SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2475-22

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, Union County.
BASHIR PEARSON,	:	Indictment No. 21-02-00031-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. Thomas K. Isenhour, J.S.C.,
	:	and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Defendant Bashir Pearson was charged with murder and weapons offenses following the fatal shooting of Tyshun Kearney. But the vast majority of the State's evidence was not against Pearson but was instead against his uncle, co-defendant Charles Leach. The only direct evidence tying Pearson to the shooting was his DNA on a black mask found near the crime scene. However, Pearson was one of three sources of DNA on the mask, there was no evidence that he ever wore the mask, and there was no evidence that one of the shooters wore a mask. Therefore, in order to bolster its case against Pearson, the State relied on several critical errors that infected Pearson's trial and now require the reversal of his convictions.

First, despite being prohibited by N.J.R.E. 702 and 703, the trial court allowed the State to elicit, over defense counsel's objection, inadmissible net opinion from its cell tower data expert that Pearson was in the "general area" of the crime scene. The expert offered this conclusion based on nothing more than his general experience and training, a practice explicitly condemned by our Supreme Court's recent decision in State v. Burney.

Then, the State presented evidence that Pearson was in South Carolina one month after the shooting and then again three months after the shooting. Despite there being no reasonable inference of flight to draw from this

evidence, and over defense counsel's objection, the trial court further infected the trial by instructing the jurors that they could use this evidence to find that Pearson fled New Jersey with consciousness of the charged offenses.

These errors, along with others discussed below, allowed the State to improperly bolster its otherwise weak case against Pearson and deprived him of a fair trial. For any or all of these reasons, Pearson's convictions must be reversed.

PROCEDURAL HISTORY

On February 4, 2021, a Union County grand jury returned Indictment No. 21-02-00031-I, charging defendant-appellant Bashir Pearson[1] with: purposeful or knowing murder, N.J.S.A. 2C:11-3a(1) or N.J.S.A. 2C:11-3a(2) (Count One); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a (Count Three); and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b (Count Five). (Da1-3)[2]

After a trial before the Honorable Michael K. Isenhour, J.S.C. and a jury from January 18 to February 1, 2023, the jury convicted Pearson of all three counts. (Da4-5; 10T 27-6 to 24) On March 21, 2023, Judge Isenhour merged the weapons offenses (Counts Three and Five) into the murder offense (Count

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[1] Codefendant Charles Leach was charged with the same offenses as Pearson in Counts One, Two, and Four. (Da1-3)

[2] The following abbreviations will be used:
Da – Defendant-Appellant's Appendix
1T – Trial – January 18, 2023
2T – Trial – January 19, 2023 (Volume 1)
3T – Trial – January 19, 2023 (Volume 2)
4T – Trial – January 20, 2023
5T – Trial – January 24, 2023
6T – Trial – January 25, 2023
7T – Trial – January 26, 2023
8T – Trial – January 27, 2023
9T – Trial – January 31, 2023
10T – Trial – February 1, 2023
11T – Sentencing Hearing – March 21, 2023.

One) and sentenced Pearson to thirty-five years in prison with thirty years of parole ineligibility, pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, and the murder statute, N.J.S.A. 2C:11-3b. (Da6-8; 11T 19-1 to 10)

On April 21, 2023, Pearson filed a Notice of Appeal. (Da9-13)

STATEMENT OF FACTS

Bashir Pearson was tried, alongside his codefendant and uncle Charles Leach, for the murder of Tyshun Kearney. While most of the evidence at trial concerned the police investigation of Leach, much of that evidence is nonetheless relevant to understanding the trial and the legal issues raised in Pearson's appeal and is therefore discussed here.

On the night of January 22, 2020, Jerry Williams was working at a barbershop at the corner of Jackson Avenue and Bond Street in Elizabeth. (2T 26-10 to 14) At around 6:40 p.m., Tyshun Kearney came inside the barbershop to meet with Williams. (2T 29-10 to 21, 30-8 to 15) About fifteen minutes later, the two men heard a "loud noise" outside; Kearney went outside to investigate. (2T 31-20 to 32-3)

Then, Williams estimated that he heard five gunshots for about "five to ten seconds." (2T 32-5 to 21) Once the gunshots stopped, Kearney came back inside the barbershop and collapsed. (2T 35-10 to 36-19) Kearney had been shot five times and was ultimately pronounced dead at 7:19 p.m. (2T 171-4 to 6; 5T 58-11 to 13; 6T 135-6 to 145-9, 159-22 to 24) Williams never saw any shooter. (2T 39-7 to 12, 41-6 to 7) Notably, there is no evidence that Kearney was shot at close range. (6T 134-11 to 13)

Williams testified that the police appeared to arrive within "seconds" of

the shooting and he "was startled because . . . how can they be there so fast." (2T 39-13 to 19) "[W]ithin three minutes," a "large crowd" with multiple officers was outside the barbershop. (2T 168-1 to 12) When leaving the barbershop, Williams noticed Kearney's car parked outside with a smashed window. (2T 40-3 to 8)

Meanwhile, Detective Alex Gonzalez testified that, at 6:54 p.m., he and his partner, Detective Michael Nicholas, were driving near the intersection of Jackson and Magnolia Avenues when they heard gunshots from the direction of Jackson and Bond, one block away. (2T 51-22 to 53-1) The officers turned right onto Jackson and drove toward the scene. (2T 51-22 to 53-1) Gonzalez claimed that he saw what appeared to be a "plume of gun smoke" closer to the intersection of Jackson and Bond. (2T 54-21 to 55-2) However, he did not write a report and his partner's report did not mention any plume of gun smoke. (2T 114-18 to 20; 2T 118-4 to 16)

Gonzalez also testified that, "about a quarter way through the block" on Jackson, he saw "an individual wearing a light-colored hoody running across the street and making his way towards this [back]yard" adjoining the backyards of homes the next street over on Madison Avenue. (2T 53-14 to 22) However, Gonzalez admitted that "multiple people" were running away from the shooting scene at the time. (2T 149-14 to 23)

Gonzalez then radioed headquarters that he was in pursuit of a man wearing a light-colored hoody and requested backup units to the general area. (2T 58-1 to 64-7) He pulled over and proceeded on foot into the backyards between Jackson and Madison, while his partner "proceeded to the right side of Jackson . . . towards the barbershop" at Jackson and Bond. (2T 57-4 to 25) "[A] couple of minutes" later, "any available law enforcement personnel" had set "perimeters" around the general area. (2T 76-18 to 23) Ultimately, Gonzalez could not get through the backyards between Jackson and Madison, so he went to the barbershop. (2T 74-4 to 12, 76-4 to 11, 77-24 to 78-1) Sergeant Vincent Powers later testified that he and the other officers did not find any evidence of note outside the barbershop. (4T 57-14 to 24)

At around 7:04 p.m., Gonzalez, joined by other officers, returned to the area of Jackson and Madison and "search[ed] through the yards of the properties that [he] believed the [man] with the light-colored hoody had possibly ran through." (2T 78-15 to 22) Specifically, the officers searched the backyards of properties at 427 and 431 Madison and the adjoined backyards of properties on Jackson. (2T 82-14 to 83-19) However, the officers did not find any evidence of note. (2T 83-18 to 19) Furthermore, the properties being searched were not taped off or secured, which Lead Detective Ryan Kirsh conceded, "was not the best practice to perform that night." (6T 178-1 to 6; 8T

60-9 to 21)

At this time, Gonzalez learned that police had detained codefendant Charles Leach, a man wearing a gray hoody, in the parking lot of a chicken restaurant two blocks away from 427 and 431 Madison. (2T 83-23 to 84-22; 2T 195-6 to 10) Leach was a friend of Kearney. (4T 41-5 to 7) The arresting officer, Officer John Londono, testified that he saw Leach walking down the street. (2T 192-4 to 9, 192-22 to 25) Londono admitted that the only description he had was of a man wearing a "light colored hoody," with no description of height, weight, build, or other clothing or characteristics. (3T 203-20 to 204-21)

Soon after, Gonzalez went to the chicken restaurant; he testified that Leach "matched the physical build" of the man wearing a light-colored hoody. (2T 85-20 to 24) Leach's right thumb was injured and he had blood on his hand and shirt (4T 91-10 to 12), which was later confirmed to be his own blood. (6T 71-1 to 6) The officers did not find a handgun or any other evidence of note on Leach. (3T 205-5 to 15)

Over the next four hours, multiple police officers searched around 427 and 431 Madison but found no evidence of note. (2T 136-9 to 137-20) Gonzalez returned to 427 and 431 Madison around 10:53 p.m. and shortly thereafter reported a "black mask" "alongside a parked SUV" between the two

properties. (2T 86-3 to 13, 89-17 to 91-20, 99-6 to 100-22) Around the same time, Officer Alexander Melendez alerted Gonzalez to a semiautomatic handgun on top of a trash can at 427 Madison. (2T 94-3 to 96-19, 107-11 to 12) Gonzalez also claimed that there "appeared to be some sort of red substance" -- either blood or paint -- on the semiautomatic. (2T 96-21 to 97-16) However, he did not write a report and his partner's report said nothing about the red substance. (2T 138-4 to 15; 2T 140-5 to 21) Moreover, Officer Khaliah Douglas, who tested the handgun for DNA and fingerprints, testified that any red substance on the semiautomatic was removed in the DNA swabbing process. (4T 177-20 to 179-14, 182-10 to 12)

Meanwhile, officers reviewing surveillance footage of the area saw that a second person had been in the backyard of 427 Madison. (2T 101-16 to 21) Therefore, Gonzalez and other officers conducted a second search of the property and found a second handgun -- a revolver -- behind a "patio storage box." (2T 101-23 to 111-21)

Sergeant Matthew Schaible testified, as an expert in ballistics and firearms identification, that the two shell casings found in Kearney's car and one shell casing recovered by the hospital were fired from the semiautomatic and two of the three bullets recovered from the autopsy were fired from the revolver; the third bullet recovered was inconclusive. (5T 143-11 to 147-23,

171-15 to 24, 179-5 to 181-20, 196-5 to 8)

At trial, the State played surveillance video[3] to demonstrate that a man wearing a light-colored hoody bent down to the area where Melendez claimed to have found the semiautomatic. (2T 106-10 to 107-12) However, Gonzalez admitted that he did not see the man wearing a light-colored hoody holding a handgun or appearing to conceal anything. (2T 119-7 to 120-8) He also agreed that his description of a man wearing a light-colored hoody was "not very specific" and that he had seen "lots of males wearing light-colored hoodies" in the area. (2T 123-13 to 24)

Moreover, Gonzalez admitted that, when he first went into the backyards on Jackson, he did not see a man wearing a light-colored hoody, let alone see him climb over a fence into the backyard of 427 Madison. (2T 121-3 to 122-2) Nor did he see any blood or other evidence of note. (2T 127-16 to 130-9) Additionally, the backyard that Gonzalez first went into in pursuit of the man in the light-colored hoody does not adjoin the backyards of 427 or 431

[3] Video evidence was played from multiple locations. Undersigned counsel cannot provide that video evidence for reasons explained in more detail in the motion filed contemporaneously with this brief. To summarize, undersigned counsel does not have that video evidence in any coherent form and has requested it from the State without success. That motion seeks to compel the State to supply all video footage that was played at trial to the Court and undersigned counsel, along with the cell-phone coverage maps addressed in Point I and the reenactment footage addressed in Point III.

