SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3367-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Salem County.
DESMOND D. LANE,	:	
Defendant-Appellant.	:	Indictment No. 21-03-00223-I
	:	Sat Below:
	:	Hon. Linda L. Lawhun, P.J.Cr., and a Jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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April 29, 2024

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CONSTITUTIONAL PROVISIONS

PROCEDURAL HISTORY

On March 23, 2021, a Salem County grand jury returned Indictment No. 21-03-00223 charging defendant-appellant Desmond Lane with possession of a handgun for an unlawful purpose in violation of N.J.S.A. 2C:39-4(a)(1) (Count One), possession of a handgun without a permit in violation of N.J.S.A. 2C:39-5(b)(1) (Count Two), three counts of aggravated assault in violation of N.J.S.A. 2C:12-1(b)(1) (Counts Three, Four, and Five), attempted murder in violation of N.J.S.A. 2C:11-3(a)(1), (2) (Count Six),[1] and two counts of murder in violation of N.J.S.A. 2C:11-3(a)(1) (Counts Seven and Eight).[2] (Da1-3).[3]

On motion of the State, the Honorable Linda L. Lawhun, P.J.Cr., dismissed Counts Two, Three, Four, and Five of the indictment with prejudice. (Da11).

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[1] Despite charging an attempt crime, the indictment fails to cite to the attempt statute, N.J.S.A. 2C:5-1, for that count.

[2] Additionally, although including both purposeful and knowing murder in the language of the murder counts, the indictment cites only to the purposeful-murder statute, N.J.S.A. 2C:11-3(a)(1); and omits citation to the knowing-murder statute under subsection (2) for those counts.

[3] Da = defendant-appellant's appendix
1T = motion hearing transcript dated July 25, 2022
2T = trial transcript dated February 15, 2023
3T = trial transcript dated February 16, 2023
4T = trial transcript dated February 22, 2023
5T = trial transcript dated February 23, 2023
6T = trial transcript dated February 24, 2023
7T = trial transcript dated March 1, 2023
8T = sentencing transcript dated April 28, 2023

A trial was held on the remaining counts in front of Judge Lawhun and a jury over several dates in February 2023. (2T; 3T; 4T; 5T; 6T). On March 1, 2023, the jury acquitted Mr. Lane of attempted murder but convicted him of the lesser-included offense of aggravated assault (under N.J.S.A. 2C:12-1(b)(3)), possession of a handgun for an unlawful purpose, and on the two counts of murder. (7T150-10 to 153-21).

On April 28, 2023, Judge Lawhun sentenced Mr. Lane to eighteen months in prison on the aggravated assault charge and thirty years on each murder charge, all consecutive with one another, for an aggregate sentence of sixty-one-and-a-half years in prison with no possibility for parole. (Da4-7). The possession count was merged with the murder counts. (Da4-7). Judge Lawhun also imposed $15,166.13 in restitution. (Da4-7).

Mr. Lane filed his notice of appeal on July 10, 2023. (Da8-10).

STATEMENT OF FACTS

In October of 2020, Latoya Hill was living in a three-story house in Salem City with her adult daughter, Candeisha Hill, and Candeisha's daughter, London. (5T6-7 to 9-14). At the time, Latoya was in a romantic relationship with Mr. Lane (sometimes referred to as "Des" in the trial transcripts), who had also been living at the house for the past year. (5T9-15 to 10-20). Candeisha, as well as Latoya's son Derek Akins, did not get along with Mr. Lane. (5T40-9 to 15). One point of contention between Candeisha and Mr. Lane was his slamming the doors of the house when he was angry. (5T94-12 to 95-6). On October 8, 2020, Candeisha and Mr. Lane had such an argument; Candeisha heard Mr. Lane slam a door, and she became upset because she had just recently fixed it. (5T94-12 to 95-1).

To deescalate the situation, Candeisha left the house. (5T102-19 to 103-2). While she was out of the house, Latoya called Candeisha and told her that Mr. Lane now had a knife. (5T103-3 to 14). Candeisha stopped by a police car she happened to be passing by, alerted the police to what her mother had told her, and returned to the house with police. (5T103-15 to 104-18). The police went into the house, brought Mr. Lane outside, and searched him for a knife but did not find anything. (5T38-10 to 39-4, 104-14 to 105-5). Police told Mr. Lane

he should leave the house to calm down and left without arresting him. (5T38-8 to 10, 105-6 to 8).

Almost immediately after the officers left, however, Candeisha called the police again, saying Mr. Lane was smashing the windows of her car. (5T105-25 to 106-5). When the police responded once more, they saw that Candeisha's car was not damaged, and the officers again left without detaining Mr. Lane. (5T39-11 to 40-8, 106-6 to 107-4).

After police left the second time, Candeisha called her brother Derek, who told her to come pick him up and bring him to the house. (5T107-5 to 108-23). Candeisha left to get her brother and ultimately returned to the house with her brother Derek, her cousin John Robinson, and her boyfriend Allen Gresham. (5T70-5 to 71-10, 108-24 to 12). Back at the house, the group "chill[ed]" in the living room for about "five, ten minutes," and then Candeisha went upstairs to go to bed. (5T110-14 to 112-14). The events that followed are less clear.

According to Candeisha's testimony at the trial, she at some point in the night got up from bed and saw a man she believed to be Mr. Lane with a mask on arguing with her cousin John in the doorway. (5T113-16 to 114-16). Candeisha was watching them from the top of the first-to-second-floor stairs. (5T114-17 to 115-2). The argument ultimately developed into a physical struggle between the masked individual, Mr. Akins, and Mr. Robinson. (5T120-13 to 120-

19). During the fracas, Candeisha could see that her brother was hiding a 9-millimeter handgun behind his back. (5T116-8 to 22). As the masked man was chasing Mr. Robinson and Mr. Akins up the stairs, he took control of the gun and started shooting. (5T121-4 to 13). Mr. Robinson and Mr. Akins were killed in the shooting and Candeisha was wounded by a shot in her leg. (5T122-3 to 6, 80-5 to 81-22).

Latoya testified that she had also been in bed around the time of the incident but got up because she heard a "commotion." (5T41-15 to 24). When she got up and went to the stairs, she saw Mr. Lane, Mr. Robinson, and Mr. Akins "fighting over [a] knife" as they were trying to get Mr. Lane out of the house. (5T42-4 to 7, 22-1 to 17). Latoya eventually heard gunshots but did not see the actual shooting because she was back in her room. (5T16-12 to 18-2). Latoya also testified that she saw Mr. Lane leaving the house with a gun, and that she never saw anyone with a facemask on. (5T18-20 to 19-6, 43-19 to 21).

When Mr. Akins's clothing was searched in the aftermath of the shooting, he was found with live handgun rounds matching both the shell-casings and discharged bullets from the shooting. (4T162-6 to 167-1, 202-21 to 24). Mr. Akins was also found with crack, heroin, and various pills. (4T169-14 to 19).

Mr. Lane's defense at trial was primarily that he was not the masked individual involved in the shooting, and that it may have been some associate of the group Candeisha brought back with her that night. (6T14-21 to 15-10).

LEGAL ARGUMENT

POINT I

BECAUSE THE SHOOTING WAS IMMEDIATELY PRECEDED BY A PHYSICAL ALTERCATION BETWEEN MR. LANE AND THE TWO VICTIMS, ONE OF WHOM WAS ARMED WITH A LOADED HANDGUN, THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON PASSION/PROVOCATION MANSLAUGHTER AS LESSER-INCLUDED OFFENSES FOR THE MURDER COUNTS. (5T184-1 to 188-5)

The facts of this case dispel any notion that the deaths of the victims were the result of premeditated murders; the decision to fire the gun was made in the heat of a physical struggle in which a man alleged to be Mr. Lane took control over one of the victims' gun. Accordingly, defense counsel appropriately argued in the charge conference that an instruction on passion/provocation manslaughter, a lesser-included offense of murder, was appropriate. Nonetheless, the trial court rejected Mr. Lane's proposed instruction based on a restrictive view of the evidence that failed to consider any reasonable inferences in his favor.

Our courts have made clear that when a trial court fails to give a requested passion/provocation manslaughter instruction that is rationally supported by the evidence adduced at trial, it is an error requiring the reversal of the related murder conviction. Accordingly, Mr. Lane's convictions for murder must be

vacated, and the matter remanded for a new trial where the jury is given the option to consider whether the conduct alleged amounted to passion/provocation manslaughter rather than murder. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. The Testimony at the Trial that a Physical Struggle Ensued Between Mr. Lane and the Victims as They Tried to Remove Him From the House, and that One of the Victims Engaged in the Struggle Was Armed with a Loaded Handgun, Was Sufficient to Warrant a Passion/Provocation Instruction.

