SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3391-21T4

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, Camden County.
JERMAINE VENABLE,	:	
Defendant-Appellant.	:	Indictment No. 2532-10-18-I
	:	Sat Below:
	:	Hon. Gwendolyn Blue, J.S.C. and a Jury.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Early one morning, a person on a bicycle shot into a car, killing one of the passengers inside, Jonathan Rojas. That bicyclist then got into a car driven by Dametre Tokley.

The State believed that the shooter was defendant Jermaine Venable and charged Venable with murder. Venable maintained his innocence and argued that Tokley committed the crime with Nasir Mason, whose fingerprint was found on Tokley's car and who was dealing heroin, as was Rojas. Three errors prevented the jury from properly considering whether the State had proven its case against Venable.

First, over defense objection, the State was allowed to elicit testimony from a ballistics expert that the ammunition found at the scene and in the victim was definitely fired from the gun later recovered from the home Venable entered the morning of the shooting. This testimony was not scientifically reliable and had the highly prejudicial effect of improperly connecting the alleged murder weapon to Venable.

Second, also over defense objection, the trial court limited the scope of testimony the defense sought to elicit about Nasir Mason. The defense was prohibited from informing the jury that Mason and Rojas both sold heroin and that the brands of heroin they sold were different. Instead, the jury heard only

that Mason was arrested six weeks before the shooting for dealing unspecified drugs a block and a half away from the scene of the shooting. Keeping from the jury the critical information about the kinds of drugs Mason was selling was unjustifiable and made the third-party guilt defense significantly less compelling.

Third, the jury was given a legally incorrect theory of accomplice liability for murder and was not given sufficient instructions about the State's obligation to prove the identity of the shooter. The State told the jury it could convict Venable of murder if he assisted Tokley afterwards, a flatly incorrect statement of law. The jury instructions did not correct that misstatement and further did not instruct the jury that the State's burden to prove Venable was the shooter was the same high burden as the other, enumerated elements of the offense.

For each of these reasons separately and all of these reasons together, Venable's convictions must be reversed.

PROCEDURAL HISTORY

Camden County Indictment Number 2532-10-18 charged defendants Jermaine Venable and Dametre Tokley with: murder, contrary to N.J.S.A. 2C:11-3a(1)(2) (Count One); conspiracy to commit murder, contrary to N.J.S.A. 2C:5-2 (Count Two); attempted murder, contrary to N.J.S.A. 2C:5-1 (Count Three); second-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(1) (Count

Four); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count Five); and second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b (Count Six). (Da 1-10) Venable was separately charged with second-degree certain persons not to have weapons, contrary to N.J.SA. 2C:39-7b(1) (Count Seven), and first-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(j) (Count Eight).

Defendants' cases were severed, and Venable's trial on Counts One through Six began on February 7, 2022, before the Honorable Gwendolyn Blue, J.S.C., and a jury. (6T) The jury acquitted Venable of Count Three and convicted him of the remaining counts on February 23, 2022. (15T 60-11 to 61-19) On February 24, trial was held on the two certain persons counts, and Venable was convicted on both counts. (16T 43-9, 61-4)

On June 9, 2022, Venable was sentenced to an aggregate term of life in prison. (17T 44-22 to 25) The trial court sentenced Venable to life on Count One and merged Counts Two and Five into that count. (17T 40-2 to 43-25) The following sentences were set to run concurrent to Count One: 10 years with 85% parole ineligibility on Count Four; 10 years with five years of parole ineligibility each on Counts Six and Seven; and 20 years with 10 years of parole ineligibility on Count Eight. (17T 40-2 to 43-25) A notice of appeal was filed on July 8, 2022. (Da 63-66)

STATEMENT OF FACTS

On July 30, 2018, at around 7:42 in the morning, a person on a bicycle shot into a car, killing Jonathan Rojas. (7T 64-13, 9T 92-11 to 14) That person then got off the bicycle and into a car. (Da 21 - Slide 10) The State's theory was that Venable was the person on the bicycle that co-defendant Dametre Tokley, was the driver. (14T 101-7 to 13) The defense theory was that Venable was not involved in the shooting and that Nasir Mason and Tokley were responsible. (14T 40-2 to 18)

Police arrived at 1123 Newton Avenue in Camden that morning after a report of shots fired. (7T 64-10 to 16) Jonathan Rojas had been shot, was taken to the hospital, and died from his injuries. (6T 122-5 to 14, 9T 92-11 to 14) Devon Fisher was also in the car (6T 74-21); no evidence that he was injured presented at trial. Inside the car, 89 baggies of heroin, labeled "Call of Duty" were found. (9T 10-24 to 11-6) Officer Matthew Barber of the Camden County Prosecutor's Office testified that both Fisher and Tokley were suspected of dealing drugs in the area of the shooting. (12T 238-12 to 21) Shell casings and a suspected bullet specimen were found at the scene; other bullet specimens were recovered at the autopsy. (8T 18-9 to 31-14, 9T 106-7 to 9)

The police investigation initially centered on recovering video footage from many locations around the area of the shooting. (7T 70-1 to 127-21) The video

depicts a person — wearing light pants, a black shirt, a mask, and a hat — on a bicycle shooting into a car and later being picked up by a person driving a Chevrolet. (11T 89-11 to 18; Da 21 – Slide 10) There was no eyewitness to the shooting, but there was one witness who saw the bicyclist afterwards. Alan Franchi testified that he saw a "person dressed all in black, black mask, everything riding a bike" holding something in his hand that morning. (6T 36-7 to 9) Franchi further testified that the man got off his bicycle, which he left on the side of the street, and got into a silver SUV with license plate P63FBB. (6T 38-13 to 41-2) He told officers that the man looked tall and thin. (6T 56-3 to 21) The defense asserted at trial that Venable was not thin at the time of the shooting. (14T 38-11 to 17) The car was registered to Isabel Santiago. (8T 12-6 to 12)

Officers found that Chevrolet parked at 715 Thurman Street. (11T 90-6) They conducted surveillance on the Chevrolet, during which time they saw Venable and Tokley enter a store, then go to 1567 South 8th Street, then approach the car. (9T 117-7 to 120-4) Both men were stopped and taken into custody. (9T 120-8)

Venable gave a statement after his arrest, which was played for the jury. (11T 101-16 to 196-22) In that statement, Venable denied knowing anything about a shooting or being involved in a homicide. (11T 192-8 to 193-23) Venable explained that he stays at 1511 South 8th Street, where the mother of his child lives. (11T 104-19 to 112-21) The night before the shooting, however, he had

stayed at a motel. (11T 111-10) He told officers that in the morning he was picked up by his cousin, Tokley, who dropped him off at 1511 South 8th Street and picked him back up later. (11T 116-19 to 125-21) Venable said that at some point, Tokley picked up a person called "Naz" and dropped him off at a store near the scene of the shooting. (11T 132-2 to 139-6) At the time of his arrest, Venable was wearing Nikes. (11T 168-2 to 5) The shooter appeared to wear Nikes as well. (Da 21 – Slide 37) Presented with a picture of the shooter, Venable told officers that person was not him. (11T 168-14 to 169-8)

When the Chevrolet was processed for evidence, fingerprints were found on the outside. (8T 57-18 to 24) The prints from the exterior of the Chevrolet were sent to the Automated Fingerprint Identification System (AFIS) for comparison. (8T 58-10 to 13) One of the fingerprints from outside the car returned as potentially matching Nasir Mason. (12T 225-5 to 14) The defense argued that Nasir Mason was "Naz," whom Venable said Tokley picked up the day of the shooting. (14T 40-2 to 18) The defense attempted to elicit that Mason was arrested a block away from the scene of the shooting a month and a half before the homicide for dealing heroin, the same drug found in Rojas's vehicle, with different branding than Rojas's, but was allowed to elicit only the date and location of the arrest and that it was for possessing and distributing undisclosed CDS. (9T 125-18 to 131-5) The undue restriction on the defense's presentation

of its third-party guilt defense is the subject of Point II, infra. Officer Barber testified that he did not consider Mason a suspect and did not investigate him. (12T 263-20 to 21)

No light-colored pants, such as the shooter was wearing, were found in the Chevrolet. (9T 36-18 to 38-14) Two hats, gloves, mask, and a sweatshirt were found. (8T 91-8 to 98-9) There was not sufficient DNA found on any of these items for comparison. (10T 59-1 to 65-13)

Demetrise Williams was friends with Venable and lived at 1567 South 8th Street. (7T 39-13 to 16, 129-13 to 18) She testified that Venable lived at his girlfriend's house down the block at 1511 South 8th Street. (7T 53-18 to 20) Venable had told her the night before that he had argued with his girlfriend, she had kicked him out, and he asked if he could stay with Williams. (7T 51-2 to 8) Williams agreed. (7T 38-1) Venable called her that morning at 7:49 and 7:51 to ask if he could come by. (7T 37-1 to 6) Williams told him he could, and he arrived five to ten minutes later, carrying an inflatable mattress in a box, which he put in the closet in the living room. (7T 38-5 to 39-10) Williams testified that Venable left and then came back later with his cousin. (7T 46-17 to 47-9)

After Venable and Tokley were arrested leaving Williams' house, it was searched. (6T 154-17 to 19) Officer Andrew McNeil of the Camden County Prosecutor's Office testified that a gun fell out of the closet in the living room

while he was conducting a search. (6T 161-11 to 14) McNeil did not see what the gun fell out of. (6T 180-15 to 21) The search he was conducting was not photographed as it proceeded. (9T 43-8 to 44-10) McNeil did not write a report about finding the gun. (6T 180-22 to 23) Charles Andrew Bodgen of the New Jersey State Police testified that he conducted a search and did not find a gun permit or an application for a permit submitted by Venable. (10T 8-3 to 21)

The gun was a central piece of evidence. No fingerprints or usable DNA were found on it. (8T 75-20, 10T 56-20 to 58-19) Edward Burek Jr., of the New Jersey State Police, testified as an expert in firearms and tool mark identification. (11T 22-1 to 6) Before trial began, the defense moved to limit his testimony to what is scientifically valid — that the casings, bullets, and gun shared "class characteristics." (Da 22-43) The denial of that motion is the subject of Point I, infra. Burek testified that the "discharged metal jackets" found at the scene were "discharged from that submitted firearm," found in Williams's closet. (11T 45-14 to 22) He also testified that three bullet fragments found during the autopsy were "discharged from the submitted pistol." (11T 52-19 to 23)

An affidavit written by Tokley was read into the record. In it, Tokley wrote that he placed the gun in the closet and he did so alone. (13T 20-19 to 21-4)

In closing, the defense pointed out that the State did not obtain video from surrounding streets that would corroborate Venable's alibi that he was at 1567

8th Street at the time of the shooting and failed to pursue Mason as a suspect. (14T 27-14 to 29-17) The defense argued forcefully that Mason had the motive and opportunity to commit the shooting, noting that he was dropped off by Tokley three blocks away from the shooting, this his fingerprints were on Tokley's car, and that he was known to be involved in drug dealing in the same area Rojas had been dealing drugs. (14T 40-5 to 18)

LEGAL ISSUES

POINT I

THE TRIAL COURT ERRED IN ALLOWING UNRELIABLE EXPERT TESTIMONY PURPORTING TO DETERMINE THAT THE GUN FOUND WHERE DEFENDANT WAS STAYING WAS THE ONE THAT FIRED THE SHOTS THAT KILLED THE VICTIM. (5T 123-10 to 128-14)

On February 1, 2022, the defense filed a motion to limit the testimony of the State's firearms expert to that which is scientifically supported.[2] (Da 22-43) Specifically, the defense argued that the expert must be precluded from asserting that the bullets or casings "matched" or conclusively came from a specific firearm, instead opining only that these items share certain characteristics common to a class of firearms. (Da 26, 29-43) The trial court erroneously denied

[2] It seems that originally the State proffered two firearms examiners, but only one testified at trial to all of the conclusions originally proffered by both. (Da 22; 11T 19-3 to 71-19) The defense did not object to the expert substitution.

this motion without engaging with the merits of Venable's argument, holding merely that "Defense Counsel has failed to meet her burden." (5T 126-10 to 20) Because defense counsel has no burden, but, rather, the proponent of the evidence — the State — has the burden to demonstrate the soundness of scientific evidence it seeks to admit, and because the State's expert strayed further in his testimony than what is scientifically supportable, the trial court's ruling was incorrect. The admission of this unreliable but compelling evidence deprived Venable of his rights to due process and a fair trial. U.S. Const. amend. XIV; N.J. Const. art. I, ¶¶ 1, 9, and 10. The convictions must be reversed.

A. The Trial Court Has a Duty to Ensure that Only Reliable Forensic Testimony is Admitted.

Trial judges serve as "gatekeepers" to "ensure that proceedings are fair to both the accused and the victim. In that role, they must assess whether expert testimony is sufficiently reliable before it can be presented to a jury." State v. J.L.G., 234 N.J. 265, 308-09 (2018). The court does so by determining whether the proffered evidence is admissible under the N.J.R.E. 702, which provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." In order for evidence to be admissible under N.J.R.E. 702, three requirements must be met:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror;
>
> (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and
>
> (3) the witness must have sufficient expertise to offer the intended testimony.

State v. Kelly, 97 N.J. 178, 208 (1984).

"For an opinion to be admissible under N.J.R.E. 702, the expert must utilize a technique or analysis with 'a sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of the truth.'" State v. J.R., 227 N.J. 393, 409 (2017) (emphasis added) (quoting Kelly, 97 N.J. at 210). "[O]ne of the criteria under N.J.R.E. 702 for the admissibility of expert testimony is that the testimony be based on reasonably reliable scientific premises." State v. Raso, 321 N.J. Super. 5, 17 (App. Div. 1999) (internal quotation marks omitted).[3]

[3] At the time of trial, New Jersey courts were assessing the admissibility of evidence under the Frye standard, which places the burden on the proponent of the evidence to clearly establish that the theory or technique has "gained general acceptance in the particular field in which if belongs." State v. J.L.G., 234 N.J. 265, 280 (2018). Since then, our courts have moved to a standard that stems from Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). State v. Olenowski, 2023 N.J. LEXIS 206 (2023). Under Olenowski, trial courts must assess new factors to determine whether a scientific theory is sufficiently reliable to be admitted. Olenowski, 2023 N.J. LEXIS at *27 (the factors are (1) whether the scientific theory can be or has been tested; (2) whether it has been subjected to peer review and publication; (3) the known and potential rate of error as well as the existence of standards governing the operation of the

As explained below, the premise that a firearm examiner can conclusively determine that ammunition came from a single gun has never been established. Therefore, the preeminent scientific reviews of firearm examination have concluded that such assertions are unsubstantiated. When confronted with a motion to limit the firearm examination testimony to that which has actually been proven to be true, the trial court erred in denying that motion out of hand. In so doing, it allowed unreliable and very compelling expert evidence to come before the jury. The convictions must be reversed.

B. Firearms and Tool Mark Examination – A Primer

Firearm and tool mark examination (FTE) is the practice of purporting to determine what tool left a mark on another object. Robert Thompson, Firearms Identification in the Forensic Laboratory at 7 (2010) (Da 67-101). At issue in this case is the subspecies of FTE when the tool at issue is a firearm (this is often referred to as "ballistics" evidence or examination).

The fundamental idea in this ballistic examination is that the "tool surface" of different parts of the gun, such as the interior of the barrel or the firing mechanism, leave marks on the softer metal that a bullet or its casing is made

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particular scientific technique; and (4) general acceptance in the scientific community). The ultimate question that must be answered under both standards is whether the proponent has demonstrated the reliability of the scientific testimony it is seeking to admit. Id. at *21-22, 30-31.

out of. Ibid. In a case such as this one, where the examiner must determine whether certain pieces of ammunition (bullets and their casings found at the murder site and retrieved at the autopsy) came from a specific gun (the "suspect" gun, found at 1567 8th Street), examiners test fire the gun into a water tank to generate test bullets and cartridges. Ibid. Examiners compare those test ammunitions to those recovered from the scene to determine if they are a "match"—if the examiner determines that they are, he opines that the ammunition from the scene came from the suspect gun. Examiners have not updated their approach to answering this question over the last 80 years: they use a comparison microscope to view two bullets or cartridges side by side, and make a determination based on the correspondence or lack thereof of the markings that they observe. Id. at 8.

