SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1825-22T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Ocean County.
MAYRA J. GAVILANEZ-ALECTUS,	:	Indictment No. 22-08-1446-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. Rochelle Gizinksi, J.S.C., and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Department of Justice, Approved Uniform Language for Testimony and Reports for the Forensic Latent Print Discipline 13

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National Academy of Science, Strengthening Forensic Science in the United States: A Path Forward 140 (2009) 11

National Research Council, The Growth of Incarceration in the United States: Exploring Causes And Consequences 139 (2014) 49

National Research Council, The Growth of Incarceration in the United States: Exploring Causes And Consequences, (2014) 49

President's Council of Advisors on Sci. & Tech., Forensic Science in Criminal Courts: Ensuring Validity of Feature-Comparison Methods 101 (2016).....12

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PRELIMINARY STATEMENT

Rebecca Gavilanez-Alectus was brutally killed in her home. The State argued that her wife, Mayra, murdered her and then ran away to avoid capture. The defense argued that an intruder killed her, Mayra discovered her body, and then ran away in a panic.

There was little direct evidence in the case: no eyewitnesses, no recorded confession, no surveillance footage that captured the crime. The State sought to make its case largely through the testimony of four forensic experts. Each of these forensic experts testified inappropriately, bolstering their findings through false claims that their field has "zero error rate" or opining on matters beyond their expertise. Because this inaccurate and unreliable testimony unfairly bolstered the State's case against Mayra, her convictions must be reversed.

A number of instructional issues also require reversal of Mayra's convictions. The court incorrectly told the jury it could infer that Mayra had the intent to kill from the use of the weapon in this case, an object that is not designed to lead to deadly injury. The court also failed to charge the jury on any lesser-included offenses to murder. These two errors prevented the jury from properly considering Mayra's mental state, if it did find she was the perpetrator. Further undermining the fairness of the trial, the trial judge instructed the jury

that a finding of beyond a reasonable doubt meant that the jury was "more or less" firmly convinced in Mayra's guilt.

Last, irrelevant and inflammatory testimony that Mayra had attacked another woman was unduly prejudicial. Individually and cumulatively, each of these errors deprived Mayra of her rights to due process and a fair trial. Her convictions must be reversed.

PROCEDURAL HISTORY

Ocean County Indictment Number 22-08-1446 charged Mayra J. Gavilanez-Alectus with: murder, contrary to N.J.S.A. 2C:11-3a(1), (2) (Count One); third-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4d (Count Two); and fourth-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5d (Count Three). (Da 1-3)

Trial began before the Honorable Rochelle Gizinksi, J.S.C., and a jury on September 19, 2022. (1T) On September 29, Mayra[1] was convicted of all counts. (8T 116-1 to 8) On January 12, 2023, Mayra was sentenced to an aggregate term of 45 years in prison with an 85% period of parole ineligibility. (9T 39-5 to 6) A notice of appeal was filed on February 23, 2023. (Da 10-13)

[1] Because the decedent and the defendant share the same last name, their first names will be used to avoid confusion.

STATEMENT OF FACTS

Rebecca Gavilanez-Alectus was found dead in the bedroom of her home, which she shared with her wife Mayra Gavilanez-Alectus, on May 17, 2020. (1T 35-6 to 41-9) The cause of death was blunt force trauma to the head. (3T 106-16) The State hypothesized that the wounds were inflicted by the edge of a wine cooler—a cylindrical object used to keep a bottle of wine cold. (3T 109-9 to 19)

The last person to speak with Rebecca seems to have been her coworker and friend, Snyme Etienne. Etienne said that she worked with Rebecca at a nursing home on May 16, 2020. (1T 91-7 to 19) Etienne claimed that she overheard a phone call made to Rebecca that day and that she recognized Mayra's voice. (1T 93-8) Etienne testified that Mayra was angry and asked Rebecca, "you want to leave me?" (1T 94-3 to 95-25) According to Etienne, Mayra picked Rebecca up after work that day. (1T 97-11) Rebecca did not come to work the next day, so Etienne went to her house with Rebecca's mother. (1T 100-7 to 101-24) The door was locked so the two women left. (1T 109-4 to 12) Later that day Francia Villacis-Gavilanez, Mayra's daughter, and Michael Stallworth, Vallicis-Gavilanez's boyfriend, came to the house. (7T 57-20 to 58-11) Stallworth found the door locked and eventually entered through a window. (7T 36-10 to 21) He found Rebecca's body in the bedroom and called the police.

(7T 38-1 to 39-22) The bedroom window was open, which Vallacis-Gavilanez said was unusual. (7T 58-15 to 23)

A wine chiller was found on the bed. (3T 171-22) Officer Daniel Lesniakowski of the Ocean County Sheriff's Department testified as a lay witness that he found one fingerprint on the inside lip of the wine chiller and no fingerprints on the outside. (3T 35-17 to 38-6) He also testified that he processed it with a substance that reacts with blood, and the results led him to believe there was blood on the chiller. (3T 14-23 to 16-21)

Captain Matthew Armstrong testified as an expert in latent fingerprint examination and analysis. (3T 47-16 to 18) His testimony, which at times exceeded the bounds of his expertise and of scientifically supported opinion, is the subject of Subsection I.A., supra. Armstrong testified that the fingerprint on the chiller and an exemplar taken from Mayra "were made by the same individual." (3T 68-2 to 3) He testified twice that two other unnamed "examiners" performed the same analysis and reached the same conclusion. (3T 59-21 to 25, 68-20 to 25) Armstrong testified that he has "never seen" any disagreement among fingerprint examiners because "[t]here's no opinion to be spoken. It's totally objective." (3T 69-12 to 13) Armstrong opined that "there was blood on the finger when it touched" the chiller. (3T 71-22 to 25)

Jeffrey Scozzafava testified as an expert in bloodstain pattern analysis.

Scozzafava claimed that "there's no error rate in bloodstain pattern analysis." (3T 134-6 to 17) He confirmed this "zero error rate" at the end of his testimony. (3T 169-22 to 25) This inaccurate assertion is the subject of Subsection I.B., supra. He examined a shirt found in the bathroom of the home Rebecca and Mayra shared. (3T 139-20, 165-15) Scozzafava opined that the stains on the shirt were "passive" "transfers," which were not "airborne" stains, but instead would be caused by wearing and removing the shirt with bloody hands. (3T 139-17 to 147-1, 166-1 to 25) He testified that it would be reasonable for no spatter to get on the shirt during a bludgeoning event. (3T 147-18 to 149-19) He also concluded that pillows had been moved during the assault, that the victim was on the bed when the bloodstains were produced, and that there had been two separate beating incidents. (3T 169-8 to 21)

The shirt that Scozzafava examined was later analyzed by Kimberly Michalik, an expert in DNA, who concluded that Rebecca "was identified as the source" of a stain found on the shirt. (5T 56-6 to 23) Michalik's failure to support her conclusion with a statistic is the subject of Subsection I.C, supra. The collar of the shirt, according to Michalik, had two contributors but the DNA was insufficient for comparison. (5T 57-12 to 14) Michalik opined that a DNA profile found on a bra taken from a home Mayra was staying in when she was

located on May 20 "was determined to be Rebecca Gavilanez-Alectus['s]" without any statistical support for that opinion. (5T 59-1 to 6)

Dr. Dante Ragasa, a pathologist, testified that the cause of Rebecca's death was blunt force trauma to the head. (3T 106-16) When asked how much force it would take to cause fractures on the skull, Ragasa provided an opinion that included the assailant's state of mind:

> Well, it's variable. There's a lot of factors involved here. First, it's the strength of the individual, the assailant, the, what do you call this, the strength of the weapon that was used and also the emotion of the assailant, which would, you know, if the assailant is enraged, even if they don't have that muscle strength and all that, but in a rage, it could create this kind of force. [(3T 103-1 to 8) (emphasis added)]

This opinion is the subject of Subsection I.D., supra.

It is undisputed that Mayra fled New Jersey the day of the murder. The defense argued that Mayra came home, found her wife dead, panicked, and fled. (8T 32-3 to 15) The State argued that she fled after committing the murder to avoid capture. (8T 41-1 to 44-18) Surveillance seems to show Mayra's car come home and leave on May 17, consistent with both the State and defense theory. (4T 97-10 to 108-5) The evidence established that Mayra drove to New York, left her car there, bought a Greyhound bus ticket to Miami, but ultimately ended up switching buses and going to Houston. (4T 14-7 to 19-25, 142-17 to 174-7) Mayra paid in cash and used a false name on her ticket. (4T 19-10)

Mayra met a woman named Jessenia Murillo on the bus to Houston. (6T 73-7) Mayra told Murillo that she was fleeing domestic violence at the hands of her husband and was afraid to use her phone because she believed he could track her. (6T 74-7 to 75-14) Murillo invited her to stay at the home of Murillo's friend, Jenny Fernandez-Nataren. (6T 74-12) Fernandez-Nataren allowed Mayra to stay at her home for a few days.

Fernandez-Nataren testified that on the third day, Mayra told Fernandez-Nataren that she needed to speak with her alone. (6T 97-20) Fernandez-Nataren testified that Mayra told her that she was a lesbian and that she killed her wife. (6T 99-8 to 103-15) Fernandez-Nataren testified that Mayra said that her relationship with Rebecca was not going well, but she managed to convince Rebecca to come over so Mayra could cook her favorite food. (6T 100-7 to 24) Rebecca told her she would pick up some poison for cockroaches on her way home. (6T 101-6 to 8) When Rebecca got home, she asked Mayra what would she would do if Rebecca died. (6T 101-18 to 20) Rebecca and Mayra went upstairs together and Rebecca fell into a deep sleep. (6T 102-1 to 7) According to Fernandez-Nataren, Mayra told her she went downstairs, saw the cockroach poison next to food she was planning to prepare for her wife and herself, and Mayra "thought [Rebecca] had done something bad because she was really tired, she was very sleepy." (6T 102-6) Fernandez-Nataren claimed that Mayra told

her that she started hitting Rebecca and then felt "a spirit that told her not to stop and that she could not stop." (6T 103-6)

Fernandez-Nataren claimed that Mayra had not changed her clothes or showered in the three days she had stayed with her and that after this confession she went to take a bath and asked Fernandez-Nataren to stay with her. (6T 105-16 to 106-6) According to Fernandez-Nataren she took the clothing that Mayra was wearing, including her bra, put them all together in a black bag, and later gave the bag to the police with Mayra's other possessions. (6T 108-4 to 7, 119-12) This was the bra that Michalik analyzed for DNA. The chain of custody from Texas to New Jersey was not clarified. Nor was there any evidence that the bra had been stored by Fernandez-Nataren in a manner to avoid contamination or transfer among Mayra's other belongings. Fernandez-Nataren testified that Mayra insisted on not sleeping alone that night, so Fernandez-Nataren slept with her in the laundry room. (6T 109-24 to 110-6) Fernandez-Nataren said that at "one point she got up and she started pushing on me, pushing on my throat, close to my neck." (6T 110-16 to 23) This other-bad-act testimony is the subject of Point III, supra.

At the time she met Mayra, Fernandez-Nataren was an FBI and DEA informant. (6T 87-3 to 13) She called her contact at the FBI, and officers came to arrest Mayra. (6T 112-11, 130-17 to 141-2) At the time of trial, Fernandez-

Nataren was facing federal charges for conspiracy to possess methamphetamine with the intent to distribute it. (6T 84-19 to 25) She claimed that she did not expect any leniency in that case in exchange for her cooperation with the State in the case against Mayra. (6T 85-9 to 17)

LEGAL ISSUES

POINT I

TESTIMONY PRESENTED BY MULTIPLE FORENSIC EXPERTS WAS UNRELIABLE, BEYOND THE BOUNDS OF THEIR EXPERTISE, AND CONSTITUTED TESTIMONIAL HEARSAY. THE INAPPROPRIATE ADMISSION OF THIS PREJUDICIAL TESTIMONY REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS. (Not Raised Below)

The trial court functions as a gatekeeper during trial to ensure that only sound scientific evidence is presented to the jury. "Properly exercised, the gatekeeping function prevents the jury's exposure to unsound science through the compelling voice of an expert. . . . Difficult as it may be, the gatekeeping role must be rigorous." In re Accutane Litig., 234 N.J. 340, 346, 390 (2018). Scientific evidence must be reliable to be admissible. State v. Kelly, 97 N.J. 178, 208 (1984).[2] Moreover, experts must not stray beyond the bounds of their

[2] At the time of trial, New Jersey courts were assessing the admissibility of evidence under the Frye standard. Since then, our courts have moved to a standard that stems from Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). State v. Olenowski, 253 N.J. 133, 152 (2023). Under Olenowski, trial

expertise, ibid., nor relay testimonial hearsay. Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011).

Throughout the trial, forensic experts violated these rules by giving opinions that were scientifically unreliable, beyond the scope of their expertise, or consisted of testimonial hearsay. These errors inappropriately strengthened the State's evidence that Mayra was the killer, putting a thumb on the scale in the State's favor in a case with no direct evidence of guilt: no eyewitnesses, no surveillance of the act, and no confession directly from Mayra herself. The State used the unreliable forensic testimony to great effect, claiming that each of the four forensic experts presented the core of the State's case against Mayra. Stripped down to only scientifically supportable claims within the experts' actual expertise, the evidence of guilt is significantly weaker. The inappropriate and seemingly scientific testimony violated our rules of evidence, case law, and deprived Mayra of her rights to due process and to a fair trial. U.S. Const. amend. XIV, N.J. Const. art. I, ¶¶ 1, 9, and 10. Mayra's convictions must be reversed.

A. The Fingerprint Examiner's Testimony Violated N.J.R.E. 702 and the Confrontation Clause.

courts must assess new factors to determine whether a scientific theory is sufficiently reliable to be admitted. Id. at 147. The ultimate question that must be answered under both standards is whether the proponent has demonstrated the reliability of the scientific testimony it is seeking to admit. Id. at 150-151.

Armstrong's testimony contained three critical problems. First, he testified that fingerprint examination is "totally objective" and implied that there was no error rate for fingerprint analysis. (3T 69-12 to 13) Second, he testified that two other examiners had assessed Mayra's fingerprint and agreed that it matched the fingerprint at the scene. (3T 59-21 to 25, 68-20 to 25) Last, he testified as to matters beyond the analysis and comparison of fingerprints when he opined about how the blood got onto the fingerprint and the chiller. (3T 71-22 to 25) Each of these errors deprived Mayra of a fair trial.

First, Armstrong's testimony presented his field as objective and infallible, which is not true. Not only did he directly state that it was "objective," but by claiming that examiners never disagree with each other, he was implying that no mistakes are ever made. These inaccurate statements suggested that there was no risk of error in his opinion that Mayra's fingerprint was a "match" to the fingerprint on the wine chiller.

Fingerprint examination is a subjective discipline. There are no objective criteria for how many or what kinds of similarities are sufficient to declare a match between two prints. National Academy of Science, Strengthening Forensic Science in the United States: A Path Forward 140 (2009) ("[F]riction ridge analysis relies on subjective judgments by the examiner."); President's Council of Advisors on Sci. & Tech., Forensic Science in Criminal Courts:

Ensuring Validity of Feature-Comparison Methods 101 (2016) (hereinafter "PCAST Report") ("[L]atent print analysis. . . depends on subjective judgment."). Thus, the claim to objectivity is false and misleading.

Together with this claim to objectivity, Armstrong's testimony that there is never disagreement among fingerprint examiners (because it is an objective task) led to the inescapable inference that there is no error rate in fingerprint examination. An error, after all, would have to be caught by someone disagreeing with the initial examination. There is, of course, an error rate to all scientifical disciplines, including fingerprint examination. See Report of the Advisory Committee on Evidence Rules (May 15, 2022) (noting that the subcommittee considered an amendment to F.R.E. 702 that would address "the problem of overstating results," yet rejected such an amendment "because Rule 702(d) already requires that the expert must reliably apply a reliable methodology. If an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d)") (emphasis added); United States v. Mitchell, 365 F.3d 215, 246 (3d Cir. 2004) ("[S]ome latent fingerprint examiners insist that there is no error rate associated with their activities. . . . This would be out-of-place under Rule 702.").

Testifying that a discipline has a zero error rate is misleading and prejudicial. Simon A. Cole, More than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 1049 (2005) ("The potential to mislead a fact-finder by saying, 'My methodological error rate is zero, and my practitioner error rate is negligible,' is extremely high."). See also Department of Justice, Approved Uniform Language for Testimony and Reports for the Forensic Latent Print Discipline 2-3 (prohibiting DOJ experts from testifying that "two friction ridge impressions originated from the same source to the exclusion of all others," or from asserting "that latent print examination is infallible or has a zero error rate.") (Da 16).

