scene opened the driver's side front door and the two observed an unresponsive female with blood on her laying across the center console of the car. [11T27-12 to 28-5]. The female was identified as Deasia Ayres. [11T29-14 to -15]. She had blood around her nose and no signs of life. [11T30-11 to -17]. There was blood on the center console, two shell casings on the front passenger's seat and a cell phone near the center console. [11T30-18 to 31-18; 11T33-20 to -25].

Willingboro Police Officer Michael Cammarota arrived at the scene and spoke with William Ayres. [11T44-12 to -13]. He explained that Deasia had not returned home the night before so he was driving around to find her and was the first to locate her vehicle. [11T44-18 to -24]. Deasia's body was eventually removed from the vehicle and the vehicle was towed to a secure lot. [11T45-6 to -23].

Ayres testified that he had a close relationship with his sister and that he would see and communicate with her daily. [10T75-7 to -25]. On September 17, 2019,

Ayres saw Deasia at their sister Bessie's home. [10T76-4 to -9]. The two made plans to pick up her Dodge Durango in Pennsauken, New Jersey, where Deasia resided with Spady, and bring it to Willingboro so she could work on fixing the vehicle's brakes. [10T76-13 to -24]. However, the plans never came to fruition. Instead, while FaceTiming with her later in the day, Ayres observed that Deasia was driving Spady's vehicle and Sam Gore was driving her Dodge Durango behind her. [10T77-5 to -11]. Ayres also observed that Deasia possessed a gun. [10T77-17 to -18]. He had never observed her with a gun before. [10T96-13 to -14].

That evening, Deasia went to a concert in Philadelphia, Pennsylvania, with Spady and sent Ayres a few text messages while there. [10T78-1 to -13]. Ayres woke up at 4:00 a.m. and saw he had a missed call from Deasia from an hour prior. [10T79-6 to -9]. Ayres decided to call her back later in the morning and went back to sleep. [10T79-13 to -18]. Deasia did not reach out to him again that morning, which was unusual. [10T79-22 to -25]. Ayres also heard from Spady at approximately 7:30 a.m. She told him that she also had not heard from Deasia. [10T80-1 to -11]. Ayres became concerned and called and texted Deasia but did not get a response. Ayres decided to drive around and look for Deasia. He contacted his sister's husband, Willie Hargrove, whom Deasia would often visit, but Hargrove stated he had not seen or heard from her. [10T82-12 to -14]. Ayres also tried to determine if Deasia was incarcerated and learned that she was not. [10T82-15 to -

24]. Next, Ayres went to co-defendant Sam Gore's grandmother's home, located at 61 Bloomfield Lane, Willingboro, New Jersey. [10T82-25 to 83-19]. No one answered the door. [10T83-17 to -22].

From 61 Bloomfield Lane, defendant drove toward Baldwin Lane and from the corner of his eye, saw Deasia's Dodge Durango. [10T85-20 to 86-2]. Ayres approached the driver's side and cupped his hand on the front window so he could see through the window tint. [10T88-6 to 88-21]. Inside he observed Deasia's body slumped towards the front passenger's seat with blood on her and the armrest. [10T88-21 to 89-13]. Ayres started to scream and yell and called Spady to tell her what he found. [10T89-22 to 89-25]. Ayres also contacted the police. [10T92-11 to -15].

Spady texted and spent time with Deasia throughout the day on September 17, 2019. At 2:47 p.m., Spady received text messages from Deasia, stating that was talking to her cousin, "Sammy" and included a picture of a gun. [10T46-9 to -16; 10T49-10 to -14]. The two departed from Spady's home in Pennsauken, New Jersey, and went to the concert in Philadelphia. [10T51-4 to -15]. After the concert, Spady dropped Deasia off at Garfield Park Academy in Willingboro, New Jersey, where she worked on the janitorial staff. [10T51-23 to 52-2]. Spady then went home and went to bed. [10T53-13 to -15].

At approximately 3:00 a.m., Deasia called Spady and told her that she was still at work and would be done soon. [10T53-19 to 54-9]. She stated that Sammy was going to take her home from work. [10T54-6 to -9]. Deasia was supposed to call Spady when she left work, but Spady never received a call. [10T54-17 to -23]. Upon waking up at 6:30 a.m. and realizing Deasia never called, Spady called and texted Deasia but did not get a response. [10T55-10 to -19]. Spady also spoke with Deasia's niece that morning, who stated that she also hadn't heard from Deasia. [10T56-14 to 57-18]. At that point, Spady was very concerned because it was not typical for Deasia to not be in contact with her family members and Spady. [10T57-19 to -25]. A short time later, Spady received a frantic phone call from Deasia's brother, William Ayres, telling her that she needed to come to Baldwin Lane. [10T58-14 to 59-25]. When she arrived at the location, Spady observed Deasia's body inside of her car, slumped over. [10T60-5 to -14]. She opened the door and saw Deasia's body, and then closed it immediately. [10T65-16 to -23]. The police arrived shortly after. [10T65-24 to 66-1].

On the evening of September 18, 2019, the Burlington County Prosecutor's Office received an anonymous phone call through the tip line regarding Deasia's murder. [11T199-21 to 200-1]. Through the tip, police became aware of Sasha Hedgepeth, the mother of defendant's girlfriend, Sashell Williams. [11T200-2 to -21]. Hedgepeth told police that defendant confessed that he and his best friend, co-

defendant Gore, murdered Deasia. [11T71-22 to 72-19]. At the time he confessed to her, Hedgepeth and defendant were on good terms and defendant was living with Williams at her aunt's home located at 14 Vine Street, Trenton, New Jersey. [11T68-6 to 69-1].

Specifically, defendant told Hedgepeth that he was driving around in Deasia's car with Gore and picked up Deasia from work and drove to Sam's grandmother's home and Deasia's sister's home. [11T72-23 to 73-20]. Gore and defendant devised a plan that Gore would say, "Man, F this shit," as a signal to defendant to shoot Deasia. [11T87-7 to -14]. Defendant told Hedgepeth that, while seated behind her in her car, he shot Deasia twice in the back of the head. [11T74-15 to 75-17]. He explained that after the first shot, her body was shaking, so he shot her again. [11T74-21 to 75-9]. After firing the shots, he ran to Gore's grandmother's home. [11T75-20 to -24]. Defendant stated that he and Gore purposely left Deasia's cell phone in the car so they could text her phone to create an alibi. [11T75-25 to 76-6; 11T77-1 to -13]. Defendant said that they killed Deasia because they wanted her gun, a .380, back and she would not give it to them. [11T77-14 to -23]. After the shooting, Gore took the gun and hid it. [11T77-24 to 78-1]. Hedgepeth stated that while confessing to what he did, defendant laughed and said Deasia was a "dike anyway." [11T94-1 to -24]. After she gave a statement to police, Hedgepeth identified defendant in a picture shown to her by police. [11T79-9 to 80-10].

Police also spoke with Williams on September 24, 2019. At that time, Williams lied to police, and said that she was with defendant on the night of the murder. [11T134-5 to 135-5]. After defendant was arrested for the murder, police approached Williams again and she gave them truthful information regarding the murder. [11T135-18 to 136-13].

As of September 19, 2019, Williams was dating defendant and was newly pregnant with his baby. [11T101-5 to -8]. The two were living on the third floor of Williams's aunt's home located at 14 Vine Street, Trenton, New Jersey. [11T 101-9 to -22]. Williams was also cousins with Gore. [11T101-19 to 102-1]. Gore was staying in Willingboro at his grandmother's home or in Trenton with his girlfriend, Jianna Cezar. [11T102-19 to 103-6].

On September 17, 2019, Gore came to 14 Vine Street and was driving Deasia's Dodge Durango. [11T103-15 to 104-5]. Williams, Gore and defendant drove around in the vehicle and then returned to 14 Vine Street where they met Cezar who arrived in her Kia sedan. [11T105-1 to 105-21]. Gore showed defendant the gun that Deasia let him hold until she got off work. [11T106-15 to -21]. Gore stated that if Deasia wouldn't let him keep the firearm, he was going to kill her for it. [11T107-3 to -12]. Defendant responded, "No, let me do it." [11T107-13 to -15]. When Deasia returned to her home, Gore and defendant left in Cezar's car and Cezar left in

Deasia's car. [11T108-23 to 110-11]. Defendant told Williams that he was going to Gore's grandmother's home and would be back in the morning. [11T110-19 to -24].

At 1:05 a.m., defendant texted Williams and told her he was "excited." [11T115-4 to -16]. Williams responded that he should be safe that and she wasn't going to be able to sleep until he was done. [11T115-22 to -25]. Defendant answered, "Get some sleep, though, ima be all right. This ain't my first." [11T116-25 to 117-1]. At 1:11 a.m. Williams texted defendant, "I hate that you left me for the night." [11T117-18 to -23]. At 2:43 a.m. defendant responded, "It's only for the night cuz we bout to get old girl dike." [11T118-5 to -7].

Around 9:30 a.m. the next morning, Williams walked herself to a nearby hospital because she wasn't feeling well. [11T1203 to -11]. Gore and defendant came to the hospital. While there, Gore behaved normally, but defendant stared at the ground. Gore received a phone call from a family member about finding Deasia's body. [11T121-15 to -22]. Gore acted surprised while on the phone, but then chuckled about it after hanging up. [11T122-2 to -9].

After they returned to their home, defendant told Williams why he was acting quiet. He explained that he no longer trusted Gore and thought Gore might try and kill him. [11T125-15 to -17]. Defendant also told Williams about what happened the previous night. He stated they picked up Deasia and rode around in her vehicle. [11T125-24 to 126-4]. They parked in front of Deasia's family member's home.

[11T125-24 to 126-4]. He stated that in the middle of them talking, he shot Deasia. [11T126-6 to -14]. He explained he and Gore devised a plan to ask her to keep the gun, and if she refused, defendant would shoot her when Gore stated, "that shit's crazy." [11T126-19 to 127-9]. Defendant told Williams that Deasia stated that she borrowed the gun from someone else so Gore could not keep the gun. [11T127-15 to -24]. Defendant told Williams that after he fired the first shot into the back of Deasia's head, she was shaking, so he shot her again in the neck and then got out of the car. [11T128-8 to 129-1]. Gore and defendant ran to Gore's grandmother's home and once there, Gore sent a message to Deasia's phone to make it appear like they were looking for her. [11T131-5 to -8; 11T132-6 to -15]. Williams also shared that a few days after the murder, defendant threw his cell phone out of the window of an Uber they were in. [11T133-9 to -17]. Finally, Williams testified that after they were arrested, and even before she gave her second statement to police, both Gore and defendant sent threats to her about her speaking with police. [11T163-24 to 164-15].

Burlington County Prosecutor's Office Sergeant Anthony Luyber was the lead detective in the investigation into Deasia's murder. He explained that the information he received from Hedgepeth about defendant's confession was corroborated by evidence only known to police and not released to the public. Specifically, the police had not shared that Deasia was shot twice in the back of the

head, that a .380 caliber firearm was used, and that Deasia was captured on surveillance being picked up from her job. [11T222-22 to 224-12].