Madison. (2T 130-24 to 133-20) Gonzalez further admitted that when he re-entered the backyards, he did not "know what route this person took" or "which direction he went." (2T 127-11 to 24) In fact, the surveillance footage showed multiple people, including one person climbing over a fence at 427 Madison, wearing light-colored hoodies. (2T 141-5 to 142-22)

Lastly, Gonzalez admitted that Melendez was alone when he found the semiautomatic and had not activated his body-worn camera. (2T 134-23 to 136-16) He agreed that "lots of officers" had been searching the area for hours but did not find either handgun. (2T 136-17 to 137-18) On cross-examination, Gonzalez acknowledged that he did not write a report despite being the person that "sparked the hours-long search for an individual in a light-colored hoody." (2T 115-1 to 12)

Melendez similarly testified about the semiautomatic (3T 211-7 to 214-24), and admitted that he also failed to write a report about the matter. (3T 218-14 to 220-4) He was surprised that no one had found the semiautomatic because it was "in plain view" for "anyone to walk by and see." (3T 226-18 to 227-3) Moreover, Melendez acknowledged that the surveillance footage showed him "walk straight over to" the area where he found the semiautomatic. (4T 22-7 to 23-9)

Melendez testified that he was wearing a body-worn camera when he found the semiautomatic but was "not sure" whether the footage was preserved. (3T 223-2 to 9) Ultimately, Melendez admitted that the body-worn camera was functional but that he did not activate it. (4T 13-1 to 14) Melendez further admitted that activating his body-worn camera "didn't come to mind" despite being mandated by established department policies. (4T 14-7 to 18-19; 4T 21-22 to 22-1)

Upon review, Detective Kirsh testified that the surveillance footage also appeared to show a "silver sedan" near the barbershop on the night of the incident. (7T 93-16 to 95-15, 96-19 to 97-20) Around 9:45 p.m. on the night of the incident, Officer Ramiel King stopped defendant Bashir Pearson, driving a silver Chevrolet Malibu, in East Orange for not wearing a seatbelt. (4T 186-4 to 188-23, 196-2 to 8) Pearson's uncles, Marquis Little and Brandon Little, were also in the car. (4T 188-10 to 18) Marquis[4] testified that he, Pearson, and Brandon had dropped his girlfriend off in East Orange that night. (4T 38-9 to 20)

The Malibu belonged to Mayasha Scott, the mother of codefendant Leach's children, who testified that Leach borrowed her car around 6:00 p.m.

[4] Because Marquis Little and Brandon Little share a last name, this brief refers to them by their first names to avoid confusion.

on the night of the incident and that Marquis returned it around 10:30 p.m. (5T 13-18 to 14-24, 16-17 to 18-7) Marquis, however, testified that he borrowed the Malibu from Scott around 5:00 p.m. (5T 31-5 to 32-1) Notably, Marquis also admitted to wearing a light-colored hoody that day. (5T 43-12 to 14)

Seven months after the incident, on June 10, 2020, police stopped and detained Pearson in Phillipsburg to inquire about any potential involvement in the shooting. (7T 42-17 to 44-2) Pearson was not charged. (7T 43-21 to 22) Over defense counsel's objection, the prosecutor had also elicited testimony that Pearson had been arrested in South Carolina three months after the incident, on April 12, 2020, for giving a false name. (6T 7-7 to 17-13)

During the June 10, 2020 detention, police collected a DNA sample from Pearson. (7T 207-14 to 18) Pearson's DNA matched one of three different sources of DNA on the black mask found between 427 and 431 Madison; the other two sources are unknown. (6T 56-13 to 58-3) Although Detective Kirsh interpreted the surveillance footage from the night of the incident as showing an individual with "something of what appears to be across their face" climbing a fence into the backyard of 431 Madison, none of the surveillance footage of the shooting shows anyone wearing a mask. (8T 74-22 to 77-19) Kirsch also testified that the individual climbing the fence "had markings on his hand consistent with . . . a tattoo," like Pearson, but acknowledged that "a

lot" of people in Elizabeth have hand tattoos. (8T 88-6 to 2) Moreover, there is no evidence that Pearson ever wore the mask and Pearson's DNA was not found anywhere else. (6T 81-3 to 82-7)

Pearson lived at 431 Madison, a multi-family building, with his mother. (5T 126-10 to 14) Mustafa Williams, Pearson's friend, testified that he was with Pearson at a corner store in Elizabeth on the day of the incident, after which they went to 431 Madison. (6T 108-17 to 114-22) Pearson's mother testified that she did not know if anyone was at 431 Madison on the afternoon of the incident, but later claimed that she "heard [Marquis's] voice" in the house. (5T 132-22 to 134-21, 136-7 to 8, 137-17 to 24)

At trial, the State played multiple videos from surveillance footage. In summation, the prosecutor argued that the footage showed Pearson calling someone outside of the barbershop and Leach waiting in the Malibu parked outside of 431 Madison. Soon thereafter, Marquis exited 431 Madison and entered the driver's side of the Malibu. (9T 49-10 to 51-6; 9T 60-11 to 61-2; 9T 62-13 to 23) Then, the prosecutor claimed, Marquis drove Leach to the barbershop, where Leach smashed Kearney's car window and cut his hand. Kearney then walked outside of the barbershop and was shot by Pearson and Leach. (9T 51-7 to 52-10) The prosecutor also argued that the footage showed Pearson climb over a fence into the backyard at 431 Madison and Leach in the

area where Melendez found the semiautomatic. (9T 65-7 to 66-1) Then, the prosecutor claimed, the two men briefly met outside of 431 Madison, Pearson left in the Malibu, and Leach walked toward the chicken restaurant. (9T 66-2 to 25, 67-5 to 69-14) None of the individuals in the surveillance footage were identifiable.

Part of the State's theory was that Leach arrived and Pearson departed from the general area of the shooting in the Malibu. (9T 49-10 to 51-6; 9T 60-11 to 61-2; 9T 62-13 to 23, 66-2 to 25, 67-5 to 69-14) However, Detective Kirsh conceded that the make and model of the car in the surveillance footage is not identifiable. (8T 79-17 to 19) Therefore, to argue that the car in the surveillance footage was the Malibu, Kirsh created a "reenactment" with Scott's Malibu driving past the same surveillance cameras near the barbershop between 6:42 and 7:02 p.m. on January 29, 2020. (8T 44-19 to 22) Kirsh then created a series of side-by-side photographs from the reenactment and original surveillance footage. (8T 43-9 to 46-18) Notably, Kirsh agreed there are "[m]ultiple variables between" the conditions on the day of the incident versus the reenactment. (8T 56-10 to 58-8) Kirsh also agreed that the make and model of the car is <u>not</u> identifiable in the reenactment footage. (8T 78-17 to 79-19)

Sergeant Nicholas Falcicchio testified as an expert in the analysis of cell-phone records. (8T 127-7 to 151-9) Falcicchio testified that the call

records showed multiple calls between three numbers -- allegedly belonging to Pearson, Leach, and Marquis -- between 6:44 and 7:04 p.m. on the night of the incident. (7T 54-20 to 65-22; 8T 171-3 to 172-15) He also opined, over defense counsel's objection, that those phones were in the "general area of the crime scene" at the time of the incident. (8T 166-17 to 167-25)

Lieutenant Tara Halpin testified that she processed Kearney's car after the incident. (5T 72-2 to 3) The front passenger window of the car was "shattered inward." (4T 60-21 to 61-14) Halpin recovered two shell casings from inside the car, but no shell casings or bullets were found on the sidewalk or street. (5T 88-22 to 23, 92-20 to 24, 101-12 to 14, 111-24 to 112-4) Halpin only checked the area around the shattered window for DNA and fingerprints. (5T 75-11 to 18) She did not check the rest of the exterior or anywhere in the interior of the car for DNA or fingerprints because "it was not requested." (5T 110-3 to 15) Additionally, Halpin recovered a baseball bat from the car but did not process it for fingerprints, although she acknowledged that there was no other baseball equipment in the car. (5T 112-23 to 113-4)

Pearson's fingerprints and DNA were not found on either of the handguns, in the backyards at 427 and 431 Madison, or at the crime scene. (4T 57-14 to 24, 99-13 to 100-11; 5T 181-14 to 23; 6T 54-19 to 55-25; 82-13 to 19) Leach's DNA was detected on the semiautomatic. (6T 58-9 to 62-6)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DEPRIVED PEARSON OF A FAIR TRIAL BY ALLOWING THE CELL TOWER EXPERT TO OFFER INADMISSIBLE NET OPINION, WITH NO LEGITIMATE BASIS OTHER THAN HIS OWN GENERAL EXPERIENCE AND TRAINING, THAT A PARTICULAR CELL TOWER HAD A PARTICULAR RANGE AND, THEREFORE, THAT PEARSON'S CELL PHONE WAS NEAR THE SHOOTING. (8T 141-4 TO 146-15, 148-14 TO 151-9, 163-25, 165-20)

An expert witness cannot offer a conclusion unsupported by factual evidence or other data. State v. Townsend, 186 N.J. 473, 494 (2006). Yet, over defense counsel's objections, Sergeant Falcicchio did just that. Falcicchio, when interpreting maps of the direction of the coverage of the cell towers that the relevant phone calls used, opined that Pearson was: (1) "in the general area of the crime scene" at the time of the shooting "based upon the location of the cell site[s]" used in particular calls and (2) "in the area of the general area [sic] of that traffic stop" in East Orange at 9:45 p.m. on the night of the shooting. (8T 167-23 to 25) Falcicchio's opinion as to the range of the cell towers lacked any legitimate basis other than his general experience and was, therefore, inadmissible "net opinion," in violation of N.J.R.E. 702 and 703. State v. Burney, 255 N.J. 1, 23-25 (2023). The admission of this net opinion was an

abuse of discretion, deprived Pearson of a fair trial, and, therefore, warrants the reversal of Pearson's convictions. U.S. Const. amends. VI and XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; Burney, 255 N.J. at 21-25.

No deference is owed to a trial court's evidentiary decision when there is abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). Here, the trial court's admission of improper net opinion from an expert witness was an abuse of discretion.

Expert testimony is admissible when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and the proposed expert has the "knowledge, skill, experience, training, or education" to form an expert opinion. N.J.R.E. 702. Additionally, the net-opinion rule, a corollary to N.J.R.E. 703, "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Burney, 255 N.J. at 23 (2023) (quoting Townsend v. Pierre, 221 N.J. 36, 53-54 (2015)). The rule "mandates that experts be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology

are reliable." Townsend, 221 N.J. at 55 (emphasis added).

It is our courts' responsibility to "ensure that the . . . expert does not offer a mere net opinion." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011). Net opinion may be admissible only if the expert explains to the jury "the why and wherefore of his or her opinion, rather than a mere conclusion." Townsend, 186 N.J. at 494 (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002)).

At the time of Pearson's trial, New Jersey courts applied the general "acceptance within a scientific community" test in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) to determine the admissibility of expert testimony. State v. Cassidy, 235 N.J. 482, 492 (2018).[5] Under the Frye test, "the State's burden is to prove that the . . . test and the interpretation of its results are non-experimental, demonstrable techniques that the relevant scientific community widely, but perhaps not unanimously, accepts as reliable." State v. Harvey, 151 N.J. 117, 171 (1997). "Whether expert testimony is sufficiently reliable to be admissible under N.J.R.E. 702 is a legal question [that the Appellate Division]

[5] Shortly after Pearson's trial, our Supreme Court adopted the principles of Daubert for examining the admissibility of expert evidence, including testing, peer review, error rates, and governing standards. State v. Olenowski [I], 253 N.J. 133 (2023). Like Frye reliability determinations, Daubert reliability determinations are to be reviewed de novo, while other case-specific determinations about expert evidence are to be reviewed for abuse of discretion. State v. Olenowski [II], 255 N.J. 529 (2023).

review[s] de novo." State v. J.L.G., 234 N.J. 265, 301 (2018).