Other courts have already held that fingerprint examiners cannot testify to the false statement that their craft is totally objective and imply that this objectivity renders fingerprint analysis free from error. For instance, in Commonwealth v. Armstrong, 2023 WL 4277878, at *10 (Mass. June 30, 2023) , the high court of Massachusetts held that a fingerprint examiner's testimony that fingerprint examination "leads to an objective analysis" was inappropriate. "This testimony suggested" that the method of fingerprint analysis performed by most analysts "is a time-tested scientific methodology leading to an objective conclusion, as opposed to a framework that includes subjective aspects and as to which the [National Academy of Sciences] report has raised concerns." Ibid.

The testimony that the "methodology itself was error-free . . . suggested that an examiner, who was faithful to the methodology, could come to an infallible conclusion[,]" and was false and inappropriate. Ibid. The same error is present in this case.

Armstrong's testimony that fingerprint examination is an objective task that never generates disagreement among examiners laid the groundwork for presenting the "match" Armstrong found as a true fact rather than an opinion. Recognizing this danger, other courts have held that "[t]estimony to the effect that a latent print matches, or is 'individualized' to, a known print, if it is to be offered, should be presented as an opinion, not a fact, and opinions expressing absolute certainty about, or the infallibility of, an 'individualization' of a print should be avoided." Commonwealth v. Gambora, 933 N.E.2d 50, 61 n. 22 (Mass. 2010). Armstrong's testimony—that Mayra's print was a "match," without any limitation or qualification of that term and in the context of a discipline Armstrong claimed is objective and error-free—conveyed to the jury the exact misleading impression courts are concerned with that Mayra left that print beyond any doubt.

Not only did Armstrong testify to this scientifically unsupported level of certainty and accuracy in fingerprint examination, but he testified that two other unnamed people agreed with his conclusion that Mayra's fingerprint was a

match to the fingerprint on the murder weapon. This testimony was inadmissible testimonial hearsay.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial, . . . offered in evidence to prove the truth of the matter asserted," and is inadmissible unless a recognized hearsay exception applies. N.J.R.E. 801, 802. Hearsay is testimonial when its primary purpose is to establish facts potentially relevant to later criminal prosecution. State ex rel. J.A., 195 N.J. 324, 345 (2008). Forensic work done on behalf of the prosecution is testimonial. Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011).

Armstrong testified that two other forensic experts reviewed the fingerprints and agreed that the latent print was a match for Mayra. That is testimonial hearsay used to establish a fact: that Mayra left the fingerprint on the wine chiller. Courts addressing this issue overwhelmingly agree. See, e.g., State v. Kiser, 2019 WL 2402962, at *8 (Tenn. Crim. App. June 6, 2019) ("[T]he import of a statement that the identification has been verified is that the identification has been deemed correct by an expert who reached the same conclusion. Moreover, the value of the verification lies in its truth. The State essentially gets two expert opinions from the testimony of one testifying expert."); People v. Pearson, 116 N.E.3d 304, 311 (Ill. App. Ct. 2018) (holding that the "verification was an out-of-court statement and it was offered to prove

the truth of the matter asserted"); People v. Griffin, 985 P.2d 15, 17-18 (Colo. App. 1998) (same). Armstrong's testimony that two other experts examined the print and agreed with his conclusion was testimonial hearsay that should not have admitted.

Last, Armstrong testified beyond his expertise when he opined on when the finger that left the latent print touched the blood. The State took great pains to ask Armstrong if the blood could have gotten on the chiller after the fingerprint was left there. (3T 71-9 to 72-9) Armstrong opined that "there was blood on the finger when it touched the object" (3T 71-22 to 23) He was not qualified to give this opinion.

An expert must stay within the bounds of his expertise when offering an opinion. State v. Zola, 112 N.J. 384, 422 (1988). Armstrong was recognized "as an expert in the field of latent fingerprint examination and analysis." (3T 47-18) As Armstrong testified, his expertise is in examining two fingerprints and determining if they "match" based on the details he observes on each. (3T 58-21 to 63-9) Comparing the features of two fingerprints is a distinct area of expertise. There is nothing in Armstrong's description of his expertise or his training that would allow him to opine as to how or when the fingerprint was placed there. Perhaps a bloodstain pattern analyst or crime scene

reconstructionist would be qualified to opine on these issues. Armstrong, however, strayed beyond the bounds of his expertise when he did so.

B. The Bloodstain Pattern Analyst's Testimony Violated N.J.R.E. 702.

Scozzafava, the bloodstain pattern analyst, testified twice that bloodstain pattern analysis is 100% accurate: he stated that "there's no error rate in bloodstain pattern analysis" and confirmed that there was a "zero error rate." (3T 134-6 to 17; 3T 169-22 to 25) As explained in subsection A, infra, no scientific discipline has a zero error rate; no scientific discipline is infallible; and it's scientifically incorrect as well as misleading and prejudicial to say so.

As with the fingerprint examiner, the testimony that Scozzafava's conclusions couldn't possibly be wrong is well known to be incorrect among scientists and courts. As a factual matter, bloodstain pattern analysis has staggering error rates. In 2021, the largest "black box" study to evaluate the "accuracy and reproducibility of conclusions made by practicing BPA analysis," produced concerning results. R. Austin Hicklin et al., Accuracy and Reproducibility of Conclusions by Forensic Bloodstain Pattern Analysts, 325 Forensic Sci. Int. 1 (2021) For instance, only 52.8% of classifications made in response to one set of prompts were correct. Id. at 2. The authors concluded that "consensus was limited, and errors were widely distributed across prompts." Id. at 4. The authors concluded that "[b]oth semantic differences and contradictory

interpretations contributed to errors and disagreements, which could have serious implications if they occurred in casework." Id. at 7.

Scozzafava's testimony is a prime example of what not to do when testifying as a forensic expert. As the President's Counsel of Advisors on Science and Technology reported in 2016, this kind of testimony is incorrect and reckless:

> [R]eviews have found that expert witnesses have often overstated the probative value of their evidence, going far beyond what the relevant science can justify. Examiners have sometimes testified, for example, that their conclusions are "100 percent certain;" or have "zero," "essentially zero," or "negligible," error rate. As many reviews—including the highly regarded 2009 National Research Council study—have noted, however, such statements are not scientifically defensible: all laboratory tests and feature-comparison analyses have non-zero error rates.

PCAST Report at 3 (emphasis added).

Scozzafava's testimony is "not scientifically valid and should not [have] be[en] permitted." Id. at 19. This testimony made his subjective determinations of the evidence at the scene—which explained away why there was barely any blood on the shirt Mayra was supposedly wearing when she killed Rebecca because it was supposedly consistent with the bloodstain pattern that would occur during a bludgeoning event followed by the removal of the shirt—as objective, incontrovertible evidence.

C. The DNA Expert's Testimony Violated N.J.R.E. 702 And 403.

Michalik testified that Rebecca was "the source" of a stain found on Mayra's shirt and that a DNA profile on the bra supposedly taken from Mayra was "determined to be Rebecca['s]." (5T 56-6 to 23, 59-1 to 6) Michalik did not give any supporting statistic for the jury to evaluate the weight of that match. The failure to do so renders the testimony scientifically unreliable as well as of limited probative value.

The scientific community and the courts that have examined the issue agree that DNA evidence must be presented with a statistical weight in order for its meaning to be given proper context. See e.g., Commonwealth v. Mattei, 920 N.E.2d 845, 858 (Mass. 2010) ("The challenged expert [DNA] testimony concerning the nonexclusion results should not have been admitted without accompanying statistical explanation of the meaning of nonexclusion."). Deloney v. State, 938 N.E.2d 724, 730 (Ind. Ct. App. 2010) (deeming DNA evidence inadmissible without "accompanying testimony explaining the statistical significance of those non-exclusion results"); United States v. Davis, 602 F. Supp. 2d 658, 673 (D. Md. 2009) ("DNA evidence cannot be admitted in a vacuum; the Government must also present some additional information with which a jury can accurately assess the significance of the consistency between a defendant's DNA profile and that of the evidence."); State v. Tester, 968 A.2d

895, 909 (Vt. 2009) ("[A]dmission of DNA match evidence, without additional evidence of the frequency with which such matches might occur by chance, is error."). "Without the probability assessment, the jury does not know what to make of the fact that the [DNA] patterns match: the jury does not know whether the patterns are as common as pictures with two eyes, or as unique as the Mona Lisa." United States v. Yee, 134 F.R.D. 161, 181 (N.D. Ohio 1991), aff'd sub nom. United States v. Bonds, 12 F.3d 540 (6th Cir. 1993). Our courts have taken for granted that a statistic would be provided with DNA evidence. State v. Marcus, 294 N.J. Super. 267, 278 (App. Div. 1996) ("Once a match is found, the final part of the interpretative stage is the calculation of the statistical significance of the match.").

Because no statistic was provided in this case, the DNA evidence was misleading and did not provide any information for the jury to properly assess its probative value.

D. The Pathologist's Testimony Violated N.J.R.E. 702.

Ragasa, the pathologist, opined that the amount of force necessary to inflict the mortal injuries on Rebecca could come from the strength of the assailant or the weapon or from "a rage" that the assailant was feeling. (3T 103-7 to 8) This opinion on how the assailant was feeling strayed beyond Ragasa's expertise. Perhaps Ragasa had expertise to explain literally how much force, the

product of mass and acceleration, would be necessary to create these kinds of injuries. But he was not qualified to opine on how a living person's state of mind relates to the mechanism of injury. Ragasa "was qualified only as an expert in forensic pathology. In that capacity, his testimony should have been limited to describing the physical properties of the implement that caused the [victim's] death[], narrating the physiological status of the bod[y] at the time of death, and ruling out the possibility that the injuries were self-inflicted or sustained as a result of mere inadvertence " State v. Jamerson, 153 N.J. 318, 337 (1998) (emphasis added). A living person's state of mind and how it would impact their ability to inflict a wound is beyond a pathologist's expertise. See also State v. Locascio, 425 N.J. Super. 474, 494 (App. Div. 2012) (medical examiner's opinion based on "numerous biomechanical factors" was beyond his expertise).

E. The Inappropriate Testimony From Four Forensic Experts Requires Reversal Of Defendant's Convictions.

Each forensic expert presented inappropriate testimony. Separately and together this testimony was clearly capable of producing an unjust result. Rule 2:10-2. The State relied on this inappropriate testimony at length to make its case against Mayra in summation:

> How do we know that the defendant caused Rebecca's death? Ladies and gentlemen, this is where we're going in this case. We know from fingerprint analysis, from DNA evidence, the cause and manner of death, the

> bloodstain pattern evidence, the defendant's own confession to Jenny and her flight. [. . . .]
>
> That's the truth, ladies and gentlemen, supported by the evidence in this case. What evidence? Again, fingerprint evidence, DNA evidence, cause and manner of death, bloodstain pattern evidence, computer forensics, and ultimately this defendant's flight.
>
> [(8T 38-1 to 6, 54-9 to 14) (emphasis added)]

In summation, the State repeated the rhetorical question multiple times, responding with the overstated forensic testimony that never should have been admitted:

- "How do we know the defendant caused Rebecca's death? The defendant's fingerprint is found on the murder weapon." (8T 55-10 to 12) And, critically, "there was blood on the finger when it touched the wine chiller." (8T 55-10 to 56)

- "How do we know the defendant caused Rebecca's death? Rebecca's blood is found on the defendant's bra in Houston." (8T 56-10 to 11)

- "How do we know that the defendant caused Rebecca's death? . . . The strength of the assailant does not matter for these types of injuries to be inflicted. But rather, the assailant's enraged emotion can create this kind of injury." (8T 57-10 to 58-16)

- "How do we know the defendant caused Rebecca's death? Bloodstain pattern analysis." (8T 58-25 to 59-1)

The forensic evidence was the bulk of the State's case for guilt. And it was inaccurate, overstated, and unscientific. Tellingly, the jury asked only one question during deliberations: it asked for the fingerprint expert's testimony. (8T

114-1 to 5) Forty minutes after the playback of that testimony, the jury returned a guilty verdict. (8T 115-9)

As our case law recognizes, expert testimony is compelling; factfinders tend to give experts great credence. This is why courts must carefully exercise their gatekeeping function: to "prevent[ ] the jury's exposure to unsound science through the compelling voice of an expert." In re Accutane Litig., 234 N.J. 340, 389 (2018). "The danger of prejudice through introduction of unreliable expert evidence is clear": "While juries would not always accord excessive weight to unreliable expert testimony, there is substantial danger that they would do so, precisely because the evidence is labeled 'scientific' and 'expert.'" Id. at 389-90 (quoting State v. Cavallo, 88 N.J. 508, 518 (1982)). In this case, the danger that the jury relied on unscientific, inappropriate testimony to reach its verdict is palpable. The convictions must be reversed.

POINT II

A NUMBER OF INSTRUCTIONAL ERRORS PREVENTED THE JURY FROM APPROPRIATELY DETERMINING DEFENDANT'S CULPABILITY. DEFENDANT'S CONVICTIONS MUST BE REVERSED. (Not Raised Below)

One of the most basic principles of New Jersey criminal law is that "[a]ccurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial." State v. Concepcion, 111 N.J. 373, 379

(1988). The charge must provide a "comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Ibid. (internal quotation marks omitted). "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations. The court must explain the controlling legal principles and the questions the jury is to decide." State v. Martin, 119 N.J 2, 15 (1990). Therefore, instructional errors on essential matters, even in cases where those errors are not raised below, are traditionally deemed prejudicial and reversible error because they interfere with the jury's proper assessment of the defendant's culpability. State v. Rhett, 127 N.J. 3, 5-7 (1992); State v. Vick, 117 N.J. 288, 293 (1989).

In this case, three errors in the jury instructions interfered with the jury's deliberations, violated Mayra's rights to due process and to a fair trial, and require reversal of her convictions. U.S. Const. amend. XIV, N.J. Const. art. I, ¶¶ 1, 9, and 10. First, the trial court erroneously told the jury it could infer that Mayra intended to kill Rebecca by the mere fact that a wine chiller was the implement used in the killing. Because a wine chiller is not a deadly weapon, that instruction should not have been given. Second, the trial court did not charge the jury on any lesser-included offenses to murder, even though they were clearly indicated in the record. Last, the trial court diminished the State's burden

of proof by telling the jury that if the jury was "firmly convinced of the defendant's guilt, more or less the defendant is guilty of the crime charged, you must find her guilty." (8T 69-2) There is nothing "less" about the high standard that is reasonable doubt. This instruction was erroneous and misleading. Separately and together, these instructional issues prevented the jury from the proper assessment of Mayra's culpability. Mayra's convictions must be reversed.

A. The Instruction That The Jury Could Infer That Defendant Meant To Kill Because Of The Use Of A Wine Chiller As A Weapon Was Erroneous, Prejudicial, And Requires Reversal Of Defendant's Convictions.

Mayra was charged with murder under N.J.S.A. 2C:11-3. To be guilty of murder, an actor must have purposely or knowingly caused death or serious bodily injury resulting in death. N.J.S.A. 2C:11-3a. Lesser mental states, such as recklessness or negligence, do not suffice for a murder conviction.

The trial court improperly alleviated the State's burden to prove Mayra's mental state with an instruction on the use of a "deadly weapon," which was inappropriate in this case where the weapon used was a wine chiller:

> A homicide or a killing with a deadly weapon, such as the wine chiller in itself would permit you to draw an inference that the defendant's purpose was to take life or cause serious bodily injury resulting in death. A deadly weapon is any firearm or other weapon device, instrument, material or substance, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury. In your deliberations, you may consider the weapon used

> and the manner and circumstances of the killing, and if you are satisfied beyond a reasonable doubt that the defendant struck and killed Rebecca Gavilanez-Alectus with a wine chiller, you may draw an inference from the weapon used, that is, the wine chiller and from the manner and circumstances of the killing as to the defendant's purpose or knowledge.

(3T 89-6 to 22) (emphasis added)

Because a wine chiller is not a deadly weapon within the meaning of this inference, the inference should not have been given. At the very least, the jury should have been told that it first had to determine whether the wine chiller was a deadly weapon before it could infer intent merely from its use.