According to firearm analysis, firearms have class characteristics and individual characteristics. The existence of class characteristics is uncontroversial. Class characteristics are the features predetermined by a manufacturer and thus common to all guns of certain makes and models. Id. at 8-9. In other words, class characteristics are measurable features that are common to a class of firearms that are intentionally made by the manufacturer. National Research Council, Forensic Science in the United States: A Path Forward 152 (2009) [hereinafter A Path Forward] (Da 102-484). The class

characteristics of the gun are imparted on bullets and their casings when they are fired. Thompson at 8. For instance, the "the number of grooves cut into the barrel of a firearm and the direction of 'twist' in those grooves are class characteristics," which result in certain "rifling" marks on the ammunition that passes through the bullet as it is ejected. A Path Forward at 152. Any ammunition fired by a gun with those grooves — which many guns of many makes and models share — will demonstrate the same "rifling" impressions. Thompson at 15. Those particular impressions on ammunition found at a crime scene "can filter and restrict the range of firearms" that are capable of leaving those impressions. A Path Forward at 152. A bullet with wide groove impressions could not have been shot from a gun that predictably leaves narrow groove impressions as a result of the deliberate design of the barrel. Thompson at 15.

More controversial, and at issue in this case, is the existence of so-called individual characteristics. Firearms examiners believe that individual characteristics in a firearm result from imperfections on tool-cutting surfaces during the firearm manufacturing process, as well as through "'wear and tear of the firearm.'" President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Validity of Feature-Comparison Methods 104 (2016) [hereinafter PCAST Report] (Da 485-59). Firearms examiners assume that as a result of these imperfections, each firearm leaves a

unique set of patterns or marks on bullets or casings that are ejected from that firearm. PCAST Report at 105.[4] These supposed individual characteristics are only evident under a microscope. Thompson at 9.

In a case such as this one, the examiner fires a test bullet from the suspect gun and compares the bullets and casings recovered from the tests to the bullets and casings recovered from the scene. (11T 45-15 to 46-16) He first determines if the class characteristics demonstrated by the firearm and ammunition are shared. Thompson at 9. If so, the examiner moves on to consider individual characteristics under a microscope. Ibid. If the examiner finds "sufficient agreement" between the individual characteristics seen in the two sets of ammunition, he declares a match and concludes that the ammunition found at the scene came from the suspect gun. Association of Firearm and Tool Mark Examiners, AFTE Theory of Identification As it Relates to Toolmarks, https://afte.org/about-us/what-is-afte/afte-theory-of-identification (Last visited May 1, 2023) (Da 580). No standard or protocol, however, dictates how many

[4] Another classification is of subclass characteristics, defined as features left on multiple items fabricated by the same tool; imperfections on the tool's cutting surface are imparted on a series of weapons. A Path Forward at 152. While class characteristics are well-defined, firearms examiners lack defined standards for distinguishing between subclass characteristics, which are shared by multiple firearms, and individual characteristics, which are not. PCAST Report at 113; A Path Forward at 153. The examiner in this case did discuss any supposed subclass characteristics.

characteristics the examiner must find in agreement to declare a match. PCAST Report at 60. Instead, firearms examiners utilize a subjective pattern matching methodology that allows each examiner to set his or her own criteria based on training and experience. See ibid.; see also National Research Council, Ballistics Imaging 54 (2008) [hereinafter Ballistics Imaging] (Da 581-891). The Association of Firearm and Tool Mark Examiners (AFTE), the leading proponent of the validity of firearms examination, states that "the interpretation of individualization/identification is subjective in nature, founded on scientific principles and based on the examiner's training and experience." AFTE Theory of Identification.

Put differently, there is no standardized guideline informed by empirical research that defines "sufficient agreement" such that an examiner can identify the firearm which expelled a particular bullet or casing. "Sufficient agreement" means whatever the examiner believes it to be in any given case.

C. There Is No Scientific Basis For The Claim That Firearms Examiners Can Definitively Determine That Ammunition Came From A Specific Gun. Testimony that Purports That Purports To Do So Is Unreliable.

As with much forensic evidence, firearm examination evidence has been admitted in trials for decades, without its fundamental assumptions being tested, let alone proven correct. So although it is true, as the trial court noted, that firearm examination evidence has been admitted in New Jersey for decades, that

admission is not the byproduct of rigorous gatekeeping and standard setting. Rather, it has been the byproduct of inertia and a lack of scrutiny of the underpinnings of firearm examination. Since 2008, three different reports have been issued by preeminent groups of scientists, calling attention to the deficits in the evidence base for the reliability of firearm examination and raising concerns about its use in court. Relying on these reports, Venable sought not to bar entirely the testimony of the states' experts, but to limit that testimony to that which is scientifically reliable.

Two of these reports were issued by the National Research Council, part of the National Academic of Sciences. The National Academy of Science, together with the National Academies of Engineering and Medicine, were founded by an Act of Congress and "provide independent, objective analysis and advice to the nation and conduct other activities to solve complex problems and inform public policy decision." National Academy of Sciences, Organization, http :// www.nasonline.org/about-nas/organization/ (Last Visited April 17, 2023). The 2008 report by NRC concluded that the "validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated," and accordingly called for significant research to place even the basic premises of firearms examination on "solid scientific footing." Ballistics Imaging at 82.

The second report from the NRC was issued in 2009. A Path Forward. After adopting and incorporating the conclusions of Ballistics Imaging, the report expressed concern that despite the "challenging" nature of distinguishing between marks left by the same or different firearms/tools, "the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates." Id. at 153-54. Nor could the NRC discern any standards sufficient to guide examiners in that endeavor, noting that "a fundamental problem with toolmark and firearm analysis is the lack of a precisely defined process," and criticizing the AFTE Theory of Identification for failing to "provide a specific protocol," and "not even consider[ing], much less address[ing], questions regarding variability, reliability, repeatability, or the number of correlations needed to achieve a given degree of confidence." Id. at 155. And, as to the research that could help flesh out such protocols, the NAS report could say only that (1) "sufficient studies have not been done to understand the reliability and repeatability of the methods," and (2) "the scientific knowledge base for toolmark and firearms analysis is fairly limited." Id. at 154.

The 2009 report concluded that firearms examination evidence lacks "any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline." Id. at 107-08. The report

acknowledged that examiners are capable of the fairly simple task of narrowing the pool of possible firearms matches using class characteristics, but the discipline and its methodology had not been demonstrated to consistently link bullets or cartridges to a particular source. Id. at 154. This recognized scientific limitation is what the defense requested to be reflected in the testimony in this case: the expert could explain that the bullets and casings shared class characteristics with the suspect gun, but should not be able to state that the bullets and casings were definitively fired by that gun.

In 2016, the PCAST report reviewed firearms examination and found it to lack foundational validity. As an initial matter, PCAST noted that the AFTE's Theory of Identification (along with the methodology of firearms examination more generally) is "circular" and thus the discipline benefits from no rigorous, or objective criteria. PCAST Report at 60. After reviewing the limited data available on FTE evidence, PCAST ultimately concluded that "the current evidence" for firearms examination "falls short of the scientific criteria for scientific validity." PCAST Report at 111.

In sum, despite its decade of use in our courts, firearm matching testimony has far outstripped what is scientifically based. Unfortunately, a discipline's

regular use in court does not mean that it is being used in a reliable way.[5] Luckily, courts have begun to respond to defense requests to review the reliability of this evidence with the kind of scrutiny all forensic evidence deserves.

In 2005, the District of Massachusetts began the trend of limiting the scope of firearm identification expert testimony in United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005). In Green, the Court permitted the prosecutor's firearm expert to testify, but limited that testimony to descriptions of ways in which the compared casings were similar and did not permit the expert to testify that the casings came from a specific weapon "to the exclusion of every other firearm in the world." Id.at 107. In Green, Judge Gertner discussed ways in which firearm

[5] NAS and PCAST are members of an expansive coalition of academics and practitioners alike who view firearms examination with skepticism and consider its claims oversold. Article after article has appeared in the world's preeminent scientific journals bemoaning the lack of research underlying firearms examination, the discipline's lack of rigor, its failure to abide by any of the hallmarks associated with the very practice of science, and the overblown conclusions made by its practitioners. See e.g., Donald Kennedy, Forensic Science: Oxymoron? 302 Science 1625 (2003) ("[T]he analysis of bullet markings exemplifies kinds of 'scientific' evidence whose reliability may be exaggerated when presented to a jury"). And statisticians (a group vital to the appropriate design of research studies and thus to any analysis of whether a discipline can lay claim to demonstrated validity) have widely endorsed the NAS reports and called for greater rigor in the design of experiments, increased transparency, and well-supported analysis and reporting or error rates. American Statistical Association, ASA Board Policy Statement on Forensic Science Reform, (April 17, 2010) (Da 892-897).

identification evidence falls short under Daubert due to failings in testability, reliability, and error rates. A year later, Judge Gertner again limited the testimony of a firearm expert in United States v. Monteiro, holding that, while the scientific principles underlying firearm identification might be reliable, "there is no reliable . . . scientific methodology which will currently permit the expert to testify that [a casing and a particular firearm are] a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty." 407 F. Supp. 2d 351, 374 (D. Mass. 2006).

Following Green and Monteiro, courts around the country have taken a closer look at firearm toolmark identification expert testimony and have started prohibiting experts from opining that ammunition definitively came from a specific gun. See New York v. Ross, 129 N.Y.S.3d 629, 642 (N.Y. Sup. Ct. 2020) (holding that a firearms examiner "may not opine on the significance of any marks other than class characteristics, as the reliability of that practice in the relevant scientific community as a whole has not been established. Moreover, any opinion based in unproven science and expressed in subjective terms such as 'sufficient agreement' or 'consistent with' may mislead the jury and will not be permitted."); Gardner v. United States, 140 A. 3d 1172 (D.C. 2016) ("[I]n this jurisdiction a firearms and toolmark expert may not give an unqualified opinion, or testify with absolute or 100% certainty, that based on ballistics pattern

comparison matching a fatal shot was fired from one firearm, to the exclusion of all other firearms.").[6]

Recently, a trial court in the District of Columbia issued an order granting precisely what defendant asks for in this case: "the government's expert witness must limit his testimony to a conclusion that, based on his examination of the evidence and the consistency of the class characteristics and microscopic toolmarks, the firearm cannot be excluded as the source of the casing." United States v. Tibbs, Case No. 2016-CF1-19431 (D.C. 2019), slip op. at 1 (Da 898-954). The court based its holding on "on the inability of the published studies in

[6] See also Missouri v. Goodwin-Bey, Case No. 1531-CR00555-01, at 7 (Cir. Ct. Greene Cty., Mo. Div. V Dec. 16, 2016) (limiting the examiner to testifying only that "this gun could not be eliminated as the source of the bullet"); United States v. Ashburn, 88 F. Supp. 3d 239, 249 (E.D.N.Y. 2015) (precluding the firearm experts from testifying that he was "certain" or "100%" sure that there is a match "to the exclusion of all other firearms in the world" or that there was a "practical impossibility" that it came from a different weapon); United States v. Willock, 696 F. Supp. 2d 536, 546 (D.Md. 2010) ("Sgt. Ensor shall not opine that it is a 'practical impossibility' for a firearm to have fired cartridges other than the common 'unknown firearm' to which [he] attributes the cartridges."); United States v. Taylor, 663 F. Supp. 2d 1170, 1180 (D. N.M. 2009) ("[B]ecause of the limitations on the reliability of firearms identification evidence discussed above, Mr. Nichols will not be permitted to testify that his methodology allows him to reach this conclusion as a matter of scientific certainty . . . or that there is a match to the exclusion, either practical or absolute, of all other guns."); United States v. Diaz, 2007 U.S. Dist. LEXIS 13152, at *3-4 (N.D. Cal. Feb. 12, 2007) (holding that the record did not support the firearm expert's conclusion that an identification could be made to the exclusion of all other firearms in the world and limited the expert's testimony accordingly).

the field to establish an error rate, the absence of an objective standard for identification, and the lack of acceptance of the discipline's foundational validity outside of the community of firearms and toolmark examiners." Ibid. The Tibbs court made clear that the ruling was not a determination that there is a need for "the exclusion of all specialized opinion testimony in the area of firearms and toolmark examination," nor was the court making a "finding that the entire discipline lacks foundational reliability." Id. at 50. Instead, as the gatekeeper, the trial court carefully sorted through the scientific evidence to separate what is scientifically supported testimony—that a specific gun cannot be excluded as a source of certain ammunition—from that which is not—that a specific gun was the source of certain ammunition.

The court in Venable's case was presented with the same information that persuaded the Tibbs court. Yet, the court failed to engage with this evidence, relying instead on the self-fulfilling prophecy of prior admissibility to continue to allow future admissibility, as discussed below.

D. The Expert's Testimony That The Guns And Casings Were Fired From The Specific Gun Was Scientifically Unsupported and Unreliable. Its Admission Was Unduly Prejudicial And Necessitates Reversal of Defendant's Convictions.

Firearm examination testimony that purports to definitively link a firearm to fired ammunition is unreliable. The defense attempted to preclude the firearm examination expert from testifying to such unreliable information, instead

limiting the testimony to what can be reliably demonstrated: that the gun and ammunition share class characteristics, which means that the firearm cannot be excluded as the one that discharged the ammunition.

Instead of engaging with any of this material, or holding a hearing to better understand the issues, the trial court decided that the defense had not met its non-existent burden. (5T 126-10 to 20) The burden to "clearly establish" the establish scientific reliability of a technique is on the proponent of the evidence. State v. Chun, 194 N.J. 54, 92 (2008).

Other than flipping the burden, the trial court came to its conclusion by relying on two cases — State v. McGuire, 419 N.J. Super. 88 (App. Div. 2011), and State v. Ghigliotty, 463 N.J. Super. 355 (App. Div. 2020) — neither of which relieved the trial court of its gatekeeping role. Neither case involved a pretrial objection to the admission of firearm matching testimony. And neither involved a fulsome record presented to the trial court on the reliability of such testimony. It is important to note that there has never been an appellate court decision passing on the reliability of firearm matching testimony following a Frye hearing on the issue; this testimony has simply skated into court unscrutinized.

In McGuire a tool mark examiner opined that, based on the markings on plastic bags, the bags were made on a specific manufacturing line. 419 N.J. Super. at 129. As an initial matter, the tool mark at issue in McGuire, the cutting

blades on a manufacturing line, have nothing to do with the tool marks at issue in this case, which are created by parts of a gun striking parts of a bullet and its casing during discharge. Whether the former kind of toolmark examination has any merit is unrelated to whether the firearm examination at issue in this case is reliable. For the first time on appeal, the defendant argued that this unrelated field was "junk science." Id. at 129-30. This Court rejected that argument, noting "the absence of a factual record." Id. at 129. The lack of record below and the belated challenge in McGuire distinguish it from this case.

In its scant analysis before determining that the tool mark analysis was appropriately admitted, the McGuire court noted merely that "tool mark analysis is not a newcomer to the courtroom" and that "[c]ourts in other jurisdictions have also admitted tool mark evidence." Id. at 130-31. While true, this is not dispositive of whether all parts of a generalized field are sufficiently reliable to be admitted into evidence. This Court has recently warned of the dangers of trial courts failing to embody their gatekeeping position to truly scrutinize the reliability of a technique, instead deferring to the fact that courts have admitted the evidence previously, making its future admission a fait accompli. As now-Justice Fasciale warned, "a long line of decisions uniformly in favor of a legal proposition suggests that a legal proposition is generally accepted. We are mindful, however, that in science, the repetition of authority does not

automatically establish reliability for purposes of a Frye hearing." State v. Pickett, 466 N.J. Super. 270, 316 (App. Div. 2021). Justice Fasciale also emphasized that the value of prior decisions admitting scientific testimony are only as good as the basis for those decisions; "a laundry list of admissibility rulings" that do not actually consider the underlying science is not a basis for admitting a scientific technique. Ibid.