In allowing Falcicchio to testify as an expert on the cell tower data, the trial court cited the Appellate Division's decision in State v. Burney, 471 N.J. Super. 297 (App. Div. 2022). In that decision, the Appellate Division allowed a cell-phone expert to testify, based on his general experience and training, about the "general" range of urban cell towers without actually providing any evidence that this estimate was accurate for the particular towers involved in that case. Burney, 471 N.J. Super. at 320-323. However, our Supreme Court has since overturned that decision, holding that this testimony was inadmissible under N.J.R.E. 702 and 703. Burney, 255 N.J. at 23-25. The Court reasoned that the expert offered no "factual evidence or other data," besides his general experience and training, to support his conclusion of a "rule of thumb" one-mile range for the particular towers. Id. at 12-14, 23-25.

Similarly, Falcicchio gave no factual evidence or other data, besides his general experience and training, to support his range-based opinion about the particular towers involved in this case. On the maps, Falcicchio used shaded-in areas to represent the direction from which certain cell towers would receive a signal from a phone. (8T 153-17 to 156-9) The shaded-in areas were not intended to represent the towers' coverage. (8T 161-2 to 17) Yet, based on these maps, Falcicchio opined that Pearson's phone -- as well as Leach's and

Marquis's phones -- were "in the general area" of the barbershop at the time of the shooting. (8T 161-24 to 162-3) "[B]ecause the testimony was based on nothing more than [the expert's] personal experience," this was inadmissible "net opinion." Burney, 255 N.J. at 25. Accordingly, the trial court sustained defense counsel's objection, finding that Falcicchio could not testify that the cell phones were in a "general area" of a tower. (8T 163-25)

But, soon thereafter, the trial court allowed the prosecutor to elicit the same inadmissible net opinion. The prosecutor asked: "Is there generally a range of coverage that this tower [would] be accepting calls from phones two miles away. . . three miles away, or is there a general range?" (8T 165-14 to 19) The trial court overruled defense counsel's objection and allowed Falcicchio to respond that "[i]t depends on how that particular tower is configured," and that, while a two- or three-mile range is possible, it is far more likely that in an area with a "large quantity of cell sites," like this, the range of the towers would "cover a smaller distance." (8T 165-20 to 166-16)

Over defense counsel's objection, Falcicchio further opined that Mayasha Scott's phone was "not in the area of the crime scene" at the time of the shooting, but that Pearson's phone was "in the general area of the crime scene based upon the location of the cell site." (8T 167-9 to 168-10) Falcicchio then offered a similar opinion that Pearson's phone was "in the general area of

the [East Orange] traffic stop" based upon the cell-tower data at 9:45 p.m. (8T 168-21 to 169-8)

Falcicchio's testimony was a mere conclusion and unsupported by the record. Falcicchio conceded that he never tested the range of the relevant cell towers, never went to those towers to make sure the maps correctly showed their locations, and never checked whether any obstructions or other factors might affect the coverage areas of those towers. (8T 175-2 to 177-9) In fact, Falcicchio had "no ability to check the condition of the towers or their actual locations from" the time of the shooting. (8T 177-6 to 9) Nonetheless, he refused to concede that the maps, specifically the shaded-in "circles" or "pies," may be "deceiving" because they do not represent the certain cell towers' coverage. (8T 177-4 to 178-10) Falcicchio also maintained on redirect that Pearson's phone was "between the wide edges of the [directional] wedge" of the shaded-in areas on the maps. (8T 177-4 to 178-10, 191-12 to 20)

In Burney, the expert testimony was inadmissible because it was not based on anything but the expert's experience and training and was, therefore, "net opinion." 255 N.J. at 16-25. Here, Falcicchio testified before the jury that Pearson's phone was "in the general area of the crime scene" based only on his general experience and training. (8T 167-23 to 25) This too was inadmissible net opinion. Moreover, the State repeatedly used this inadmissible net opinion

during summation to bolster its claims the Pearson was involved in the shooting. Having conceded that the surveillance footage -- allegedly showing Pearson at the shooting -- was not "the clearest," the State spent considerable time arguing that the cell phone evidence placed Pearson at the shooting. (9T 49-24 to 51-1, 58-7 to 8, 59-5 to 7, 68-10 to 13, 78-15 to 79-14)

Additionally, the Appellate Division should not determine the weight or worth of a particular piece of evidence when evaluating whether an error was harmful; that "is in the sole province of the jury." State v. Hedgespeth, 249 N.J. 234, 253 (2021). Reversal of the resulting convictions is required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also Hedgespeth, 249 N.J. at 252-253 (citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's arguments in favor of conviction are reversible and never harmless)).

As our Supreme Court has recognized, a "jury may overestimate the quality of the information provided by" cell site analysis, making the admission of "cell-site evidence that overpromises on the technique's precision -- or fails to account adequately for its potential flaws" all the more likely to prejudice a defendant. Burney, 255 N.J. at 25 (quoting State v. Hill, 818 F.3d

289, 299 (7th Cir. 2016). Here, the jury could have more readily accepted defense counsel's arguments about reasonable doubt if Falcicchio was properly barred from opining on the location of Pearson's phone to bolster the State's case. Thus, the trial court's error in allowing the admission of this testimony cannot be deemed harmless. Hedgespeth, 249 N.J. at 253; Scott, 229 N.J. at 485. Therefore, Pearson's resulting convictions must be reversed, and the matter remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN CHARGING THE JURY ON FLIGHT BECAUSE PEARSON'S PRESENCE IN SOUTH CAROLINA DID NOT REASONABLY JUSTIFY AN INFERENCE THAT HE LEFT NEW JERSEY WITH A CONSCIOUSNESS OF GUILT AND TO AVOID ARREST. (8T 200-15 TO 20)

The trial court further erred in charging the jury on flight as consciousness of guilt, over defense counsel's objection, where the only evidence offered by the State to support the charge was that Pearson's cell phone was in South Carolina one month after the shooting and that he was arrested in South Carolina three months after the shooting for unrelated reasons. (6T 7-7 to 17-13; 8T 169-12 to 170-10, 200-15 to 20; 10T 96-4 to 97-19) The trial court's error in charging the jury on flight deprived Pearson of his rights to due process and a fair trial, and requires reversal of his convictions. U.S. Const. amends. VI and XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

Under certain circumstances, flight from the scene of a crime may be evidential of consciousness of guilt. State v. Mann, 132 N.J. 410, 418-19 (1993). However, given "the potential for prejudice to the defendant and the marginal probative value of evidence of flight," id. at 420, the trial court must carefully consider whether the probative value of evidence of flight is 'substantially outweighed by the risk of . . . undue prejudice, confusion of issues, or misleading

the jury.'" State v. Randolph, 228 N.J. 566, 595 (2016) (quoting N.J.R.E. 403(a)). The probative value of flight depends on

> the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.
>
> [Mann, 132 N.J. at 420 (quoting United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)).]

The "imperative [is] that 'each link in the chain of inferences leading to that conclusion [--i.e., consciousness of guilt of the crime charged--] is sturdily supported.'" Id. at 419 (quoting United States v. Beahm, 664 F.2d 414, 420 (4th Cir. 1981)).

Thus, an instruction on flight is appropriate only when the evidence establishes that a defendant's motive for leaving the scene was to avoid apprehension of the charges contained in the indictment. State v. Wilson, 57 N.J. 39, 49 (1970) ("A jury may infer that a defendant fled from the scene of a crime by finding that he departed with an intent to avoid apprehension for that crime."). Mere departure from the scene of the crime does not imply consciousness of guilt. State v. Sullivan, 43 N.J. 209, 238 (1964). "'For departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably

justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt.'" Mann, 132 N.J. at 418-19 (quoting Sullivan, 43 N.J. at 238-39).

Where that inference is attenuated, a flight charge should not be given. See Mann, 132 N.J. at 419. That is, the evidence of flight "must be intrinsically indicative of a consciousness of guilt." Randolph, 228 N.J. at 595 (internal quotation marks omitted). "'[W]hen the defendant has not actively sought to avoid capture,'" the inference connecting defendant's behavior to consciousness of guilt "'is further attenuated.'" Mann, 132 N.J. at 419 (quoting United States v. Foutz, 540 F.2d 733, 740 (4th Cir. 1976)).

Here, the evidence did not support the inference that Pearson's actions constituted "flight" because there was "no nexus" between the alleged offense and his presence in South Carolina: there was no evidence as to when Pearson left New Jersey or arrived in South Carolina; there was no evidence that Pearson was consistently in New Jersey or that it would be irregular for him to be in South Carolina; there was no evidence that Pearson knew he was wanted by police in connection with the shooting before he left New Jersey. The evidence established only that Pearson was in South Carolina between February 19, 2020 and March 4, 2020, one month after the shooting, and then was arrested in South Carolina on April 12, 2020, three months after the shooting, for giving a false

name. (6T 7-7 to 17-13) There is no evidence as to whether Pearson remained in South Carolina the entire time between March 4, 2020 and April 12, 2020. In fact, Pearson ultimately returned to New Jersey before being detained in relation to the shooting after his April arrest. (7T 42-17 to 44-2) These facts do not "reasonably justify an inference that [Pearson went to South Carolina] with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt." Mann, 132 N.J. at 418-19 (internal quotation marks and citation omitted).

The trial court's improper flight charge, having overruled defense counsel's objection, had the clear capacity to produce an unjust result. The Appellate Division "will not reverse if an erroneous jury instruction was 'incapable of producing an unjust result or prejudicing substantial rights.'" Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015). However, "'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). Therefore, "[e]rroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." State v. McKinney, 223 N.J. 475, 495-96 (2015) (quoting State v. Afanador, 151 N.J. 41, 54 (1997)).

The only direct evidence tying Pearson to the crime was that his DNA matched one of three possible sources on a black mask found between 427 and 431 Madison. (6T 56-13 to 58-3) Moreover, there is no evidence that Pearson ever wore the mask. (6T 81-3 to 82-7). But the court instructed the jury that Pearson's presence in South Carolina -- one month after the shooting and then again three months after the shooting -- could be used to find consciousness of guilt in the charged offenses. In an otherwise weak case, this instruction had the clear capacity to tip the scales against Pearson. Therefore, his convictions should be reversed and the matter remanded for a new trial.