"The establishment of presumptions favorable to the government in criminal and quasi-criminal cases raises delicate issues of due process under the Fifth and Fourteenth Amendments." State v. Ingram, 98 N.J. 489, 496 (1985) (internal citations omitted). It is critical that application of an inference does not in any way "undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." State v. Ingenito, 87 N.J. 204, 220 (1981). Our case law requires that "[t]he validity and applicability" of an inference "must be judged in the light of the totality of the circumstances in a particular case." State v. Blanca, 100 N.J. Super. 241, 249 (App. Div. 1968). An inference cannot be sustained "if the inference of the one from proof of the other is arbitrary because of lack of connection between the

two in common experience." Ingram, 98 N.J. at 549; see also State v. Thomas, 132 N.J. 247, 255 (1993) ("To be constitutional, the elemental fact must bear a rational connection, in terms of logical probability, to the evidentiary fact."). The necessary logical link is missing between the use of a wine chiller to strike someone and an intent to kill or to cause serious bodily injury that an actor is practically certain will result in death. Therefore, the use of the inference was inappropriate.

Our courts "have long accepted that the use of a deadly weapon raises an inference that there was an intent to kill." State v. Martini, 131 N.J. 176, 271 (1993), overruled on other grounds by State v. Fortin, 178 N.J. 540 (2004) (internal quotations omitted). This inference stems from early 20th century case law which identified a logical link between the use of a weapon designed to be deadly (a deadly weapon per se) and the result of the use of that weapon—that it does exactly what it was designed to do: to kill someone. In 1909, our courts upheld the use of an instruction that read:

> The intention to take life may be presumed from the use of a deadly weapon, a weapon calculated to extinguish life. It is to be presumed that the person who uses the weapon intended to execute the work which the weapon was calculated to accomplish; that is, if a person fires at another with a pistol, and kills him, and there is nothing else shown, the presumption is that he intended to do just what the weapon was intended to do; that is, to kill.

State v. Maioni, 78 N.J.L. 339, 343–44 (1909) (internal quotation marks omitted) (emphasis added).

Our court found this instruction to be "incontestably sound." Ibid. As the court explained, in a case with a person who put a gun against someone's head and deliberately pulled the trigger, such a presumption would be appropriate: the actor used the weapon, which was designed to be deadly, in a way that would reliably lead to death. Ibid. If, however, the facts of a case showed that the actor was aiming elsewhere and a person was killed as a ricochet, the instruction "would be legally indefensible." Ibid.

Thus, Maioni makes clear that from the beginning of the use of this inference, it was appropriate only when a weapon that was designed to kill was used to kill. Thus, our case law has rejected arguments that the inference is inappropriate in homicides involving guns when the actor's intent was at issue. Martini, 131 N.J. at 271. That a weapon designed to cause death was used in a way that causes death bears a rational relationship to the actor's intent to cause death. But an ordinary object that is used in a manner that leads to a person's death does not signify intent in the same way. There is no basis in common experience that would lead one to understand that hitting a person with a wine chiller would necessarily lead to death in the way that shooting them would. A wine chiller, unlike a gun, is not designed to cause death.

That is not to say that a jury could not, on its own, infer intent to kill from the weapon used and the manner in which it is used. But there are many intermediate logical steps for a jury to consider in such a case. How heavy was the chiller? Would a reasonable person understand it to be capable of hurting someone grievously? How were Rebecca and Mayra positioned relative to each other? How many times was Rebecca hit? All of these questions, and more, would be relevant to the jury's determination of whether the attack evinced an intent to kill or to cause serious bodily injury that would nearly certainly kill. But that intent should not have been inferred merely by the use of the chiller. The jury should have considered all of the context of the attack and made a determination about Mayra's intent. But by issuing the inference, the court short-circuited that deliberative process and inappropriately alleviated the State's burden.

At the very least, the jury should have been told that it could infer intent from the use of the wine chiller only if it first found the wine chiller was a deadly weapon, a weapon "calculated to extinguish life." Maioni, 78 N.J.L. at 343. The requirement that the question be presented to a jury when a non-per-se-weapon is used is as old as the inference itself. In Fitch v. State, 36 S.W. 584, 584 (Tex. Crim. 1896), a Texas court held that it was error for the court not to instruct the jury that it was required to determine whether a "stick of wood or piece of rail,"

which was three or four feet long and weighed three or four pounds, was a "deadly weapon." Ibid. The court reversed the defendant's conviction due to the failure to present to the jury the questions of whether the weapon was a deadly weapon and whether its use evinced an intent to kill. Ibid. See also Pannill v. Commonwealth, 38 S.E.2d 457, 462 (Va. 1946) ("Generally, unless a weapon is per se a deadly one, the jury should determine whether it, and the manner of its use, places it in that category, and the burden of showing these things is upon the Commonwealth.")

Erroneously telling the jury that the wine chiller was, as a matter of law, a deadly weapon and that Mayra's intent could be inferred from its use was plain error, clearly capable of causing an unjust result. Rule 2:10-2. If the jury determined that Mayra was the perpetrator, the only question remaining would be her intent. By telling the jury that it could infer Mayra's intent by the mere use of the wine chiller, the court inappropriately lessened the State's burden of proof. There was evidence that Mayra, if she were the killer, was not purposefully or knowingly doing anything during the attack, having allegedly told Fernandez-Nataren that she was overtaken by a "spirit." (6T 103-6) As further explained in Subsection B, supra, there was reason to believe that, if Mayra was the perpetrator, she acted with a lesser mental state. Her convictions must be reversed.

B. The Failure To Charge Any Lesser-Included Offenses Of Murder Requires Reversal of Defendant's Convictions.

The State alleged that Mayra killed Rebecca purposefully or knowingly. Although not requested by the State or the defense, the possibility that Mayra acted with a different mental state, and was therefore guilty of a form of manslaughter, was "obvious from the record" and indeed "jump[ed] off the page." State v. Dunbrack, 245 N.J. 531, 545 (2021).

"[T]he right to have the jury consider lesser included offenses implicates 'the very core of the guarantee of a fair trial.'" State v. Short, 131 N.J. 47, 53 (1993) (quoting State v. Purnell, 126 N.J. 518, 531 (1992)). "[S]o paramount is the duty to insure a fair trial that a jury must deliberate in accordance with correct instructions even when such instructions are not requested by counsel." Purnell, 126 N.J. at 531-32 (quoting State v. Grunow, 102 N.J. 133, 148 (1990)). The "primary obligation" of trial courts is to "see that justice is done, and that a jury is instructed properly on the law and on all clearly indicated lesser-included offenses, even if at odds with the strategic considerations of counsel." State v. Garron, 177 N.J. 147, 180 (2003).

The defense did not request any lesser-included offenses at trial and perhaps even objected off-the-record to a passion/provocation instruction being given. (9T 7-4 to 8-4) However, our Supreme Court made clear that such a defense objection is not paramount; rather it is the interest of the jury and the

citizens it represents that controls. State v. Powell, 84 N.J. 305, 319 (1980) ("Very simply, where the facts on the record would justify a conviction of a certain charge, the people of this State are entitled to have that charge rendered to the jury, and no one's strategy, or assumed (even real) advantage can take precedence over that public interest.").

The duty of a trial court to charge unrequested lesser-included offenses is well-established arises where "the facts clearly indicate the appropriateness" of the charge. State v. Robinson, 136 N.J. 476, 489 (1994) (internal quotations and citation omitted). A court need not "scour the statutes to determine if there are some uncharged offenses of which the defendant may be guilty." State v. Funderburg, 225 N.J. 66, 81 (2016) (internal citations omitted). Yet a court must "charge to a lesser offense that was not requested by the parties when that charge is obvious from the record." Dunbrack, 245 N.J. at 545. In this case, the need to charge lesser-included manslaughter offenses was clearly indicated.

First, the court should have instructed the jury on passion/provocation manslaughter. "Passion/provocation manslaughter has four elements: the provocation must be adequate; the defendant must not have had time to cool off between the provocation and the slaying; the provocation must have actually impassioned the defendant; and the defendant must not have actually cooled off before the slaying." State v. Mauricio, 117 N.J. 402, 411 (1990). Where a trial

court finds the first two requirements are satisfied, the subjective elements "should almost always be left to the jury." Mauricio, 117 N.J. at 413. Therefore, if the first two elements are "clearly indicated," a passion/provocation manslaughter charge is "mandate[d]." Robinson, 136 N.J. at 492.

The charge was mandated in this case because the first two elements were clearly indicated: adequate provocation and no time to cool off. "Adequate provocation" is conduct "sufficient to arouse the passions of an ordinary person beyond the power of his/her control." Mauricio, 117 N.J. at 412 (internal quotation and citations omitted). "What is really meant by 'reasonable provocation' is provocation which causes a reasonable man to lose his normal self-control," not provocation "such as to cause a reasonable man to kill." Wayne R. LaFave, 2 Substantive Criminal Law § 15.2(b) (3d ed. 2021). "[A]lthough a reasonable man who has thus lost control over himself would not kill," in cases of adequate provocation, a defendant's use of force in "reaction to the provocation is at least understandable," warranting a conviction for a crime less blameworthy than murder. Ibid.

Our courts have held that a threat on a defendant's life is an adequate provocation. Thus, in Powell, 84 N.J. at 320, our Supreme Court held that a passion/provocation instruction was necessary when there was evidence that there was an argument between the defendant and the decedent, and the decedent

had grabbed defendant's gun. Similarly, it is well-established that a "menacing gesture" can be adequate provocation even where the gesture did not put a defendant "in danger of being killed or seriously injured." State v. Bonano, 59 N.J. 515, 523-24 (1971). As in those cases, a threat to Mayra's life was present in this case. At a N.J.R.E 104 hearing about the voluntariness of Mayra's alleged confession, the trial court found that Fernandez-Nataren's testimony established Mayra's belief that "Rebecca may have intended to poison herself or that she intended to poison the two of them." (6T 65-1 to 2) Like someone grabbing a gun or making a menacing gesture with a knife, finding out that your wife is attempting to poison you is a similar threat of harm to the defendant and thus constitutes adequate provocation.

At sentencing, the trial court belatedly indicated it did not believe there was adequate provocation in this case. (9T 24-3 to 28-25) Although the issue was not relevant at sentencing, insofar as the court's reasoning may be cited by the State as justifying the failure to issue the instruction at trial, the court's retrospective attempt to justify its failure to issue the instruction is unavailing. The court relied on its own view of the pictures of the scene to conclude that the argument that Rebecca bought poison was "not sensible" and that the meat "had not been touched." (9T 28-1 to 22) But the trial court misapprehended the appropriate standard. "It is essential to bear in mind that defendant's use of the

evidence to support a manslaughter instruction need only be plausible, it need not be the most probable explanation. The measure of probability is for the jury once the claims of the parties have passed the threshold of possibility. Powell, 84 N.J. at 415. Thus, in Powell, our Supreme Court held that it was error not to instruct the jury on passion/provocation manslaughter even when the evidence for it was, in part, a statement made by the defendant that he later "disavowed." Id. at 415. Neither the fact that only part of the confession could be true if passion/provocation was to be an appropriate verdict, nor that defendant disavowed his statement, nor his lies about his alibis, nor the fact that it was "[m]ost likely" that the defendant committed murder was a basis to withhold this instruction from the jury. Id. at 415. "A court need not accept the suggestion" that passion/provocation manslaughter occurred in order to be required to give that instruction. Ibid.

Here, there was evidence that Mayra believed Rebecca was trying to kill her. That is an adequate provocation. There is no evidence that any time elapsed between when Mayra discovered this and when she killed Rebecca. Therefore, the passion/provocation instruction was necessary.

The court should also have charged aggravated and reckless manslaughter. Aggravated manslaughter is a reckless killing, committed with extreme indifference to human life. N.J.S.A. 2C:11-4a. Reckless manslaughter is a

reckless killing. N.J.S.A. 2C:11-4b. The difference between aggravated and reckless manslaughter "is the difference in the degree of the risk that death will result from defendant's conduct." State v. Curtis, 195 N.J. Super. 354, 364 (App. Div. 1984). Reckless manslaughter "involves a mere possibility of death"; aggravated manslaughter "involve[s] a probability of death." Id. at 365.

Thus, the critical question in deciding whether it would be appropriate to charge these lesser-included offenses is whether the jury could have had a reasonable doubt whether Mayra hit Rebecca intending, or at least knowing, that serious injury or death would result and, instead, the jury would believe that Mayra merely recklessly disregarded that risk of death.

Our courts have been ordered to instruct juries on the lesser-included offenses of aggravated and reckless manslaughter in cases with stronger indicia of intent to kill than this case. In O'Carroll, the victim died by strangulation that would have taken a number of minutes to accomplish. State v. O'Carroll, 385 N.J. Super. 211, 219-220 (App. Div. 2006). Yet this Court held that it was clearly indicated that a jury could have questioned defendant's intent and believed that he struggled with the victim and did not intend to seriously injure her, despite the amount of time necessary to accomplish a strangulation, and, thus, aggravated and reckless manslaughter should have been charged. Id. at 228-233. As in O'Carroll, a properly instructed jury in this case "could have found that

rather than intending [the victim's] death, or knowing that her death was the likely result of his actions, defendant consciously disregarded a known risk with either a probability or possibility that death would follow from [her] conduct." Id. at 232.

Similarly, even a purposeful blow to the head with a brick that is so forceful that it causes the victim to lose consciousness (and die thereafter) is not so clearly the "knowing" infliction of serious injury that can lead to death that it precludes the charging of aggravated and reckless manslaughter as a lesser-included offense; rather, it was deemed plain error to omit such these instructions. State v. Jenkins, 178 N.J. 347, 354-364 (2004). Only where the nature of the weapon and the crime itself is such that no reasonable juror could doubt that the actor intended to kill or seriously injure is manslaughter properly withheld from the jury as a possible verdict. See State v. Mendez, 252 N.J. Super. 155, 161-162 (App. Div. 1991) (spraying a machine gun into a crowd does not support an instruction on a lesser manslaughter offense); State v. Sanchez, 224 N.J. Super. 231, 242-243 (App. Div. 1991) (close-range maliciously-fired shotgun blast into face, neck and chest does not warrant aggravated manslaughter instruction, but court noted the "fine line" ordinarily present between the culpable mental states for murder and aggravated manslaughter). In other words, it is the very rare homicide that charging a lesser included form of

manslaughter is not the appropriate course of action. This was not that rare homicide.

Failure to charge the jury sua sponte regarding a lesser-included charge will warrant reversal where that error is "sufficient to raise 'a reasonable doubt" as to whether it "led the jury to a result it otherwise might not have reached.'" Funderburg, 225 N.J. at 79 (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)). That standard is met in this case. Even if the jury believed Mayra was the killer, there was still the important question of her intent. There was no witness who could opine on Mayra's intent, and there was no confession that suggested a murderous intent. As to passion/provocation manslaughter, the act was so violent and unexpected and the confession so confusing that it jumped off the page to everyone that something might be wrong with Mayra's mental state: as the trial court noted, this confession spurred a need to investigate an insanity or diminished capacity defense. (9T 26-13 to 21) The killing seems senseless and inexplicable. But the reason for the killing may well have been the reason the jury was unable to consider: that Mayra acted under a provocation that caused her to lose her self-control. As to aggravated and reckless manslaughter, the unusual implement used in the crime—which, as discussed above, is not per se a lethal weapon—could have led the jury to doubt that Mayra intended to cause death or injury likely to lead to death, but disregarded the chance that death

would occur. The likelihood that Mayra acted without purposeful or knowing intent is further suggested by her alleged confession, in which she said she was overtaken by a spirit, hardly a sign of deliberative action. Mayra's convictions must be reversed.

C. The Inappropriate Instruction On The Meaning Of Reasonable Doubt Necessitates Reversal Of Defendant's Convictions.

At the beginning of its final instruction, when defining fundamental legal concepts, the trial court told the jury: "If, based on your consideration of the evidence, you are firmly convinced of the defendant's guilt, more or less the defendant is guilty of the crime charged, you must find her guilty." (8T 68-20 to 69-7) The insertion of "more or less" diluted the significance of reasonable doubt and diminished the State's burden. Mayra's convictions must be reversed.

"A jury instruction that fails to communicate the State's burden to prove guilt beyond a reasonable doubt is not amenable to harmless-error analysis and requires reversal." State v. Medina, 147 N.J. 43, 49 (1996). The Supreme Court has "cautioned trial courts against using any charge that has a tendency to understate or trivialize the awesome duty of the jury to determine whether the defendant's guilt was proved beyond a reasonable doubt." State v. Biegenwald, 106 N.J. 13, 41 (1987) (internal quotation marks omitted). Thus, our Supreme Court has explained that a definition of reasonable doubt as "a doubt for which a reason can be given" was inappropriate because "[j]urors may harbor a valid

reasonable doubt even if they cannot explain the reason for the doubt." Medina, 147 N.J. at 52.

