SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3324-21

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Conviction in the Superior Court of New Jersey, Law
v.	:	Division, Gloucester County.
LAWRANCE A. BOHRER,	:	Ind. No. 17-07-536-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. Christine Allen-Jackson, J.S.C. and a jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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January 16, 2024

DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

Defendant appeals his convictions and forty-year sentence for accomplice liability for felony murder and accomplice liability for first-degree robbery, accomplice liability for reckless manslaughter, reckless manslaughter and theft. He was acquitted of murder, felony murder, aggravated manslaughter, and own-conduct robbery.

The only evidence that directly tied defendant to the offense came from his co-defendant, a heroin addict who provided a statement to the police on the day he pled guilty to aggravated manslaughter with the possibility of a reduced sentence in exchange for his testimony. The victim suffocated after having been tied up in blankets and robbed of a debit card, which the co-defendant admittedly used to withdraw $500 from the victim's bank account shortly after the robbery.

Defendant's convictions must be reversed for several reasons. First, the court abused its discretion when it permitted the State to play the video of the co-defendant's police statement through the testimony of a police detective, seventeen days after the co-defendant had testified at trial, consistently with his prior statement. The statement did not meet the evidentiary requirements for admission of a prior consistent statement because it was not provided before the co-defendant had a motive to fabricate defendant's involvement.

Second, there were critical errors in the jury charge on accomplice liability for first-degree robbery. The jury was never instructed that it could not find defendant guilty of being an accomplice to robbery based solely on actions taken after robbery of the debit card. The omission of this instruction in the context of the accomplice liability instructions was plain error, especially in light of the fact that the jury acquitted defendant of own-conduct robbery when it had been properly instructed.

The jury also was never instructed on the elements of first-degree robbery in the context of the accomplice liability charge, and it was never asked on the verdict sheet whether defendant was guilty of the elements that raised accomplice liability for robbery to the first-degree.

Third, defendant's due process rights were violated when the court halted jury deliberations for fourteen days because the court and the attorneys had planned vacations. The trial had lasted for a month, with dozens of witnesses. This extended break exposed jurors, unnecessarily, to outside influences and hampered their ability to recall the evidence.

Defendant's sentence must be reversed because the court made multiple contradictory and completely unexplained findings on aggravating and mitigating circumstances in addition to other errors.

Defendant's convictions and sentence should be reversed.

PROCEDURAL HISTORY[1]

On July 19, 2017, defendant Lawrance Bohrer and co-defendant Thomas Bergholz were charged under Indictment No. 17-07-536 for the following

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[1] 1T = Transcript of July 17, 2018, proceedings
2T = Transcript of July 18, 2018, proceedings
3T = Transcript of August 9, 2018, proceedings
4T = Transcript of November 7, 2018, proceedings
5T = Transcript of November 8, 2018, proceedings
6T = Transcript of April 2, 2019, proceedings
7T = Transcript of May 9, 2019, proceedings
8T = Transcript of July 25, 2019, proceedings
9T = Transcript of August 27, 2019, proceedings
10T = Transcript of September 27, 2019, proceedings
11T = Transcript of January 22, 2020, proceedings
12T = Transcript of September 27, 2021, proceedings
13T = Transcript of September 28, 2021, proceedings
14T = Transcript of September 30, 2021, proceedings
15T = Transcript of October 4, 2021, proceedings
16T = Transcript of October 5, 2021, proceedings
17T = Transcript of October 7, 2021, proceedings
18T = Transcript of October 8, 2021, proceedings
19T = Transcript of October 12, 2021, proceedings
20T = Transcript of October 14, 2021, proceedings
21T = Transcript of October 15, 2021, proceedings
22T = Transcript of October 18, 2021, proceedings
23T = Transcript of October 21, 2021, proceedings
24T = Transcript of October 22, 2021, proceedings
25T = Transcript of October 25, 2021, proceedings
26T = Transcript of October 26, 2021, proceedings
27T = Transcript of October 28, 2021, proceedings
28T = Transcript of October 29, 2021, proceedings
29T = Transcript of November 1, 2021, proceedings
30T = Transcript of November 16, 2021, proceedings
31T = Transcript of November 18, 2021, proceedings
32T = Transcript of November 19, 2021, proceedings
33T = Transcript of May 3, 2022, proceedings

offenses as related to the death of Michael Fazzio on or about March 10, 2017:

> first-degree felony murder, under N.J.S.A. 2C:11-3(a)(3) (count one);
>
> first-degree purposeful, knowing or serious bodily injury murder, under N.J.S.A. 2C:11-3(a)(1) and (2) (count two);
>
> first-degree robbery, under N.J.S.A. 2C:15-1(a)(1), or -1(a)(2) or -1(a)(3) (count three);
>
> first-degree accomplice to felony murder, under N.J.S.A. 2C:11-3(a)(3) and N.J.S.A. 2C:2-6(b)(3) (count four);
>
> first-degree accomplice to robbery, under N.J.S.A. 2C:15-1(a)(1) and/or -1(a)(2) and/or -1(a)(3). and N.J.S.A. 2C:2-6 (count five);
>
> first-degree accomplice to first-degree purposeful, knowing or serious bodily injury murder, under N.J.S.A. 2C:11-3(a)(1) and (2), and N.J.S.A. 2C:2-6 (count six);
>
> third-degree endangerment by knowing conduct that creates a substantial risk of death under N.J.S.A. 2C:24-7.1(a)(3) (count seven);
>
> third-degree criminal restraint, under N.J.S.A. 2C:13-2(a) (count eight); and
>
> third-degree theft by unlawful taking, under N.J.S.A. 2C:20-3(a) (count nine).
>
> [Da5-Da9.]

The trial was held on fourteen days from September 28 to October 26, 2021 (13T-26T). Deliberations began on October 28, 2021, and continued on October 29, and November 1, 2021 (26T168-12 to 15;Da71). There were no deliberations from November 2 to November 15, 2021.

After additional deliberations, the jury returned a verdict on November 19, 2021 (32T3-1 to 32T5-12). It acquitted defendant of: murder, felony murder, aggravated manslaughter, accomplice to murder, second-degree robbery, criminal restraint, endangering, and robbery (32T3-16 to 432T5-9). The jury convicted defendant of: accomplice liability for felony murder (count four), accomplice liability for robbery (degree not specified) (count five), reckless manslaughter as a lesser-included offense of murder (count two), accomplice liability for reckless manslaughter, and theft by unlawful taking (count nine) (Da10-Da13;32T20 to 32T5-5).

On May 3, 2022, the court sentenced defendant as an accomplice to felony murder to a prison term of forty years, with 85% to be served without parole (33T34-20 to 3;Da57-Da60). It sentenced him to a term of ten years for accomplice liability for first-degree robbery, with 85% to be served without parole, and seven years for reckless manslaughter with 85% to be served without parole, all to be served concurrently with the felony murder sentence

(33T35-23 to 33T39-16;Da57-Da60). The court merged the conviction for theft into the robbery conviction (33T36-4 to 8).

On July 1, 2022, defendant filed a notice of appeal (Da1-Da4).

STATEMENT OF FACTS

Michael Fazzio lived alone in a house on his parents' farm at 730 Buck Road in Monroeville (15T119-14 to 24;24T9-7 to 12;24T11-3 to 4). On March 13, 2017, Fazzio's father, Frank Fazzio, found his son on the floor of the home (15T85-19 to 24;15T60-1 to 10;15T90-25;24T8-14 to 25). A couch had been turned over on top of him (15T87-8 to 10;15T86-6 to 11). Fazzio was not moving and he did not respond to his father's attempts to waken him (15T86-5 to 14;15T88-1 to 7). His parents called the police (15T88-8 to 15).

Fazzio died from "mechanical and positional asphyxia" (25T38-8 to 11). His body had been wrapped in two blankets that were tightly duct-tapped from his chest to his mouth (25T41-7 to 25T42-21). He had been "hog tied," face-down, with his wrists, arms and legs bound behind his back with orange electrical cord such that he was unable to straighten out (25T37-23 to 25T40-10). There were blood stains on his pants and shirt, and on the carpet (20T17-6 to 10).

One of Fazzio's pockets was turned inside-out (20T18-20 to 24). There was a cut in the duct tape and the blanket near the victim's face and superficial

cuts on his left hand (20T37-1 to 5;25T43-17 to 25). Underneath the body, the police found an empty sleeve for a debit card (24T16-14 to 15). His cell phone was missing (24T23-4 to 10).

The police found no sign of forced entry (20T14-5 to 13). Nor did they find any identifiable fingerprints at the scene (20T48-11 to 20T59-22;20T87-1 to 20T88-5). The first detective on the scene testified that the bedroom appeared to be orderly and it did not appear to have been rummaged through (20T76-7 to 11;20T79-2 to 8). There was some change in a box on top of a bedroom dresser (20T80-20 to 25).

The medical examiner was unable to determine a time of death (25T59-20 to 25T60-24). The last time Fazzio had been seen alive was Friday, March 10, 2017 (24T12-7 to 9). At 12:07 a.m. on March 11, 2017, two days before Fazzio's body was found, five hundred dollars had been withdrawn from his bank account through the ATM at Fulton Bank's Clayton office (16T14-1 to 17).

Surveillance photos showed an individual at the ATM during the transaction (16T21-13 to 16T24-22). A bandanna covered the lower portion of the person's face and he wore black, grey and neon green gloves, a baseball cap and two hooded sweatshirts pulled up over the cap (24T19-21 to 24T20-

6). The individual was alone and no video captured him meeting anyone or getting into a car (25T16-7 to 20).

Security video from a nearby nail salon showed that a Jeep passed by on Delsea Drive at 12:02 a.m. on March 11, 2017 (19T33-20 to 19T34-7;19T38-1 to 19T39-1;19T44-7 to 19T45-23). Surveillance video obtained from 22 Maple Street in Clayton showed that a Jeep passed by at 12:05 a.m. on March 11, 2017 (21T196-7 to 20;21T203-13 to 21T204-6). A black-and-white video taken from 105 Maple Street showed a Jeep, but its license plate could not be seen (24T38-21 to 24T40-25;25T16-21 to 25T17-24). Surveillance video played for the jury showed an older model jeep "kind of circling the area during the time that the ATM footage from the victim's bank account had taken place" (24T38-5 to 24T39-13).

While walking to the store along North Delsea Drive in Clayton, Darryl Senior found the victim's phone, in pieces, by the side of the road on either March 10 or 11, 2017 (17T27-13 to 14;17T28-14 to 17T29-6;17T37-21 to 17T39-21). After putting the phone back together and charging it, Senior called the number for the only saved contact in the phone, named "Tommy B" (17T29-9 to 22;24T31-3 to 23). "Tommy" answered and told Senior that he knew who owned the phone and that he would pick it up on "Saturday" (17T29-22 to 17T30-3).

But "Tommy" never came to get the phone (17T30-7 to 9). Instead, a couple of days later, an officer from the Prosecutor's Office called the phone (17T30-15 to 22). Senior met with the police on March 14, 2017 (17T35-3 to 5).

The police identified the number for "Tommy" on Fazzio's phone as belonging to co-defendant Thomas Bergholz (24T32-19 to 24). They located Bergholz on March 14, 2017, at a gas station in Monroeville (20T111-4 to 25). He was in a pickup truck with the truck's owner, Michael Lair (20T11-17 to 25;20T135-21 to 20T136-1;24T34-5 to 10). Bergholz was wearing a green sweatshirt similar to the one seen on the bank surveillance video (24T34-18 to 25). There was also what appeared to be blood on his sweatshirt, pants and boots, and cuts on top of his head (20T138-1 to 5;24T34-22 to 25).

The police took Bergholz to the Prosecutor's Office for questioning (20T136-2 to 10). He claimed that he had nothing to do with what happened to Fazzio (16T148-1 to 13).

Bergholz's phone records showed that he searched the victim's name on the internet March 11, 2017, at 7:53 a.m. (24T68-18 to 24T69-16;24T105- 1 to 18). The phone records also showed that on Thursday, March 9, 2017, he called defendant numerous times, that there were calls between them on March

10, and that Bergholz had made numerous unanswered calls to defendant's phone on March 12, 13, and 14, 2017 (24T59-12 to 24T77-21).

On March 11, 2017, Bergholz sent two text messages to defendant's phone at approximately 4:46 a.m. and 4:47 a.m: "Get everything out of your truck that I we or 'cause them clothes are dirty" and "You know what I mean" (21T226-6 to 18;24T83-7 to 22). On March 12, 2017, Bergholz sent several texts asking defendant to respond (24T84-7 to 24T85-15).

Defendant was interviewed at the Gloucester County Prosecutor's Office, on March 14, 2017, after the police had spoken to Bergholz (24T46-12 to 18;24T50-3 to 7). Defendant had a pair of gloves in his sweatshirt pocket that were similar to the gloves seen on the Fulton Bank surveillance video (20T115-2 to 17). The police took his gloves and his cellphone (20T115-18 to 20T117-19).

A recording of defendant's interview was played for the jury (21T13-1 to 21T157-15). He told the police that he worked as a carpenter and did odd jobs, maintenance and "tree work" (21T32-8 to 17;21T38-20). He had known Fazzio "for a short while," and they had been friends, but he had not been to the house since 2013 and they currently did not "see eye to eye" (21T91-16 to 21T92-12;21T94-9 to 10;21T96-20 to 22;21T98-4 to 21T99-5). Fazzio had claimed defendant had assaulted him, but defendant denied having done so

(21T104-16 to 25). Defendant could not remember the last time he saw Fazzio, but it might have been a week earlier when he was driving down Buck Road and Fazzio was riding a bicycle (21T107-20 to 22;21T108-19 to 21T111-4).

Defendant also knew Bergholz, but the last time that he saw Bergholz was "about two weeks" earlier (21T61-1 to 25). They had had "a little bit of falling out" sometimes "because he does stupid shit" (21T68-9 to 16). Bergholz had not called him "in a while" (21T64-11 to 21T65-18). Defendant had deleted Bergholz from his phone and he had deleted and ignored Bergholz's calls (21T64-11 to 21T65-18). Bergholz "might" have called for a ride the previous week, but he ignored the call (21T70-20 to 21T71-11). Defendant said he "might have" given Bergholz a ride the previous Thursday (21T71-2 to 21).