POINT III

THE TRIAL COURT IMPROPERLY ENCROACHED ON THE JURY'S FACTFINDING ROLE BY SUA SPONTE INSTRUCTING THE JURORS THAT, OUTSIDE OF THEIR PRESENCE, IT OVERRULED DEFENSE COUNSEL'S OBJECTION AND FOUND THE REENACTMENT PHOTOGRAPHS "PROPERLY ADMISSIBLE" AND "APPROPRIATE FOR THE JURY TO VIEW." (NOT RAISED BELOW)

To bolster the unclear surveillance footage of the shooting, the State created side-by-side still photographs from the original footage and the reenactment footage to argue that Mayasha Scott's Malibu was the car in both. (8T 43-9 to 46-18; 8T 78-17 to 79-19) Out of the jury's presence, the trial court overruled defense counsel's objection to the admission of the "reenactment" photographs.[6] (8T 25-13 to 38-10) But later, the court sua sponte told the jury: "Ladies and gentlemen, there was an objection to the admission of this. The court has determined that it is properly admissible, and it is admitted into evidence. It is appropriate for the jury to view the photos." (8T 46-19 to 23) (emphasis added) In doing so, the court encroached on the jury's factfinding role of determining what weight to give this evidence, thereby violating Pearson's state and federal rights to a fair trial and due process. U.S. Const. amends. VI and XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; State

[6] Pearson does not challenge the admission of the reenactment photographs.

v. Ridout, 299 N.J. Super. 233, 235 (App. Div. 1997). This error was clearly capable of producing an unjust result and therefore Pearson's convictions must be reversed and the matter remanded for a new trial. R. 2:10-2.

A court cannot tell a jury that it found a statement to be admissible. State v. Hampton, 61 N.J. 250, 272 (1972). This rule is codified in N.J.R.E. 104(c), which states that:

> Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury . . . If the judge admits the statement the jury shall not be informed of the finding that the statement is admissible but shall be instructed to disregard the statement if it finds that it is not credible.
>
> [(emphasis added).]

N.J.R.E. 104(c) ensures that the jury's factfinding role is "unhampered by knowledge of the court's prior" ruling. State v. Bowman, 165 N.J. Super. 531, 537 (App. Div. 1979). The Appellate Division has reversed convictions when courts and prosecutors have informed juries that the court found a statement to be admissible. See id. at 537-539.

The Appellate Division has extended this rule to other pieces of evidence. In Ridout, the Court found plain error when the trial court instructed the jury that it had found an identification to be admissible because it was the jury's role to determine the evidence's credibility; the instruction encroached

on the jury's factfinding role. 299 N.J. Super. at 238-239. The Court held that "[we] think the fundamental defect in these instructions" -- and the parallel to Hampton -- "is obvious." Id. at 238.

The trial court here violated this rule by unnecessarily instructing the jury that there was an objection to the reenactment photographs but it nonetheless "determined that it is properly admissible" and "appropriate for the jury to view the photos." (8T 46-19 to 23) There was no need for the trial court to mention defense counsel's objection or its decision overruling that objection to the jurors. In doing so, the court encroached on the jury's factfinding role in assessing the proper weight to give this evidence, thereby violating Pearson's state and federal rights to an impartial jury and due process. Furthermore, the purpose of holding an N.J.R.E. 104 hearing to determine admissibility of the photos out of the presence of the jury is directly contradicted by the trial court having told the jury what had occurred.

Pearson had the right to an untainted jury determination of the proper weight to be given to the reenactment evidence -- ranging from significant to none. Ridout, 299 N.J. Super. at 239. "If the evidence is admitted, the jury must determine its credibility based on essentially the same circumstances that the judge considered, and, of course, without a judicial seal of approval." Ibid. (emphasis added). However, the "judicial seal of approval" was stamped onto

the reenactment photographs, thereby hurting defense counsel's efforts to dispute their credibility and value. A reasonable juror could not be expected to consider this evidence without also considering the trial court's improper instruction that the reenactment photographs were "properly" in evidence and "appropriate" for the jury to view.

The reenactment photographs were intended to bolster the State's otherwise weak case against Pearson. The State admitted that the surveillance footage was unclear. (9T 55-19) As discussed above, the only direct evidence tying Pearson to the crime was that his DNA matched one of three possible sources on a black mask found between 427 and 431 Madison. The other two sources of DNA are unknown and there is no evidence that Pearson ever wore the mask. (6T 56-13 to 58-3, 81-3 to 82-7). Moreover, none of the surveillance footage of the shooting shows anyone wearing a mask. (8T 74-22 to 77-19) By telling the jury that it found the reenactment footage to be admissible, the trial court put its thumb on the scale of credibility for this evidence and tainted jury deliberation in a manner that had the clear capacity to affect the verdict. R. 2:10-2. Accordingly, Pearson's convictions should be reversed and the matter remanded for a new trial.

CONCLUSION

For the reasons discussed in Point I, II, and III, this Court should reverse Pearson's convictions and remand the matter for a new trial.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-2475-22T4

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	Criminal Action
v.	:	On Appeal from a Final Judgment of Conviction of the Superior Court
BASHIR PEARSON,	:	of New Jersey, Law Division,
Defendant-Appellant.	:	Union County.
	:	Sat Below:
		Hon. Thomas K. Isenhour, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF-RESPONDENT

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DATED: July 31, 2024

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COUNTER-STATEMENT OF PROCEDURAL HISTORY[1]

On February 4, 2021, a Union County grand jury returned Indictment No. 21-02-00031, charging defendant-appellant Bashir Pearson with purposeful or knowing murder, in violation of N.J.S.A. 2C:11-3a(1) or N.J.S.A. 2C:11-3a(2) (count one); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4a (count three); and second-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5b (count five). (Da1 to 3).[2]

From January 18, 2023 through February 1, 2023, defendant and co-defendant appeared before the Honorable Thomas K. Isenhour, J.S.C., and a jury, for a joint trial. (1T to 10T). On February 1, 2023, the jury found

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[1] Da refers to defendant's appendix on appeal.
Pa refers to the State's appendix on appeal.
1T refers to the trial transcript, dated January 18, 2023.
2T refers to the trial transcript, dated January 19, 2023. (Vol. 1).
3T refers to the trial transcript, dated January 19, 2023. (Vol. 2).
4T refers to the trial transcript, dated January 20, 2023.
5T refers to the trial transcript, dated January 24, 2023.
6T refers to the trial transcript, dated January 25, 2023.
7T refers to the trial transcript, dated January 26, 2023.
8T refers to the trial transcript, dated January 27, 2023.
9T refers to the trial transcript, dated January 31, 2023.
10T refers to the trial transcript, dated February 1, 2023.
11T refers to the sentencing transcript, dated March 21, 2023.

[2] Co-defendant Charles E. Leach was charged in counts one, two, and four of the indictment. (Da1 to 3).

defendant guilty as charged on all counts. (Da4 to 5; 10T26-18 to 28-13).

On March 21, 2023, defendant appeared before Judge Isenhour for sentencing. (11T). The court merged counts three and five into count one and sentenced defendant to thirty-five years in prison with thirty years of parole ineligibility, pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. (Da6 to 8; 11T19-1 to 10). The court also imposed the appropriate fines and penalties. Ibid.

On April 21, 2023, defendant filed a Notice of Appeal. (Da9 to 13). This appeal follows.

COUNTER-STATEMENT OF FACTS

On January 22, 2020, co-defendant Leach and defendant murdered the victim, Tyshun Kearney, by shooting him multiple times. That evening, between 6:30 p.m. and 7:00 p.m., Jerry Williams was working at the Jackson Avenue barbershop, located at 421 Jackson Avenue, in Elizabeth, New Jersey. (2T26-8 to 14; 2T28-5 to 6; 2T29-10 to 16). There were four or five people inside the shop: Ibn, Jerry, the victim Tyshun Kearney, Mr. Williams, and another customer. (2T29-17 to 30-9). They suddenly heard a loud noise "right out the front door," at which time the victim, Mr. Kearney, looked outside and exited the barbershop. (2T31-20 to 32-2). Five or ten seconds later, Mr. Williams heard five gunshots; some were "very loud noises" and others were "low noises." (2T32-3 to 12).

Mr. Williams ran for cover and ran into the closet that was in the back of the barbershop. (2T35-10 to 15). Ibn went into the bathroom, while Jerry "was just scrambling around," ultimately choosing to brace himself behind the door. (2T35-16 to 20). Eventually, Mr. Williams exited the closet and went to check on Jerry. (2T35-21 to 36-1). As he did, Mr. Williams heard a banging on the door and when he asked, "who is it," Mr. Kearney said, "it was me." (2T36-1 to 5). Jerry opened the door and Mr. Kearney walked in. (2T36-5). Mr. Kearney took four or five steps, walking approximately ten feet, and then

collapsed. (2T36-6 to 8). Mr. Williams immediately picked up the phone and called 9-1-1. (2T36-9 to 14). He then tried to talk to Mr. Kearney, who was mumbling something; when Mr. Williams turned Mr. Kearney over, Mr. Williams saw dark, red blood. (2T36-11 to 19).

Union County Sherriff's Officers Richard Brattole, Elizabeth Police Officer Kutsyy, and Detective Heller quickly arrived and began to render aid. (2T39-13 to 19; 2T175-6 to 9; 2T176-10 to 18; 2T177-9 to 178-18). They rolled Mr. Kearney over, used shears to cut off his shirt and attempted to find any bullet wounds. (2T179-4 to 9). They observed a chest wound in Mr. Kearney's left upper chest area below his shoulder, and attempted to apply a chest seal. (2T179-14 to 180-4).

At 6:56 p.m., Albert Cosaj, an Emergency Medical Technician with the Elizabeth Fire Department, was dispatched to the scene. (2T164-16 to 19; 2T165-21 to 25; 2T167-13 to 20; 2T168-4 to 6). Upon his arrival, he located Mr. Kearney, who had sustained a gunshot wound to his left shoulder, right side/back, lower abdomen, left knee, and right knee. (2T169-9 to 24; 2T170-9 to 18). Mr. Cosaj's supervisor indicated that Mr. Kearney had a pulse, so Mr. Cosaj moved Mr. Kearney onto a stretcher and brought him to the ambulance for further assessment. (2T170-2 to 8). In the ambulance, Mr. Kearney became pulseless and was not breathing, so Mr. Cosaj initiated chest

compressions and started CPR. (2T171-7 to 21). Mr. Kearney was then transported to Trinitas Hospital. (2T171-3 to 6). CPR was continued all the way to the hospital. (2T171-24 to 172-2).

Union County Prosecutor's Office Detective Sonia Rodriguez responded to Trinitas Hospital and was advised that Mr. Kearney was pronounced dead by Dr. Hague at 7:19 p.m. (5T55-12 to 16; 5T57-10 to 59-5). Detective Rodriguez then collected a projectile that was found in the body, and Mr. Kearney's wallet, sneakers, jogging pants, sweatshirt, and some other clothing articles. (5T58-14 to 21). She then brought the items back to the Union County Prosecutor's Office and secured them in the vault. (5T59-12 to 21).

On January 23, 2020, Dr. Junaid Shaikh, an expert in the field of forensic pathology and autopsies, conducted the autopsy on Mr. Kearney. (6T128-9 to 129-3). Dr Shaikh identified five gunshot wounds. (6T135-3 to 145-3). Wound number one was located on the chest region below the collar bone and perforated the pulmonary arteries. (6T135-3 to 7; 6T136-20 to 137-8). Inside the wound, Dr. Shaikh recovered a projectile. (6T137-14 to 21). Wound number two was located in the left upper part of the arm and exited the left upper scapula region. (6T138-3 to 9). Wound number three was located below the second exit wound, the left lower region of the victim's torso. (6T141-18 to 142-4). Dr. Shaikh was able to recover a projectile from the

wound, located in the dorsal muscle. (6T141-24 to 142-4). Wound number four was located in the abdominal region; it entered on the left side and exited on the right side. (6T142-23 to 144-7). Wound number five entered right above the victim's knee and exited through the rear of the victim's right thigh. (6T144-16 to 145-9). Dr. Shaikh recovered a projectile from the wound. (6T145-4 to 9). As a result of his examination, Dr. Shaikh concluded that the cause of death was multiple gunshot wounds. (6T159-18 to 24). He further concluded that the manner of death was a homicide. (6T160-3 to 4).