Proof beyond a reasonable doubt is not anything "less" than proof that leaves a jury firmly convinced of the defendant's guilt. Like in Medina, the instruction given here was inappropriate because it made the reasonable doubt standard appear less weighty that it is. Proof beyond a reasonable doubt is proof that leaves a jury firmly convinced of defendant's guilt, and no less. Unlike Medina, in which the error was found harmless because "immediately following the offending clause, the trial court provided an alternative definition of reasonable doubt," there was no alternative definition given in this case. Ibid. Therefore, the harm of the erroneous instruction was not mitigated.

"The denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction" is a structural error that requires reversal of a conviction. United States v. Gonzalez–Lopez, 548 U.S. 140, 148–49 (2006). The instruction in this case trivialized the high burden of proof that is required in criminal cases. The convictions must be reversed.

D. Individually And Cumulatively, The Instructional Errors Require Reversal Of Defendant's Convictions.

An improperly instructed jury cannot reach a valid verdict. Two of the instructional errors in this case went straight to the heart of an essential element of the offense: Mayra's mental state. The deadly weapon inference should not

have been given; its issuance put a thumb on the scale of finding the mental state for murder. Further, failure to give any lesser-included instruction also pushed the jury into convicting Mayra of murder if it found she was the killer, despite clear reason to believe she acted under a strong provocation or without intending to cause death or serious bodily injury that was practically certain to cause death. Last, the lessening of the meaning of reasonable doubt infected the jury's deliberations as to all charges. Mayra's convictions must be reversed.

POINT III

THE ADMISSION OF IRRELEVANT AND INFLAMMATORY EVIDENCE THAT DEFENDANT HAD ATTACKED A WITNESS REQUIRES REVERSAL OF HER CONVICTIONS. (Not Raised Below)

Fernandez-Nataren testified that after Mayra supposedly confessed to her that she murdered her wife, Fernandez-Nataren willingly went to sleep with her. Fernandez-Nataren then stated that at some point that night Mayra "got up and she started pushing on me, pushing on my throat, close to my neck." (6T 110-16 to 23) She testified further that "that something would happen" to her because of her knowledge of Mayra's "confession." (6T 113-3) This testimony was irrelevant and inflammatory. It served to depict Mayra as a person who commits violence against women. The admission of this testimony violated our rules of

evidence and denied Mayra of due process and a fair trial. U.S. Const. amends. VI, XIV; N.J. Const., art. I, pars. 1, 9, 10. Her convictions must be reversed.

New Jersey Rule of Evidence 404(b) sharply limits the admission of evidence of other crimes or wrongs. This limitation is essential to guard against the risk "that the jury may convict the defendant because he is a 'bad' person in general" rather than because of the evidence adduced at trial. State v. Cofield, 127 N.J. 328, 336 (1992). "Because evidence of a previous misconduct 'has a unique tendency' to prejudice a jury, it must be admitted with caution." State v. Willis, 225 N.J. 85, 97 (2016). Prior-bad-act evidence "has the effect of suggesting to a jury that a defendant has a propensity to commit crimes, and, therefore, that it is more probable that he committed the crime for which he is on trial." Ibid. (internal quotation marks omitted).

To make certain that such evidence will be used only for appropriate, limited purposes and not to demonstrate the defendant's propensity to commit crime, Cofield set out a four-pronged test for the admissibility of evidence under N.J.R.E. 404(b):

> (1) the evidence of the other crime must be relevant to a material issue in dispute;
>
> (2) it must be similar in kind and reasonably close in time to the offense charged;
>
> (3) the evidence must be clear and convincing; and,

> (4) the evidence's probative value must not be outweighed by its apparent prejudice.

Cofield, 127 N.J. at 338. As the Cofield court emphasized, admitting evidence of other bad acts is the exception, not the rule. Id. at 337. As such, N.J.R.E. 404(b) is a rule of exclusion, not a rule of inclusion. Willis, 225 N.J. at 100.

The evidence in this case failed to meet prongs (1) and (4) of the Cofield test. Moreover, the failure to give any instruction to the jury to not consider the choking as evidence of Mayra's bad character exacerbated the prejudice from the inappropriate admission of the other-bad-act evidence.

The evidence presented at trial was not relevant to any material issue in dispute, which is a prerequisite for admission of other-bad-act evidence. Willis, 225 N.J. at 98. The other-bad-act evidence "cannot merely be offered to indicate that because the defendant is disposed toward wrongful acts generally, he is probably guilty of the present act." Ibid. (internal citation omitted). No relationship existed, and none was proffered, between the choking and Rebecca's murder. Because the other-bad-act evidence had zero probative value, the prejudice of its admission outweighed the non-existent probative value. Inappropriately establishing that Mayra was violent towards another woman not only raises the general specter that she is a bad person who does bad things, but it raises the specific likelihood, in the mind of the jury, that she is violent towards women in her life.

The similarity between the charged offense and the uncharged conduct, both involving violence against a woman sharing a bed with Mayra, exacerbates the prejudice of the admission of this evidence. In State v. Hernandez, 170 N.J. 106, 131-133 (2001), the Supreme Court reversed a conviction because of the admission of bad-act testimony that bore a strong similarity to the charged conduct. In Hernandez, the defendant was charged with possession and possession with intent to distribute CDS. Id. at 113. The State introduced testimony that defendant had sold drugs in the same manner twenty times during the two months prior to arrest for the instant offense. Id. at 129. The Court held first that "[t]hat extremely prejudicial testimony smacks of prohibited 'propensity' evidence," a concern equally present in this case due to the similar nature of the prior offenses. Ibid.

Finally, the failure to issue any instruction to the jurors about how to use this evidence compounds the harm of admitting the evidence. Our Supreme Court has held that a clear, explicit instruction on the appropriate use of other-bad-act evidence is necessary in every case. State v. Oliver, 133 N.J. 141, 158 (1993). In Hernandez, an instruction was given, but found to be inadequate, resulting in the reversal of defendant's convictions. The Court explained that because of the striking similarity between the offenses, "even if one could hypothesize some weighty probative value to attribute to that troubling

testimony that would outweigh its undue prejudicial affect, it is difficult, if not impossible, to divine the limiting instruction that could offset its 'propensity' impact." Hernandez, 170 N.J. at 130. In this case, an instruction was not even attempted.

Because of the introduction of this testimony, the jury was more likely to find Mayra killed her wife because she's a violent person who hurts women and the jury was never told that this was an inappropriate line of thinking. Thus, because "[a]ppropriate and proper charges to a jury are essential for a fair trial," the failure to properly instruct the jury on the appropriate use of the other-act evidence (that should have never been admitted in the first place) necessitates reversal of Mayra's convictions. State v. Green, 86 N.J. 281, 287 (1981).

POINT IV

EVEN IF ANY ONE OF THE COMPLAINED-OF ERRORS WOULD BE INSUFFICIENT TO WARRANT REVERSAL, THE CUMULATIVE EFFECT OF THOSE ERRORS WAS TO DENY DEFENDANT DUE PROCESS AND A FAIR TRIAL. (Not Raised Below)

Because each of the errors complained of in Points I through III would have affected the jury's resolution of defendant's guilt, Mayra separately asserts that even if none of those errors is deemed sufficient on its own to warrant reversal, together they deprived her of due process and a fair trial, as guaranteed

to her by the Fourteenth Amendment and the corresponding provisions of the state constitution. State v. Sanchez-Medina, 231 N.J. 452, 469 (2018).

It was undisputed that Rebecca was killed—no issue of accident or causation was in this case. Who the killer was and what their mental state was were the only two issues before the jury. The only evidence of Mayra's guilt was the "confession" relayed secondhand by an informant with pending charges and, perhaps, Rebecca's DNA on Mayra's undergarments. To bolster its case, the State elicited from its forensic experts inaccurate testimony about the infallibility of the scientific fields at issue in this case. This testimony placed Mayra's fingerprint on the murder weapon beyond dispute, presented as an unerring truth that the blood pattern found on a shirt at the scene was consistent with the wearer removing it after beating Rebecca, stated as a blanket truth that Rebecca's DNA was in the blood on Mayra's bra, and explained away any physical issue that Mayra might have creating these kinds of injuries by presenting Mayra's supposed "rage" as a scientific excuse. The State also allowed its star witness to opine about similar, uncharged conduct of choking her as they slept together. Between these errors in the evidence presented, and the errors in the jury instructions, which prevented the jury from properly deliberating on Mayra's mens rea, Mayra was deprived of a fair trial. Her convictions must be reversed.

POINT V

THE SENTENCE OF 45 YEARS IS EXCESSIVE FOR DEFENDANT, WHO WAS 50 YEARS OLD AT THE TIME OF SENTENCING AND WAS A FIRST-TIME OFFENDER. (9T 34-17 to 40-18)

The trial court sentenced Mayra to 45 years in prison with an 85% period of parole ineligibility. (9T 39-5 to 13) In doing so, the court made inappropriate findings about general and specific deterrence and failed to give proper weight to the fact that this was Mayra's first conviction. The resultant sentence is excessive for this first-time offender, who was 50 years old at the time of sentence.

When imposing a sentence, a court must consider the applicability of the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1 to determine the length of a defendant's prison term within the available range. This step requires a court to "identify the aggravating and mitigating factors and balance them to arrive at a fair sentence." State v. Natale, 184 N.J. 458, 488 (2005). Simply enumerating the applicable aggravating and mitigating factors is insufficient. State v. Kruse, 105 N.J. 354, 363 (1987). Rather, a court's sentencing decision must "follow[] not from a quantitative, but a qualitative analysis." Ibid.

In this case, the judge found mitigating factor (7), the defendant has no history of prior delinquency or criminal activity and gave it moderate weight. N.J.S.A. 2C:44-l(b). (9T 37-5 to 17) The judge found aggravating factors (2),

that the victim was substantially incapable of exercising normal physical or mental power of resistance and gave it heavy weight; (3) the risk that defendant will commit another offense, giving it lighter weight, and (9), the need to deter. N.J.S.A. 2C:44-l(a), giving it "extremely heavy" weight. (9T 35-14 to 37-3)

The trial court's heavy reliance on deterrence was misplaced, especially when viewed in conjunction with Mayra's advanced age upon release even if she received the minimum sentence of 30 years in prison. As our Supreme Court recently emphasized, "[a] defendant's age is doubtlessly among the information that courts should consider when calibrating a fair sentence." State v. Torres, 246 N.J. 246, 273 (2021). That information is necessary to consider the need for deterrence and incapacitation. Mayra was 3 days shy of 51 years old at the time of sentencing. (9T 37-7 to 8) Even if sentenced to the minimum term — 30 years in prison with 30 years of parole ineligibility — she would not be parole eligible until she was almost 80. The 45-year-sentence sentence is longer than necessary to serve a deterrent or incapacitative purpose; the minimum possible sentence would have been sufficient. That is because older people are much less likely to commit crimes, and each marginal year of a lengthy sentence has minimal to no deterrent value.

"The empirical fact of a decline in the crime rate with age is beyond dispute." Travis Hirschi and Michael R. Gottfredson, Age and the Explanation

of Crime, 89 Am. J. Soc. 552, 565 (1983). Because older people are dramatically less likely to reoffend, experts agree that these studies persuasively prove that very lengthy sentences go beyond what is necessary to prevent re-offense if the defendants were released. In the words of the National Research Council, "because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders." National Research Council, The Growth of Incarceration in the United States: Exploring Causes And Consequences, 155-56 (2014).

As with incapacitation, there is a clear consensus about deterrence in the social science literature: each extra year of a lengthy sentence does very little to nothing to further either general or specific deterrence. As to general deterrence, "[t]he weight of criminological knowledge teaches that marginal increases in the severity of criminal sanctions rarely bring about marginal improvements in general deterrence in the community." Model Penal Code: Sentencing (American Law Inst., Proposed Final Draft, 2017). See also National Research Council, The Growth of Incarceration in the United States: Exploring Causes And Consequences 139 (2014) (the relationship between sentence length and crime rate reflects "diminishing deterrent returns to increasing sentence length,"

such that there is only "a small crime reduction response" to increases in lengthier sentences). Similarly, as to specific deterrence, the National Academy of Sciences concluded that "[t]here is no credible evidence of a specific deterrent effect of the experience of incarceration." Id. at 156. The specific-deterrence effect of incarceration, if any, "rapidly diminish" as sentences become lengthy, David S. Abrams, Building Criminal Capital vs Specific Deterrence: The Effect of Incarceration Length on Recidivism 21 (Working Paper Dec. 2011). The 45-year sentence is longer than necessary to further incapacitation or deterrence.

In sum, because the trial court failed to adequately account for Mayra's age upon release if she received a lesser sentence, and the effect of her age and lengthy sentence on the need to deter, the sentence must be vacated, and the matter remanded for a new sentencing proceeding.

CONCLUSION

For all the reasons set forth in Points I-IV, Mayra's convictions must be reversed. In the alternative, for the reasons set forth in Point V, her sentence must be vacated and the matter remanded for a new sentence.

Respectfully submitted,

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Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-1825-22T4

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Respondent,	:	On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Ocean County.
v.	:	Sat Below:
MAYRA J. GAVILANEZ-ALECTUS,	:	Hon. Rochelle Gizinksi, J.S.C., and a jury.
Defendant-Appellant.	:	

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PSR - Defendant's Presentence report
1T – September 19, 2022 – Vol. 1
2T – September 19, 2022 – Vol. 2
3T – September 20, 2022
4T – September 21, 2022
5T – September 22, 2022
6T – September 27, 2022
7T – September 28, 2022
8T – September 29, 2022
9T – January 12, 2023

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On August 11, 2022, an Ocean County Grand Jury returned Indictment 22-08-1446, charging defendant with committing first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (a)(2) and related weapons charges. (Da1-3).

Trial was held before the Honorable Rochelle Gizinski, J.S.C, and a jury in September 2022. (1T-8T). On September 29, 2022, defendant was convicted on all counts. (Da4-5); (8T116-1 to 8). On January 12, 2023, defendant was sentenced to forty-five years New Jersey State Prison under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, for count one. (9T39-5 to 9; Da6-9).

On February 23, 2023, defendant filed a notice of appeal. (Da10-13).

COUNTERSTATEMENT OF FACTS

The following facts were deduced from defendant's trial.

A. Rebecca Gavilanez-Alectus was discovered murdered in her bedroom.

Snyme Etienne, a coworker of the victim, Rebecca Gavilanez-Alectus, knew defendant as Rebecca's spouse. (1T75-1 to 3; 1T77-21 to 78-16; 1T79-14 to 80-17). On May 16, 2020, Rebecca told Snyme she wanted to leave defendant. (1T86-23 to 87-6). At work that day, Rebecca took an angry call from defendant on speaker in front of Snyme about Rebecca leaving defendant. (1T92-23 to 93-16; 1T94-10 to 19; 1T94-21 to 25; 1T95-16 to 19).

After work, Snyme reached out to Rebecca, but Rebecca never replied.

This worried Snyme because Rebecca always answered. (1T97-22 to 98-14). Around 7:00 a.m. the next day, Snyme looked for Rebecca at work, but she was not there. (1T99-4 to 100-25). Snyme called Rebecca's mom, and together they went to Rebecca's house where she lived with defendant; but the door was locked. (1T101-1 to 102-10; 1T107-3 to 12). Snyme suggested calling the police, but Rebecca's mom declined. Snyme then returned to work. (1T108-5 to 109-12).

Later that day, defendant's daughter, Francia N. Gavilanez, received a worried phone call from Rebecca's mother. She told Francia about going to the house. (7T57-18 to 58-5). At around 11:35 a.m., Francia went with her boyfriend to the house to look for defendant. (7T35-1 to 2; 7T35-13 to 36-5). They knocked on the front door, but no one answered and the back door was also locked. (7T36-6 to 15). Michael took the screen off a window, went inside, and let Francia inside. (7T36-16 to 25). He went upstairs and when he reached the second floor, he saw a body lying in bed. (7T37-1 to 7). Once in the bedroom, he saw blood everywhere and confirmed there was a body in the bed. (7T37-8 to 19). When he moved the blanket, he realized it was Rebecca and called the police. (7T28-12 to 39-2; 4T139-13 to 17; 7T39-11 to 20).

On May 17, 2020, Officer Michael DeFluri responded to a call for an unconscious female. (1T34-20 to 36-16). At the house he went upstairs and

entered the bedroom, where he found Rebecca under blankets soaked in blood. (1T38-20 to 39-8; 1T39-24 to 40-5). DeFluri testified that the bedroom was "a pretty gruesome scene" so he requested additional personnel to the scene. (1T39-24 40-8 to 16).