In addition to receiving an anonymous tip as to defendant's involvement and speaking with Hedgepeth, police obtained surveillance video that corroborated defendant's confession. First, video surveillance as well as key fob swipes revealed that Deasia left work at Garfield Academy at 2:56 a.m. and entered the front driver's side seat of her vehicle. [12T101-18 to 102-25]. Next, video from the Willingboro MUA building, located on Baldwin Lane, one tenth of one-mile from where Deasia's Dodge Durango was parked, depicted the Dodge Durango driving on Baldwin Lane towards where the vehicle was found between 3:12 a.m. and 3:14 a.m. [12T114-5 to -25]. Further, police obtained video surveillance from 72 Bloomfield Avenue, which was located diagonally across the street from Gore's grandmother's home at 61 Bloomfield Avenue. [11T56-16 to 24; 11T57-23 to -25]. That footage showed Deasia's Dodge Durango in the area at approximately 3:07 a.m. [11T58-5 to -13]. Police also determined that 61 Bloomfield Avenue was approximately five houses from 42 Baldwin Lane near where the Dodge Durango was located. [11T180-24 to 181-3]. Surveillance video from the area revealed two individuals walking from Baldwin Lane towards Bloomfield Avenue and entering Gore's grandmother's home after 3:00 a.m. [11T184-18 to 185-1; 11T219-10 to -22]. Additionally, surveillance

footage depicted Gore's bedroom light turning on at approximately 3:20 a.m. on September 18, 2019. [11T207-10 to -18].

Gore's cell phone was legally recovered as part of the investigation. [11T207-22 to 208-2]. The data recovered from the cell phone provided a step-by-step map of Gore's movement that evening and into the early morning hours, including his leaving his grandmother's home at 2:48 a.m. and picking Deasia up at Garfield Park Academy at 2:58 a.m. [12T100-12 to 101-11]. Additionally, Gore's phone registered him climbing one set of stairs at 3:21 a.m., followed by him sending a text message to Deasia that was never read. [12T121-22 to 122-25]. At 3:40 a.m., Gore opened the photos application on his phone and deleted three pictures of him holding a gun. [12T144-8 to -20].

Finally, call detail records from defendant's cell phone number, 609-496-416, revealed that when defendant attempted to call Williams at 2:25 a.m. on September 18, 2019, his phone was in the area of 61 Bloomfield Avenue. [12T178-3 to -17].

Burlington County Medical Examiner Dr. Ian Hood performed an autopsy of Deasia's body. [12T14-6 to -9]. He identified two wounds in the back of her head, approximately two and one-half inches apart. [12T16-12 to -22]. He also observed soot and gunpowder deposited on the collar of the shirt she was wearing. [12T16-12 to -22]. Dr. Hood recovered the one .380 heavily-nosed jacketed caliber bullet from her head. [12T18-19 to -23]. The exit wound of the other bullet appeared just above

her hairline. [12T20-11 to -16]. Dr. Hood referred to the shooting as "execution-style" explaining that it was in close range as evidenced by the gunpower stippling around the wounds. [12T23-7 to -17]. Dr. Hood opined that either of the wounds would have been fatal because they were so close to Deasia's brain stem, and that a person seizing, or having a shaking motion, is not an uncommon involuntary movement after sustaining a brain injury such as a gunshot. [12T24-17 to 25-18]. Dr. Hood concluded that Deasia's cause of death was two gunshot wounds to her head and the manner of death was homicide. [12T26-20 to 27-1].

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROHIBITED DEFENDANT FROM ARGUING THIRD-PARTY GUILT.

Judge Garrenger correctly denied defendant from arguing third party guilt at trial. Defendants, during the course of a trial, are "entitled to prove [their] innocence by showing someone else committed the crime." State v. Koedatich, 112 N.J. 225, 298 (1988). In order to introduce evidence of a potentially culpable third party, there must be a showing made that the proposed evidence can be linked to the victim or the crime. Id.; State v. Sturdivant, 31 N.J. 165 (1959).

Third-party-guilt evidence is admissible so long as "the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of

the State's case." State v. Perry, 225 N.J. 222, 238 (2016) (quoting State v. Cotto, 182 N.J. 316, 332 (2005)); see State v. Fortin, 178 N.J. 540, 591 (2004); State v. Sturdivant, 31 N.J. 165, 179 (1959). Stated otherwise, "[s]omewhere in the total circumstances there must be some thread capable of inducing reasonable men to regard the event as bearing upon the State's case. State v. Sturdivant, 31 N.J. 179 (1959). The doubt cast on the State's case must be based on "specific evidence linking the third-person to the crime" or to the victim. State v. Timmendequas, 161 N.J. 515, 620 (1999).

In setting a standard for the admission of third-party guilt, courts have acknowledged the concern about "the ease in which unsupported claims may infect the process." State v. R.Y., 242 N.J. 48, 66 (2020), citing State v. Loftin, 146 N.J. 295, 345 (1996). To avoid said infection, defendant's are prohibited from introducing evidence "in order to prove some hostile event and leave its connection with the case to mere conjecture." Id. at 66-67, citing State v. Sturdivant, 31 N.J. 165, 179 (1959).

The decision to admit evidence of third-party guilt is "particularly fact-sensitive and rests within the trial court's discretion." State v. Perry, 225 N.J. 222, 239 (2016). A trial court's ruling on the admission of third-party guilt evidence is assessed under the abuse of discretion standard. Brenman v. Demello, 191 N.J. 18, 31 (2007). "A trial court's discretion is abused when relevant evidence offered by the defense and necessary for a fair trial is kept from the jury." State v. R.Y., 242 N.J. 48, 66 (2020), quoting State v. Cope, 224 N.J. 530, 554-55 (2016).

When a criminal defendant seeks to cast blame on a specific third-party, the defendant must notify the State in order to allow the State an opportunity to properly investigate the claim. State v. Loftin (Loftin I), 146 N.J. 295, 345-46 (1996) (see State v. Cotto, 182 N.J. 316, 334 (2005)).

The New Jersey Supreme Court recently ruled the admission of third-party guilt evidence in State v. R.Y., 242 N.J. 48 (2020). There, five year old and seven year old sisters shared with their mom that while being babysat by defendant, who was a family friend, he touched them in their vaginas. Id. at 56. The next day, the seven year old spoke with a Division of Child Protection and Permanency caseworker and reported that defendant's step-son touched her "in a bad part." Id. at 57. She denied anyone else touching her inappropriately. Id. at 57. The seven year old was then taken to the Ocean County Prosecutor's Office where she was interviewed by a detective and stated that defendant inappropriately touched her. Id. at 58. At trial, she testified that she did not remember who touched her but that it was a "a big boy." Id. at 61.

The State moved to preclude the DCPP caseworker from testifying that the seven year old told him only the stepson touched her inappropriately. Id. at 62. Defendant argued it was admissible for various reasons, including demonstrating third-party guilt. Id. The trial court granted the State's motion, holding that the defendant did not present sufficient evidence of the stepson's third-party guilt. Id. The Appellate Division affirmed as to the trial court's findings regarding third-party guilt. Id. at 63.

The New Jersey Supreme Court reversed and found that the seven year old's statement to the DCPP caseworker that the defendant's stepson inappropriately touched her was "sufficient evidence that another person may have committed the crime for which [the] defendant was on trial, as opposed to 'mere conjecture.'" Id. at 68-69.

Before trial, the State filed a motion in limine asking the court to prohibit any arguments from defendant regarding third-party guilt and to not provide a third-party guilt charge to the jury. [9T64-16 to -22]. The State first argued defendant failed to provide notice of his intent to rely on third-party guilt as required by State v. Cotto, 182 N.J. 316, 334 (2005). [9T65-6 to -12]. The State also argued that defendant should be prohibited from arguing third-party guilt because there was no link between a third-party and Deasia's murder. The State hypothesized that defendant would argue that Derique[3] Ballard, the father of Spady's child, had problems with the couple and that a non-testifying relative of Deasia's stated that Ballard had shot at him and Deasia on a prior occasion. [9T65-18- to -24]. The State explained that there was no evidence linking Ballard to Deasia's murder. [9T65-25 to 66-3].

Defendant responded that the State was provided notice of defendant's third-party guilt argument "at least since last Tuesday," which he argued was enough time for the State to investigate, as is the purpose of giving notice. [9T68-6 to -10]. Defendant stated that Hargrove alleged that Ballard "supposedly fired a gun" at the

[3] Ballard's first name is misidentified in the record as "Tareek."

victim as she drove by in her car. [9T68-17 to -24]. He also alleged that the police interviewed Ballard and therefore considered the claim to be valid. [9T68-25 to 69-5]. Finally, defendant argued he would more seriously and unfairly be prejudiced if he was barred from arguing third party guilt compared to the prejudice the State faced if it was permitted. [9T71-2 to 72-4].

Judge Garrenger granted the State's motion to bar defendant from arguing third-party guilt. [9T76-10 to -17]. The court held that it had "a paucity of information with regard to any proof, or substantial proof or probability that a third person, or a specific third person committed the act." [9T76-2 to -5]. Judge Garrenger also held that the court did not have any information that had a rational tendency to engender a reasonable doubt with respect to an essential element of the State's case. [9T76-10 to -17]. The court left open the possibility of the emergence of evidence as to third-party guilt and held it would rule accordingly if it arose during trial. [9T77-10 to -19].

Prior to defendant's presentation of his case, the State asked the court to remind defendant prior to him calling Detective Sergeant Luyber as a witness, that he is prohibited from raising the issue of third-party guilt in front of the jury. [13T3-19 to 4-6]. Defendant responded that his questions to Detective Sergeant Luyber would not address third-party guilt. [13T5-2 to -7]. The court recalled that, as a witness for the State, Detective Sergeant Luyber testified that police explored the various leads it gathered during its investigation and they all turned out to be dead ends. [13T6-11 to -

17]. Judge Garrenger advised that he would give leeway to defendant to ask questions regarding those leads, though he anticipated that any questions would have been asked and answered. [13T6-18 to -21].

Judge Garrenger appropriately ruled that defendant did not have a sufficient basis to argue third-party guilt. Defendant alleged that Hargrove stated Ballard fired shots at Deasia. He did not supply any evidence that had a "rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case." Defendant did not establish when or where the alleged shooting took place. The record is void of Hargrove's statements, so it is unclear as to the depth and credibility of his knowledge of the alleged event. Because it is unclear as to the basis and details of the allegations, the trial court was unable to assess if the witnesses' statements would have been permitted at trial under the Rules of Evidence.

Further, there is no evidence that Ballard was in the area at the time of Deasia's murder. As noted by the State at the motion hearing, on the night of her death, Deasia was not following her normal work schedule, so it was unlikely that Ballard, who had no relationship with her, knew of her whereabouts. Even assuming arguendo that Ballard had fired shots in an area where Deasia was present on some prior occasion, it does not meet the legal standard of creating the possibility of reasonable doubt that defendant committed the crime here, especially when considered in light of the weight of the State's evidence in this case.

Defendant's argument that Hargrove's allegation that Ballard shot at him and Deasia was "clearly sufficient" to raise a reasonable doubt that defendant was the shooter is a bald and unsupported assertion. The assertion is a strong example of an unsupported claim that courts worry will infect the criminal justice process and, contrary to case law, be used to suggest a prior hostile event and leave its connection with the case to mere conjecture. Here, there is no evidence in the record that a prior hostile event even occurred. Instead, the State presented extensive evidence that defendant and co-defendant Gore orchestrated and committed the crime, and thus his argument regarding third-party guilt was correctly prohibited.

Finally, this case is substantially different from R.Y. There, the evidence of third-party guilt came directly from the victim, who, at trial, testified that she did not know who inappropriately touched her. Given the nature of the charges and the victim's own contradictory statements to the caseworker and police, her statement naming a third-party was well-beyond mere conjecture.

In short, especially given the facts and circumstances of this case and the strong weight of the State's evidence, Judge Garrenger did not abuse his discretion when he ruled that defendant was prohibited from introducing any arguments of third-party guilt. Not only was the alleged evidence of third-party guilt vague and baseless, it was mere conjecture and would not cast any reasonable doubt with the jury that defendant was the perpetrator.

POINT II

DETECTIVE KOHLER'S EXPERT TESTIMONY REGARDING THE LOCATION OF DEFENDANT'S CELL PHONE ON THE NIGHT AND EARLY MORNING HOURS OF THE VICTIM'S DEATH WAS NOT INADMISSIBLE LAY OPINION. (NOT RAISED BELOW).