Defendant denied having given Bergholz permission to stay at a summer property that defendant owned at 59 Ballpark Lane on Lake Garrison (21T66-6 to 24;21T28-9 to 14). (The property was less than a quarter mile from Fazzio's home (17T79-1 to 17).) Defendant said he told Bergholz that he did not want Bergholz staying there (21T66-6 to 24). But the house had a combination lock and Bergholz "might" have had the number (21T67-6 to 21T68-6). Defendant denied having dropped off Bergholz at the Garrison Lake house the previous

week, but said Bergholz might be staying at another house there (21T74-23 to 21T75-11).

Defendant owned a blue 1998 Jeep Wrangler (21T30-21 to 21T31-8). He left the keys in the unlocked Jeep "most of the time" and he let other people borrow it (21T16 to 25;21T58-1 to 15). The last time that he had let Bergholz use the Jeep was around March 3 or 4 (21T78-1 to 21T79-25).

Defendant's clothes and a buccal swab were taken after the interview (21T146-1 to 21T150-19;22T59-1 to 20). There was suspected bloodstains on the gloves, which were sent to the New Jersey State Police lab for testing (24T47-1 to 19). The police found that the gloves pictured in the Fulton Bank video were sold at Advanced Auto Parts near Clayton (21T8-1 to 21T11-5). Bergholz had an account at that store (21T160-1 to 7). The store had no record that he bought the gloves, but said it could have been a cash purchase (21T160-18 to 25).

The police tested the various samples of the duct tape and the blanket used on Fazzio for DNA evidence (21T162-10 to 17). The parties stipulated that both defendant and Bergholz were excluded as contributors to DNA evidence found on the duct tape from the blanket placed over the victim's head (21T162-3 to 21T163-3).

But the DNA was matched, through the CODIS database, to a woman named Amanda Seth (21T163-4 to 12). Seth was a known heroin addict (21T185-14 to 15). Hospital records showed that at 9:48 p.m. on March 10, 2017, Seth had gone to the emergency room at Cooper Hospital, where she was admitted at 3:03 a.m. on March 11, 2017, and discharged at 6:27 a.m. that day (21T177-19 to 21T180-15).

Fazzio's DNA was found as the major contributor in the blood stains on both gloves taken from defendant (22T161-20;22T164-9 to 22T166-21;23T139-4 to 23T141-13). Defendant's DNA was found in the saliva on a black and white bandanna that the police seized from his Lake Garrison house (22T88-22 to 22T89-1;22T116-11 to 22T117-17;23T163-3 to 6). The police believed that the bandanna had been worn as a face mask by the person seen in the bank surveillance video (22T116-19 to 22;24T131-1 to 11). The State's DNA expert, Brett Hutchinson, admitted that there was no way to determine how long defendant's DNA had been on the bandanna (23T172-23 to 23T173-1).

On May 1, 2017, the police received the DNA results and they arrested Bergholz and defendant (24T126-3 to 24).

On November 15, 2019, Bergholz provided a statement to the police (16T77-7 to 16T78-2). The same day, he pleaded guilty to aggravated

manslaughter in exchange for a recommended sentence of between ten and twenty years (16T23-12 to 24;Da61-Da66).

He testified against defendant at trial (16T55-7 to 16T155-14;17T23-2 to 17T24-25). Bergholz testified that he knew Fazzio and that he had been to Fazzio's home (16T55-15 to 25). Bergholz would go over to Fazzio's house on occasion to work with him or his father (16T141-24 to 16T142-11).

Bergholz also knew defendant, because they worked together doing construction and "tree work" for about four years, and they hung out shooting pool and doing drugs together (16T57-18 to 16T59-25;16T64-17 to 16T65-10). Bergholz said Fazzio and defendant had been friends, but they were not getting along because Fazzio would come over to Bergholz's lake house "drunked up" (16t66-18 to 16T67-25).

Bergholz was staying in defendant's Garrison Lake house (16T56-23 to 16T57-5;16T60-3 to 16). At the time, Bergholz was doing as much heroin as he could afford (16T111-21 to 16T112-2). Defendant also was using heroin (16T112-3 to 6).

On March 8, 2017, defendant drove Bergholz to pick up some money from a friend of Bergholz's and then to Camden to get drugs (16T68-1 to 16T69-7). Defendant then dropped off Bergholz at defendant's lake house (16T69-9 to 11). They met again the next evening, Friday, March 10, 2017, at

approximately 6:00 p.m, and Bergholz testified that the purpose of the meeting was that defendant "was probably giving me a ride to go get drugs" in Camden (16T69-12 to 16T70-1). Defendant also did the drugs with Bergholz (16T70-2 to 4). Afterwards, they went to Glassboro where Bergholz stole a pair of boots from K-Mart by putting his own boots into the box (16T70-5 to 21;16T71-20 to 16T72-19). The police retrieved the box with Bergholz's old boots (16T73-15 to 16T73-19;20T68-8 to 13).

Bergholz was unsure as to what happened next (16T75-22 to 25). He testified: "I think he ended up dropping me off. We were about to be dropped off. I guess he was -- I guess ended up calling it a night. He was going to drop me off" (16T76-8 to 11). But Bergholz also said they "were going to the Fazzio house" (16T76-22).

After reading his prior police statement, Bergholz said he and defendant discussed "Getting some money for drugs" after they left K-Mart (16T79-5 to 8). They passed Fazzio's house and "decided to go try to get some cash real quick" from "Mike's house" (16T79-18 to 23). They parked the Jeep on a dirt lane and walked across the field to the house (16T80-8 to 15). Bergholz had on cheap, thin black gardening gloves that he got from the Jeep, and defendant wore black and yellow "mechanic gloves" (16T84-5 to 21;16T143-18). Bergholz wore a green sweatshirt and defendant "probably had a grey one on"

(16T85-1 to 4). Bergholz generally kept some belongings in defendant's Jeep (16T140-25 to 16T141-2).

Looking through a window, Bergholz saw Fazzio lying on the couch (16T85-20 to 21). Bergholz said he and defendant went into the living room where "Larry grabbed a blanket and threw it over his head, and we jumped on him" (16T87-3 to 13). Then Bergholz held Fazzio while defendant duct-taped his legs and feet (16T98-11).

Bergholz "started looking for money" by checking Fazzio's pockets, going through the house, and rummaging through drawers (16T98-25 to 16T99-18). He did not find any cash (16T99-20). Bergholz found and took a credit card from the counter (16T99-2 to 3;16T100-21 to 25). He got the pin number from Fazzio (16T101-3). Bergholz claimed that he cut a hole in the blanket because Fazzio said he could not breathe, and that he did not see Fazzio get tied up with the orange electrical cord, but he knew that Fazzio was tied up before they left the house (16T100-2 to 4;16T101-10 to 14;16T102-16 to 19).

Bergholz testified that, when he came out of the bedroom, defendant said: "He's good. We got time to hit the ATM" (16T102-20 to 22). Bergholz took Fazzio's cell phone when they left the house (16T107-19 to 21).

They left the house and took the Jeep to Clayton (16T103-25 to 16T105-21). They parked the Jeep and Bergholz "got out and went and hit the ATM machine" to get the cash (16T105-22 to 25). Bergholz took a handkerchief and defendant's mechanic gloves from the Jeep (16T106-10 to 16T107-2).

Bergholz identified himself as the person in the bank surveillance video at the ATM machine (16T115-22 to 16T116-4). He withdrew $500, which was the maximum he could get, and then he returned to where defendant remained parked with the Jeep (16T107-5 to 25). Bergholz said he "probably threw" the black and yellow mechanic's gloves "in the center console" or "on the dashboard" when he left the ATM (16T116-14 to 25). Defendant threw the phone out of the car window as they left Clayton (16T115-3 to 6).

Bergholz said they did not have any plan to hurt or injure Fazzio (16T142-21 to 16T143-1). He believed that Fazzio would free himself (16T146-6 to 12).

They went to a Wawa in Glassboro, and then to Philadelphia to get drugs, when the drug dealer in Camden did not pick up the phone (16T109-3 to 16T110-6). Defendant dropped Bergholz off at approximately 3:00 a.m. in Lake Garrison (16T112-10 to 16T113-22). When he was arrested, Bergholz was wearing camouflage pants that he had taken from defendant's house (16T151-10 to 18).

Over two weeks after Bergholz testified, the State played the video recording of his November 15, 2017, police statement during the testimony of a police detective who took the statement (24T144-25 to 24T186-20).

Claire Foster testified that she had met defendant through Bergholz (23T60-14 to 23T61-11). She shared a house with defendant in 2017 and he would drive people around as a way to make money (23T55-8 to 23T56-23). Defendant let Bergholz borrow the Jeep (23T79-16 to 24).

Two weeks prior to the murder, Bergholz and his girlfriend had stayed at the house for three or four nights (23T57-16;23T68-6 to 23T69-23). On the day Bergholz left, he stole Foster's disability debit card and withdrew $241.00, leaving only $9.00 on the card (23T70-5 to 25). Foster said Bergholz had stolen from his mother and "a lot of people" (23T74-1 to 4). He had lost his job two weeks earlier because he stole his employer's truck with wood inside and sold the wood (23T96-11 to 25).

In a statement to the police on March 15, 2017, Foster said that on the previous Friday or Saturday night, defendant had gone out at 3:00 p.m. and he did not return until 4:00 a.m. the next morning (23T72-8 to 23T73-18;23T88-16 to 22). Bergholz had been calling since then, but defendant had ignored the calls and texts, and he had changed the contact name for Bergholz's phone number to "Jill" (23T73-17 to 25;23T81-11 to 15;23T89-11 to 24). Foster said

Bergholz had been staying in defendant's lake house, and Foster and defendant picked him up in defendant's Jeep from a dirt road near Lake Garrison the week before the murder (23T74-16 to 23T75-20).

Kimberly Beal owned the house where Foster and defendant stayed (23T99-1 to 24). In a statement to the police on Wednesday, March 15, 2017, Beal had said that, the previous weekend, defendant left at 3:00 p.m. on Friday, March 10, 2017, and he returned early Saturday morning (23T105-7 to 23T107-1).

Fazzio's daughter, Stephanie, testified that she had met defendant once at a barbeque at her brother's house in the summer of 2016 (15T120-23 to 15T121-2). Defendant and her father "seemed very friendly, like everything was fine" (15T121-2 to 3).

LEGAL ARGUMENT

POINT I

DEFENDANT'S CONVICTION MUST BE REVERSED BECAUSE THE COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO PLAY THE VIDEO OF CO-DEFENDANT THOMAS BERGHOLZ'S STATEMENT SEVENTEEN DAYS AFTER BERGHOLZ HAD TESTIFIED AT TRIAL BECAUSE THE VIDEO, MADE THE DAY HE PLEADED GUILTY TWO YEARS EARLIER, FAILED TO MEET THE ADMISSIBILITY REQUIREMENTS AS A PRIOR CONSISTENT STATEMENT UNDER N.J.R.E. 607 AND BECAUSE ITS ADMISSION WAS NOT HARMLESS (17T4-5 to 17T12-11).

Defendant's convictions must be reversed because the court erred when it permitted the State to play the video of Bergholz's statement weeks after he had testified at trial. The statement did not meet the admissibility requirements of N.J.R.E. 607, because it was not provided prior to the events that created the motive to fabricate the allegations in the statement and because its admission through the testimony of a police officer constituted inadmissible hearsay. The admission of the statement was not harmless error, because it contained additional allegations that were not included in Bergholz's trial testimony and that the State relied upon to allege defendant's involvement in the robbery and killing.

After Bergholz testified, the State moved to admit the recording of his statement from November 15, 2019, pursuant to N.J.R.E. 607, on the basis that the defense had "implied a recent fabrication, or improper influence or motive" (17T4-5 to 10). Bergholz's November 15, 2019, statement had been provided in the presence of his attorney, on the same day that he pleaded guilty to aggravated manslaughter in exchange for a recommended sentence of between ten to twenty years (24T145-5 ot 24T150-25;Da61-Da66).

The State argued that the video recording of the November 15, 2019, statement was admissible either through Bergholz or through Detective Gabarino, who took the statement (17T5-9 to 18). Defense counsel objected because Bergholz's testimony was not inconsistent with his statement (17T6-2 to 17T7-20;17T11-19 to 25). She also objected to the playing of the recorded statement during Detective Gabarino's testimony because it was "not a prior consistent statement made by Det. Gabarino" (17T14-4 to 7).

But the court ruled that the statement was admissible to show that "at a time prior to there being the benefit of the plea" Bergholz gave a statement that was consistent with his courtroom testimony (17T10-12 to 15). It also ruled that the State could introduce the statement "during rebuttal" through Gabarino's testimony (17T15-23 to 17T16-1). The court found that admission of the statement was permissible under N.J.R.E. 607 to "rebut whether there

was a motive at the time that he gave that statement" (17T10-16 to 20). The court said the statement was "not admissible as substantive" evidence, but it never instructed the jury to that effect (17T10-10 to 11;24T186-21 to 24T188-21).

As a result of the court's ruling, the State played the entire one-hour-long statement during Gabarino's testimony in the State's case-in-chief on October 22, 2021, seventeen days after Bergholz had testified on October 5, 2021 (24T144-24 to 24T186-23). At the time the video was played, the court did not provide the jury with any instructions how to consider it as evidence 24T186-21 to 24T188-21). During the jury charge, the court instructed the jury only on prior "inconsistent" statements (26T109-19 to 26T110-23). At the jury's request, the video of Bergholz's police statement was played again during deliberations, back-to-back with a playback of his trial testimony (29T4-20 to 29T5-10).

A trial court's decisions to admit or exclude are reviewed deferentially for an abuse of discretion that results in a clear error of judgment. State v. Williamson, 246 N.J. 185,198-99 (2021). But no special deference is afforded to its interpretation of the law or to legal conclusions that flow from established facts. Id. at 199. In this case, the trial court misapplied the law to the established facts that surrounded Bergholz's police statement.

Under the relevant provision of N.J.R.E. 607(b), "A prior consistent statement shall not be admitted to support the credibility of a witness except: (1) to rebut an express or implied charge against the witness of recent fabrication or of improper influence or motive." "The admission of a prior consistent statement under N.J.R.E. 607 is not precluded under the rule against hearsay because "N.J.R.E. 803(a)(2) . . . allows admission of statements offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive." Neno v. Clinton, 167 N.J. 573, 580 (2001). (citation and internal quotation marks omitted). "The scope of the exception encompasses prior consistent statements made by the witness before the alleged 'improper influence or motive' to demonstrate that the witness did not change his or her story." Ibid. (citation omitted).