Elizabeth Police Detective Alex Gonzalez was working with his partner Detective Nicholas on the day of the homicide. (2T44-19 to 23; 2T45-14 to 20). At 6:54 p.m., they were stopped at a red traffic signal located at Magnolia Avenue and Jackson Avenue, when they heard gunshots within a very close distance to their location, in the direction of Jackson Avenue and Bond Street. (2T46-1 to 3; 2T51-16 to 52-4). They immediately proceeded in the direction of Bond Street and, as they turned onto Jackson Avenue, Detective Gonzalez observed an individual wearing a light-colored hoody darting away from the right side of the street, where Jackson Avenue Barbershop is located, and towards backyards that were located across the street from the barbershop. (2T52-23 to 53-9). The person in the hoody was the only person that Detective Gonzalez saw running across the street. (2T54-9 to 12).

In response, Detectives Gonzalez and Nicholas proceeded down Jackson Avenue, whereupon Detective Gonzalez's attention was drawn to what appeared to be gun smoke underneath one of the lampposts closer to the intersection of Jackson Avenue and Bond Street. (2T54-21 to 55-3). Detective Gonzalez notified police headquarters via his police radio that he was in pursuit of someone as a result of hearing shots fired, and then he pulled over his police vehicle, exited the car, and gave chase after the individual. (2T56-21 to 57-1; 2T58-1 to 7; 2T61-3 to 66-7). Detective Nicholas also exited the vehicle, but he proceeded to the right side of Jackson Avenue, towards the barbershop. (2T57-2 to 6). Surveillance video captured the detectives' arrival, the suspect Detective Gonzalez described, and Detective Gonzalez's initial pursuit. (2T70-17 to 74-2). Detective Gonzalez eventually stopped his chase and returned to the barbershop. (2T74-4 to 76-2).

Meanwhile, Elizabeth Police Officer John Londono, who was working in the community services division as a patrolman, also responded to the scene. (2T190-10 to 22). As he turned left onto Magnolia Avenue, Officer Haverty, who was adjacent to Officer Londono's vehicle, advised Officer Londono that he observed a male matching the description Detective Gonzalez provided. (2T191-25 to 192-6). The officers followed the suspect down Magnolia Avenue and made a left. (2T192-6 to 7). They entered the U.S. Fried Chicken

parking lot and apprehended the suspect, who was later identified as co-defendant Leach. (2T192-7 to 193-3). Officer Londono collected a gray hoody from co-defendant Leach. (2T195-6 to 12). He also observed that co-defendant Leach was wearing a white thermal shirt that had blood on the right side. (2T195-16 to 21).

Eventually, Detective Gonzalez heard that an individual had been detained at the U.S. Fried Chicken restaurant and he responded to that location. (2T83-23 to 84-18). When Detective Gonzalez arrived, he spoke with the officers who had detained the individual, and they presented him with that person. (2T84-19 to 22). Detective Gonzalez believed the person matched the physical build of the individual with the light-colored hoody. (2T85-18 to 24). Detective Gonzalez was then presented with a light-colored gray hoody that the detained individual was holding at the time he was apprehended. (2T85-24 to 86-2).

Detective Gonzalez then returned to the area of the barbershop and helped other law enforcement officers, including Detective Heller and Officer Melendez, canvass for evidence. (2T86-5 to 112-4). While canvassing, Detectives Gonzalez and Heller observed a discarded mask on the curbside, alongside a parked SUV that was located in between 427 and 431 Madison Avenue. (2T89-17 to 90-6). While Detective Gonzalez was by the SUV,

Officer Melendez, who also was canvassing, located a semiautomatic handgun near the walkway of 431 Madison Avenue. (2T92-25 to 93-19; 2T95-6 to 14; 3T212-10 to 213-8). The handgun was inside a small trash can on the side of the home. (2T95-17 to 96-4; 3T212-10 to 213-8). Video surveillance footage depicts an individual in a light-colored hoody placing the black semi-automatic handgun in the small trash can. (2T107-7 to 12). Detective Gonzalez observed a red substance that appeared to be blood or paint on the handgun. (2T96-16 to 97-2). Detective Gonzalez then notified his sergeant that the handgun was located and his sergeant advised Detective Gonzalez that the Crime Scene Identification Unit would respond and process the firearm. (2T97-10 to 16).

Detective Gonzalez continued to canvass for evidence and eventually re-entered the rear yard of 427 Madison Avenue. (2T101-12 to 21). While searching that area, Detective Gonzalez attempted to look between two fences that abutted each other. (2T102-3 to 13). Detective Gonzalez lifted himself up and did not see any items of evidence. (2T102-14 to 15). However, when he attempted to jump down, he rolled his ankle in the yard of 427 Madison. (2T102-15 to 18). He then went inside of 427 Madison to look at surveillance video from the home. (2T102-21 to 103-4).

After watching the video, Detective Gonzalez returned to the side

walkway of 427 Madison Avenue to inspect a storage box. (2T107-25 to 108-2). Detective Gonzalez observed and located a "black with brown handle revolver handgun." (2T109-4 to 6; 2T110-23 to 111-2). Detective Gonzalez then notified his sergeant that he had located a second handgun and his sergeant advised Detective Gonzalez that the Crime Scene Identification Unit would respond and process that firearm as well. (2T109-8 to 13). The pain from Detective Gonzalez's rolled ankle became too much, so he ceased his search and went to the hospital. (2T112-7 to 12).

Union County Sherriff's Office Sergeant Vincent Powers and Officer Vanessa Lang, who work in the Crime Scene Identification Unit, responded to the scene at approximately 7:25 p.m. (4T46-22 to 23; 4T47-14; 4T52-21 to 53-15). They photographed the scene and collected physical evidence. (4T55-25 to 88-22). At 431 Madison Avenue, they found a black mask and a black semi-automatic firearm with suspected blood, which was photographed, made safe, and secured. (4T65-5 to 13; 4T66-4 to 67-17; 4T69-5 to 10). They also recovered a gun magazine that was under the firearm. (4T72-3 to 9). At 427 Madison Avenue, they found another firearm, a revolver, which was photographed, made safe and secured. (4T73-23 to 74-9; 4T75-2 to 16). Discharged casings were also recovered. (4T76-23 to 25). They then returned to the original scene, where they photographed and documented the removal of

the victim's car. (4T88-20 to 89-3).

Sergeant Powers and Officer Lang then went to the Elizabeth Police Headquarters where they photographed and document co-defendant Leach, his clothes and his personal items. (4T90-2 to 24). Co-defendant Leach had a white shirt with red stains, consistent with blood, on the lower left, and sneakers that also had a reddish stain on the heal, which also was consistent with blood. (4T93-9 to 94-5). While photographing co-defendant Leach's person, Sergeant Powers noticed co-defendant Leach had an injury to his right thumb and there was blood on his hand. (4T91-10 to 14). A buccal swab was then taken from co-defendant Leach. (4T91-15 to 18).

After documenting co-defendant Leach, Sergeant Powers returned to 427 Madison Avenue. (4T95-12 to 16). He watched surveillance video and then searched the area where the revolver was found for latent prints or ridge detail. (4T95-22 to 96-10). Sergeant Powers noticed fingermarks on the top of the deck box that was in the area. (4T96-19 to 21). Sergeant Powers did not attempt to lift any fingerprints because the area was not conducive to fingerprint recovery, but he collected swabs for possible contact DNA. (4T97-3 to 14). Sergeant Powers then examined the fence and applied black fingerprint powder to the top of the fence. (4T99-13 to 17). Sergeant Powers noticed a friction ridge, but it was insufficient for fingerprint comparison.

(4T100-2 to 20). As a result, Sergeant Powers only collected a swab of the area for possible contact DNA. (4T100-21 to 25).

On January 23, 2020, Union County Sherriff's Officer Tara Halpin, who was assigned to the Crime Scene Identifications Unit and the Bureau of Investigations, responded to the Union County Prosecutor's Office garage and sally port with her partner, Detective Suter, to process the victim's Honda Accord. (5T68-19 to 69-2; 5T72-16 to 73-13). Officer Halpin noticed the front passenger window was broken and mostly leaning inward into the vehicle and that there was no exterior damage of note. (5T74-19 to 24). Inside the vehicle, they recovered two discharged cartridge casings, one on the front driver floor and the other in the rear driver floor. (5T81-2 to 18). They then photographed the vehicle. (5T75-3 to 8).

After photographing the vehicle, Officer Halpin and Detective Suter applied black powder to surfaces to look for fingerprints. (5T75-9 to 18). They were able to lift one print that was "useable" and several other impressions that were not usable for a fingerprint comparison. (5T77-11 to 15; 5T79-15 to 21). They then swabbed areas of the vehicle for DNA. (5T78-18 to 21; 5T79-16 to 24).

Four days later, on January 27, 2020, Officer Halpin and Detective Carew processed co-defendant Leach's Chevy Malibu for items of evidentiary

value and DNA latent impressions. (5T90-5 to 18). There were several impressions on the exterior of the vehicle that were conducive for fingerprint comparisons that were photographed and lifted. (5T91-14 to 22). There were other impressions that were not useable and were swabbed. Ibid. A search of the vehicle revealed "official State of New Jersey paperwork associated with [co-defendant Leach]" inside the vehicle. (5T92-20 to 24).

On multiple occasions from February 5, 2020 through June 10, 2020, law enforcement officers attempted to detain defendant to conduct an investigatory detention. (7T41-1 to 42-22). During that time, on April 12, 2020, Defendant was stopped in South Carolina and provided the officer with a false name. (6T7-7 to 17-13). Eventually, he was arrested in July 29, 2020, in Elizabeth. (5T202-20 to 203-12).

At trial, the State introduced the testimony of several experts. Union County Police Sergeant Matthew Schaible testified as an expert in ballistics and firearm identification. (5T147-17 to 19). He testified that both the semi-automatic firearm and the revolver were operable. (5T170-6 to 11). He further testified that the bullet that was recovered from the hospital was fired from the semi-automatic handgun that was recovered. (5T171-9 to 172-4). He also testified that the two shell casings that were recovered from the victim's Honda were ejected by the semi-automatic handgun. (5T172-5 to 9).

Additionally, Sergeant Schaible testified that the three casings recovered from the revolver were, in fact, fired by that revolver. (5T178-10 to 17). He also found that two of the three bullets that were recovered from the victim's body during autopsy, specifically, the ones recovered from Mr. Kearney's chest and back, were fired from the revolver. (5T178-18 to 179-12; 5T180-21 to 25; 5T181-7 to 15). Sergeant Schaible also testified that the third bullet that was recovered during the autopsy, the one that came from the victim's knee, rendered inconclusive results, but that it could not be excluded as having come from the revolver. (5T178-18 to 179-12; 5T181-1 to 6; 5T181-7 to 15).