B. The police investigate Rebecca's apparent homicide.

Detective Sergeant Michael O'Hearn from the Ocean County Sheriff's Office Crime Scene Investigation (CSI) Unit arrived at the house to process a homicide. (1T118-21 to 119-7; 1T121-9 to 12; 1T127-10 to 12). In processing the house, he photographed a tray with raw meat and collected a wine chiller covered in blood by the victim's thighs and a bloody shirt on the bathroom counter. (7T37-1 to 7; 1T134-9 to 13; 1T140-2 to 6; 1T152-8 to 10; 1T144-21 to 25; 1T145-11 to 22; 5T25-17 to 22). Examination of the wine chiller revealed that it weighed about five and a half pounds and that there was suspected blood on the inside lip. (3T13-10 to 12; 3T13-15 to 14-2; 3T15-13 to 16; 3T19-8 to 14).

A forensic analysis on defendant's cell phone showed that on May 16, 2020, she searched for cheap flights, a travel agency, Greyhound, and Canal Street in New York City on Apple Maps. (4T27-15 to 22; 4T36-16 to 18; 4T43-24 to 25; 4T79-7 to 18; 4T80-18 to 22; 4T81-17 to 82-8 to 10). Ring camera footage from around defendant's home depicted her home around 4:32

p.m., and leaving at 5:15 p.m., in her 2005 red Chrysler Pacifica. (4T89-21 to 91-20; 4T110-15 to 18; 4T113-8 to 114). A stop-and-hold on defendant's car was entered into the National Crime Information Center for law enforcement. (4T140-19 to 142-10). On May 19, 2020, an automatic license plate reader identified her car in front of 9 East 40th Street in New York City on May 16, 2020, at 7:11 p.m., where it remained. (4T142-11 to 23; 4T145-16 to 23).

Surveillance footage from East 40th Street captured defendant's vehicle arriving at 7:00 p.m. on May 16, 2020; a person in a red shirt exited the car. (4T150-19 to 152-3). Surveillance footage from Popular Bank in New York showed a person in a red shirt enter on May 16, 2020, at 7:31 p.m. (4T153-8 to 11; 4T154-1 to 9). Defendant's Poplar Bank records revealed a $700 withdrawal from her account at that time. (4T157-22 to 25; 4T160-5 to 11). Other surveillance footage from that day, between 7:30 and 9:00 p.m. showed her entering the Port Authority Bus Terminal, going to the ticket counter, and waiting for a bus. (4T165-20 to 173-15; 4T179-4 to 7; 4T180-19 to 23).

On May 16, 2020, a ticket was purchased in defendant's name at the Greyhound station in the New York City Port Authority for a trip from New York to Miami, Florida, with a transfer in Richmond, Virginia. (4T8-23 to 9-4; 4T14-7 to 15-1; 4T15-22 to 19; 4T17-13 to 15). Greyhound's records indicated that the passenger did not board at the transfer point. (4T17-3 to 15).

On May 17, 2020, a ticket to Houston, Texas was purchased with cash for a passenger named Lorena Rodriguez. (4T18-17 to 19-25; 4T20-9 to 11).

C. Defendant fled New Jersey and confessed to murdering her wife.

On May 17, 2020 while waiting for a Greyhound bus to Houston, defendant approached Jessenia Murillo Ramos and introduced herself as Lorena and asked for help fleeing her abusive husband. (6T72-14 to 23). (6T74-6 to 21). Jessenia called Jenny Fernandez-Nataren, whom she lived with, to ask if defendant could stay at their home for a few days. (6T74-10 to 14; 6T87-20 to 89-12). On May 18, 2020, they met Jenny at the Houston bus station. (6T78-2 to 12; 6T89-23 to 18). Defendant provided Jenny with the same information. (6T90-2 to 92-15). Sympathizing with defendant Jenny offered her a place to stay and brought her home. (6T90-6 to 10; 6T93-1 to 5).

Around 1:00 a.m. on May 19, defendant asked to speak to Jenny alone and started crying and asking for forgiveness. (6T97-15 to 98-6). Eventually defendant told Jenny she had killed her wife. (6T99-1 to 17). She told Jenny Rebecca had stopped answering her calls, but she had convinced Rebecca to come to the house and planned to cook her favorite food. (6T100-4 to 11). Rebecca said she was picking up cockroach poison and then coming. (6T100-17 to 101-8). Defendant said one of the first things Rebecca asked when she got to the house was what defendant would do if she died. (6T101-13 to 20).

Rebecca said she was sleepy, so defendant told her to lie down while she cooked. (6T101-20 to 102-3). Defendant said she saw the roach poison next to the food she was going to cook and suspected Rebecca had tampered with it, due to her drowsiness and the comment about dying. (6T102-8 to 15). So defendant said she started hitting Rebecca with her hands. Rebecca woke up asking, "Why are you killing me?" (6T102-15 to 103-5). Defendant told Jenny that at that moment, she heard a spirit telling her not to stop. (6T103-5 to 7). Defendant grabbed a chiller and when she was done, there was blood all over the room, so she left. (6T103-13 to 21). Defendant told Jenny that she went to New York and abandoned her car there. (6T104-1 to 2).

After confessing, defendant seemed shaken up, so Jenny suggested she take a bath and eat something. (6T104-14 to 18; 6T105-14 to 18). Defendant asked Jenny to stay in the bathroom. (6T106-1 to 10). She was still wearing the same clothes she wore at the bus station, and when she undressed, Jenny saw what looked like blood on defendant's bra. (6T105-19 to 106-19). As defendant bathed, Jenny gathered her clothes in a black bag. (6T108-2 to 7; 6T109-9 to 12). Jenny had been working as an FBI informant and planned to tell her connection in the FBI about defendant. (6T87-1 to 11; 6T108-8 to 10).

The next day, Jenny called her FBI contact. (6T111-3 to 12). The agent coordinated with local police, and on May 20, 2020, Houston Police Detective

Daniel Guzman went to Jenny's house and participated in defendant's arrest. (6T113-9 to 13; 6T117-22 to 25; 6T130-20 to 131-9; 6T132-7 to 13). Jenny gave the police a recounting of what occurred the last few days and the bag with all the clothes. (6T119-12 to 18). Defendant was transported back to New Jersey on June 2, 2020. (4T184-22 to 185-2).

Based on all the above facts and the expert testimony discussed below, the jury found defendant guilty of all charges. (8T116-1 to 8).

LEGAL ARGUMENT

POINT I

THE EXPERTS TESTIFIED HELPFULLY WITHIN THEIR RELEVANT FIELDS.

The forensic evidence established Rebecca died from cranial blunt force trauma during two beatings with a wine chiller that had defendant's fingerprint, and Rebecca's blood was on a shirt found in the house and the bra defendant wore. Notably, there were no objections during the testimony presenting this evidence, and the DNA expert was not cross-examined. Defendant thus carries the substantial burden to prove the testimony amounted to plain error, a burden she fails to meet.

Moreover, the forensic evidence, although discussed, was not pivotal to the State's case. Defendant does not dispute that Rebecca was murdered with the wine chiller; and allegedly her discovery of the body caused her flight.

Thus, the forensic evidence merely affirmed what defendant acknowledged. In contrast, the jury heard about defendant's confession, her flight, and her lies. The jury was also properly instructed that they held ultimate authority as fact-finders and were not obligated to accept expert testimony. Thus, the few remarks by forensic experts, when considered within the broader context of their testimony and the trial itself, do not rise to the level of plain error.

"If scientific . . . 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 thereto in the form of an opinion or otherwise." N.J.R.E. 702. "In all cases where expert testimony is allowed, the trial court, . . . should give a limited 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.'" State v. Cotto, 471 N.J. Super. 489, 531 (App. Div. 2022) (citation omitted); State v. Jenewicz, 193 N.J. 440, 466 (2008). "The bases on which an expert relies when rendering an opinion are a valid subject of cross-examination." Ibid.

"The failure of defendant to have interposed an objection to the expert's testimony limits [appellate] review to search for plain error[.]" State v. Nesbitt, 185 N.J. 504, 516 (2006); see R. 2:10-2. "Convictions after a fair trial, based on strong evidence proving guilt beyond a reasonable doubt,

should not be reversed because of a . . . evidentiary error that cannot have truly prejudiced defendant or affected the end result." State v. W.B., 205 N.J. 588, 614 (2011).

At the beginning of the trial, Judge Gizinski instructed the jurors they were the "sole judges of facts," and it was up to them to "determine the credibility of witnesses." (1T7-22 to 8-4; 1T28-7 to 19-2). Judge Gizinski then gave instructions on how to consider expert testimony, noting the jury was not "bound by such expert's opinion" and should "consider each opinion and give it the weight to which [they] deem it entitled," which included rejecting it. (1T20-21 to 24). She instructed them that it is "always within the special function of the jury to determine whether the facts on which the answer or testimony of an expert is based actually exists." (1T21-3 to 11). Then, before the first expert in the case testified, Judge Gizinski informed the jury that they were "not bound by his opinion" and could reject it. (3T41-19 to 21).

Again, during final jury instructions, Judge Gizinski reminded the jury of the same principles, of all the experts they heard from, and that they were "not bound by such expert's opinion." (8T77-6 to 79-4). Thus, the jury was repeatedly informed that they were to consider the credibility of the experts and then weigh that evidence themselves.

A. The State's fingerprint expert properly testified to opinions within his expertise and according to applicable standards and New Jersey Law.

The State's latent fingerprint expert's testimony did not amount to plain error. He was not constrained by out-of-state caselaw, and defendant could have used the scientific reports for cross-examination but chose not to. Testifying about the verification step was proper expert testimony about the basis for his expert opinion. And the expert remained within his expertise in ridge analysis when discussing the blood on the finger when it made the print.

1. Captain Armstrong properly testified defendant's fingerprint was on the inside lip of the wine chiller.

Captain Matthew Armstrong from the Ocean County Sheriff's Office CSI Unit testified as an expert in latent fingerprint examination and analysis. (3T47-16 to 18). He explained he uses the ACE-V method, which stands for analysis, comparison, evaluation, and verification, to examine fingerprints. (3T58-21 to 23). The analysis takes place when he receives a latent fingerprint and examines it, what material it was left on, what the surface looks like, and if it is suitable for comparison. (3T58-24 to 59-4). A ten-fingerprint exemplar is also analyzed to ensure it is eligible for comparison. (3T59-5 to 13).

Armstrong completes a side-by-side comparison between the latent and exemplar prints during the comparison step. The evaluation step is Armstrong's conclusion of whether the latent print is from the same source as the exemplar. (3T59-18 to 20). Ocean County's procedures require

verification by two other examiners before the results are published. (3T59-22 to 60-1).

Captain Armstrong next described the ACE-V results here, comparing the ten-fingerprint exemplar from defendant and the latent print developed from the inside lip of the wine chiller. (3T49-1 to 3; 3T63-4 to 9). Based on fourteen points of identification, Armstrong determined that defendant's right thumb made the latent print inside the wine chiller. (3T67-13 to 68-4). He then stated that for the verification step, two examiners did the exact same thing he did and reached the same conclusion. (3T68-17 to 21; 3T68-22 to 68-25). The prosecutor asked if he would have come to the same conclusion if there had been a difference of opinion, but Armstrong answered that he had "never seen that." (3T69-1 to 5). He explained that with "fingerprints, they're basically, you're looking at it. . . . There's no opinion to be spoken. It's totally objective." (3T69-12 to 16).

The testimony adheres to New Jersey legal standards, and defendant's references to out-of-state case law fail to establish an unjust result. In 2009, the National Academy of Sciences (NAS) issued a report called Strengthening Forensic Science in the United States: A Path Forward, which discussed criticisms of how certain forensic testing was introduced at trial. In regard to latent fingerprint testimony, "courts have . . . concluded the NAS Report

insufficient to warrant changes to the status of latent fingerprint identification evidence." State v. Lizarraga, 364 P.3d 810, 830 n.20 (Wash. Ct. App. 2015) (collecting cases). This Court noted, "the purpose of the NAS report is to highlight deficiencies in a forensic field and to propose improvements to existing protocols, not to recommend against admission of evidence." State v. McGuire, 419 N.J. Super. 88, 132 (App. Div. 2011) (citing Hon. Harry T. Edwards [committee co-chair], Statement Before U.S. Senate Judiciary Committee (March 18, 2009) ("nothing in the [NAS] Report was intended to answer the 'question whether forensic evidence in a particular case is admissible under applicable law'")).

A California Court of Appeals, addressing a claim based on the NAS report, noted the ways a defendant can diminish the weight of any fingerprint evidence, including "challenging the training of the fingerprint expert . . . the process by which the fingerprint expert made the comparison, . . . or by showing that the fingerprints do not match, either by calling the defense's own expert or simply showing the jury where they do not match[.]" People v. Rivas, 190 Cal. Rptr. 3d 43, 51 (Ct. App. 2015). Courts have acknowledged that the proper place for defendant's alleged errors about the overstatement of a fingerprint expert's analysis was at trial in front of the jury. See People v. Luna, 989 N.E.2d 655, 673 (2013). When addressing the same criticisms made

by defendant here, the Illinois Court of Appeals stated, "Questions concerning underlying data, and an expert's application of generally accepted techniques, go to the weight of the evidence, rather than its admissibility." Ibid. (quoting Donaldson v. Cent. Ill. Pub. Serv. Co., 767 N.E.2d 314, 326 (2002). "Before the jury, the examining attorney 'may expose shaky but admissible evidence by vigorous cross-examination or the presentations of contrary evidence.'" Ibid. (quoting Donaldson, 767 N.E.2d at 330).

Defendant instead relies on Massachusetts Supreme Court rulings, which found the report showed a "need to prevent overstatement of the accuracy of fingerprint comparisons," and has since required that testimony indicating a latent print matches a known print "be presented as an opinion, not a fact[.]" Commonwealth v. Gambora, 933 N.E.2d 50, 59, 61 n.22 (Mass. 2010). But even then, the court has recognized that any overstatement could be harmless. Id. at 60-61. In reaching this determination, the court emphasized that evidence of a defendant's guilt could be significant, rendering any alleged overstatement inconsequential to the jury's judgment or only have a "very slight effect." Id. at 61; see also Commonwealth v. Fulgiam, 73 N.E.3d 798, 820-21 (Mass. 2017); Commonwealth v. Armstrong, 211 N.E.3d 622, 626 (Mass. 2023). The court also acknowledged that any error could be mitigated by the expert's other testimony, such as the facts that latent prints come from

uncontrolled settings, that it is impossible to determine when latent prints are deposited, and that there may be issues with the surface from which a latent print is taken. Fulgiam, 73 N.E.3d at 821.

The Massachusetts cases are not binding authority, and neither the expert nor the prosecutor was obligated to ensure that the testimony complied with another state's expert rules. See Mason v. State, 433 P.3d 1254, 1273 (Okla. Crim. App. 2108). As the Oklahoma Court of Criminal Appeals aptly noted, "the scholarly and scientific articles could have been, but were not, used at trial to cross-examine the fingerprint expert about the reliability of his conclusions regarding the comparison of fingerprints and palm prints." Ibid. The same happened here nor did she object to any of his statements.

Additionally, the jury heard how the latent print in this case was left on a jagged surface with a "small crack running through it," which had to be considered in the analysis. (3T62-22 to 63-14). Thus, given the other evidence of defendant's guilt, including her flight from the crime scene, and her confession, if there was error in allowing Armstrong's unchallenged statement it does not rise to plain error.

2. Captain Armstrong's description of the verification process was admissible.

New Jersey's expert rule allows for hearsay evidence to be presented if it is the type of evidence reasonably relied on by experts in the field. That

evidence is then admissible for the limited purpose of apprising the jury of the opinion's basis and not for its contents' truth. State v. Torres, 183 N.J. 554, 576 (2005) (quoting N.J.R.E. 703). Thus, "an expert may offer out-of-court statements of others to support the opinions presented." Ibid. (citing State v. Pasterick, 285 N.J. Super. 607, 620 (App. Div. 1995)). In criminal cases, the limit is that the expert testimony cannot become "a vehicle for the 'wholesale [introduction] of otherwise inadmissible evidence.'" State v. Vandeweaghe, 351 N.J. Super. 467, 481-83 (App. Div. 2002).

