SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3191-21

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, Somerset County.
TAYYAB WARE,	:	
Defendant-Appellant.	:	Indictment No. 21-07-0593
	:	Sat Below:
	:	Hon. Peter J. Tober, J.S.C.

BRIEF AND APPENDIX
ON BEHALF OF DEFENDANT-APPELLANT

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Dated: September 30, 2023

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS (CONT'D.)

PAGE NOS.

JUDGMENTS, RULINGS, AND ORDERS BEING APPEALED

INDEX TO APPENDIX

TRANSCRIPT OF CITATIONS

"1T" – January 7, 2022, status conference (not cited)
"2T" – January 18, 2022, pretrial proceeding (not cited)
"3T" – January 20, 2022, hearing on scheduling (not cited)
"4T" – January 24, 2022, hearing on discovery
"5T" – January 25, 2022, scheduling conference
"6T" – January 26, 2022, discovery ruling
"7T" – January 31, 2022, Miranda hearing and trial
"8T" – February 2, 2022, trial
"9T" – February 3, 2022, trial
"10T" – February 4, 2022, trial (Volume I)
"11T" – February 4, 2022, trial (Volume II)
"12T" – February 8, 2022, trial
"13T" – February 9, 2022, trial
"14T" – February 10, 2022, trial
"15T" – February 11, 2022, jury charge conference
"16T" – February 14, 2022, summations and jury charges
"17T" – February 15, 2022, verdict
"18T" – May 10, 2022, motions and sentencing

TABLE OF AUTHORITIES

PAGE NOS.

CASES

TABLE OF AUTHORITIES CONT'D

PAGE NOS.

CASES

STATUTES

TABLE OF AUTHORITIES (CONT'D.)

PAGE NOS,

STATUTES (CONT'D.)

RULES

RULES OF EVIDENCE

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PROCEDURAL HISTORY

Defendant Tayyab Ware and codefendant Todd Smith were charged under Somerset County Indictment 21-07-00593 with second-degree conspiracy to commit robbery, contrary to N.J.S.A. 2C:15-1a and N.J.S.A. 2C:5-2a(1) and (2) (count one); first-degree purposeful or knowing murder, contrary to N.J.S.A. 2C:11-3a(l) or (2) (count two); first-degree felony murder, contrary to N.J.S.A. 2C:11-3a(3) (count three); first-degree robbery, contrary to N.J.S.A. 2C:15-1a(1), (2) and (3) (count four); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (count five); and second-degree unlawful possession of a handgun, contrary to N.J.S.A. 2C:58-4 and N.J.S.A. 2C:39-5b (count six). (Da 1-3)[1] Codefendant Smith was charged separately with an additional count of unlawful possession of a handgun (count seven). (Da 3)

Ware was tried before the Honorable Peter J. Tober, J.S.C. and a jury on various dates in January and February 2022. [2] (7T to 17T) On January 26, 2022, before the trial commenced, Judge Tober entered an order prohibiting the State from introducing at trial three items of recently produced discovery and the State

[1] "Da" – defendant-appellant's appendix

[2] On January 7, 2022, codefendant Smith pled guilty to count four, robbery as amended to a second-degree offense, and testified at trial against Ware. (4T 12-16 to 12-21; 10T, 11T, 12T 5-3 to 57-9)

filed an interlocutory appeal (6T 4-4 to 12-11); this Court granted the State's appeal and reversed the trial court's ruling on February 2, 2022. (8T 6-9 to 6-19) On February 15, 2022, the jury found Ware guilty as charged. (Da 4-6; 17T 18-11 to 21-1)

On May 10, 2022, Ware appeared before Judge Tober for a hearing on his motion for judgment of acquittal notwithstanding the verdict/new trial. Judge Tober denied the motion (18T 5-5 to 6-16), and proceeded to sentence Ware as follows. After merging felony murder with knowing or purposeful murder, and conspiracy to commit robbery and possession of a weapon for an unlawful purpose with robbery, Judge Tober sentenced Ware to three concurrent prison terms: 35 years for murder, with a 30-year period of parole ineligibility, N.J.S.A. 2C:11-3b(1); 15 years for robbery, 85% to be served without parole, N.J.S.A. 2C:43-7.2; and seven years for the firearms offense, with a 42-month period of parole ineligibility, N.J.S.A. 2C:43-6c. The requisite fines and monetary penalties were also imposed. (Da 7-10; 18T 17-6 to 19-12)

Ware filed a Notice of Appeal on June 21, 2022. (Da 11-15)

STATEMENT OF FACTS

A. Introduction

On November 1, 2020, defendant Tayyab Ware and two friends, Ronricos Davis and codefendant Todd Smith, drove from Georgia to New Jersey in a red Chrysler 300 that Davis rented. (13T 55-10 to 55-11; 13T 59-14 to 60-9) Ware and Davis were living in Georgia at the time; Smith was visiting form New Jersey. (Da 21; 10T 12-12 to 13-11; 10T 61-10 to 61-16) Ware, originally from New Jersey, had been living in Augusta for several years, where he was pursuing a career in music as a battle rapper. Ware and Smith knew each other high school, but lost contact with after graduation. (Da 28; 10T 58-12 to 58-19; 14T 128-2 to 128-17; 14T 129-6 to 129-22) Ware attended college for one year and then joined the Army; he was honorably discharged in 2012. He had no prior convictions. (14T 125-4 to 125-17; 18T 15-17 to 16-4) Smith spent close to ten years in prison for robbery and violating parole. (10T 12-12 to 13-11; 10T 56-8 to 57-11) Smith and Ware reconnected through Facebook after Smith was released from prison in 2019. (10T 56-8 to 57-1)

Ware and his friends arrived in New Jersey on November 2, 2020, and checked into the Raritan Hotel in Fords for two nights. (8T 69-5 to 75-13) Because it was the first time Ware had been back to New Jersey in several years, he spent the day visiting people and "partying." (Da 25; 10T 21-14 to 21-24)

On the night of November 2, Smith and another man were involved in a fatal shooting at a dice game in a barbershop in Franklin. The two men traveled to and from the barbershop in the red Chrysler that Davis had rented. (9T 89-21 to 95-23) Davis was not alleged to have had any involvement in the crimes Smith committed.

Smith learned there would be a dice game that night from his friend, Hassan Cooper, who had lost $6000 playing dice at the barbershop two days before and was angry about it. (9T 16-16 to 17-11; 9T 21-10; 13T 122-2 to 122-10) At the time of the shooting, Cooper was not in New Jersey; he, reportedly, left New Jersey on November 1 and went to North Carolina. (13T 110-7 to 110-16; 14T 50-16 to 50-25) A couple of days after the shooting, Smith drove to Virginia, picked up Cooper, and brought him back to New Jersey. (10T 33-23 to 35-15; 13T 125-13 to 125-20) It is unclear how or why Cooper wound up in Virginia. Ware was not alleged to have had any connection to Cooper or the barbershop.

Smith was arrested on December 22, 2020, in Clark and charged with murder and robbery. (10T 5-2 to 5-12; 10T 41-23) At the time of his arrest,

Smith was in possession of a loaded firearm.[3] (14T 6-4 to 6-14; 10T 42-18 to 42-23; 10T 43-25 to 44-14)

Smith gave a post-arrest statement to police that, as Smith admitted at trial, was filled with lies and inconsistencies. (11T 122-17 to 122-22) He began his statement by telling police that he was not in New Jersey on the day of the shooting; he claimed he was living out of state since September and had just returned for his cousin's funeral. (10T 74-7 to 79-21) He later told police that he went to Virginia on November 2, picked up a friend and "drove him back up here." (10T 83-10 to 84-21) He finally admitted that he was at the barbershop that night but claimed he went there alone and had nothing to do with shooting. (10T 97-10 to 109-16) He told police, "I was there gambling, a shot went off, I looked up, I ran, that's it." (10T 117-6 to 117-7)

On December 30, 2022, Atlanta police, accompanied by New Jersey detectives, arrested Ware at his home. The detectives believed that Ware was the person with Smith at the barbershop that night because surveillance footage showed the two suspects dressed in the same clothing that Smith and Ware were wearing earlier that day (Ware was wearing a jacket with a NASA emblem on it and red sneakers), and cellphone records showed that Ware's phone was in the

[3] The police found a revolver on Smith. (13T 104-8 to 104-14) A shell casing recovered from the backroom of the barbershop indicated that a semiautomatic firearm was used in the shooting on November 2. (14T 13-7 to 13-24)

vicinity of the barbershop at the time of the incident.[4] (9T 109-2 to 110-16; 13T 34-7 to 34-13; 13T 62-23 to 63-2; 14T 134-10 to 134-11)

Ware voluntarily submitted to questioning and adamantly maintained that he was not at the barbershop on November 2, 2020, and had nothing to do with the shooting. Throughout his 39-page statement, Ware expressed difficulty remembering details about the night because he had been partying and drinking heavily and was "fucked up." (Da 22, 24-26, 30) He remembered being in Newark and seeing his father and aunt, and being in Piscataway and seeing friends of Smith's, but maintained that he never went with Smith to the barbershop in Franklin. (Da 22, 26-28) When told that cellphone records showed his phone in the vicinity of the barbershop, he told detectives that he could not remember whether he had his phone with him that night and that it was possible he had left the phone in the car or on the dresser in the hotel room. (Da 34, 36,

[4] According to the State's expert in historical cellphone data analysis, cellphone records showed Ware's and Smith's cellphones in the vicinity of the barbershop around the time of the shooting. (13T 34-7 to 34-13) Unlike the records for Smith's phone, which showed that a call was received in the vicinity of the barbershop around the time of the shooting, records for Ware's phone did not show any calls placed or received in Franklin during the relevant timeframe; rather, the records showed "only a data transaction during that timeframe," while the phone was in the vicinity of the barbershop. (13T 28-21 to 29-6) As the expert explained, a "data transaction" means only that the phone was using data at a particular time, and there are "one of a million" ways for a phone to use data, e.g., when a text or email is received, or an application is open. (13T 14-4 to 14-20; 13T 37-6 to 38-1; 14T 37-22 to 37-25)

42) When shown surveillance photos of the suspects, one of whom was dressed in the NASA jacket and red sneakers he had on earlier in the day, Ware steadfastly maintained that he was not the person wearing those clothes in the photos; all he remembered about those clothes was that he woke up on the morning of November 3, and realized they were missing. (Da 32-34, 52) He told the detectives: "All my shit was gone, Like all of my shit was gone. Like straight up, And I don't, I ain't even remember the night. And I'm like, 'yo, where's my shit?' And nobody had an answer for me. So, like I don't know." (Da 32)

Surveillance footage from the hotel showed the Chrysler returning about an hour after the shooting, and Davis carrying Ware, who appeared to be very drunk, into the hotel. (Da 50; 9T 98-9 to 98-19; 9T 100-24 to 101-14; 9T 117-18 to 117-20) Ware was not wearing the NASA jacket, red sneakers, or anything else that the shooting suspect had on. (9T 113-3 to 113-6) In his statement to police, given sometime in January 2021, Davis confirmed that Ware woke up the morning after he was carried into the hotel drunk and complained that his clothes, including his jacket and shoes, were missing. (14T 35-5 to 36-15; 14T 67-20 to 68-4)

While in the jail awaiting trial, Smith made calls to his girlfriend, instructing her to do things for him. In one of the calls, Smith said he was concerned about "stuff" that was "going on outside," and that "Hass," referring

to Cooper, was "a rat." (13T 139-15 to 139-24) In another call, Smith told his girlfriend, "we got a problem," "they have photographs," and instructed her to "[t]ell Q that they have to change their numbers." (13T 134-3 to 134-17; 13T 136-15; 13T 137-9 to 138-1; 13T 139-7 to 139-14) Police were unable to determine who "Q" was. (13T 137-23 to 138-6)

Ware and Smith were scheduled to be tried jointly, with jury selection set to begin on January 5, 2022. Due to "COVID issues," jury selection was rescheduled for January 18. On January 7, 2022, Smith entered into a plea agreement with the State. (2T 5-13 to 5-22) Smith agreed to plead guilty to first-degree robbery and testify against Ware; in exchange, the State agreed to recommend a 10-year prison term and dismiss the remainder of the charges. (10T 7-6 to 9-7) The State also agreed that if Smith "supplie[d] additional post plea cooperation as to the prosecution of [Ware], the State will consider amending plea to second degree robbery for ten years, 85 percent. Defense counsel is free to argue for a lesser sentence to the second-degree range." (10T 10-16 to 10-23)