Defendant's argument that Detective Kohler's limited expert testimony about the location of defendant's cell phone on the night and early morning hours of the victim's death was properly admitted. Detective Kohler provided a plethora of testimony about the evidence he extracted from Gore and Deasia's phone. He then was appropriately qualified without objection to testify as an expert witness in the area of cellphone mapping and cell phone forensics and offered limited testimony about the approximate location of defendant's cell phone at 11:04 p.m. on September 17, 2019, and 2:25 a.m. on September 18, 2019. His testimony did not violate the Supreme Court's holding in State v. Burney, 255 N.J. 1 (2023), and given the plethora of evidence presented by the State, its inclusion was not clearly capable of producing an unjust result.

Approximately six months after this case was tried, the New Jersey Supreme Court heard oral argument in State v. Burney, where the defendant argued, in part, that a detective's expert testimony about cell site analysis for the purpose of placing the

defendant's phone within a general area at a particular time was erroneously admitted.[4] In Burney, FBI Special Agent David testified that, on the night of the crime at time of the charged crimes, the defendant's cell phone "pinged" a cell tower with an approximately one-mile coverage area that included the crime scene. Id. at 11. He concluded that the towers had a one-mile range based on a "rule of thumb" for the towers in the area. Id. at 12. At a Frye hearing, Special Agent David testified about the steps he took using the defendant's cell phone information to map out the area where he believed the phone was in at the time of the crime. Id. at 11-13. Special Agent David testified that at the time of the crime, the defendant's phone used a tower in Orange, New Jersey, referred to as "the Parkway Tower," to receive a text message. He stated that the tower's coverage radius "would reasonably include the crime scene," and was at the "outer boundary" of his estimated coverage area. Id. at 13-14. Notably, Special Agent David also testified that there were two other cell towers closer to and within the range of the crime scene. Id. at 13. He testified that he did not test the range of the Parkway Tower and that its range can be affected by various factors that he did not measure as part of his assessment for the case. The trial court admitted Special Agent David's testimony, finding that it was "sufficiently reliable based upon its general acceptance by the courts and other jurisdictions." Id. at 14.

[4] The second argument raised in Burney addressed the admission of a first-time-in-court identification of defendant. This argument is not relevant to this case.

At trial, Special Agent David testified consistently with his pretrial testimony. Notably, he testified that it was "highly highly unlike[ly]" that the Parkway Tower did not cover the crime scene based the tower's coverage distance. Id. at 15. After his testimony, the defendant made a new objection, arguing that Special Agent David's testimony was impermissible net opinion because it did not have an underlying justification. Id. The trial court rejected the defendant's argument. Id. The defendant was found guilty of all but one charge. Id. at 16. The Appellate Division found that the trial court did not abuse its discretion when it allowed Special Agent David to provide expert testimony at trial. Id. at 16-17.

The Supreme Court reversed the Appellate Division's holdings. First, the Court acknowledged that state and federal courts throughout the country "have accepted expert testimony about cell site analysis for the purpose of placing a cell phone within a 'general area' at a particular time." Id. at 22. The Court found that Special Agent David's "rule of thumb" testimony constituted inadmissible net opinion "because it was unsupported by any factual evidence or other data." Id. at 22. The Court supplied a list of factors Special Agent David failed to address in his testimony, including the height of the tower, the estimated absorption of radio energy by nearby buildings or hills, the angle of the tower's antenna and diagnostic data from the tower on the date of the crime. Id. at 24-25. The Court concluded that because Special Agent David's testimony was "based on nothing more than [his] personal experience, the trial court

erred in allowing the jury to hear [the] testimony." Id. at 25. The Court noted that a cell phone mapping expert was not required to address all of the listed factors, but that the testimony must be based on more than just the expert witness's personal experience. Id. at 25.

To be qualify as expert testimony, the witness must be "qualified as an expert by knowledge, skill, experience, training or education" and must offer "a scientific, technical, or …specialized opinion that will assist the triat of facts. See N.J.R.E. 702; Pomerantz Paper Corp v. New Cmty. Corp., 207 N.J. 344, 372 (2011). Further, the testimony must not be net opinion. Testimony constitutes net opinion when an expert offers bare conclusions, unsupported by factual evidence. See e.g., Buckelew v. Grossbard, 85 N.J. 512, 524-25 (1981). The net opinion rule "requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion". See State v. Townsend, 186 N.J. 473, 494 (2006); see also Rosenberg v. Tavorath, 352 N.J.Super. 385, 401 (App. Div. 2002). When an expert's testimony is grounded in their personal views rather than objective facts, the testimony must be excluded. Pomerantz Paper Corp., supra, 207 N.J. at 372-374.

Here, Detective Sergeant Kohler provided limited testimony as an expert in cell phone mapping and forensics. He first explained the basics of how cell phones work and how cell phone providers maintain records of a phone's activity. [12T168-11 to 168-25]. Detective Sergeant Kohler testified that he obtained the call detail

records for defendant's phone number, physically reviewed them, and then entered them into software to map the call tower location for two calls. [12T169-22 to 170-19].

Detective Sergeant Kohler explained to the jury that information he plotted was able to only give a rough area of where the phone was located and that the actual location could be affected by a number of factors, such as any nearby buildings and where someone is in the building they placed a call from. [12T171-12 to -22]. Detective Sergeant Kohler further explained that in an urban area, such as Trenton, New Jersey, it is likely that a phone is going to hit off of a close tower and not one that is several miles away. [12T171-25 to -5]. Detective Sergeant Kohler also testified that he knew based on his training and experience that Willingboro, New Jersey, has several towers throughout the different park areas, so a call placed in Willingboro would very likely not hit off a tower that is several miles away. [12T172-7 to -17].

Using S-85, Detective Sergeant Kohler depicted the information for the call placed at 11:04:14 p.m. on September 17, 2019. The graphic showed the location of the cell phone tower that the phone pinged off the GPS coordinates, and the azimuth, which he explained that the direction that the middle of the base that the call was placed off faces, which was 210 degrees for this call. [12T171-4 to -11; 12T173-21 to -24]. Detective Sergeant Kohler testified that the "pink area" depicted in the

graphic is the area where the call would have originated from, while also noting that the picture only displays the angle and that the measurements were approximate. [12T175-4 to -15]. Detective Sergeant Kohler further explained that the call did not originate from the area outside the outlined pink area because it would have hit off another tower. [12T175-16 to -25]. He summarized that the mapping program he used indicates that the call placed at 11:04 p.m. places defendant's cell phone in the area of 14 Vine Street, Trenton, New Jersey. [12T176-1 to -8]. This evidence was generally corroborated by Williams' timeline up to the murder, including that she, defendant, Gore and Cezar spent time outside of 14 Vine Street earlier in the evening before defendant and Gore left for Willingboro to murder Deasia. [11T106-2 to 109-17].

Second, as depicted in S-86, Detective Sergeant Kohler used cellular data to map the phone call placed from defendant's phone at 2:25 a.m. on September 18, 2019. Detective Sergeant Kohler testified the call was consistent with being placed at Sam Gore's grandmother's home located at 61 Bloomfield Lane, Willingboro, New Jersey. [12T`78-9 to –11]. He explained that the angle he constructed based on the call detail records was "consistent of the device being in that area when the phone call is placed and routed through the T-Mobile network." [12T178-18 to -22]. Notably, this testimony was corroborated by other evidence and the timeline presented by the State, including the text message defendant sent to Williams about

picking up Deasia and the video footage of Deasia exiting Garfield Academy and entering her Dodge Durango.

On cross-examination, Detective Kohler testified that he was not able to say, based upon the data of the exact location of defendant's phone, only that it is consistent with being in the angle of the tower where 14 Vine Street happens to be. [12T196-19 to 197-10]. He also answered that unlike Gore's phone, he was unable to say defendant's phone was physically at 61 Bloomfield Lane because defendant's phone was never physically recovered. [12T199-4 to -12].

On redirect examination, Detective Sergeant Kohler explained that in S-85 he placed a dot on 14 Vine Street only to show the location that was involved in the investigation, and not to say that defendant was "definitely there" at the time the call was placed. [12T203-9 to -20]. He explained again that the 11:04 p.m. phone call hit off the identified tower and that the base of the tower was facing 210 degrees, which included 14 Vine Street, but also included the other streets and area as depicted in S-85. [12T203-21 to 204-19]. Detective Sergeant Kohler also explained that the call detail records for defendant's cell phone number indicated that at 2:25 a.m., the phone moved from the area of Trenton, New Jersey, to Willingboro, New Jersey, and while in Willingboro, attempted to call Williams. [12T204-25 to 205-15]. He clarified again that he had no evidence that places defendant in the area of Bloomfield Lane at 2:25 a.m., only his cell phone. [12T207-16 to -24].

Lead Investigator Detective Sergeant Luyber, on redirect, after defendant noted through cross-examination that the figures in the neighborhood surveillance videos were unable to be identified as defendant and Gore, clarified that he had other evidence, namely "cell site tower information, cell phone extraction information that puts both Mr. Gore and Mr. Woods in Willingboro at the time of the incident." [11T220-7 to -14]. Notably, he did not testify as to whether it was defendant or Gore's phone where cell site tower information was extracted from.

On recross, defendant directly asked Detective Sergeant Luyber, "And you're saying that your evidence that Mr. Woods was in that car was based on cell phone locations because he was in Willingboro?" to which Detective Sergeant Luyber responded, "Yes, sir." [11T227-22 to -25]. Finally, Detective Sergeant Luyber testified on redirect that the cell tower information did not place defendant directly in Sam Gore's home, and instead that "his cell phone was hitting off of the cell tower, that one third of a pie which is in the area of Sam Gore's house along with the homicide scene." [11T229-2 to -7]. None of this testimony was improper.

This case is distinguishable from Burney. First, and most importantly, defendant did not contest Detective Sergeant Kohler's proposed testimony before or during trial. There was no N.J.R.E. 104 hearing to develop a record of the steps and methods Detective Sergeant Kohler used to map the location of defendant's cell phone for those two calls. Thus, the record is insufficient here for this Honorable

Court to question or assess the methods and techniques utilized by Detective Sergeant Kohler.

Next, unlike in Burney, Detective Sergeant Kohler testified that he created S-85 and S-86 by interpreting the information from the call detail records and inputting them in a mapping software. Conversely, the record in Burney suggests that Special Agent David manually created the maps depicting the towers pinged by the defendant's phone, including drawing two lines extending from each of the cell towers' pinged sectors and testifying that each of the lines had an approximated length of one mile. Here, defendant does not challenge the software used by Detective Sergeant Kohler and cannot establish that the factors listed in Burney were not incorporated into Detective Sergeant Kohler's expert testimony.

Further the testimony that was challenged in Burney was specific and limited to Special Agent David's testimony about his "rule of thumb" that the Parkway Tower had an approximate coverage area of one mile. Specifically, without explaining the origin and basis for the "rule of thumb," he stated that the "towers **likely** had an approximate length of one mile based on a "rule of thumb." Id. at 12. When questioned about how he determined the length of the "arms" that created the coverage area for the cell towers, he explained:

> So…the length that was used for these arms is, again, an estimate and these are one mile, which is a rule of thumb for this particular technology and this particular frequency in this particular area. So just

> based on my training and experience, one mile is a good estimate of the tower range for Sprint in this area." [emphasis omitted]. Id. at 12.

Special Agent David also testified that there were two other cell towers that were closer to, and within the range of, the crime scene and that the crime scene was only slightly less than one mile from the Parkway Tower and at the "outer boundary" of his estimated coverage area. Id. at 13.