Amanda Margolis, an expert in the field of DNA analysis, testified for the State at trial. (6T37-8 to 10). She testified that serology was conducted on a black mask, white Nike sneakers, jeans from co-defendant Leach, a gray Puma hooded sweatshirt from co-defendant Leach, swabs of suspected blood from a semiautomatic firearm, swabs from a revolver, and swabs from the cylinder release pin from the revolver. (6T52-11 to 17). Blood was indicated on the heel area of the right sneaker, the right front area of the jeans that were seized from co-defendant Leach, the right front pocket of the jeans that were seized from co-defendant Leach, the right sleeve near the thumb hole of the sweatshirt that was seized from co-defendant Leach, the front left chest area of the sweatshirt that was seized from co-defendant Leach, and the swabs of

suspected blood from the semi-automatic firearm. (6T53-3 to 9). Saliva was discovered on the black mask. (6T53-14 to 17).

The items were also tested to determine if there was comparable DNA. Numerous items had an insufficient amount of DNA detected for purposes of comparison. (6T54-18 to 24; 6T55-12 to 25). However, Ms. Margolis was able to obtain a DNA profile from the mask and determined that given the mixture of DNA obtained from the mask, it is approximately 45,500 times more likely if the DNA is a mixture of defendant and two unknown individuals than a mixture of three unknown individuals, which "provides strong support that [defendant] is a contributor to this DNA profile." (6T56-12 to 57-17). Co-defendant Leach and the victim were excluded as possible contributors to the mixture. (6T57-22 to 58-3).

Ms. Margolis also testified that she was able to obtain a single source DNA profile from the heel area of co-defendant Leach's sneaker. (6T58-9 to 12). She stated that, given the DNA profile obtained from this item, it was "approximately 26.1 quadrillion times more likely if [co-defendant Leach] is the source of the DNA than an unknown individual[,]" which provides very strong support that co-defendant Leach is the source of the DNA profile obtained. (6T58-13 to 21). Ms. Margolis similarly testified that a single profile was obtained from co-defendant Leach's jeans and his sweatshirt and

that given the DNA profile obtained from these items were, respectively, approximately 25.8 quadrillion times more likely and 25.7 quadrillion times more likely if co-defendant Leach was the source of the DNA than an unknown individual, which provides very strong support that co-defendant Leach was the source of the DNA profile. (6T59-5 to 61-16).

Additionally, Ms. Margolis testified about the DNA results that were obtained from the semi-automatic handgun. (6T61-17 to 20). Specifically, she testified that a single DNA profile was obtained and given the DNA obtained from the firearm, it was approximately 25.9 quadrillion times more likely if co-defendant Leach was the source of the DNA than an unknown individual. (6T62-1 to 5). Ms. Margolis stated that his value provides very strong support that co-defendant Leach was the source of the DNA from the semi-automatic firearm. (6T62-5 to 6; 6T94-1 to 10).

Union County Prosecutor's Office Detective Sergeant Nicholas Falcicchio testified as an expert in the field of cellular telephone record analysis. (8T151-21 to 24). He plotted the cellphone activity among the four target cellphones shortly before and after the homicide, identifying which towers were in use by each phone. (8T160-4 to 15; Pa9). Detective Sergeant Falcicchio did not opine on the distance that any of the phones were from the towers that he identified, and he explicitly stated, multiple times, that the

shaded areas of his demonstrative aid represented an antenna's directionality and not radio frequency coverage. (8T160-21 to 161-14; 8T178-6 to 25; 8T184-12 to 19; 8T190-25 to 191-11; 8T194-9 to 20; Pa1 to 15).

In addition to the aforementioned evidence, the State admitted numerous clips of surveillance video footage from the night of the homicide and a compilation of relevant segments that were obtained. (7T39-24 to 40-25; 7T74-9 to 77-8; Pa16). The videos captured the defendants before the shooting, the shooting itself, co-defendant Leach fleeing, the search for evidence, and the discovery of the firearms and mask. (Pa18).

The video also showed that a silver sedan was relevant to the investigation. Specifically, a review of the video showed co-defendant Leach arrive at the scene of the shooting in a silver vehicle that was consistent with a silver 2017 Chevy Malibu, which is owned by Mayasha Scott, the mother of co-defendant Leach's children, and which she testified co-defendant Leach drove on the night of the homicide. (5T16-24 to 17-9; Pa18). And, defendant was stopped later that night at 9:45 p.m., in East Orange driving the Chevy Malibu. (4T186-4 to 188-23; 4T196-2 to 8). Jurors were shown side-by-side photo comparisons of stills from the video surveillance and the reenactment of Mayasha Scott's silver 2017 Chevy Malibu vehicle driving through the area of the shooting. (7T195-7 to 22; 8T42-12 to 54-9).

LEGAL ARGUMENT

POINT I

DETECTIVE SERGEANT FALCICCHIO'S TESTIMONY WAS PROPERLY ADMITTED BY THE COURT. (RULINGS AT 8T141-4 to 146-15; 8T148-14 to 151-9; 8T163-25; 8T165-20)

Defendant claims the trial court's introduction of Detective Sergeant Falcicchio's expert testimony was contrary to State v. Burney, 255 N.J. 1 (2023). Defendant's claim is without merit. Detective Sergeant Falcicchio's testimony, which was based upon his training, his experience, and the records that he was provided, was properly admitted and did not violate the holding of Burney. Indeed, Detective Sergeant Falcicchio's demonstrative aid and his testimony clearly and unequivocally explained that he could not opine how close a phone was to a cell phone tower, but rather could state which towers were used and which antenna was utilized. Accordingly, the trial court did not abuse its discretion in permitting Detective Sergeant Falcicchio to testify. Moreover, even if the trial court's ruling was improper, in light of the overwhelming evidence of defendant's guilt, any error was harmless.

Appellate courts generally "defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). "A court abuses its discretion when its 'decision is made without a rational

explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020) (internal quotation omitted)). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." R.Y., 242 N.J. at 65 (alteration in original) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

The proponent of expert testimony bears the burden of proof on admissibility. State v. Torres, 183 N.J. 554, 567 (2005). Expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." State v. Gonzalez, 249 N.J. 612, 633-634 (2022). The expert witness must have sufficient expertise to offer the intended testimony. State v. B.H., 183 N.J. 171, 194 (2005). Additionally, "[a]s gatekeepers, trial judges must ensure that expert evidence is both needed and appropriate, even if no party objects to the testimony." State v. Sowell, 213 N.J. 89, 99-100 (2013). And witnesses may not base their testimony on inadmissible evidence. See State v. Frisby, 174 N.J. 583, 592 (2002) (finding that the defendant's trial was tainted by a testifying witness's reliance on inadmissible evidence).

Indeed, these requirements are set forth in N.J.R.E. 702 and N.J.R.E. 703, which govern the admissibility of expert testimony. Townsend v. Pierre, 221 N.J. 36, 53 (2015).

> Expert testimony must be offered by one who is "qualified as an expert by knowledge, skill, experience, training, or education" to offer a "scientific, technical, or . . . specialized" opinion that will assist the trier of fact, see N.J.R.E. 702, and the opinion must be based on facts or data of the type identified by and found acceptable under N.J.R.E. 703.
>
> [Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011) (omission in original).]

Stated differently, Rule 702 imposes three requirements for the admission of expert testimony:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.
>
> [State v. Derry, 250 N.J. 611, 632-33 (2022) (quoting Torres, 183 N.J. at 567-68).]

"Those requirements are construed liberally in light of Rule 702's tilt in favor of the admissibility of expert testimony." State v. Jenewicz, 193 N.J. 440, 454 (2008).

In addition to these requirements, "a court must ensure that the proffered expert does not offer a mere net opinion." Ibid. The net opinion rule, a corollary of N.J.R.E. 703, "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Townsend, 221 N.J. at 53-54 (quoting Polzo v. County of Essex, 196 N.J. 569, 583 (2008)). "The rule requires that an expert 'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Id. 221 N.J. at 54 (quoting Borough of Saddle River v. 66 East Allendale, LLC, 216 N.J. 115, 144 (2013)); see also Pomerantz Paper Corp., 207 N.J. at 372.

In this case, Detective Sergeant Falcicchio was properly qualified as an expert and aptly testified which towers were utilized by the relevant cell phones in this case. Detective Sergeant Falcicchio is a certified wireless analyst and a communications network specialist, with two certifications in telecommunications and two certifications in mobile forensics. (8T115-10 to 13). In order to obtain those certifications, Detective Sergeant Falcicchio took classes on how telephones work as a network, radio fundamentals, radio spectrum modems and modulations, and mobility and cellular fundamentals. (8T125-17 to 127-11). He also has attended the FBI's historical cell site analysis training course and a course on cellular WIFI analysis. (8T128-13 to 25). Additionally, he attended a course on cellular technology and mapping

analysis taught by a radio frequency engineer, where they discussed "mapping of records analysis, advanced reports, technology, statistical and link analysis and call detail records mapping analysis." (8T129-1 to 8). He continues to take training in the field of analyzing cell phone data and has analyzed cell phone data hundreds of times. (8T116-6 to 18). Detective Sergeant Falcicchio has spent numerous hours attending these courses and obtaining these certifications. Moreover, he has testified approximately seven times as an expert in this field. (8T136-17 to 25).

Before addressing the facts of this case, Detective Sergeant Falcicchio explained generalized concepts that apply to this field. Specifically, he explained that a cell phone tower is a structure that has antennas for cell phone service, that it can come in varying shapes and sizes, that the coverage from towers overlap, and that the coverage can be affected by a variety of things, including a customer's distance from the tower, any obstructions that might be in the way, or just a particular way that the phone company structure or configured that network. (8T118-20 to 119-17). He also testified that historical cell site information usually cannot provide very specific location data indicating that a phone was at a particular address. (8T120-11 to 16).

Detective Sergeant Falcicchio then explained the PowerPoint slides that he created to assist the jurors in understanding the cell phone records that the

cell phone providers produced. (8T153-12 to 162-3; 8T164-13 to 172-23). Detective Sergeant Falcicchio explained that the call detail records provide the location of a cell phone tower, which is the physical location of the cell site. (8T153-21 to 154-3). He further explained that he plotted those points on a map and the shaded area on his depiction only establishes the direction of the antenna that was being utilized by a call. (8T154-4 to 5). He clarified that "there's no estimation of any coverage with that. It's simply a graphical representation of the direction from the antenna that that antenna faces." (8T154-5 to 8). He then reiterated that he was not "saying that that particular area covers any particular area to a certainty where as if you aren't standing in that exact area, you wouldn't be using that cell phone tower." (8T155-19 to 22). He also explained that the shaded area on the PowerPoint slides was not intended to say a particular phone was in the darker color, that it does not represent radio frequency coverage, and that it merely showed directionality of the antenna. (8T160-18 to 161-14).

Utilizing the information provided by the cell phone companies and his training and experience, Detective Sergeant Falcicchio transformed that data into a visual representation and plotted the information on a map. (8T153-18 to 154-8; Pa1 to 15). This transformation was not a net opinion, but rather a recreation based on specific facts that were in evidence.

Indeed, there are only a few comments in the entirety of Detective Sergeant Falcicchio's testimony to which defendant objects. First, defendant claims it was improper for Detective Sergeant Falcicchio to state, "three of the devices are located in the general area of [the map] that's been marked 'crime scene.'" (8T161-24 to 162-3).[3] But, as previously stated, the data essentially spoke for itself: the cell phone towers that were utilized by three of the phones around the time of the crime were located a few blocks away from where the murder occurred. Moreover, as Detective Sergeant Falcicchio then testified, slide nine of his PowerPoint presentation contained the locations of the cell towers utilizing the data provided by the cellular providers, but did not represent coverage. (8T164-13 to 165-1; Pa9). It also did not represent specifically where the cell phones making the calls were located. Indeed, nearly all of the Detective Sergeant's slides indicate that the graphics do not represent coverage area. Thus, Detective Sergeant Falcicchio's testimony was proper and defendant's claim is without merit.