Our courts have not addressed expert testimony on the ACE-V method used for fingerprint analysis. But in North Carolina, the Supreme Court found that testimony regarding the non-testifying analyst's opinion, though hearsay, was admissible under North Carolina Rule of Evidence 703, which is substantively identical to N.J.R.E. 703. State v. Jones, 368 S.E.2d 844, 846 (N.C. 1988). The court highlighted that the rule "permits an expert witness to base an opinion on the out-of-court opinion of an expert who does not testify." Ibid. Because the witness in that case testified his identification "has to be verified and initialed before it can be typed and mailed out" the court found that "without verification of his own opinion by another examiner, the witness could not have arrived at, and testified to, a final conclusion regarding the fingerprint." Ibid. Thus, the court found, "[t]he opinion of the other examiner

. . . necessarily forms a part of the basis for the opinion to which the witness testified, and it clearly was reasonable for an expert in the field of fingerprint identification to rely upon such a procedure." Ibid. Further the court noted that because the "challenged testimony was not offered for the truth of the matter asserted, but as a part of the basis for [the] opinion, it was not hearsay" and therefore it was properly admitted. Id. at 849.

But other states, including the Massachusetts Supreme Court, caution against allowing testimony about the ACE-V analysis verification step, because "'verifying' suggests that a nontestifying expert concurs with the testifying expert's conclusion" and that testimony "would be improper hearsay testimony." Fulgiam, 73 N.E.3d at 821-22 (citing Commonwealth v. Chappell, 40 N.E.3d 1031 (2015)); see, e.g., State v. Connor, 937 A.2d 928, 930 (N.H. 2007); People v. Pearson, 116 N.E.3d 304, 311 (Ill. App. Ct. 2019); State v. Smith, 628 N.E.2d 1176, 1181 (Ill. 1994).

This Court should adopt the same reasoning as North Carolina. As already noted, New Jersey courts allow facts constituting hearsay relied on by expert witnesses to be admitted not "to establish the truth of their contents, but to apprise the jury of the basis of the expert's opinion." Corcoran v. Sears Roebuck & Co., 312 N.J. Super. 117, 134-35 (App. Div. 1998) (citing N.J.R.E. 703). Captain Armstrong testified that Ocean County procedures required his

results to be verified by two other examiners in order to be published. (3T59-22 to 60-1). As the court in Jones noted, "without verification of his own opinion . . . the witness could not have arrived at, and testified to, a final conclusion regarding the fingerprint." Jones, 368 S.E.2d at 846. Thus, under N.J.R.E. 703, the other examiners' review that Armstrong relied on in forming his opinion and was not introduced for the truth of the matter asserted, but rather as evidence that the expert conformed to the proper methodology used by experts in the field.

Even so, the testimony defendant now calls error did not amount to plain error. See Pearson, 116 N.E.3d at 311. In Pearson, the court noted that "even if the trial court had excluded [the expert's] hearsay testimony, her testimony about the identification process and her own analysis and conclusions was properly admitted." Pearson, 116 N.E.3d at 311-12. The court found that given the extent of her testimony, including her education and training, the process of comparisons, and her conclusions, the improper admission of hearsay was harmless because it did not pose a reasonable possibility that the verdict would have been different had the hearsay been excluded. Pearson, 116 N.E.3d at 311-12.

The same result is warranted here. In addition to hearing the method of testing Captain Armstrong performed in this case, the jury heard that Captain

Armstrong was a CSI latent print examiner for eleven years and examined thousands of latent prints. (3T43-2 to 21; 3T45-3 to 6). The jury also heard that Armstrong received training from the FBI National Academy, CJIS (the national version of AFIS), attended a palm print symposium, and completed ongoing proficiency testing every six months, which he never failed. (3T44-9 to 19; 3T45-16 to 46-10). And as already noted, the jury heard how the latent print here was left on a jagged surface with chips and a "small crack running through it[.]" (3T62-22 to 63-14).

Hence, the jury could independently assess Captain Armstrong's testimony, factoring in his training, analysis performance in this case, and potential print issues from a jagged surface with a crack. Any alleged error in the jury hearing that other analysts verified his conclusions did not result in the jury reaching a result it otherwise might not have reached.

3. Captain Armstrong's testimony remained within the scope of his expertise.

Lastly, defendant's claim that Captain Armstrong's testimony went beyond the scope of his expertise is meritless. When describing how fingerprints are examined, he stated that an expert is "looking at detail" and that there are three levels of detail." (3T60-2 to 4). The first level of detail is patterns in the ridge structures. (3T60-4 to 61-1). The second level is the "ridge characteristics." (3T61-13 to 15). Armstrong explained that a person's

"friction ridge skin has lines" and the details in those lines including splits and ends are level two details. (3T61-15 to 25). And level-three details are the ridges' uniqueness, including where the pores are located on the ridge. (3T62-2 to 9). When comparing, he noted that he starts by finding an end ridge and then count ridges looking for another ending ridge. (3T65-17 to 25). The fingerprint is immediately excluded if there is a dissimilarity, such as seeing an ending ridge not on the ink print. (3T65-2 to 8).

Captain Armstrong explained that the latent fingerprint here was developed from a chemical reaction with blood. (3T70-13 to 71-8). Based on his review of hundreds of prints like this one, he determined that there "was blood on the finger when it touched the object." (3T71-13 to 23). He explained he could tell "because the ridges are . . . pronounced." (3T71-24 to 25). He explained that if the print were on the item and then blood was to go on top of it, "blood would go everywhere into the furrows . . . between the ridges." (3T72-10 to 14). He concluded that since here the blood "was only on the ridges," it was touched with blood. (3T72-16 to 18). Thus, this statement was directly within his expertise as a latent fingerprint examiner who analyzes and interprets ridges in fingerprints. A bloodstain pattern analyst, on the other hand, has no expertise in the ridges and furrows of a fingerprint and would be unqualified to make a conclusion regarding an

interpretation of those ridges. See (3T131-1 to 10). The testimony was thus Captain Armstrong's scope and was thus properly admitted.

B. The unchallenged bloodstain pattern expert testimony was proper.

1. The expert testimony established that the victim was subjected to two blood-shedding events.

Jeffrey Scozzafava testified as an expert in bloodstain pattern analysis. (3T130-1 to 2). A bloodstain is "a visible stain left on something that's come into contact with the blood." (3T130-24 to 25). Bloodstain analysis focuses on looking at stains and seeing if there are patterns in the stains "to determine what the mechanism was that created the bloodstain pattern." (3T131-1 to 10).

Scozzafava testified that bloodstain pattern analysis has no error rate, explaining,

> [f]rom the validation studies that I've read and being with different associations for private and public, when you're using proper methods, there's no error rate in bloodstain pattern analysis. There have been errors that have been pointed out, but that was human error and it was not following established methods. [(3T134-6 to 18).]

When asked if bloodstains are easily distinguishable from each other through training and experience, he testified, "[s]ometimes they are. Sometimes they're not." (3T138-7 to 10). At the end of Scozzafava's testimony, the prosecutor asked, "If you follow the methodology, there's a zero-error rate, is that accurate?" and he responded, "[y]es." (3T169-22 to 25).

Scozzfava provided a step-by-step recounting of his examination here and his five conclusions including that there had been two beating events and the stains were consistent with a blunt force trauma event. (3T139-8 to 140-4; 3T152-16 to 153-4; 3T156-3 to 7; 3T160-1 to 162-21; 3T167-16 to 20).

2. Scozzafava provided proper testimony.

Scozzafava qualified his statement that there was no error rate in blood spatter analysis by stating that it was based on a review of validation studies, including from the FBI and use of proper methods. See (3T134-6 to 18). Essentially, that conclusion was based on his "experience, training, [and] education," which is proper N.J.R.E. 702 testimony. The jury could have rejected that statement, as instructed, if they had deemed it incredible. Moreover, when talking about the error rate, Scozzafava noted that there have been recorded human errors. (3T134-14 to 16). The jury could have thus listened to his testimony with skepticism, considering that he, being human, could have committed the same errors he described in processing the stains in this case, especially since he also noted that bloodstains are not always easily distinguishable from each other. (3T138-7 to 10).

Defendant never objected to this testimony nor did he cross-examine the expert about the zero-error rate. In fact, the judge commented that cross-examination only took five minutes. (3T175-8 to 10). And in her closing,

defendant relied on Scozzafava's conclusions, hoping that the jury would "go back and look at his words" to show that if defendant had beaten Rebecca to death, there would not be blood on her clothing, in an attempt to diminish the inculpatory nature of the blood found on defendant's bra. (8T10-9 to 11-6).

Defendant's "zero-error" claim fails to reach the level of plain error—she relied on the expert and in the context of his entire testimony that one comment did not lead to an unjust result.

C. A statistical number was not necessary for the jury to evaluate the DNA evidence because the victim was the source of the DNA.

The jury received instructions that an individual could be deemed the source of a DNA profile only if it met a specific statistical threshold. Failure to reach this threshold would limit the DNA expert to identifying the person merely as a match to the DNA. Here, the DNA testing conclusively identified the victim as the source of the DNA profile derived from various evidence pieces. Thus, a statistical comparison was unnecessary for the jury to understand the DNA evidence, as it lacked the ambiguity associated with mere matches involving other potential matches. The expert's testimony is therefore not error, let alone plain error.

1. The DNA expert testimony established the victim was the source of the DNA profile generated on several pieces of crime-scene evidence.

Kimberly Michalik, a forensic scientist from the New Jersey State Police

Office of Forensic Sciences, testified as an expert in DNA analysis. (5T36-11 to 17; 5T41-24 to 25). She explained that the lab looks at twenty-seven locations on the DNA to generate a profile because "the more DNA that [the lab] looks at, the more exclusionary a profile can be, so the more we can say that someone is the source of a DNA profile." (5T43-17 to 19).

Once a profile is created, scientists examine known reference samples, comparing them to unknown samples collected as evidence. (5T46-21 to 47-1). A statistical evaluation is then made "to give weight to that comparison . . . if the statistic reaches a certain threshold, [the scientist is] able to competently say that someone is the source of that profile." If it does not reach that threshold, the scientist can only say that someone matches that profile. (5T48-10 to 17). Michalik explained that the statistical analysis is generated by looking at "how frequent the profiles are within that population" and then determining "how common or rare that profile is." (5T48-22 to 24).

Here, there were two reference samples: one from the victim and one from defendant. (5T51-6 to 12). There were also four unknown samples collected from a portion of the stained shirt found in the bathroom, the collar of the shirt, the wine chiller, and two swabs from the stain on defendant's bra. (5T25-23 to 27-10; 5T31-18 to 32-9). Michalik tested those samples and concluded that: (1) the victim was the source of the DNA on the wine chiller;

(2) the victim was the source of the DNA found on the blood stain portion of the striped shirt; (3) DNA from the collar of the striped shirt was a mixture from two people but was insufficient for comparison; and (4) the victim was the source of the DNA from the stain on the bra. (5T55-6 to 57-14; 5T58-13 to 25). Defendant never objected to any of these conclusions or cross-examined the DNA expert.

2. Since the only positive DNA results in this case determined that the victim was the source of the DNA, no statistical explanation was necessary.

Again relying on out-of-state cases, defendant alleges error with the DNA expert's testimony but failed to include Maryland's Supreme Court's finding that "when a DNA method analyzes genetic markers at sufficient locations to arrive at an infinitesimal random match probability, expert opinion testimony of a match and of the source of the DNA evidence is admissible." Young v. State, 879 A.2d 44, 45 (Md. 2005). The court reasoned that "scientific advances in DNA profiling enable an examiner employing particular methods and analyzing genetic markers at a sufficient number of loci to testify, to a reasonable degree of scientific certainty, to the source of the DNA evidence," which would not require contextual statistics. Id. at 47.

Thus, contextual statistics were unnecessary here, as the jury was informed that to generate the most exclusionary profile the lab examined

twenty-seven DNA locations, ultimately confirming the victim was the source. (5T43-17 to 19). The jury also learned that a DNA analyst can only say a person is a source of the DNA profile generated if it reaches a certain statistical threshold. (5T48-10 to 17). As a result, the fact that the Massachusetts Supreme Court prohibits the admission a DNA match without the jury hearing about the likelihood of that match occurring is unpersuasive. See Commonwealth v. Mattei, 920 N.E.2d 845, 854 (Mass. 2010). In those cases, the DNA profiles were merely matches requiring statistical analysis for the jury to comprehend the likelihood of another person's DNA also matching. But here, where the murder victim was identified as the source of the DNA, no statistical reference was necessary.

Additionally, in cases where the DNA evidence "was of marginal significance" in the context of the entire case, admission of the DNA evidence without qualifying statistical evidence has been found not to result in a substantial likelihood of a miscarriage of justice. See Commonwealth v. Linton, 924 N.E.2d 722 (Mass. 2010); Commonwealth v. Carnes, 933 N.E.2d 598, 622 (Mass. 2010). Here, the DNA evidence identifying the victim was not pivotal to the State's case, which is demonstrated by the lack of objection or cross-examination by defendant. Defendant did not dispute that Rebecca was a homicide victim or that the wine chiller was the murder weapon. And

the lack of a comparable profile from the swab of the striped shirt's collar did not affect defendant in any way. Though it was determined that the victim was the source of the DNA on defendant's bra, it was just one piece of evidence the State relied on in addition to defendant's confession and her flight. Moreover, as mentioned above defendant relied on the blood on her bra as evidence she did not commit the beating. This single piece of evidence thus proved insufficient to sway the jury to a verdict it would not have otherwise reached.

D. The pathologist provided accurate testimony regarding the methods that could lead to the victim's injuries.

1. Dr. Ragasa testified about Rebecca's significant head injuries.

Dr. Dante Ragasa, a forensic pathologist at the Ocean County Medical Examiner's office, performed the autopsy of the victim and testified as an expert in forensic pathology. (3T84-1 to 3; 3T86-18 to 20; 3T87-11 to 13). He testified that there were "multiple gaping lacerations, or wounds . . . on the top of the head, mostly on the left side, and with a lot of blood on the victim." (3T91-1 to 4). He counted seven to nine lacerations with exposure of the skull on the left side of the head and three to four depressed fractures on the skull. (3T92-17 to 93-18). He explained that the inside of the skull revealed that a strike to the base of the skull was a significant impact, stating it was a "tremendous blow to do something like that that goes from the left side into the base." (3T103-16 to 21). Dr. Ragasa determined that the cause of death

was multiple blunt force injuries to the head. (3T106-11 to 16). On cross-examination, he stated that the wine chiller was capable of inflicting the type of injuries discovered on the victim. (3T109-1 to 5). Dr. Ragasa explained that there are multiple factors involved in the amount of force required to cause fractures to the skull, including the strength of the assailant, the power of the weapon, and the emotion of the assailant. He explained, "If the assailant is enraged, even if they don't have that muscle strength and all that, but in a rage, it could create this kind of force." (3T102-24 to 103-8).

2. Dr. Ragasa testified within the bounds of his expertise when he described the victim's injuries.

"A forensic pathologist's testimony is . . . restricted to describing the mechanics of death." State v. Jamerson, 153 N.J. 318, 338 (1998). A forensic pathologist can base their opinions on the nature of a victim's injuries. See State v. Locascio, 425 N.J. Super. 474, 491-92 (App. Div. 2012).

Dr. Ragasa's observation about rage was presented as part of a list of potential factors influencing the force required to fracture a skull. It did not constitute an opinion on defendant's mental state, and thus contrasted with that in Jamerson. It also did not amount to an explicit opinion on Rebecca's death. And the jury had been informed earlier that the wine chiller weighed five pounds and that the victim sustained seven to nine lacerations on the head. This aligned with Dr. Ragasa's actual opinion that the cause of death was blunt

force trauma, and it was properly admitted.

E. Given the entirety of the expert's testimony and the State's evidence, the expert testimony was proper.

Demonstrating plain error involves a significant burden, and defendant's focus on isolated expert snippets falls short. Assessing such error requires the full testimony and its context within the State's case. Defendant's fragmented analysis without relation to the expert's complete testimony fails, and the complete testimony reveals, no error, let alone plain error.

POINT II

THE JURY WAS PROPERLY INSTRUCTED ON THE CHARGED OFFENSES, AND THE STATE'S BURDEN WAS NEVER DIMINISHED.

Again, defendant's failure to object to any alleged instructional errors despite numerous opportunities to do so demonstrates that the jury was properly instructed. Defendant's use of an over five-pound wine chiller to hit Rebecca in the head in two separate events indicates an intentional act, not reckless behavior. And the self-serving statements claiming her belief that Rebecca had poisoned do not clearly indicate that defendant was passionately or proportionally provoked. Thus, the jury was properly only instructed on first-degree murder, and that she used the wine chiller in a manner that led the jury to reasonably infer she intended to kill Rebecca. Although Judge Gizinski

made an imperfect comment regarding proof beyond a reasonable doubt, the jury had received the proper definition multiple times before and after the misstatement. Thus, the State's burden of proof was not lessened.

"Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial. The trial court has an absolute duty to instruct the jury on the law governing the facts of the case." State v. Concepcion, 111 N.J. 373, 379 (1988). Thus, "an appellate court must first 'determine whether the trial court erred' and, if so, must proceed to determine 'if the mistake was clearly capable of producing an unjust result such that a reasonable doubt is raised as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Canfield, 470 N.J. Super. 234, 269 (App. Div. 2022)), aff'd as modified, 252 N.J. 497 (2023) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)). But does not do so "in isolation [of] those statements alleged to be obscure or ambiguous, but looks to the charge as a whole.'" Concepcion, 111 N.J. at 376 (quoting State v. Freeman, 64 N.J. 66, 69 (1973)).

"Where there is a failure to object, it may be presumed that the instructions were adequate." State v. Morais, 359 N.J. Super. 123, 134-35 (App. Div. 2003). Thus, "[w]hen a defendant fails to object to an error or omission at trial, [appellate courts] review for plain error." State v.

Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2). When applied to jury instructions, "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Belliard, 415 N.J. Super. 51, 66 (App. Div. 2010) (quoting State v. Hock, 54 N.J. 526, 538 (1969)).

A. It was reasonable for the jury to infer that defendant intended to kill Rebecca based on the way she used the wine chiller.

The definition of a deadly weapon includes a class of objects that have an ordinary proper use but may become deadly in how it is used. Thus, it was proper for the jury to be instructed that they could infer that using a five-pound wine chiller to hit someone in the head repeatedly demonstrated an intent to cause death. Even so, the jury was free to reject the inference.

"Generally speaking, a presumption is an evidentiary device that enables 'the trier of fact to determine the existence of an element of the crime—that is, an "ultimate" or "elemental" fact—from the existence of one or more "evidentiary" or "basic" facts.'" State v. Ingram, 98 N.J. 489, 495 (1985) (quoting Ulster County Court v. Allen, 442 U.S. 140, 156 (1979)). "To be constitutional, the elemental fact must bear a rational connection, in terms of logical probability, to the evidentiary fact." State v. Thomas, 132 N.J. 247,

254-55 (1993). "Central to the validity of a statutory presumption is the way that the matter is presented to the jury." Ingram, 98 N.J. at 499. "The jury should be instructed in terms of inferences which may or may not be drawn from a fact, the jury being at liberty to find the ultimate fact one way or the other." State v. Stasio, 78 N.J. 467 (1979). "Of course, the State must still be held to its burden of proving each element of the offense beyond a reasonable doubt, and that burden may not be shifted to the defendant." Thomas, 132 N.J. at 256-57.

One permissible inference found in the Model Criminal Jury Charges is the inference that a defendant's purpose was "to take a life of cause serious bodily injury resulting in death" because of the use of a deadly weapon. Model Jury Charges (Criminal), "Murder (N.J.S.A. 2C:11-3(a)(1) and 3(a)(2)) (rev. Jun. 14, 2004). A deadly weapon is defined as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury[.]" N.J.S.A. 2C:11-1(c). Thus, statutorily "deadly weapons can be divided into two categories: firearms, which are per se deadly weapons and every other object which may or may not be a deadly weapon." State v. Burford, 321 N.J. Super. 360, 363 (App. Div. 1999). Within the second category is a "class of objects 'having a

wide variety of lawful uses but of which may take on the character of a deadly weapon' depending on the circumstances." Id. at 364 (quoting State v. Riley, 306 N.J. Super. 141, 147 (App. Div. 1997)). Thus, "the character of this class of objects as deadly weapons is, in every case, entirely circumstantial--that is, did a particular defendant possess a particular object at a particular time and in a particular situation with the intention of using it as a weapon." Ibid. (quoting Riley, 306 N.J. Super. 147).

Thus, while instructing the jury on homicide here, Judge Gizinski properly gave the model jury charge that included the second category of deadly weapons. This includes items that, given the circumstances and manner in which they are used, have the potential to cause death or serious bodily injury. The instruction specifically told the jury to consider the manner and circumstances of the killing when evaluating the use of the wine chiller, emphasizing that it was not solely about the mere presence of the wine chiller but the specific manner in which it was employed.

The particulars of this case reasonably supported an inference of intent to cause death or serious bodily injury, particularly in the context of repeatedly striking someone in the head with a five-pound wine chiller, which the jury was free to reject.

B. No lesser-included offenses were clearly indicated from the record.

Rebecca died from blunt force trauma to the head, due to two distinct beatings with a five-pound wine chiller. The pathologist's examination revealed multiple head injuries, encompassing seven to nine lacerations and three to four depressed fractures on the skull. The repetitive use of such a weighty object strongly implies an intentional act.

Also, the record lacks any evidence supporting the notion that defendant acted out of a passionate response. Even if one were to consider her self-serving statements suggesting a belief that Rebecca intended to poison her, defendant neither cooked nor consumed any of the food. In her confession, she said Rebecca asked why she was killing her, yet she persisted. Consequently it does not rise to passion provocation manslaughter.

The judge was thus not compelled to sift through the record to find grounds for unrequested charges. The evidence did not clearly indicate that this crime was anything other than knowing or purposeful murder, and thus, the judge was not required to sua sponte charge any lesser-included offenses.

A person who purposely, knowingly, or recklessly causes the death of another person has committed criminal homicide. N.J.S.A. 2C:11-2(a). N.J.S.A. 2C:11-3(a) explains criminal homicide constitutes murder when (1) "[t]he actor purposely causes death or serious bodily injury [(SBI)] resulting in death;" (2) "[t]he actor knowingly causes death or serious bodily injury

resulting in death;" or (3) a killing is committed in the course of one of several enumerated crimes, and thus constitutes felony murder. Serious bodily injury is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ[.]" N.J.S.A. 2C:11-1(b).

Homicide constitutes manslaughter when the actor recklessly causes death "under circumstances manifesting extreme indifference to human life." N.J.S.A. 2C:11-4(a). "The distinction between [aggravated and reckless manslaughter] turns on the degree of probability that the death will result from the defendant's conduct." State v. Galicia, 210 N.J. 364, 378 (2012); N.J.S.A. 2C:11-4. "When it is probable that death will result from that conduct, the standard for aggravated manslaughter is met[;]" but "when it is only possible that death will result, the homicide constitutes reckless manslaughter." Ibid. Both offenses "are lesser included offenses of purposeful or knowing murder and differ from murder only in that they require a less culpable state." State v. Bishop, 225 N.J. Super. 596, 601 (App. Div. 1988). The last lesser-included offense of murder, "passion/provocation manslaughter," occurs when what would otherwise be murder is "committed in the heat of passion resulting from a reasonable provocation.'" Galicia, 210 N.J. at 378-79 (quoting N.J.S.A. 2C:11-4(b)(2)).

The decision whether to deliver the lesser-included offenses of murder "rests primarily with the trial judge who must determine whether such a manslaughter instruction is appropriate in light of the facts of a particular case." Bishop, 225 N.J. Super. at 602. "Where the evidence clearly raises an issue justifying a finding, it must be charged even absent a request. Id. at 602-03. "However, if the parties do not request a lesser-included-offense charge, reviewing courts 'apply a higher standard, requiring the unrequested charge to be 'clearly indicated' from the record.'" State v. Fowler, 239 N.J. 171, 188 (2019) (quoting State v. Alexander, 233 N.J. 132, 143 (2018)). The clearly indicated standard does not require trial courts to "scour the statutes to determine if there are some uncharged offenses of which the defendant may be guilty," State v. Brent, 137 N.J. 107, 118 (1994), or "meticulously sift through the entire record . . . to see if some combination of facts and inferences might rationally sustain' a lesser charge." Funderburg, 225 N.J. at 81, (quoting State v. Choice, 98 N.J. 295, 299 (1985)). "Instead, the evidence supporting a lesser-included charge must 'jump[ ] off the page' to trigger a trial court's duty to sua sponte instruct a jury on that charge." Fowler, 239 N.J. at 188 (quoting State v. Denofa, 187 N.J. 24, 42 (2006)).

At the charge conference, Judge Gizinski asked defendant if she wanted any lesser-included offenses, and she said no. The judge asked specifically if

she was asking for a passion/provocation charge, and again, she said no. (7T78-11 to 15). But at sentencing, defendant argued she was entitled to passion/provocation sentencing. So Judge Gizinski pointed out that defendant rejected any instruction for lesser-included offenses on "at least three occasions, the first being . . . in chambers and then on-the-record conference required by the rules, [and] the pre voir dire conference." (9T7-4 to 9).

1. The manner of the victim's death did not clearly indicate anything other than an intentional act.

It cannot reasonably be said that hitting a victim in the head repeatedly with a heavy wine chiller in two distinct events involved mere reckless conduct or a conscious disregard of a substantial risk of death. Thus, in the absence of a request for a charge on the lesser-included offenses, the trial judge had no obligation to charge the jury on manslaughter.

"A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result." N.J.S.A. 2C:2-2(b)(1). "A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result." N.J.S.A. 2C:2-2(b)(2). A person acts recklessly when they "consciously disregards a substantial and unjustifiable risk" that death will occur from their conduct, and disregarding the risk "involves a gross deviation from the standard of conduct that a reasonable

person would observe" in the same situation. N.J.S.A. 2C:2-2(b)(3).

"A person can be found guilty of 'purposeful' SBI murder if the actor's purpose was to inflict serious bodily injury, but the actor nevertheless 'knew that the injury created a substantial risk of death and that it was highly probable that death would result.'" State v. Wilder, 193 N.J. 398, 408 (2008) (quoting State v. Cruz, 163 N.J. 403, 417-18 (2000)). Alternatively, a person can be found guilty of knowing SBI murder "when the State makes the same showing, but 'rather than proving that serious bodily injury was [the] defendant's conscious objective, it . . . demonstrate[s] that he was aware that it was practically certain that his conduct would cause serious bodily injury.'" Id. at 409 (quoting State v. Jenkins, 178 N.J. 347, 362-63 (2004)).

"SBI murder is distinguishable from aggravated manslaughter because the latter, lesser charge does not require an intention to cause serious bodily injury or an awareness that death is 'practically certain' to follow." Ibid. "In assessing whether a defendant has manifested extreme indifference to human life, the focus is not on the defendant's state of mind, but on the circumstances under which the defendant acted." Ibid. (quoting Cannel, N.J. Criminal Code Annotated, cmt 2. on N.J.S.A. 2C:11-4 (2007)). As a result, "SBI murder involves a higher degree of culpability than does aggravated manslaughter." State v. Ramsey, 415 N.J. Super. 257, 267 (App. Div. 2010).

Despite defendant's rejection of an instruction on any lesser-included offenses, Judge Gizinski nonetheless placed on the record her rejection of a manslaughter instruction. She found no rational basis to instruct the jury on aggravated manslaughter and stated, "[i]f I were to order it over the objection of the defense, it would be based entirely on speculation[.]" (8T4-16 to 5-7). Then, at sentencing in response to defendant's belated claim, Judge Gizinski also noted that the evidence did not clearly indicate a need to instruct the jury of manslaughter. She recognized that "the evidence showed that there were at least two blood-shedding events, . . . multiple skull fractures[that] went so far beyond the force needed to kill the victim[.]" As a result, she found "there could be no doubt that the crime here causing death goes well beyond even the highest degree of recklessness." (9T32-3 to 12).

As Judge Gizinski properly noted, no rational basis, let alone a clear indication, existed for manslaughter instructions. The medical examiner's testimony, about the victims multiple, severe wounds, inflicted while asleep, combined with the murder weapon's heavy weight and repeated use, makes clear that defendant was at least conscious that the injuries she caused posed a substantial risk of death and that it was highly probable death would result.

2. <u>The evidence did not clearly indicate that defendant was reasonably or adequately provoked.</u>

Evidence of passion/provocation also did not jump off the page. The

only provocation defendant points to come from her self-serving statements that she believed Rebecca was trying to poison her and that a spirit controlled her. The record belies the first claim, and the second is at most an argument for diminished capacity, which defendant did not pursue. Thus, the record did not clearly indicate a need for a passion/provocation manslaughter instruction.

Passion/provocation manslaughter has four elements: "(1) reasonable and adequate provocation; (2) no cooling-off time in the period between the provocation and the slaying; (3) a defendant who actually was impassioned by the provocation; (4) a defendant who did not cool off before the slaying." State v. Josephs, 174 N.J. 44, 103 (2002). "The first two elements are 'objective; thus, if they are supported by the evidence, the trial court should instruct the jury on passion/provocation manslaughter, leaving the determination of the remaining elements to the jury.'" Galicia, 210 N.J. at 380 (quoting Josephs, 174 N.J. at 103).

In determining if there is adequate provocation, the court must decide whether a reasonable person would have been provoked "sufficiently to 'arouse the passions of an ordinary [person] beyond the power of [their] control.'" Canfield, 470 N.J. Super. at 275 (quoting State v. King, 37 N.J. 285, 301-02 (1962)). The adequacy of the provocation depends on the proportionality of the response. State v. Darrian, 255 N.J. Super. 435, 449

(App. Div. 1992).

Following defendant's request at sentencing, Judge Gizinski explicitly put on the record why passion/provocation manslaughter was inappropriate. She recognized that when a defendant does not request the charge, the instruction is only required when the facts clearly indicate the two object elements. (9T25-6 to 24). When reviewing the objective elements, Judge Gizinski stated that "the evidence presented at trial showed no provocation, reasonable, adequate or otherwise, to satisfy this element." (9T26-2 to 7). Judge Gizinski rejected the assertion that defendant's belief that poison might have been added to their dinner provoked her. The judge highlighted that crime scene photos revealed the meat was still raw and in its original container, making it improbable that defendant had consumed any poison. The sole evidence of supposed poison was a Home Depot receipt indicating defendant had bought mouse bait on the day of the murder. (9T27-6 to 28-11). She thus "found no evidence to satisfy the first objective element of the passion/provocation analysis and, therefore, did not charge the jury on the lesser offense." (9T28-21 to 25). Instead, Judge Gizinski highlighted the trial evidence, including that "defendant "attacked the victim while she was sleeping. There were no defensive wounds on the victim's body, and the blood spatter analysis indicates the victim never got up from the supine position."

Thus, Judge Gizinski noted, "the only passion was the force with which the defendant beat the sleeping victim." (9T31-11 to 32-2).

C. The State's burden of proof beyond a reasonable doubt was never diminished.

Minor flaws in instructions do not warrant a new trial. Only if numerous errors compromise proof beyond a reasonable doubt does a verdict fall. Examining instructions here, even with an isolated imperfection, reveals no threat of lessening the State's burden.

"In a criminal prosecution, the State bears the burden of proving beyond a reasonable doubt every element of an offense." State v. Medina, 147 N.J. 43, 49-50 (1996). But "[n]either the New Jersey Constitution nor the Federal Constitution explicitly demands that trial courts define reasonable doubt. Both constitutions require only that the trial court inform the jury of the State's burden to prove the defendant's guilt beyond a reasonable doubt." Id. at 50. And "[n]either constitution defines reasonable doubt." Ibid. "Because the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof, reasonable-doubt instructions must be considered in their entirety." State v. Wakefield, 190 N.J. 397, 473 (2007). "Taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." State v. Dreher, 302 N.J. Super. 408, 467 (App. Div. 1997). "Only those instructions that overall lessen the

State's burden of proof violate due process." Wakefield, 190 N.J. at 473.

As long as the jury receives the proper definition that does not lessen the State's burden of proof, one inaccurate statement does not result in plain error. In Medina, three separate statements inaccurately presented the State's burden; yet when examining the instructions as a whole, the Supreme Court found no error sufficient to warrant a new trial. 147 N.J. at 61. Ultimately, the Supreme Court found, "[a]lthough some parts of the charge were incorrect, when read in its entirety, the charge does not violate due process" and "[d]espite the regrettable errors, the charge did not so infect the instruction as to lower the State's burden of proof." Id. at 55-56.

Here, like in Medina, the jury repeatedly heard the proper definition of the State's burden and the requirement they prove each element of each offense beyond a reasonable doubt. Thus, when read in its entirety, the jury was instructed correctly and does not warrant a new trial.

At the beginning of trial, Judge Gizinski informed the jury that "[t]he burden of proving each element of the charges beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant." (1T22-9 to 18). She specified that the State's burden was to prove "its case by more than a mere preponderance of the evidence, yet not necessarily do an absolute certainty." And when explaining the beyond-a-reasonable-doubt standard,

Judge Gizinski specified that

> In criminal cases, the State's proof must be powerful than that [of civil cases], it must be beyond a reasonable doubt. A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It's a doubt that a reasonable person hearing the same evidence would have. Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. [(1T22-19 to 23-13).]