Detective Sergeant Kohler's testimony did not rely on the "rule of thumb" estimation that was challenged and found to be net opinion in Burney. In fact, nowhere in Detective Sergeant Kohler's testimony did he state that he relied on his "personal experience" like the problematic "rule of thumb" testimony in Burney.

Finally, unlike Special Agent David, Detective Sergeant Kohler did not offer any sweeping and firm conclusions. Special Agent David "emphasized to the jury that it was 'highly, highly unlike[ly]' that the Parkway Tower did not cover the crime scene based on the tower's approximated coverage distance." Id. at 15. Conversely, Detective Sergeant Kohler was not as declarative in his testimony. He made clear that the information can provide a "rough area depending upon lot of environmental factors." He also testified that the measurements were "approximate" and explained there was "no way to be able to say the physical exact location a tower can physically go towards." [12T175-12 to -15]. Finally, he testified that the location of where the call was placed to Williams at 2:25 a.m. was *consistent with* the area where Sam

Gore sent a text message to Deasia shortly after defendant shot her. [12T180-10 to -22].

Assuming arguendo that Detective Sergeant Kohler's expert testimony was improperly admitted, its inclusion was not clearly capable of producing an unjust result. The evidence against defendant in this case was overwhelming. Both Williams and Hedgepeth testified that defendant confessed to murdering Deasia. Notably, Hedgepeth shared details of the murder that police were aware of but had not been shared with the public. Defendant admitted to not being at 14 Vine Street on the night of Deasia's murder when he texted Williams that night that he would only be gone for one night. Defendant also confessed to committing the murder in his own words, when he texted Williams at 2:43 a.m. that he and Gore were about "to get old girl dike."

Williams' statement to police was also corroborated by Gore's text messages with Deasia, the surveillance video from Garfield Academy, and the surveillance video from 72 Bloomfield Lane. Williams' details regarding how Deasia was murdered was also corroborated by the two .380 caliber gunshot wounds Dr. Hood located in the back of her head. Williams' statement to police that after the murder, Woods and Gore went back to Gore's grandmother's home and texted Deasia in an attempt to create an alibi was corroborated by the activity information gathered from Gore's phone and the surveillance video depicting Gore's bedroom light going on at

the time the text message was sent. Thus, the jury heard through other strong evidence both that defendant was with Gore and Williams earlier in the night at 14 Vine Street in Trenton, New Jersey, and that within an hour of the murder, he was in the area of Gore's grandmother's home and where Deasia was murdered.

In sum, the concerns regarding cell phone mapping expert testimony that were addressed by the New Jersey Supreme Court in State v. Burney are not present in this case. Instead, Detective Sergeant Kohler's limited uncontested expert testimony involving cell phone mapping was properly admitted. Given the State's vast and weighty evidence, Detective Sergeant Kohler's expert testimony cannot serve as a basis for a reversal of defendant's convictions.

POINT III

DEFENDANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT WAS NOT VIOLATED WHEN DETECTIVE SERGEANT LUYBER TESTIFIED THAT AN ANONYMOUS 9-1-1 CALLER LED POLICE TO SPEAK TO SASHA HEDGEPATH. (Responds to Defendant's Pro Se POINT I). (Not Raised Below).

Defendant's right to confront witnesses was not violated through Sergeant Luyber's testimony about the anonymous 9-1-1 call received by police. The Sixth Amendment of the United States Constitution provided a defendant the right "to be confronted with the witnesses against him." State v. Roach, 219 N.J. 58, 74 (2014). In Crawford v. Washington, 541 U.S. 36, 53-54 (2004), the United State Supreme Court held that the Confrontation Clause of the United States Constitution prohibits

the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." State v. Slaughter, 219 N.J. 104, 116-117 (2014). "The Court made clear that the ultimate goal of the Confrontation Clause is to test the reliability of testimonial evidence in 'the crucible of cross-examination.'" State v. Basil, 202 N.J. 570, 591 (2010), citing Crawford, supra, 541 U.S. at 591.

The Confrontation Clause permits a defendant to explore, on cross-examination, a prosecution witness's alleged bias. As the United States Supreme Court has observed, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." State v. Bass, 224 N.J. 285, 301 (2016), citing Delaware v. Van Arsdall, 475 U.S. 673, 678–79, (1986) (citations omitted).

"Out-of-court statements interdicted by the Confrontation Clause include both testimonial statements elicited by the police during interrogations, see Crawford, supra, 541 U.S. at 51-52, and testimonial statements volunteered to the police, see Davis v. Washington, 547 U.S. 813, 822 n.1, (2006)." "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." State v. Basil, 202 N.J. 570, 592 (2010) (internal citations omitted). In contrast, statements "are testimonial when the

circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id.

Defendant's argument that Detective Sergeant Luyber's testimony about the anonymous tip police received violated his right to confront the witnesses against him is misplaced. Here, there was lengthy testimony, mostly elicited by defendant, that was limited in detail about the anonymous tip that police received, the identity of the caller, and what resulted from the call. First, Sasha Hedgepeth testified that after defendant confessed to her that he killed Deasia, she told a "friend of [hers]" who then called the police within 24 hours of the murder. [11T70-15 to 71-2]. Later that day during the trial, the anonymous tip was addressed again during the direct examination of Detective Sergeant Luyber. The following colloquy was exchanged:

> State: Was there an anonymous phone call that was made to investigators?
>
> Luyber: Yes. On the evening of September 18 we received an anonymous phone call through the tip line of an individual that had information in regards to the homicide of Deasia Ayers.
>
> State: Based on the information that came through that anonymous call or anonymous tip, did you take any action?
>
> Luyber: Yes, I did.
>
> State: And what did you - - or who did you come into contact with based upon that tip call?

> Luyber: I came into contact with an individual by the name of Sasha Hedgepeth.
>
> [11T199-21 to 200-5].

On cross-examination, Sergeant Luyber was immediately questioned about the identity of the anonymous caller. Sergeant Luyber testified that the anonymous caller was not Sasha Hedgepeth, but a friend of hers. [11T211-12 to -19]. Sergeant Luyber also testified that, even though police received the anonymous tip on September 18, 2019, they did not speak with Hedgepeth and learn about defendant's confession until September 24, 2019. [11T212-5 to 213-3]. Thus, as the State's witness, on both direct and cross-examination, Sergeant Luyber did not offer any statements from the anonymous caller that implicated defendant. He only testified that an anonymous caller reported they had information about the homicide and that the tip lead police to Sasha Hedgepeth.

Sergeant Luyber was also called as a defense witness. In attempt to elicit testimony that Sergeant Luyber testified to the Burlington County Grand Jury that Hedgepeth was the anonymous caller but on cross-examination said the caller was not Hedgepeth, defendant started cross-examination by immediately bringing up the anonymous caller. Through the hostile questioning, Sergeant Luyber identified the anonymous caller as a person named "Angel." [13T10-23 to 13-25]. In an effort to defend himself against allegations of perjury by defendant, Sergeant Luyber testified:

> So in that grand jury testimony when I said the anonymous caller was Sasha Hedgepeth, I would be referring to the person who we interviewed in regards to who provided that information to the caller. The caller was identified as Sasha's friend, Angel, who gave us and led us to Sasha Hedgepeth.
>
> Angel was never interviewed on this case. Angel just called on behalf of a friend and then made the introduction for us to speak to Sasha, who I'm pretty sure this jury heard her testimony.
>
> I did not perjure myself. If it was - - if I misspoke or if I was - - made any type of assumption that the anonymous caller was Sasha Hedgepeth, I said to you on Wednesday when I testified, not Thursday, that the anonymous caller was her friend Angel who was just helping out a friend making that phone call and then making the introduction to the police.
>
> [13T14-5 to -21].

The anonymous tip was addressed again when the State cross-examined Luyber as a defense witness. Luyber testified that an anonymous caller placed a call on the evening of September 18, 2019, and that police followed-up on the call and spoke with the caller who led them to Hedgepeth. [13T71-51 to 73-20]. Sergeant Luyber explained that police are permitted to name a witness "Jane Doe" in a probable cause statement and leave that identification for up to 10 days after the defendant is arrested, at which point the person must be named, like Hedgepeth was. [13T75-2 to -10]. On redirect, Sergeant Luyber again explained the situation and clarified that there were not two anonymous callers. Instead there was one anonymous caller who led police to Hedgepath who was referred to as "Jane Doe" in the initial affidavit of probable cause. [13T86-13 to -25].

Finally, in summation, the State did not include any of the caller's statements and only argued that the caller was told second-hand information from Hedgepeth and contacted police which lead to police speaking with Hedgepeth directly. [12T151-3 to -14].

Defendant's argument that his confrontation clause rights were violated fails because, as presented to the jury, the anonymous caller's statement was not an accusation or indicative of defendant's guilt. The jury heard that the caller had information regarding Deasia's murder. Detective Sergeant Luyber never testified that the anonymous caller implicated defendant in the murder. Instead, the only relevance of the anonymous tip was that it led police to speak with Hedgepeth. Defendant's repeated assertions that the anonymous tip implicated him in the crimes are misplaced because the testimony about the anonymous callers statement did not name defendant as perpetrator and the jury did not hear that the anonymous caller identified defendant as the person who killed Deasia.

Further, the identity of the anonymous caller was made an issue at trial by defendant in a futile attempt to challenge the credibility of Detective Sergeant Luyber's testimony at trial. Thus, the harm defendant alleges he suffered here was self-created.

Finally, and most notably, the jury already heard testimony from Hedgepeth about the anonymous caller. She testified that after defendant confessed to her, she

told a friend about defendant's confession who then called the police. Given that the confrontation clause is largely concerned with a defendant's ability to cross-examine their accuser, defendant does not explain what information could be elicited on the cross-examination of the anonymous caller that would have aided in his defense. Instead, testimony from the caller would only bolster Hedgepeth's testimony about the details of the crime that defendant included in his confession. Defendant argues that the anonymous caller would have challenged the credibility of Hedgepeth and Williams because the police report indicates that the caller said Hedgepeth was not present when defendant confessed to the murder. Not only was that assertion directly contradicted by Hedgepeth's statement to police, but, if it was true, all of Hedgepeth's testimony about the confession would have been barred as hearsay. [Da25].[5] Therefore, defendant's argument that his right to confront witnesses was violated fails and his appeal must be denied.

[5] Da25 was not part of the record below and defendant has not filed a motion to expand the record to include it in his appeal.

POINT IV

THERE WERE NO CUMULATIVE ERRORS WHICH WARRANT THE REVERSAL OF DEFENDANT'S CONVICTIONS. (Responds to Defendant's POINT III).

Defendant contends that the purported errors outlined in POINT I and POINT II of his brief in the aggregate deprived him of a fair trial.[6] When multiple errors are alleged, "the predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair." State v. Wakefield, 190 N.J. 397, 538 (2007). However, even where a defendant alleges multiple errors, "the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." State v. Weaver, 219 N.J. 131, 155 (2014). Given that there were no trial errors regarding defendant's ability to argue third-party guilt or Detective Sergeant Kohler's testimony, there was no cumulative effect that denied defendant a fair trial.

Defendant's argument that his inability to present evidence of third-party guilt and Detective Sergeant Kohler's cell phone mapping testimony cumulatively prohibited him from receiving a fair trial is contradicted by the evidence. The "inconsistencies" defendant argued were present in Hedgepeth and Williams testimony are unpersuasive. Instead, as argued by the State in its closing, the jury

[6] At the time of the filing of his initial brief, defendant had not raised the argument included in his pro se brief. The state assumes defendant includes the argument he raises in POINT I of his pro se brief as part of the cumulative error he alleges.

was presented with a plethora of evidence that corroborated Hedgepeth and Williams testimony and statements to police and increased their overall credibility as witnesses. Further, as argued above, the State presented additional circumstantial evidence to place defendant in Willingboro at and around the time of the murder, and there was insufficient evidence in the record to suggest there was possibly a third-party who committed the crime. Similarly, defendant failed to establish his Sixth Amendment rights were violated.