This temporal factor does not constitute "a rigid admissibility requirement" and is not "absolutely controlling," but "whether the statement was made before the asserted motive or influence to fabricate is a substantial factor in determining relevance." State v. Muhammad, 359 N.J. Super. 361, 386, 388 (App. Div. 2003). A "post-motive" statement ordinarily should be excluded when the only basis for admission is the alleged improper influence or motive. Ibid.

The trial court's view of Bergholz's statement as having been provided prior to his motive to fabricate is contrary to the indisputable fact that he provided it contemporaneously with his guilty plea, in the presence of the attorney who was in the process of negotiating that plea offer, which Bergholz accepted that day (Da61-Da66;24T145-5 to 24T150-25). It was not a "prior" consistent statement, because it was not made prior to the existence of a motive for Bergholz to fabricate defendant's involvement as the more culpable party. To the contrary, it was made on the same day that he tendered his plea. The November 15, 2019, statement was not relevant to the issue of Bergholz's credibility, because it had no ability to refute defendant's allegation that it was fabricated in response to Bergholz's improper motive of attempting to secure a favorable plea offer.

Furthermore, the introduction of Bergholz's prior statement through the testimony of Detective Gabarino was hearsay. "Hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" State v. Branch, 182 N.J. 338, 357 (205) (quoting N.J.R.E. 801(c)). Even if Bergholz's statement had been admissible during his own testimony, it was not admissible through the testimony of the police detective who took the statement. Id. at 371-72.

The admission of the statement was not harmless error because it contained additional, significant allegations that were not included in Bergholz's trial testimony. For example, in his police statement Bergholz repeatedly made defendant the protagonist who, for example: found the duct tape used to tie up Fazzio, (24T152-19 to 20); ran the duct tape around Fazzio's face (24T152-1); and gave Bergholz his sweatshirt; gloves and bandanna to wear (24T154-23 to 25). These statements did not contradict what Bergholz said at trial, but they introduced additional hearsay evidence in support of the State's case.

Moreover, the introduction of the statement through Gabarino's testimony on the second to last day of trial, seventeen days after Bergholz had testified, allowed the State to completely re-present its key witness's evidence for a second time at trial, and twice during deliberations. "'Mere repeated telling of the same story is not relevant to whether the story, when told at trial is true.'" Major Patrick D. O'Hare, From Toro to Tome: Developments in the Timing Requirements For Substantive Use of Prior Consistent Statements, 1995 Army Law. 21, 25. The tenets of Rule 607 were misused to bolster the credibility of the State's key witness by the unwarranted repetition of his allegations. The introduction of this hearsay evidence cannot be deemed

harmless in this case where Bergholz's allegations were the only evidence of defendant's direct involvement in the robbery and killing.

Defendant's convictions must be reversed because the court abused its discretion when it allowed the State to introduce the videotaped evidence of its key witness's police statement through a police detective's testimony.

POINT II

DEFENDANT'S CONVICTIONS BASED ON ACCOMPLICE LIABILITY FOR FIRST-DEGREE ROBBERY AND ACCOMPLICE LIABILITY FOR FELONY MURDER MUST BE REVERSED, BECAUSE MULTIPLE ERRORS IN THE RELATED JURY INSTRUCTIONS HAD THE CLEAR CAPACITY TO LEAD TO AN UNJUST RESULT (not raised below).

Defendant is entitled to a new trial because the jury instructions on accomplice liability for robbery were confusing, omitted a critical instruction on liability for "afterthought robbery," and failed to instruct the jury on the elements of first-degree robbery. Moreover, defendant was convicted of being an accomplice to first-degree robbery and sentenced on that offense, even though the verdict sheet never asked the jury whether defendant was guilty of the elements that raise robbery to a first-degree offense. These errors in the instructions on accomplice liability for robbery were especially harmful because the jury acquitted defendant of all own-conduct robbery offenses for

which it had been properly instructed on "afterthought robbery" and first-degree robbery.

"[P]roper jury instructions are essential to a fair trial" and "erroneous instructions on material points are presumed to" be prejudicial. State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). In the absence of an objection to the charge, courts will review challenged jury instructions for plain error "clearly capable of producing an unjust result," R. 2:10-2. Id. at 494.

1. It Was Plain Error Not To Instruct The Jury As Part Of The Accomplice Liability Instructions That, Pursuant To State v. Whitaker, 200 N.J. 444 (2009), Defendant Could Not Be Found Guilty As An Accomplice To Robbery Or As An Accomplice To Felony Murder, Based Solely On His Conduct After Someone Else Had Robbed And Killed The Victim.

Defendant's convictions for accomplice liability for robbery and felony murder must be reversed because the oral and written jury instructions on accomplice liability for robbery failed to instruct the jury, as required by State v. Whitaker, 200 N.J. 444, 463 (2009), that, even if the jury found that defendant had participated in the subsequent theft of the money from the bank ATM, it could not convict him of being an accomplice to robbery unless it determined that he also had been involved with the theft of the debit card through the use of force. The omission of this instruction in the context of the accomplice liability robbery charge had the clear capacity to bring about an

unjust result, Rule 2:10-2, as shown by the fact that, when the jury was properly instructed on the Whitaker principles in the context of own-conduct robbery, it acquitted defendant of that offense.

Unlike other states, New Jersey does not recognize the legal theory of "afterthought robbery." State v. Lopez, 187 N.J. 91, 101 (2006). Instead, under the New Jersey robbery statute, N.J.S.A. 2C:15-1(a), "the intention to steal must precede or be coterminous with the use of force." Ibid. Any threats or violence must have been made to further the individual's intention to commit a theft. Ibid.

New Jersey's accomplice liability and robbery statutes, and its case law, reject the concept that "a person who aids the escape of a robber is an accomplice to robbery even if he did not have a purpose to promote or facilitate the theft when it occurred." Whitaker, 200 N.J. at 463. The driver of the vehicle that takes away the perpetrator who committed the robbery by the use of force cannot be found "retroactively guilty" of robbery "if he had no intent to participate in the theft at or before the time of its occurrence." Ibid.

The court's instruction on own-conduct robbery correctly charged the jury that defendant could not be found guilty of robbery if it found that he had formed the intent to commit a theft after the use of force (26T135-9 to 13). But the jury was never provided with a Whitaker instruction as part of the

accomplice liability instructions on robbery (26T140-15 to 26T141-2). It was never told that, as with own-conduct robbery, it could not find defendant guilty as an accomplice to robbery if it determined that defendant's involvement began only after Bergholz had already obtained the victim's debit card through the use of force.

"[A]ll robberies are thefts, but not all thefts are robberies." State v. Mejia, 141 N.J. 475, 495 (1995). There were two thefts alleged here: first, the theft by force of the victim's debit card and, second, the theft of money from his bank account. The jury found defendant guilty of theft by his own conduct solely for third-degree theft by unlawful taking in count three (Da9-Da10). By acquitting defendant of the own-conduct robbery charge, murder, aggravated manslaughter, criminal restraint, and endangerment, the jury rejected the State's theory - and Bergholz's claims - that defendant was the person who hog-tied and rolled the victim up in two blankets or that he was the person who took the credit card by use of force.

The acquittals suggest that the jury also rejected the State's allegation that defendant was in the house when that use of force occurred, which was consistent with absence of any forensic evidence that placed him there, and with the evidence that Seth's was the only DNA found at the scene and that Bergholz admitted that he was in the house while the victim was being

restrained for the purpose of obtaining the victim's money or a credit card. The omission of the Whitaker instruction as part of the accomplice liability robbery instruction was especially harmful in light of these acquittals and the absence of any evidence, aside from Bergholz's self-serving testimony, that defendant was in the house when the robbery and killing occurred.

It also was especially harmful because the accomplice liability instruction specifically allowed the jury to find defendant guilty on the basis that he aided or lent support or assistance to Bergholz in the commission of the robbery (26T142-6 to 19). The jury should have been instructed that if it found that defendant's aid, support or assistance to Bergholz had occurred after Bergholz had used force to obtain the debit card, it could not find defendant guilty of accomplice liability for robbery.

Based on phone text messages and video evidence that showed a Jeep similar to defendant's in the area of the bank, the jury could have found that defendant had no prior knowledge of what Bergholz did or intended to do at Fazzio's house, but that he picked Bergholz up in the Jeep sometime after the robbery, drove Bergholz to the ATM afterwards and that he kept some of the money that Bergholz took and that, during the course of the drive, he had learned that Bergholz had wrapped the victim up to steal the debit card.

But the jury was never told that, alone, none of that evidence was sufficient to support a finding that defendant was guilty as an accomplice to robbery, because all of those events occurred after force had been used to obtain the victim's debit card.[2] Defendant's conviction as an accomplice to first-degree robbery must be reversed because, under the circumstances here, the omission of a Whitaker charge was plain error that had the capacity to bring about an unjust result.

2. It Was Plain Error For The Court To Instruct The Jury In The Accomplice Liability Instructions On All Of The Possible Elements Of Second-Degree Robbery And None Of The Elements Of First-Degree Robbery, Which Was The Only Theory Argued By State Based On The Victim's Death, And Then To Allow Defendant To Be Convicted And Sentenced As An Accomplice To First-Degree Robbery, Which Was Not Even A Question On The Verdict Sheet.

Defendant's conviction as an accomplice to robbery also must be reversed because the jury instructions on accomplice liability for robbery were confusing and inconsistent with the State's theory of the case. Moreover, he was convicted of accomplice liability for first-degree robbery and sentenced to ten years for that offense, even though the jury was never instructed on the elements of first-degree robbery in the context of the accomplice liability

[2] The jury's finding of guilt on reckless manslaughter and on accomplice liability for reckless manslaughter would have been consistent with a finding that defendant failed to act when he learned what Bergholz had done in the house and that that failure caused the victim to suffocate.

instructions, and even though the verdict sheet never asked the jury to find the elements that would support defendant's conviction on accomplice liability for first-degree robbery.

The statutory elements of the crime of robbery are set forth as follows:

> a. Robbery defined. A person is guilty of robbery if, in the course of committing a theft, he:
>
> (1) Inflicts bodily injury or uses force upon another; or
>
> (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or
>
> (3) Commits or threatens immediately to commit any crime of the first or second degree.
>
> An act shall be deemed to be included in the phrase "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.
>
> b. Grading. Robbery is a crime of the second degree, except that it is a crime of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.
>
> [N.J.S.A. 2C:15-1 (emphasis added)]

Consistent with the statute's provisions for alternative bases of guilt in Section (a), the separate model jury charges on robbery in the first-degree and robbery in the second-degree direct the court to select the appropriate elements from section (a)(1), (2) or (3) that describe the criminal conduct alleged by the

State. Model Jury Charges (Criminal), "Robbery In The Second Degree (N.J.S.A. 2C:15-1)" (rev. July 2, 2009); Model Jury Charges (Criminal), "Robbery In The First Degree (N.J.S.A. 2C:15-1)" (rev. Sept. 10, 2012).

The model charge for first-degree robbery contains the additional provisions that, as appropriate to the allegations, the court instruct the jury pursuant to N.J.S.A. 2C:15-1(b) on the elements of armed robbery or the allegation that the defendant "purposely attempted to kill anyone" or "purposely inflicted or attempted to inflict serious bodily injury."

Defendant was indicted for first-degree robbery and accomplice liability for first-degree robbery (Da6-Da7).[3] In the prosecutor's closing argument, she argued: "[T]he evidence that we presented before you is that during the course of the theft, stealing his ATM card, stealing his money, that they knowingly inflicted, or attempted to inflict serious bodily injury upon Michael Fazzio. Or that they purposely attempted to kill Michael Fazzio. If either of those are fulfilled, the defendant is guilty of robbery" (26T73-2 to 9).

The court instructed the jury on the elements of first-degree robbery in the context of the charge on own-conduct robbery, for which defendant was

[3] In addition to the confusing jury charges, the indictment on the robbery offenses also contained the confusing, circular accusation that the co-defendants were guilty of robbery, in part, because they committed or threatened "to commit a crime of the first or second degree, that is, Robbery upon Michael Fazzio" (Da6-Da7).

acquitted (26T135-23 to 26T137-21;Da10-Da11). But the jury instructions (both oral and written) on accomplice liability for robbery omitted any instruction on the elements of first-degree robbery, despite the fact that these elements were the sole bases for the State's theory of the case (26T140-15 to 26T141-2;Da44). "[T]he failure to charge the jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel." State v. Afanador, 151 N.J. 41, 56 (1997).

Moreover, both the robbery by own-conduct instructions and the accomplice liability for robbery instructions (oral and written) confusingly listed all three bases from N.J.S.A. 2C:15-1(a), for a finding of guilt on second-degree robbery (26T131-9 to 26T132-8;26T140-17 to 16T141-2;Da38-Da39;Da44), despite the fact that the State never alleged that defendant was guilty of second-degree robbery or identified which of the three possible factual bases from N.J.S.A. 2C:15-1(a)(1), (2), or (3), provided the basis for a conviction.

In addition to the fact that the jury was never instructed on the elements of first-degree robbery in the context of accomplice liability robbery, it was never asked on the verdict sheet whether he was guilty of the elements of that offense. Question three on the verdict sheet asked the jury to decide if defendant was guilty of "Robbery" (Da10). A subpart of question three, "3A,"

asked the jury whether "the defendant attempted to kill or purposely inflicted or attempted to inflict serious bodily injury," which would have established the offense as a first-degree crime (Da11). But the verdict sheet directed the jury to answer question 3A only if it found defendant guilty of robbery (Da11). Because the jury acquitted him of robbery, it never answered Question 3A (Da11).

Question four asked the jury to determine guilt "On the charge of Liability for the Conduct of Another for Robbery" (Da11). The jury found defendant guilty on that charge (Da11). Unlike question three, question four had no follow-up question relating to the elements of first-degree robbery (Da11).

The jury could not have found defendant guilty of being an accomplice to first-degree robbery because it was never asked to decide that question and it was never instructed on the elements of that offense. Yet the court sentenced defendant to a ten-year term for accomplice liability first-degree robbery and the judgment of conviction shows a conviction for accomplice liability first-degree robbery (33T37-16 to 25;Da57).