At the conclusion of trial, Judge Gizinski again instructed the jury that "the defendant on trial is presumed to be innocent and unless each and every essential element of an offense charged is proved beyond a reasonable doubt, the defendant must be found not guilty on that charge." (8T67-16 to 20). She explained that the "prosecution must prove its case by more than a mere preponderance of the evidence, yet not an absolute certainty." (8T68-2 to 4). She went on to say:

> The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told it is necessary to prove only that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that, it must be beyond a reasonable doubt.
>
> A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial

> consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.
>
> Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced of the defendant's guilt, more or less the defendant is guilty of the crime charged, you must find her guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give the defendant the benefit of the doubt and find her not guilty. [(8T68-5 to 69-6)]

The trial court's singular inadvertent use of the phrase "more or less" did not affect the jury's verdict. At the beginning of the trial, the jury received the model jury charge on the beyond a reasonable doubt standard and again right before the "more or less" statement. Thus, the jury was informed multiple times that the criminal standard is higher than the civil one and that for each charged crime, the State was required to prove each element of each offense beyond a reasonable doubt. Consequently, when read as a whole, the jury instructions did not lessen the State's burden or warrant a new trial.

POINT III

JENNY'S TESTIMONY WAS NOT OTHER CRIMES EVIDENCE AND WAS STRATEGICALLY ELICITED ON CROSS-EXAMINATION.

"A trial court's ruling on the admissibility of evidence is reviewed on appeal for abuse of discretion." State v. Rose, 206 N.J. 141, 157 (2011). "When a trial court weighs the probative value of evidence against its prejudicial effect pursuant to N.J.R.E. 403, its ruling should be overturned only if it constitutes 'a clear error of judgment.'" State v. Cole, 229 N.J. 430, 449 (2017) (quoting State v. Koedatich, 112 N.J. 225, 313 (1988)). But if the party "appealing did not makes its objection to admission known to the trial court, the reviewing court will review for plain error, only reversing if the error is 'clearly capable of producing an unjust result.'" Rose, 206 N.J. at 157 (quoting R. 2:10-2).

Under N.J.R.E. 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith." "The threshold determination under Rule 404(b) is whether the evidence relates to 'other crimes,' and thus is subject to continued analysis under Rule 404(b)[.]" Ibid.

While testifying in court, Jenny narrated the events related to defendant's confession, including an interaction between her and defendant.

After bathing, defendant asked if Jenny would lie down with her because she was scared. (6T109-12 to 13). Jenny agreed and held her at defendant's request. (6T109-24 to 110-8). Jenny testified that at one point, she woke up to defendant "pushing on my throat, on my, close to my neck, on my chest," saying that she was seeing blood and in response, Jenny told her, "Don't worry, don't worry, there's nothing here, you're in my house[.]" (6T110-15 to 23; 6T110-24 to 111-2).

On cross-examination, defendant asked whether Jenny told Detective Guzman that defendant was screaming in her sleep, "They're going to kill me. Help me." (6T122-23 to 123-1). In response, Jenny stated that she told Guzman that defendant was choking her and that she screamed that she needed help. (6T123-2 to 4). Defendant clarified that Jenny was the one who made the request for help. (6T123-2 to 7). Defendant never provided Jenny's statement to Detective Guzman to impeach this statement.

This interaction between defendant and Jenny was not other crimes evidence but rather part of the narrative detailing defendant's confession to Jenny. Throughout the direct-examination, there was no reference to any form of assault or choking by defendant on Jenny. Instead, the narrative depicted defendant experiencing a nightmare, with Jenny offering comfort and assurance. It was only during cross-examination when defendant strategically

sought to introduce testimony suggesting she may have felt threatened that Jenny refuted such assertions, stating she was the one asking for help. Thus, the State did not introduce any other-crimes evidence requiring an N.J.R.E. 404(b) analysis.

POINT IV

DEFENDANT RECEIVED A FAIR TRIAL, AND THERE WERE NO CUMULATIVE ERRORS TO WARRANT A NEW ONE.

"When legal errors cumulatively render a trial unfair, the Constitution requires a new trial." State v. Weaver, 219 N.J. 131, 155 (2014). "[T]he predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair." Wakefield, 190 N.J. at 538. "If a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." State v. T.J.M., 220 N.J. 220, 238 (2015) (quoting Weaver, 219 N.J. at 155).

As discussed, defendant has not demonstrated any prejudicial error that occurred at trial. The principle of cumulative error, thus, does not apply here.

POINT V

DEFENDANT'S FORTY-FIVE YEAR SENTENCE WAS BASED ON AN APPROPRIATE BALANCING OF AGGRAVATING AND MITIGATING FACTORS.

The Legislature's goal in sentencing "was to achieve greater uniformity in sentencing." State v. Torres, 246 N.J. 246, 262 (2021). "The Legislature was also guided by 'the concept that punishment of crime [should] be based primarily on principles of deserved punishment in proportion to the offense and not rehabilitative potential.'" Ibid. (alteration in original) (quoting State v. Yarbough, 100 N.J. 627, 636-37 (1985)). "Under the Code, 'the severity of the crime is now the single most important factor in the sentencing process.'' Ibid. (quoting State v. Hodge, 95 N.J. 369, 378-79 (1984)).

Defendant received a fair sentence, and defendant's age alone is insufficient to reduce her sentence. When discussing fairness concerns, the Supreme Court noted that "[a] defendant's age is doubtlessly among the information that courts should consider when calibrating a fair sentence" because "[a]ssessing the overall fairness of a sentence requires a real-time assessment of the consequences of the aggregate sentences imposed" which "includes taking into account the age of the person being sentenced." Torres, N.J. at 273. Nonetheless, the Court still recognized that "age alone cannot

drive the outcome." Ibid. The Court noted, "[a]n older defendant who commits a serious crime . . . cannot rely on age to avoid an otherwise appropriate sentence." Ibid. Age is just one "fact that can and should be in the matrix of information assessed by a sentencing court[.]" Ibid.

At sentencing, Judge Gizinski found aggravating factor two based on the fact Rebecca was asleep when defendant attacked her. (9T35-14 to 36-6); see N.J.S.A. 2C:44-1(a)(2). She also found aggravating factor three based on the disproportionate reaction to her wife's request for separation, but gave it light weight. (9T36-7 to 21); see N.J.S.A. 2C:44-1(a)(3). Finally, she found aggravating factor nine and gave it extremely heavy weight, stating that "defendant showed no mercy, took advantage of someone she . . . should have been protecting, and instead, while she slept, mercilessly beat her to death with a wine chiller." (9T36-22 to 27-3); see N.J.S.A. 2C:44-1(a)(9).

Judge Gizinski gave mitigating factor seven moderate weight because defendant was forty-nine years old at the time of the offense and had no criminal history. (9T37-4 to 17); see N.J.S.A. 2C:44-1(b)(7). But she rejected mitigating factors eight and nine based on the defendant's attitude toward the crime. (9T37-18 to 38-4); see N.J.S.A. 2C:44-1(b)(8)-(9). Thus, she found the "aggravating factors substantially outweigh the mitigating factors." (9T38-7 to

9). She therefore sentenced defendant to forty-five years for first-degree murder. (9T39-5 to 9).

Judge Gizinski properly weighed the aggravating and mitigating factors and came up with an appropriate sentence. In doing so, she considered defendant's age when finding mitigating factor seven, noting that she was forty-nine years old when she committed the crime, but it was her first offense. Thus, the sentence properly considered the heinous nature of the murder while recognizing defendant's age.

CONCLUSION

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

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1825-22T4
INDICTMENT NOS. 22-08-1446-I;

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division,
MAYRA GAVILANEZ-ALECTUS,	:	Ocean County.
Defendant-Appellant.	:	Sat Below:
	:	Hon. Rochelle Gizinksi, J.S.C.
		DEFENDANT IS CONFINED

Your Honors:

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

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant Mayra Gavilanez-Alectus respectfully refers this Court to the procedural history and statement of facts set forth in her brief previously submitted in this matter.

LEGAL ARGUMENT

Mayra relies on the arguments made in her previously filed brief, and adds the following:

POINT I

THE INAPPROPRIATE AND UNRELIABLE TESTIMONY OF FOUR FORENSIC EXAMINERS WAS CENTRAL TO THE STATE'S CASE. THE ADMISSION OF THIS TESTIMONY REQUIRES THE REVERSAL OF DEFENDANT'S CONVICTIONS.

In her initial brief, Mayra set forth the myriad ways in which the four forensic examiners who testified on behalf of the State overstepped the bounds of appropriate testimony. In response, the State first attempts to minimize the significant benefit this testimony provided to the State's case. The claim that they were "not pivotal to the State's case" or that any errors were harmless because the jury was "not obligated to accept expert testimony" is belied by the record and case law. (Sb 7-8)[1]

[1] Sb – State's brief

First, as laid out at length in Mayra's initial brief, the State greatly relied on these experts in summation to argue that it had met its burden. (8T 38-1 to 59-1) The State's reliance on these experts makes sense, because the case was otherwise weak. Without the inappropriate expert testimony, the State's case rests on:

- one witness's second-hand account of the state of Mayra's marriage;
- the fact of Mayra's flight;
- an unrecorded confession relayed by a witness facing federal narcotics charges;
- the assertion by one fingerprint examiner that Mayra's finger was on the wine chiller;
- the significance of the blood on Mayra's shirt, as explained by a bloodstain pattern analyst's subjective interpretation;
- a DNA analysis of the blood on the shirt, which the jury would weigh according to its interpretation of the statistic generated by the analyst.

Through the inappropriate expert testimony, the State bolstered its case by informing the jury that:

- three fingerprint experts believed Mayra left the fingerprint instead of just one;
- the fingerprint could not have been left before the murder;

- both fingerprint analysis and bloodstain pattern analysis were essentially infallible;
- the DNA in question was Rebecca's, without any information to determine the weight to give that assertion;
- the assailant's "rage" could make up for the amount of strength needed to inflict these injuries.

It is undeniable that the State's case is much stronger with these additions. And the State's case needed that strengthening, because it lacked direct proofs of Mayra's identity as the murderer. The surveillance footage supports both the State and defense case; there was no eyewitness to the offense itself; and there is no recorded, Mirandized or otherwise reliable confession. The State's attempt to minimize the impact of this testimony on its case must be rejected.

Second, the idea that the jury would somehow discern the difference between the reliable portions of the experts' testimony and ignore the unreliable portions must also be rejected. Experts are believed because they are proffered as exactly that: experts. "Given an expert witness's singular status in the courtroom, the uncritical acceptance of expert testimony can becloud the issues." State v. J.R., 227 N.J. 393, 411 (2017) (alterations and quotation marks omitted). In other words, our courts do not just assume that "[t]he jury

could have thus listened to [the expert's] testimony with skepticism," because that is the opposite of what courts have recognized jurors do with expert opinion. (Sb 21) Moreover, it is not the jury's job to discern that it must reject unreliable expert testimony that should never have been admitted in the first place: "Reliability is critical to the admissibility of expert testimony. Indeed, an expert opinion that is not reliable is of no assistance to anyone." State v. Olenowski, 253 N.J. 133, 150 (2023) (alterations and quotation marks omitted). These convictions cannot be saved with the bare hope that the jury might have not believed the testimony the State asked them to believe.

In terms of the substance of the testimony itself, Mayra relies on her previously filed brief and adds only a few comments about the fingerprint expert. Contrary to the assertions in the State's brief, Mayra is not arguing that no fingerprint testimony was admissible. She is not arguing that the expert was "constrained by out-of-state caselaw" (Sb 10) or that the verification stage should have somehow been shielded from the jury. Mayra is arguing that the fingerprint examiner's testimony overstepped the bounds of his own community's well-established consensus on appropriate testimony and relayed information that is clearly inadmissible hearsay under New Jersey's own hearsay case law. If the State's position is now that the fingerprint examiner had to testify about verification in order to demonstrate the reliability of his

method, (Sb 17) the State needed to bring in the people who conducted that verification. No hearsay exception allows the expert to just relay it. Although the State claims to rely on a hearsay exception that allows an expert to convey hearsay that was the basis of his opinion, "while the expert may not have been able to testify to his conclusions regarding the fingerprint without verification, it does not follow that the opinion of the other examiner forms a part of the basis for the testifying expert's opinion." State v. Connor, 937 A.2d 928, 932 (N.H. 2007). Nor does the Confrontation Clause allow the expert to relay this clearly testimonial hearsay. Relying on a pre-Crawford v. Washington case to argue otherwise misses the last 20 years of Confrontation Clause jurisprudence that governs this case. (Sb 15)

Ultimately, the State's response to the errors its own experts repeatedly made is to argue that the defense is responsible for not stopping these experts from making these mistakes. At bottom, the question of whose "fault" it is that this unreliable testimony was set forth by the State's experts is irrelevant. The lack of objection means this Court must review the errors for plain error, not that the convictions are immune from reversal. The injection of unreliable and inappropriate scientific testimony into this trial rendered it unfair. This Court has the ability to recognize that unfairness and reverse Mayra's convictions.

POINT II

THE FAILURE TO INSTRUCT ON ANY LESSER-INCLUDED OFFENSES TO MURDER REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

In her initial brief, Mayra argued that the failure to instruct the jury on any lesser-included offenses requires the reversal of her murder convictions. In response, the State essentially argues that it does not believe that Mayra committed a manslaughter offense. That is not relevant. The only relevant question is whether the basis for these lesser-included offenses was clearly indicated by the evidence. It was.

As to passion/provocation manslaughter, the State argues that the instruction should not have been given because the basis for the instruction are "self-serving statements" by Mayra. (Sb 28) Nowhere in our law does it provide that the basis of an instruction that mitigates a defendant's criminal culpability must not be "self-serving" — such a requirement would be nonsensical, as a lesser-included charge would always serve the defendant, and often the defendant is the only person who would have information to demonstrate that a basis for such a charge exists. In fact, when deciding whether to give the charge, "the trial judge must view the facts in the light most favorable to the defendant. In other words, it is only when the trial judge determines that no jury could rationally conclude that the State had not proven

beyond a reasonable doubt that the asserted provocation was insufficient to inflame the passions of a reasonable person ... that the trial judge should withhold the charge." State v. Blanks, 313 N.J. Super. 55, 72 (App. Div. 1998) (internal quotation marks, citations, and alterations omitted) (emphasis added). The State's skepticism about the believability of the facts of that would need to be found to support a manslaughter conviction turns the inquiry about whether to charge the offense on its head.

There is a basis in this record on which a reasonable jury could find that there was a provocation that inflamed Mayra. In Blanks, this Court held that a passion/provocation instruction should have been given, although it was not requested, because the defendant testified that the "victim's attitude towards him was belligerent," that the victim punched him, and a fork found near the victim's body "suggest[ed] that the victim may have brandished the fork and further provoked the defendant." Ibid. As in Blanks, it is possible that the evidence would not persuade the jury that Mayra committed passion/provocation manslaughter. But there was enough evidence in the record—including her statement, the uncooked meat, and a receipt for rat poisoning, akin to the fork in Blanks—from which a jury could conclude just that.

The State fares no better in its argument against aggravated and reckless manslaughter. Maybe the jury would agree that "[t]he repetitive use such a weighty object strongly implie[d] an intentional act." (Sb 33) But if strangling someone for a few minutes, State v. O'Carroll, 385 N.J. Super. 211, 219-220 (App. Div. 2006), or hitting someone with a brick, Jenkins, 178 N.J. at 354-364, are possibly acts of manslaughter rather than murder, such that the jury must be instructed on lesser-included offenses to murder, there is no basis for categorically asserting that hitting someone with a wine chiller can constitute only murder.

Last, this Court must reject the State's tautological argument that the jury was properly told that the wine chiller was a deadly weapon and that it could infer intent to kill from its use. In supporting this position, the State asserts that "[t]he definition of a deadly weapon includes a class of objects that have an ordinary proper use but may become deadly in how it is used." (Sb 30) If that were the case, any object that was used to kill someone would be a deadly weapon for the purposes of the inference: because someone died the object would necessarily be a deadly weapon, and because a deadly weapon was used, intent to kill could be inferred. That means intent could be inferred in literally every case in which someone died. This would render the inference nonsensical and dilute the jury's role in determining intent in a homicide to

unacceptable levels. Telling the jury that it could infer that Mayra meant to kill merely because a wine chiller was the object that led to Rebecca's death—or, in the alternative, failing to tell the jury that it could not infer Mayra's intent merely from the weapon used without first finding it was a deadly weapon under the appropriate definition—requires reversal of Mayra's convictions.

CONCLUSION

For all of the reasons set forth in this brief and in Mayra's initial brief, her convictions must be reversed.

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DATED: January 22, 2024