Pursuant to N.J.S.A. 2C:1-8(e), juries may be instructed on what are called "lesser-included offenses" of those listed in the indictment when there exists a "rational basis" for such an offense. The "rational basis" test for finding an appropriate lesser-included offense has been called "a low threshold" by our Supreme Court. State v. Carrero, 229 N.J. 118, 129 (2017). The principle underlying the lesser-offenses statute is that "no defendant should be convicted of a greater crime or acquitted merely because the jury was precluded from considering a lesser offense." State v. Canfield, 470 N.J. Super. 234, 270 (App. Div. 2022) (citations and internal quotations omitted), aff'd as modified, 252 N.J. 497 (2023).

In New Jersey, a purposeful killing can be either murder or the lesser offense of passion/provocation manslaughter. State v. Coyle, 119 N.J. 194, 221 (1990); see also N.J.S.A. 2C:11-4(b)(2). If there is evidence of

passion/provocation in the record, the State can secure a conviction for murder "only if it proves beyond a reasonable doubt that the purposeful killing was not the product of passion/provocation." Ibid. Accordingly, when there is evidence of passion/provocation in connection to a killing, the trial court is required to instruct a jury that the State must prove beyond a reasonable doubt the killing was not the product of passion/provocation. Id. at 221-22.

In assessing whether a trial court should have supplied a passion/provocation charge, our Supreme Court has instructed that four elements are relevant: "[1] the provocation must be adequate; [2] the defendant must not have had time to cool off between the provocation and the slaying; [3] the provocation must have actually impassioned the defendant; and [4] the defendant must not have actually cooled off before the slaying." State v. Mauricio, 117 N.J. 402, 411 (1990). The first two elements are "objective," and as such, the trial court must assess if, when viewed in the light most favorable to the defendant, a jury could "rationally construe[] the facts" to find those elements are met. Id. at 412-13. If the trial court finds the first two elements are met under that "rational basis" test, the second two elements should "almost always" be left to a jury to decide. Id. at 413; see also Carrero, 229 N.J. at 129.

Here, the testimony at the trial was that Mr. Lane was involved in a physical altercation with two men who were trying to get him to leave the house,

one of whom was armed with a loaded handgun, and that he ultimately got control of the handgun during the altercation and shot the two victims in the heat of the moment. Under such facts, there can be no serious dispute that there was no adequate cooling off period with respect to the second element of the passion/provocation test; the shooting happened in the course of the brief physical altercation between the two victims and the man alleged to be Mr. Lane. The only element reasonably in dispute, then, is the first: whether a reasonable person would have been provoked in Mr. Lane's situation. Reviewing the evidence and reasonable inferences therefrom, a reasonable jury could have found that a reasonable person in Mr. Lane's situation would have been adequately provoked.

In assessing the "reasonable provocation" element, the critical inquiry is whether "loss of self-control is a reasonable reaction" to the provocation.[4] Id. at 412. While words alone cannot constitute adequate provocation, "battery, except for a light blow, has traditionally been considered, almost as a matter of law, to be sufficiently provocative." Canfield, 470 N.J. Super. at 276 (citations and

[4] The "reasonable" person standard in this context is something of a misnomer, as one would think that a reasonable person would never lose control to the point of committing an intentional killing no matter how upset or provoked he or she was. Accordingly, it is important to look at that question in relation to the facts of cases where our Supreme Court has found that there was adequate provocation in the record, like Mauricio and Carrero, as discussed later in this Point.

internal quotations omitted). Even a single punch can constitute adequate provocation. State v. Robinson, 136 N.J. 476, 491 (1994); State v. Blanks, 313 N.J. Super. 55, 71 (App. Div. 1998). Likewise, "[t]he presence of a gun or knife can satisfy the provocation requirement." Carrero, 229 N.J. at 129.

In reviewing the evidence for facts supporting reasonable provocation, a trial court must "examine the record thoroughly" for any evidence supporting the existence of passion/provocation. Canfield, 470 N.J. Super. at 272. The evaluation of that evidence must be in "a light most favorable to the defendant," considering "all inferences that logic and common sense will allow," and finding against including the instruction only when there is no "room for dispute" as to whether a reasonable person would have been provoked. Mauricio, 117 N.J. at 412, 415, 417 (citations and internal quotations omitted). Because of the low rational-basis threshold, little more than a "scintilla" of evidence is all that is necessary to find a basis for reasonable provocation. State v. Crisantos, 102 N.J. 265, 278 (1986).

Two cases provide particularly useful guidance for evaluating that issue under these facts: State v. Mauricio and State v. Carrero. In Mauricio, the inebriated defendant was trying to enter a nightclub but was refused entry by the security guard on duty who shoved the defendant out, causing them both to fall. 117 NJ. at 405-06. The defendant came back twenty minutes later—this time

with a sawed-off shotgun hidden under his trench coat—and tried to enter again. Id. at 406-07. The security guard once more forcibly pushed him out of the club. Id. at 406. About fifteen minutes after being thrown out of the bar a second time, the defendant shot a patron he mistakenly believed was the security guard who had repeatedly thrown him out of the club. Id. at 408-09.

The Supreme Court readily concluded that because "[t]here was sufficient testimony to permit a jury to conclude that [the security guard] used physical force to eject defendant from the Lounge[,]" there was sufficient evidence of passion/provocation to require the instruction. Id. at 416. Importantly, the Court also noted that the defendant's misbehavior with respect to the physical quarrels did not preclude a passion/provocation instruction, saying, "[t]he issue here is whether a reasonable person would have been provoked, not whether a reasonable person would have engaged in conduct that incited the alleged provocation." Id. at 415.

Similarly, in Carrero, the Supreme Court considered whether a passion/provocation instruction was appropriate even though it was inconsistent with the defense presented at trial. There, the defendant was spending time at his girlfriend's house, and there were two other men at the house with whom the defendant had a turbulent history. Carrero, 229 N.J. at 122-23. According to the girlfriend, during a moment when the defendant and one of the men were left

alone in the kitchen, she heard a gunshot and came down to see the defendant standing over the victim holding a gun; the victim pleaded with the defendant, but he ultimately shot the person in the head. Id. at 124. The defendant, meanwhile, testified that the man threatened him with the gun while they were alone, and a physical struggle ensued in which multiple shots were fired that struck the victim. Ibid.

Although the defendant argued a theory of self-defense rather than passion/provocation at the trial, the Supreme Court found that the testimony was nonetheless sufficient for a passion/provocation instruction. Specifically, the Court stated, although a verbal disagreement would not be enough, "the presence of the gun could have provoked a reasonable person in defendant's position." Id. at 130. The Court went on to note that a jury could have reasonably inferred the victim was the first one to pull out a gun, and that even if he did not, "the physical struggle between Hall and defendant constituted a battery, which we have said rises to the level of adequate provocation." Ibid. As to the fact of the instruction being inconsistent with the defense's theory of the case, the Court also held that, "[a] defendant is entitled to a lesser-included offense instruction rationally supported by the evidence, even if the instruction is inconsistent with the defense theory." Id. at 128.

In Mr. Lane's case, there was similarly sufficient testimony to warrant an instruction on passion/provocation manslaughter. Like in Mauricio, Latoya testified at the trial that there was a physical struggle between the victims and Mr. Lane as the victims were "trying to get [Mr. Lane] out of the house." (5T22-9 to 17). Candeisha similarly testified that there was a "tussle" between the victims and Mr. Lane. (5T120-5). More importantly, however, is the fact that one of the victims, Mr. Akins, was armed with a loaded handgun—almost certainly the same gun that was used in the shooting. Because Mr. Lane ultimately got control of the gun, the reasonable inference is that at some point Mr. Akins must have produced the gun during the struggle. Just like Carrero, a physical struggle in which the victim produces a handgun against a defendant must sufficiently meet the low-threshold rational-basis test for instructing on passion/provocation manslaughter. Id. at 130. Accordingly, given the clear facts in support of the instruction, the trial court was obliged to instruct the jury on passion/provocation manslaughter as lesser-included offenses of the murder counts.

B. Defense Counsel Sufficiently Advocated for the Passion/Provocation Instruction to the Court Despite an Initial Request for an All-or-Nothing Trial, and the Trial Court's Stated Reasons for Denying the Instruction Were Legally Erroneous.

In the proceedings below, the presentation of the passion/provocation issue was more complex than a simple denial of a request by trial counsel. When the trial court initially asked defense counsel during the charge conference if he wanted any lesser-included offenses, defense counsel responded he did not, saying he discussed the matter with Mr. Lane and they would prefer an "all or nothing type of situation." (5T161-20 to 162-4). The prosecutor concurred that because the defense was a "straight denial," it was appropriate to not have any lesser-included offenses. (5T164-1 to 17, 165-20 to 22). However, defense counsel also acknowledged that "there are certain circumstances where the Court has to charge [lesser-included offenses] even though there is no" request by the defense. (5T164-23 to 25).