Defendant's argument that his conviction should be reversed due to cumulative error should be denied because he fails to establish that there were any trial errors, let alone trial errors that were so cumulatively prejudicial that the jury's verdict should be disrupted.

POINT V

THE JUDGMENT OF CONVICTION MUST BE AMENDED TO MERGE COUNT THREE INTO COUNT TWO AND TO REFLECT 1,119 DAYS OF JAIL CREDITS. (Responds to Defendant's POINT IV).

The State concedes that the judgment of conviction should be remanded to reflect that Count Three merges into Count Two and amended to remove the $100 VCCO assessment and $75 Safe Neighborhood Assessment imposed on Count Three.

POINT VI

THE MATTER SHOULD BE REMANDED FOR A HEARING ON DEFENDANT'S ABILITY TO PAY RESTITUTION. (Responds to Defendant's POINT V).

The State concedes that the matter should be remanded for the sentencing court to conduct an ability-to-pay hearing.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Honorable Court to affirm defendant's convictions and sentence and to remand the matter for restitution hearing regarding defendant's ability to pay.

Respectfully submitted,

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/s/ Nicole Handy

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April 23, 2024

LETTER BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

HONORABLE JUDGES OF THE SUPERIOR COURT, APPELLATE DIVISION
HUGHES JUSTICE COMPLEX
P.O. BOX 006
TRENTON, NJ 08625

RE: STATE OF NEW JERSEY (PLAINTIFF-RESPONDENT)
V.
DEVON K. WOODS (DEFENDANT-APPELLANT)
DOCKET NO. A-1549-22 DEFENDANT IS CONFINED

CRIMINAL ACTION
ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BURLINGTON COUNTY.

SAT BELOW: HON. CHRISTOPHER J. GARRENGER, J.S.C.

Honorable Judges:

Pursuant to R. 2:6-2(b) and 2:8-1, please accept this letter brief, in lieu of a more formal brief, on behalf of the State of New Jersey, in opposition to defendant's appeal.

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STATEMENT OF PROCEDURAL HISTORY

The State relies on the procedural history set forth in its initial brief.

STATEMENT OF FACTS

The State relies on the statement of facts set forth in its initial brief with an emphasis on the following facts as they are relevant to the issue raised in defendant's supplemental brief.

Sergeant Kohler testified that, when enabled by the user, cellphones have the ability to track and share location data of the phone. [12T62-5 to -8].[1][2] Sergeant Kohler explained that where the device is registered is dependent on the signal of the GPS, which is based on the location. [12T62-20 to -25]. He gave the example that, in a building, "it might be a little less specific than if you were outside." [12T62-20 to -25]. Sergeant Kohler testified that Ayres's phone had location services on the day and evening of the crime. [12T76-6 to 12]. At the time she texted Spady a photograph of a gun earlier in the day, Ayres's phone was located on Randolph Street in Camden, New Jersey. [12T76-10 to -14]. Later that evening, while texting with defendant, Ayres shared her location with

[1] The State incorporates the abbreviations and transcript designations utilized in its initial brief.

[2] At the time of trial, David Kohler was a Sergeant in the Burlington County Prosecutor's Office. Prior to the start of co-defendant Gore's trial, he was promoted to the rank of lieutenant.

him through her phone, establishing that she was at Garfield Park Academy in Willingboro, New Jersey, her place of work. [12T87-22 to 88-5].

Sergeant Kohler also testified that Gore's location services were on, and that at the time he texted Ayers that he was outside of Garfield Park Academy to pick her up, his cell phone was also at that location. [12T98-12 to 99-5]. At 12:51 a.m. Gore's phone was present at defendant's address, 14 Vine Street, Trenton, New Jersey. [12T129-16 to -21]. At both 1:34 a.m. and 1:41 a.m., Gore's phone was located in the area of Bloomfield Lane. [12T130-8 to 11]. At 1:47 a.m., Gore's device was located at Garfield Park Academy, as shown on surveillance footage, and then returned to Bloomfield Lane at 1:54 a.m. [12T130-12 to -15].

At 2:48 a.m. Gore's phone was located at 61 Bloomfield Lane and at 2:58 a.m., as corroborated by surveillance footage, his device was at Garfield Park Academy. [12T100-24 to 101-7]. [3] At 3:20 a.m. Gore's phone registered him climbing a flight of stairs. [12T121-24 to 122-8].

[3] In the **STATEMENT OF FACTS** section of his supplemental brief, defendant includes testimony provided by Sergeant Kohler regarding the data of when Gore's phone display turned on and off. [Db3]. That testimony is not part of the "GPS location or health activity data" disputed here.

LEGAL ARGUMENT

POINT I

THE EVIDENCE REGARDNG GPS LOCATION AND HEALTH ACTIVITY DATA DID NOT REQUIRE EXPERT TESTIMONY. (NOT RAISED BELOW).

> N.J.R.E. 702, titled, "Testimony by Expert Witness," provides:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Otherwise, pursuant to N.J.R.E. 701, "If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness' perception and (b) will assist in understanding the witness' testimony or determining a fact in issue."

In the case at bar, it was not necessary for the State to proffer the testimony of an expert witness as to how geolocation data stored on defendant's phone, and recovered during an extraction of that phone, came to be stored on defendant's phone. "Generally, the accuracy of GPS devices is accepted." State v. McDuffie, 450 N.J. Super. 554, 570 (App. Div. 2017).[4] Although New Jersey

[4] McDuffie involved a claim that disclosure of detailed information regarding the GPS device, which police sought to protect from disclosure, should have been ordered so the defendants could have retained an expert to challenge the device's accuracy.

presently has no published case directly on point, a number of jurisdictions who have addressed this issue have concluded that geolocation/GPS data is widely considered so reliable that expert testimony is not required for its admission at trial.

The Court of Appeals of Maryland held that GPS/geolocation data from a device carried by the defendant as part of his employment "which would be understandable to a lay juror based on common experience, was admissible in evidence without the need for foundation testimony by an expert concerning the operation of, and science underlying, the GPS device." Johnson v. State, 179 A.3d 984 (Md. 2017). In Johnson, the defendant was an officer with the Maryland Transit Administration, and was required to carry a GPS device called a "Pocket Cop," while on duty. The "Pocket Cop" device "records GPS data concerning its location and movements," and allows officers' supervisors to track where they are at any particular moment, including the duration of time spent on any specific call. Id. at 521. At defendant's trial for the sexual assault of a woman with whom he came into contact while on duty, the State introduced GPS information from his "Pocket Cop" that demonstrated that the defendant had spent 14 minutes in the vicinity of the victim's friend's home and 37 minutes in the vicinity of the victim's residence, where she testified the sexual assault had occurred. Id. at 521.

On appeal, the defendant argued that the report of the geolocation information from the device should not have been admitted into evidence without expert testimony regarding the operation of the GPS device. Notably, even though defendant had not properly preserved the issue for appeal, the court elected to address the issue. In denying the defendant's appeal, the Johnson Court stated, "Expert testimony is often required to explain scientific or technical matters. But **expert testimony is not required simply because one can explain a matter scientifically**." Id. at 516 (emphasis added). The Court went on to state:

> As Mr. Johnson necessarily conceded before us, GPS technology is pervasive and generally reliable. Courts have recognized the reliability of GPS technology in other contexts. See, e.g., United States v. Jones, 132 S. Ct. 945 (2012) (Alito, J., concurring) (noting that smart phones equipped with GPS devices are accurate enough to determine real time traffic conditions); In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel., 849 F. Supp. 2d 526, 533 (D. Md. 2011) (recognizing that GPS technology would permit law enforcement to track suspects "within ten meters or less"). **GPS technology is also familiar to the general public, who use it for purposes similar to those for which the MTA uses its Pocket Cop device — tracking one's location.**
>
> Although a user may not understand precisely how a GPS device works, the same is true for other commonly used devices such as clocks, scales, and thermometers. The general public has a common sense understanding of what information the device conveys — time, weight, temperature — and of the margin of error to which such devices are ordinarily subject: a colleague's watch may tell time a minute faster or slower than one's own; the scale at the gym may display a different weight than the scale at home; and a

> thermometer that estimates child's temperature may give a slightly different answer in a second reading.
>
> In the same way**, the general public relies on GPS devices to locate a destination, to ascertain a route to get there from a current location, and to estimate the duration of travel. The general public is also aware that a GPS device may not be absolutely precise — e.g., a navigation system may tell a driver to turn onto a road just passed, or a ridesharing application may send a car service down the street from the individual who summoned it. Moreover, any of these devices may be broken or provide erroneous information for reasons that only an expert would explain. But that does not mean that lay jurors are incapable of comprehending the information provided by the device and its usual margin of error.**
>
> Id. at 530-533 (emphasis added).

Even more recently, the Maryland Court of Appeals held, in State v. Galicia, 278 A.3d 131 (Md. 2022), that " a user's ability to adjust the location tracking feature of a smartphone is within the understanding of the average lay person and that a witness whose testimony referred to that ability did not have to be qualified as an expert." Id. at 135. In Galicia, the Maryland Special Court of Appeals held that defendant's conviction must be reversed because the State introduced testimony from a Google custodian of records about a gap in defendant's cell phone location information, and "[h]ow and under what circumstances Google tracks location data related to searches and other activity on a device is not within the realm of common knowledge, and many laypeople would be unaware that that function can be enabled or disabled."

The Court of Appeals reversed the Special Court of Appeal's decision and reinstated defendant's conviction. The Court stated:

> …smartphones have become ever more ubiquitous and the location tracking capabilities of those devices and their applications (or "apps") ever more familiar. Smartphone ownership among American adults grew from 35% in 2011 to 85% in 2021, and ownership among adults aged 18-49 is greater than 95%. While few could explain the technology used by phones and the network of towers and satellites with which they constantly communicate, the fact that they collect data about users' habits, including location, is widely understood: "A cell phone's identification of its location is one of its essential virtues. A cell phone must be found by a service provider for it to be used as a phone." State v. Copes, 165 A.3d 418 (2017). There has been, and will continue to be, much debate over which aspects of this pervasive yet rapidly evolving technology are within the common knowledge. The question currently before us, however, concerns not so much the technology behind location tracking, but rather the understanding that a user may exercise some control over this feature and the data that it generates.
>
> Even had location tracking technology — and the average person's familiarity with it — stood still over the past decade, this case is plainly closer to the simple recitation of the data exemplified in Johnson than it is to the interpretive process at issue in Payne. The location tracking records introduced during Mr. O'Donnell's testimony were the data generated by Google's standard recordkeeping practices; it is evident that he used no specialized skill to reformat or translate any of the raw data. Mr. Galicia argues that the records were not self-explanatory, and that Mr. O'Donnell had to decipher the categories of information in those records. However, the gap in the chronological listing is obvious in the exhibit. The more significant issue is whether Mr. O'Donnell relied on specialized knowledge in explaining that a user has the ability to enable or disable the tracking of that data, thereby ascribing significance to that gap.
>
> Google's location history tracking is a consumer feature designed to be understood and managed by accountholders. When a court

> considers whether testimony is beyond the "ken" of the average layman, the question is not whether the average person is already knowledgeable about a given subject, but whether it is within the range of perception and understanding. "Testimony elicited from an expert provides useful, relevant information when the trier of fact would not otherwise be able to reach a rational conclusion; such information 'is not likely to be part of the background knowledge of the judge or jurors themselves.'" Payne, 440 Md. at 699, quoting David H. Kaye, et al., The New Wigmore: Expert Evidence §1.1 (2d ed. 2010). Some smartphone users — and the minority of Americans who do not own smartphones — may not personally have experience toggling their location tracking on and off, but the simple fact that a mobile electronic device allows its users to customize the data they share with the manufacturer, the cell phone service provider, and various apps is common knowledge in modern society. That a user's customized or default settings may impact the records kept by those entities does not require specialized knowledge to understand.
>
> Id. at 160-162.