This is not an instance where the conviction for accomplice liability for first-degree robbery can simply be molded to a second-degree offense. This error, of failing to properly instruct the jury on the elements of first- and

second-degree robbery in the context of the accomplice liability instructions, compounded the court's erroneous omission of a Whitaker instruction, as discussed, supra. Cf. State v. Casilla, 362 N.J. Super. 554, 570-71 (2003) (the Appellate Division molded the verdict from first-degree to second-degree kidnapping where the trial court had failed to instruct the jury on the elements of the first-degree offense, because the jury returned a valid verdict on second-degree kidnapping). Defendant is entitled to a new trial, with the proper instructions on accomplice liability for robbery.

In sum, defendant's conviction for accomplice liability for first-degree robbery must be reversed because: the court failed to provide the jury with a Whitaker charge as part of the instructions on accomplice liability for robbery; it failed to instruct the jury on the elements of accomplice liability for first-degree robbery; and the verdict sheet never asked the jury to determine whether he was guilty of accomplice liability for first-degree robbery and because these errors were compounded by the omission of the Whitaker charge.

Defendant's conviction for accomplice liability for felony murder also must be reversed. Reversal of the conviction on a predicate felony requires reversal of the felony murder conviction. State v. Savage, 172 N.J. 374, 395-400 (2002). In this case, defendant was acquitted of own-conduct robbery

when provided with the proper instructions on Whitaker and on the elements of first-degree robbery. It was the conviction for accomplice liability for robbery that allowed the State to obtain a conviction for murder, while at the same time, relieving it from the burden of having to prove that that murder was purposeful or knowing. For that reason, both the conviction for accomplice liability for first-degree robbery and the conviction for accomplice liability for felony murder must be reversed.

Defendant's conviction for accomplice liability for first-degree robbery and his conviction for accomplice liability for felony murder must be reversed.

POINT III

DEFENDANT'S CONVICTIONS MUST BE REVERSED BECAUSE HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT HALTED ONGOING JURY DELIBERATIONS FOR 14 DAYS TO ACCOMMODATE THE VACATION SCHEDULES OF THE JUDGE AND THE ATTORNEYS (partially raised below) (29T6-13 to 22).

Defendant's convictions must be reversed because his due process rights were violated when the court interrupted jury deliberations for fourteen days in a row because the attorneys and the judge had consecutive, planned vacations. This was a month-long, complex trial with dozens of witnesses. The extended break necessarily exposed jurors to outside influences and impacted their

ability to recall specific aspects of the evidence and testimony from the trial in violation of defendant's constitutional right to a trial by an impartial jury.

After closing arguments on Tuesday, October 26, 2021, jurors deliberated for three days, on October 28 and 29, and November 1, 2021 (26T168-12 to 15;27T;28T;29T;Da72). There were no further deliberations that week because Tuesday, November 2, 2021, was Election Day, and several jurors and the attorneys said they were unavailable on the remaining days of that week (29T8-5 to 8). The following week, November 8 to 12, 2021, the judge was on vacation (29T6 to 14 to 15). The attorneys asked if another judge could be available so that deliberations could continue, but the court simply responded "I don't know" (29T6-13 to 22).

The result was that jurors did not return to deliberate until November 16, 2021, fifteen days after they had last deliberated (30T;Da72). One juror was unable to return and he was replaced that day (30T3-2 to 25). There were no deliberations the next day, November 17 (Da72). On November 18, 2021, a second juror was replaced with an alternate, and the jury returned its verdict the following day, November 19, 2021 (31T5-8 to 15;32T3-1 to 3;Da72).

Appellate courts "traditionally have accorded trial courts deference in exercising control over matters pertaining to the jury." State v. R.D., 169 N.J.

551, 559-60 (2001). The trial court's actions are reviewed for an abuse of discretion. State v. Wakefield, 190 N.J. 397, 497 (2007).

The trial court abused its discretion when it allowed the extended two-week break in deliberations after this long and complex trial. The unnecessary, extended break in deliberations violated defendant's due process rights under the Fourteenth Amendment of the United States Constitution, and his right to trial by an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution.

As the California Court of Appeals has recognized, an extensive adjournment of jury deliberations "risks prejudice to the defendant both from the possibility that jurors might discuss the case with outsiders at this critical point in the proceedings, and from the possibility that their recollections of the evidence, the arguments, and the court's instructions may become dulled or confused." People v. Santamaria, 229 Cal.App.3d 269, 277-78 (Cal. Ct. App. 1991). It "disrupts the very process and pattern of the jury's orderly examination of the evidence." Id. at 278.

The defendant in Santamaria also faced charges of first-degree murder. Ibid. In that case, the jury deliberations were interrupted for eleven days, also for the judge's planned vacation. Id. at 274-76.

The California court found a "considerable" risk of prejudice "inherent" in suspending deliberations in a complex murder trial for eleven days. Ibid. The prejudice arose "from the prolonged exposure of the jurors to outside influences, from the strong probability that their recollections of the evidence and the instructions would fade or become confused, and from the subversion of the pattern of orderly deliberation." Id. at 278-79.

Moreover, the interruption had occurred "at the most critical period in the trial," when the parties had presented their evidence and arguments, and the court had instructed the jury on the relevant legal principles. Id. at 281. The lengthy interruption was particularly inappropriate for a trial that took twelve days over a two-and-a-half week period, and had thirty-two witnesses. Id. at 282.

In evaluating the prejudice from the trial court's error, the California court said that "common sense and experience tell us that the delay undoubtedly had some significant effect on jurors' ability to remember complicated facts, as well as on their recall and understanding of instructions." Id. at 282. The same common sense and experience informed the court's conclusion that "that the jurors undoubtedly came into contact with many people during the lengthy adjournment." Id. at 282.

The court recognized that proving the harmful effect of the extended delay on jurors' understanding and ability to remember, or the existence of improper discussions by individual jurors, would present an "impossible task" for an appellant. Id. at 282. "The deleterious effects of an undue and prolonged gap in deliberations may be difficult to quantify, but their existence cannot be doubted." Id. at 282. The trial court's actions violated the due process requirement that an accused be tried by an impartial jury free of outside influences. Id. at 281.

Finding that the error "affect[ed] the dynamics of the legal process itself" and "the integrity of the legal process, the court reversed the conviction. Id. at 282-83. The defendant's due process rights were violated by the extreme variation, without necessity, from established modes of trial. Id. at 283.

To an equal or greater extent, all of the concerns expressed by the California court are present here. Defendant's trial, with twenty-nine witnesses, took place over a period of almost one month, from September 28 to October 26, 2021, almost twice the length of the two-and-a-half-week trial in Santamaria. The break in jury deliberations extended for the longer period of fourteen days, rather than the eleven-day break in Santamaria.

Indisputably, this lengthy adjournment exposed jurors to many outside influences before they could come together again to decide the case. The

extensive delay had to have significantly affected jurors' ability to remember the evidence and the jury instructions.

Moreover, the extended break did not arise from sudden or unanticipated events. It arose because the judge's planned week-long vacation followed several vacations days that had been planned by the attorneys, which followed the Election Day holiday. The parties were aware that the month-long trial had already stretched to the end of October. At the very least, when deliberations had not finished on Monday, November 1, 2021, the court was made aware that jurors would not be able to return to deliberate before November 15, 2021, unless it arranged for a substitute judge to be available while the jury deliberated, as counsel requested. But the court never made that arrangement and the record contains no explanation why it did not do so.

Defendant was facing conviction on the most serious of offenses, murder, with the prospect of life in prison. The trial was long and complicated. Under these circumstances, the court abused its discretion when it adjourned jury deliberations for two weeks because the extensive break in the middle of deliberations violated defendant's rights to due process.

Defendant's convictions must be reversed because his due process rights were violated when the court adjourned the proceedings for a two-week break in the middle of jury deliberations.

POINT IV

DEFENDANT'S SENTENCE MUST BE REVERSED BECAUSE IT WAS THE RESULT OF MULTIPLE LEGAL AND FACTUAL ERRORS AND BECAUSE IT WAS EXCESSIVE (33T32-24 TO 33T39-8).

Defendant's sentence must be reversed because the court committed multiple factual and legal errors in sentencing and because defendant's forty-year sentence is excessive.

At sentencing, the court found aggravating factor three, the risk that defendant would commit another offense, N.J.S.A. 2C:44-1(a)(3); aggravating factor six, the extent of defendant's prior record, N.J.S.A. 2C:44-1(a)(6), and aggravating factor nine, the need for deterrence, N.J.S.A. 2C:44-1(a)(9) (33T33-4 to 12). It gave moderate weight to the aggravating factor of defendant's prior record and significant weight to the need for deterrence (33T33-7 to 12).

The court found mitigating factor seven, that defendant "had no history of prior delinquency or criminal activity and led a law-abiding life for a substantial period of time," N.J.S.A. 2C:44-1(b)(7) (33T13 to 22). At sentencing, the court also said it also gave "slight weight" to mitigating factor eight, that defendant's conduct was the result of circumstances unlikely to recur, N.J.S.A. 2c:44-1(b)(8) (33T34-11 to 13. But, despite this finding,

mitigating factor eight is not listed on defendant's judgment of conviction (Da59).

On the conviction for being an accomplice to felony murder, the court sentenced defendant to a prison term of forty years, with 85% to be served without parole (33T34-20 to 33T35-3). On the charge of accomplice liability for robbery, initially, the court sentenced defendant to a seven-year term in prison, with no mention of a minimum term (33T35-20 to 33T36-2). The court sentenced defendant to a four-year term for theft, but then it merged that sentence into the robbery conviction, except for the $50 Victim Compensation and the $75 Safe Streets fines (33T36-3 to 9).

The court sentenced defendant to a seven-year prison term for reckless manslaughter, also with no mention of a minimum term, and a seven-year term as an accomplice to reckless manslaughter, also with no minimum term (33T36-10 to 19). But then it merged the seven-year sentence for accomplice to reckless manslaughter with the reckless manslaughter sentence except, again, for fines (33T36-14 to 19). All of the sentences were to be served concurrently (33T37-15).

After the court had issued its sentence, the prosecutor told the court that robbery was a first-degree charge, and that the offense also was subject to the No Early Release Act, N.J.S.A. 2C:43-7.2 (NERA) (33T37-16 to 20). In

response, the court said: "So I will just -- I'll sentence you to 10 years New Jersey State Prison on that" (33T37-21 to 25). At no point did the court ever acknowledged or inform defendant that his sentences for robbery and reckless manslaughter were subject to minimum terms of 85% pursuant to NERA, although the NERA minimums are shown on the JOC (33T37-16 to 33T40-25).

1. Defendant's Sentence Must Be Reversed Because The Court Failed To Provide A Reasoned Explanation For Finding Multiple Contradictory Aggravating And Mitigating Factors And Because Those Findings Were Not Supported By Sufficient, Competent Credible Evidence In The Record.

An appellate court accords a deferential level of review to a trial court's sentencing determination, and it must affirm the sentence: "unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'" State v. Rivera, 249 N.J. 285, 297-98 (2021) (quoting State v. Roth, 95 N.J. 334, 364-65, 471 A.2d 370 (1984)).

Defendant's sentence must be reversed because the court's findings on the aggravating and mitigating factors were not supported by competent, credible evidence in the record and because the court failed to provide a

detailed reasoned explanation for its finding of contradictory factors. Prior to his arrest on these charges, defendant had had a single municipal court conviction in Philadelphia for receiving stolen property in 1995 and a single disorderly persons conviction in New Jersey for simple assault in 2013 (PSR). The court never explained how these two non-indictable offenses supported a finding that defendant had a prior extensive record sufficient to be afforded "moderate" weight in sentencing.

Moreover, the court provided no explanation for its contradictory finding of aggravating factor six, the extent of defendant's prior record, and mitigating factor seven, that he had a led a law-abiding life for a significant time before the offense. Similarly, the court's finding of aggravating factor three, the risk that the defendant will commit another offense, also stands in unexplained "counterpoise" to its finding of mitigating factor seven. State v. Case, 220 N.J. 49, 67 (2014).

In exceptional circumstances, courts may find it necessary to apply seemingly contradictory aggravating and mitigating factors. State v. Fuentes, 217 N.J. 57, 80 (2014). But the trial court's sentencing findings must be supported by sufficient, competent credible evidence in the record and the court must provide a reasoned explanation that reconciles any seemingly

contradictory findings on aggravating and mitigating factors. State v. Case, 220 at 67; State v. Fuentes, 217 N.J at 81. That did not occur here.

In addition, the court failed to explain its unclear and contradictory findings of aggravating factor nine, the need for deterrence and its statement during sentencing that it also gave "slight weight" to mitigating factor eight, that defendant's conduct was unlikely to recur. The record will rarely support a finding of both of these factors. State v. Fuentes, 217 N.J. at 80. But when it does, the court must explain how it reconciles those two factors and how it balances the weight assigned to each, and it must address both specific and general deterrence. Id. at 81. In this case, the court's failure to provide these explanations was especially problematic because, although the court said it found the existence of mitigating factor eight, that factor was not included on defendant's JOC. At minimum, defendant's JOC must be amended to reflect the addition of this mitigating factor.

In addition to its unexplained, contradictory findings on the aggravating and mitigating factors, the court clearly was confused as to the range of possible sentences for robbery and the required minimum terms for each offense. It seemed that the court, either was unaware of the sentencing range for first-degree robbery or was unaware that defendant was being sentenced on a first-degree offense, and it also seemed unaware that the robbery and

manslaughter convictions were subject to NERA. Furthermore, it improperly sentenced defendant on offenses that merged.

Defendant's sentence must be reversed because the court's findings on the aggravating and mitigating factors were contradictory and unclear, and because they were not supported by sufficient credible evidence in the record.

2. Defendant's 40-Year Sentence As An Accomplice To Felony Murder Was Grossly Excessive, Given His Lack Of Prior Felony Convictions, The Jury's Acquittals On The Own-Conduct Robbery And Murder Charges, And The Co-Defendant's 13-Year Sentence For Aggravated Manslaughter.