After reviewing caselaw and acknowledging it was in fact obliged to instruct on any appropriate lesser-included offenses regardless of the parties' positions, the trial court began reviewing the evidence with respect to a possible aggravated or reckless manslaughter lesser-included instructions. (5T176-20 to 179-2). The trial court again asked for defense counsel's position but noted that it must instruct on potential manslaughter offenses irrespective of the parties'

stances if it believes they are sufficiently supported by the evidence. (5T180-19 to 24). Over the defense's renewed objections, the trial court stated it was going to instruct on aggravated and reckless manslaughter because the testimony supported a "dispute" at the bottom of the stairs wherein the defendant came in control of the victim's gun and "then began firing up the staircase." (5T181-7 to 19).

Despite the objections, defense counsel noted that "for completeness," it would be appropriate to also charge passion/provocation manslaughter because of the fight at the bottom of the stairs. (5T184-1 to 18). The trial court disagreed, stating, "I don't think there was a sufficient factual basis for a provocation that then would have led somebody to act in the heat of passion." (5T185-23 to 185-1). Defense counsel observed his "awkward situation of arguing different theories," but stated that because there was testimony that one of the victims was armed with a handgun during the physical dispute, the "implication of [Candeisha's] testimony was that [Mr. Akins] was going to . . . threaten Mr. Lane with the handgun," and that even though no witness saw it there is a reasonable inference Mr. Akins pulled the gun on Mr. Lane during the quarrel. (5T185-14 to 186-10). Counsel also alerted the trial court to the fact that caselaw states that "threatening with a gun or a weapon or giving someone a beating could be the basis for the passion/provocation charge." (5T186-8 to 10). The trial court

looked at the relevant cases and acknowledged defense counsel was right on the law, but nonetheless stated that because there was no direct testimony that Mr. Akins threatened Mr. Lane with a gun, it could not instruct the jury on passion/provocation manslaughter. (5T187-15 to 188-5). Ultimately, the jury was instructed only on aggravated and reckless manslaughter as lesser-included offenses of murder, and it convicted Mr. Lane on both counts of murder.

The trial court's refusal to accept defense counsel's request for a passion/provocation instruction was legally erroneous and denied Mr. Lane a very real chance of being convicted of something lesser than purposeful murder. As an initial matter, there is nothing about defense counsel initially advocating Mr. Lane's position that he did not want any lesser-included offenses that would preclude this argument on appeal or subject it to a more rigorous standard of review. As aptly noted by the trial court, it was obliged to instruct on supported lesser-included offenses whether defense counsel wanted the instructions or not. (5T180-19 to 24); see State v. Jenkins, 178 N.J. 347, 361 (2004) ("a trial court has an independent obligation to instruct on lesser-included charges when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense"). This is true even where a defendant argues affirmatively against inclusion of a lesser-included offense. Jenkins, 178 N.J. at 358-60. Accordingly, a defendant will generally not be precluded from arguing

on appeal that it was reversible error not to include a lesser-included offense so long as the trial court's decision not to include it was based on its own review of the evidence and law, and not mere reliance on defense counsel's objections. Ibid.

Here, although he made known Mr. Lane's desire for an all-or-nothing trial, defense counsel nonetheless argued at length in favor of including a passion/provocation instruction once the trial court made clear it was going to instruct the jury on aggravated and reckless manslaughter and an all-or-nothing approach was no longer on the table. During that argument, defense counsel pointed to all of the evidence and reasonable inferences that warranted the instruction, alerted the trial court to the governing legal principles, and affirmatively argued for the inclusion of that instruction. (5T185-14 to 186-10). Nonetheless, the trial court refused to instruct passion/provocation manslaughter based on its own erroneous application of the law.

As to the trial court's erroneous decision not to include the passion/provocation charge, it was based almost entirely on the fact that there was no direct testimony of Mr. Akins having struck the defendant or threatened him with the gun. (5T186-11 to 17, 187-22 to 188-5). But a review of evidence with respect to a potential passion/provocation instruction involves not merely looking at the four corners of the evidence presented, but also any "legitimate

inferences to be drawn from those facts." Mauricio, 117 N.J. at 414. Indeed, with respect to those inferences, a trial court should take "all inferences that 'logic and common sense' will allow" in favor of the instruction. Id. at 417 (parenthetically quoting State v. Powell, 84 N.J. 305, 315 (1980)). Certainly, as defense counsel correctly noted, it was entirely reasonable to infer that the "tussle" between the three men involved some degree of battery by the two victims against the defendant, and that Mr. Akins must have first produced the gun during the fight. Those inferences, as made clear in Carrero and Mauricio, are sufficient to meet the low bar for instructing on passion/provocation manslaughter.

In short, there was certainly more than a "scintilla" of evidence, Crisantos, 102 N.J. at 278; in support of a passion/provocation instruction sufficient to merit its inclusion at the trial. Defense counsel made every appropriate argument in favor of the instruction, and the trial court denied the request based on an erroneous application of the law. Indeed, under the facts, a reasonable jury may well have convicted Mr. Lane of passion/provocation manslaughter in lieu of murder. Because Mr. Lane was unlawfully denied the opportunity to have his jury assess that issue, his convictions for murder must be reversed, and the matter remanded for a new trial wherein the jury is appropriately instructed on passion/provocation manslaughter as an alternative to murder.

Lastly, in the alternative, if this Court does not find the issue sufficiently preserved under the rational basis test, a passion/provocation instruction was otherwise warranted under the "clearly indicated" standard of review. When defense counsel does not specifically request a lesser-included charge, the court nonetheless "has an independent obligation to instruct on lesser included charges when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense." State v. Thomas, 187 N.J. 119, 132 (2006) (citing Jenkins, 178 N.J. at 361). A record "clearly indicates" a lesser included offense if the evidence for the offense is "jumping off the page." State v. Dunbrack, 245 N.J. 531, 545 (2021) (citing State v. Denofa, 187 N.J. 24, 42 (2006)). Stated another way, a judge is required to instruct a lesser included offense not requested by the parties when the charge is "obvious from the record." Ibid.

For all of the reasons the previously stated, the passion/provocation issue was "jumping off the page" such that the trial court should have instructed it. First, defense counsel advocated for including the instruction, and so alerted the trial court to the need for the instruction and all of the pertinent facts and law requiring its inclusion. Second, the undisputed narrative of the case—a killing committed in the heat of a physical struggle in which the victim was armed with a handgun—sufficiently bespeak a passion/provocation issue to render it

jumping off the page. See State v. Taylor, 350 N.J. Super. 20, 40-41 (App. Div. 2002) (passion/provocation clearly indicated where defendant stabbed victim who was armed with a gun during physical altercation). Accordingly, under any standard, the passion/provocation instruction was required, and the failure to include it was reversible error.

POINT II

AT SENTENCING, THE TRIAL COURT MADE ERRORS IN WEIGHING THE AGGRAVATING FACTORS AND FAILED TO CONDUCT THE APPROPRIATE ANALYSIS BEFORE IMPOSING THREE CONSECUTIVE SENTENCES, RESULTING IN AN EXCESSIVE SENTENCE AMOUNTING TO LIFE WITHOUT THE POSSIBILITY OF PAROLE. (8T22-3 to 30-13)

Even if Mr. Lane's convictions are affirmed, his sentences must nonetheless be reversed and remanded because the trial court gave "significant" aggravating weight to charges that were dismissed, erroneously imposed aggravating factor one (an exceptional factor that was not even requested by the State), and failed to engage in the required analysis before imposing consecutive sentences that, in the aggregate, amounted to the practical equivalent of life in prison without the possibility of parole. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

"[O]nce a judge determines that a term of imprisonment should be imposed, the judge has discretion but must sentence in accordance with the applicable statutes and must determine the length of the term by carefully analyzing and weighing aggravating and mitigating factors." State v. Randolph, 210 N.J. 330, 348 (2012); see also N.J.S.A. 2C:44-1. A remand for resentencing is required "when the trial court double counts or considers an improper aggravating factor . . . ." State v. Carey, 168 N.J. 413, 424 (2001). Similarly,

when a trial court fails to engage in the proper inquiry before imposing consecutive sentences, "ordinarily a remand should be required for resentencing." Ibid.