On January 10, 2022, the State supplied Ware's attorney with additional discovery, including unsigned "letters" implicating Ware as the shooter, which Smith alleged were written to him by Ware in the summer of 2021. Then, on January 19, 2022, the State supplied Ware's attorney with expert reports

indicating that Ware's fingerprints were found on the letters.[5] (4T 4-2 to 7-8) The Defense objected to the State calling Smith as a witness at trial and to the introduction of the untimely letters and expert report. (4T 8-4 to 8-6) The judge ruled that Smith could testify but barred the State from introducing the late discovery, and the State filed an interlocutory appeal. (6T 4-4 to 12-11) On the morning of February 2, 2022, before opening statements commenced, this Court granted the State's appeal and reversed the trial court's ruling. The Defense declined an adjournment to retain a fingerprint expert,[6] and the trial proceeded. (8T 6-9 to 6-19)

B. The Shooting

The evidence established that on Monday, November 2, 2020, at approximately 8:46 p.m., Franklin Township police were dispatched to a

[5] Smith supplied the letters to his attorney on January 7, the same day he entered his guilty plea, and his attorney supplied the letters to the prosecutor on January 10. (2T 65-22 to 68-8)

[6] At trial, the Defense explained Ware's fingerprints on the unsigned letters, which Ware adamantly denied writing. One of the letters was written on a piece of paper that Ware had handled because it was part of the packet of discovery sent to Ware by his attorney. (14T 162-17 to 162-19) Smith admitted that when he and Ware were in jail together, he took all of Ware's discovery and never gave it back. (10T 14T 168-6 to 168-10) As to the other two, Ware remembered handling at least one because Smith handed it to him to sign, but Ware refused and handed it back. Ware also testified that he and Smith handled each other's papers because all their paperwork was mixed together (14T 162-17 to 162-22) – something Smith did not dispute. (10T 234-8 to 234-9)

shooting that occurred at a barbershop on Hamilton Avenue (8T 40-7 to 41-8) When they arrived, they found the owner of shop, Denny Sanchez, lying on top of a pool table in a backroom, with a bullet hole above the bridge of his nose. He was unresponsive and had no pulse, and CPR was administered. Sanchez was transported to the hospital where he was pronounced dead. (8T 41-9 to 43-11; 8T 52-7 to 52-16)

Surveillance video from the barbershop and nearby businesses established that a red Chrysler 300 drove into the area around 8:30 p.m. and parked about a block away from the barbershop. (8T 84-6 to 102-10; 13T 55-10 to 55-23) A few minutes later, two Black males – one wearing red sneakers and a jacket that had a NASA emblem – entered the shop, and without stopping, walked directly through the main room to a backroom, behind the counter and past the cash register. (12T 78-2 to 78-13; 13T 50-19 to 53-4; 13T 120-16 to 120-24) The two males emerged seconds later – the one in the NASA jacket was holding a gun – and quickly left the shop. (13T 52-16 to 53-4; 14T 10-20 to 10-22; 14T 11-16 to 13-11) The two suspects were in the shop for less than a minute (14T 8-19 to 9-2); after leaving the shop, they got into the red Chrysler and drove away (13T 53-22 to 54-15); the entire time, their faces were concealed by the hoods and masks. (14T 17-22 to 17-22) There was no video footage of what transpired in the backroom because no surveillance cameras were located there. (13T 49-22

to 50-2) Police learned what occurred from witnesses who were in the backroom when Sanchez was shot.

There were about eight or nine people in the room at the time of the shooting (9T 15-24 to 16-15; 9T 64-8); they were there for a dice game, as either players or spectators. (9T 8-3 to 83-5) Several of them testified at trial and provided substantially similar accounts: two Black males walked into the backroom, their faces concealed by hoods and masks, one had a gun. The males told everyone to get down on the ground and the one holding the gun said, "Do you know what time it is?" (9T 10-23 to 11-14; 9T 23-21 to 24-11; 9T 39-12 to 39-14; 9T 69-21) Sanchez tried to stop the males from taking money that was on top of the pool table; they heard a gunshot and the two males left; they realized that Sanchez, who was lying on top of the pool table, had been shot and the money was gone. (9T 27-15 to 27-25; 9T 75-16 to 75-25; 9T 80-21 to 81-2)

None of the witnesses could tell who the two males were because their faces were covered, and the incident happened so fast. (9T 24-6 to 24-11; 9T 38-9 to 38-16; 9T 49-5 to 52-3; 9T 76-7 to 77-18) One of the witnesses testified that the male with the gun was taller than the other, and two of the witnesses testified that the males seemed young, like they were in their 20s. (9T 24-19 to 25-5; 9T 29-22 to 29-24; 9T 77-3 to 77-8) Except for the money on the pool table, nothing else was taken, and it appeared to one of the witnesses that

Sanchez had been targeted. (9T 27-18 to 28-9; 9T 75-16 to 76-4; 9T 81-3 to 81-7; 9T 83-3 to 83-5)

According to the witnesses, Sanchez held dice games in the backroom of the barbershop after hours, once or twice a week, or every other week. (9T 8-13 to 9-6; 8T 73-11 to 73-18) When dice games took place, the pool table was used; that is, players would throw the dice and place the cash they were betting on the table. (9T 15-17 to 15-23; 9T 61-13 to 61-22) While dice games at the barbershop were a common occurrence, they did not usually take place on Mondays. (9T 73-11 to 73-23; 9T 13-15 to 14-13) When one of the witnesses, Torres Rodriguez, was asked how he knew there was going to be a game that Monday, he said that "a Black guy" who he knows as "Black Cee-Lo" – Cee-Lo is a dice game, he explained – called him and said "he wanted to play" and asked if there was a game that night. Rodriguez then called Sanchez who told him there would be a game. (9T 13-23 to 13-24; 9T 14-14 to 15-6)

Rodriguez also testified about a dice game that took place two days before the shooting. On that night, a Black male, who attended games in the past but whose name Rodriguez did not know, came with "his brother," whom Rodriguez had never seen before. After losing several thousand dollars, the brother left angry because he wanted to continue playing but Sanchez told him that the game was over. (9T 16-16 to 17-11; 9T 21-10) According to Rodriguez, the man

whose brother lost the money was at the barbershop on the night of the shooting, and when asked by Rodriguez, he said that his brother would not be playing because he was in Atlanta. (9T 21-13 to 23-17) Police determined that a person named Hassan Cooper lost $6000 two days before the shooting. (14T 49-24 to 50-8)

C. The Investigation

Through data from the Chrysler's GPS, cellphone records and surveillance video, the following facts were established.

Ware, Smith, and Davis headed to New Jersey after picking up the red Chrysler from the Augusta airport in Georgia on the morning of November 1, 2020. (13T 26-10 to 27-1; 13T 32-16 to 33-2; 13T 89-18 to 89-21) The group arrived in New Jersey on the morning of November 2, 2020, stopping at a Wawa market in Piscataway at approximately 9:00 a.m. (13T 63-3 to 63-9), and checking into the Raritan Hotel around 11:00 a.m. (9T 95-2 to 98-7; 11T 60-21 to 61-3) All three men left the hotel in the red Chrysler about an hour later. (9T 95-2 to 98-7; 13T 91-17 to 92-2) Ware was wearing the NASA jacket and red sneakers at the Wawa, when he checked into the hotel, and when he left the hotel at noon.

Between noon and the time of the shooting, the car traveled around Middlesex and Essex Counties, periodically stopping back at the hotel. The car's

GPS showed it traveling around Piscataway between noon and 1:00 p.m., returning to the hotel at 1:37 p.m.; traveling to Perth Amboy, returning to the hotel around 2:30 p.m.; traveling to Essex County, arriving in Irvington at 3:06 p.m. and in Newark at 3:59 p.m.; leaving Newark at 5:28 p.m., and arriving back at the hotel around 5:40 p.m., where it remained until 6:35 p.m. After leaving the hotel at 6:35 p.m., the car went back to Piscataway before going to the barbershop. (13T 92-8 to 97-20) After leaving the barbershop, the car traveled around Edison for about 40 minutes, making at least one stop at a 7-Eleven, before returning to the hotel at 9:50 p.m. (13T 98-8 to 99-23)

The surveillance footage from the hotel, which captured activity around the lobby and main entrance, did not show the Chrysler when it returned to the hotel in the afternoon and early evening. Nor did it show any of the men entering or exiting the hotel at any time between 12:00 p.m., when all three men left through the main entrance and got into the Chrysler, and 9:50 p.m., when Davis carried Ware into the hotel through the main entrance.[7] (9T 97-7 to 98-15; 9T 109-2 to 112-19) The State theorized that Ware was in the Chrysler when it returned to the hotel in the early evening because cellphone records showed

[7] If any of the men had used another entrance to enter or exit the hotel during the afternoon or early evening, the surveillance footage would not have captured that activity; the footage captured activity around the lobby and main entrance only. Due to construction that was going on in 2020, the outside surveillance cameras were not working. (8T 81-1 to 81-23; 9T 118-2 to 119-5)

outgoing calls placed from Ware's phone around 6:30 p.m., while the phone was in the vicinity of the hotel. (13T 31-23 to 32-14; 16T 54-10 to 54-15) Detectives admitted, however, that they otherwise had no idea where Ware had been before he was carried into the hotel at the end of the night (9T 111-22 to 112-19), or how many people got in and out of the Chrysler while it was traveling around Essex and Middlesex Counties between noon and 9:50 p.m. (14T 19-11 to 19-21; 14T 24-10 to 24-25)

D. Smith's Testimony

Smith testified as to the terms of his plea agreement and admitted that testifying against Ware was a condition of the agreement. Smith also admitted that he was indicted for, among other things, felony-murder. Smith understood that, under that the law, he could be convicted of felony-murder if he committed an armed robbery with another, and during the commission of the robbery someone was fatally shot, even if he was not the shooter and did not intend for anyone to be shot. He testified that he could have been sentenced to life in prison if he had gone to trial and been convicted of felony-murder; instead, in exchange for his testimony against Ware, he can argue for a sentence as low as five years in prison. (10T 38-4 to 39-16; 10T 183-14 to 183-23)

Smith gave the following account of the shooting. He heard the barbershop was "a gambling spot" and went there with Ware "[t]o rob it." (10T

17-3 to 18-4) He did not have a gun, but Ware did. (10T 18-14 to 18-21) They walked in, told everyone to get down, grabbed money from the pool table, and "[a] shot went off" from Ware's gun. (10T 18-22 to 19-7) They ran out of the shop, got back in the car and drove away. (10T 19-12 to 21-6) He did not expect Ware to fire the gun and did not know Ware's reason for doing so. (10T 19-6 to 19-11)

Smith testified that after leaving the barbershop, he drove back to a hotel with Ware, stopping for gas and cigarettes along the way. (10T 21-4 to 21-13) Smith admitted that he stopped to pick up Davis before returning to the hotel, and that Davis had to carry Ware inside because Ware was drunk. (10 45-15 to 45-18; 10T 50-14 to 50-23) Smith also admitted that he dropped Ware in Newark to see family earlier in the day (10T 143-8 to 143-17); and that Ware had gone to a party and a bar, and had been drinking the whole day. (10T 16-19 to 16-23; 10T 21-14 to 21-24; 10T 146-14 to 146-24; 10T 150-6 to 150-16)

When asked about Ware's clothing, Smith claimed that Ware changed in the backseat "[t]o cover up what just happened" (10T 50-17 to 51-20), and that Davis was in the car when Ware changed clothes. (10T 182-5 to 183-9) Smith also claimed that Ware left the clothes in the car but could not say what happened to them. (10T 52-17 to 52-25)

According to Smith, after they returned to the hotel, Hassan Cooper called him from Virginia and asked for a ride back to New Jersey. Smith left later that night or "the first thing the next morning" to pick up Cooper. (10T 63-14 to 63-21)

When asked how he found out about the dice game that night, Smith said, "I asked somebody." (10T 98-9 to 98-11) When asked if that person was Hassan Cooper, he said that it was. (10T 98-12 to 98-15) Smith claimed that he called Cooper sometime on November 2 to ask about gambling spots. Smith testified: "I didn't ask him whether there was going to be a dice game on that exact day. I just asked him where was a local gambler's spot in the area, and he gave me that." (10T 98-19 to 98-22) Smith also claimed that Cooper never told him, and he had no idea, that Cooper lost thousands of dollars at the barbershop two days earlier. (10T 43-16 to 43-20; 10T 98-2 to 99-16)

When asked how the idea to commit a robbery came about, Smith claimed that he and Ware were driving around; he told Ware that he had found a place to gamble that night; and then he and Ware simultaneously came up with the idea to commit a robbery. (10T 151-7 to 152-6) Smith testified; "I don't remember exact words, but I said there's something about the gambling spot. Uh, next thing I know we both just looked at each other and started laughing. And we was like, what, I asked him what he was laughing about, and he asked

me what I was laughing about, then we both said the same thing." (10T 152-11 to 152-16)

Through Smith's testimony, the State introduced the unsigned letters that Smith claimed Ware wrote. The letters read:

> Yo, Buzz, I need you to chill. I knew you'd be mad at me, that's why I didn't tell you. They still don't have anything crazy. I know that if you think anything crazy, let me know. I told you I will take a 15 and free you. You're not going to have to wear this with me. Don't get paranoid. It's been almost ten months, I still ain't implicate no one. It's going to stay that way. We'll talk face-to-face, but real shit, on my mom, no reason for not telling you had nothing to do with the case. It was just I didn't want you to be mad at me.