Ghigliotty is similarly irrelevant to this case. The question presented in Ghigliotty was whether defendant was entitled to a Frye hearing on the reliability of "firearms toolmark identification expert's use of untested three-dimensional (3D) computer imaging technology." Ghigliotty, 463. N.J. Super. at 360. To give context to this Court's holding that defendant was indeed entitled to a Frye, this Court first provided "a general overview of the field of firearm identification," relying largely on the four reports Venable relies on in subsection B. Id. at 360-65. Defendant was not challenging the admissibility of traditional firearms identification in that case; Ghigliotty is, in fact, a State's appeal from the trial court order granting the defense a Frye on the new computer imaging technology. As this Court explained "the trial court's concern was not with the general acceptance of the discipline of firearm toolmark identification, but rather with the new technique." Id. at 375. Thus, in Ghigliotty neither this Court nor the trial court was asked to do what the defense asked the court to do

in this case: to finally review the reliability of the firearm examiner's testimony, something that has never been done in New Jersey.

By relying on two irrelevant cases, the trial court failed to act as gatekeeper. It erroneously allowed the State's expert to testify that the bullets recovered from the scene and from the victim and the casings recovered from the scene were "discharged from the submitted pistol[,]" without any form of qualification. (11T 44-14 to 52-23) This proclaimed definite match is unsupported by the scientific evidence.

What this definite match did was put the murder weapon in Venable's hands. Without the expert's testimony, even if the jury believed that the gun was Venable's, the link between the gun and the murder was negligible. Testifying only about class characteristics, which are shared at least by all guns of the same type made by the same manufacturer, significantly weakens the link the State sought to establish between Venable and the gun. The admission of this testimony cannot be considered harmless beyond a reasonable doubt, State v. Macon, 57 N.J. 325, 336 (1971), because of the dearth of other evidence against Venable: no eyewitness identification, no surveillance where the shooter's face is clearly seen, no DNA linking him to the gun or the mask found in the Chevrolet, no motive. Other than the ballistics, the only link presented were that both men wore Nikes, a very common brand of shoe. As Venable pointed out in

closing, even the police officer that arrested him was wearing black Nikes. (14T 33-14 to 25) Venable's convictions must be reversed. In the alternative, the matter must be remanded for a hearing on the reliability of the firearms testimony.

POINT II

THE TRIAL COURT ERRED IN PRECLUDING THE DEFENSE FROM ELICITING RELEVANT AND PROBATIVE TESTIMONY THAT SUPPORTED ITS THIRD-PARTY GUILT DEFENSE AND ALLOWING THE STATE TO IMPROPERLY UNDERMINE IT. (9T 70-2 to 75-6, 13T 4-1 to 12-18)

The State's theory was that Tokley and Venable committed the crime together; Tokley as the driver, Venable as the shooter. The defense theory was that Tokley committed the crime with Nasir Mason; either man could have been the shooter or the driver. The defense urged that Mason had the motive to kill Rojas because they were engaged in a drug dealing rivalry. The trial court incorrectly restricted the information the defense could elicit about Mason, keeping from the jury probative information that supported the defense theory of third-party guilt. This error deprived Venable of his rights to due process and a fair trial. U.S. Const. amend. XIV; N.J. Const. art. I, ¶¶ 1, 9, and 10. His convictions must be reversed.

Before trial, the defense made it clear that their defense was that Nasir Mason and Tokley committed the murder together. Venable argued that the fact that Mason was arrested for dealing drugs "a month and a half before the homicide in the same area where Rojas engaged in drug distribution allows the defense to argue that Mason had motive, that he wanted to kill a rival drug dealer." (Da 1010) Bolstering this theory was that "both Venable and Tokley told police that 'Naz' was with them earlier in the day" and that Nasir Masons' fingerprint was on Tokley's car. (Da 47-48) Based on this showing, the trial court ordered the State to turn over discovery related to Mason's drug arrest. (Da 59) What the defense learned from this discovery was that Mason was dealing the same drug found in the car Rojas was driving — heroin — but that it was branded differently — Rojas's brand was "Call of Duty" and Mason's was "Mr. Nice Guy." (9T 73-8 to 9) Venable attempted to elicit these two additional facts in order to demonstrate that Rojas and Mason "are rival drug dealers because they're selling different brands," which established a motive for Mason to murder Rojas. (9T 73-15 to 16) This attempt was renewed a few days later. (13T 4-1 to 7-7)

The trial court erroneously precluded the defense from introducing this evidence. It reasoned that "different facets of people . . . sell drugs" in "inner cities," "[b]ut it does not mean there's a drug rivalry unless you have evidence

to come in the courtroom with." (9T 74-5 to 10) Venable argued that the different branding was sufficient to infer competition between Mason and Rojas. (9T 74-18 to 21) The court stated that just because "two vendors on the street" are "trying to make more money than the other . . . does not mean that there is a rivalry." (9T 75-1 to 6) Defense counsel responded that a rivalry is exactly established by that kind of brand competition, such as between Coca-Cola and Pepsi. (9T 75-9 to 13)

The trial court erred in holding the defense to an inordinately high standard and excluding this testimony, thereby gutting Venable's defense. A defendant "has the right to introduce evidence that someone else committed the crime for the purpose of raising reasonable doubt about his own guilt." State v. Cope, 224 N.J. 530, 552 (2016). Thus, "third-party guilt evidence need only be capable of raising a reasonable doubt of defendant's guilt to warrant its admissibility." Ibid. (internal quotation marks and alterations omitted). "A court cannot bar the admissibility of third-party guilt evidence that 'has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case.'" Ibid. (internal quotation marks omitted). Yet, that is what the trial court did here.

In State v Cope, this Court held that a trial court cannot bar the admission of testimony critical to a defendant's case on the basis that the court does not find

the defense plausible. In Cope, the defendant was charged with possession of a weapon. In a notarized statement, one of the defendant's employees stated that the weapon was his. Id. at 540-41. The trial court barred the admission of this statement because the court believed it to be "factually impossible." Ibid. This Court held that the trial court erred in substituting its judgment for the jury's: "the issue is not whether the court believed [the witness's] testimony exculpated defendant, but whether his prospective testimony before the jury would have presented 'a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case.'" Id. at 554.

Knowing that a person whose fingerprint was found on the getaway car was selling a different brand of the same drug as the person murdered has a rational tendency to engender reasonable doubt. As the trial court noted, vendors of different brands want their brand to do more business than the other. It's a commonsense notion. Just as in Cope, the trial court here erred by keeping from the jury evidence it did not personally believe exculpated Venable. The defense did not have to prove that Mason was in a business rivalry with Rojas. It just had to demonstrate a rational connection that would suggest such a rivalry. After that demonstration was made, the jury should have been given all of the facts in their assessment of Venable's guilt. Perhaps if Mason's fingerprint had not been on the car, his relevance could have been dismissed. But the trial court

understood that Mason was relevant and that is why the court let some information about his arrest be elicited. Giving the jury only part of that information was illogical, an abuse of discretion, and is not harmless beyond a reasonable doubt. Macon, 57 N.J. at 336. Venable's convictions must be reversed.

POINT III

THE PRESENTATION OF AN ILLEGALLY INCORRECT BASIS TO FIND DEFENDANT GUILTY, COMBINED WITH JURY INSTRUCTIONS THAT WERE INSUFFICIENT TO GUIDE THE JURY IN ITS DELIBERATIONS, REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS. (Partially raised below at 13T 57-12 to 71-10; 14T 8-4 to 13-15)[7]

The State's theory of the case was that Venable was the person on the bicycle who shot Rojas; in other words, he was the principal. Yet, in summation, the State suggested for the first time that Venable could have been an accomplice and presented to the jury an incorrect version of accomplice liability: that a person who helps conceal evidence of a murder after the fact is an accomplice in the murder itself. The court then instructed the jury on accomplice liability, despite its inapplicability in this case. This presentation of a theory of accomplice liability, combined with the failure to give instructions that fully

[7] Subsection A was not raised below. The failure to issue an alibi charge, which is part of the issue in subsection B, was raised below.

explained the defense case—identification and alibi—denied Venable his rights to due process and a fair trial. U.S. Const. amend. XIV; N.J. Const. art. I, ¶¶ 1, 9, and 10. Venable's convictions must be reversed.

A. The State Argued An Incorrect Theory Of Accomplice Liability, And The Trial Court's Instruction Did Not Correct The Legal Misconception Presented To The Jury.

One of the most basic principles of New Jersey criminal law is that "[a]ccurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial." State v. Concepcion, 111 N.J. 373, 379 (1988). The charge must provide a "comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Ibid. (internal quotation marks omitted). Therefore, instructional errors on essential matters, even in cases where those errors are not raised below, are traditionally deemed prejudicial and reversible error because they interfere with the jury's proper assessment of the defendant's culpability. State v. Rhett, 127 N.J. 3, 5-7 (1992). Here, where the jury was improperly urged to convict Venable as an accomplice on a faulty theory of liability, the jury charge on accomplice liability failed to dispel that legally inaccurate basis for conviction. The combination of the inadequate instruction and incorrect argument was clearly capable of causing an unjust result and mandates reversal. R. 2:10-2.

In summation, the State argued that Venable would be guilty of murder as an accomplice if Tokley was the shooter and Venable hid the gun later. Specifically, the State argued that the issuance of the "interesting" "accomplice liability charge" meant that "even if you didn't believe that this Defendant was the one who pulled the trigger, he's still guilty, because they acted together. That he acted with Dametre Tokley, and that they committed the murder, and that he aided him." (14T 96-22 to 97-8) The State went on to explain: "What does it mean to aid somebody? To help them. It means calling a friend to help you hide the murder weapon, so that you won't get caught." (14T 97-14 to 16)

This is an incorrect statement of law. (14T 97-17 to 19) In State v. Whitaker, 200 N.J. 444, 448-49 (2009), our Supreme Court rejected exactly this argument, holding that a person who helps a murderer dispose of a murder weapon does not act as an accomplice to murder. In other words, "after-the-fact accomplice liability [is] an impermissible basis on which to find defendant guilty" of murder. Id. at 455. In Whitaker, the Supreme Court reversed the defendant's conviction when the prosecutor argued this legally erroneous theory of vicarious liability even though the jury was given the model charge on accomplice liability and no objection was raised by the defense at trial. The Court explained that "[a]lthough no objection was raised to the prosecutor's legal theory, if accepted and acted on by the jury, it would have led to defendant's wrongful conviction

of robbery and felony murder." Id. at 465. The prosecutor's misstatement of the law was not cured by the fact that the trial court gave the jury the model charge on accomplice liability. As our Supreme Court explained, that charge is insufficient in the face of a legally incorrect argument made by the State: "[t]he trial court had the obligation not only to give the model charges on accomplice liability and the substantive crimes to the jury, but also to dispel the tantalizingly simple but mistaken legal theory the prosecutor offered in summation to the jury." Ibid.

Whitaker controls this case and requires reversal. The State presented the same erroneous accomplice-after-the-fact theory, which was "tantalizingly simple": if Rojas was killed, which he was, and Venable put the murder weapon in the closet, he was guilty of murder as an accomplice, regardless of his intent. The State was thus freed of its burden to actually prove who the shooter was, a challenging requirement given the lack of direct evidence in this case, by suggesting a much easier way to convict Venable of murder. As in Whitaker, the trial court in this case merely read the model charge, without clarifying for the jury that the State's legal theory was not a proper basis to find Venable guilty of murder. Thus, because the State's theory was legally wrong, it was not dispelled by the trial court's instruction, Venable's convictions must be reversed.

B. The Trial Court Failed To Provide Two Necessary Instructions: The Identification And Alibi Charges.

In addition to the incorrect accomplice argument and incomplete accomplice charge that did not dispel the applicability of that argument, the jury was not given two instructions necessary to guide its deliberations: an identification instruction and an alibi instruction. The defense asked for an alibi instruction. (13T 57-11 to 13) That request was denied because no notice of alibi had been given and because the court found that Venable's claim of alibi was not "specific" enough. (13T 57-20 to 68-11) The identification instruction was not requested. Both instructions were necessary, and the failure to issue them was clearly capable of creating an unjust result. R. 2:10-2.

Because Venable contended that he was not the person on the bicycle, the model charge on identification when no identification has been made should have been given. Model Criminal Jury Charge, Identification: No In- Or Out-Of-Court Identification (Da 60). That instruction tells the jury that it must determine "not only whether the State has proven each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proven beyond a reasonable doubt that this defendant is the person who committed it." Ibid.

Because Venable contended that he was elsewhere at the time of the murder — specifically, that he had been at 1567 South 8th Street at that time (14T 12-11 to 15) — the jury should have been given the model charge on alibi. The

instruction tells the jury that "[t]he defendant has neither the burden nor the duty to show that he/she was elsewhere at the time and so could not have committed the offense. You must determine, therefore, whether the State has proved each and every element of the offense charged, including that of the defendant's presence at the scene of the crime and his/her participation in it." Model Criminal Jury Charge, Alibi (Da 61-62). These two instructions inform the jury about a critical element of the offense—that defendant was the perpetrator—and explicitly tells the jury that the State retains the same high burden for that element as all the enumerated elements that comprise each crime. The failure to give either of these instructions requires reversal of Venable's convictions.

The failure to apprise the jury of every element of a crime is reversible error. State v. Vick, 117 N.J. 288, 290-92 (1989). This is so because the absence of a jury instruction on an element means that there can be no proper jury finding of that element. Id. at 291. "[T]here is simply no substitute for a jury verdict" on every element of a crime. Ibid. The identity of the perpetrator is an element of the offense that must be proven beyond a reasonable doubt. State v. Cotto, 182 N.J. 316, 326 (2005). Even though Venable was not identified by anyone, the State still bore the responsibility to prove, beyond a reasonable doubt, that Venable was the man on the bicycle who shot into the car.

The Supreme Court has never condoned the failure to give any form of an identification instruction. Even in Cotto, where the failure to issue an identification instruction was found to be harmless error, the trial court did at least specifically instruct that jury "that the State bears the burden of proving beyond a reasonable doubt 'each and every element of the offense, including that of the defendant's presence at the scene of the crime and his participation in the crime." Cotto, 182 N.J. at 326. Thus, the instruction in Cotto, although it was not the complete identification instruction, emphasized that the State "bears the burden of proving beyond a reasonable doubt that the defendant is the wrongdoer." Id. at 327.

Under Cotto, an instruction that it is the State's burden to prove identity beyond a reasonable doubt is mandatory. No such instruction was given in this case, not even the more limited instruction given in Cotto. Further, although our Supreme Court has held that the failure to provide an alibi charge is not constitute reversible error, the rationale for that rule in part is that "the trial court's instruction to the jury on identification . . . ma[kes] it clear that the prosecution had to prove beyond a reasonable doubt that defendant was present

at the scene and committed the offense charged." State v. Echols, 199 N.J. 344, 363-65 (2009). The failsafe of an identification charge was missing here.[8]

C. The Improper Explanation Of Accomplice Liability, As Well As The Missing Identification And Alibi Instructions, Require Reversal Of Venable's Convictions.

Necessary to a fair trial is that only legally accurate theories of guilt are presented to the jury, both by the State and by the trial court. Also necessary is that jury instructions are provided to the jury on each material element of the offense. Both of those requirements of a fair trial were violated in this case. Venable's convictions must be reversed.

POINT IV

BECAUSE THERE IS NO EVIDENCE OF ANY AGREEMENT, A JUDGMENT OF ACQUITTAL MUST BE ENTERED ON THE CHARGE OF CONSPIRACY TO COMMIT MURDER. (Not Raised Below)

The existence of an agreement is necessary to support a conviction of conspiracy. Because there was no evidence of such an agreement presented at

[8] Contrary to the trial court's reasoning, Venable did not fail to comply with Rule 3:12-2, because he was not relying on any witnesses to establish his alibi, which his what the rule governs. Regardless, "trial courts are not at liberty to withhold an instruction, particularly when that instruction addresses the sole basis for defendant's claim of innocence and it goes to an essential element of the State's case." State v. Davis, 363 N.J. Super. 556, 562 (App. Div. 2003). The defense was that Venable was not at the scene, on the bicycle, shooting in the car. The trial court was required to instruct the jury fully on that defense.

trial, Venable's conviction for conspiracy to commit murder violates his due process rights and must be reversed. U.S. Const. amend. XIV; N.J. Const. art. I, ¶¶ 1, 9, and 10. In the alternative, the failure to properly instruct the jury that an agreement to aid someone after a murder does not constitute a conspiracy to commit murder requires reversal of Venable's conspiracy conviction.