At Mr. Lane's sentencing, the trial court applied aggravating factors one (nature and circumstances of the offenses), three (risk of reoffense), six (prior record), and nine (specific and general deterrence), as well as mitigating factor five (victim induced commission of offense). (8T22-3 to 30-13); see N.J.S.A. 2C:44-1(a), (b). The trial court ultimately sentenced Mr. Lane to thirty years in prison on each murder count, as well as eighteen months in prison for aggravated assault, all run consecutively and all with no parole eligibility, for an aggregate sixty-one-and-a-half-year sentence with no possibility for parole. Several errors by the trial court compounded to result in this excessive sentence.

First, the trial court erred in giving "significant weight" to dismissed offenses when it applied aggravating factor three. Our caselaw has repeated time and again that unproven allegations of criminal conduct may not be used against a defendant at sentencing. See State v. K.S., 220 N.J. 190, 199 (2015) ("[W]hen no such undisputed facts exist or findings are made, prior dismissed charges may not be considered for any purpose."); State v. Tirone, 64 N.J. 222, 229 (1974) ("[A] defendant's arrest record is a factor which may be considered in the determination of an appropriate sentence so long as the sentencing judge does

not infer guilt from charges which have not resulted in convictions."); State v. Green, 62 N.J. 547, 571 (1973) (holding the court may consider arrests but "shall not infer guilt as to any underlying charge with respect to which the defendant does not admit his guilt"); State v. Farrell, 61 N.J. 99, 107 (1972) ("It must be remembered that unproved allegations of criminal conduct should not be considered by a sentencing judge.").

Here, the trial judge did exactly that by using pending charges (which were subsequently dismissed) against Mr. Lane to sentence him more heavily. Specifically, in finding aggravating factor three, the trial court stated:

> I give this factor significant weight based not only upon the circumstances of this case and his history, but upon the fact that he has multiple other cases pending; three of them, all of which occurred in or around 2020. They're being dismissed today, but there was repetitive criminal conduct within a very short period of time and I think there's a significant risk that it will recur in this particular defendant.
>
> [(8T24-22 to 25-5) (emphasis added).]

Again, charges that were not only unfinalized but on the precipice of being dismissed entirely are not permissible bases for affording heavy weight to aggravating factor three. The trial court may base its decision on the instant case and prior convictions, but not unproven offenses on the verge of being dismissed. Accordingly, affording factor three "significant weight" because of those offenses was improper.

Secondly, the trial court also erred by applying aggravating factor one, "[t]he nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner," N.J.S.A. 2C:44-1(a)(1). "When [a court] assesses whether a defendant's conduct was especially 'heinous, cruel, or depraved,' a sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." State v. Fuentes, 217 N.J. 57, 74-75 (2014). Because "the Legislature ha[s] already considered the elements of an offense in the gradation of a crime," double-counting the elements of an offense in support of an aggravating factor "erod[es] the basis for the gradation of offenses and the distinction between elements and aggravating circumstances." Ibid. (citation omitted). Situations where factor one applies generally involve intentional infliction of cruelty and harm through "extraordinary brutality." See id. at 75 (noting "'cruel' conduct may give rise to an aggravating factor . . . when the defendant intended 'to inflict pain, harm and suffering").

As an initial matter, it is noteworthy that the State did not request the application of aggravating factor one at sentencing. Although not dispositive, the fact that the State itself did not see this as a case warranting that factor is at least highly indicative of the record not supporting the kind of extraordinary

brutality warranting the application of this exceptional aggravating factor.

Regardless, the trial court's stated bases for applying factor one are otherwise either improper or insufficient. Much of the trial court's stated reasons constituted double-counting the elements of the offenses; specifically, the trial court stated that factor one applies because "three people got shot," Mr. Lane knew Candeisha was in the house and could have been hit, and that the shots Mr. Lane fired were "reckless" and "exceed[ed] . . . what would have been necessary to prevent the men from having contact with Mr. Lane. . . ." (8T25-16 to 26-11). All of these facts, however, are encompassed by the crimes for which Mr. Lane was convicted, and the recycling of those facts to apply an exceptional aggravating factor is impermissible double-counting. Fuentes, 217 N.J. at 74-75.

The trial court additionally stated that factor one was appropriate because there were other people in the house beyond the three victims who could have been hurt. However, speculative harm that was never actualized or even intended by the defendant can hardly be said to be "extraordinary brutality," id. at 75; nor suggestive of actions done in a particularly "heinous, cruel or depraved manner," N.J.S.A. 2C:44-1(a)(1). Thus, there was no credible evidence in the record supporting the rare application of aggravating factor one.

Third, a sentencing remand is additionally required because the trial court failed to evaluate the "overall fairness" of imposing consecutive sentences under State v. Torres, 246 N.J. 246, 268 (2021). It is well-established that when a court imposes consecutive or concurrent sentences, it is required to thoroughly explain that decision by analyzing certain factors. See State v. Yarbough, 100 N.J. 627, 643-44 (1985). Those factors include whether:

> (a) the crimes and their objectives were predominantly independent of each other;
>
> (b) the crimes involved separate acts of violence or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims; [and]
>
> (e) the convictions for which the sentences are to be imposed are numerous[.]
>
> [Ibid.]

In addition to analyzing the enumerated Yabrough factors, "[a]n explicit statement[] explaining the overall fairness of a sentence imposed on a defendant for multiple offenses" is essential before imposing consecutive sentences. Torres, 246 N.J. at 268. When a trial court fails to explicitly consider the overall fairness of an aggregate sentence in rendering its decision, such failure "not only

undermines Yarbough's goal of promoting predictability and uniformity in sentencing, but also risks deviating from the Legislature's command that the Code be construed so as to 'safeguard offenders against excessive, disproportionate or arbitrary punishment.'" Id. at 272-73 (citing N.J.S.A. 2C:1-2(b)(4)).

Here, the trial court imposed multiple layers of consecutive sentences, running each of the three sentences consecutive to one another for an aggregate sentence of more than sixty years in prison with no opportunity for parole. For a person in his thirties like Mr. Lane, that functionally amounts to life in prison with no opportunity for parole. However, while the trial court briefly discussed some of the Yarbough factors at the sentencing, nowhere did the trial court acknowledge the practical reality of the sentence imposed or its "real-time consequences." See id. at 273 ("Assessing the overall fairness of a sentence requires a real-time assessment of the consequences of the aggregate sentences imposed . . . ."). Accordingly, at a new sentencing hearing, the trial court must consider the actual length of the sentence imposed and state explicitly why such a sentence is fair. Id. at 268.

Finally, the trial court also erred in imposing a substantial restitution without any ability-to-pay hearing. Pursuant to N.J.S.A. 2C:44-2(b), restitution may only be imposed if "[t]he defendant is able to pay or, given a fair

opportunity, will be able to pay restitution." In evaluating the amount of restitution or fine to impose, the trial court is required to thoroughly evaluate the record to "establish a fair and reasonable amount of restitution and method of repayment." State v. Newman, 132 N.J. 159, 173 (1993). Accordingly, before restitution is imposed, a hearing should be had to establishing the ability of the defendant to pay the financial penalty, and the trial court must give a statement of reasons for finding the defendant does in fact have an ability to pay. Id. at 170.

At Mr. Lane's sentencing, the trial court imposed $15,166.13 in restitution without holding any ability to pay hearing or giving any detailed statement of reasons for how Mr. Lane might have the ability to pay that amount. Nor is there anything in the record establishing that Mr. Lane could pay such a fine. Accordingly, that restitution must be vacated, and the matter remanded so that an ability to pay hearing and statement of reasons can be had before imposing any restitution.

CONCLUSION

For the reasons expressed herein, Mr. Lane's convictions must be vacated and the matter remanded for a new trial, or, alternatively, the matter must be remanded for the imposition of a reduced sentence.

Respectfully submitted,
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Dated: April 29, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3367-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Salem County.
DESMOND D. LANE,	:	Indictment No. 21-03-00223-I
	:	Sat Below:
Defendant-Appellant.	:	Honorable Linda L. Lawhun, P.J.Cr., and a Jury

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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Dated: AUGUST 19, 2024

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

The State adopts and incorporates the Statement of Procedural History as set forth in the defendant's brief.

COUNTER STATEMENT OF FACTS

On October 8, 2020, Latoya Hill lived with the defendant, her daughter, Candeisha Hill, and her granddaughter at 137 Thompson Street in the City of Salem. (5T7-2 to 19). The residence is a three story duplex. Latoya was in a dating relationship with the defendant. (5T9-20 to 22).

Earlier in the night of October 7, 2020, police were called to the residence because Candeisha complained about the defendant making too much noise. (5T29-19 to 23). Candeisha leaves the residence. (5T37-12 to 15). While she was away, Latoya calls her and advises her that the defendant was walking around with a butcher knife. Candeisha sees a police officer while driving and advises him of the situation. (5T103-3 to 25). When she returned she had also brought the police officer. (5T38-3 to 5). Latoya was interviewed by the police and she advised them that the defendant had the butcher knife. (5T38-16 to 18). The police were unable to locate the knife. (5T39-3 to 4). They advised the defendant that he should leave the residence. (5T105-10 to 24).