See also United States v. Brooks, 715 F.3d 1069, 1078 (8th Cir. 2013) (District Court properly took judicial notice of the "accuracy and reliability of GPS technology); and Commonwealth v. Thissell, 928 N.E.2d 932, fn. 15 (Mass. 2010) (A review of the origins of GPS technology provides further assurance of its reliability).

Significantly, Ohio has specifically concluded that expert testimony regarding the "analysis" of data extracted from a cellular phone, including steps and elevation information retrieved from a Fitbit health app on a defendant's iPhone is not required for the evidence to be admissible at trial. In State v. Washington, 2022 Ohio 1426 (Ohio Ct. App. 2022), the Court of Appeals for

the Second Appellate District rejected the defendant's claim that step and stair (elevation) data extracted from the app should not have been admitted at trial through the lay testimony of the detectives who analyzed the phone using a Cellebrite extraction program. Id. at ¶153-165. In Washington, the defendant alleged that he was sleeping at his mother's one-story home at the time of the offenses. The Fitbit app data demonstrated that at the time at issue, the defendant was walking around and climbing steps. Id. at ¶156. In rejecting defendant's claim the Court held:

> … Detective Sergeant Cooper's testimony was factual in nature. He described the method he used to extract data from the Apple cell phone that he had received from Detective Jessup and identified reports that were generated. Cooper did not provide any opinions requiring specialized knowledge, training, or experience. The trial court did not err in permitting Cooper to testify as a lay witness.
>
> Detective Jessup's testimony similarly was factual in nature. **Jessup's testimony focused on the numbers of steps taken and the number of flights climbed, as reflected on the extraction report.** The health application itself defined how the "step count" and "flights climbed" were calculated, and neither concept required a specialized understanding of the health application. (See State's Ex. 144.) **Detective Jessup did not conduct an analysis of the data, nor did he offer an opinion on the accuracy of the information**. As with Detective Sergeant Cooper, the trial court reasonably permitted Detective Jessup to testify as a lay witness regarding the health app reports.
>
> [Id. at ¶163-164].

The Washington Court did not find that any testimony regarding how the step and elevation data recorded by the Fitbit app and extracted via Cellebrite came to be in the app was required.

Analogously, New Jersey has allowed lay testimony regarding the extraction of evidence from a defendant's laptop in a prosecution for possession of CSAM. In State v. Miller, 449 N.J. Super. 460 (App. Div 2017) rev'd on other grounds by State v. Miller, 237 N.J. 15 (2019), Defendant appealed, arguing that the court admitted impermissible testimony when the detective who performed a forensic examination of his laptop testified at trial, but was not qualified as an expert. In affirming the trial court's decision to admit the lay testimony, the Court stated:

> (Detective)[B]ruccoliere did not testify as an expert or provide an expert opinion. Rather, he testified as a fact witness about his forensic investigation of defendant's laptop, and merely reported what he found, including the presence of videos and images depicting child pornography, and peer-to-peer software that allowed others to access the child pornography.
>
> Id. at 471.

In the instant case, the State introduced highly reliable, well-understood location data through the lay testimony of Sergeant Kohler, who performed the extraction of Gore, Ayres' and Cezar's iPhones that they possessed for years. The information on Gore's phone detailed his latitude, longitude, the date and time, and the horizontal accuracy of latitude and longitude—meaning, how far

from that specific latitude and longitude the iPhone could have been at the time—for every reading. This information is stored on the database that IS the iPhone, just like a photo, a text message, or a web browsing history.

Significantly, the judiciary of this state relies upon geolocation data transmitted from defendants on ankle bracelet monitoring every day and finds violations of pretrial release without expert testimony as to how that data came to be recorded and transmitted. See N.J.S.A. 2A:162-17b(2)(k). Citizens of the State of New Jersey rely upon iPhone geolocation data every day when they navigate traffic using the Waze app and check up on their children using find my iPhone. Law enforcement utilizes GPS-based apps, such as Snapchat's SnapMap, to quickly and successfully locate missing youth and at risk-adults.

The State did not ask Sergeant Kohler to extrapolate or interpret the data he derived from the electronic examination he conducted using Cellebrite technology and he was subjected to cross-examination about the limitations of his testimony. In sum, nothing about Sergeant Kohler's testimony was beyond the ken of the average juror, and as the Johnson Court noted, lay jurors are capable of understanding the information provided by the device and its usual margin of error. Accordingly, defendant's argument that Sergeant Kohler improperly testified as a lay witness regarding GPS location and Health Activity

data obtained from Gore and Cezar's phones is unpersuasive and must be denied by this court.

POINT II

THE INCLUSION OF SERGEANT KOHLER'S TESTIMONY REGARDING THE GPS LOCATION AND HEALTH ACTIVITY DATA OF CO-DEFENDANT GORE AND JIANNA CEZAR'S PHONES WAS NOT CLEARLY CAPABLE OF PRODUCING AN UNJUST RESULT.

Generally, failure to "object or otherwise preserve an issue for appeal at the trial court level" limits appellate review to a plain error inquiry. State v. Santamaria, 236 N.J. 390, 404 (2019). Plain errors are those "clearly capable of producing an unjust result." R. 2:10-2. In the context of a jury trial, the possibility must be "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. Jordan, 147 N.J. 409, 422 (1997) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). Defendant did not challenge the inclusion of this testimony at trial, nor did he allege that the State was required to call an expert to testify about how geolocation evidence arrives at and is stored on a cell phone.

Here, the GPS data from Gore and Cezar's phones, as well the Apple health data from Gore's phone only corroborated testimony provided by the State's key witnesses, Hedgepath and Williams about Gore and Cezar's whereabouts and interactions in the time leading up to and after the murder. Notably, compared to co-defendant Gore, Hedgepath and Williams were key

witnesses at trial, as defendant confessed to both of them about his and Gore's plan to kill the victim and that he specifically was the person who shot her twice in the back of the head. Further, the data did not directly address defendant's location, only Gore's, and to accept the data as corroborative, the jury had to also believe the testimony of Hedgepath and Williams that defendant was with Gore throughout the night and just seconds before he killed the victim. Hedgepath and Williams' testimony about defendant planning the murder and his confession shortly after, was fully corroborated by the text messages he sent Williams throughout the evening and night of the murder. Because of the volume of evidence of defendant's guilt and because the GPS and Apple health evidence as testified by Sergeant Kohler was only tangentially related to defendant, he fails to establish that the inclusion of the disputed evidence was clearly capable of producing an unjust result, and thus his conviction should be affirmed.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Honorable Court deny defendant's appeal and affirm his conviction and sentence.

Respectfully submitted,

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BURLINGTON COUNTY PROSECUTOR

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LETTER SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1549-22
INDICTMENT NO. 20-01-0021

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Burlington County.
v.	:	
DEVON K. WOODS, Defendant-Appellant.	:	Sat Below: Hon. Christopher Garrenger, J.S.C. and a jury.
	:	DEFENDANT IS CONFINED

Your Honors:

If this Court grants defendant-appellant Devon K. Woods's motion for leave to file a supplemental brief, this letter is submitted in lieu of a formal brief pursuant to Rule 2:6-2(b) to raise this supplemental point.

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CONCLUSION 13

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Devon K. Woods relies on the procedural history and statement of facts set forth in his opening brief.[1] The following facts are relevant to the issue raised in this supplemental point.

Prior to being qualified as an expert in cell phone mapping and cell phone forensics (12T163-24 to 168-7),[2] Detective Seargent David Kohler testified as a lay witness about GPS location data extracted from Sam Gore's and Jianna Cezar's cellphones (Apple iPhones). Kohler testified that GPS location data from Gore's phone reflected that his phone was at the following locations: 14 Vine Street at 12:51 a.m.; Bloomfield Lane from 1:34 to 1:41 a.m.; Garfield Park Academy at 1:41 a.m.; Bloomfield Lane at 1:54 a.m.; Bloomfield Lane at 2:48 a.m.; Garfield Park Academy at 2:58 a.m.; and Bloomfield Lane at 3:09 a.m. (12T129-3 to 130-15; 12T133-1 to 135-7; 12T100-12 to 101-11). Similarly, Kohler testified that GPS location data from Jianna Cezar's phone reflected that the phone was at the following locations: 14 Vine Street between 12:45 and 1:08 a.m.; 61 Bloomfield Lane between 1:33

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[1] Woods retains the abbreviations and transcript designations used in his previous briefs.

[2] After being qualified as an expert in these fields, Kohler testified about the historical cell site analysis and the maps he created regarding the approximate location of Woods's cellphone, as discussed in Point II of Woods's opening brief.

and 1:42 a.m., and 61 Bloomfield Lane between 1:55 a.m. to 7:07 a.m. (12T149-23 to 153-21).

Kohler also testified that two "activity screens" from Gore's cellphone showed that he walked 122 steps around 3:09 a.m., the approximate time that the surveillance video captured two unidentifiable individuals exit the Durango and enter Gore's grandmother's home. (12T135-12 to 20). Kohler further testified that there was no activity on Gore's phone from 3:09 a.m. to 3:19 a.m., which was "indicative of the phone being laid down and not moved for a period of time." (12T137-18 to 138-18). The phone's display turned back on at 3:19 a.m., the same time that the surveillance video captured two unidentifiable individuals enter Sam Gore's grandmother's home. (12T138-1 to 12). Kohler also stated that the "health activity" application on Gore's iPhone registered him climbing one set of stairs at 3:21 a.m. (12T119-17 to 122-8; 12T138-9 to 139-8). Afterwards, Gore's phone sent a text message to Ayers's phone that was never read, and the surveillance video shows a light turn on in Gore's bedroom. (12T119-17 to 122-8).

In summation, the prosecutor relied on the GPS location data to argue that Woods was with Gore at 2:25 a.m., contending that Woods was "going to visit his friend. His friend [i.e. Sam Gore] is at 61 Bloomfield. We know that because of location services. We don't have location services for this man's

[Devon Woods] phone because he got rid of his phone." (13T154-1 to 7). Likewise, the prosecutor argued that the extraction of Sam Gore's phone "showed exactly where Sam Gore is, 2:48 he's on Bloomfield, the same area where Devon Woods' phone was hitting at 2:25. And at 2:58 when that video shows that Durango pulling up to Garfield Park Academy, lo and behold, that's exactly where Sam Gore's phone is. And we know he wasn't alone. There were two people in that car with her that day." (13T162-24 to 163-8).

The prosecutor also argued that data from Gore's phone showed that he ascended a flight of stairs at 3:21 a.m., after the surveillance video showed two individuals entering Gore's grandmother house. (13T174-23 to 175-15). According to the prosecutor, this data therefore reflected that Gore and Woods were returning after committing the murder. (13T174-23 to 175-15). The prosecutor also noted that the GPS location data from Gore's and Cezar's cellphones corroborated the State's theory of the case for the defendants' locations at several other times. (13T182-18 to 185-12). And the prosecutor specifically contended that the GPS location data corroborated the testimony of Sashell Williams and Sasha Hedgespeth: "Location services, we know where they were. We know what they were doing. It's all corroborated. All corroborated because Sashell and Sasha are telling the absolute God's honest truth." (13T185-9 to 12).

LEGAL ARGUMENT

Woods relies on all the legal arguments raised in his opening brief and in his pro se brief. He adds the following supplemental point.