A trial judge is required to state the reasons that it arrives at a particular sentence. State v. Case, 220 N.J. at 65. In addition to its erroneous findings on the aggravating and mitigating factors, the court provided no reason at all for imposing a forty-year sentence for felony murder. The sentencing range for felony murder ranges from thirty years, with a thirty-year minimum, to life in prison or a specific term of years between thirty years and life. N.J.S.A. 2C:11-3(b).

Defendant's forty-year sentence was excessive in this circumstance, where the jury acquitted him of both robbery and murder by his own conduct, and where he had no prior indictable convictions. The court gave no explanation for imposing a sentence that was ten years longer than the minimum thirty-year sentence under the Code.

Nor did the court explain its justification for imposing a sentence that was twice as long as the maximum twenty-year sentence that had been offered to Bergholz as part of his plea. The judge later sentenced Bergholz to a thirteen-year term for aggravated manslaughter (Da68).

"[T]here is an obvious sense of unfairness" when "equally culpable perpetrators" receive highly disparate punishments, especially when the primary distinction between them is that the more harshly punished defendant exercised his right to trial. State v. Roach, 146 N.J. 208, (1996); State v. Hubbard, 176 N.J. Super. 174, 175 (1980). Defendant's forty-year sentence was over three times as long as the thirteen-year term that Bergholz ultimately received (Da68). See Roach, 146 N.J. at 233 (thirty-year disparity between co-defendants' sentences was "huge"). Bergholz had cooperated with law enforcement, but the jury's acquittal on multiple charges made it clear that jurors rejected much of Bergholz's testimony regarding defendant's alleged involvement in these crimes.

Concededly, Bergholz was sentenced after defendant. But he and defendant were sentenced by the same judge. Sentencing judges must take into account and give substantive weight to the sentences imposed on similar co-defendants. Id. at 234. At the very least, at the time of sentencing defendant, the court was aware that Bergholz's maximum possible sentence

was twenty years, and that the jury had rejected many of the allegations in his testimony. The court provided no reasons why defendant should have received such a substantially longer sentence than Bergholz was facing.

Defendant's sentence must be reversed because the trial court misapplied the aggravating and mitigating factors, expressed confusion regarding the law pertaining to possible sentencing ranges, minimum terms, and merger, and because the sentence was excessive.

CONCLUSION

Defendant's convictions and sentence should be reversed.

Respectfully submitted,

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Dated: January 16, 2024

Superior Court of New Jersey

Appellate Division
DOCKET No.: A-3324-21
CRIMINAL ACTION

STATE OF NEW JERSEY	:	On Appeal from A Conviction The Superior Court of New Jersey, Law
Plaintiff-Respondent	:	Division, Gloucester County
v.	:	
		Indictment No. 17-07-0536-I
LAWRANCE A. BOHRER,	:	
		Sat Below:
Defendant-Appellant	:	Hon. Christine Allen-Jackson J.S.C.

BRIEF AND APPENDIX ON BEHALF OF STATE – RESPONDENT

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DEFENDANT IS PRESENTLY CONFINED

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PROCEDURAL HISTORY

The State adopts and incorporates the Defense statement of procedural history in this case.

STATEMENT OF FACTS

The State generally accepts and incorporates the Appellant's Statement of Facts in this case. However, the following additional information is provided for this court's review.

Bergholz Testimony

Mr. Bergholz initially testified in this matter on October 5, 2021. (See generally, 16T). At the conclusion of the direct-examination, Bergholz acknowledged that he had entered a plea agreement related to the case, but that he had not received any benefit related to his testimony that day. (16T120:12-15). Prior to cross-examination, there was discussion concerning an order previously entered by the court below, which would limit the Defense's cross-examination concerning any plea bargain Bergholz had struck. (16T125-126). Bergholz was directed by the court not to discuss any sentence or length of sentence he would receive pursuant to the agreement. (16T134:9-15). The cross-examination then solicited testimony that he entered into a plea agreement expecting to receive a lesser sentence; that the agreement was conditioned upon his trial testimony being consistent with a second statement given on November of 2019; that he agreed to testify against his co-defendant, and if he did not the plea could be revoked; and that he was a heroin addict who had difficulty recalling events accurately. (16T137:2-139:13). The Defense then drew attention to the fact that when Bergholz was interviewed by police the first time, he denied having any involvement with the crime in question.

(16T148:4-16). In response to the State pointing out on re-direct that Bergholz was only required to plea truthfully, the Defense solicited testimony that Bergholz had not received any plea offer after giving his initial statement denying involvement. (16T154:13-155:14).

The following day, it was brought to the court's attention that limiting the cross-examination with regard to the potential sentence was improper. (17T:13-24). The court indicated that it was going to reopen the cross-examination to allow further exploration of Bergholz's likely sentence. (Ibid.). At that point, the State provided notice that it intended to admit Bergholz second statement (made prior to his plea) to show that it was consistent with his trial testimony, as commentary on his sentence would further the inference that there was a motive to fabricate his trial testimony. (17T18-24; 17T9:4-9). The Defense responded by arguing that the State should not be permitted to do this, despite cross-examination being reopened, "because we've already closed out both direct and cross." (17T:24-25).

The court found that the Defense had made the inference of recent fabrication. (17T10:9-10). However, the court concluded that Bergholz second statement would not be admissible as substantive evidence without providing a reason as to why, though it had noted earlier that it was "not as if you have a child witness where you can show that there's no recent fabrication, that would then be admissible to substantive evidence." (17T10:10-11; 17T4:11-15). The court found instead that the testimony was admissible under N.J.R.E. 607 to rehabilitate Bergholz. (17T10:7-

11:3; 17T12:2-17). The court also indicated that "Det. Garbarino would have to – to introduce that statement, if you're showing that there was a prior consistent statement." (17T15:23-16:1).

Jury Charge for Robbery

The jury was advised that in order to convict the Defendant of Robbery, the State had to prove that,

> Number one, that the defendant was in the course of committing a theft. Number two, that while in the course of committing that theft the defendant, (a) knowingly inflicted bodily injury or used force upon another; (b) threatened another with, or purposely put him in fear of immediate bodily injury; (c) committed or threatened immediately to commit the crime of murder.
> [26T132:1-8].

Those elements were then explained in detail. (26T132:9-135:22). The jury was advised that robbery is a second degree, "except when it is a crime of the first degree. And it provides the following. (a) Purposely attempts to kill anyone; or (b) Purposely inflicted or attempt to inflict serious bodily injury." (26T135:24-136:4). The elements of robbery were then further explained with a distinction between 1st and 2nd degree provided. (26T136:5-138:13).

Accomplice Liability Charge

The jury was also instructed on accomplice liability. (26T137:15-147:10.) More specifically, the elements of accomplice liability for felony murder, murder, and robbery were each set out. Ibid. The following portion of the charge is particularly relevant to this appeal:

> Remember that this defendant can be held to be an accomplice with equal responsibility, only if you find as a fact that he possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act. In order to convict the defendant as an accomplice to the specific crimes charged, you must find that this defendant had the purpose to participate in that particular crime. He must act with purpose, or promoting, or facilitating the commission of the substantive crimes with which he is charged.
> It is not sufficient to prove only that the defendant had knowledge that the other person was going to commit the crimes charged. The State must prove that it was the defendant's conscious object that the specific conduct charged be committed. In sum, in order to find the defendant guilty of the committed -- of committing the crimes of felony murder, robbery, murder, the State must prove each of the following elements beyond a reasonable doubt. Number one, that Thomas Bergholz committed the crimes of felony murder, robbery or murder. Number two, that this defendant solicited him to commit them and/or did aid, or agree, or attempt to aid him in planning or committing them. Number three, that this defendant's purpose was to promote or facilitate the commission of the offenses. And, number four, that this defendant possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act.
> [26T144:15-145:19.]
>
> If, however, you find the defendant not guilty of acting as an accomplice to Thomas Bergholz on the specific crime charged, then you should consider whether the defendant did act as an accomplice of Thomas Bergholz, but with the purpose of promoting or facilitating the commission of some lesser offense, other than the actual crimes charged in the Indictment. The law recognizes that two or more persons may participate in the commission of an offense, but each may participate therein with a different state of mind. The liability or responsibility of each participant for any ensuing offense is dependent upon his own state of mind, and not on anyone else's. You're are guided by these legal principles.
> [26T146:17-147:5.]

Note that the jury was also advised that their verdict must be unanimous. (26T146:6-8; 26T159:20-23; 26T160:12-18).

Sentencing Factors Considered

The State argued for aggravating factors three, six, and nine. (33T25:7-26:16). The State submitted that mitigating factor seven was applicable but should only be given minimal weight. (33T:2614-22). The State requested a forty year sentence subject to NERA for the accomplice liability felony murder conviction and noted that theft, accomplice liability to robbery, reckless manslaughter, and accomplice liability to reckless manslaughter would all merge with that sentence. (33T:27:12-28:16). The Defense argued mitigating factors two, seven, and eight. (33T29:4-30:14). The Defense agreed that all of the other offenses should merge into the accomplice liability felony murder, and requested the mandatory minimum of thirty years for that offense. (33T30:15-22).

In sentencing the Defendant, the court noted that he had prior disorderly persons convictions for theft and receiving stolen property. (33T32:24-33:3). The court found the factors as follows:

> Aggravating factors include three, the risk that you would commit another offense. I -- I do find that to be an aggravating factor in this matter. Six, your prior record. To the prior record, I give that moderate weight. But there's nine, the need to deter you and others from violating the law, which is always an important message in reference to future offenses, particularly any crime of this nature, sir, and to that I give significant weight. Mitigating factors. I've listened to the arguments of counsel. Counsel has -- and -- and to mitigating factor number seven, that you had no history of prior delinquency or criminal activity and lead a law-abiding life for a substantial period of time. There was a substantial period of time between the 1996 convict- convict- -- conviction and the current offense. So I do recognize that you let [sic] -- led a law-abiding life for substantial period of time and to that I give moderate weight. The defense has also requested that I consider number

> two. That you did not contemplate that your conduct would cause or threaten serious harm. I'm going to deny that request. Indeed, any time you enter the house of another uninvited, and either by accomplice as well as recklessly committed an act that ends up with that person deceased there has to be a contemplation that there could be harm to the individual involved any time that you would -- any time that these factors exist. So I'm going to deny mitigating factor number two -- that you did not contemplate that your conduct would cause or threaten serious harm. Eight, the conduct was a result of circumstances unlikely to reoccur. To that I give slight weight. I do find that the aggravating factors significantly outweigh the mitigating factors. There is a presumption of imprisonment that is involved here on these offenses. [33T33:4-34:17.]

The court then sentenced the Defendant to a term of 40 years subject to an 85% parole disqualifier on the accomplice liability for felony murder conviction. (33T34:20-35:21). That was the aggregate sentence, as the remaining convictions merged and/or ran concurrent. (33T35:22-36:22).

LEGAL ANALYSIS

I. BERGHOLZ'S STATEMENT WAS ADMISSIBLE SUBSTANTIVELY AND ANY ALLEGED ERROR IN THE FORM OF ADMISSION WAS HARMLESS .

The issue raised by the Defense regarding witness Bergholz concerns the admission at trial of his prior consistent statement. The court below found that during Bergholz' cross-examination, the Defense had inferred that he had a motive to fabricate his trial testimony. Accordingly, the court permitted the State to admit a prior consistent statement of Bergholz pursuant to N.J.R.E. 607, in an effort to show consistency and thus rehabilitate the witness. Counsel alleges this was improper. When reviewing such an issue on appeal,

> "'[c]onsiderable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion.'" State v. Kuropchak, 221 N.J. 368, 385, 113 A.3d 1174 (2015) (citation omitted). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted."'" Id. 221 N.J. at 385-86, 113 A.3d 1174 (citations omitted).
> [State v. Moorer, 448 N.J. Super. 94, 106 App. Div. 2016).]

Here, the court below properly found that the Defense had inferred during cross-examination that Defendant had a motive to fabricate his trial testimony. Furthermore, the prior consistent statement was made before the existence of the plea agreement, which was the alleged motive to fabricate. However, even if this court finds that it was made contemporaneous to the plea, New Jersey does not have a rigid temporal requirement for admission in circumstances such as this. Therefore,

as will be shown, the court acted properly in admitting the statement and that ruling cannot be said to be a manifest denial of justice requiring reversal.

New Jersey Rule of Evidence 607 notes that "A prior consistent statement shall not be admitted to support the credibility of a witness except: (1) to rebut an express or implied charge against the witness of recent fabrication or of improper influence or motive." N.J.R.E. 607(b). The companion rule to N.J.R.E. 607 is N.J.R.E. 803(a), which sets forth a similar hearsay exception that is not dependent upon the declarant's unavailability. The rule states that:

> The following statements are not excluded by the hearsay rule:
>
> . . . The declarant-witness testifies and is subject to cross-examination about a prior otherwise admissible statement, and the statement:
> . . .
> (2) Is consistent with the declarant-witness' testimony and is offered to rebut an express or implied charge against the declarant –witness of (A) recent fabrication or (B) improper influence or motive . . .
> [N.J.R.E. 803(A)]

Under N.J.R.E. 607, once there has been an implied or expressed inference as noted above, "the party calling a witness may [] attempt to support credibility through direct or redirect examination and through the introduction of extrinsic evidence." State v. Frost 242 N.J. Super. 601 (1990). "N.J.R.E. 803(a)(2) [] permits the substantive use of prior consistent statements as an exception to the hearsay exclusionary rule under the same conditions set forth in N.J.R.E. 607 for using such statements to support the credibility of a witness." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, Comment 2 to N.J.R.E. 607, comment 4 (Gann,

2020); State v. Moorer, 448 NJ Super 94, 108-111 (App. Div. 2016). Additionally, the prior consistent statement need not have occurred prior to the alleged motive to fabricate to be admissible. State v. Muhammad, 359 NJ Super 361, 386-388 (App. Div. 2003) (noting that the New Jersey Supreme Court previously "declined to adopt as a rigid admissibility requirement that the prior statement was made prior to the motive or influence to lie.").