(Da 56; 10T 27-12 to 27-24)

> I was just trying to get them to keep talking and seeing what they have. I figured if they thought we was at odds, they keep talking and showing me, showing me all they had. All of us, and was showing me the pictures they had. I wanted them to keep talking. I ain't implicate you if that's what you thinking. To be honest, I ain't tell you all of it cuz I knew you'd trick every time they asked if it was you, and I said I ain't know. I didn't think you would understand, but you know, I ain't read it just cuz -- no, ain't mean it just was getting in their head, to be honest.

(Da 57; 10T 28-2 to 28-12)

> I, TW, came to New Jersey with a childhood friend to visit family and friends. . . . During the trip TS and TW went to the Hamilton Barber Shop to gamble. As soon as we walked in, all I remember was the table slamming. I had a gun on me which TS didn't know

> about, and my PTSD kicked in.[8] All I remember was . . . a loud bang, and a bunch of big men moving around. I yelled for everyone not to move, but the victim, Denny Sanchez, charged for my weapon. I let a shot off hitting him by accident. I had no intention on killing the victim.

(Da 58; 10T 29-8 to 30-4) The third letter contained edits – words were crossed out and language was added – that Smith said he made, and at the bottom of the paper, the first two sentences of the letter were rewritten in noticeably different handwriting, which Smith said, "was supposed to be me rewriting it. I started but never finished." (Da 58; 10T 28-19 to 29-5)

Smith made the following claims regarding the letters. He and Ware were in the Somerset County Jail together after they were arrested. Sometime during the summer of 2021, he received the State's discovery for his case, which contained Ware's post-arrest statement to police. Smith got angry at some of the things Ware said about him in the statement, prompting Ware to write letters explaining why he said certain things to the police. (10T 22-22 to 24-13) Smith said that Ware explained in writing instead of verbally because "We was in lock-up and he didn't want nobody to hear it." (10T 24-14 to 24-18) When asked "what would happen if somebody heard him say something inculpatory in lock-

[8] Ware was in combat in Afghanistan and suffers from PTSD as a result. (14T 125-4 to 127-10) Smith was aware that Ware served in the military, had been deployed to Afghanistan. (10T 54-20 to 54-25)

up," Smith responded: "I'm not 100 percent sure, but people weren't going to like that." (10T 24-19 to 24-22)

When asked by the prosecutor why he started rewriting the third letter, Smith said, "Because [Ware] asked me to because he said his handwriting was sloppy. . . . He said his handwriting was sloppy so he asked me to do the writing." (10T 30-13 to 30-22) The prosecutor then asked Smith if Ware told him "to do anything with these letters after he gave them to you," and Smith responded: "He told me to flush them." (10T 31-7 to 31-9) Smith did not explain why Ware was concerned about his sloppy handwriting if he expected the letters to be "flush[ed]," but explained why he did not flush them: "Well, to show what happened that night." (10T 31-10 to 31-13)

Smith admitted that he took Ware's discovery and never gave it back and that one of the letters was written on the back of a page from Ware's discovery. (11T 223-8 to 224-13; 11T 229-10 to 229-20) He denied, however, that he or one of his friends wrote the letters, or that he asked Ware to sign any of the letters. (11T 233-8 to 233-22)

E. The Defense's Case

Ware testified on his own behalf and called five character witnesses who testified to his character for truthfulness. (14T 95-24 to 177-6)

Ware told the jury, as he had told the police, that on November 2, 2020, he spent the day visiting friends and family, and partying and drinking heavily, because it was the first time he had been back to New Jersey in several years, and swore that he was not at the barbershop with Smith that night. (14T 131-21 to 134-22 to 136-13) Although he still had trouble remembering the events of November 2, 2020 (e.g., 151-4 to 151-5), he provided more details at trial than he was able to give police on the day of his arrest. With respect to the clothing he was wearing, Ware remembered visiting his father in the Newark,[9] where he showered and changed his clothes, because he had been wearing the same clothes for more than a day; he put the clothes and sneakers he had changed out of in the trunk in the Chrysler. (14T 137-6 to 138-7; 14T 148-16 to 148-23)

When asked why he did not tell police those details, Ware explained, "Because honestly it was kind of a shock to me that the whole thing that was going on. I really couldn't remember. . . . At the time I'm just like all I could hear was murder in the back of my head. Like I am being charged with murder, so a lot of the things I couldn't recollect at the time." (14T 138-8 to 138-16) Ware testified that since his arrest, he was able to jog his memory by talking to

[9] Ware said he uses the term "Newark" to refer to surrounding towns, such as Irvington and East Orange, as well. (14T 147-10 to 148-1)

people and reviewing the discovery. (14T 122-13 to 122-18; 14T 136-14 to 136-21)

Ware testified that he "bounced around" a lot that day: he remembered being at his father's house and aunt's house with Davis and Smith and then going to Piscataway with them; at some point, his aunt picked him up in Piscataway and took him back to Newark; later in the night, his aunt and her boyfriend drove him to meet Smith and Davis, so he could go back to the hotel with them; Ware did not remember exactly where he met up with Smith but remembered that his aunt and her boyfriend had to help him into the Chrysler because he was very drunk. (14T 138-17 to 139-7; 14T 147-10 to 151-15) Ware remembered that he did not have his phone with him when his aunt picked him up in Piscataway and figured he had left it in the Chrysler. (14T 152-13 to 153-8) Ware said that when they returned to the hotel, Davis took his phone from the car for him and put it on the dresser in his hotel room. (14T 139-15 to 139-24)

With respect to the letters, Ware adamantly denied that he wrote them, and explained why it was unsurprising that his fingerprints would be on them: he and Smith had joint access to each other's papers while they were in jail, because all their paperwork was mixed together – something Smith did not deny (10T 234-8 to 234-9; 14T 162-17 to 162-22); one of the letters was written on a piece of discovery that belonged to Ware – something Smith did not deny (11T

229-10 to 229-20; 14T 162-17 to 162-19); Smith handed him the letter that read like a confession and told him to sign it, but he refused and handed it back. (14T 158-14 to 158-16; 14T 163-7 to 164-24) Ware said that Smith and his friends had tried to "pressure him into taking a deal." (14T 158-11 to 158-12) Ware testified, "He explained to me, like, since I have no record and he is a felon, if I take the plea he will have people take care of me because I can get a lighter sentence, because he knew I had PTSD. He said I can use that for my defense. I told him you're crazy if you think I'm about to cop out to something I didn't do." (14T 159-9 to 159-18)

F. The Jury's Deliberations

The jury deliberated over the course of two days and sent two notes to the court. (16T 175-4 to 184-13; 17T 3-14 to 18-6) In response to the first note, asking for a readback of Ware's testimony (16T 178-7 to 178-10), the judge played Ware's testimony in its entirety. (17T 3-14 to 4-2) In response to the jury's second note, asking for clarification of the terms "knowingly" and "purposely" as they are used in the context of murder, the judge reread portions of the model charge on murder. (17T 8-6 to 16-23)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO ENGAGE IN HANDWRITING COMPARISON, WHERE THE MATTER HAD NOT BEEN ADDRESSED PRETRIAL, THERE WAS NO RULING ON THE SUFFICIENCY OF THE HANDWRITING SAMPLE OFFERED BY THE STATE, AND THE JURORS WERE NOT INSTRUCTED ON HOW TO PROPERLY WEIGH THEIR COMPARISON. (Not Raised Below)

There was ample reason for the jury to doubt that Tayyab Ware was the shooter: an hour after the shooting, Ware was not dressed in the clothing that the shooter was wearing, and he was extremely intoxicated; Ware had been drinking and partying the whole day, and, as Davis confirmed, was upset the next morning when he realized his clothes were gone; Ware explained how an associate of Smith's would have had access to his clothing – he put it in the trunk of the Chrysler after changing at his father's house, and why his cellphone was in the vicinity of the barbershop at the time of the incident – he left it in the Chrysler; the only direct evidence of Ware's guilt was the testimony of Todd Smith, an admitted liar with a prior conviction for robbery. Thus, it was critical for the State to convince the jury that Ware wrote the damning letters that Smith claimed Ware had given him. The letters were critical to the State's case.

The State, however, did not introduce samples of Ware's handwriting or retain a handwriting expert. Rather, the prosecutor suggested that the Miranda Waiver form

on which Ware printed his name was a sufficient sample of Ware's handwriting, and urged the jury to compare it with the handwriting in the letters..

During his cross-examination of Ware, the prosecutor asked a series of questions designed to suggest that the "A's and R's" Ware wrote when he printed his name on the Miranda Waiver form were similar to the A's and R's in the unsigned letters that Smith claimed Ware wrote:

> Q: Okay. I'm going to ask you something else, Mr. Ware. There is marked in evidence as S-4 your Miranda form. Is that the form that Detective Drews went over with you before he took a statement from you?
>
> A: Yes, sir.
>
> Q: Okay. And there's a place down there at the bottom where he asked you to print your name, correct?
>
> A: Yes, sir.
>
> Q: And did you print your name?
>
> A: Yes, sir.
>
> Q: Okay. So, did you, when you printed your name, write these A's and R's?
>
> A: Yes, sir.
>
> Q: Okay. Now, you heard Mr. Smith's testimony when he was here, correct?
>
> A: Yes, I did.

> Q: I'm going to show you something else. Mr. Smith handed some documents over to his attorney's office and he says that you wrote these. Did you write these?
>
> A: No, I did not.
>
> Q: So you didn't write the A's and R's that we see on this, did you?
>
> A: No, I did not.
>
> Q: Did you write them on any of these?
>
> A: I didn't write any of those letters.

(14T 155-17 to 156-17)

Clearly, the prosecutor's intention was to prompt the jury to compare Ware's writing on the Miranda form, find the similarity the prosecutor suggested, and use it to conclude that Ware wrote the letters. In his summation, the prosecutor told the jury to do just that. Thrice the prosecutor urged the jury to compare the way Ware printed his name on the form with the handwriting in the unsigned letters.

> Those letters have indicia of reliability, not just from the fingerprints, not just from the handwriting. If you could compare to Mr. Ware's Miranda form, you'll have that in the back room. You can make your own comparison to that, but also from the tone of the letters and the context of them.

(16T 49-13 to 49-18) (emphasis added)

> He's trying to calm Smith down from being mad at him because of all the things he said about him in the statement and he's also trying to let him know, "Hey, just chill out. I am not going to make you go down for what I did" and by the way, when you get in that deliberation room because I am looking at right it now, look at his Miranda form and his printed name and look at the writing on this and [defense counsel] says Mr. Smith had enough time to mimic his writing there. That's –- that's your decision. You can certainly find that if you believe that to be the case.