SUPPLEMENTAL POINT

THE DETECTIVE IMPROPERLY TESTIFIED AS A LAY WITNESS REGARDING THE GPS LOCATION AND HEALTH ACTIVITY DATA OBTAINED FROM CELLPHONES. (Not Raised Below)

Detective Seargent Kohler's testimony about the GPS location and "health activity" information from Sam Gore's and Jianna Cezar's cellphones required "scientific, technical or other specialized knowledge." N.J.R.E. 702. Specifically, this testimony needed to be supported by specialized knowledge about how the technology, software, and algorithms used by these particular Apple iPhones reliably computes GPS location and health activity information. As such, expert testimony was required under N.J.R.E. 702. The State, however, did not offer Kohler as an expert in these areas and instead improperly presented this technical testimony as lay testimony.[3]

[3] Although Kohler was later qualified as an an expert in cell phone mapping and cell phone forensics, the training he discussed was limited to using "call detail records" and mapping software to create maps of historical cell site data, which provides a larger, general location in which a cellphone is located. (12T163-24 to 168-7). He did not testify about specialized training or knowledge in how the GPS location on an Apple iPhone is computed or the

Just like a lay police officer would not be allowed to read to a jury the numbers in the alleles and loci found in a DNA report, he cannot be allowed to read the latitude, longitude, and number of steps recorded by a cellphone when the State has not established that the officer has specialized knowledge or expertise in how the device came up with those numbers. Because the State improperly offered this critical testimony through a lay officer rather than a qualified expert, Woods was deprived of due process and a fair trial. See U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.; R. 2:10-2. Woods's convictions should be reversed.[4]

If a witness seeks to give an opinion that requires "scientific, technical or other specialized training," the witness must fulfill the requirements of N.J.R.E. 702. The proponent of expert testimony must establish: "(1) the subject matter of the testimony must be beyond the ken of the average juror; (2) the field of inquiry must be at a state of the art such that an expert's testimony could be sufficiently reliable and (3) the witness must have

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margin of error for such computations, nor did he testify about how the phone could accurately measure steps walked and flights of stairs ascended.

[4] As noted in defense counsel's certification in support of the motion for leave to file this supplemental point, the trial court in Sam Gore's pending trial granted Gore's motion to preclude the State to from presenting lay testimony on the GPS location and health activity information. This Court denied the State's application for permission to file an emergent motion to appeal this ruling on February 28, 2024.

sufficient expertise to offer the testimony." State v. Olenowski (Olenowski I), 253 N.J. 133, 143 (2023) (quotations omitted).[5] Furthermore, the net-opinion rule "requires that an expert give the why and wherefore that supports the opinion, rather than a mere conclusion." Townsend v. Pierre, 221 N.J. 36, 54 (2015) (quotations omitted). Additionally, "our Court Rules require certain disclosures when a party seeks to use expert opinion testimony at trial." State v. Derry, 250 N.J. 611, 634 (2022) (citing Rule 3:13-3(b)(1)(I)). And the trial courts must "give a limiting instruction to the jury that conveys to the jury its absolute prerogative to reject both the expert's opinion and the version of the facts consistent with that opinion." Ibid. (quotation omitted).

Moreover, the Court has "held that the measurements derived from the device are admissible at a criminal trial only when they are shown to have sufficient scientific basis to produce uniform and reasonably reliable results and will contribute materially to the ascertainment of the truth." State v. Haskins, 131 N.J. 643, 649 (1993) (quotations omitted). Similarly, the Court has held that "[p]roper authentication of [a] map required a witness who could

[5] Olenowski I held that prospectively, a Daubert-like standard, rather than the Frye standard, should be used when determining the reliability of proffered expert testimony in criminal cases. This supplemental point does not challenge whether some expert, such as a software engineer from Apple, could be sufficiently qualified to testify about GPS and health activity data obtained from an iPhone. Rather, the issue is whether lay testimony about such data is permissible.

testify to its authenticity and be cross-examined on the methodology of the map's creation and its margin of error." State v. Wilson, 227 N.J. 534, 553, (2017).

New Jersey appellate courts have not yet addressed the issue of whether a lay witness is permitted to testify about GPS location or health activity data obtained from a cell phone. But in discussing the less precise location information derived from historical cell-site analysis, our Court recently noted that "[a]cross the nation, state and federal courts have accepted expert testimony about cell site analysis for the purpose of placing a cell phone within a 'general area' at a particular time." State v. Burney, 255 N.J. 1, 21-22 (2023) (emphasis added). Other state and federal courts have reached differing results on "whether and when an expert is required to testify about historical cell site data." State v. Boothby, 951 N.W.2d 859, 871-76 (Iowa 2020), as amended (Dec. 14, 2020) (surveying cases). Given its statement in Burney, our Court would likely follow the approach of "requir[ing] an expert to testify about any historic cell site data." Id. at 875 (collecting cases following this approach).

Notably, several courts have conducted Daubert hearings to determine the scientific reliability of more precise GPS location data derived from cellphones. See, e.g., Commonwealth v. Arrington, 226 N.E.3d 851, 854-57,

861-67 (Mass. 2024) (holding that a trial court properly excluded proffered expert testimony on "frequent location data (FLH)" from an Apple iPhone 6, which was used to place the defendant's phone within 143 feet of the crime scene); State v. Pierce, 222 A.3d 582 (Del. Super. Ct. 2019) (assessing the reliability of Google Wi-Fi location data), aff'd o.b., 236 A.3d 307 (Del. 2020) Wells v. State, 675 S.W.3d 814, 828-830 (Tex. App. 2023) (assessing the reliability of Google location data), petition for discretionary review granted (Jan. 24, 2024). Accordingly, these courts recognize that expert testimony is required to support this type of testimony.

In the present matter, Kohler's testimony about the GPS and health activity information obtained from Gore's and Cezar's cellphones needed to be presented by an expert with sufficient "scientific, technical or other specialized training" in the technology and software used by Apple to calculate this information. When Kohler simply read this technical information from the cellphone extractions, without presenting any specialized knowledge or explanation as to how this data was reliability computed, he improperly supplied the jury with an unsupported net opinion in violation of N.J.R.E. 702 and N.J.R.E. 703. See United States v. Gissantaner, 990 F.3d 457, 463 (6th Cir. 2021) ("If highly consequential evidence emerges from what looks like an indecipherable computer program to most non-scientists, non-statisticians, and

non-programmers, it is imperative that qualified individuals explain how the program works and ensure that it produces reliable information about the case."). Moreover, because the State did not attempt to qualify Kohler as an expert in the requisite Apple technology and software, it skirted the disclosure requirements of Rule 3:13-3(b)(1)(I) and deprived the jury of the required limiting instruction for expert testimony about this information. See Derry, 250 N.J. at 634.[6] By improperly presenting this testimony though a lay witness, the State avoided these important requirements to ensure that only reliable technical or scientific evidence is presented to the jury.

Indeed, our Court has long emphasized "that the measurements derived from the device are admissible at a criminal trial only when they are shown to have sufficient scientific basis to produce uniform and reasonably reliable results and will contribute materially to the ascertainment of the truth." Haskins, 131 N.J.at 649 (quotations omitted). If the admissibility of a simple map requires the testimony of a qualified expert familiar with the "methodology of a map's creation and its margin of error," Wilson, 227 N.J.

[6] Because Kohler was qualified as an expert only for his testimony about the historical cell site analysis regarding Woods's cellphone, the jury would not have construed the expert-testimony limiting instruction provided in the final jury charges to apply to Kohler's lay testimony about the GPS and health activity information from Gore's and Cezar's cellphones.

at 553, the same must be required for technology and software that purports to measure a phone's precise location and the steps walked and flights ascended by the phone's user. A defendant must not be required to "blindly accept[]" the technology's "reliability." State v. Pickett, 466 N.J. Super. 270, 278-79 (App. Div. 2021) (holding that the defendant was entitled to discovery of "software's source code and supporting software development and related documentation" in advance of a Frye hearing to challenge the software's reliability).

Even under plain error review, reversal is required because State relied heavily on this improper lay testimony to corroborate its theory of the case as to Gore and Woods's locations at relevant time frames. See State v. Nesbitt, 185 N.J. 504, 515 (2006) ("The failure of a defendant to object to expert testimony does not relieve the trial court of its gatekeeper responsibilities . . . ."). As quoted above in the statement of facts, the prosecutor relied on this testimony extensively in summation, specifically contending that the GPS location data corroborated the suspect testimony of Sashell Williams and Sasha Hedgespeth. Indeed, no eyewitness placed Woods or Gore at the murder scene; the surveillance videos from Garfield Park Academy did not reveal the occupant or occupants in the car that Ayers got into; and videos from outside of Gore's grandmother's house are not clear enough to identify the two

individuals who went into the house. Critically, the State used the testimony about Gore walking 122 steps, his phone's display turning off for a period of time, and then Gore ascending steps – all while his phone was located at his grandmother's house – to corroborate his actions at the time of the murder. Given the lack of other evidence as to Gore and Woods's locations, there is a reasonable probability that the jury relied on Kohler's improper lay testimony about Gore's precise locations and movements to credit the State's theory of the case and convict Woods.

Especially considering the cumulative impact of other issues raised in Woods's previously briefs in conjunction with the prejudicial effect of this improper lay testimony, Woods's convictions should be reversed.

CONCLUSION

For the reasons stated in this supplemental point and the reasons stated in Woods's previous briefs, the convictions should be reversed.

Respectfully submitted,

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LETTE REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1549-22
INDICTMENT NO. 20-01-0021

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent/	:	On Appeal From a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Burlington County.
v.	:	Sat Below:
DEVON K. WOODS, Defendant-Appellant.	:	Hon. Christopher Garrenger, J.S.C. and a jury.
	:	DEFENDANT IS CONFINED

Your Honors:

This letter is submitted in lieu of a formal reply brief pursuant to Rule 2:6-2(b) on behalf of defendant-appellant Devon K. Woods.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Devon K. Woods relies on the procedural history and statement of facts set forth in his opening brief.[1]

LEGAL ARGUMENT

Woods relies on all the legal arguments raised in his opening brief and in his pro se brief. He adds the following.

POINT I

THE TRIAL COURT ERRONEOUSLY RESTRICTED THE DEFENSE FROM ARGUING THIRD-PARTY GUILT.

Contrary to the State's argument that trial court was unable to assess whether Willie Hargrove's statement would have been admissible under the rules of evidence (Sb21), the trial prosecutor's own proffer as to the substance of Willie Hargrove's statement established its admissibility. On appeal, the State paraphrases the prosecutor's proffer as follows: "The State hypothesized that defendant would argue that Derique[] Ballard, the father of Spady's child, had problems with the couple and that a non-testifying relative of Deasia's [i.e.

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[1] Woods retains the abbreviations and transcript designations used in his opening brief and adds the following:
Db = defendant's appellant brief
Sb = State's respondent brief

Willie Hargove] stated that Ballard had shot at him and Deasia on a prior occasion." (Sb19; see also full quotation of prosecutor's proffer at Db17-18). Regardless of exactly when or where this prior shooting took place,[2] Hargrove had first-hand knowledge of this shooting and could have testified about it without offering any inadmissible hearsay. Contrary to the trial court's ruling, the defense thus had a good-faith basis to refer Hargrove's statement during opening statements and to present Hargrove's testimony about the previous shooting. See State v. Wakefield, 190 N.J. 397, 442 (2007) ("The scope of . . . opening statement is limited to the facts [counsel] intends in good faith to prove by competent evidence." (internal quotation omitted)).

The State's other contention[3] regarding third-party guilt confuses the standard for admissibility of evidence of third-party guilt with the potential weight that the jury would ultimately accord to that evidence. Specifically, the State argues that "[e]ven assuming arguendo that Ballard had fired shots in an area where Deasia was present on some prior occasion, it does not meet the

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[2] The trial prosecutor proffered that "Mr. Hargrove in his statement doesn't even know when that happened. It was some weeks or months before; doesn't even know the exact date." (9T66-7 to 10).