In State v. Torres two officers testifying at trial relayed prior incriminating statements that another witness had made. 313 N.J. Super. 129, 156 (App. Div. 1998). The court noted that this was hearsay, but found that the impact of the hearsay was vitiated. That was because the actual witness who made the statements had previously taken the stand and testified consistently with those statements. Id. at 158. Thus, even though N.J.R.E. 803(a)(2) had not yet come into force, it was harmless error to allow the hearsay in. Id. at 158. The court went on to note that the statements would be admissible in the future under N.J.R.E. 803(a)(2), stating,

> Somewhat akin to "fresh complaint" under N.J.R.E. 803(a)(2), a prior statement of a testifying witness . . . is admissible if it is "consistent with the witness' testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive." Such statements were excluded from the hearsay rule and made admissible as substantive evidence under the Evidence Rules adopted by Order of the Supreme Court of New Jersey on September 15, 1992. These rules became effective July 1, 1993, just nine days after the conclusion of defendant's trial.
>
> In the event of a retrial, N.J.R.E. 803(a)(2) would permit proof of [the witness's] prior consistent statements to rebut the assertion that he was fabricating his trial testimony because of a motive to shift the blame to the defendant. In these circumstances, we cannot say that it was plain

> error to allow [the witness's] testimony as to his earlier statements that defendant, not he, shot [the victim]. R. 2:10-2. Further, as N.J.R.E. 803(a)(2) allows the use of such testimony as substantive evidence, it was also not plain error to omit a cautionary charge. [Id. at 158-59.]

In Neno v. Clinton, the New Jersey Supreme Court considered a similar situation where another officer testified to the substance of statements made by others. 167 N.J. 573, 579 (2001). The Court noted that N.J.R.E. 803(a)(2) allows for the admission of a prior statement of a witness to refute a recent charge of fabrication, but only after there has been an allegation or inference of fabrication or similar. Id. at 580. The testimony was ultimately deemed inadmissible, not because it was being admitted through the officer, but "because there was no charge of improper influence or motive in [the] case." Id. at 581.

In State v. Muhammad, the Appellate Division provided further guidance on when prior statements may be admitted for purposes of rehabilitation. State v. Muhammad, 359 N.J. Super. 361, 386-388 (App. Div. 2003). There, it was noted that a consistent statement offered under N.J.R.E. 607 or N.J.R.E. 803(a) (2) does not need to be made prior to the alleged motive to fabricate. Ibid. In that case, the "defendant argue[d] that implicit in N.J.R.E. 803(a)(2) is a temporal proximity requirement. On this theory, unless the prior statement was made before the occurrence of the asserted improper influence or motive, it lacks relevance to refute the charge." Id. at 386.

The Appellate Division looked to State v. Chew, where the Court declined to adopt such a rigid rule in the context of a murder trial. Ibid. (citing State v. Chew, 150 N.J. 30 (1997)). There, the defendants challenged the admissibility of prior statements made by two witnesses who had previously provided the defendant with an alibi but later inculpated him. Ibid. Their trial testimony was "substantially" consistent with the inculpatory statements previously given. Ibid. In finding it unnecessary to determine whether there was a temporal motive to fabricate,

> [t]he Court []noted that 'cross-examination tested whether the witnesses were further motivated by their plea agreements and whether the police had fed them with the details of their stories.' Ibid. The Court concluded that in these circumstances '[t]he prior consistent statements had significant 'probative force bearing on credibility beyond merely showing repetition.'
> [Id. at 387.]

Accordingly, the Chew Court found it appropriate to allow for the admission of consistent statements "after some motive to fabricate arose, but before other motives to fabricate arose." State v. Moorer 448 N.J. Super. 94 (App. Div. 2016) (citations omitted).

The Muhammad court found that there had been no determination, post Chew, that N.J.R.E. 803(a)(2) imposed a temporal proximity requirement. Id. at 388. The court noted that the rules of evidence also supported not imposing such a requirement, stating, that "the purpose of N.J.R.E. 803(a) (2) is best advanced by not requiring a strict temporal requirement, but instead allowing trial judges to

evaluate relevance under all of the circumstances in which the prior statement is proffered." Ibid.

Turning to the case below, both the State and Defense had initially rested without the State introducing Bergholz second statement made in November 2019 to prove that his trial testimony was consistent. (16T). However, when the court came back the following day and re-opened the cross-examination of Bergholz, this became fair game. The Defense was permitted to make the inference that there was motive to fabricate yet again, and so the State was permitted to respond in kind.

> [T]he trial court has broad discretionary power over decisions such as whether and to what extent to allow re-direct and re-cross-examinations, whether a witness can be re-called, and whether a party may reopen its case. Judicial discretion in this regard will rarely be overturned on appeal; even in criminal cases, where the defendant is afforded the greatest possible latitude in presenting a case, the judge may require that a criminal defendant testify at a certain point in the trial, rather than when the defendant wanted to testify. [1 New Jersey Evidence Courtroom Manual § 1 (2023)]

As previously noted, the court below found that it was compelled to re-open the cross-examination of Bergholz after it had concluded. (16T3:13-23). This was to allow questioning concerning the sentence Bergholz would receive. (Ibid.). The court also found that the Defense, in questioning Bergholz about his plea at length, had clearly drawn the inference that Bergholz had a motive to fabricate his testimony. (16T10:1-23). This was reasonable; there were thirteen questions asked by the Defense during cross-examination initially, which insinuated that Bergholz was testifying in whatever way necessary to receive a favorable sentence.

(16T137:2-139:13). The Defense then went even further once cross-examination was re-opened, asking an additional seven questions concerning the sentence Bergholz believed he would receive in exchange for his testimony. (17T23:8-24:11). The court then told the State, unprompted, "you may redirect – redirect." (17T24:14). This was well within the court's discretion to permit and was justified, given the second bite at the apple that the Defense had received.

If the court erred at all, it was in suggesting that the State could not admit Bergholz's statement as substantive evidence and that to use his statement, it would have to be admitted through another witness. (17T10:1-21; 17T15:23-25). No reason for the limitation on the use as substantive evidence was given. However, the suggestion by the court that it was "not as if you have a child witness where you can show that there's no recent fabrication, that would then be admissible to substantive evidence", indicates the court was possibly considering N.J.R.E. 803(c)(27), and not N.J.R.E. 803 (a)(2).

While it may have been prudent to admit the statement of Bergholz while he was on the stand so that the Defense could have subject him to additional cross, this was certainly not fatal.

First, the Defense objected to the re-direct of Bergholz and the admission of his statement during the same. The Defense wanted their opportunity to draw further negative inferences without affording the State the opportunity to rebut them. They should not now complain that they did not have the opportunity to re-cross Bergholz,

given that the State was not permitted to admit the statement through him in accordance with the Defense's wishes.

Second, the Defense knew the statement was coming in before Bergholz took the stand the second time and knew what the statement contained. (16T10:1-23). As it was consistent with his testimony in court the prior day, the Defense was not missing an opportunity to execute an effective cross-examination, because it has crossed him on the same facts the day before.

As Chew indicates, cross-examination on a plea agreement is one of the most effective ways to highlight why the jury should take a witness's testimony with a grain of salt. The Defense here was able to cross Bergholz twice on his plea and alleged motive to fabricate. Chew also suggests that because such a cross-examination can have a great impact on perceived reliability, allowing a prior consistent statement in, is highly probative for the jury's determination in that regard. As such, it was reasonable to do so in this case.

Third, Torres and Neno suggest that N.J.R.E. 803 (a)(2) allowed the admission of the statement through Garbarino. That rule of evidence contemplates hearsay exceptions which are not dependent on the declarant's unavailability. Again, Bergholz was subject to cross-examination on his prior statement twice when the Defense inquired about his plea and sentence, inferring both served as a motive to fabricate his trial testimony. The Defense also questioned his ability to recall events, highlighted potential inconsistencies in his account, and went into specific

details concerning his November 2019 statement. (16T137:1-155:15). Thus, the requirement that he testify and be subject to cross-examination on the statement was satisfied. While it is somewhat odd that the court did not permit admission of the statement through Bergholz himself, Garbarino was still available to call as a witness and he was capable of authenticating the statement. Accordingly, the rules of evidence were satisfied here, as there was an inference of fabrication, Bergholz was properly crossed on the issue, and the statement was otherwise properly authenticated.

Appellate Counsel argues that even if this statement was otherwise admissible for the reasons set forth above; N.J.R.E. 607 and N.J.R.E. 803(a)(2) do not apply because the statement was allegedly made at the same time as the plea, not before it. That is false. Bergholz provided the statement prior to any plea agreement. Counsel attempts to conflate the statement and the plea, calling them contemporaneous. However, the reality is that when Bergholz gave his statement, there was no legally binding plea agreement between the State and Bergholz. Counsel tacitly acknowledges this. (Da24).

Even if this court were to view the situation as contemporaneous, Muhammad expressly notes that the prior consistent statement does not need to be made prior to the alleged motive to fabricate. Although it is a factor to be considered, it must be considered in the totality of circumstances. Here, there are additional factors that must be also be weighed; namely that the Defense crossed Bergholz on his plea and

sentence on two separate occasions, that the Defense inferred a motive to fabricate via a total of twenty questions on the issue, and the fact the statement was not made after the plea agreement was entered. These factors clearly weigh in favor of admission. Therefore, it cannot be said that the court abused its discretion in allowing the statement in.

Finally, it bears repeating that the statement was admissible under N.J.R.E. 803 (a)(2) as substantive evidence, as the requirements for that rule are virtually the same as those for admitting a statement under N.J.R.E. 607. This renders moot the argument that the court failed to provide a limiting instruction on how to use the statement. Given that it was admissible as substantive evidence, no limiting instruction was required. This is in line with the ruling in Torres where it was noted "as N.J.R.E. 803(a) (2) allows the use of such testimony as substantive evidence, it was also not plain error to omit a cautionary charge."

In sum, given the effectiveness of the two cross-examinations, admitting this prior statement had a "probative force bearing on credibility beyond merely showing repetition." It was highly relevant for the jury's determination of whether or not they should find Bergholz credible. The statement and Bergholz' trial testimony were "substantially" consistent, just as in Chew. Counsel acknowledged this in brief, stating that the November 2019 statement "did not contradict what Bergholz said at trial . . ." (Da25.) Additionally, all of the factors present weighed in favor of

admissibility. As such, it was not an abuse of discretion for the court below to find it admissible.

Furthermore, if it was improper to admit it through the Detective, this was harmless error only. This is because Bergholz had already taken the stand, and any cross-examination requirement was sufficiently satisfied. The fact that the statement was also admissible via N.J.R.E. 803(a) (2) suggests that no limiting instruction prohibiting consideration as substantive evidence was required. Accordingly, any alleged error, if actual error at all, was harmless.[1]

II. THE ACCOMPLICE LIABILITY CHARGE WAS ADEQUATE.

The Appellant points to State v. Whitaker as justification for the position that a more detailed accomplice liability charge was required in this case. State v. Whitaker, 200 N.J. 444 (2009). In Whitaker, the State offered two theories on which the jury could find the defendant guilty of accomplice liability for robbery. Id. at 444-45. In the first, it was suggested that he could be found guilty if he "aided and abetted" the co-defendant in robbing the victim. Id. at 444. In the second theory, the State suggested that, even if the defendant was not aware of the co-defendant's

[1] Counsel notes that there were seventeen days between the time when Bergholz testified and when the statement was played via the Detective. (Da25). The State submits that this is of little significance. There has been no argument raised that it was improper for the jury to review the statement during deliberations, which was much later on. That would seem to significantly undermine the focus on the intervening time between testimony and the playing of the statement. The focus here should be on how the testimony was introduced, not when it was played.

intention to rob the victim, he could be found guilty of accomplice liability if he aided the co-defendant in discarding the firearm used in the robbery. Ibid.

In rejecting this theory, the New Jersey Supreme Court noted that "[t]he Code's accomplice liability statute requires that a defendant act with a purposeful state of mind in furtherance of the crime." Id. at 457. Additionally, "to be found guilty as an accomplice, a defendant must not only share the same intent as the principal who commits the crime, but also must 'at least indirectly participate in the commission of the criminal act." Id. at 457 (citations omitted). "To summarize, to establish liability in a robbery case, the Code requires that the State prove that an accomplice shared the principal's intent to commit the theft before or at the time the theft or attempted theft was committed." Id. at 464. The Court noted that, while there was sufficient evidence to find the Defendant guilty of accomplice liability, the fact that the jury could have convicted him of afterthought liability could not be ignored. Id. at 465. A new trial was ordered, with an indication that the court should read the model jury charges on accomplice liability to the jury. Id. at 465-66.

In the case below, there was no suggestion by the State that the Defendant could be found guilty of Robbery or Felony Murder based on his conduct occurring after the fact or based on some other purpose. The State's theory of the case placed the Defendant at the scene of the crime, actively engaged in the Robbery and actively engaged in the conduct which caused the death of the Victim. (15T47:22-5012; 26T45:10-76:8). As to the required purpose, the State noted that,

> this accomplice liability is applicable to the robbery, the felony murder charge that you'll consider, and the murder charges that you'll consider. But if you find that Thomas Bergholz, or someone else committed robbery, felony murder, and/or murder against Michael Fazzio, and this defendant either solicited them, agreed with them, attempted to aid them, planning -- and planning to commit it with them, and his purpose was to carry on the commission of that offense, and he had that same mind set, then the defendant is also guilty of robbery, of felony murder, and of murder.
> [26T72:14-25.][2]

Furthermore, the court very clearly instructed the jury that they must find that the Defendant had the purpose to commit the alleged underlying offenses to convict the Defendant of the relevant accomplice liability offenses. (26T144:15-145:19). Indeed, the charge that was read reflects the model jury charge verbatim, except for the necessary modifications specific to the case. (26T138:15-148:17; See Model Jury Charges: Criminal Liability for Another's Conduct/ Complicity – Lesser – Includes 2C:2-6.)[3] The court noted that knowledge of the conduct was not enough. Rather, the jury was told that they must "find that this defendant had the purpose to **participate in that particular crime**" for which the Defendant was charged as an accomplice. (26:144:21-23) (emphasis added). The jury was also instructed that if they found that the Defendant had the purpose to commit a lesser included offense, e.g. theft, that they may consider whether he was an accomplice to the lesser offense. (26T146:17-147:5.)

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[2] The State also clarified that in felony murder, the resulting death does not have to be intended by the participants. (26T73:20-74:16.)

[3] Note that during the charging conference, the court specifically referenced this charge, and the Defense expressly agreed to its use. (25T80:10-22).