(16T 77-4 to 77-14) (emphasis added)

> . . . I would suggest to you, ladies and gentlemen, that not only are Mr. Ware's fingerprints on those letters, which in and of itself are pretty damning, but the context of the letters and the way that the writing is written compared to his Miranda form also give them that authenticity and the reason why –- and [defense counsel] kept saying why wouldn't he turn this over earlier? . . .

(16T 80-5 to 80-12) (emphasis added)

Permitting the jury to engage in handwriting comparison, where there was no ruling on whether the Miranda form provided a sufficient sample of Ware's handwriting, and the jurors were not instructed on how to properly weigh their comparison, violated Ware's right to due process and a fair trial. U.S. Const. amends. V and XIV; N.J. Const. art. I, pars. 1, 9, and 10. His convictions must be reversed.

In State v. Carroll, 256 N.J. Super. 575 (App. Div. 1992), this Court addressed the propriety of allowing the jury to compare the handwriting on a motel registration

card with samples of defendant's handwriting. At issue in that case was whether the signature on the registration card belonged to defendant. Id. at 589. The handwriting samples the prosecutor sought to introduce were a box of work orders obtained from defendant's employer, with the defendant's signature on them. The prosecutor "maintained that there were certain distinctive characteristics of defendant's signature that anyone could notice. The judge reviewed the specimens and said that to the untrained eye they did look similar." Ibid. The Defense objected, arguing that "it would be unfair for the prosecutor to put in exemplars without expert testimony." Ibid.

In ruling on the issue, the judge first noted that the admission of handwriting samples without expert testimony is permitted under N.J.S.A. 2A:82–1, which provides:

> In all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by the witnesses; and such writings and the testimony of witnesses respecting the same may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dispute; provided nevertheless that where the handwriting of any person is sought to be disproved by comparison with other writings made by him, not admissible in evidence in the cause for any other purpose, such writings before they can be compared with the signature or writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been

> written before any dispute arose as to the genuineness of the signature or writing in controversy.

After determining that defendant's signatures on the work orders were authentic, the judge permitted their introduction. Id. at 589-90.

This Court affirmed the trial court's ruling, holding that "the defendant's writings on the work orders and the disputed signature on the hotel registration were properly admitted despite the absence of expert testimony." Id. at 594. The Court noted "there is ample authority for our holding that the jury may without the assistance of expert testimony compare a disputed signature with handwriting contained in genuine documents in those circumstances where the trial judge in his discretion is satisfied that such a comparison by the jury would have probative value." Id. at 598 (emphasis added). The Court's decision was also influenced by the trial court's instruction, cautioning the jury on the weight that should be given to such evidence. The instruction read:

> In this case you have heard some evidence about and you will have available for your inspection samples of the Defendant's handwriting in the form of I believe S–80 in evidence, a folder of some work orders as he has acknowledged and you have another piece of evidence S–51, which is a registration slip at Ascot Motel. It is in sharp dispute as to whether the Defendant indeed is the person who wrote the registration at the motel and that is one of the questions that you may wish to consider in evaluating all of the evidence how important that question is entirely up to you to decide [sic]. I simply point out to you that you may, if you chose to, if you fine [sic] it credible and helpful, you may consider the documents and the

> testimony that you heard about the documents regarding the handwriting on the forms and on the registration certificate at the motel.
>
> There is not, however, any evidence before you of an expert nature on that subject. You did not hear from any expert testimony, nor did you hear any other specific testimony, lay or expert, that would compare or did compare specifically and say that the signature on the card was or was not that of the Defendant. So that is a factor that you may consider in connection with all of the other evidence in deciding how important or how significant or unimportant or insignificant all of that evidence is to be.
>
> [Id. at 595.]

Unlike in Carroll, the prosecutor did not simply encourage the jury to compare a signature on the letters with samples of Ware's signature. Instead, he encouraged the jury to infer that Ware wrote the unsigned letters based on what the prosecutor suggested was a similarity between lowercase A's and R's in the unsigned letters and the two lowercase A's and one lowercase R that Ware wrote when he printed his name on the Miranda form.

The prosecutor did that without notifying the Defense of his intention to use the Miranda form as a handwriting sample and without a ruling by the judge as to its admissibility for that purpose, i.e., without a ruling that there was anything distinctive about the A's and R's or that a sample of two letters of a 26-letter alphabet is a sufficient handwriting sample. See, e.g., State v. McCoy, 759 S.E.2d 330, 333 (N.C. Ct. App. 2014) ("before handwritings may be submitted to a jury for its

comparison, the trial court must satisfy itself that there is enough similarity between the genuine handwriting and the disputed handwriting, such that the jury could reasonably infer that the disputed handwriting is also genuine"); Pettus v. U.S., 37 A.3d 213, 220 (D.C. 2012)(noting expert's testimony that "'[t]he identification of authorship is not based on one single characteristic': 'we have to have sufficient identifying characteristics in common [and] ... no significant differences and variation between the two writings'"); Johnson v. Coombe, 271 A.D.2d 780, 780-81 (N.Y. App. Div. 2000) ("the trier of fact . . . may make his or her own comparison of handwriting samples in the absence of expert testimony . . . if there are sufficient similarities between the two to comprise substantial evidence that they were written by the same person")(internal quotation marks and citations omitted).

Here, it was error for the judge permit the prosecutor to use the Miranda form as a handwriting sample, without first determining whether there was enough similarity between the print on the form and the print in the unsigned letters, "such that the jury could reasonably infer that the disputed handwriting is also genuine." McCoy, 759 S.E.2d at 333. Additionally, the judge did not provide the jury with any type of instruction to eliminate the danger that the jurors might assign improper weight to their comparison. The jury was not reminded that Ware disputed that he wrote the letters, that there was no expert testimony on the matter, and that ultimately the jury was the final arbiter of the issue – as the jury in Carroll had been instructed.

Because the letters were critical to the State's case and because their authorship was disputed, permitting the jury to engage in a handwriting comparison under these circumstances was clearly capable of producing an unjust result. R. 2:10-2.

POINT II

THE PROSECUTOR'S IMPROPER SUMMATION DENIED WARE A FAIR TRIAL AND DUE PROCESS OF LAW, AND REQUIRES REVERSAL. (Not Raised Below)

The goal of the prosecutor is not to see that the government prevails, but that justice is done. State v. Ramseur, 106 N.J. 123, 320 (1987); State v. Marks, 201 N.J. Super. 514, 535 (App. Div. 1985). It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88 (1935). In this case, the prosecutor lost sight of his duty to seek justice when he engaged in the following improprieties, the combination of which deprived Ware of a fair trial and due process of law. U.S. Const. amends. V and XIV; N.J. Const. art. I, pars. 1, 9, and 10.

A. The Prosecutor Improperly Argued That Ware Was Acting In Conformity With His Propensity To Steal.

In his post-arrest statement, Ware repeatedly asserted that he did not kill anyone on November 2, 2020, and he is not a murderer (e.g., Da 46, 51), and told detectives that he may commit petty crimes like stealing, but would not commit murder: "Sir, sir, listen. I'm not even into this type of shit, yo. I do little shit. Like, I may steal, but I ain't into that." (Da 28) Ware's admission to a history of stealing should have been redacted from his statement before it was

introduced into evidence, because the State did not proffer a reason for its admission beyond showing Ware's propensity to commit crime, as required under N.J.R.E. 404(b).

N.J.R.E. 404(b) provides:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

The rule "is premised on the virtually self-evident proposition that such evidence is likely to impair the defendant's right to have a jury decide his guilt or innocence based solely on the relevant evidence presented at trial, free of the prejudice that such proof would likely inject into the proceeding." State v. Mazowski, 337 N.J. Super. 275, 281 (App. Div. 2001) (citing State v. Stevens, 115 N.J. 289, 302 (1989)); see also State v. Weeks, 107 N.J. 396, 406 (1987) ("The central premise of the broad prohibition is that 'the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is introduced for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial.'")(quoting McCormick, Evidence § 190, at 557–58 (E.

Cleary 3d ed. 1984)). The danger that a jury would use a defendant's history of stealing to infer that he was more likely to commit robbery is manifest.

However, the jury may not have paid attention to Ware's admission because it was a fleeting comment in a 39-page statement that was introduced at a trial that was over a week long. Thus, its unobjected-to admission might arguably have been harmless had the prosecutor not drawn the jury's attention to it in his summation. Not only did the prosecutor draw attention to Ware's admission, he argued, in direct violation of N.J.R.E. 404(b), that Ware's history of stealing should be used to infer that he went to the barbershop to steal. The prosecutor told the jury,

> [H]e says, talking about a murder, "I am not even into this type of shit, yo. I do little shit. Like, I may steal, but I ain't into that." Well, I guess if he's stealing from people, he needs money and I guess he was stealing from those people in the barbershop when he went in there to grab that –- him and Mr. Smith grabbed that money off the table. Maybe he didn't intend to shoot Denny Sanchez and he didn't think this was going to be a murder. He thought they were just going to go in there and grab some money, a quick hit, in and out[.]

(16T 68-17 to 69-3)

The prosecutor's improper argument in summation extinguished any possibility that the jury would not have used Ware's admission to prior acts of stealing as evidence that he committed the crimes for which he was on trial. See

State v. Schumann, 111 N.J. 470, 478 (1988) (finding that improper summation comments compounded the prejudicial effect of other crimes evidence).

B. The Prosecutor Began And Ended His Summation By Inflaming The Passions Of The Jury.

The prosecutor began and ended his summation with remarks intended to inflame the jury, engender sympathy for the victim, and convey that justice would not be done unless Ware was convicted.

> We are here, ladies and gentlemen, because Denny Sanchez was killed. Okay? It's just the way trials work. You don't see hear a lot about Denny Sanchez, but he's the reason we're here. His life was taken from him. He's a husband, a son, a brother, business owner and his life was snuffed out that night and that's why we're here and you should never lose sight of that as we're considering evidence in this case. This is about somebody having their life snatched from them.

(16T 47-5 to 47-14) (emphasis added) The prosecution ended his summation

> You know, during this trial at the outset, defense counsel asked each of you to look at his client and he asked you if you could give him a fair trial. We all want a fair trial for Mr. Ware. He is entitled to a fair trial. He is entitled to have you consider the evidence in this trial and he has been given a fair trial.
>
> The State has been held to its proofs. The State has provided its evidence in this case, but you know what, a fair trial doesn't mean one that the defendant gets what he wants out of a verdict. Okay?
>
> A fair trial is one where justice is served and the conclusion is the right conclusion. Now, there is

> someone else who deserves a fair trial here, ladies and gentlemen and I can't tell you to look at him and ask if you'll give him a fair trial because he's not with us anymore. Denny Sanchez, Denny Sanchez was killed that night. He was killed during this robbery and he deserves a fair trial and his family deserves a fair trial.

(16T 101-5 to 101-24)(emphasis added)

These remarks exceeded the bounds of propriety. "[A] jury as fact-finder should undertake its task as dispassionately as possible without being divert[ed] ... from deciding the case on the relevant evidence concerning the crime and the defendant." State v. Williams, 113 N.J. 393, 451 (1988)(internal quotation marks omitted). Here, the prosecutor's improper comments prevented the jurors from dispassionately performing their role by improperly focusing on the personal characteristics of the victim and the effect of the victim's death on his family, and by implying that justice for the victim and his family could only be achieved if Ware was convicted. Id. at 450-51 ("objectionable remarks relating to the victim's character and future plans . . . were neither appropriate nor harmless"); State v. Rodriguez, 365 N.J. Super. 38 (App. Div.), certif. denied 180 N.J. 150 (2003)(disapproving prosecutor's comment, "Let the battle for justice be won," because it improperly "implied that the only way in which justice would be done was if the jury found defendant guilty").