[3] On appeal, the State has not briefed an argument that it received insufficient notice of defense's intention to argue third-party guilt, so that issue is waived. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived. ").

legal standard of creating the possibility of reasonable doubt that defendant committed the crime here, especially when considered in light of the weight of the State's evidence in this case." (Sb21). To be sure, a jury might have been persuaded by the State's argument that it was unlikely that Ballard would have known of Ayers's whereabouts because she was not following her normal work schedule on the night of the murder. Perhaps the State would have presented evidence that they had adequately investigated Ballard as a suspect. But the jury might have alternatively credited Hargrove's first-hand testimony regarding the previous shooting, found that Ballard had longstanding problems with his Spady and Ayers, and concluded that there was a reasonable possibility that Ballard murdered Ayers. Indeed, Hargrove would not merely testify that Ballard generally had problems with Spady and Ayers. Hargrove would testify that Ballard actually shot at Ayers within the weeks or months prior to the murder. The proffered testimony was therefore more than mere conjecture about a prior, hostile event.

Ultimately, "the issue is not whether the State presented sufficient evidence for the jury to return a guilty verdict, but whether [the defendant] was denied the opportunity to present a full defense -- to present evidence that would have allowed the jury to return a not-guilty verdict." State v. Hannah, 248 N.J. 148, 190 (2021). "That standard does not require a defendant to

provide evidence that substantially proves the guilt of another, but to provide evidence that creates the possibility of reasonable doubt." State v. Cotto, 182 N.J. 316, 333 (2005). Hargrove's proffered testimony might not have substantially proved that Ballard committed the murder, but the proffered testimony created the possibility of reasonable doubt. As such, the trial court erroneously restricted the defense from arguing third-party guilt. This unfair limitation on the defense allowed the jury to hear only conclusory testimony from the lead detective that all the other leads that the police had investigated "turned out to be dead ends." (11T229-16 to 22). As a result of this prejudicial restriction on the defense's presentation of third-party guilt, Woods's convictions should be reversed.

POINT II

THE IMPROPER NET OPINION ON THE LOCATION OF WOODS'S CELL PHONE AMOUNTED TO PLAIN ERROR.

The State relies heavily on the fact that defense counsel did not object to Kohler's testimony about the location of Wood's cell phone. But the State does not address the established principle that "[t]he failure of a defendant to object to expert testimony does not relieve the trial court of its gatekeeper responsibilities . . . ." State v. Nesbitt, 185 N.J. 504, 515 (2006). For this reason, when expert testimony clearly runs afoul of the Rules of Evidence,

reversal is required even under plain error review. See, e.g., State v. Reeds, 197 N.J. 280, 298-301 (2009) (finding plain error where prejudicial expert testimony was admitted on the central issue); State v. Pasterick, 285 N.J. Super. 607, 622-23 (App. Div. 1995) (finding plain error where the expert's "testimony was so prejudicial to [the] defendant that, even if it were marginally relevant and otherwise admissible, failing to exclude it under N.J.R.E. 403 was a mistaken exercise of the trial judge's discretion"). Accordingly, reversal is required here because Kohler's testimony on the coverage range of the cell towers in Trenton in Willingboro, based on nothing more than his training and experience, was clearly an inadmissible net opinion. See Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011) ("[A] court must ensure that the proffered expert does not offer a mere net opinion.").

The State incorrectly contends that Kohler's testimony was proper because he did not rely on a "rule of thumb" but instead relied on his training and experience. (Sb27; 31-32). But the State ignores that the expert in Burney also estimated the coverage area of a cell tower based on a "rule of thumb" and his "training and experience." State v. Burney, 255 N.J. 1, 24-25 (2023); see also id. at 12 (the expert testified, "So just based on my training and experience, one mile is a good estimate of the tower range for Sprint in this

area."). Our Supreme Court agreed with the Northern District of Illinois that an "expert's estimates of the ranges of different cell towers were unreliable because they were based solely on the expert's training and experience." Id. at 24 (emphasis added) (citing United States v. Evans, 892 F. Supp. 2d 949, 956 (N.D. Ill. 2012)). This is because "[e]stimating the coverage area of radio frequency waves [of a cell tower] requires more than just training and experience, . . . it requires scientific calculations that take into account factors that can affect coverage." Ibid. (alterations in original) (quoting Evans, 893 F. Supp 2d at 956). Accordingly, Kohler's net opinion on the range of the cell towers in Trenton and Willingboro suffered from the same fatal flaw as in Burney.

Nor does the fact that Kohler testified that he used a mapping software cure the defects with his net opinion. (12T170-17 to 19).[4] The net-opinion rule "requires that an expert give the why and wherefore that supports the opinion, rather than a mere conclusion." Townsend v. Pierre, 221 N.J. 36, 54 (2015) (quotations omitted). Kohler offered no explanation as to whether or how the software he used estimates the coverage area of cell towers. Indeed,

[4] Woods respectfully disagrees with the State that the record in Burney suggests that Special Agent David created his maps manually and did not use mapping software. (Sb31). It is unlikely that David manually mapped "120-degree pie-shaped wedges" without using some sort of computer program. Burney, 255 N.J. at 12.

Kohler's testimony regarding how the maps depicted the coverage areas was even more lacking than the testimony offered by Special Agent David in Burney. In Burney, David "testified that each of the lines [on the maps he created] had an approximate length of one mile." 255 N.J. at 12. In this case, by contrast, Kohler did not even appraise the jury of the specific length of the pink lines on the maps. He simply answered "no" when the prosecutor asked if "in general, will a phone that is several miles away?" (12T171-25 to 171-1). He stated that in Trenton, "[i]t's going to be consistent -- especially in more of an urban area, it is going to be a close tower." (12T172-3 to 6). And in Willingboro, "Roughly, the same thing. It could be a little bit further. Willingboro is not as urban, but I know, based on my training and experience, that Willingboro has several towers throughout the different park areas that Willingboro is made up of." (12T172-7 to 8-12). As such, the record reflects that these rough estimates of the cell towers' coverage areas were based on Kohler's training and experience. Kohler simply did not offer sufficient explanation or foundation for his estimates to satisfy the net-opinion rule.

Finally, the admission of this improper net opinion requires reversal because the State relied heavily on the historical cell-site testimony to place Woods with Gore at the time of the murder. As detailed in Woods's opening brief (Db32-33), the prosecutor relied on this testimony extensively in his

opening statements and summation. (10T25-11 to 17; 13T154-3 to 5; 13T175-10 to 14). Indeed, the prosecutor needed to emphasize this testimony because the State lacked direct evidence to place Woods with Gore at the scene of the murder. No eyewitness placed Woods at the murder scene. The surveillance videos from Garfield Park Academy did not reveal the occupant or occupants in the car that Ayers got into. The videos from outside of Gore's grandmother's house are not clear enough to identify the two individuals who went into the house. And although the location data from Gore's cell phone strongly suggests that he was at the murder scene and returned to his home during the relevant time frame, the only forensic evidence placing Woods in Willingboro near that time of the murder was Kohler's impermissible net opinion. Thus, there is a reasonable probability that the jury relied on Kohler's improper opinion to conclude that Woods was at the crime scene.

On appeal, the State relies heavily on Woods's alleged confession to Sashell Williams and Sasha Hedgespeth (Sb33-34) to argue harmless error, but the jury had substantial grounds to doubt the credibility of those witnesses. As defense counsel emphasized in summation, the witnesses offered inconsistent accounts of: where the alleged confession took place; who was present during the alleged confession; whether the victim was shot in the face, neck, or the back of the head; whether the codefendants used their own gun or the victim's

gun; how many times they stopped at Gore's grandmother's house; and what the verbal signal was for Woods to shoot the victim. (13T126-23 to 134-22). Counsel also emphasized that Hedgespeth was unhappy that Woods had gotten her eighteen-year-old daughter pregnant, was unemployed, and was planning to move with them to live in Section 8 housing in Florida. (13T119-6 to 119-14; 11T89-20 to 90-18). And importantly, the jury heard that Williams initially told the police that she was with Woods on the night of the murder. (11T134-5 to 135-3). Given these clear bases for the jury to question the credibility of these witnesses, their testimony is not strong enough evidence to render the improper admission of Kohler's net opinion harmless.

In sum, because the State relied heavily on a foundationless net opinion to place Woods at relevant locations, his convictions should be reversed.

POINT III

THE STATE ELICITED TESTIMONY THAT VIOLATED THE BANKSTON RULE. (As argued in Defendant's Pro Se Brief)

On the State's direct examination, Detective Sergeant Luyber testified that "we received an anonymous phone call through the tip line of an individual that had information in regards to the homicide of Deasia Ayers" and that as a result, he came into contact with Sasha Hedgespeth. (11T199-21 to 200-5). Also on the State's direct examination, Sasha Hedgespeth testified

she told a friend about Woods's alleged confession, and that friend contacted the police. (11T70-5 to 71-1). Although these two pieces of testimony were brief, they created the logical implication that Hedgespeth's friend had implicated Woods in the crime.

It is well-settled that "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." State v. Bankston, 63 N.J. 263, 271 (1973). "The common thread that runs through Bankston, Irving, and Tilghman, is that a police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant." State v. Branch, 182 N.J. 338, 351 (2005) (internal citations omitted). Under the Bankston rule, "it is the 'creation of the inference, not the specificity of the statements made,' that determines whether the hearsay rule was violated." State v. Roach, 146 N.J. 208, 225 (1996) (quoting State v. Irving, 114 N.J. 427, 447 (1989)); see also State v. Watson, 254 N.J. 558, 60-10 (2023) ("When an officer conveys information from someone who does not testify, either directly or by inference, and the information incriminates the defendant, both the Confrontation Clause and the hearsay rule are implicated." (internal quotation omitted)).

Because the above-quoted testimony of Luyber and Hedgespeth created

the logical implication that Hedgespeth's friend had implicated Woods in the crime, this testimony ran afoul of the Bankston rule, was inadmissible hearsay, and violated Woods's confrontation rights. There is a reasonable possibility that the jury relied on this inadmissible hearsay to bolster the questionable credibility of Sasha Hedgespeth and Sashell Williams. Consequently, this constitutional error was not harmless beyond a reasonable doubt. See Branch, 182 N.J. at 353 ("Because the issue is now to be resolved under the 'plain error' rule, we must consider whether there is reasonable doubt that the jury would have ruled other than as it did." (quoting Irving, 114 N.J. at 447)). Woods convictions should therefore be reversed.

POINT IV

THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL.

The combined prejudice of all the errors raised by Woods, including the issue raised in his pro se brief, deprived Woods of due process and a fair trial and require reversal of his convictions. All the errors affected whether the jurors would credit the suspect testimony of Sashell Williams and Sasha Hedgespeth about Woods's alleged confession. The jurors would have been less likely to credit this alleged confession if: (1) they heard that Derique Ballard had problems with Ayers and Spady and shot at Ayers in the months before the crime; (2) they did not hear Kohler's impermissible net opinion that

Woods's cell phone was in Trenton and Willingboro at times consistent with the time frame provided by Sashell Williams; (3) they did not hear that Sasha Hedgespeth had shared Woods's alleged confession with a friend who then contacted the police. Considering the combined effect of these errors, Woods's convictions should be reversed.

CONCLUSION

For the reasons stated in Woods's opening brief, pro se brief, and this reply brief, his convictions should be reversed. And as the State concedes, if the convictions are not reversed, the matter must be remanded for: (1) the judgment of conviction to be amended to merge count three into count two, to remove the fines and penalties associated with count three, and to reflect 1,119 days of jail credits; and (2) a hearing on Woods's ability to pay restitution.

Respectfully submitted,

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