This was distinct from the situation in Whitaker, where the prosecutor suggested that even if the Defendant did not have the intent to commit the Robbery, he could still be convicted of the same if he thereafter aided in hiding the weapon used. Here, the Assistant Prosecutor made no such assertion. Additionally, the court's expressed instruction that the Defendant had to have the purpose of committing the "particular" underlying offense clearly shows that a jury charge consistent with the ruling in Whitaker was given. That instruction was clear, unambiguous, and served the very purpose that Appellate Counsel notes is required; to ensure that the jury did not convict the Defendant based on conduct occurring after the underlying offenses or based on some other purpose.

Counsel argues none-the-less that the verdict is inconsistent and that the conviction on theft and accomplice liability to robbery suggests that the jury may have found Defendant guilty based on conduct occurring after the robbery.

In State v. Grey, the Court considered instances of seemingly inconsistent verdicts and adopted the rule set forth in Dunn v. United States, 284 U.S. 390, (1932) and affirmed in United States v. Powell, 469 U.S. 57 (1984). State v. Grey, 147 N.J. 4, 11-12 (1996). The Court held that, "so long as the evidence is sufficient to support a conviction on the substantive offense beyond a reasonable doubt, such verdicts are normally permitted." Id. at 10 (citing State v. Petties, 139 N.J. 310 (1995)). In expounding upon this position, the Court quoted the United States Supreme Court in Powell as follows:

> [I]nconsistent verdicts ... should not necessarily be interpreted as a windfall to the Government at the defendant's expense.
>
> It is equally possible that the jury, convinced of guilt, properly reached its [guilty verdict] ... and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on [a different] offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.
> Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.
> [Gray at 11-12 (citing Powell at 65 (emphasis in the original) (citations omitted).]

Distilled to their essence, these cases indicate that seemingly inconsistent verdicts should not be a basis for overturning a conviction. As long as there is evidence sufficient to support the guilty verdicts reached, those convictions should stand. The court below considered whether there was sufficient evidence in this regard and appropriately found that there was. (33T20:15-22:22). Beyond that, it is not the role of the court to guess at the reasons the jury arrived at the verdict they did. Whether Defendant's convictions are consistent or not, the fact remains that the came about as a result of sufficient proofs. Accordingly, this should not be a basis to overturn those verdicts.

III. THE ROBBERY CONVICTION SHOULD STAND BECAUSE THE ELEMENTS WERE PROVIDED TO THE JURY AND THE JURY RETURNED A VERDICT BASED ON THOSE ELEMENTS.

A. THE ELEMENTS OF FIRST DEGREE ROBBERY WERE PROVIDED.

The State concedes that the jury charge related to accomplice liability for 1st degree robbery reflects the elements of robbery without the additional question that would raise it to a first degree, as noted in Counsel's brief at Da35. However, this ignores the fact that the charge was read immediately after the jury had been read the charge on own-conduct-robbery, which did set out the distinction between 1st and 2nd degree. (26T136:5-138:13; 26T144:15-145:19.) Surely, the jury would not have forgotten the element of 1st degree Robbery that was read to them only a moment before. Thus, it is appropriate to infer that jury was able to understand what the law required to sustain a 1st degree conviction for accomplice liability robbery.

Even if this court finds that the jury should have been instructed again on the 1st degree robbery element in the context of accomplice liability and that the failure to do so constitutes error; there can be no question that the elements for 2nd degree robbery accomplice liability were clearly set out. (26T140:15-141:2). Accordingly, the remedy here would be to resentence the Defendant to 2nd degree robbery. While Counsel maintains that, the supposed lack of a Whitaker charge makes this an unjust resolution; the reality is that the jury was appropriately charged on accomplice liability, as explained previously.

Instead, the situation here would be analogous to that in State v. Casilla, 362 N.J. Super. 554, 570-72 (2003). There, the trial court read the elements necessary for a guilty verdict on 2nd degree kidnapping but failed to read the additional "failure

to release unharmed" element necessary to convict an individual for 1st degree kidnapping. Id. at 566-67. After the jury returned a verdict of guilty, the court still sentenced the defendant to 1st degree kidnapping. Id. at 567.

Although the defense raised no objection to the kidnapping charge at the time of trial, the Appellate Division noted that, "our Supreme Court has repeatedly indicated that 'the failure to charge the jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel.'" Id. at 570 (citing State v. Federico, 103 N.J. 169, 176 (1986)). The Division then considered whether it was appropriate to mold the improper conviction for 1st degree kidnapping into 2nd degree kidnapping. Id. at 571. It found that in that case, since the trial judge had read the elements necessary for 2nd degree kidnapping and the jury returned a verdict based on those elements, there was no molding at all. Ibid. Rather, modifying the judgement of conviction to a 2nd degree simply "memorialize[d] the jury's verdict." Ibid. The Division also suggested that any attempt to retry the defendant for a 1st degree kidnapping could implicate double jeopardy issues. Ibid.

The reasoning in Casilla was recently applied by this court once more in State v. Paden-Battle, where the trial judge again failed to read the necessary element to elevate kidnapping to a 1st degree. State v. Paden-Battle, 464 N.J. Super. 125, 137-38 (App. Div. 2020). The defendant contended that the absence of the escalating factor deprived him of a fair trial. Id. at 139. The Division was not convinced, and

found no reason why it should not simply resentence him to 2nd degree kidnapping, as all of those elements had been read to the jury and they returned a guilty verdict on them. Id. at 138-140.

Here, similar to Casilla and Paden-Battle, if this court does find that the failure to advise the jury of the 1st degree element specifically in the accomplice liability charge was error, the remedy should be to sentence him to 2nd degree robbery. Just as in Casilla and Paden-Battle, all of the elements of the 2nd degree offense were set out and provided to the jury in this case. Thus, when the jury returned a verdict of guilty on accomplice liability to robbery, it was at minimum a proper verdict of guilt for accomplice liability to robbery in the 2nd degree.

As to Counsel's argument concerning an overturning of felony murder, this becomes a moot point based on the above analysis. Felony murder does not require a specific degree of robbery, rather only that a robbery occurred in connection with the homicide. N.J.S.A. 2C:11-3a(3). Additionally, as an appropriate accomplice liability charge was read, there are no grounds to overturn the robbery conviction based on Whitaker. Accordingly, even if this court finds that the Defendant should be resentenced to 2nd degree Robbery, the felony murder conviction should stand.

B. THE ELEMENTS OF ACCOMPLICE LIABILITY ROBBERY WERE SUFFICIENTLY STATED.

Appellant Counsel suggests that there should have also been a more specific instruction concerning the elements of accomplice liability robbery. (Da34). To begin, the jury was given an instruction that their verdict must be unanimous.

(26T159:20-23; 26T160:12-18). Generally, such a charge is sufficient to ensure that the jury reaches a consistent verdict. See State v. Cagno, 211 N.J. 488 (2012). Furthermore, no request was made by the Defense for a more detailed charge. (25T69:5-72:5). Nor does the Defense allege that the jury expressed any confusion about the charge as read. Finally, it should be noted that the charge reflected the robbery count in the indictment, which put the Defense on notice of what they had to defend against. As such, if it was error to reference multiple factual bases for the robbery, it was harmless error only.

Unanimity requires "'jurors to be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence." State v. Frisby, 174 N.J. 583, 596 (2002) (quoting United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)). "Although the need for juror unanimity is obvious, exactly how it plays out in individual cases is more complicated." Ibid. Accordingly, although an instruction regarding unanimity as to a specific charge "should be granted on request, in the absence of a specific request, the failure so to charge does not necessarily constitute reversible error." State v. Parker, 124 N.J. 628, 637, 592 A.2d 228 (1991).

In State v. Frisby, the Court found that a specific act of endangerment needed to be explicitly found because the State had alleged two distinct theories that were conflicting with each other. 174 N.J. 583 (2002). In that case the State alleged the defendant had either "actually inflicted injuries on [the victim] or failed to supervise him adequately thus resulting in his injury [or] (2) that she abandoned him." 174

N.J. 583, 591 (2002). The Court found that a unanimity charge was required because "different theories were advanced based on different acts and entirely different evidence." Id. at 599. However, in rendering its opinion the Court also confirmed that a unanimity charge is not always required. The Court indicated for example, that the "conceptually similar" facts in State v. Parker would not require such a charge, "where defendant showed the child victims pornography, informed them of her sexual desires, and used foul language." Id. (citing 124 N.J. 628, 639 (1991). The Court also noted that a unanimity charge was not required in State v. T.C., where "different sadistic acts towards a child victim including hitting, verbal abuse, starvation, and humiliation did not require a specific unanimity charge because there was a single theory of ongoing emotional and physical abuse advanced and the acts alleged were conceptually similar." Id. at 424 (citing 347 N.J. Super. 218 (App. Div. 2002)).

To discern whether a unanimity charge is required, Parker directs that the court should ""'examine two factors: whether the acts alleged are conceptually similar or are 'contradictory or only marginally related to each other,' and whether there is a 'tangible indication of jury confusion.'" State v. Gandhi, 201 N.J. 161, 193 (2010) (quoting Parker, 124 N.J. at 639).

The argument that the charge in this case was not specific enough necessarily implicates the Defendant's indictment, which included all of the subsections referenced later in the jury charge. In State v. Spano, the defendant was convicted

of certain offenses related to his role as a police officer. State v. Spano, 128 N.J. Super. 90, 91 (App. Div. 1973). On appeal, he challenged, among other things, the adequacy of a particular count in the indictment. Ibid. This court was unconvinced.

> The particular count of the indictment of which defendant has been convicted ought to have been more precise. But defendant now latches on to only one count -- the 23rd in a multicount indictment in which defendant was charged in three other counts, one of which was in great detail -- in making an argument that would exalt technical niceties at the expense of substantial justice, but which suffers from a lack of realistic persuasiveness. The purposes of an indictment are: to enable a defendant to know that against which he must defend; to prevent an accusation in derogation of our interdiction of double jeopardy; and to preclude substitution by a trial jury of an offense for which the grand jury has not indicted. State v. Williamson, 54 N.J. Super. 170 (App. Div. 1959), aff'd o.b. (but with concurring and a dissenting opinion) 31 N.J. 16 (1959). None of these purposes was in the least offended here. Having said that we note that, in any event, defendant's attack comes entirely too late, appearing for the first time on appeal. R. 3:10-2.
> State v. Spano, 128 N.J. Super. 90, 92 (App. Div., 1973).

The same principle was applied by this court in a more recent case (albeit an unpublished one) that is directly relevant to the present matter. In State v. Elliot, this court considered whether a reversal was warranted where the jury was "instructed that it could convict defendant of robbery if it found that he either *knowingly used* force or *threatened* to use force against the victims in committing a theft, pursuant to subsection (1) or (2) of N.J.S.A. 2C;15-1(a), respectively." State v. Elliot, 2010 N.J. Super. Unpub. LEXIS 718, *8 App. Div. 2010) (emphasis in the original). Notably, the indictment only referenced subsection 1 of robbery and the defense had raised an objection to the reading of the additional subsection in the jury charge. Ibid.

The court looked to R. 3:7-3(a) which governs the contents of an indictment and provides as follows:

> The indictment or accusation shall be a written statement of the essential facts constituting the crime charged . . . . It may be alleged in a single count either that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. *An indictment or accusation or any count thereof charging the violation of a statute or statutes shall state the official or customary citation thereof, but error in the citation or its omission shall not be ground for dismissal of the indictment or accusation or for reversal of a conviction if the error or omission did not prejudicially mislead the defendant. . . .*
> [Id. at 9 (emphasis in the original).]

The court followed the reasoning in Spano, noting that among other things, the indictment must be sufficient to inform the defendant of what they must defend against and must also preclude the substitution of an unindicted charge. Id. at 10. The court noted that those principles are not rigidly applied. Ibid. However, a defendant cannot be convicted on a theory of guilt that was not advanced by the State, charged by the court, or otherwise constituted a lesser included offense. Ibid. The Elliot court found that even though the indictment there only referenced one subsection of robbery, it was not error to include an additional subsection in the jury charge. Id. at 13. That was because,

> defendant was provided constitutionally adequate notice that he was being charged with second-degree robbery. The police reports and witness statements that were provided to defendant in discovery unequivocally put him on notice that the State's proofs included not only using force against his victims, as charged in the indictment, but also threatening them with immediate bodily injury. Thus, defendant knew "that against which he must defend" and he was not convicted by

> the jury "of an offense for which the grand jury has not indicted." Spano, supra, 128 N.J. Super. at 92.
> [Id. at 13-14.]

In the case below, the Defense did not object to the robbery charge as proposed. (25T69:5-72:5). This was even after the State expressly stated that the robbery charge should include subsections (a), (b), and (c). (25T70:8-10). That same charged formed the basis for the accomplice liability robbery charge at issue. The charge concerning accomplice liability robbery referenced inflicting bodily injury or using force upon another, threatening or putting one in fear of bodily injury, and committing or threatening to immediately commit the crime of murder. (26T140:15-141:2). The acts suggested were conceptually similar, as they all contained an element of actual or threatened violence. The facts alleged by the State which would support such elements were also all conceptually similar in that they too all involved threats or actual acts of violence. The State alleged that the Defendant and Bergholz broke into the victim's home, jumped on him, covered him with a blanket, tied him up, ransacked his house, took his ATM card, demanded his pin, got his pin, threw a couch on top of him, and left him to die. (15T47:23-50:12; 26T:2-51:13). Furthermore, there is no indication that the jury raised a question expressing confusion on the acts submitted for their consideration. Thus, the test set out in Parker was satisfied.

Additionally, the Defense was put on notice from the time of the issuance of the indictment that the state alleged all subsections later charged to the jury, as the

indictment also referenced the same subsections. (Da006-Da007). Thus, the Defense was on notice of what it would have to defend against. The situation is similar to Elliot where this court upheld a multi-subsection charge, in that the various discovery throughout this case informed the Defense of what the State's theory of the case was. As such, the allegations were no surprise. The situation is also distinct from Elliot in that the subsections referenced in the jury charge were all actually delineated in Defendant's indictment. Thus, there were no additional subsections added and the notice to the Defense was actually more complete than in Elliot. Furthermore, based on information and belief, the Defense never objected to the form of that count of the indictment, nor the charge for it later. As noted in Spano, R. 3:10-2 suggests it is far too late to raise the issue now. Accordingly, this should not be a basis to overturn the accomplice liability robbery conviction.