In any criminal prosecution, the State must prove the defendant guilty of the charges against him beyond a reasonable doubt. In In re Winship, 397 U.S. 358, 363 (1970), the United States Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged." The Winship doctrine precludes a conviction where the proofs are insufficient as to an essential element of the offense. Jackson v. Virginia, 443 U.S. 307 (1979). When examining the sufficiency of evidence to support a charge, the question is "whether, viewing the State's evidence in its entirety. . . and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Bunch, 180 N.J. 534, 548-49 (2004); State v. Reyes, 50 N.J. 454, 458-59 (1967)

Venable was charged with conspiracy to commit murder. The gravamen of the offense of conspiracy is the unlawful agreement between the parties. State

v. Carbone, 10 N.J. 329, 336-337 (1952); State v. Abrams, 256 N.J. Super. 390, 401 (App. Div. 1992). "The offense depends on the unlawful agreement and not on the act which follows it; the latter is not evidence of the former." Carbone, 10 N.J. at 337. Further, "[t]he mere knowledge, acquiescence, or approval of the substantive offense, without an agreement to cooperate, is not enough to establish one as a participant in a conspiracy." Abrams, 256 N.J. Super. at 401. While circumstantial proof may be used to prove conspiracy, it must nevertheless be proof which demonstrates an agreement, and not merely proof of the completed crime. State v. General Restoration Co., 42 N.J. 366, 375-376 (1964).

Here there simply was no proof whatsoever of an agreement between Venable and Tokley, the alleged co-conspirator, to murder Rojas. Even assuming that Venable was the shooter and Tokley was the driver in the car that picked him up, that is evidence only of an agreement to pick Venable up. That is not evidence that Tokley agreed help Venable plan or commit the murder itself, which is what the conspiracy statute requires. N.J.S.A. 2C:5-2a.

It is true that our Supreme Court has held that an agreement to commit a crime can be inferred from evidence of coordinated action before the commission of the offense, which facilitates the commission of that offense. State v. Samuels, 189 N.J. 236, 248 (2007) (where defendant helped another find

the room targeted for a robbery, stood by the other's side while the other drew a gun, there was sufficient evidence to infer that the two men had engaged in a conspiracy to commit robbery). That is different from inferring an agreement from behavior after an offense is committed. Even if Tokley knew he was picking up his cousin because he had just committed murder — of which there is no evidence of in the record — that is not evidence that Tokley had agreed to aid Venable in committing murder, as opposed to merely helping him evade prosecution for murder.

At the very least, the jury needed to be instructed that an agreement to help Venable escape from the scene of the shooting does not constitute conspiracy to murder. In Grunewald v. United States, 353 U.S. 391, 413-15 (1957), the Supreme Court of the United States reversed a conspiracy conviction because the jury was not told that "concealment in order to achieve the central purpose of the conspiracy" was part of the substantive crime of conspiracy, while "concealment intended solely to cover up an already completed crime" was not. "[A] vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." Id. at 405 (emphasis in original). This distinction was not made in this case. Moreover, the legally erroneous

argument about accomplice liability for murder — that helping someone after-the-fact is the same as having the purpose to promote the murder — further muddied the waters for the jury as to whether some sort of agreement to assist after the murder could be a basis for culpability for the charges in this case. As in Grunewald, the failure to explain to the jury the permissible and impermissible bases of a conspiracy conviction requires reversal.

Our Supreme Court has explained that "the aim in criminalizing conspiracies is to prosecute the agreement itself, thus punishing jointly planned criminal activity quite apart from any underlying offense involved in the conspiracy." State v. Hardison, 99 N.J. 379, 383 (1985). That aim is not accomplished when no proof of an agreement exists, and there is only proof that someone committed the substantive crime. Because no evidence of an agreement existed in this case, Venable's conviction for conspiracy must be reversed and a judgment of acquittal entered on that count.

POINT V

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

Because each of the errors complained of in Points I through IV would have affected the jury's resolution of Venable's guilt, Venable separately asserts that

even if none of those errors is deemed sufficient on its own to warrant reversal, in the aggregate the errors deprived him of due process and a fair trial. State v. Sanchez-Medina, 231 N.J. 452, 469 (2018). There was no dispute that Tokley committed this crime with someone. The only question was whether that person was Venable. The trial was unfairly biased towards answering that question in the affirmative through unreliable "scientific" evidence that placed the murder weapon in Venable's hands, by the undue restriction on Venable's presentation of a third-party guilt defense, and by inadequate jury instructions that improperly broadened the scope of Venable's liability for murder while simultaneously failing to give the jury sufficient guidance on the State's burden to prove Venable was the shooter. For each and all of these reasons, Venable's convictions must be reversed.

POINT VI

AT SENTENCING, THE TRIAL COURT IMPROPERLY CONSIDERED ARRESTS THAT DID NOT LEAD TO CONVICTIONS AND FAILED TO CONSIDER THE IMPACT OF DEFENDANT'S ADVANCED AGE AT RELEASE. THE SENTENCE MUST BE VACATED, AND THE MATTER REMANDED FOR A RESENTENCING. (17T 22-14 to 42-14)

The trial court sentenced Venable to life in prison, subject to an 85% period of parole ineligibility. (17T 40-2 to 3) In doing so, the court inappropriately

considered arrests that did not lead to convictions and failed to account for Venable advanced age at release when considering the appropriate aggregate sentence. The resultant sentence is excessive for Venable, who was 50 years old at the time of sentencing.

When imposing a sentence, a court must consider the applicability of the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1 to determine the length of a defendant's prison term within the available range. This step requires a court to "identify the aggravating and mitigating factors and balance them to arrive at a fair sentence." State v. Natale, 184 N.J. 458, 488 (2005). Simply enumerating the applicable aggravating and mitigating factors is insufficient. State v. Kruse, 105 N.J. 354, 363 (1987). Rather, a court's sentencing decision must "follow[] not from a quantitative, but a qualitative analysis." Ibid. Moreover, "[t]he finding of any factor must be supported by competent, credible evidence in the record." State v. Case, 220 N.J. 49, 64 (2014).

In this case, the defense asked for the mandatory minimum sentence of 30 years with a 30-year period of parole ineligibility. (17T 18-9 to 15) It argued that anything more than that sentence would be a life sentence, practically if not officially, and that Venable deserved the opportunity to life outside of prison again. (17T 18-12 to 13) The court rejected the mitigating factors proffered by the defense: (8) the defendant's conduct was the result of circumstances unlikely

to recur; and (9) the character and attitude of defendant indicate that he is unlikely to commit another offense. N.J.S.A. 2C:44-l(b). (17T 36-8 to 37-13) The judge found aggravating factors (3), that there is a risk that the defendant will commit another offense; (6) the extent of the prior record and the seriousness of the offenses of which he has been convicted; and (9), the need to deter. N.J.S.A. 2C:44-l(a) (17T 31-10 to 32-17) The trial court made two errors in its consideration of the aggravating factors and in determining that life was the appropriate sentence.

First, the trial court found that arrests Venable had been subjected to that did not lead to convictions—or that even led to acquittals—could be held against him. (17T 28-22 to 25 "[T]he Court under law can take into consideration arrest, even if there's a not guilty, even if it's dismissed"). The court then went on to find that prior arrests that did not lead to convictions supported the finding of all three aggravating factors. (17T 29-1 to 32-7) The court considered "a total of 20 arrests" as supporting these aggravating factors, even though Venable had only seven superior court convictions, with the last conviction for a violent offense having been in 1991. (17T 25-8 to 26-11)

Our Supreme Court has made abundantly clear that "when no such undisputed facts exist or findings are made, prior dismissed charges may not be considered for any purpose." State v. K.S., 220 N.J. 190, 199 (2015) (emphasis

added). Thus, evidence of a defendant's prior arrests that do not materialize into convictions cannot be considered at sentencing. The Court in K.S. specifically disapproved State v. Brooks, 175 N.J. 215, 229 (2002) and State v. Green, 62 N.J. 547 (1973), which had allowed for the practice in some circumstances. K.S., 220 N.J. at 199. Although Brooks addressed prosecutors' consideration of charges not leading to convictions when considering applications for Pre-Trial Intervention, Green addressed judges considering such charges when imposing a sentence. Therefore, consideration of these types of unproven allegations to find aggravating factors is improper at sentencing as well as in the PTI context.[9] See also State v. Tillery, 238 N.J. 293, 326 (2019) (stating, in the context sentencing, that in K.S. the Supreme Court found the "practice" of "drawing inferences from the mere fact that charges have been brought "improper"). Improper consideration of these arrests tainted the trial court's assessment of both aggravating and mitigating factors and requires a resentencing.

[9] Allowing such a use of unproven prior allegations of criminal activity is inherently discriminatory against defendants who are part of groups that have traditionally been the subject of systemic mistreatment in the criminal justice system. People of color, such as Venable, are more likely than whites to have contacts with the police and less likely to receive "curbside" or "stationhouse" adjustments, more likely to be charged (and charged more seriously) than whites, likely to receive harsher plea offers than whites, more likely to be convicted at trial than whites, and likely to be sentenced more severely than whites. See Josephine Ross, Warning: Stop-And-Frisk May Be Hazardous To Your Health, 25 Wm. & Mary Bill of Rts. J. 689, 704-705 (2016).

Second, the court failed to consider Venable's advanced age upon release, even if he were sentenced to the minimum sentence. As our Supreme Court has recently emphasized, "[a] defendant's age is doubtlessly among the information that courts should consider when calibrating a fair sentence." State v. Torres, 246 N.J. 246, 273 (2021). That information is necessary to consider the need for deterrence and incapacitation. Venable was 50 years old at the time of sentencing. (17T 14-4) Even if sentenced to the minimum term — 30 years in prison with 30 years of parole ineligibility — he would not be parole eligible until he was 76. (17T 18-14 to 15) The life sentence is longer than necessary to serve a deterrent or incapacitative purpose; the minimum possible sentence of 30 years with a 30-year period of parole ineligibility would have been sufficient. That is because older people are much less likely to commit crimes, and each marginal year of a lengthy sentence has minimal to no deterrent value.

"The empirical fact of a decline in the crime rate with age is beyond dispute." Travis Hirschi and Michael R. Gottfredson, Age and the Explanation of Crime, 89 Am. J. Soc. 552, 565 (1983). Because older people are dramatically less likely to reoffend, experts agree that these studies persuasively prove that very lengthy sentences go beyond what is necessary to prevent re-offense if the defendants were released. In the words of the National Research Council, "because recidivism rates decline markedly with age and prisoners necessarily age as they

serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders." National Research Council, The Growth of Incarceration in the United States: Exploring Causes And Consequences, 155-56 (2014).

As with incapacitation, there is a clear consensus about deterrence in the social science literature: each extra year of a lengthy sentence does very little to nothing to further either general or specific deterrence. Therefore, the sentence in this case is much longer than necessary to further the goal of deterrence. "The weight of criminological knowledge teaches that marginal increases in the severity of criminal sanctions rarely bring about marginal improvements in general deterrence in the community." Model Penal Code: Sentencing (American Law Inst., Proposed Final Draft, 2017). Similarly, the National Academy of Sciences concluded that the relationship between sentence length and crime rate reflects "diminishing deterrent returns to increasing sentence length," such that there is only "a small crime reduction response" to increases in lengthier sentences. Growth of Incarceration at 139. The same applies to specific deterrence. "There is no credible evidence of a specific deterrent effect of the experience of incarceration." Id. at 156. The specific-deterrence effect of incarceration, if any, "rapidly diminish" as sentences become lengthy, David S.

Abrams, Building Criminal Capital vs Specific Deterrence: The Effect of Incarceration Length on Recidivism 21 (Working Paper Dec. 2011). In short, the life sentence is much longer than necessary to further incapacitation or deterrence.

In sum, because the trial court considered arrests that did not lead to convictions and failed to adequately account for Venable's age upon release if he received a lesser sentence, the sentence must be vacated, and the matter remanded for a new sentencing proceeding.

CONCLUSION

For all the reasons set forth in Points I-IV, Venable's convictions must be reversed. In the alternative, for the reasons set forth in Point V, the matter must be remanded for resentencing.

Respectfully submitted,

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Assistant Deputy Public Defender
Attorney ID: 063222014

Dated: May 4, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003391-21T4

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	On Appeal from a Judgment
Plaintiff-Respondent,	:	of Conviction in the
v.	:	Superior Court of New Jersey, Law Division, Camden County.
JERMAINE VENABLE ,	:	Indictment No. 2532-10-18-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. Gwendolyn Blue, J.S.C.
	:	and a Jury.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

Upon review of defendant's recitation of the Procedural History of the matter, the State has no objection and would adopt same as if set forth in the State's responsive brief. (Db2-Db4).

COUNTERSTATEMENT OF FACTS

On July 30, 2018, at approximately 7:42 a.m., defendant Jermaine Venable fired a semiautomatic handgun five times into a silver Toyota Scion at the intersection of Fourth Avenue and Kaigns Avenue in Camden, causing the death of Jonathan Rojas and serious injury to Devon Fisher.

Officers observed bullet marks on the front windshield, a broken driver's window, cigarette butts, broken glass, and five shell casings stamped with "Win 40 S&W." (6T118-1 to 16). The Scion was impounded and searched pursuant to a valid warrant, wherein officers noted suspected bullet holes on the vehicle dashboard and front passenger seat; bullet fragments found in the vehicle interior, the back of the front driver's seat, under the driver's seat, the dashboard, and the rear passenger seat; and partial latent fingerprints on the exterior driver and passenger doors and

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[1] The State would adopt defendant's citations to the record as referenced in fn.2 of his appellate brief with the addition of the following citation:

"Db" refers to defendant's brief;

"Pa" refers to the State's appendix to this brief.

sun roof. (8T10-1 to 61-1). Officers observed blood in the Scion interior front driver's seat area, front passenger seat area, front passenger door frame and door panel, and the front passenger's side door frame, and recovered ID cards and mail belonging to both victims. (8T10-1 to 61-1).

Dr. Gerald Feigin, the medical examiner who conducted Mr. Rojas's autopsy, testified that Mr. Rojas's manner of death was homicide and his cause of death was four gunshot wounds to his chest and back. (9T89-1 to 93-16). Dr. Feigin advised that he could not determine the sequence of the gunshot wounds and opined that while all four wounds were "potentially fatal," the "most rapidly fatal" gunshot wound entered Mr. Rojas's back and traveled through his ribs and lungs. (9T89-1 to 93-16).

Immediately after the shooting, Alan Franchi testified that he observed a group of people running down Kaign Avenue followed by a male, later identified as defendant, dressed in black clothing and a black ski mask riding a red bicycle. (6T36-1 to 38-4). Mr. Franchi observed defendant meet and get picked up by a silver Chevy Captiva on the corner of Third and Kaigns, one block away from the shooting, at 7:43 a.m. Multiple surveillance cameras and a ShotSpotter activation corroborated this testimony. (6T38-1 to 41-20).

Camden County Prosecutor's Office Detective Andrew McNeil testified that he and fellow officers obtained surveillance videos after learning that the suspect

may have been picked up by a Chevy Captiva directly after the shooting. Det. McNeil testified that multiple surveillance cameras revealed Mr. Tokley's Chevy drive directly to Demetrise Williams's residence after he picked up defendant following the shooting. (6T148-1 to 151-25).