C. The Prosecutor Improperly Denigrated The Defense.

Throughout his summation, the prosecutor used disparaging language

to refer to defense counsel's arguments and Ware's testimony: "the idea floated by defense counsel" (16T 49-3 to 49-4); "this got floated a few times and in a couple of different ways" (16T 57-7 to 57-8); "the defense is throwing out all of these wild theories for the case, none of which by the way exonerate his client" (16T 94-13 to 94-16); "that tale he told up there" (16T 102-5); "he hasn't come up with that story yet" (16T 8422 to 84-23). These remarks constituted an improper denigration of Ware, his attorney, and his defense. State v. Munoz, 340 N.J. Super. 204, 217 (App. Div. 2001), certif. denied, State v. Pantoja, 169 N.J. 610 (2001)(finding improper prosecutor's suggestion that defendant's alibi was "concocted by" defendant's girlfriend and his attorney); See State v. Sherman, 230 N.J. Super. 10, 17-18 (App. Div. 1988)(finding improper prosecutor's comment, "At the end of the path is a bucket of gold called the truth, and the object of lawyers ... sometimes is to throw stumbling blocks in front of you.").

D. Conclusion

When remarks "stray over the line of permissible commentary," courts must "weigh 'the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial,' and ... reverse a conviction on the basis of prosecutorial misconduct only if 'the conduct was so egregious as to deprive defendant of a fair trial.'" McNeil-Thomas, 238 N.J. at 275 (quoting State v. Wakefield, 190 N.J. 397,

437 (2007)). The fact that an objection was not made does not preclude a finding of plain error. See e.g. State v. Neal, 361 N.J. Super. 522, 535 (App. Div. 2003) (notwithstanding failure to object comments that unfairly attacked defendant deemed to be egregious and deprived defendant of right to fair trial); Sherman, 230 N.J. Super. at 18 (notwithstanding strong evidence of guilt repeated improper comments constituted plain error).

As discussed in Point I, supra, there was ample reason for the jury to doubt that Ware was the shooter. Ware mounted a zealous defense, testified on his own behalf, and produced five witnesses who testified to his character for truthfulness. Because this was close case for the jury, the prosecutor's improper comments in summation clearly capable of producing an unjust result by tipping the scale in favor of the State. R. 2:10-2.

POINT III

UNDER THE FACTS OF THIS CASE, THE JUDGE'S FAILURE TO GIVE A COOPERATING WITNESS CHARGE REQUIRES REVERSAL. (Not Raised Below)

The jury's determination of the critical question – was Ware the person seen on the surveillance footage wearing the NASA jacket and red sneakers? – hinged on whether the jury believed Smith's trial testimony. To determine the credibility of Smith's testimony, the jury was instructed on factors that affect witness credibility in general, e.g., the witness's demeanor and interest in the outcome of case, and whether the witness made any inconsistent or contradictory statements. It was also instructed that it may consider Smith's prior conviction for robbery in assessing his credibility. (16T 112-11 to 114-6) The jury was not instructed, however, on how to assess Smith's credibility in light of his status as a cooperating witness. Under the facts of this case, the judge's failure to read the model charge on Testimony of a Cooperating Co-defendant or Witness deprived Ware of his right to due process and a fair trial. U.S. Const. amends. V and XIV; N.J. Const. art. I, pars. 1, 9, and 10.

The model charge on Testimony of a Cooperating Co-defendant or Witness provides, in part:

> The law requires that the testimony of such a witness be given careful scrutiny. In weighing (his/her) testimony, therefore, you may consider whether (he/she) has a special interest in the outcome

> of the case and whether (his/her) testimony was influenced by the hope or expectation of any favorable treatment or reward, or by any feelings of revenge or reprisal.
>
> If you believe this witness to be credible and worthy of belief, you have a right to convict the defendant on his/her testimony alone, provided, of course, that upon a consideration of the whole case, you are satisfied beyond a reasonable doubt of the defendant's guilt.
>
> [Model Jury Charges (Criminal): Testimony of a Cooperating Co-Defendant or Witness (Revised 2/6/06)(emphasis added).]

In the context of a cooperating codefendant, this charge is known as the "'accomplice rule,' i.e., a specific cautionary instruction that the evidence of an accomplice must be carefully scrutinized and assessed in the context of his interest in the proceeding." State v. Artis, 57 N.J. 24, 33 (1970)(emphasis added). In State v. Spruill, 16 N.J. 73 (1954), the reason for the "accomplice rule" was explained:

> Accomplices, tainted as they are with confessed criminality, are often influenced in their testimony by the strong motive of hope of favor or pardon; and so it is incumbent upon the courts to 'look carefully into the secret motives that might actuate bad minds to draw in and victimize the innocent.' [citations omitted] The fact that co-conspirators have turned 'State's evidence' naturally affects 'injuriously the credit to be given to their testimony'; for it is 'suggestive, at least, of a bargain between them and the State authorities with relation to the punishment which would be inflicted upon them in case their testimony aided in bringing about' the conviction of the accused. [citation omitted]
>
> [Id. at 78.]

Although the "accomplice rule" is "ordinarily for the benefit of the defendant," it "may be to the defendant's disadvantage because the very use of 'accomplice' has an opprobrious and detrimental connotation." State v. Gardner, 51 N.J. 444, 461 (1968)(citing State v. Begyn, 34 N.J. 35 (1961)). There is also the concern that "the use of that word where the witness admits his guilt gives rise to the natural suggestion that the defendant whom he has implicated is likewise a participant in the crime." Ibid. Due to the possible prejudice to the defendant, it is "generally not wise to give such a charge absent a request." Artis, 57 N.J. at 33. Thus, the Court in Artis held it is "[c]ertainly ... not error, let alone plain error, for a trial judge to fail to give this cautionary comment where it has not been requested." Ibid.

Under the circumstances of this case, there was no danger of prejudice to Ware if the jury had been given the cooperating-witness charge. There was no danger that the charge would cause the jury to infer guilt from Ware's association with a guilty codefendant. Ware's and Smith's connection transcended their status as codefendants. Ware's connection to Smith was well-established and uncontested. Ware did not deny that he and Smith were friends, that Smith had visited him in Georgia, that they were staying at the same hotel, or that they were together on November 2, 2020. In other words, their status as

codefendants did not suggest that Ware and Smith were associated to a greater degree than the evidence already established.

Because there was no conceivable risk of prejudice, defense counsel's failure to request a cooperating-witness charge did not prevent the judge from giving the charge. Unlike the general charges on assessing a witness's credibility, the cooperating-witness charge is not permissive. Rather, it requires the jury to give "careful scrutiny" to the testimony of a cooperating witness based on their strong motivation to lie and unique interest in the outcome of the proceeding. Without such a charge, the jury would not have been aware of the enhanced scrutiny that a cooperating witness's testimony requires. See State v. Henderson, 208 N.J. 208, 296-97 (2011)(citing model charge on cooperating codefendant/witness as an example of a charge that must be given even "with matters that may be considered intuitive," because "it is the court's obligation to help the jurors evaluate evidence critically and objectively to ensure a fair trial").

Under the circumstances of this case, where the credibility of Smith's testimony was a critical issue for the jury to determine, the judge's failure to give a cooperating witness charge was clearly capable of producing an unjust result. R. 2:10-2.

CONCLUSION

For the reasons set forth above, defendant urges this Court to reverse his convictions and remand the matter for a new trial.

Respectfully submitted,

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Public Defender
Attorney for Defendant-Appellant

By:_____/s/Alyssa Aiello_____
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Assistant Deputy Public Defender

DATED: September 30, 2023

THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-003191-21
INDICTMENT NO. 21-07-0593-I

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TAYYAB WARE,

Defendant-Appellant.

CRIMINAL ACTION

On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Somerset County.

Sat Below:
Hon. Peter J. Tober, P.J.Cr., and a jury

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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E-Filed: March 18, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COUNTER-STATEMENT OF PROCEDURAL HISTORY

The State adopts Defendant's recitation of this case's procedural history. (Db1-2).[1]

COUNTER-STATEMENT OF FACTS

On November 2, 2020, Denny Sanchez and several friends were playing a dice game in the back of Sanchez' barbershop. (8T:52-5 to 25; 9T:8-15 to 12-5). As they were playing, they were interrupted by the arrival of two masked men. (9T:8-15 to 12-5; 27-14 to 25). Upon their arrival, they announced, "You know what time it is," and ordered that everyone get onto the floor. One of them held a gun in his hand, as well. The masked men moved to Sanchez and began trying to take his money. One of the men in the room, Rafael Torres Rodriguez, attempted to flee and run out through a side door. Ibid.

He was stopped by one of the men, who grabbed his arm and said, "where are you going?" (9T:8-15 to 12-5). The man threw Rodriguez to the floor, and as he fell, he heard a gunshot. When Rodriguez stood up, the men had left, and Sanchez was lying face-up on the pool table in the room. Another dice-player did not immediately understand what had transpired, and said to Sanchez, "You can get up now. They have gone." It was then that Sanchez' friends realized that the armed intruder had shot Sanchez in the face. Ibid.

Todd Smith was one of the masked men who entered the barber shop that

[1] The State adopts defendant's citation conventions.

night, and he explained how and why Sanchez died: a chance to pick up a few hundred dollars. (10T:17-13 to 19-17; 151-15 to 152-16). The other masked intruder, the one armed with a gun and Sanchez' murderer, was Smith's friend, defendant Tayyab Ware. (10T:17-13 to 19-17).

Smith and defendant had both driven from Atlanta, Georgia, on November 1, 2020. (10T:13-15 to 16-15). They arrived in New Jersey and checked into the Raritan Hotel on November 2, 2020, at 11:03 a.m. Ibid. They spent the day visiting people and drinking. (10T:16-16 to 25). Eventually, Smith and defendant ended up at a bar together in Edison. (10T:17-1 to 20-6; 151-7 to 14; 159-1 to 175-25). Smith told defendant that he knew a good gambling spot: Sanchez' barber shop, and asked defendant if he would like to go gamble. Defendant agreed, and both men left the bar in Edison to go got o the barber shop. On their way there, Smith and defendant exchanged a look and began to laugh. Smith asked defendant what defendant was laughing about, and defendant asked Smith the same question. Then, they both realized they had the same idea: rob the game. Ibid.

Smith described their plan as no plan at all: he called it a "freestyle" robbery, with no discussion of who would do what. (10T:165-14 to 166-7). The only goal was "take the money" and their method was "just go with the flow." Ibid. They arrived at approximately 8:38 p.m. (13T:116-12 to 13). They got to

the barbershop and immediately went to the back room, where Smith entered first. (10T:17-1 to 20-6; 151-7 to 14; 159-1 to 175-25). They had since donned masks, and defendant entered behind Smith while drawing his gun. Smith grabbed the money he saw on the pool table, while defendant said, "you know what time it is." Smith took money from one of the gamblers' pockets, as well. Defendant shot Sanchez in the face. Smith and defendant immediately ran from the room, and out of the barbershop. They returned to the rental car and drove off. Ibid.

Smith claimed that he had no idea defendant was going to shoot anyone. (10T:171-20 to 177-5). He was not sure how much money they made, but knew it was less than a thousand dollars. Ibid.

Surveillance of the Raritan Hotel revealed that defendant[2] checked into the hotel before the murder, wearing a distinctive NASA jacket and red sneakers. (13T:61-1 to 66-20; 112-23 to 114-1; 14T:134-10 to 134-17). Defendant was again captured on surveillance, on the same day, at a Wawa with Smith, wearing the same clothes. They were in a red Chrysler 300, which was also the getaway car used at the murder. (13T:55-2 to 56-19, 63-3 to 65-24). The shooter was

[2] It is undisputed that the individual shown at the hotel, and at the Wawa, are defendant and that the NASA jacket is defendant's. (14T:134-10 to 21). It is also undisputed that defendant was in the red Chrysler during the trip as well. (14T:137-6 to 16).

caught on the barbershop surveillance video wearing the same NASA jacket. (13T:51-2 to 9; 52-1054-7; 62-23 to 63-2). Additionally, cell phone tracking data places defendant's phone in the vicinity of the murder, at the time of the murder, as well. (13T:28-21 to 29-6; 34-7 to 17).

After the murder, defendant was seen again on the Raritan hotel surveillance video at approximately 9:50 p.m., over an hour after the murder. (10T:182-23 to 183-4). He was carried into the hotel by Smith and their travelling companion R.J., or Ronriquez Davis,[3] apparently very intoxicated, wearing different clothes than he had been before. Ibid. Now, he was in long johns. (10T:51-14 to 52-5). Smith stated that defendant changed his clothes in the car to cover his tracks. Ibid. Defendant's explanation for his new outfit, in his statement to police, was that someone stole his clothes. (14T:33-11 to 21).