After the police left the residence, they were called back to the house by Candeisha. (5T39-11 to 13). She reported that defendant was trying to break the windows in her car. (5T39-17 to 19). The police observed no damage to the vehicle. (5T40-4 to 8). Candeisha moves her car and calls her brother Derek Akins, who is

in Penns Grove and advises him of the situation. While on the phone, the defendant begins to chase Candeisha down the street. She returns to her car and drives to Penns Grove, and returns with Derek, and her second cousin, John Robinson. (5T40-20 to 41-9).

Shortly after midnight, in the early hours of October 8, the defendant returns to the residence. Latoya observed Derek and John trying to get the defendant out of the house and they were struggling over the butcher knife the defendant had taken from the residence. (5T22-1 to 17). Later when Latoya was in her second-floor bedroom she heard multiple gunshots from the hallway and her daughter yell that she had been shot. (5T15-12 to 22; 5T13-17 to 18). Upon exiting her bedroom she observed her son, Derek, laying on the second floor landing having been shot multiple times. (5T14-21 to 15 to 11). Lying next to Derek was John also suffering from multiple gunshots. (5T16-8 to 17-1). Also on the landing was the defendant holding a handgun and the butcher knife. (5T17-8 to 25, 5T20-16 to 21-25). Desmond then ran down the stairs and out of the residence. (5T18-4 to 10). The knife was dropped on the stairs leading to the first floor. (5T20-20 to 23).

Candeisha testified that she had brought Derek and John to the house approximately 30 minutes prior to the defendant returning. (5T68-18 to 21). Candeisha, who was the named renter on the lease, did not want the defendant in her house. (5T88-3 to 6). Candeisha then went to her bedroom located on the third floor

and was planning to go to sleep. (5T87-1 to 14). The defendant was no longer at the house and things were calm. (5T88-7 to 25).

Candeisha indicated that her brother then came to get her and said the defendant had returned to the house and Derek was going to tell the defendant that he was not welcome there anymore. (5T67-12 to 15). John had remained at the front door where the defendant was located. When Candeisha and Derek came down the stairs they observed that there was an argument between the defendant and John. (5T89-21 to 90-7). The defendant was wearing a mask, but Candeisha indicated that she knew it was him as he was coming, with a tote, to get his tote of clothes and she saw his face. (5T90-8 to 9; 91-21 to 23). Candeisha saw the defendant pull the butcher knife on John. This occurred while they were standing at the front door. (5T86-12 to 20). Derek had a gun tucked into his pants in the small of his back and had begun to descend the stairs. As the defendant began to stab at John, Derek began backing up the stairs and at some point the gun falls to the ground and the defendant began reaching for it. The defendant gained possession of the gun and began shooting as Derek and John fled up the stairs. (5T115-3 to 124-7). Derek never pointed the gun at anyone. (5T124-19 to 21).

Candeisha indicated that she was standing at the top of the stairs when she suffered a gunshot wound in the left leg. (5T66-23 to 67-9). When she was shot, she observed the defendant with the handgun. He was inside the residence on about

the third step from the bottom. (5T78-15 to 79-2). The defendant was the only individual with a gun. (5T78-21 to 23).

John was attempting to run into Latoya's room. (5T79-20 to 80-1). Derek was in the second-floor hallway. (5T80-2 to 4). At this point, the defendant begins to climb the stairs. He forces his way into Latoya's room and shoots John. (5T809 to 14). Candeisha runs past Derek into another room. She hears more shots and subsequently looks out the door as she closes it and sees Derek and John laying in the hallway. (5T81-20 to 82-1).

The medical examiner determined that both John and Derek's deaths were homicides by multiple gunshot wounds. (4T64-8 to 14; 79-10 to 12; 66-1; 104-12 to 22). Ballistics determined the bullets were fired from the same gun. (4T214-1 to 8).

LEGAL ARGUMENT

Point I: The Trial Court Properly Found That There Was No Rational Basis to Charge the Jury with Passion/Provocation Manslaughter

A person commits first-degree murder when he, as here, "purposely" or "knowingly causes death or serious bodily injury resulting in death." N.J.S.A. 2C:11-3(a). Meanwhile, "a homicide which would otherwise be murder under N.J.S.A. 2C:11-3 may be considered passion/provocation manslaughter when committed in the heat of passion resulting from a reasonable provocation," under N.J. S .A 2C: 11-4(b)(2).

Meanwhile, "passion/provocation manslaughter is considered a lesser-included offense of murder: the offense contains all the elements of murder except that the presence of reasonable provocation, coupled with the defendant's impassioned actions, establish a lesser culpability." State v. Robinson, 136 N.J. 476, 482 (1994). To be guilty of passion/provocation manslaughter, "an intentional homicide that would otherwise be murder may be mitigated to manslaughter when it is 'committed in the heat of passion resulting from a reasonable provocation." State v. Funderberg, 225 N.J. 66, 80 (2016)(citing State v. Mauricio, 117 N.J. 402, 411 (1990)); N.J.S.A. 2C:11-4(b)(2).

Passion/provocation manslaughter has four elements: "the provocation must be adequate, the defendant must not have had time to cool off between the provocation and the slaying; the provocation must have actually impassioned the defendant; and the defendant must not have actually cooled off before the slaying." Robinson, 136 N.J. at 490 (quoting Mauricio, 177 N.J. 411).

To satisfy the "adequate provocation" element, "a jury must conclude that a reasonable person in the defendant's position would have been provoked sufficiently to 'arouse the passions of an ordinary man beyond the power of his control.'" Funderberg, 225 N.J. at 80 (quoting State v. King, 37 N.J. 285, 301-02 (1962)).

"The generally accepted rule is that words alone, no matter how offensive or insulting, do not constitute adequate provocation to reduce murder to manslaughter." State v. Crisantos, 102 N.J. 265, 274 (1986). However, while it is settled that words alone are not sufficient for adequate provocation, words in addition to a "menacing gesture" could be considered adequate provocation for passion/provocation manslaughter. State v. Bonano, 59 N.J. 515, 523-24 (1971). Respectfully, this is not such a case.

At the outset, as defendant concedes, the defense strategy was that the shooter was not the defendant. That it was either an intentional misidentification or a case of mistaken identity. (6T19-4 to 20-19; 21-21 to 22-3). The defendant opposed any

lesser includeds as they ran counter to his defense strategy. (5T161-24 to 162-4; 164-19 to 22; 165-13 to 16). It was not until after the Court determined that it had to charge aggravated manslaughter and reckless manslaughter that the possibility of a passion/provocation charge was discussed. (5T184-1 to 185-1). As the Court correctly noted, the provocation could not be words alone and the record was devoid of any additional provocation. There was no testimony that the defendant was acting in the heat of passion. See Cristanos, 102 N.J. at 279-280.

First, the testimony established that the defendant went to the residence. He was aware that he was not wanted there and he was told to stay away by the police. Not only did he voluntarily go there, he armed himself with a deadly weapon, the knife, and wore a mask to conceal his identity. This all occurred prior to the alleged provocation and demonstrates that his actions were premediated and not carried out in the heat of passion. If the defendant had the mental capacity to wear a mask to conceal his identity, it follows that he was not acting in the heat of the moment where his passions were inflamed beyond his power of control. See Funderberg, 225 N.J. at 80.

In any event, there is no evidence that the defendant was in anyway menaced with the handgun or that Derek pointed it at him. To the contrary, the evidence indicates that the gun was tucked into Derek's waistband behind his back and must have fallen out when Derek retreated up the stairs backwards. (5T120-15 to16). No

witness saw how the gun ended up on the stairs, but Candeisha saw the defendant grab the gun from the steps. (5T122-7 to 18). Candeisha is the only witness that placed the gun with Derek and she specifically testified that Derek never pulled the gun out and did not point it at anyone (5T124-19 to 21) and there is no evidence that contradicts this testimony.

The Court appropriately found that the testimony did not support a finding that there was a provocation to justify defendant's conduct warranting a passion/provocation charge. Contrary to defendant's argument, there is no testimony that Derek threatened anyone or brandished the gun. He was not involved in the altercation between John and the defendant over the knife. Further, the testimony was clear that the defendant was the individual in possession of the knife—he brought it with him to the residence. The defendant had the knife all night. He possession of the knife was reported to the police, by Latoya and Candeisha, prior to the shooting.