Ms. Williams testified that defendant, who she knew as "Maine," called her twice on the morning of July 30, 2018, at 7:49 a.m. and 7:51 a.m. and asked her if he could stay with her because his girlfriend kicked him out. (7T36-1 to 37-20). Ms. Williams testified that defendant arrived at her residence at 1567 S. 8th Street approximately 5-10 minutes later carrying a blow-up mattress box that he put in her living room closet. (7T38-1 to 39-25). Ms. Williams testified that Mr. Tokley, who she knew as "Meech," knocked on her door while defendant was inside. Ms. Williams advised that Mr. Tokley and defendant left after Ms. Williams told Mr. Tokley she did not want him in her house. (7T46-1 to 15). Ms. Williams testified that she did not know a person named Nasir Mason and he was not at her house that morning. (7T47-1 to 49-25).

Later that day, police executed a search warrant on Ms. Williams's residence. (6T160-1 to 169-25). Officers recovered a box containing a semiautomatic .40 Glock model 22 handgun with a round in the chamber, and an extended 22-round magazine loaded with 10 rounds in the same closet where defendant had placed a box earlier that day. Detective Marcelle LaCroix testified that the bullets in the

firearm chamber and the magazine all had the same "Win .40 S&W" headstamp. (6T160-1 to 169-25).

Det. LaCroix also testified that officers searched Mr. Tokley's Chevy Captiva and recovered four cell phones, $440, two clear plastic bags, and 89 ziplock bags of suspected heroin stamped with "Call of Duty" on the front. (8T18-1 to 19-24). Officers also recovered a black hooded sweatshirt, a bucket hat, a reversible camo bucket hat, a black mask, blue disposable gloves, and an ID card and mail registered to Mr. Tokley from the vehicle. Ibid.

New Jersey State Police Sergeant Edward Burek was admitted as an expert in firearms and toolmark identification. Sgt. Burek testified that he tested the firearm, five shell casings, and nine bullet fragments collected in the course of this investigation. (11T37-1 to 65-1). Sgt. Burek advised that the tests performed on the portions of the .40 S&W discharged metal bullet jackets indicate that the bullets found at the scene were fired from the suspect firearm because the test jackets and sample jackets had the same microscopic features. (11T37-1 to 65-1). Sgt. Burek also advised that the tests that he performed on the .40 S&W discharged bullet cartridge cores also indicated that they were fired from the suspect firearm because the test and sample cartridge cores had the same extractor marks and firepin drag, which are features unique to a specific firearm. (11T37-1 to 65-1). Sgt. Burek also

testified that the firearm was operable and capable of being discharged, and that the magazine properly fit and functioned with the suspect firearm. (11T37-1 to 65-1).

On January 20, 2022, the Hon. Gwendolyn Blue, J.S.C., denied defendant's motion to take Judicial Notice of the criminal history of an individual named Nasir Mason, and the facts surrounding his convictions. (Da52-Da59). Defendant argued that these convictions supported defendant's theory that the victims were killed by not defendant, but Mr. Mason, who was arrested on C.D.S. charges in the same general neighborhood where the victims were shot. (Da52-Da59).

The trial court found that defendant's request was beyond the scope of judicial notice under N.J.R.E. 201(b)(4), first finding that it would be improper to take judicial notice of a judgment of conviction "simply because they have been filed with a court" and that admission of this evidence would inappropriately "circumvent the rule against hearsay." (Da55). The trial court also found that defendant was seeking relief on "pure speculation" because he failed to present evidence that either Mr. Mason or Mr. Rojas sold drugs, that the two were drug rivals, that Mr. Mason killed Mr. Rojas because they were drug rivals, or even that Mr. Mason was the person that defendant identified as "Nas." (Da52-Da59).

On February 14, 2022, the trial court reiterated this ruling, stating: "I made it very clear, in my order, this is the only thing that I'm allowing because Nasir Mason is not on trial. . . You're only allowed to elicit that Nasir Mason was arrested, the

date of his arrest, and only what the charges are. I'm not allowing you to go into evidence seized." (9T70-7 to 15). On February 17, 2022, the trial court again denied defendant's request to present evidence seized during Mr. Mason's arrest, reiterating that defendant was still permitted to present evidence in support of his theory of third-party guilt despite his failure to proffer any supporting evidence. (13T4-10 to 5-11). "[Y]ou have absolutely not a scintilla of any evidence that Nasir Mason and the victims were involved in a drug rivalry. . . Nasir Mason is not on trial before the court. You have nothing that ties in your theory of some type of drug rivalry. I'm not going to allow you to go any further than that." (13T6-2 to 23).

On February 7, 2022, the Hon. Gwendolyn Blue, J.S.C., conducted a hearing on defendant's motion to limit the State's firearm expert testimony under N.J.R.E. 702 and N.J.R.E. 403. (5T1, et seq.). Defendant did not challenge the qualifications of the State's expert, but alleged that the expert's firearm toolmark identification testimony was not backed by a scientific basis under the Daubert[2] standard. (Da22-Da44). The trial court denied this motion, first acknowledging that the State's proffered expert testimony on firearm and toolmark identification "is well-established, spanning over 100 years in the United States." (5T125-9 to 16). The court found that New Jersey courts have repeatedly found that this proffered

[2] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

testimony was scientifically reliable in New Jersey courts under the Frye[3] standard and provisions in N.J.R.E. 702. (5T125-9 to 16). The trial court further found that defendant failed to meet his burden by relying on cases alleging the unreliability of toolmark identification under Daubert when the correct test in New Jersey is under Frye. (5T127-9 to 25). The court further found that defendant failed to prove that the prejudicial value would be outweighed by the probative value under N.J.R.E. 403. (5T128-1 to 9). The trial court stated the same in a written order. (Pa1-Pa2).

On February 17, 2022, the trial court denied defendant's motion for an alibi jury instruction based on the contents of defendant's taped statement. (13T66-22 to 70-18). The court concluded that defendant failed to comply with alibi notification requirements in Rule 3:12-2 but, even if defendant had provided timely notice of its reliance on an alibi, the record did not support this instruction because defendant failed to establish proof of an alibi. (13T66-22 to 70-18). The court stated the same in a written order. (Pa3-Pa4).

On February 22, 2022, the trial court reiterated these findings and reminded defense counsel that even if he had complied with the notice and furnishing requirements of the court rules, the jury was not permitted to hear an alibi instruction because defendant's statement failed to provide consistent details as to where he

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3 Frye v. U.S., 293 F. 1013, 1014 (1923).

was, what he was doing, or who he was with at any given time on the morning of the shooting. (14T10-3 to 7).

On February 23, 2022, the jury convicted defendant as charged except for Count Three, first-degree attempted murder of Devon Fisher, for which he was found not guilty. (15T60-11 to 62-24; Da11-Da16).

On February 24, 2022, Judge Blue conducted the second part of the bifurcated jury trial charging defendant with second-degree certain persons not to possess a weapon, in violation of N.J.S.A. 2C:39-7(b)(1) (Count Seven); and first-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(j) (Count Eight). (16T, et seq.). The jury convicted defendant as charged. (Da11-Da16).

On June 9, 2022, defendant was sentenced to an aggregate term of 75 years with 85% NERA parole ineligibility. (17T40-2 to 5; Da17-Da20). Defendant was sentenced to a life sentence/75 years with 85% parole ineligibility for Count One (first-degree murder); concurrent ten-year sentence with 85% NERA parole ineligibility for Count Four (second-degree aggravated assault of Devon Fisher); a concurrent ten-year sentence with five-year parole ineligibility for Count Six (second-degree unlawful possession of a weapon); a concurrent ten-year sentence with five-year parole ineligibility for Count Seven (certain persons not to possess a weapon); and a concurrent twenty-year term with ten-year parole ineligibility for Count Eight (first-degree unlawful possession of a weapon). (17T42-9 to 44-12).

For sentencing purposes, Count Two merged with Count One and Count Five merged with Counts One and Four. (17T42-9 to 44-12). The trial court applied aggravating factors three, six, and nine and did not apply any mitigating factors. (17T31-10 to 38-6).

This appeal follows.

LEGAL ARGUMENT

POINT I: THE TRIAL COURT DID NOT ERR IN ADMITTING EXPERT BALLISTICS TESTIMONY BECAUSE DEFENDANT FAILED TO PROVE THAT FIREARM TOOLMARK IDENTIFICATION IS NOT "GENERALLY ACCEPTABLE" UNDER THE FRYE STANDARD. [Raised Below.] (5T123-10 to 128-14).

On appeal, defendant argues that the trial court erred in denying his motion to limit the State's expert ballistics testimony because the science on which firearm toolmark identification is based is unreliable. (Db10). Defendant further urges this Court to remand this issue to determine the reliability of toolmark identification forensics under the Daubert standard for expert testimony. (Db10). The State respectfully disagrees. It is well-established that New Jersey courts have deemed toolmark identification "generally acceptable" under the Frye standard for one century, and defendant's unreliability argument has been explicitly litigated and rejected by our courts. The State further urges this Court to follow our Supreme Court's instructions in State v. Olenowski[4], which explicitly cautioned lower courts against disturbing rulings based on Frye and advised that the Daubert standard would only be used going forward. Olenowski, 253 N.J. at 154.

For expert testimony under N.J.R.E. 702 to be admitted, "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror;

[4] 253 N.J. 133, 138-39 (2023)

(2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." In re Accutane Litigation, 234 N.J. 340, 349 (2018) (quoting State v. Kelly, 97 N.J. 178, 223 (1984)).

Furthermore, "a trial court has an independent obligation to ensure that plaintiffs have sufficient process for defending their evidentiary submissions...[as] it would be able to properly 'assess whether the expert's opinion is based on scientifically sound reasoning or unsubstantiated personal beliefs couched in scientific terminology.'" In re Accutane, 234 N.J. at 387-88 (citing Kemp ex. rel. Wright v. State, 174 N.J. 412, 427 (2002)). Also, "[t]esting the admissibility of expert testimony by focusing not only on the jury's comprehension of the subject matter but also on whether the specific proffered testimony will aid the jury in resolving factual issues has been a recurring theme in our cases." State v. Berry, 140 N.J. 280, 291 (1995).

The Frye test "requires trial judges to determine whether the science underlying the proposed expert testimony has gained general acceptance in the particular field in which it belongs." State v. J.L.G., 234 N.J. 265, 280 (2018) (quoting Frye, 293 F. at 1013). "[T]here are three ways to establish general acceptance under Frye: expert testimony, authoritative scientific and legal writings, and judicial opinions." J.L.G., 234 N.J. at 281 (cited by State v. Ghigliotty, 463

N.J. Super. 355, 375 (App. Div. 2020). "Proof of general acceptance does not mean that there must be complete agreement in the scientific community about the techniques, methodology, or procedures that underlie the scientific evidence." State v. Chun, 194 N.J. 54, 91-92 (2008); Ghigliotty, 463 N.J. Super. at 375; accord State v. McGuire, 419 N.J. Super. 88, 133 (App. Div. 2011).

Our courts have repeatedly stated: "tool mark analysis is not a newcomer to the courtroom." McGuire, 419 N.J. Super. at 130. "Testimony by tool mark experts has been admitted to New Jersey courts [under the Frye standard] without objection," as well as in "other jurisdictions." Id. at 130-31; see State v. Behn, 375 N.J. Super. 409, 416-19 (App. Div. 2005) (discussing admitted testimony from "a ballistics and tool mark identification expert" linking bullets recovered from victim to a rifle that the defendant had purchased); State v. Cito, 213 N.J. Super. 296, 299 (App. Div. 1986) (discussing admitted testimony from a tool mark expert linking a screwdriver seized from the defendant's home to the scene of the crime); Ghigliotty, 463 N.J. Super. at 375 (discussing the well-established history of tool mark identification experts in New Jersey ballistics jurisprudence).

In February 2023, the New Jersey Supreme Court departed from using the Frye standard and adopted the Daubert[5] standard to determine the reliability of expert witness testimony admitted under N.J.R.E. 702 in future criminal and quasi-

[5] Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993).

criminal cases. State v. Olenowski, 253 N.J. 133, 138-39 (2023). The Court explained this change by explaining that the Frye standard was "restrictive" and "difficult to apply to certain types of expert evidence," while Daubert "empowers courts to directly examine the reliability of expert evidence and consider a broader range of relevant information." Id. at 139.

However, the Court emphasized that this decision should not disturb prior rulings based on the Frye standard and should only be addressed in "future challenges" that "address the admissibility of new types of evidence" or "challenges to the admissibility of evidence that has previously been sanctioned but the scientific reliability underlying the evidence has changed." Olenowski, 253 N.J. at 154.

Here, the State submits that based on the newly enacted Olenowski decision, this Court should review the trial court's N.J.R.E. 702 ruling based on the Frye standard under which it was originally determined because the expert evidence that defendant challenges is neither new, nor has the scientific reliability on which it is based changed. Olenowski, 253 N.J. at 154.

Instead, as properly acknowledged by the trial court in its written and oral decisions, defendant "failed to meet their burden as they simply argue there is no scientific basis to support the use of the terms he seeks to bar." (Pa1-Pa2). The trial court also emphasized this Court's decisions in Ghigliotty and McGuire that

specifically found that the same tool mark identification challenged by defendant was "generally accepted" in New Jersey under Frye. (5T126-11 to 127-18).

The trial court noted that defendant's argument was reviewed, and rejected, by this Court in McGuire, 419 N.J. at 132-133. The trial court also acknowledged that the McGuire Court reviewed, and rejected, the same 2009 NAS study (Da102-Da247) on which defendant relies. 419 N.J. at 131-132. Regarding this specific study, the McGuire Court found:

> [The NAS report] contains some criticism of tool mark analysis, including lack of information about variances among individual tools, lack of a clearly defined process, and a limited scientific base of knowledge. But the NAS report does not label the discipline "junk science." It acknowledges that tool mark analysis can be helpful in identifying a class of tools, or even a particular tool, that could have left distinctive marks on an object. The report concludes that development of a precisely specified and scientifically justified testing protocol should be the goal of tool mark analysis.
>
> . . . [T]he purpose of the NAS report is to highlight deficiencies in a forensic field and to propose improvements to existing protocols, not to recommend against admission of evidence.
>
> [McGuire, 419 N.J. Super. at 131-133 (internal and external citations omitted).]

In addition to the similarities in the arguments and sources between this case and McGuire, the trial court here also acknowledged defendant's persistent use of non-Frye cases from other jurisdictions to support his argument: "I note for the

record that every case Counsel submitted for the Court's review, all of these cases relied on the Daubert standard, or a Frye issue was not raised[.]" (5T126-14 to 18). Indeed, in this appeal, defendant continues to argue that this Court review this testimony under Daubert, despite Olenowski's specific instruction to the contrary.

Instead, the State asks that this Court affirm the trial court's decision to rely on relevant precedent regarding this exact issue of tool mark identification, particularly McGuire and Ghigliotty, in reviewing this issue. In addition to McGuire's discussion and rejection of the same reports defendant currently cites, the reports defendant now relies on do not meet defendant's burden to prove that the State's expert evidence is not "generally accepted" under Frye. See Chun, 194 N.J. at 91-92 ("Proof of general acceptance does not mean that there must be complete agreement in the scientific community about the techniques, methodology, or procedures that underlie the scientific evidence." Regardless, the trial court found that tool mark identification is based on a "foundation of knowledge" that is "described in forensic text books, scientific literature, reference material, training manuals, and peer-reviewed scientific journals." (5T125-9 to 16). The trial court's decision that tool mark identification is acceptable expert testimony under Frye as an affirmation of multiple decades of New Jersey jurisprudence.

POINT II: THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S REQUEST FOR A THIRD-PARTY GUILT DEFENSE BECAUSE THERE WAS NO EVIDENCE ON THE RECORD FOR A JURY TO CONSIDER THIS DEFENSE. [Raised Below.] (9T70-2 to 75-6, 13T4-1 to 12-18).

Defendant alleges that the trial court erred in denying defendant's motion to take judicial notice of the criminal history of Nasir Mason in support of his third-party guilt theory. (Db28-Db32). However, the trial court correctly found that defendant failed to proffer any evidence in support of this theory and the State respectfully asks this Court to affirm.