At trial, defendant claimed he changed his clothes earlier in the day, at his father's house, because his clothes smelled bad, and he wanted to change before visiting his aunt. (14T:137-17to 138-7; 147-19 to 149-15; 153-12 to 155-16). He claimed he put the clothes—jacket, sneakers, and all—into the trunk of the rental car, and he did not know what happened to them after that. He also claimed that he took R.J.'s shoes, to explain why he was wearing different shoes later. There

[3] Davis rented the car for the trip, but refused to stay at the hotel in Raritan with Smith and defendant because he did not like it. (10T:13-20 to 14-23).

was no clear explanation for why he would change shoes, or why he would go to visit his aunt, who he had not seen in years, in long johns. He claimed that Smith and R.J. brought him to his aunt's party, and he was essentially drinking through the entire day. Ibid. He further asserted he only went to New Jersey to visit and party with his aunt, because they were both Scorpios, and with other people he had not seen in years. (14T:131-15 to 20).

To bridge a final gap – namely, how he got back to the Chrysler with R.J. and Smith to be carried into the Raritan Hotel after his friends left him with his family – defendant claimed that his aunt met Smith and R.J. somewhere, and they carried him into the Chrysler from her car. (14T:138-22 to 139-7). Smith then drove defendant and R.J. back to the hotel, according to defendant. Thus, the footage of defendant being carried into the hotel would fit into the story. Ibid.

Notably, on cross, Defendant changed his story. Defendant claimed that this was not what happened; in fact, R.J. and Smith had stayed with him at his aunt's home the entire time, and then all three went to some house in Piscataway. (14T:149-3 to 152-24). When challenged about this inconsistency, defendant switched things around again: now, his friends brought him to his father's house, where he showered and changed his entire outfit, all three went to his aunt's home, all three left to go to Piscataway, and then R.J. and Smith dropped

defendant back off at his aunt's house. Then, when defendant realized he did not have his phone – he claimed he left it in the car, to explain why his cell phone had used data in the vicinity of the murder – his aunt met his friends somewhere to transfer him back to the Chrysler. Ibid.

Equally notable, when Smith pled guilty and agreed to testify against defendant, he provided several letters, written by defendant, wherein defendant admitted to shooting Sanchez because his "PTSD kicked in." (10T:27-12 to 31-6, 32-1 to 33-6). These letters also had defendant's fingerprints on them. (12T:100-17 to 20). The letters asked Smith to calm down, and promised Smith that defendant would admit to his crime and free Smith. (10T:27-12 to 31-6).

LEGAL ARGUMENT

POINT I

The prosecutor's use of handwriting comparison was not improper, particularly when defendant was the first to use the same tactic himself to his own advantage.

Defendant first argues, for the first time on appeal, that he was denied a fair trial when the trial prosecutor compared the writing on the confession letters to the writing on defendant's Miranda[4] forms. (Db24-32). Defendant asserts that he adequately explained away all evidence against him in the case, and that the

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

State's case essentially hinged on the confession letters – thus, the prosecutor calling attention to the handwriting in the letters, without expert testimony or any limiting instructions, unduly prejudiced the jury and deprived him of a fair trial.

Defendant is wrong in several respects. First, the State's case was far from weak – indeed, the only weakness displayed at trial was defendant's own explanations for the evidence against him. Our law is also clear that jurors are fully able to compare handwriting samples without expert assistance. Moreover, and most tellingly, defendant did not want expert analysis of the handwriting in question because he was the first one to ask the jury to compare handwriting samples. It was, in fact, defendant who first invited the jury to compare his handwriting to Smith's; it was defendant who asserted that the letters were forged by Smith; it was defendant who claimed the writing was not his; and it was defendant who asked the jury to use their own judgement to compare the handwriting samples. Any error was thus fully invited by defendant.

Because this issue was never raised below, and defendant "thus deprive[d] the trial judge of the opportunity to ameliorate any perceived errors, he must establish that the comments made constitute plain error under Rule 2:10-2. Plain error must be 'sufficient [to raise] a reasonable doubt as to whether the error led the jury to a result that it otherwise might not have reached.'" State v. Feal, 194

N.J. 293, 312 (2008) (quoting State v. Daniels, 182 N.J. 80, 102 (2004); State v. Macon, 57 N.J. 325, 336 (1971)); State v. Papasavvas, 163 N.J. 565, 625 (2000) ("Generally, if no objection was made to the [purportedly] improper remarks, the remarks will not be deemed prejudicial. Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made. Failure to object also deprives the court of the opportunity to take curative action"). If no objection is made, "there is a presumption that that the [comment] was not error and was unlikely to prejudice the defendant's case." Singleton, 211 N.J. 157, 182 (2012).

Under N.J.S.A. 2A:82-1, our legislature has stated:

> In all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by the witnesses; and such writings and the testimony of witnesses respecting the same may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dispute; provided nevertheless that where the handwriting of any person is sought to be disproved by comparison with other writings made by him, not admissible in evidence in the cause for any other purpose, such writings before they can be compared with the signature or writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy.

(emphasis added). Similarly, in State v. Carroll, this Court found that "there is

ample authority for our holding that the jury may without the assistance of expert testimony compare a disputed signature with handwriting contained in genuine documents in those circumstances where the trial judge in his discretion is satisfied that such a comparison by the jury would have probative value." 256 N.J. Super. 575, 598 (App. Div.), certif. denied, 130 N.J. 18 (1992). Moreover, "we have not been shown any New Jersey case that requires expert testimony before the fact finder may compare the signatures." Id. at 594.

Carroll also dealt with the question of what to do when the writings in question were not provided in discovery pretrial. Id. at 598-99. In Carroll, work orders signed by the defendant were compared to signatures tying Carroll to the crime. There was no dispute that the work orders contained Carroll's true signature. Carroll complained, like defendant here, that he was deprived of due process and a fair trial when he was not provided with the writings prior to trial. Indeed, the evidence in question was discovered mid-trial, and was provided to Carroll and his attorney as soon as the State had access to the information. Ibid.

This Court disagreed with Carroll, finding that even with the late inclusion of the writings:

> There is no reason to believe that defendant would have been able to prove he had not written the documents or signed the registration card if he had this discovery sooner. Further, defendant has failed to note any newly discovered evidence or opinions in this regard. Defendant failed to specify what "different trial

> strategy" he would have adopted had he been aware sooner that the registration card would be used nor does defendant explain how he was prejudiced by not receiving this discovery earlier.

Ibid. A similar situation exists here.

In the case at hand, there is no dispute that the handwriting on defendant's Miranda form is his. The disputed writings, the letters, were admitted into evidence over the defense and trial court's objection by order of this Court, as well. The jury was always, therefore, going to be able to assess each of these items of evidence. The absence of an expert, here, is of no moment. Like in Carroll, the jury was more than equipped to compare pieces of writing in evidence before them. This falls in line with our statutory language as well: "such writings and the testimony of witnesses respecting the same may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dispute." N.J.S.A. 2A:82-1 (emphasis added).

Defendant notes that, unlike Carroll, the writing in question was not a signature, but the letters A and R, and claims this distinction should sway this Court to consider the information prejudicial. The plain language of the statute debunks this argument: "In all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine shall be permitted..." N.J.S.A. 2A:82-1 (emphasis added). That the writing here is two letters versus

a whole signature is thus of no moment at all.

Additionally, it must be noted that the State was not the one who initially invited handwriting comparison by the jury—it was defendant. In his opening, he alleged that the notes were forgeries, written by Smith or by someone else. (8T:34-2 to 13). Then, during his cross of Smith, defense counsel placed Smith's Miranda warning signature into evidence, and asked Smith to identify his handwriting, including his "very distinct way of dotting your I's." (11T:220-3 to 221-3). Defense counsel then used that known writing, from Smith's Miranda warnings, to compare it to the writing on the jail letters to identify which portions were written by Smith—with the clear implication being that Smith had forged the letters. (11T:230-19 to 232-14). At no point did defendant ask for expert testimony, or for the trial judge to determine the "similarity" or veracity of the writings. At no point did defendant "notify" the State that he intended to use Smith's Miranda form as a handwriting sample, nor did defendant ask the judge for a ruling about its admissibility for that purpose; both things that the defendant now complains the State did not do. (Db30).

It was only after that that the prosecutor did the exact same thing: used defendant's known writing from his Miranda warnings to compare to the writing on the letters. (14T:155-17 to 156-15). Trial errors that "'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are

not a basis for reversal on appeal....'" State v. A.R., 213 N.J. 542, 561 (2013) (citation omitted). The doctrine "is grounded in considerations of fairness, and is meant to prevent defendants from manipulating the system." Id. at 561-62 (internal markings and citations omitted). The doctrine is implicated "when a defendant in some way has led the court into error...." Id. at 562 (internal markings and citations omitted). When the doctrine applies, reversal is only appropriate where the error "cut mortally into the substantive rights of the defendant [causing] a fundamental miscarriage of justice...." Ibid. (internal markings and citations omitted).

Such is the exact case here, though the State maintains that there was no error here to begin with; the jurors were entitled to make their own comparisons of the writings and draw their own conclusions based on the evidence, without an expert opinion. However, even to assume arguendo that there was error, that error was most certainly invited by defendant. Defendant was the first to use handwriting comparisons, and defendant was the first to call the letters forgeries by Smith. Why he did not insist on a handwriting expert, or any judicial finding of sufficient "similarity,"[5] is clear: had he done so, it would have been just as

[5] Defendant cites to several out-of-state cases where other jurisdictions have required or permitted such a finding of similarity by the trial court. (Db30-31). Defendant has not provided any New Jersey authority stating the same, because it does not exist: our statutes and caselaw impose no such requirement.

likely to harm his position as to help it.

This was a strategic decision that cannot be faulted—the strategy was sound, despite the fact that it was unsuccessful. However, defendant may not now turn around and hide from the fact that he was the one to employ this tactic on appeal. "The doctrine of invited error does not permit a defendant to pursue a strategy...hopefully to his advantage—and then when the strategy does not work out as planned, cry foul and win a new trial." State v. Williams, 219 N.J. 89, 100-01 (2019) (holding trial counsel's decision not to object to potentially improper testimony for strategic reasons cannot form the basis for plain error under the doctrine of invited error).

Additionally, Our Supreme Court has long-held that defendants may not selectively introduce pieces of evidence that the prosecution would otherwise be unable to admit in their own case-in-chief for his own advantage, "without allowing the prosecution to place the evidence in its proper context." See State v. James, 144 N.J. 538, 554 (1996) (finding "opening the door" doctrine is essentially a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond to (1) admissible evidence that generates an issue, or (2) inadmissible evidence admitted by the court over objection.") (emphasis added). Here, defendant placed the authenticity of the letters directly at issue, and used handwriting

comparison to bolster his assertion that Smith had forged the letters. The State is certainly permitted to respond to that argument in kind.

Defendant also complains at a lack of an instruction to the jury to "eliminate the danger that the jurors might assign improper weight to their comparison." (Db31). Here, again, this was unrequested at trial and must be evaluated for plain error. Feal, 194 N.J. at 312. Defendant claims that the Carroll decision considered that the judge gave such a limiting instruction in that case, which is true, but this was not dispositive to the issue. Additionally, in Carroll, the State was the only one using handwriting comparisons. Here, defendant did as well, and asked the jury to do the same comparison, and come to a conclusion that would benefit him, instead. Reviewing courts presume the newly minted objection on appeal is "not error" and "unlikely to prejudice the defendant's case." Singleton, 211 N.J. at 182. In a situation like this, defendant is unable to now claim that the judge should have sua sponte given a limiting instruction to the jury where both parties used the same strategy to the same end, and wanted the jurors to assess the writings freely, each to their own benefit.

Finally, defendant also complains that the jury was not "reminded" that he disputed the letters' authorship, that they were not "reminded" that there was no expert testimony, or "reminded" that it was the final arbiter of the issue. (Db31-32). The record itself dispels these contentions.