The defendant and Candeisha had been having issues for a few hours prior to the shooting. The police had been to the residence twice, one of which was for him having the knife, and the defendant was told to leave. Nevertheless, he voluntarily returned to the residence, armed with a knife (that both Latoya and Candeisha had indicated was in his possession) and attempted to gain entry into the home and was denied entry by John. At this point, Derek (and the gun) was upstairs getting

Candeisha. While Derek was coming down the stairs, the defendant was already arguing with John and then attempted to stab John with the knife. (5T115-16 to 21; 120-14 to 19; 124-2 to 4). The attack with the knife was already underway and the gun was still tucked into Derek's waitband behind his back out of sight from the defendant. The gun could not possibly have been the trigger, as the defendant suggests, for the assault. The record is completely devoid of evidence that the defendant was aware of the gun prior to him attacking John with the knife. It simply could not have been the trigger that set this tragic event in motion. Instead, it was the defendant voluntarily coming to a residence, armed with a deadly weapon, concealing his identity with a mask and attempting to forcibly gain entry when he knew he was not to be there. Simply put, the testimony demonstrates that the defendant caused the event and was not provoked.[1]

The defendant's reliance on State v. Carrero, 229 N.J. 118 (2017) is misplaced as the facts of this case are clearly distinguishable from those present in case. In Carrero, there was testimony concerning the prior arguments involving the defendant and the victim. Here, at most, there was testimony that Derek did not like the victim. There is no testimony concerning any ill will between the defendant and

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[1] Further, though not advanced by the defendant here, any disagreement between the defendant and Candeisha was further removed in time from the shooting and the defendant would have had a sufficient opportunity to cool down and there was no physical altercation between the defendant and Candeisha.

John, nor was there testimony that the defendant even knew who John and Derek were. Also present in Carrero is the testimony that the victim pulled a handgun on the defendant. Here, the testimony is exactly the opposite. The uncontroverted trial testimony was that Derek did not pull the gun or point it at the defendant. (5T12419 to 21). See Funderberg at 82 (declining to charge passion/provocation where there was insufficient evidence that the victim wielded the knife).

In Carrero the defendant elicited testimony at trial supporting passion/provocation and requested the instruction from the trial court. Here, there was no testimony that the defendant acted under passion or provocation and the defendant did not intend to seek a passion/provocation charge until the judge indicated she was charging other lesser includeds.

The defendant is now asking this court to infer passion/provocation when there is no evidence to support it. To the contrary, the evidence indicates that the defendant was attacking an unarmed man with a knife and Derek was descending the stairs and Derek never pointed the gun at the defendant. The evidence contradicts the inference the defendant is asking this court to draw. "An inference is a deduction of fact that may be drawn logically and reasonably from another fact or group of facts established by the evidence." Model Jury Charge-Inferences Theft by Receiving Stolen Property. Here, the evidence is exactly the opposite of the

inference that the defendant is seeking to be drawn—the proposed inference is not "logically and reasonably" flowing from the evidence and must be rejected.

There is no evidence that the victims did anything to the defendant beyond not allowing him into the residence where he was not wanted and the police told him to stay away from. The defendant voluntarily came to the residence and created the situation he is now claiming caused his passion/provocation. A defendant should not benefit when "he created the circumstances of his own passion or provocation..." State v. Harris, 141 N.J. 525, 572-73 (1995).

Likewise, the simple fact that an altercation took place is not enough, based on this record, to find a rational basis for a passion/provocation defense. In Carrero, there was testimony that the altercation was initiated by the victim when he pulled a gun. Carrero 229 N.J. at 124. In Mauricio, while the defendant was attempting to gain entry into a night club, he was forcibly removed and pushed by the bouncer; the defendant then returned, a second time, and was pinned behind the door and again pushed out by the bouncer. In Mauricio, like in Carrero there was testimony that the altercation was initiated by the intended victim, the bouncer.[2] In Cristanos, a case where the Supreme Court found there was no basis to charge passion/provocation, the testimony was that the victim attempted to land the first blow and kicked one of

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2 In Mauricio, the defendant actually killed a third party mistaking them to be the bouncer.

the defendants prior to the assault that led to the victim's death. Cristanos, 102 at 268-269. In State v. Canfield, 470 N.J. Super. 234 (App. Div. 2022)(affirmed as modified 252 N.J. 497 (2023)), another case where the Court found passion/provocation did not exist, the testimony presented was that the victim was coming towards the victim with an alleged HIV infected hypodermic needle after a verbal altercation when he was killed by the defendant. Canfield 470 N.J.Super. at 262-263.

All of these cases have two things in common that are distinguishable from the case before the Court. First, in every single one of them, there was testimony that victim initiated the incident—whether by striking the defendant first, brandishing a handgun or coming towards the defendant with the hypodermic needle. Here, there is no testimony that the victims initiated anything. At best, there was testimony that there was a "tussle" between the defendant and John when the defendant came to the home. The record is devoid of any testimony that John said or did anything that initiated the altercation, which is why it was proper for the trial court to find that there was no evidence of provocation. There was no testimony that a punch was thrown or any other specific action alleged. It was merely described as a "tussle" or struggle over the knife and that the defendant was trying to stab John with it. None of the witnesses were present when the incident started. Second, in

none of the cases, was identification an issue. Here, the defense was that the defendant was not the shooter.

In any event, the testimony before the jury was that the defendant came to the house, wearing a mask to conceal his identity and was armed with a deadly weapon. This is evidence that the action was premeditated and not a situation where the defendant was reacting out of passion, to a provocation, he could not control. There simply was no rational basis to charge the jury with passion/provocation.

The testimony was that it was the defendant who was armed with a deadly weapon and brandishing it against John. There is no testimony that John was armed. It is John and Derek that attempted to flee and were pursued by the defendant—armed with the knife, that was ultimately dropped on the steps when the defendant left the residence. There simply is not any evidence that the defendant can point to establish a provocation of the defendant. That is why this Court is being asked to leap to the inference that the gun must have been drawn—when there is not a scintilla of evidence to support this conclusion and it is at odds with the actual testimony that John was unarmed and Derek never pulled out or pointed the handgun.

In sum, like in Cristanos, passion/provocation was inconsistent with both the defendant and State's theories of the case and there was no testimony at trial indicating that the defendant was acting under passion or provocation. Cristanos at

280. Not one witness testified that the defendant acted in the heat of passion or was provoked in any way, therefore, there was no basis for the Court to charge the lesser included offense of passion/provocation manslaughter.

Point II. The Sentence Imposed was Appropriate and Does Not Represent an Abuse of Discretion

"For each crime in a series the court should impose a sentence, taking into account the appropriate aggravating and mitigating circumstances set forth in N.J.S.A. 2C:44-1(a) and -1(b), before considering whether the sentences should run consecutively or concurrently." State v. Rogers, 124 N.J. 113, 119 (1991). In the present matter, regardless of the Court finding that the aggravating factors quantitatively and qualitatively outweighed the mitigating factors, the defendant was sentenced to the mandatory minimum term of 30 years must do 30 years on the murder convictions and the mandatory 18 months must do 18 months on the aggravated assault that was subject to the Graves Act. The individual sentences on each of the counts could not have gotten better for the defendant. It was appropriate to run the sentences consecutively to each other and the overall sentence was fundamentally fair and appropriately tailored to the defendant and his actions.

The Court found Aggravating Factor Three. This factor was given significant weight. (8T24-20 to 23). While the court did cite the charges that were being dismissed by the State, there was ample support in the record, absent those charges, to support the finding that the factor should be given significant weight. The defendant, since becoming an adult had an almost constant string of incurring new charges or being incarcerated. He had three prior indictable convictions, including

one for a handgun offense where he was released from state prison twenty (20) months prior to the current offense. His third conviction for failing to register actually occurred between his release on the weapons offense and the current matter. In fact, he was on probation for that offense when he committed the murders and assault now before the Court. In addition to the indictable convictions, he had seven (7) disorderly person convictions and one (1) local ordinance violation. He has been given the benefits of fines and probation and has already served a five-year sentence in the custody of the state prison system. Nothing has deterred his criminal activity.

Additionally, the facts of this case also support the finding that the defendant will commit another offense. Here, the defendant went to the home having been already advised that he was not to be there. He blatantly ignored the instructions of the police to stay away; thus demonstrating his conscious disregard for the legal system. This factor was appropriately given significant weight.

Likewise, the Court found Aggravating Factor Six. This factor was given moderate weight. The finding of this factor was appropriate and does not appear to be disputed by the defendant.

Further, the Court found Aggravating Factor Nine. This factor was given significant weight and also does not appear to be disputed by the defendant.