"A defendant is entitled to prove his innocence by showing that someone else committed the crime with which he or she is charged." State v. Jimenez, 175 N.J. 475, 486 (2003) (citing State v. Koedatich, 112 N.J. 295, 297 (1989), cert. denied, 488 U.S. 1017 (1989)). "'[T]he third party evidence need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt.'" Ibid. (quoting Koedatich, 112 at 199) (external citations omitted).

However, a defendant must prove an "evidential link" of third-party guilt, rather than "mere conjecture." Jiminez, 175 N.J. at 487 (quoting State v. Sturdivant, 31 N.J. 165, 179 (1959), cert. denied, 362 U.S. 956 (1960)). "As we have previously recognized, the concern with respect to claims of third-party guilt is 'the ease in which unsupported claims may infect the process.'" State v. R.Y., 242 N.J. 48, 66-

67 (2020) (quoting State v. Loftin, 146 N.J. 295, 345 (1996) (Loftin I)). To avoid that issue, a defendant may not seek to introduce evidence in order "to prove some hostile event and leave its connection with the case to mere conjecture." Sturdivant, 31 N.J. at 179; see also Loftin I, 146 N.J. at 346 (allowing defendant to introduce evidence that "a generic 'someone else' did the crime," but could not identify a specific individual without any evidence).

"[T]he evidence a defendant seeks to admit in support of a third-party guilt defense must be capable of demonstrating 'some link between the [third-party] evidence and the victim or the crime.'" State v. Perry, 225 N.J. 222, 236-39 (2016), (second alteration in original) (quoting Koedatich, 112 N.J. 225, 301). Indeed, "[s]omewhere in the total circumstances there must be some thread capable of inducing reasonable men to regard the event as bearing upon the State's case." Sturdivant, 31 N.J. at 179. In addition to establishing a link more than "mere conjecture," evidence in support of third-party guilt must satisfy our court's Rules of Evidence. State v. Fortin, 178 N.J. 540, 591 (2004) (Fortin II).

"A trial court must engage in a fact-sensitive analysis to determine whether the evidence of third-party guilt meets this requirement." State v. Cotto, 182 N.J. 316, 333 (2005). "The question of relevancy ultimately rests in a sound exercise of discretion." Sturdivant, 31 N.J. at 179.

In State v. Hannah, 248 N.J. 148, 180-83 (2021)[6], the Supreme Court found that evidence of a pager number connecting a murder victim to another suspect, in addition to the suspect's mother's testimony linking her son's connection to drug dealers, were of "critical importance" in establishing defendant's third-party guilt defense because a "reasonable person to conclude that there was a 'scintilla' of evidence or a 'piece of evidence' linking [the third party]" to the crime. Id. at 187.

Here, the trial court did not err in limiting the evidence that defendant could present in support of a theory that Mr. Mason committed the murder, because defendant failed to present anything other than "pure speculation." Unlike in Hannah, where defendant provided notice that he would be asserting a third-party guilt defense supported by police reports, physical evidence, and testimony, here, defendant did not possess such evidence. Rather, the trial court found that defendant had "not a scintilla of corroborating information" that the victim sold drugs, that Mr. Mason and the victim were apparent drug dealing rivals, that Mr. Mason had a motive to kill the victims, or that Mr. Mason killed the victims because of this alleged rivalry. In fact, the trial court properly acknowledged that defendant could not even prove that the individual he identified as "Naz" was even Mr. Mason. As such, the

[6] While the Hannah decision was found through the lens of ineffective assistance of counsel, the State respectfully submits that the Court's analysis of third-party guilt is instructive to this case. Id. at 187-190.

trial court determined that defendant failed to show a connection between two people selling drugs in an urban community and a motive for the murder of the victim. Ibid.

Furthermore, the trial court properly declined to take judicial notice of Mr. Mason's criminal history because it was proffered for the sole "purpose of determining the truth of what it asserts simply because the certification has been filed with a court and thus is part of a court record." RWB Newton Assocs. v. Gunn, 224 N.J. Super. 704 (App. Div. 1988); N.J.R.E. 201(b)(4). Specifically, the trial court correctly opined that while these court records showed that Mr. Mason had been convicted for drug and related offenses in 2018, 2019, and 2021 in roughly the same neighborhood where the victim was killed, defendant failed to prove how these convictions were relevant because there was zero connection between the incidents giving rise to these convictions and Mr. Rojas's murder on an entirely different date. (Da55).

The trial court also declined to take judicial notice of the majority of Mr. Mason's criminal history because "rules regarding judicial notice are designed solely to provide a speedy an deficient means of proving matters which are not in genuine dispute," and cannot be used to circumvent other rules of evidence, for example, testimony that could potentially be subject to cross-examination. (Da55-Da57). The trial court correctly determined that defendant failed to establish proof an alleged drug rivalry based only on the fact that heroin was recovered on the victim's body,

and that Mr. Mason was convicted for selling heroin one and a half months before the murder.

> There's no evidence that Nas is Nasir Mason. There's absolutely no evidence that you've shown this Court that there was even a drug rivalry amongst the parties in this area.
>
> If you look at inner cities . . . and some suburban communities, there are different facets of people that sell drugs. But it does not mean there's a drug rivalry unless you have evidence to come in the courtroom with. Not speculation, but evidence.
>
> [9T74-1 to 9.]

Finally, the trial court did not unilaterally prohibit defendant from introducing evidence of his theory of third-party guilt, despite having "absolutely nothing" to support it. (13T12-7 to 16). For example, the court allowed defendant to elicit testimony that Mr. Mason's fingerprint was found on the exterior of Mr. Tokley's Chevy, and that Mr. Mason was arrested for drug charges in the same neighborhood that the victim was murdered. However, defendant failed to prove that the jury would have reached an alternate outcome had they heard evidence that defendant and Mr. Rojas each were in possession of heroin with two different "stamps" or "brands." As discussed at length by the trial court, the fact that two different "brands" of heroin were found on two individuals in the same neighborhood one and a half months apart is not evidence of a drug rivalry, let alone proof of murder.

POINT III: THE TRIAL COURT DID NOT ERR IN CHARGING THE JURY BECAUSE ITS INSTRUCTIONS PROPERLY CITED THE LAW AND WERE BASED ON EVIDENCE IN THE RECORD TO SUPPORT THEM. [Partially Raised Below.] (13T57-12 to 71-10; 14T8-4 to 13-5).

Defendant alleges that the trial court erred in failing to charge the jury with proper instructions, specifically, that it gave the jury the incorrect law for accomplice liability and failed to charge the jury on alibi and identification. (Db32-Db39). However, defendant failed to prove that the jury heard instructions with improper law and failed to present evidence that would make alibi and identification instructions necessary.

In the context of challenges to jury charges, plain error is: "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930 (1970). "If a defendant fails to object to a trial court's instructions, the failure to challenge the jury charge is considered a waiver to object to the instruction on appeal." State v. Maloney, 216 N.J. 91, 104 (2013). However, we will reverse if the error is "clearly capable of producing an unjust result."

In the absence of a request for the charge, we do not presume prejudice but review the charge and the corroborative evidence to determine whether the

deficiency was harmless, or "clearly incapable of producing an unjust result." State v. Gaines, 377 N.J. Super. 612, 623 (App. Div. 2005); R. 2:10–2.

A. Accomplice Liability

"A jury should be "clearly instructed that culpability under [N.J.S.A. 2C:2-6(c)(1)(c)] required proof beyond a reasonable doubt that the conscious object of a defendant's failure to prevent the commission of a particular crime was to promote or facilitate the crime.'" State v. Ramirez, 246 N.J. 61, 65 (2021) (quoting State v. Ramirez, 462 N.J. Super. 1, 25-26 (App. Div. 2019)).

Under N.J.S.A. 2C:2-6(c)(1), a person may be deemed "an accomplice of another person in the commission of an offense if ... [w]ith the purpose of promoting or facilitating the commission of the offense," if

> (1) with the purpose of promoting or facilitating the commission of the offense, he (a) solicits such other person to commit it; (b) agrees or attempts to aid such other person in planning or committing it; or (c) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so; or (2) his conduct is expressly declared by law to establish his complicity.
>
> [N.J.S.A. 2C:2-6(c)(1)-(2).]

Furthermore, "whether a defendant is a principal or an accomplice, the State must prove that he possessed the mental state necessary to commit the offense." State v. Whitaker, 200 N.J. 444, 458 (2009); N.J.S.A. 2C:2–2(a). "An accomplice is only guilty of the same crime committed by the principal if he shares the same criminal

state of mind as the principal." State v. Fair, 45 N.J. 77, 95 (1965). On the other hand, an accomplice who does not share the same intent or purpose as the principal may be guilty of a lesser or different crime than the principal. State v. Bielkiewicz, 267 N.J. Super. 520, 528 (App. Div. 1993). 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." Ibid.

Two persons who conspire to commit a crime and participate in some way in its commission are joint principals. In re In re State in Interest of A. B. M., 125 N.J. Super. 162, 309 A.2d 619 (App. Div.), aff'd 63 N.J. 531 (1973). "If the State's theory is that a defendant acted as an accomplice, the trial court is obligated to provide the jury with accurate and understandable jury instructions regarding accomplice liability even without a request by defense counsel." State v. Maloney, 216 N.J. 91, 105 (2013).

In State v. Faucette, this Court held that the trial court's accomplice liability jury instructions "adequately identified the applicable accomplice liability principles and articulated the elements necessary" for the relevant offense. 439 N.J. Super. 241, 269-70 (App. Div.), certif. denied, 221 N.J. 492 (2015). This Court determined that jury instructions explaining that "the State must prove it was . . . defendant's conscious object that a specific crime charged be committed," in addition to

accomplice liability instructions providing that one is "legally accountable for the conduct of another" when "with the purpose of promoting or facilitating the commission of the offense . . . aids of agrees or attempts to aid such other person in planning or committing it" were sufficient for the jury to properly reach a verdict. Id. at 270-71.

Defendant relies on Whitaker, 200 N.J. at 448-49 (2009), to assert that the State relied on a "faulty theory of liability" when it told the jury that defendant could still be guilty of murder if Mr. Tokley was the shooter and Mr. Venable helped him hide the murder weapon because Whitaker prohibits accomplice liability for individuals who become involved after the crime has been committed. (Db33-34). However, the State submits that Whitaker's facts are distinguished from this case because defendant is the alleged principle in this case and there was sufficient information for the jury to determine that defendant intended to commit the relevant offenses.

Here, defendant alleges that the State falsely advised the jury that defendant should be found guilty as an accomplice even if Mr. Tokley fired the weapon because defendant assisted in hiding the firearm after the murder. (Db33-34). See Whitaker, 200 N.J. at 465 ("If all the jury believed was that defendant aided [co-defendant] in concealing the weapon after [co-defendant] committed the robbery, then defendant could not be found guilty" of those offenses.").

However, this is a clear misrepresentation of the evidence supporting the State's theory that defendant was the principal actor in these offenses. Unlike in Whitaker, here the jury heard much more evidence about defendant's role in the murder before the firearm was stashed: defendant left Mr. Tokley's vehicle, committed the assault and murder, rode his bicycle away, was picked up after in Mr. Tokley's vehicle, and then stored the murder weapon at his friend's home. As such, defendant's argument that the State advised the jury to find defendant guilty as an accomplice for the sole act of hiding the firearm after Mr. Tokley used it is not supported by the evidence.

Furthermore, the Whitaker Court found that the jury charges were inadequate because it was "impossible to determine" whether the jury convicted defendant based on the State's erroneous recitation of accomplice liability. Id. at 465. Again, Whitaker is distinguished because here, defendant was not convicted on the sole fact that he hid a firearm involved in a murder after the fact, but because there was sufficient evidence proving that defendant had the requisite criminal intent to commit or attempt to commit all of the charged offenses.

Moreover, even if the jury was confused by the prosecution's comment in summation about defendant's liability for Mr. Tokley, the court's extensive jury charges on accomplice liability was corrective and would not have changed the outcome of the trial. The court explained how an individual could become liable for

another person's conduct, the requisite legal intent for each alleged accomplice, that an accomplice's mindset can be different from another accomplice which can affect the level of guilt for each accomplice, how accomplice liability can be formed, and how and why a person can be found guilty for offenses that an accomplice committed. See (14T162-11 to 170-21). Importantly, the court specifically identified the elements that the jury was to find beyond a reasonable doubt if the jury believed Mr. Tokley was the principal:

> Number one, that . . . Dametre Tokley committed the crimes. . . . 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. Three, that this defendant's purpose was to promote or facilitate the commission of the offenses. And 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.
>
> [14T167-10 to 21.]

Therefore, the jury instructions for accomplice liability were properly given to the jury and, even if the prosecutor's comments during summation were incorrect, the court's comprehensive instructions corrected and properly explained and identified this legal issue to the jury. The record evidences that the jury was correctly instructed on accomplice liability and defendant failed to prove that the jury's verdict would have been different otherwise. The State asks this Court to affirm.

B. Identification/Alibi

Defendant argues that the trial court erred in failing to instruct the jury on identification and alibi and that this failure warrants reversal. This argument is without merit. As thoroughly discussed at trial, defendant failed to provide notice of an alibi defense, as instructed by the rules, and was therefore barred from this instruction. Furthermore, even if defendant did give timely notice of this defense, the trial court did not err in denying defendant's request to give an alibi instruction because defendant failed to present evidence that he was elsewhere at the time of the murder. Also, the trial court did not err in not instructing the jury on identification because court did include instructions emphasizing the State's burden of proving every element, including the person who committed the offenses, beyond a reasonable doubt.

Under N.J. Court Rule 3:12-2,

> If a defendant intends to rely in any way on an alibi, within 10 days after a written demand by the prosecutor the defendant shall furnish a signed alibi, stating the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.
>
> [R. 3:12-2(a).]

However, if defendant fails to timely provide the information required, "the court may refuse to allow the party in default to present witnesses at trial as to

defendant's absence from or presence at the scene of the alleged offense." R. 3:12-2(b).

Furthermore, "[t]his Court has long held that the failure to provide a separate alibi [jury] charge does not constitute reversible error." State v. Echols, 199 N.J. 344, 363 (2009); see also, e.g., State v. Edge, 57 N.J. 580, 590–91 (1971) (holding failure to give requested alibi charge was harmless); State v. Peetros, 45 N.J. 540, 544–45 (1965) (holding no reversible error in not giving alibi charge where defendant and dentist testified defendant was at dentist's office in Philadelphia when offense committed in Camden).

In explaining why it is not error to fail to give an alibi charge, the Supreme Court found that "the important thing is to make it plain to jurors that to convict they must be satisfied . . . that guilt has been established beyond a reasonable doubt." State v. Garvin, 44 N.J. 268, 274 (1965) (quoted by Echols, 57 N.J. at 364). "If a defendant's factual claim is laid beside the State's and the jury understands that a reasonable doubt may arise out of the defense testimony as well as the State's, the jury has the issue in plain, unconfusing terms." Ibid.

However, if "events at the trial should be thought to suggest to the jury that the defendant has the burden of proving he could not physically have committed the crime," the trial court should "dissipate that danger" by clarifying that "the defendant does not have the burden of proving where he was at the critical time" but that any

evidence offered in that respect should be considered in the overall determination of reasonable doubt as to guilt. Garvin, 44 N.J. at 274. As such, the Court determined that the failure to give an alibi instruction was harmless because the instructions "made it clear that the prosecution had to prove beyond a reasonable doubt that defendant was present at the scene and committed the offense charged." Ibid.

Furthermore, when identification is a "key issue," the trial court must instruct the jury on identification, even if a defendant does not make that request. State v. Green, 86 N.J. 281, 291 (1981); State v. Davis, 363 N.J. Super. 556, 561 (App. Div. 2003) (instructions are necessary when they relate to "essential and fundamental issues and those dealing with substantially material points").

Failure to issue an identification instruction may constitute plain error, the determination of which "depends on the strength and quality of the State's corroborative evidence rather than on whether defendant's misidentification argument is convincing." Davis, 363 N.J. Super. at 561. As such, a "trial court is required to issue a 'specific instruction' even when the defendant's misidentification argument is 'thin.'" Cotto, 182 N.J. at 326 (citing Davis, 363 N.J. Super. at 561).