Defendant also claims it was error for the Prosecutor to ask Detective Sergeant Falcicchio if there was a general range of coverage of two to three miles and that the Detective Sergeant's response was likewise improper.

[3] Defense counsel for co-defendant Leach objected and the court sustained the objection, but the answer does not appear to be stricken.

(8T165-14 to 19). Defendant's claim is without merit. Notably, Detective Sergeant Falcicchio did not say "yes," but rather responded that "[i]t depends on how that particular tower is configured." (8T165-25 to 166-1). He further stated, "[i]f that tower is configured to cover that distance, which would not be typical in an urban environment, that could be possible." (8T166-3 to 5). He then explained that "typically, in an urban environment where there's a need for a large amount of cell sites, there are large quantity of cell sites that cover a smaller distance. In an area that might not be as densely populated, cell sites might cover further distances in miles." (8T166-6 to 13). Such testimony was accurate and was not an opinion about the specific location of the defendants' phones. Thus, defendant's claim is meritless.

Defendant also claims it was improper for the Detective Sergeant to have opined that the last device, Ms. Scott's phone, was not in the area of the crime scene and that the other three numbers were in the general area of the crime scene because it was a net opinion. Defendant's claim similarly is without merit. As Detective Sergeant Falcicchio testified, his opinion was based on a review of the call detail records, the distance from the crime scene, and the cell sites that are in the area between the two locations. (8T167-9 to 25). These are specific facts and conclusions that can be replicated and, thus, the Detective Sergeant's opinion was not a "net opinion."

Finally, defendant challenges the propriety of Detective Sergeant Falcicchio's testimony that the phone number associated with defendant was "in the general area of that traffic stop" that occurred in East Orange. (8T168-19 to 169-11). Again, defendant's claim is without merit. As Detective Sergeant Falcicchio testified, his opinion was based on a review of the call detail records and the cell sites that are in the area. (8T169-10 to 11). These are specific facts and conclusions that can be replicated and, thus, the Detective Sergeant's opinion was not a "net opinion."

Indeed, contrary to defendant's assertion, this case is distinguishable from State v. Burney, 255 N.J. 1 (2023). In Burney, the trial court held a Frye[4] hearing to determine the admissibility of Special Agent Ajit David's testimony. Id. at 11. At the end of the hearing, Special Agent David was qualified as an expert in historical cell site analysis, which he explained "isthe use of cell phone companies' business records to approximate where a user may have been at a particular time of interest." Ibid.

The Supreme Court described Special Agent David's testimony as follows:

> [he] testified at the Frye hearing that he obtained defendant's phone records from Sprint, which cataloged the date and time of calls and text messages,

[4] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

the cell towers and sectors that the phone used, and the locations of those towers. Based on this information, Special Agent David created maps depicting the towers pinged by the defendant's phone on the evening of December 25, and which sectors the defendant's phone utilized. Special Agent David plotted the cell towers and drew two lines -- 120-degree pie-shaped wedges -- extending from each of the cell towers' pinged sectors. Critically, Special Agent David testified that each of the lines had an approximate length of one mile, with the space in between them representing his estimated coverage area of the cell tower's sector.

Special Agent David opined that the towers likely had this one-mile range based on a "rule of thumb" for towers in the area. When asked how he determined the length of the two lines or "arms" that comprised the 120-degree coverage area for the cell towers, he explained:

So . . . the length that was used for these arms is, again, an estimate and these are one mile, which is a rule of thumb for this particular technology and this particular frequency in this particular area. So just based on my training and experience, one mile is a good estimate of the tower range for Sprint in this area. It's also further kind of supported by the location of the adjacent towers. We can infer, based on how the network is laid out and the fact that Sprint has designed this to avoid coverage gaps, that the tower needs to extend out to a certain distance that obviously doesn't cross over other towers, but that provides enough overlap between adjacent sectors so that there's no drops, no call drops, no dead zones in between. So just using a one-mile approximation, which has been a good approximation in my experience in this area.

[Id. at 11 to 12 (emphasis added)].

With this foundation, Special Agent David testified that on December 25 at 8:02 p.m., defendant's phone used a tower in Orange, the "Parkway Tower," to receive a text message. Id. at 12. Using his maps, Special Agent David gave his opinion that the Parkway Tower's coverage radius "would reasonably include the crime scene." Id. at 12-13. Special Agent David acknowledged that the crime scene is slightly less than one mile from the Parkway Tower and is at the "outer boundary" of his estimated coverage area. Id. at 13. Special Agent David also acknowledged, however, that two other cell towers were closer to, and within range of, the crime scene. Ibid.

The Supreme Court also noted that Special Agent David testified that he did not test the actual range of the Parkway Tower and further noted that a tower's range and coverage area can be affected by many factors, including the height of the antenna, surrounding terrain and buildings, signal frequency, transmitter and phone power ratings, and antenna direction, but he did not offer measurements or data as to those specific factors when testifying as to his estimated range for the Parkway Tower. Ibid. Special Agent David similarly did not measure the actual coverage area of the Parkway Tower through either "drive testing" or "propagation maps." Ibid.

The trial court and Appellate Division both found Special Agent David's testimony to be admissible. The Supreme Court disagreed. The Court found

that "Special Agent David's 'rule of thumb' testimony constitutes an improper net opinion because it was unsupported by any factual evidence or other data." Id. at 25.

Although there admittedly are similarities between Detective Sergeant Falcicchio's testimony and that of Special Agent David's testimony, they differ in two important respects: Detective Sergeant Falcicchio's map did not depict coverage areas and the majority of his testimony did not address the cell phones' proximity to the towers. His demonstrative exhibit, (Pa1 to Pa15), and his testimony clearly and explicitly set forth that the map shows the location of the cell sites and the directionality of the antennas, not coverage. Moreover, Detective Sergeant Falcicchio admitted that he could not tell how close a cellphone was to a particular tower and did not attempt to do so. Rather, the Detective Sergeant simply plotted cell towers on a map and acknowledged the towers, which were several blocks from the crime scene, were in the general area of the crime scene. Accordingly, this case is distinguishable from, and does not run afoul of, Burney.

However, even if the admission of the testimony was improper, its admission was harmless. Defendant's guilt was proven beyond a reasonable doubt by the overwhelming evidence that established his guilt. Police were in the area at the time of the shooting and responded almost immediately to the

location. (2T46-1 to 3; 2T51-16 to 52-4). Detective Gonzalez observed one of the shooters, a male wearing a light-colored hoody, fleeing from the scene and he gave chase. (2T64-5 to 7). That person, co-defendant Leach, was captured that evening, holding a light-colored sweatshirt. (2T83-23 to 86-2). Furthermore, his DNA was found on the semi-automatic firearm that fired the bullet that was recovered from the victim's body at the hospital and undoubtedly was one of the murder weapons. (5T171-9 to 172-9; 6T62-5 to 6; 6T94-1 to 10).

But co-defendant Leach was not the only person involved in the murder. Proofs that were admitted at trial established that a second firearm, a revolver, was used. (5T170-6 to 11; 5T171-9 to 172-4; 5T172-5 to 9; 2T107-25 to 108-2; 2T109-4 to 6; 2T110-23 to 111-2). Thus, it cannot be questioned that there was a second shooter.

Although law enforcement was unable to recover DNA or fingerprints from the revolver, the remaining evidence proved the second shooter was defendant. Defendant and co-defendant Leach were in communication before the murder and after the murder. Moreover, video surveillance and photos established what defendant was wearing before the murder and that his outfit matched the clothing of the second shooter. Although the second shooter's face may not be visible because he was wearing a mask, notably, law

enforcement officers recovered a black mask near the crime scene, on the curbside between 427 and 431 Madison Avenue and the DNA evidence provided strong support that defendant contributed the DNA profile that was discovered on the mask. (2T89-17 to 90-6; 6T56-12 to 57-17).

Furthermore, shortly after the murder defendant was stopped in Mayasha Scott's Chevy Malibu. (4T186-4 to 188-23; 4T196-2 to 8). While this may appear innocuous, a review of the video showed defendant arriving at the scene of the shooting in a silver vehicle that was consistent with that car, and Ms. Scott testified defendant drove that car on the night of the homicide. (5T16-24 to 17-9; Pa16). Thus, defendant's presence in the car that was used by co-defendant Leach to arrive at the crime scene is highly probative of defendant's involvement in the crime. And, notably, when defendant was stopped in South Carolina months later, he gave a fake name to police. (6T7-7 to 17-13).

Although the DNA evidence may not have placed the revolver in defendant's hand like it placed the semi-automatic in co-defendant Leach's hand, the proofs establishing defendant's guilt nevertheless were overwhelming. Furthermore, none of the aforementioned evidence depended on the cell site locations. Accordingly, even if the trial court abused its discretion by admitting Detective Sergeant Falcicchio's testimony, any error

was harmless.

Indeed, the probative value of the testimony and any harm that defendant can attribute to same was minimized by defense counsels' cross-examination. Counsel asked whether Detective Sergeant Falcicchio drove to the locations of the towers, to which the Detective Sergeant responded that he did not, but looked at the locations on Google Earth for indication that they exist. (8T175-14 to 23). He also testified that he could not tell if there were any physical obstructions to the cell towers or what the conditions of the towers were in 2020. (8T175-24 to 176-25). Counsel even asked whether the slides were "incredibly deceiving," to which Detective Sergeant Falcicchio disagreed and reiterated that he was not opining about proximity or cell site coverage, but rather directionality. (8T178-6 to 179-23). Indeed, defense counsel asked whether Detective Sergeant Falcicchio could state whether a cell phone was two blocks, twenty blocks, or two miles away, and Detective Sergeant Falcicchio admitted that he could not. (8T185-11 to 22). Thus, even if the admission of his testimony was improper, it was harmless. As such, defendant's conviction should be affirmed on appeal.

POINT II

THE TRIAL COURT PROPERLY CHARGED THE JURY ON FLIGHT. (8T200-10 TO 20; 9T96-4 to 97-2).

Defendant claims the trial court erred in providing the jury with a flight instruction. Defendant's claim is without merit. The trial court aptly found that there was a strong degree of confidence that one could infer defendant fled from New Jersey after the shooting because of his consciousness of guilt. Accordingly, the trial court properly instructed the jurors on "flight." However, even if the trial court erred by providing this instruction, any error was harmless in light of the overall proofs and overall jury charge. As such, defendant's conviction should be affirmed on appeal.

It is well-established that "[c]orrect charges are essential for a fair trial[,]" and to that end, "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). "Erroneous jury instructions on matters material to a jury's deliberations are ordinarily presumed to be reversible error." State v. Jackmon, 305 N.J. Super. 274, 277-78 (App. Div. 1997). A jury charge serves as a "road map to guide the jury, and without an appropriate charge, a jury can take a wrong turn in its deliberations." State v. Nelson, 173 N.J. 417, 446 (2002) (quoting State v. Martin, 119 N.J. 2, 15 (1990)). The Supreme Court has repeatedly emphasized

that "clear and correct jury instructions are essential for a fair trial." Nelson, 173 N.J. at 446. Therefore, jury charges must "relate the law to the facts of a case." State v. Savage, 172 N.J. 374, 389 (2002). "[T]he test is to examine the charge in its entirety, to ascertain whether it is either ambiguous and misleading or fairly sets forth the controlling legal principles relevant to the facts of the case." State v. Labrutto, 114 N.J. 187, 204 (1989). Although a party is entitled to a charge which fully, clearly, and as accurately as possible sets forth the fundamental issues, he is not entitled to a charge in his own words. State v. Ball, 268 N.J. Super. 72, 112 (App. Div. 1993); Labrutto, 114 N.J. at 204; State v. Green, 86 N.J. 281, 288-89 (1981), aff'd, 141 N.J. 142 (1995), cert. denied, 516 U.S. 1075 (1996).