In his closing, defense counsel stated:

> So, we have the handwritten – we – we have the letters. By the way, why didn't we have a handwriting expert? Why didn't we have somebody come in and look at those letters and say, "I can tell you this. I reviewed Mr. Ware's handwriting and I've reviewed the letters that are written and they're written by Mr. Ware." You know why? Because it wasn't going to work, that's why.

(16T:17-4 to 11). The jury was thus "reminded" about defendant's dispute, and about the lack of expert testimony. As for reminding the jury that they were the factfinders, and it was their assessment of the writing that would control, the prosecutor and trial court took care of that. In the State's closing, as defendant candidly quotes, the prosecutor stated multiple times, in terms of the writing comparisons, that the jury should assess the evidence and draw their own conclusions:

> If you could compare to Mr. Ware's Miranda form, you'll have that in the back room. You can make your own comparison to that, but also from the tone of the letters and the context of them.

(16T:49-15 to 18);

> ...and by the way, when you get in that deliberation room because I am looking at right it now, look at his Miranda form and his printed name and look at the writing on this and [defense counsel] says Mr. Smith had enough time to mimic his writing there. That's – that's your decision. You can certainly find that if you believe that to be the case.

(16T:77-8 to 14). This is in addition to the jury charge which already told the jurors that they are the "sole and exclusive judges of the evidence...[r]egardless of what counsel said or what I may have said in recalling the evidence in this case [it] is your recollection of the evidence that should guide you as judges of the facts." (16T:109-3 to 9). Defendant's fears are thus wholly unfounded.

In short, defendant was the one who first asked the jury to compare the different styles of handwriting from Smith's Miranda form to the letters in question, to argue that Smith forged the letters entirely. The State, in doing the same with defendant's Miranda form, merely used the same argument, and left it up to the jury to decide which side the evidence backed. Moreover, it was not error to ask a lay jury to compare the letters to writings where the authors are undisputed. The jury was well aware of their role, and was fully equipped to carry it out. Defendant's convictions are sound, and should be affirmed.

POINT II

The prosecutor's summation was proper and did not deny defendant a fair trial and due process of law.

Defendant claims he is entitled to reversal because the Prosecutor's summation at trial allegedly included propensity evidence, inflamed the passions of the jury, and denigrated the defense. (Db33-39). These arguments fail because the Prosecutor's summation constituted fair comment on the

evidence, was not unduly prejudicial or inflammatory, and contained nothing that rises to the level of plain error.

Defendant's failure to object and raise these issues below limits this Court's standard of review to evaluating the record for plain error. See R. 2:10-2; State v. Singh, 245 N.J. 1, 13 (2021) (finding "[w]hen a defendant does not object to an alleged error at trial, such error is reviewed under the plain error standard"); see also, State v. Ates, 426 N.J. Super. 521, 535 (App. Div. 2011), certif. granted, 213 N.J. 389 (2013) ("Comments during summation to which there is no objection are generally not considered prejudicial"). "[A]n unchallenged error constitutes plain error if it was 'clearly capable of producing an unjust result,'" Singh, 245 N.J. at 13 (quoting R. 2:10-2), and "raise[s] 'a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached,'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)). "The mere possibility of an unjust result is not enough." Ibid. When applying the plain error standard, this Court evaluates an error "in light of the overall strength of the State's case." State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Galicia, 210 N.J. 364, 388 (2012)); see also, State v. Clark, 251 N.J. 266, 287 (2022); State v. Hightower, 120 N.J. 378, 410 (1990) (holding officer's testimony that defendant "was the person responsible for the murder" was harmless error because of "the

strength of the State's case, the length of the trial, and the number of witnesses called"). Where no objection was made at trial, "there is a presumption that that the [alleged error] was not error and was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012). The burden rests on defendant to prove "that the error was clear and obvious and that it affected his substantial rights." State v. Koskovich, 168 N.J. 448, 529 (2001).

When a defendant seeks reversal of his conviction on the grounds of alleged prosecutorial misconduct in summation, under the plain error standard the conviction will stand unless the prosecutor's "misconduct was so egregious that it deprived the defendant of a fair trial." State v. Cordero, 438 N.J. Super. 472, 490 (App. Div. 2014), certif. denied, 221 N.J. 287 (2015) (quoting State v. Frost, 158 N.J. 76, 83 (1999)); see also, State v. McGuire, 419 N.J. Super. 88, 139 (App. Div.), certif. denied, 208 N.J. 335 (2011); State v. Wakefield, 190 N.J. 397, 437-38 (2007), certif. denied, 552 U.S. 1146 (2008). Even where a remark is improper, reversal of a conviction is not mandated. "Not every instance of misconduct in a prosecutor's summation will require a reversal of a conviction. There must be a palpable impact." State v. Roach, 146 N.J. 208, 219 (1996).

A. The Prosecutor's summation was not "evidence" and any reference in the summation to Defendant's prior acts was merely a fair comment on the evidence made in response to Defendant's own summation.

Defendant first claims the Prosecutor's summation violated evidentiary rules by referencing the post-Miranda statement Defendant gave to detectives on December 30, 2020, in which Defendant stated:

> Sir, sir, listen. I'm not, I'm not even in to [*sic*] this t-type of shit, yo. I do little shit. Like, I may steal, but I ain't into this.

(Da32). Despite making no objection to the introduction of this statement or the Prosecutor's summation, Defendant now claims the State's reference to this statement in summation violated N.J.R.E. 404(b) because the jury could have viewed Defendant's "admission to prior acts of stealing as evidence that he committed the crimes for which he was on trial." (Db35). This Court should reject Defendant's argument because the Prosecutor's reference to Defendant's statement was a fair comment on evidence that was already admitted and was made in response to arguments made in Defendant's summation.

A prosecutor's summation is not "evidence" subject to the New Jersey Rules of Evidence. See R. 1:7-1(b) (noting that parties may make closing statements only "[a]fter the close of evidence"); see also, New Jersey Courts, Model Criminal Jury Charges, Parts 1 & 2 ("Arguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated

as evidence." (emphasis added)). Rather, in summation the "prosecutor is granted wide latitude to make 'fair comment' on the evidence so long as he or she stays within legitimate inferences that can be deduced from the evidence." McGuire, 419 N.J. Super. at 142 (quoting State v. Mayberry, 52 N.J. 413, 437 (1968)). To assess whether a prosecutor's remarks in summation rise to the level of plain error, appellate courts "must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." State v. Engel, 249 N.J. Super. 336, 379 (App. Div.), certif. denied, 130 N.J. 393 (1991) (quoting United States v. Young, 470 U.S. 1, 12 (1985) (internal quotation marks omitted)). During summation, the prosecutor is permitted to "respond to an issue or argument raised by defense counsel." State v. Johnson, 287 N.J. Super. 247, 266 (App. Div.), certif. denied, 144 N.J. 587 (1996). Finally, trial errors that "were induced, encouraged, or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal . . . ." State v. A.R., 213 N.J. 542, 561 (2013). This doctrine is implicated "when a defendant in some way has led the court into error." Id. at 562 (internal markings and citations omitted). When the doctrine applies, reversal is only appropriate where the error "cut mortally into the substantive rights of the defendant [causing] a fundamental miscarriage of justice." Ibid. (internal markings and citations omitted).

Here, the Prosecutor's reference in summation to Defendant's own admission that he "may steal" was merely a "fair comment" on the evidence. McGuire, 419 N.J. Super. at 142. A video recording of the full interview during which Defendant made this statement was already admitted into evidence as Exhibit S-5 and played for the jury. (13T:69-17). Defendant did not object to the admission of the statement, nor does Defendant challenge the admission of the statement on appeal. Moreover, the Prosecutor only fleetingly referenced this statement in order to "respond to an issue or argument raised by defense counsel" in the Defendant's summation. Johnson, 287 N.J. Super. at 266. Just moments prior to the Prosecutor's reference to Defendant's statement, defense counsel in summation stated:

> I have some notes here on this page that I am going to go through before I get into the testimony of the witnesses. You heard that, and it's in evidence, [Defendant] gets a military check[6] every month for his service in the Armed Forces. He cashed that check right before he came up to New Jersey. He doesn't need to rob anybody.

16T:17-14 to 20 (emphasis added). Defendant's summation was geared to persuade the jury that Defendant had no motive for robbing the dice game at the Hamilton Avenue barbershop, in part because he gets this check every month

[6] A check from the federal government in favor of Defendant was admitted into evidence as Exhibit D-20. (14T:169-12).

and does not need the money. In direct response to Defendant raising the issue of motive in summation, the Prosecutor said the following:

> Now, [defense counsel] puts up this check, holds up this check, $1,400 check he gets – Mr. Ware gets once a month from the military and [defense counsel] says, "Oh, he doesn't need money, he doesn't need money. He's a successful musician." I don't know if you ever heard of him, I hadn't before this case, but – and he gets a check from the military, completely inconsistent with Mr. Ware's statement to the police by the way because when the police interview Mr. Ware, and I wouldn't even bring up his financial status if [defense counsel] hadn't brought it up first and tried to say, "Well, he wouldn't rob a place because why would he rob a place when he has money?" He tells the police, "I ain't got too much shit. I am homeless. All I got is my clothes. I lost my crib. I needed money for a house," and he says, talking about a murder, "I am not even into this type of shit, yo. I do little shit. Like, I may steal, but I ain't into that." Well, I guess if he's stealing from people, he needs money and I guess he was stealing from those people in the barbershop[.]

16T:68-2 to 22 (emphasis added). This context illustrates that the Prosecutor only referenced Defendant's prior statements for the sole purpose of rebutting Defendant's argument in summation that Defendant "doesn't need to rob anybody." That Defendant "needs money" and did have a motive for robbery is a "legitimate inference[ ] that can be deduced from the evidence" – i.e., Defendant's statements that he is "homeless" and "may steal." McGuire, 419 N.J. Super. at 142. The jury was free to weigh this inference against Defendant's claim that he "doesn't need to rob" to assess whether and to what extent a motive

existed.

Finally, even if this Court were to find some error in the Prosecutor's reference to Defendant's statement, such error would have been "induced" or at least "acquiesced" to by defense counsel, who first raised the issue of motive in summation. A.R., 213 N.J. at 561. The Prosecutor stated he would not have addressed Defendant's financial status if defense counsel had not first claimed that Defendant is financially stable and "doesn't need to rob." At any rate, Defendant cannot meet his burden of showing that this alleged error was "so egregious that it deprived [him] of a fair trial." Cordero, 438 N.J. Super. at 490. Defendant has not shown how this fleeting reference to his statement had a "palpable impact," Roach, 146 N.J. at 219, sufficient to constitute plain error. By contrast, the record shows that any error in referencing Defendant's statement was negligible "in light of the overall strength of the State's case." Sanchez-Medina, 231 N.J. at 468.

B. The Prosecutor did not inflame the passions of the jury.

Defendant next claims that the Prosecutor's summation was intended to "inflame the jury." (Db36). Defendant collects several quotations from the Prosecutor's summation and contends that these comments "prevented the jurors from dispassionately performing their role by improperly focusing on the personal characteristics of the victim and the effect of the victim's death on his

family." (Db37). This argument fails because nothing in the Prosecutor's summation was so unduly prejudicial or inflammatory to rise to the level of plain error.

"[P]rosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries." Frost, 158 N.J. at 82. "[P]rosecuting attorneys, within reasonable limitations, are afforded considerable leeway in making opening statements and summations." State v. DiFrisco, 137 N.J. 434, 474 (1994). New Jersey courts appreciate that "[c]riminal trials are emotionally charged proceedings" and the "prosecutor is not expected to conduct himself in a manner appropriate to a lecture hall." State v. Harris, 141 N.J. 525, 559 (1995); see also, State v. R.B., 183 N.J. 308, 333-34 (2005) ("Trials, particularly criminal trials, are not tidy things. The proper and rational standard is not perfection; as devised and administered by imperfect humans, no trial can ever be entirely free of even the smallest defect.").