However, "[w]hile in some instances it may not be necessary to present an extended charge on identification, nevertheless, the complete absence of any reference to identification as an issue or as an essential element of the State's case is improper." Davis, 363 N.J. Super. at 561.

For example, in Cotto, the Supreme Court found that the trial court's jury instruction for identity was sufficient because it "emphasized the same common denominator" as the Model Jury Instructions, that is, "the State bears the burden of proving beyond a reasonable doubt that the defendant is the wrongdoer." Id. at 327. In Cotto, the trial court specifically explained to the jury "that the State bears the burden of proving beyond a reasonable doubt 'each and every element of the offense, including that of the defendant's presence at the scene of the crime and his participation in the crime." Id. at 326. The Court opined that although the trial court did not use the word "identification" and "could have given a more detailed instruction," it found that it did not err because the instructions "clearly explained the State's burden to the jury." Id. at 327.

Here, the trial court did not err in failing to give alibi or identification jury instructions because the jury was sufficiently instructed that the State alone had the burden to prove beyond a reasonable doubt any and all elements of the crime, including identification of the suspect and his/her presence at the scene of the crime.

First, the trial court did not err in declining defendant's request for an alibi instruction because defendant did not notify the State or the court of its intention to rely on an alibi until after both parties rested. Defendant also acknowledged that he failed to provide proper notice, as provided by R. 3:12-2. (14T9-13 to 18). Despite defendant's failure to give timely notice, the trial court still allowed defendant the

opportunity to provide the State and court with a written and signed list of the names and addresses of proposed alibi witnesses "[i]n the interests of fairness and justice." (14T9-5 to 21). However, defendant admitted that he did not have any witnesses and that he was relying on his recorded statement to detectives to support his alibi. (1T9-24 to 25).

Second, the trial court did not err in declining to instruct the jury on this charge because it correctly determined that defendant's statements to detectives were not an alibi, but "more akin to general denial of having knowledge of the crime." (14T11-15 to 16). The trial court aptly reasoned that "there are absolutely no time periods that [were] given by Mr. Venable that he could put a number on where he was anywhere." (13T67-7 to 12). The trial court further reiterated: "detectives repeatedly attempted to establish a time frame of the defendant's locations the morning of the incident," but "defendant continued to make statements that he did not know the time frame of where he was that morning." (14T10-9 to 13). As such, the trial court did not err in failing to give an alibi jury instruction.

Nonetheless, the State submits that even if this Court determines that an alibi instruction should have been read, this error was harmless. Defendant argues that this error is reversible because the alibi Model Jury Charge

> tells the jury that '[t]he defendant has neither the burden nor the duty to show that he/she was elsewhere at the time and so could not have committed the offense. You must determine, therefore, whether the State has proved each

> and every element of the offense charged, including that of the defendant's presence at the scene of the crime and his/her participation in it.
>
> [Db36-37; Da61-62.]

While "the failure to provide a separate alibi [jury] charge does not constitute reversible error," Echols, 199 N.J. at 363, here the jury was still instructed that defendant's "presence at the scene of the crime" and "his/her participation" in the crime were each elements that the State was required to prove beyond a reasonable doubt for each offense.

However, if "events at the trial should be thought to suggest to the jury that the defendant has the burden of proving he could not physically have committed the crime," the trial court should "dissipate that danger" by clarifying that "the defendant does not have the burden of proving where he was at the critical time" but that any evidence offered in that respect should be considered in the overall determination of reasonable doubt as to guilt. Garvin, 44 N.J. at 274. As such, the Court determined that the failure to give an alibi instruction was harmless because the instructions "made it clear that the prosecution had to prove beyond a reasonable doubt that defendant was present at the scene and committed the offense charged." Ibid.

The jury was also instructed that they could only find defendant guilty of an offense if the State proved beyond a reasonable doubt that he is the person who committed the offense:

> In its case, the State contends that the defendant's unlawful purpose in possessing the firearm was to use it against the persons of Jonathan Rojas and Devon Fisher. You must not rely upon your own notions of the unlawfulness of some other undescribed purpose of the defendant. Rather, you must consider whether the State has proven the specific unlawful charge.
>
> [14T156-9 to 157-3.]

Here, the trial court properly charged the jury by explaining the State's burden to prove each element of the crime beyond a reasonable doubt, including that defendant was the individual who committed the charges. Defendant alleges that the trial court committed reversible error in failing to read the Model Jury Charge, but even without an explicit request to charge the jury on identification, the trial court nonetheless included an instruction that "emphasized the same common denominator," Cotto, 182 N.J. at 327, as to the State's burden of as to the State's burden of proving that defendant was the wrongdoer.

Specifically, both the Model Jury Charge and the trial court's instruction explained: defendant contends that the State has not proven that he committed the crime; it is the State's burden to prove beyond a reasonable doubt that defendant committed the alleged offense(s); defendant does not have any duty whatsoever to prove that he did not commit the crime(s) or that the crime(s) was committed by another person; and the jury must determine whether the State satisfied its burden of

proving beyond a reasonable doubt not only each element of each offense, but that defendant committed the alleged offense.

It is the State's position that if this Court finds that an identification instruction was necessary in this case, the above instruction, by itself, was sufficient because it reiterated the State's burden to prove beyond a reasonable doubt that defendant was the wrongdoer. However, if this Court determines that the above instruction was not sufficient, the State submits that the jury was further instructed regarding the State's identification burden multiple times. See, e.g., 14T116-20 to 117-4 (explaining the jury's duty "to determine whether the State has proven beyond a reasonable doubt that defendant violated a specific criminal statute"); 14T118-1 to 12 ("the burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant"); 14T125-13 to 21 (clarifying the State's burden to prove "beyond a reasonable doubt that the defendant violated a specific criminal statute"). The trial court also included instructions pertaining to the "defendant's presence at the scene of the crime," see, e.g., (14T161-5 to 10), and "his participation in the crime," see, e.g., (14T126-10 to 13), two factors that the Cotto Court found to be determinative in sufficiently explaining the State's identification burden to the jury. See Cotto, 182 N.J. at 326.

As such, the State respectfully asks this Court to affirm.

POINT IV: THE TRIAL COURT PROPERLY FOUND THAT THE STATE PRESENTED EVIDENCE OF CONSPIRACY BEYOND A REASONABLE DOUBT. [Not Raised Below.]

Defendant alleges that the State failed to present sufficient evidence of conspiracy and asks this Court to vacate defendant's conviction. (Db39). However, the record indicates that there was sufficient evidence for the jury to determine that defendant and Mr. Tokley conspired to murder Mr. Rojas and the State asks this Court to affirm.

Evidence is sufficient to support a finding of guilt when the entirety of the State's direct and circumstantial evidence, viewed most favorably and given the benefit of all reasonable inferences, permits a reasonable trier of fact to find each element of the crime beyond a reasonable doubt. State v. Brown, 80 N.J. 587, 591 (1979); State v. Reyes, 50 N.J. 454, 459 (1967). See also Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

Evidential errors that are not objected to at trial are reviewed under "plain error." R. 2:10-2; State v. Trinidad, 241 N.J. 425, 452 (2020). Courts consider whether the "error [was] 'sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached.'" State v. Prall, 231 N.J. 567, 581 (2018) (alterations in original) (quoting State v. Daniels, 182 N.J. 80, 95 (2004)).

Under the Criminal Code,

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
>
> [N.J.S.A. 2C:5-2(a).]

The "major basis of conspiratorial liability [is] the unequivocal evidence of a firm purpose to commit a crime that is provided by the agreement . . . . Actual commission of the crime is not a prerequisite to conspirator liability. . . . It is the agreement that is pivotal." In re State ex rel. A.D., 212 N.J. 200, 222 (2012) (citing State v. Samuels, 189 N.J. 236, 245–46 (2007) (quotations and citations omitted)). "A conspirator can be held responsible for the acts of his or her co-conspirators even if the acts are not within the scope of the conspiracy, if they are reasonably foreseeable as the necessary or natural consequence of the conspiracy." Ibid. (internal quotations and citations omitted).

"Although there is a great deal of similarity between accomplice and conspirator liability and frequently liability may be found under both theories' the concepts are not identical." State v. Samuels, 189 N.J. 236, 254 (2007) (citing Cannel, New Jersey Criminal Code Annotated, comment to N.J.S. 2C:2–6(c) (2006)). "The critical difference is that, as statutorily defined, conspiracy requires

proof of an agreement to commit a crime whereas accomplice liability does not." Ibid.; compare N.J.S.A 2C:5–2a (conspiracy defined), with N.J.S.A. 2C:2–6c (accomplice liability defined).

Furthermore, because the conduct and words of co-conspirators is generally shrouded in "silence, furtiveness and secrecy," the conspiracy may be proven circumstantially. State v. Phelps, 96 N.J. 500, 509 (1984) (internal citations omitted); State v. Kamienski, 254 N.J. Super. 75, 94 (App. Div. 1992) (stating that "[a]n implicit or tacit agreement may be inferred from the facts and circumstances"). "Circumstantial evidence is to be tested by the rules of ordinary reasoning such as govern mankind in the ordinary affairs of life." Samuels, 189 N.J. at 245. "While certain actions of each of the defendants, when separated from the main circumstances and the rest of the case, may appear innocent, that is not significant and undoubtedly appears in every case of criminal conspiracy." Ibid. "[T]here are no legal rules as to what inferences may be drawn. The question is one of logic and common sense." State v. Powell, 84 N.J. 305, 314 (1980). "When each of the interconnected inferences [necessary to support a finding of guilt beyond a reasonable doubt] is reasonable on the evidence as a whole," judgment of acquittal is not warranted." Samuels, 189 N.J. at 246 (internal citations omitted).

Here, the trial court did not err in charging the jury with conspiracy because there was sufficient evidence for the jury find defendant guilty of conspiring with

Mr. Tokley to commit murder beyond a reasonable doubt. Defendant alleges that, at most, Mr. Tokley was the "getaway driver" and there was no agreement to commit the murder because he was not aware that defendant planned to kill the victim.

However, Samuels is instructive in illustrating how the conduct of co-conspirators can satisfy the State's burden to prove conspiracy. Samuels, 189 N.J. at 247-49. In Samuels, this Court found that a jury could convict a defendant of conspiracy beyond a reasonable doubt based on circumstantial evidence of defendant and co-defendant's "conduct and post-arrest statement," including where the two went, the time they committed the alleged offenses, who they encountered, and what they did when they got there. Id. at 248. "It is unlikely that defendant, or anyone else, would go to a motel room in a community near his home at 11:00 p.m. without a clear understanding of the purpose of the trip." Id. at 249. "This was not a visit to a friend, a quick run to the store or a late-night stop for something to eat. By helping in the search for the correct room, defendant demonstrated that he knew where he and [co-defendant] were going." Ibid.

Similarly, here, the jury reasonably convicted defendant of conspiracy to commit murder because it was evident from Mr. Tokley's conduct that he was an active participation in this plan murder. As in Samuels, it is "unlikely" that Mr. Tokley drove defendant to Camden as early as 6:42 a.m., seemingly dropped him

off, and then acted as the unaware getaway driver when he picked defendant up one block away one minute after the murder:

> [Mr. Tokley] didn't just simply drive around haphazardly, and happen to come across the defendant after the shooting. He knew exactly where he was going, and he knew exactly where to pick him up. As you saw in the video, the two individuals . . . meet up with the bike, tosses the bike on the side of the road, jumps in the car, and they're gone. That's coordination. That's a plan. That's intent.
>
> [14T53-12 to 19.]

It is also unlikely that Mr. Tokley was unaware that defendant planned to stash his firearm at Ms. Williams's house because he immediately drove him there and waited outside while defendant brought the mattress box concealing the firearm inside. As the Samuels Court found it "unlikely that defendant, or anyone else, would go to a motel room in a community near his home at 11:00 p.m. without a clear understanding of the purpose of the trip," the State submits that, similarly, it is unlikely that Mr. Tokley would start driving defendant around at 6 a.m., drop him off, pick him back up a street away, and immediately drive to the home of a woman he did not know "without a clear understanding of the purpose of the trip."

Furthermore, the State presented multiple videos from surveillance cameras around the city that show defendant and Mr. Tokley in his Chevy from as early as 6:23 a.m. on July 30, 2018. The jury then saw another video from 7:42 a.m. of the shooter riding a bicycle and shooting a firearm into Mr. Rojas's vehicle while he and

Mr. Fisher were inside. This video was corroborated by the ShotSpotter activation, which went off at 7:42 a.m. Eyewitness Alan Franchi testified that he observed the shooter ride his bicycle down Third Street and observed him get into Mr. Tokley's Chevy Captiva, testimony that was corroborated by another surveillance video showing the shooter getting off of his bike and into the Chevy at 7:43 a.m. The Chevy was then tracked by multiple surveillance cameras as driving to Ms. Williams's house at 1535 S. 8th Street, where another surveillance camera captured defendant and Mr. Tokley exiting the Chevy at 7:48 a.m., defendant entering the residence with a box while Mr. Tokley waited outside, and driving away minutes later. Importantly, the surveillance videos capturing the Chevy's journey to Ms. Williams's house do not show any individual getting in or out of Mr. Tokley's vehicle or any individual besides defendant, and later Mr. Tokley, entering or exiting Ms. Williams's house.

The State submits that this evidence plotting defendant and Mr. Tokley's movement and conduct before and after the murder is indicative of a specifically coordinated plan evidencing Mr. Tokley's participation. As such, the State respectfully asks this Court to affirm this conviction.

POINT V: DEFENDANT FAILED TO PROVIDE ANY EVIDENCE OF CUMULATIVE ERROR THAT WOULD HAVE RESULTED IN A DIFFERENT OUTCOME AT TRIAL. [Not Raised Below.]

Defendant submits the cumulative effect of the errors alleged herein requires the reversal of his convictions. (Db43). The State respectfully submits that defendant's argument lacks merit because the record below establishes that defendant received a fair and impartial trial. As set forth above, none of the errors alleged by defendant constitute prejudicial errors requiring reversal of defendant's conviction. It is respectfully submitted that these purported errors, singly or in combination, are not of such magnitude that they affected the jury's verdict or denied defendant a fair trial.

In State v. Orecchio, 16 N.J. 125, 129 (1954), the Court dealt with prejudicial errors which, in their aggregate, justified the granting of a new trial motion. No such aggregate or cumulative result has occurred herein. In light of the evidence and testimony presented regarding defendant's guilt, any error complained of did not have an effect on the jury's verdict. This verdict was not the result of a miscarriage of justice. Incidental legal errors in a trial which did not prejudice the rights of a defendant or make the proceedings unfair do not require reversal. State v. D'Ippolito, 22 N.J. 318, 325 (1956); Orecchio, 16 N.J. at 129.

Assuming, arguendo, that some minor errors occurred below, defendant has nonetheless failed to establish that these purported errors, even when viewed

collectively, denied him a fair trial. "Defendant is entitled to a fair trial but not a perfect one." Bruton v. U.S., 391 U.S. 123, 135 (1968). Moreover, as the New Jersey Supreme Court recognized, in pertinent part:

> The proper and rational standard [for the review of claimed trial errors] is not perfection; as devised and administered by imperfect humans, no trial can ever be entirely free of even the smallest defect. Our goal, nonetheless, must always be fairness.
>
> [State v. Wakefield, 190 N.J. 397, 537 (2007).]

Defendant does not offer specific arguments in his present assertion, only alleging that "a close review of the record" would reveal aggregate errors committed during the course of the case that deprived him of a fair trial. (Db34). Contrary to defendant's belief, defendant was properly convicted on all charges by ample and credible evidence adduced during his trial, including the multiple surveillance videos from Camden businesses and residences, credible testimony from eyewitnesses, and physical evidence discovered at Ms. Williams's home and the two vehicles.

As set forth in the State's brief, defendant has failed to establish any error and, consequently, defendant is without a basis for obtaining relief under the theory of cumulative error. The instant convictions were validly obtained, without error, through sufficient credible evidence which established defendant's guilt beyond any reasonable doubt. The State asks that his convictions be affirmed.