Finally, the Court found Aggravating Factor One. The Court gave this factor moderate weight. The Court found that this factor was applicable due to the way in which the murders were committed. The fact that the defendant had the ability to leave at any point, yet he pressed his attack up the stairs firing multiple shots again and again. He did this despite knowing that a child was present in the home and her bedroom was on the second floor where he was pressing his attack. He was aware that Latoya, his girlfriend, also resided on the second floor. Candeisha, who was not involved in the events on the first floor was struck with a bullet demonstrates the recklessness and disregard demonstrated by the defendant. And the events, while already tragic, could have been even worse with the number of individuals, including a child, that were in the home. The Court rightly pointed out that the defendant did more than he needed to do to accomplish his goals. Both Derek and John were shot multiple times. The Court appropriately gave this factor moderate weight.

The Court additionally found Mitigating Factor Five and gave the factor slight weight.

Despite the Court finding that the Aggravating Factors substantially outweighed the mitigating factors, the Court imposed the mandatory minimum sentences for the two murders. The sentence on the aggravated assault was mandated by the Graves Act. N.J.S.A. 2C:43-6g.

So even assuming *arguendo* that the sentencing court committed error in the finding and weighing of the aggravating and mitigating factors (which the State disputes), it had no impact on the length of the individual terms as the sentence was mandated on the aggravated assault or the minimum allowable for the murder despite the Court finding that the aggravating factors substantially outweighed the mitigating factors.

The determinative argument on appeal is whether the sentences should run consecutive or concurrent to each other. As the defendant's separate acts committed against multiple victims clearly supported consecutive sentences, the sentence must be affirmed.

Appellate review of sentencing decisions is narrow and governed by the abuse of discretion standard. State v. Blackmon, 202 N.J. 283, 297 (2010). Only in exceptional cases should the trial judge's exercise of discretion be reversed. State v. Case, 220 N.J. 49, 65 (2014) (appellate courts afford considerable deference to the sentencing court provided that "the trial judge follows the Code and the basic precepts that channel sentencing discretion"). The sentence must be affirmed if it (a) meets all applicable guidelines; (b) if the judge's reasons for imposing sentence, after weighing all relevant aggravating and mitigating factors, were adequately explained and supported by the record; and, (c) the sentence does not shock the judicial conscience. State v. Roth, 95 N.J. 334, 364-66 (1984).

The court's decision whether to sentence consecutively or concurrently must be guided by the principle that "'there can be no free crimes in a system for which the punishment shall fit the crime.'" State v. Carey, 168 N.J. 413, 422 (2001) (quoting State v. Yarbough, 100 N.J. 627, 643 (1985)). To that end, the court should consider the extent to which:

> (a) the crimes and their objectives were predominantly independent of each other;
>
> (b) the crimes involved separate acts of violence or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims;
>
> (e) the convictions for which the sentences are to be imposed are numerous.
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> [Id. at 422-23 (quoting Yarbough, supra, 100 N.J. at 644).]

"[T]he Yarbough guidelines are just that-guidelines. They were intended to promote uniformity in sentencing while retaining a fair degree of discretion in the sentencing courts. As such, the five 'facts relating to the crimes' contained in Yarbough's third guideline should be applied qualitatively, not quantitatively." Carey, 168 N.J. at 427. "When a sentencing court properly evaluates the Yarbough

factors in light of the record, the court's decision will not normally be disturbed on appeal." State v. Miller, 205 N.J. 109, 129 (2011).

The Court, in explaining her reasoning in imposing consecutive sentences noted that there were three separate victims, that each shot was a separate act of violence and that Derek and John were shot multiple times, that when the defendant had the gun he could have left, but didn't. (8T28-13 to 29-3). Those findings by the Court are clearly supported by the record and do not represent an abuse of discretion.

Additionally, the shooting of the three victims were separate and distinct violent acts from each other. The testimony was that the defendant was in a tussle with John, not Derek or Candeisha. There was no need to shoot any of them, much less all three of them. They were distinct acts, committed multiple times in the case of Derek and John.

Our Courts have clearly held that, "(C)rimes involving multiple deaths or victims who have sustained serious bodily injuries represent especially suitable circumstances for the imposition of consecutive sentences." Carey at 428. This is due to the fact that the "total impact of singular offenses against different victims will generally exceed the total impact on a single individual who is victimized multiple times." Id. at 429. See also State v. Roach, 146 N.J. 208, 230 (1996)(consecutive sentences based on two convictions for felony murder not an abuse of discretion because of multiple victims); State v. Jang, 359 N.J. Super. 85,

97 (App. Div. 2003)(consecutive sentences for murder of wife and attempted murder of husband affirmed even without statement of reasons from sentencing judge as they "were individual crimes with two separate victims").

In State v. Molina, 168 N.J. 436 (2001), consecutive sentences were affirmed when the only Yarbough factor supporting the imposition of consecutive sentences was that there was multiple victims. Citing to Carey the Court held that the multiple victim factor should be given "great weight". Id. at 442-443.

While the Court did not explicitly address the overall fairness of the sentence. The analysis can be gleaned from the transcript and the sentence imposed was fundamentally fair. The defendant was convicted of two counts of murder and one count of aggravated assault. Two individuals lost their lives and another suffered a gunshot wound. And while the murder convictions were run consecutive to each other, the terms of imprisonment were the lowest possible—despite the judge finding that the aggravating factors substantially outweighed the mitigating factors. If the Court was not looking at the overall fairness of the sentence, the terms of imprisonment on each count should have been substantially higher based on the court's aggravating and mitigating factor analysis. Instead, it is clear the Court considered the overall length of the term of imprisonment when she factored in that the sentences should have been consecutive under Yarbough. The Court appeared focused on the fairness of the overall sentence and avoided using similar factors to

increase of the lengths individual terms and also using them to impose consecutive sentences. State v. Miller, 108 N.J. 112 (1987).

This was a sentence for the murders of two individuals. The facts of this case are markedly different than those in State v. Torres, 246 N.J. 246 (2021) relied upon by the defendant. This sentence does not shock the conscious, it was rational and proportional to the charges on which the defendant was convicted and the character of the defendant. The Court did not abuse its discretion.

In regard to the restitution awarded, the defendant stipulated to the amount and the entry of the Order. (8T13-10 to 16). While ultimately the State relies on the sound discretion of this Court, it seems if the defendant contests his ability to pay a restitution award, that should have been raised at the Court below, when he consented to the entry of the order, and not, for the first time, on appeal.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the defendant's convictions and sentence be Affirmed.

Respectfully submitted,

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SALEM COUNTY PROSECUTOR

By: 
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005842003

August 19, 2024

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REPLY LETTER BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3367-22
INDICTMENT NO. 21-03-00223

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Salem County.
DESMOND D. LANE,	:	Sat Below:
Defendant-Appellant.	:	Hon. Linda L. Lawhun, P.J.Cr., and a Jury.
		DEFENDANT IS CONFINED

Your Honors:

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

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Desmond D. Lane respectfully refers this Court to the procedural history and statement of facts set forth in his brief previously submitted in this matter.

LEGAL ARGUMENT

In reply to the State's brief, Mr. Lane relies on the arguments made in his previously filed brief and adds the following:

POINT I

THE EVIDENCE AT TRIAL THAT MR. LANE WAS IN A PHYSICAL ALTERCATION WITH TWO MEN—ONE OF WHOM WAS ARMED WITH THE HANDGUN THAT ULTIMATELY BECAME THE LETHAL WEAPON—WAS SUFFICIENT UNDER THE LAW TO REQUIRE THE TRIAL COURT TO INSTRUCT THE JURY ON PASSION/PROVOCATION MANSLAUGHTER UPON REQUEST BY DEFENSE COUNSEL.

Several aspects of the State's response to Mr. Lane's passion/provocation argument warrant a brief reply.

First, the State repeatedly harps on the idea that, because Mr. Lane went to the house (where he lived) knowing he was not wanted there by his romantic partner's daughter, Candeisha Hill, he may have had some blame in the beginning of the argument and, thus, was precluded from receiving an

instruction on passion/provocation manslaughter. (Sb8-10).[1] For several reasons, this argument falls short. As an initial matter, Mr. Lane was not solely responsible for the events that ensued. Ms. Hill returned to the house with the two victims (and others) with an eye towards potentially confronting Mr. Lane. (5T107-5 to 109-12). Specifically, when Ms. Hill told her brother, Derek Akins, what had been going on that night, he was very angry and told her to bring him to the house. Moreover, there was no testimony that Mr. Lane initiated the physical fight that ended in the shooting, or even that he started the verbal confrontation that preceded the physical fight.[2] Nor did Mr. Lane introduce a gun into the situation; rather, it was Ms. Hill's brother, who insisted she bring him to the house, who was armed with the handgun.