IV. THE DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE BREAK IN PROCEEDINGS.

Counsel cites no law from this jurisdiction, which would justify a finding that the decision to pause jury deliberations was a violation of due process. Additionally, while Counsel credits the delay is deliberations to the vacation schedule of the court and the attorneys, the reality is that it was the unavailability of the jury and the Defense Counsel which caused deliberations to be pushed further out.

On Monday, November 1, 2021, the court proposed continuing deliberations on Wednesday November 3, 2021, as November 2, 2021 was Election Day. (29T5:17-23). Counsel then inquired what would happen if there was an issue with

Wednesday, to which the court replied that deliberations would continue on Thursday, November 4, 2021. (29T6:2-4). Counsel took issue with this, indicating she would not be available that Thursday or Friday. (29T6:2-11). The court then inquired of the jury whether it would be available on Wednesday, November 3, 2021. (29T8:9-16). It was indicated that five members would not be available. Ibid. Thus, three potential days of deliberation were lost due to the Defense's and Juror's unavailability. This is important to note because when the jury did return to deliberate after the break in proceedings, they returned a verdict the first thing on the third day of deliberations. (33T1-5). Thus, it is highly probable that, had the jury and Defense been available, a verdict would have been reached prior to the break in proceedings.

Additionally, it is inaccurate to say that the trial court simply disregarded the request for a different judge to continue with deliberations in the court's absence. Appellant Counsel is correct in that the court indicated it did not know at first whether a different judge would be available. (29T20:20-22). However, the State later raised the issue once more, asking again whether anyone else was available to preside over deliberations on November 8, 2021. (29T7:21-24). The court indicated that no one else was available. (29T7:25).

In any event, the suggestion that the proper remedy would have been having another judge stand in ignores the fact that such a judge would have had no familiarity with the trial whatsoever. Thus, it would have been extremely difficult,

if not impossible for such a judge to address any trial specific questions from the jury that could arise during their continued deliberations.

Giving credence to Appellant Counsel's argument here would also require courts across the State to block out substantial portions of the yearly calendar where trials simply could not be had, because there was an outside chance that the trial would run into a holiday, a counselor's vacation time, the court's vacation time, a witness's vacation time, a juror's vacation time, and so on. This would not be appropriate. It would make a court's calendar nearly impossible to manage.

Defendant should not receive an overturned conviction simply because deliberations took longer than was anticipated and his attorney and some jurors had scheduling conflicts. This point warrants no further consideration.

V. THE FAILURE TO ADVISE THE DEFENDANT OF THE MANDATORY MINIMUMS HE FACED ON THE LESSER-INCLUDED ROBBERY OFFENSE WAS HARMLESS ERROR.

It is conceded here that, although the State pointed out during sentencing that 1st degree robbery is a NERA offense, the court thereafter never expressly advised the Defendant that he was subject to a mandatory minimum term of 85% before being eligible for parole on his robbery conviction. Yet, the Defendant did still hear it from the State that it was a NERA offense. (33T37:16-20). Furthermore, the court did advise the Defendant that he was subject to an 85% NERA parole disqualifier on the accomplice liability felony murder charge. (33T34:20-35:3). All of the other offenses merged/ and or ran concurrent to that term. Thus, the failure to advise the

Defendant that he had to serve 85% of the ten-year term on the robbery was inconsequential, as the Defendant understood that he was serving 85% of his aggregate sentence and also understood that the robbery offense carried with it the same 85% parole disqualifier. The failure of the court to expressly state a mandatory minimum which was less than that which he would ultimately serve was harmless error.

VI. THE COURT DID IMPOSE A SENTENCE THAT WAS WITHIN THE PERMISSIBLE RANGE, BUT DID NOT ADEQUATELY EXPLAIN THE AGGRAVATING AND MITIGATING FACTORS FOUND.

In order to impose an appropriate sentence, a trial court considers the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b). The factors are weighed against each other and the court must establish on the record how the sentence was determined. State v. O'Donnell 117 NJ 210, 215 (1989). When the factors considered are supported by the record, so long as they are properly balanced, an appellate court should affirm the sentence. State v. Carey, 168 NJ 413, 426-27 (2001). When a court follows the aforementioned guidelines, the sentence should only be modified if it "shock[s] the judicial conscience." State v. Roth, 95 NJ 334, 365 (1984). Indeed, even when a factor is inappropriately applied, the sentence should stand provided it is not otherwise capable of producing an unjust result. See R.2:10-2; State v. O'Donnell, 117 N.J. 210, 215-16 (1989); State v. Ghertler, 114 N.J. 383, 393 (1989); State v. Roth, 95 N.J. 334, 363-65 (1984).

In State v. Roth, the New Jersey Supreme Court set forth certain guidelines for reviewing a sentence issued by a lower court. See Generally 95 NJ 334 (1984). The Court held that an Appellate court may " review sentences to determine if the legislative policies, here the sentencing guidelines, were violated; (b) review the aggravating and mitigating factors found below to determine whether those factors were based upon competent credible evidence in the record; and (c) determine whether, even though the court sentenced in accordance with the guidelines, nevertheless the application of the guidelines to the facts of this case make the sentence clearly unreasonable so as to shock the judicial conscience." Id. at 364-65.

In State v. O'Donnell, the New Jersey Supreme Court reinstated a sentence previously vacated by the Appellate Division. 117 N.J. 210, 212 (1989). In vacating the sentence, the Appellate Division found that the trial court had improperly considered certain aggravating factors while failing to consider applicable mitigating factors. Id. at 214. The Court found that there was ample evidence in the record to support the trial court's findings and that the lower court had indeed considered mitigation. Id. at 215- 221. In reinstating the sentence, the Court noted that, "in reviewing the sentence, moreover, the Appellate Division did not confine itself to determining whether the aggravating and mitigating factors as found by the trial court were supported by sufficient credible evidence . . . The trial court's sentence, however, reflects a sensitive balancing of the aggravating and mitigating factors." Id. at 219. In conclusion, the Court noted "on occasion, a sentence within the

statutory guidelines may strike a reviewing court as harsh, 'but that is the consequence of the legislative scheme and not a clear error of judgment by the trial court.'" Ibid. (citing State v. Dunbar, 108 N.J. 80, 83 (1987).

In State v. Ghertler, the Court considered a case where the Appellate Division vacated a consecutive term and instated a concurrent in its place. 114 N.J. 383 (1989). The Division noted in their statement of reasons on remand that the lower court "'had properly applied the appropriate factors to arrive at a proper custodial term' . . . however, despite defendant's substantial criminal record, 'the imposition of a long term with a 5-year minimum on a 24-year old who never received a significant custodial sentence was so clearly unreasonable as to shock the judicial conscience.'" Id. at 386-87.

In considering the sentence once more, the Court reiterated the permissible basis for review set forth in Roth and stated that "the test, then, is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is rather whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review." Id. at 388 (citing Roth at 365). The Court, in reversing and re-instating the original sentence held that "there is no litmus test that will categorically demark the point at which . . . a sentence [is] to be so clearly wide of the mark as to shock the court's conscience. All agree that the rubric does not embrace disagreement over sentencing results." Id. at 393.

In State v. Fuentes, the Court considered whether the trial judge had set forth an adequate explanation of aggravating factors. State v. Fuentes, 217 N.J. 57 (2014). The Court focused on the application of aggravating factors one and nine, noting that the lower court had failed to set forth an adequate explanation as to why those factors were applied.

> Its supplemental statement of reasons disclosed only that aggravating factor one was given moderate to significant weight, that defendant stabbed the victim several times and continued to beat him well beyond what was necessary for self-defense, and that defendant used excessive force. The court neither discussed in detail the circumstances of the offense nor identified the facts in the record -- distinct from the facts necessary to prove the elements of aggravated manslaughter -- that supported its finding.
> [Id. at 77.]

> As with aggravating factor one, the sentencing court's reasons for applying aggravating factor nine are insufficiently explained, and the application of this factor is not supported by competent and credible evidence in the record. If the court determines when it resentences defendant that aggravating factor nine applies, it should address both general and specific deterrence pursuant to N.J.S.A. 2C:44-1(a)(9). If it finds both aggravating factor nine and mitigating factor eight, the sentencing court should explain how it reconciles those two findings. Finally, the court should explain in greater detail its assessment of the weight assigned to each aggravating and mitigating factor, and its balancing of those statutory factors as they apply to defendant.
> [Id. at 80-81.]

What was most telling about the case was not the fact that the Court instructed the lower court to provide a statement of reasons, but rather that the Court declined to hold that certain, seemingly inapposite factors, could not both be found. The Defendant specifically argued that aggravating factor nine, the need for deterrence, and mitigating factor eight , that defendant's conduct was "the result of

circumstances unlikely to recur" could not both be found by a sentencing court. Id. at 69. The Court declined to find as much. Id.at 79. Instead, it noted that,

> In exceptional cases, even if the record demonstrates that the offense at issue arose in circumstances unlikely to recur, thus supporting a finding as to mitigating factor eight, a defendant could nonetheless pose a risk of recidivism, requiring specific deterrence within the meaning of N.J.S.A. 2C:44-1(a)(9). While such a case will be rare, we decline to hold that aggravating factor nine and mitigating factor eight can never apply in the same sentencing.
>
> We also decline to find that aggravating factor nine is inappropriate in a case in which the defendant had no prior record, and the sentencing court accordingly applies mitigating factor seven, N.J.S.A. 2C:44-1(b)(7). Neither the statutory language nor the case law suggest that a sentencing court can find a need for deterrence under N.J.S.A. 2C:44-1(a)(9) only when the defendant has a prior criminal record.
> [Id. at 80.]

Finally, the Court also provided an example of how a sentencing court may arrive at a mid-range sentence, as was the case in this matter.

> [O]ne "reasonable" approach for sentencing judges is to use "the middle of the sentencing range as a logical starting point for the balancing process." [State v. Natale, 184 N.J. 458,488 (2005)]. So, for example, "if the aggravating and mitigating factors are in equipoise, the midpoint will be an appropriate sentence." Ibid. Moreover, "reason suggests that when the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." Ibid.
> [Id. at 73.

In State v. Case 220 N.J. 49 (2014), the Court once again considered the statement of reasons provided in a sentencing. N.J. 49 (2014). It again took issue

with the adequacy of the statement of reasons for the factors found by the lower court. Id. at 64-65. The Court noted that,

> In determining the appropriate sentence to impose within the range, judges first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case. State v. Fuentes, 217 N.J. 57, 72, 85 A.3d 923 (2014). The finding of any factor must be supported by competent, credible evidence in the record.
> [Id. at 64.]

The Court indicated that the lower court found factors which were not supported by the record, over emphasized, or not adequately explained. Id. at 66-68. It placed particular emphasis again on the need to explain seemingly inconsistent factors. Id. at 68. Additionally, the Court emphasized the need to address each mitigating factor raised by the defense. "At his sentencing, defendant presented nine mitigating factors for the court's consideration, and yet the court addressed only three, finding mitigating factor seven and rejecting mitigating factors two and five." Id. at 69.

> Mitigating factors that "are called to the court's attention" should not be ignored, State v. Blackmon, 202 N.J. 283, 297, 997 A.2d 194 (2010), and when "amply based in the record . . . , they must be found," State v. Dalziel, 182 N.J. 494, 504, 867 A.2d 1167 (2005). In short, mitigating factors "supported by credible evidence" are required to "be part of the deliberative process." Dalziel, supra, 182 N.J. at 505, 867 A.2d 1167.
>
> Whether a sentence should gravitate toward the upper or lower end of the range depends on a balancing of the relevant factors. Fuentes, supra, 217 N.J. at 72, 85 A.3d 923. "[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend

> toward the higher end of the range." Natale, supra, 184 N.J. at 488, 878 A.2d 724.
> [Id. at 64-65.]

In the present matter, the court addressed each aggravating and mitigating factor raised. Additionally, the sentence of forty years was in the middle of the permissible range, and was reasonable given that the aggravating factors outweighed the mitigating factors. In actuality, the sentence here was more lenient than it would be if the example provided in Fuentes was strictly followed. There, it was suggested that "if the aggravating and mitigating factors are in equipoise, the midpoint will be an appropriate sentence." As reiterated in Case, "when the aggravating factors preponderate, sentences will tend toward the higher end of the range." Thus, the forty year mid-range sentence is actually lower than Natale suggests a sentence should be where aggravating factors outweigh those that mitigate.

However, the trial court's statement of reasons for certain aggravating and mitigating factors appears less detailed than that suggested in Fuentes and Case. Namely, the finding of aggravating factor 9 and mitigating factor 8 does not appear to be sufficiently explained. The State maintains that those factors would not upset the balance of the aggravating and mitigating analysis, which resulted in the sentence imposed. This is particularly so, given that factor 8 was only given slight weight. (33T34:11-13.) However, it cannot be said with certainty. Accordingly, it may be appropriate to remand the matter so that the statement of reasons for the aggravating and mitigating factors may be fully and adequately explained.

CONCLUSION

For the reasons previously stated, this appeal should be **DENIED.** Specifically, the jury was advised of the elements of first degree robbery and accomplice liability, and was thus able to understand the findings of fact necessary for a guilty verdict. The failure to state the parole disqualifier in the context of the robbery conviction was harmless error, as the Defendant was advised that he had to serve 85% of his term on the forty year conviction for accomplice liability to felony murder. That term was in the middle of the permissible range of sentence and was in accordance with the balancing of aggravating and mitigating factors, with the aggravating factors outweighing the latter. **ACCORDINGLY,** the sentence below should not be disturbed.

IN THE **ALTERNATIVE,** if this court finds that the necessary elements for first-degree accomplice liability to robbery were not adequately set out, it should remand the matter for re-sentencing on second-degree robbery accomplice liability only. The sentence should not otherwise be disturbed, as the accomplice liability to felony murder would still stand, thus making the aggregate sentence still appropriate. The imposition of the forty-year term was in accordance with the balancing of the aggravating and mitigating factors, as set out by the lower court. While the state believes the aggravating and mitigating factors found were appropriate, it may be

appropriate to also direct the court below to more fully explain certain aggravating and mitigating factors found, namely aggravating factor 9 and mitigating factor 8.

Respectfully submitted,

s/ *Michael C. Mellon*

Michael C. Mellon, SDAG/
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