Defendant cites State v. Williams, 113 N.J. 393, 448 (1988), as an example of when a prosecutor commits prejudicial error by unnecessarily discussing the "victim's character and future plans." In Williams, a capital murder case where the defendant was sentenced to death, the prosecutor spoke at length about the homicide victim's life, occupational pursuits, and plans for her upcoming marriage. The prosecutor called the victim "Bright, beautiful,

educated, religious, a member of her church choir." The prosecutor also lambasted the defendant for "brutally, savagely, permanently . . . destroy[ing] all the goodness and humanity that was Beverly Mitchell." Ibid. The victim "didn't deserve to die as she did, naked, ravaged, in agony, and calling to Jesus for help. Jesus help me, Jesus help me." Id. at 453. Although the Supreme Court reversed on other grounds, the Court noted "It is constitutionally required that juries in capital trials reach a verdict and impose a penalty without inordinate exposure to unduly prejudicial, inflammatory commentary." Id. (emphasis added).

Illustrative is the more recent case of State v. Timmendequas, 161 N.J. 515, 588-589 (1999), in which the prosecutor "contrasted the victim's life and dreams with the terror she felt at the moment of her death. And . . . depicted the victim as an angel at the mercy of a defendant who was amoral." Ibid. The prosecutor called the defendant in that case "evil," "awful," "depraved," "despicable," and "appalling," described him as "lustful" for a small child, and asked the jury to put themselves in the shoes of the child victim at the moment of her death. Id. at 584-85. Nonetheless, the court did not reverse the trial even after such inflammatory remarks – remarks that are far more inflammatory than those used in this case. Id. at 588-89. The Court so found: (1) because much of the summation was based upon the evidence presented at an extremely emotional

trial; (2) because the judge issued a curative instruction; and, (3) "most importantly," because the evidence of defendant's guilt was overwhelming and "based primarily on the inculpatory statements made by defendant after the murder." Ibid.

Here, the Prosecutor's summation noted that victim Denny Sanchez was "a husband, a son, a brother, business owner and his life was snuffed out that night." (16T:47-9 to 10). The Prosecutor said, "We all want a fair trial for Mr. Ware. He is entitled to a fair trial. . . . but you know what, a fair trial doesn't mean one that the defendant gets what he wants out of a verdict." (16T:101-8 to 15). The Prosecutor concluded by stating, "Denny Sanchez was killed that night. He was killed during this robbery and he deserves a fair trial and his family deserves a fair trial." (16T:101-22 to 24).

These comments pale in comparison to those of the prosecutors in Williams and Timmendequas. In those cases, the prosecutors used colorful adjectives to describe both the victims and defendants. By contrast, the Prosecutor's summation here contained no such viscerally descriptive adjectives pertaining to the Defendant or the victim. The Prosecutor merely recited basic facts about the victim and made generalized statements about the victim and his family deserving a fair trial. Nor did the Prosecutor even imply, as Defendant now claims, that justice "could only be achieved if [Defendant] were convicted."

(Db37). Indeed, immediately before stating that the victim deserved a fair trial, the Prosecutor first emphasized that "We all want a fair trial for Mr. Ware. He is entitled to a fair trial." (16T:101-8 to 9). Even if anything in the Prosecutor's summation was improper, no error occurred because the jury did not suffer "inordinate exposure to unduly prejudicial, inflammatory commentary." Williams, 113 N.J. at 453. Moreover, Defendant again is unable to meet his burden of showing that this alleged error was "so egregious that it deprived [him] of a fair trial." Cordero, 438 N.J. Super. at 490. Defendant has not shown how these generalized, fleeting comments about the victim were "clearly capable of producing an unjust result," Singh, 245 N.J. at 13.

C. The Prosecutor did not denigrate the defense.

Finally, Defendant argues the Prosecutor's summation "improperly denigrated the defense" by using "disparaging language to refer to defense counsel's arguments and [Defendant's] testimony." (Db37-38). This Court should reject this argument because at no point did the Prosecutor use disparaging language and his summation properly questioned the credibility of Defendant's theory of the case.

Defendant cites State v. Munoz, 340 N.J. Super. 204, 218 (App. Div. 2001), which held "[i]t is improper for a prosecutor during summation to demean the role of defense counsel or cast unjust aspersions upon a lawyer's motives."

The prosecutor in summation argued that a defense witness' testimony showed "that the alibi was concocted by [the witness] and [the defendant's counsel] after she goes to hire him." Id. at 217. Although the Court in Munoz agreed with the defendant that "[i]t was improper for the prosecutor to imply that defense counsel played a role in distorting the facts," the Court also held "It is, however, not improper for a prosecutor to comment on the credibility of a defense witness's testimony." Id. at 217-18 (citing State v. Robinson, 157 N.J. Super. 118, 120 (App. Div.), certif. denied, 77 N.J. 484 (1978)). Accordingly, even though defense counsel objected at trial to the prosecutor's comments in summation, no reversible error occurred because "the prosecutor's dereliction was isolated" and because the comments "essentially question the credibility" of a defense witness. Id. at 218.

Here, Defendant complains that the following comments in the Prosecutor's summation somehow constituted "disparaging language:" "the idea floated by defense counsel," (16T:49-3 to 4); "this got floated a few times and in a couple of different ways," (16T:57-7 to 8); "the defense is throwing out all of these wild theories for the case, none of which by the way exonerate his client," (16T:94-13 to 16); "that tale he told up there," (16T:102-5); and "he hasn't come up with that story yet," (16T:84-22 to 23).

Unlike the prosecutor in Munoz, these comments were not derelict in the

slightest. At no point did the Prosecutor "demean" defense counsel or accuse defense counsel of "concocting" facts. Rather, the Prosecutor's comments here merely "question the credibility" of the Defendant's theory of the case. Munoz, 340 N.J. Super. at 218. These comments easily fall within the "wide latitude" granted to prosecutors "to make 'fair comment' on the evidence." McGuire, 419 N.J. Super. at 142. And unlike in Munoz, defense counsel here made no objection to the Prosecutor's comments in summation. Accordingly, if no reversible error occurred in Munoz despite defense counsel's timely objection to the prosecutor's allegations that defense counsel "concocted" an alibi, then no reversible error occurred here under the plain error standard. Defendant has again failed to show how these comments simply challenging the credibility of Defendant's case were "so egregious that it deprived [him] of a fair trial," Cordero, 438 N.J. Super. at 490, and were "clearly capable of producing an unjust result," Singh, 245 N.J. at 13.

POINT III

As our courts have already stated, it was not plain error for the trial court not to charge the jury with an unrequested cooperating witness charge.

Defendant's final point of contention is one our courts have already addressed. Defendant asserts that the trial court should have, sua sponte, charged the jury with the model charge on a cooperating co-defendant or witness. (Db40-

43); see Model Jury Charges (Criminal): Testimony of a Cooperating Co-Defendant or Witness (Revised 2/6/06). Defendant admits that this was not a charge he ever requested the court to give.

Thus, his argument fails. Our caselaw has stated very clearly that the accomplice charge, in and of itself, can be prejudicial to the defendant as it tacitly acknowledges that the defendant was an accomplice to the cooperator's admitted crime. Thus, where the charge is unrequested, "[c]ertainly it is not error, let alone plain error, for a trial judge to fail to give this cautionary statement where it has not been requested." State v. Artis, 57 N.J. 24, 33 (1970).

Trial counsel did not object to this instruction, so it is reviewed for plain error. See R. 1:7–2; State v. Wakefield, 190 N.J. 397, 473 (2007) ("[T]he failure to object to a jury instruction requires review under the plain error standard."). "Pursuant to Rule 1:7–2, a defendant is required to challenge instructions at the time of trial or else waives the right to contest the instructions on appeal." State v. Belliard, 415 N.J. Super 51, 66 (App. Div. 2010) (citing State v. Adams, 194 N.J. 186, 206–07 (2008)). Where there is a failure to object, reviewing courts presume the instruction was "not error" and "unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012).

As such, this Court "may reverse only in the presence of plain error, that is error 'clearly capable of producing an unjust result.'" Ibid. (quoting Adams,

194 N.J. at 207). In terms of a jury charge, meeting the plain error standard requires "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing [C]ourt and to convince the [C]ourt that of itself the error possessed a clear capacity to bring about an unjust result." State v. Nero, 195 N.J. 397, 406 (2008) (quoting State v. Hock, 54 N.J. 526, 538 (1969)). This burden rests on defendant's shoulders. State v. Koskovich, 168 N.J. 448, 529 (2001).

Jury "charges must be read as a whole in determining whether there was any error." State v. Torres, 183 N.J. 554, 564 (2005). The effect of any error must be considered "in light 'of the overall strength of the State's case.'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). Any unchallenged issue with the jury charge is considered "in light of 'the totality of the entire charge, not in isolation.'" State v. Burns, 192 N.J. 312, 341 (2007) (quoting Chapland, 187 N.J. at 289).

Regarding the testimony of a cooperating co-defendant or witness charge, there is specific guidance enumerated within the charge itself that puts this claim to rest. "While a defendant is entitled to such a charge if requested and a judge may give it on his own motion if he thinks it advisable under the circumstances, it is generally not wise to do so absent a request, because of the possible prejudice to the defendant. State v. Begyn, 34 N.J. 35, 54-56 (1961); State v.

Gardner, 51 N.J. 444, 460-461 (1968). Certainly, it is not error, let alone plain error, for a trial judge to fail to give this cautionary comment where it has not been requested." State v. Artis, 57 N.J. 24, 33 (1970) (emphasis added); see also State v. Gardner, 51 N.J. 444, 460-461 (1968); State v. Anderson, 104 N.J. Super. 18 (App. Div. 1968), aff'd 53 N.J. 65 (1968), cert. denied, 394 U.S. 966 (1969). This language is included on the model charge itself, in footnote one, at the title of the document. Model Jury Charges (Criminal): Testimony of a Cooperating Co-Defendant or Witness (Revised 2/6/06), at page 1, n.1. The very first line of text in that note is as follows: "This charge should not be given except upon request of defense counsel." Ibid. (emphasis added).

In Artis, the same argument was forwarded to our Supreme Court. 57 N.J. at 33. There, as well, the cooperating witness/accomplice charge was unrequested but a cooperating co-defendant had given testimony for the State. Ibid. Our Supreme Court found that it was "certainly" not plain error for the judge to fail to give the charge sua sponte "because of the possible prejudice to the defendant." Ibid. Such is the exact same case here.

Defendant claims the judge should have given the charge because he claims that there was no risk of prejudice to him, as the jury already knew the two were friends. Here, the trial court held a comprehensive charge conference on its own court day, on the record, going through each page of the jury charge

with trial counsel. See (15T). Defendant acquiesced to the jury charge both before, (16T:3-8 to 15), and after, (16T:170-1 to 4), it was given at trial. "Pursuant to Rule 1:7–2, a defendant is required to challenge instructions at the time of trial or else waives the right to contest the instructions on appeal." State v. Belliard, 415 N.J. Super 51, 66 (App. Div. 2010) (citing Adams, 194 N.J. at 206–07).

The issuance of this charge must be "carefully scrutinized and assessed in the context of his interest in the proceeding." Artis, 57 N.J. at 33. Defendant had several opportunities to request the charge, and chose not to. This indicates that, at the time, defendant felt there was a risk of prejudice such that requesting the charge would be more harmful than not. Moreover, the Artis court also found it significant that: (1) cross-examination had revealed that the co-defendant faced more serious charges if he did not cooperate, and (2) that the jury had been instructed that credibility of witnesses could be affected by their interest in the outcome of the trial. Ibid.

Both facts are also present here. The jury was well aware that Smith took a plea bargain which required his truthful testimony against defendant, even on direct examination. (10T:5-21 to 11-15). This included the fact that he hadn't been sentenced yet. Ibid. On cross, it was emphasized that his plea bargain was very, very beneficial to him if he cooperated. (10T:40-4 to 16). The jury charge

also contained an instruction that credibility can be affected by a witness's interest in the outcome of a trial. (16T:112-7 to 113-12).

Thus, there was no possibility of an unjust result here. The jury was certainly aware that Smith's testimony should be viewed in the light of his interest in the outcome of the trial, and knew they could take that into account. Where the charge itself could have exposed the defendant to undue prejudice, it was not plain error for the judge to fail to give it, sua sponte. Defendant's convictions should be affirmed.

CONCLUSION

For the above reasons and authorities cited in support thereof, the State respectfully urges this Court to affirm the conviction and sentence entered below.

Respectfully submitted,

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