Regardless, even assuming for the sake of argument Mr. Lane did have some substantial culpability in the altercation preceding the shooting, "[t]he issue here is whether a reasonable person would have been provoked, not whether a reasonable person would have engaged in conduct that incited the alleged provocation." State v. Mauricio, 117 N.J. 402, 415 (1990). In other

[1] Sb = State's respondent brief
5T = trial transcript dated February 23, 2023

[2] Indeed, the testimony suggests the opposite: the initial argument started because the other victim, Candeisha's cousin John Robinson, "said something" to Mr. Lane. (5T90-25 to 91-1).

words, it does not matter for purposes of passion/provocation manslaughter if Mr. Lane had some fault in the initial argument when one of the people with whom he was arguing was armed with, and may have brandished, a loaded handgun. State v. Taylor, 350 N.J. Super. 20, 41 (App. Div. 2002) ("[W]e need not consider whether defendant 'started' the verbal confrontation since, by the time the altercation became physical, defendant was not the only one armed."). Nor does it matter that Mr. Lane might not have known about the gun in the very beginning of the argument. Ibid.

In this vein, the State also argues that this case is distinguishable from Mauricio because in that case "there was testimony that the altercation was initiated by the intended victim, the bouncer." (Sb12). That statement misrepresents the facts of the case. The physical altercation between the bouncer and Mauricio did not spring out of nowhere: Mauricio was being (appropriately) refused entry into the club because of his inebriated misbehavior, and then he directly initiated the second altercation by trying to get in a second time while armed with a gun. Mauricio, 117 N.J. at 405-06.

Indeed, the facts of this case are much more in line with a passion/provocation instruction than Mauricio. To summarize the events in Mauricio: the defendant was initially "nudge[d]" out of the club by the bouncer; the defendant left and returned twenty minutes later with a sawed-off shotgun

hidden under his coat; Mauricio instigated a second altercation with the bouncer by trying to go back into the club; then, fifteen minutes later, Mauricio shot a random passerby he believed to be the bouncer. Id. at 405-09. Such facts are much more conducive to a premeditated murder than anything in Mr. Lane's case. Here, much like State v. Carrero, 229 N.J. 118 (2017), it was the victim who was armed with a handgun, and the shooting occurred in the midst of the initial and only physical altercation.

The State's brief also repeatedly asserts that there is "no testimony that Derek threatened anyone or brandished the gun." (Sb9, Sb13). As argued below and in the appellate brief, however, even if there was no direct testimony on this point, it was certainly a reasonable inference that Mr. Akins may have been brandishing the gun: he was armed with the gun; he brought the gun to the house to potentially confront Mr. Lane; he was in a physical fight with Mr. Lane; and the gun obviously came out into the open enough for Mr. Lane to purportedly take control of it. Indeed, common-sense-wise, it would be more surprising if he did not take out his gun during the fracas. That Ms. Hill said she did not specifically see her brother brandish the gun is hardly dispositive; she may have missed it in the chaos of the situation, or she may not have been truthful. In short, it is far from some otherworldly leap of logic to say Mr. Akins might have pulled out the gun he was armed with during the altercation, and any reasonable

inference in favor of passion/provocation must be drawn for purposes of this argument. See Mauricio, 117 N.J. at 417 (accepting that the bouncer may have been bigger than Mauricio although there was no trial record of the size of the bouncer).

Moreover, even if Mr. Akins did not specifically brandish the gun, it is the "presence" of the gun that established sufficient provocation; it does not need to specifically be wielded against the defendant provided the person with whom the defendant is arguing is visibly armed with it. Carrero, 229 N.J. at 129.

Finally, it must be reemphasized that an evaluation of the trial record for this "low threshold" issue must be in "a light most favorable to the defendant," considering "all inferences that logic and common sense will allow." Mauricio, 117 N.J. at 412, 417 (citations and internal quotations omitted). The State's brief mostly does the opposite of this, taking every inference against the instruction and rejecting out of hand any inference in its favor. The test, however, is not whether the State or this Court believes that "a jury might easily reject defendant's view of the facts and draw inferences different from those reached in defendant's brief . . . ." Id. at 415. If there is any "room for dispute" as to whether the killings could have been the result of passion/provocation, it must have been submitted to the jury. Ibid.

Accordingly, because there was a rational basis in the record for an instruction on passion/provocation manslaughter, the trial court was required to provide that instruction, and the failure to do so was reversible error.

POINT II

THE TRIAL COURT'S ERRORS IN THE ANALYSIS OF THE AGGRAVATING FACTORS REQUIRE A REVERSAL AND WHOLESALE RESENTENCING, AS DO THE UNCONTROVERTED ERRORS WITH RESPECT TO THE IMPOSITION OF CONSECUTIVE SENTENCES.

As to the respondent's sentencing arguments, several additional issues require clarification.

First, it is notable that the State essentially concedes that the trial court's consideration of offenses Mr. Lane was charged with but that were about to be dismissed in assigning significant weight to aggravating factor three was improper. (Sb16). The State instead largely arguing that the error was harmless. However, Mr. Lane is entitled to a sentence imposed by consideration of appropriate factors under the Code regardless of whether the State or this Court believes that the ultimate outcome was not excessively unjust. See State v. Sutton, 132 N.J. 471, 486 (1993) (holding, although it did not regard sentence as abuse of discretion, new sentencing was nonetheless required because "confidence in the ultimate sentencing determination will be enhanced

substantially by a sentencing proceeding that incorporates the deliberation and exercise of reasoned discretion . . .”). These dismissed offenses were used to give aggravating factor three “significant weight.” It is imperative that the trial court’s assessment of the aggravating factors is not improperly tilted by factors the court is not permitted to consider.

Similarly, the State also acknowledges that there was no overall-fairness analysis as required by State v. Torres, 246 N.J. 246, 268 (2021), but instead argues that the “analysis can be gleaned from the transcript and the sentence imposed was fundamentally fair.” (Sb22). Torres explicitly states, however, that “[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding or in multiple sentencing proceedings, is essential to a proper Yarbough sentencing assessment.” 246 N.J. at 268 (emphasis added). Moreover, Mr. Lane was functionally sentenced to the most severe sentence a person can receive in our state: life without the possibility of parole. Accordingly, it is imperative that the trial court make an “explicit” assessment of this “essential” issue.

As to the more heavily disputed error, although it did not request aggravating factor one at the sentencing, the State nonetheless asserts on appeal it was not error for the trial court to sua sponte apply that extraordinary and rarely applied aggravating factor. To avoid simply repeating the arguments made

in Mr. Lane's appellant brief on this point, it should suffice to say that the State's brief does nothing to support this factor. It is always true that a defendant could have decided not to commit the crimes he has been convicted of, and it is nearly always true that the facts of the case "could have been worse." (Sb18). None of this supports a finding that the crimes were "committed in an especially heinous, cruel, or depraved manner." N.J.S.A. 2C:44-1(a)(1). Nor does the State say anything about the fact that much of the trial court's reasoning on this factor constitutes impermissible double-counting. See State v. Fuentes, 217 N.J. 57, 74-75 (2014).

With respect to the errors in the trial court's assessment of the aggravating and mitigating factors, the State argues that, even if they are errors, they are irrelevant because Mr. Lane got the statutory minimum on his individual convictions, and thus, the only relevant issue is the imposition of consecutive sentences. (Sb19). Again, the express words of Torres completely contradict this argument:

> although the evaluation of aggravating and mitigating factors occurs when setting the sentence within the range applicable to each offense, sentencing is a holistic endeavor. A court performing the Yarbough fairness assessment must be mindful that aggravating and mitigating factors and Yarbough factors . . ., in their totality, inform the sentence's fairness. All are relevant to the overall fairness of the aggregate sentence imposed on the sole defendant before the court.

[Torres, 246 N.J. at 449.]

In other words, there is no meaningful way to completely extricate the aggravating/mitigating-factor analysis from the consecutive/concurrent-sentence analysis; such errors impact the overall-fairness assessment that is essential for determining the aggregate length of the sentence.

Finally, the State's brief insinuates that this Court should find no error with the sentencing court's analysis because it could have imposed a heavier sentence. (Sb16, 22). Unless Mr. Lane miraculously lives to be 90 years old while incarcerated, he is going to die in prison under his current sentence. There is significant daylight between the minimum of a 30-year aggregate sentence that could have been imposed and the 61.5-year sentence he is currently serving. Accordingly, it is imperative that a sentencing analysis be conducted that is free from significant error.

CONCLUSION

For the reasons expressed herein, Mr. Lane's convictions must be reversed and the matter remanded for a new trial, or, alternatively, his sentences must be vacated and the matter remanded for a reduced sentence.

Respectfully submitted,
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BY: 

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Dated: August 21, 2024