To determine whether alleged defects in a jury charge rise to the level of such reversible error, those claims must be considered within the context of the charge as a whole, not in isolation. State v. R.B., 183 N.J. 308, 325 (2005); see also State v. Chapland, 187 N.J. 275, 289 (2005). When examining the entire charge, the reviewing court should consider whether the erroneous instruction was fatal to the conviction. Jackmon, 305 N.J. Super. at 299 (citing State v. Rhett, 127 N.J. 3, 7 (1992)). If the court finds that prejudicial error did not occur, the jury's verdict must stand. State v. Coruzzi, 189 N.J. Super. 273, 312 (App. Div. 1983); see also State v. Loftin, 146 N.J. 295 (1996).

Flight from the scene of a crime, depending on the circumstances, may be evidential of consciousness of guilt, provided the flight pertains to the crime charged. State v. Mann, 132 N.J. 410, 418-19 (1993); see also State v. Wilson, 57 N.J. 39, 49 (1970) ("A jury may infer that a defendant fled from the scene of a crime by finding that he departed with an intent to avoid apprehension for that crime." (emphasis added)). Flight will have "legal significance" if the circumstances "reasonably justify an inference that it was done with a consciousness of guilt" to avoid apprehension on the charged offense. State v. Ingram, 196 N.J. 23, 46 (2008) (quoting Mann, 132 N.J. at 418-19). Evidence of flight must be "intrinsically indicative of a consciousness of guilt." State v. Randolph, 228 N.J. 566, 595 (2017). However, evidence of flight does not need to "unequivocally support a reasonable inference" of the defendant's guilt. Ibid.

An instruction on flight "is appropriate when there are 'circumstances present and unexplained which … reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt.'" State v. Latney, 415 N.J. Super. 169, 175-76 (App. Div. 2010) (quoting State v. Mann, 132 N.J. 410, 418-19 (1993)). The jury must be able to find departure and "the motive which would turn the departure into flight." State v. Wilson, 57 N.J. 39, 49 (1970).

The propriety of admitting the evidence and delivering the instruction

> depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.
>
> [Mann, 132 N.J. at 420 (quoting United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)].

Whether sufficient evidence in the record exists to support a flight charge is within the trial judge's discretion. State v. Long, 119 N.J. 439, 499 (1990).

Here, the trial court properly provided an instruction on flight. As the trial court stated,

> The Court is going to give that flight charge based upon the testimony presented with the time specified in terms of when the first investigative detention order was obtained; the efforts detailed by Detective Kirsh in terms of visiting a number of locations, including most significantly, the defendant's mother's home and conferring with the mother going to 431, as well as other individuals.
>
> I find that there's a sufficient basis in the record to find that the defendant was aware of the charges, or at least for the jury to consider that he was aware of the charges and consider whether the fact that he was detained in another -- or found in another state and

> provided a fake name or false name when detained is sufficient for them to infer consciousness of guilt.
>
> [8T200-21 to 201-11].

Based on these proper findings, the trial court ultimately provided the jury with the following instruction:

> There has been some testimony in this case from which you may infer that Bashir Pearson fled shortly after the homicide of Tyshun Kearney. Mr. Pearson denies that the acts constituted flight. The question of whether Mr. Pearson fled after the commission of the crime is another question of fact for your determination. Mere departure from a place where a crime has been permitted does not constitute flight. If you find that Mr. Pearson, fearing that an accusation or arrest would be made against him on the charge involved in the indictment, took refuge in flight for the purpose of evading the accusation or arrest on that charge, then you may consider such flight in connection with all the other evidence in the case as an indication or a proof of consciousness of guilt.
>
> Flight may be considered only as evidence of consciousness of guilt if you should determine that the defendant's purpose in fleeing was to evade accusation or arrest for the offense charged in the indictment. It is for you as judges of the facts to decide whether or not evidence of flight shows a consciousness of guilt and the weight to be given to such evidence in light of all the other evidence in this case.
>
> [9T96-4 to 97-2].

Defendant claims the trial court erred in providing this charge because there was "no nexus" between defendant's presence in South Carolina and the

crimes charged. Defendant's claim is without merit. As the trial court aptly found, the police obtained multiple investigatory detention orders and attempted to find defendant. Law enforcement attempted to find defendant at locations he frequented, but were unable to locate him. Suspiciously, defendant left the State. When he was stopped in South Carolina, he provided a fake name. The timing of defendant's departure and his conduct in South Carolina when stopped by law enforcement provide a reasonable basis to support an inference that defendant's flight was a result to avoid apprehension and a consciousness of guilt. Therefore, the trial court did not abuse its discretion in providing the flight charge.

However, even assuming the court's decision was erroneous, any error was harmless. Foremost, as previously argued in POINT I, supra, the evidence against defendant was overwhelming. Therefore, this charge did not have the capacity to produce an unjust result.

Indeed, when considering the charge as a whole, it is clear that this charge could not improperly prejudice defendant. The court told the jury that the question of whether defendant fled after the commission of the crime is a question of fact for them to determine. It also told them that mere departure from a place where a crime has been permitted does not constitute flight and that defendant denied that he fled. Moreover, the court explicitly informed the

jurors that they could not consider the flight evidence unless they found defendant's purpose in fleeing was to evade accusation or arrest for the offense charged in the indictment. Thus, in order for the jury to even consider defendant's flight as consciousness of guilt evidence, the jury had to first make the inferences that defendant's claims did not exist for the charge to be provided. Accordingly, if defendant's claim is true, that there was no evidence to support such an inference, the jury undoubtedly would not have found defendant's departure amounted to flight and would not have considered it against him. As such, even if defendant is correct and the court should not have given the flight charge, it is clear that he was not prejudiced by same. Therefore, his conviction should be affirmed on appeal.

POINT III

THE TRIAL COURT DID NOT ERR BY INFORMING THE JURY THAT HE OVERRULED DEFENDANT'S OBJECTION. (Not Raised Below).

For the first time on appeal, defendant claims the trial court deprived him of a fair trial by informing the jury that the court overruled defendant's objection to the admission of the recreation evidence and the "Court has determined that it is properly admissible and it is admitted into evidence. It is appropriate for the jury to view the photos." (8T46-19 to 23). Because defendant did not object below, this Court should not consider this claim. However, even if this Court does consider defendant's assertion, it should be denied because it is without merit. The trial court's statement did not infringe upon the jury's fact-finding authority and, thus, it was not improper. However, even assuming the court's comment was inappropriate, it was harmless and, therefore, defendant's conviction should be affirmed on appeal.

> It is a well-settled principle that . . . appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest."
>
> [Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234

(1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)).]

Here, where defendant did not object to this instruction below, this Court should decline to consider the issue on appeal. However, if this Court nevertheless chooses to consider defendant's claim, it should be rejected because it does not amount to plain error. See R. 2:10-2. Under that standard, an appellate court can reverse only if it finds that the error was "clearly capable of producing an unjust result." Ibid.; State v. Cole, 229 N.J. 430, 458 (2017). Here, the alleged error does not have that capacity and, thus, defendant's conviction should be affirmed on appeal.

Although the State recognizes that N.J.R.E. 104(c) explicitly precludes a trial court from informing the jury that it conducted a hearing outside of their presence and that the Court found a defendant's statement was admissible, the Rule does not provide guidance regarding other evidence. Nevertheless, in State v. Ridout, 299 N.J. Super. 233, 238-40 (App. Div. 1997), this Court appears to have expanded N.J.R.E. 104(c)'s preclusion to other circumstances where a trial judge must make a preliminary finding of admissibility. In those circumstances, a trial court "cannot tell the jury anything that would preempt its fact-finding function." Because the instruction here merely advised the jury that the recreation was admissible and not why the court reached that

conclusion, the commentary did not run afoul of Ridout. Therefore, defendant's claim of error is without merit.

Indeed, the instruction here is completely distinguishable from the offending commentary of Ridout. In Ridout, the critical issue in the case was identification. Ridout, 299 N.J. Super. at 234. Both the victim and the doorman identified the defendant in a pretrial photographic area but were unable to make an in-court identification. Ibid. Accordingly, the out-of-court identifications made by each witness constituted the primary evidence against the defendant. Ibid. Following an evidential hearing, the judge found that the two out-of-court identifications met the conditions for admissibility stated by the rule. Id. at 235. However, the trial court then made the fatal error of "telling the jury what his finding was, namely, that he had determined that the out-of-court identification procedure was not suggestive and that the conditions of fairness and reliability had been met." Ibid. The court reiterated its findings at the close of the State's case and in its general instruction at the end of the case. Id. at 237-38.

The Appellate Division reversed the defendant's conviction. The Court did not take issue with the hearing or fault the trial court's conclusion that the photographs were not suggestive. Id. at 238-39. However, the court in Ridout stated, "[t]he problem is in his having told the jury that he had determined that

the conditions of admissibility had been met and that he had thus specifically determined that the identifications were not only not suggestive but also had met the reliable and trustworthy conditions stated by the rule." Id. at 239. The court found this was a problem because the judge's comments preempted the jury's fact-finding function. Ibid. The court further noted that

> while the judge here may have obliquely suggested to the jury that they were the final arbiters of the facts, we are persuaded that the jury must necessarily have been influenced in its weight and credibility determinations by the judge assuring it he had already found the identifications to be reliable and trustworthy--precisely the determinations the jury had to make. The defendant was, consequently, deprived of her right to have the jury make unfettered and undirected critical findings of fact.
>
> [Ibid.]

The concerns expressed in Ridout are not present in this case. Indeed, the trial court's comment did not explain why it deemed the recreation was admissible. More importantly, the comment did not infringe upon the jury's fact-finding function. The trial court did not advise the jurors that the images were sufficiently reliable or trustworthy and it did not tell the jurors that it found the image of the car in the recreation was sufficiently similar to the image of the car from the video surveillance footage to be probative. Rather, the trial court simply informed the jurors that there was an objection, the court

overruled the objection, and it found the video was admissible and could be presented. Accordingly, it did not violate N.J.R.E. 104 or Ridout.

Finally, even assuming the detective's comment was improper, any error was harmless because it was not capable of producing an unjust result. As argued in POINT I, supra, there was overwhelming proof of defendant's guilt. Unlike Ridout, where the out-of-court identifications were the primary pieces of evidence against the defendant, here, the recreation was merely a small piece of a much larger pie of evidence against defendant. The comment, which did not infringe on the juror's fact-finding function, did not have the capacity to change the jury's evaluation of the evidence, let alone, their finding of guilt. Moreover, counsel's failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. State v. Frost, 158 N.J. 76, 82-84 (1999). Accordingly, even if this Court finds the trial court's comments were improper, they do not amount to plain error and, thus, defendant's conviction should be affirmed on appeal.

CONCLUSION

For the foregoing reasons, the State respectfully requests that defendant's conviction and sentence be affirmed.

Respectfully submitted,

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MSL/bd