POINT VI: THE TRIAL COURT DID NOT ERR IN SENTENCING DEFENDANT BECAUSE HIS SENTENCE WAS BASED ON CREDIBLE EVIDENCE ON THE RECORD AND WAS WITHIN THE SENTENCING GUIDELINES. [Raised Below.] (17T22-14 to 42-14).

Defendant alleges that the trial court failed to consider his "advanced age" and improperly considered his arrest history as part of his sentencing, and therefore his sentence was excessive. (Db44-Db50). However, the trial court properly sentenced defendant within the statutory term for first-degree murder after finding that the aggravating factors outweighed the mitigating factors based on competent, credible evidence on the record. Regardless, even if this Court determines that the trial court improperly relied on factors including defendant's prior arrests, reversal is not warranted because this factor was not determinative of the court's sentencing decision. The State respectfully asks this Court to affirm.

As the New Jersey Supreme Court continues to reaffirm, appellate review of sentencing is "deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). See also State v. Miller, 205 N.J. 109, 127 (2011); State v. Cassady, 198 N.J. 165, 180 (2009). Indeed, if there is such adherence to the Code's sentencing scheme by a trial court, "its discretion should be immune from second-guessing." State v. Bieniek, 200 N.J. 601, 612 (2010). See also State v. Jabbour, 118 N.J. 1, 5 (1990) (holding that, if a trial court

follows the sentencing guidelines, an appellate court ought not second-guess the sentencing court's decision); State v. Roth, 95 N.J. 334 (1984).

The standard of review is one of deference. The test on appeal 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. State v. Ghertler, 114 N.J. 383, 388 (1989); see also State v. Ball, 268 N.J. Super. 72, 145 (App. Div. 1993), aff'd, 141 N.J. 142 (1995), cert. denied, 516 U.S. 1075 (1996).

A person convicted of first-degree murder shall be sentenced "to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole." N.J.S.A. 2C:11-3(b)(1). For sentencing purposes, "life imprisonment" is calculated to seventy-five years. N.J.S.A. 2C:43-7.2(b).

Murder is specifically exempted from the Criminal Code's provision that courts "shall" sentence defendants to a presumptive sentencing term. State v. Abdullah, 184 N.J. 497, 507 (2005); N.J.S.A. 2C:44-1(f)(1). Therefore, since the "standard term" for murder is a sentence between thirty years and life imprisonment, sentencing courts have the discretion to impose a sentence within this statutory range based on applicable sentencing factors because murder convictions "[do] not impose

a de facto ceiling below life imprisonment." Abdullah, 184 N.J. at 507-08. "[B]ecause the crime of murder has no presumptive term, defendant, like every murderer, knows he is risking life in prison." Id. at 508.

A sentencing court has the authority to consider a defendant's criminal history as an aggravating factor. N.J.S.A. 2C:44-1(a)(6); see also State v. Tillery, 238 N.J. 293, 328 (2019) ("defendant's prior record is central to aggravating factor six, N.J.S.A. 2C:44-1(a)(6), and may be relevant to other aggravating and mitigating factors as well"). Indeed, the assessment of a defendant's risk of recidivism, prior criminal history, and need for deterrence (aggravating factors three, six, and nine, respectively) "is a qualitative assessment that we want and expect the court to make." State v. Thomas, 188 N.J. 137, 153 (2006).

> A court's findings assessing the seriousness of a criminal record, the predictive assessment of chances of recidivism, and the need to deter the defendant and others from criminal activity, do all relate to recidivism, but also involve determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history.
>
> [State v. Thomas, 188 N.J. 137, 153 (2006) (citing Dunbar, 108 N.J. at 96-97).]

However, where a sentencing judge weighs a defendant's record heavily because it is "lengthy," and the record is lengthy because of numerous charges or arrests that did not result in convictions, the judge should state the reasons why those

charges and arrests are relevant to the character of the sentence being imposed. State v. Tanksley, 245 N.J. Super. 390, 396 (App. Div. 1991).

For example, our courts have found that a defendant's "lengthy juvenile record, his adult record including violations of parole and probation, [and] his failure to respond to any rehabilitative programs" were proper factors for which to assess the applicability of aggravating factor three." Dunbar, 108 N.J. at 96-97. Moreover, "to support a finding of aggravating factor three, the record must contain evidence demonstrating a likelihood of re-offense – be it expert testimony, or the defendant's criminal history, lack of remorse, premeditation, or other competent evidence." State v. Rivera, 249 N.J. 285 (2021); State v. Carey, 168 N.J. 413, 427 (2001) ("a defendant's denial of responsibility supports a finding under aggravating factor three that the defendant is at risk of reoffending"); State v. Rivers, 252 N.J. Super. 142, 153-54 (App. Div. 1991) ("defendant's lack of remorse and consistent denial of wrongdoing may establish a need to deter the defendant from similar conduct in the future").

Furthermore, a court's observation of a defendant's "uninterrupted history of criminality" may support its findings for aggravating factors three, six, and nine. State v. Dalziel, 182 N.J. 494, 503 (2005). As such, importantly, "adult arrests that do not result in convictions may be 'relevant to the character of the sentence . . .

imposed.'" State v. Rice, 425 N.J. Super. 375, 382 (App. Div. 2012) (quoting Tanksley, 245 N.J. Super. at 397).

Furthermore, while a defendant's "age alone cannot drive the outcome," this factor is "doubtlessly" among the information that courts should consider during sentencing because "[a]ssessing the overall fairness of a sentence requires a real-time assessment of the consequences of the aggregate sentences imposed, which perforce includes taking into account the age of the person being sentenced." State v. Torres, 246 N.J. 246, 273 (2021). This calibration "does not call for speculation or divination about defendant's future behavior," but "the court sentences the defendant 'as the defendant appears before the court on the occasion of sentencing.'" Ibid. (internal citations removed). Essentially, since "the goal is to provide the sentencing judge with the 'composite picture of the whole man,'" State v. Randolph, 210 N.J. 330, 346 (2012) (quoting State v. Green, 62 N.J. 547, 566 (1973)), trial courts endeavor to have "the fullest information possible concerning the defendant's life and characteristics." Ibid. (internal citations omitted).

Here, defendant heavily relies on State v. K.S., 220 N.J. 190, 199 (2015), to argue that the trial court was forbidden from considering defendant's arrest record during sentencing. However, defendant's reliance on K.S. is irrelevant to the court's analysis of aggravating and mitigating factors under N.J.S.A. 2C:44-1 because K.S. forbids the consideration of previously dismissed charges or arrests only in regard

to Pretrial Intervention applications guided by completely different standards under N.J.S.A. 2C:43-12(e) and R. 3:28. See 220 N.J. at 197-98.

Instead, in its decision, the trial court opined: "[defendant] has had continuous contact with the criminal justice system, starting with 01/23/1990, straight through. Even after being sentenced to some pretty lengthy sentences[.] . . . as soon as he's released, he again has contact with the criminal justice system." (17T31-17 to 25). Defendant's prior record not only supported the court's application of aggravating factor six, but the court's conclusion that prior arrests and convictions had not discouraged defendant from incurring additional offenses and convictions, or served as a deterrent from committing new offenses.

Regardless, even if the trial court was not permitted to consider defendant's arrest record in its calculation, this decision was harmless because defendant's arrest record was not determinative in the court's overall sentencing decision. The court did describe defendant's entire history with the court system, but relied on his actual "extensive" criminal record and the "seriousness of the offenses for which he has been convicted," including six municipal court convictions, seven indictable convictions, and multiple fines and contempt charges from Family Court. (17T31-6 to 9, 32-5 to 11). Furthermore, the trial court correctly opined that previous attempts to deter defendant's criminal conduct also apparently failed because defendant continued to incur new convictions even after lengthy terms of

incarceration, parole, and probation. (17T27-4 to 32-10). The State submits that defendant's history proves an inability or unwillingness to comply with any monitoring or probationary terms or orders.

Finally, defendant's argument that the trial court failed to properly consider defendant's "advanced age" because "older people are much less likely to commit crimes" is without merit. (Db48). First, defendant himself negates this argument because he has continued to commit and be convicted for new offenses as he got older. (PSA). Second, the State submits that defendant's "advanced" age and decades-long extensive contact with the court system is contrary to this argument because it is unlikely that defendant did not understand the consequences of his actions, particularly because he continued to incur increasingly violent and dangerous offenses even after being subject to terms of incarceration and probation intended to prohibit future criminal activity. The trial court did not err in sentencing defendant because it was based on competent, credible evidence from the record and within the sentencing guidelines. The State asks this Court to affirm.

CONCLUSION

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

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3391-21T4
INDICTMENT NOS. 2532-10-18-I;

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Camden County.
JERMAINE VENABLE,	:	
Defendant-Appellant.	:	Sat Below:
	:	Hon. Gwendolyn Blue, J.S.C.
		DEFENDANT IS CONFINED

Your Honors:

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

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Jermaine Venable relies on the procedural history and statement of facts from his initial brief.

LEGAL ARGUMENT

POINT I

NEW JERSEY COURTS HAVE NEVER FOUND THAT BALLISTIC ANALYSIS IS RELIABLE ENOUGH TO BE ADMITTED AT TRIAL. THE FAILURE OF THE TRIAL COURT TO HOLDING A HEARING ON THE RELIABILITY OF THIS METHOD WHEN REQUESTED WAS ERROR.

In his initial brief, Venable argued that the failure to hold an evidentiary hearing to determine the reliability—and therefore admissibility—of firearm analysis was error, requiring reversal or, at the very least, a remand for that hearing. In response, the State claims that "defendant's unreliability argument has been explicitly litigated and rejected by our courts." (Sb 10)[1] This has never happened.

The only case the State cites in support of this contention is State v. McGuire, 419 N.J. Super. 88 (App. Div. 2011). (Sb 14) As explained in Venable's initial brief, McGuire has nothing to do with this case because it is about a totally different type of analysis. Yes, both the analysis in McGuire

[1] Sb – State's brief
Ra – Appendix to defendant-appellant's reply brief

and the analysis in this case fall under the broad umbrella of "firearm and tool mark analysis." But this broad term involves analysis of any marks left by any tool. The analysis in McGuire was about the tools used to cut plastic bags. Id. at 133. Whatever the ability for an expert to match the markings left from a blade that cuts bags has no bearing on the ability to match completely different marks left by completely different instruments—in this case, of matching casings and bullets to a specific gun. Although McGuire did contain some discussion of the National Academy of Sciences report discussed in Venable's brief, it did not contain reference to the wealth of information about the unreliability about the specific matching task at issue in this case, because that information postdates McGuire.

The understanding of the reliability of ballistics analysis continues to evolve, with new developments occurring even after the filing of Venable's initial brief. In June, the Supreme Court of Maryland held that it was error for a State's expert witness opine, without any limitation, that particular bullets were fired from a particular firearm. Abruquah v. State, 296 A.3d 961, 998 (Md. 2023). The court held that a ballistics expert could testify "about firearms identifications generally, his examination . . . , his comparison . . . , and whether the patterns and markings on the crime scene bullets are consistent or inconsistent with the patterns and markings on the known bullets." Ibid. What

was not reliable enough to be admissible, however, is an expert's "unqualified opinion" that ammunition was fired from a specific gun. Id. at 997. This holding was based on the conclusion that "firearms identification has not been shown to reach reliable results linking a particular unknown bullet to a particular known firearm." Ibid.

As scientific inquiry into the reliability of ballistics analysis has progressed, courts have had to take a fresh look at evidence they have admitted for a century with any scrutiny at all. As a court in Illinois explained in its ruling finding ballistics analysis insufficiently reliable to be admissible under Frye, the failure to appropriately scrutinize this evidence has led to unknown numbers of wrongful convictions. Illinois v. Winfield, 15 CR 14066-01 (Feb. 8, 2023) (Ra 1-44). The court in that case hoped that "the above sampling of wrongful convictions should serve as a wake-up call to courts operating as rubber stamps in blinding finding general acceptance of firearms identification evidence." Id. at 41. Venable hopes so as well.

Contrary to the State's claim in its brief, the defense is not asking this Court to make any determination under Daubert. The defense is asking this Court to do what it had to do under Frye and will continue to do under Daubert: to determine whether a specific discipline is reliable. State v. Olenowski, 253 N.J. 133, 143 (2023) ("In criminal cases up until now, this

Court has used the Frye standard to assess reliability.") (emphasis added). The standard matters, but the essential question is the same. The failure to truly ask that question—and the consequent failure to come up with a substantive answer—was error. The convictions must be vacated or, in the alternative, the matter remanded for an admissibility hearing.

POINT II

UNDULY RESTRICTING THE THIRD-PARTY GUILT DEFENSE BY STRIPPING IT OF IMPORTANT AND COMPELLING DETAILS VIOLATED DEFENDANT'S RIGHTS AND REQUIRES REVERSAL OF HIS CONVICTIONS.

In his initial brief, Venable argued that being precluded from producing details to further his theory of third-party guilt required reversal. In its response, the State claims both that there was no basis for a third-party guilt defense and also that sufficient evidence about that defense was submitted. (Sb 18-20) In support of these arguments, the State relies principally on State v. Hannah, 248 N.J. 148 (2021). Hannah, however, supports Venable's position.

Our Supreme Court held in Hannah that the failure to present certain evidence deprived the defendant "of his constitutional right to present a complete and credible third-party-guilt defense." Id. at 188 (emphasis added). Hannah makes clear that the bare facts of such a defense, without the existent corroborative details, is insufficient to protect a defendant's right to a fair trial.

In Hannah, defendant was accused of murder. The State argued that he had an accomplice to the murder, LaCue, while defendant argued that that supposed accomplice actually committed the homicide with another, Thomas. Factually, the case is analogous to the case at bar: LaCue is Tokley, the person that everyone understood to be involved, and Thomas is Nasir Mason. The jury

heard the bare details of the third-party guilt theory: Hannah testified that LaCue and Thomas were at the scene at the time of the shooting and he had no role. Ibid. What the jury didn't hear, however, was significant: that the victims had Thomas's pager number on them when they were murdered and that Thomas had motive to frame Hannah for the murders. Id. at 163-64. Because the jury was not presented with this information, the defendant's "third-party guilt defense rose or fell based on his uncorroborated account." Id. at 189. Because there was information to corroborate this defense, "[t]hat evidence undoubtedly lay at the heart of Hannah's right to present a complete defense, and indeed, its admission was necessary to ensure the basic fairness of his trial." Id. at 190.

As in Hannah, the presentation of a barebones third-party-guilt defense was insufficient to ensure the basic fairness of Venable's trial. The jury heard that:

- Nasir Mason's fingerprint was found on Tokley's car, which was the getaway car. (12T 225-5 to 14)
- Mason was arrested six weeks before the shooting for "controlled substances" a block and a half away from the scene. (9T 129-1)
- Venable told officers during his interrogation that Tokley picked up "Naz" the day of the shooting and dropped him off near the scene. (11T 132-2 to 139-6)

The jury did not hear that:

- The drug Mason dealt was heroin, the same drug found in the victim's car in what can only be classified as a distribution quantity: 89 Ziploc bags. (9T 8-13 to 11-8)
- That the heroin Mason dealt was a different brand than the heroin the victim dealt. (9T 73-8 to 9)

What is a more credible third-party-guilt defense? (A) That a person whose fingerprint was on the getaway car and sold controlled substances was the killer; or (B) That a person whose fingerprint was found on the getaway car and sold a different brand of heroin in the same vicinity as the victim was the killer. The details in the second option add a specificity to the third-party-guilt defense and a motive that makes it significantly more compelling than the first option.

Further, that the trial court allowed for the bare-bones information of option (A) to be presented makes clear that it did, in fact, understand the relevance of Mason to Venable's defense. To allow some, but not all, of the information to be presented to the jury is irrational.

As in Hannah, "the issue is not whether the State presented sufficient evidence for the jury to return a guilty verdict, but whether [defendant] was denied the opportunity to present a full defense—to present evidence that would have allowed the jury to return a not-guilty verdict." Hannah, 248 N.J. at 190. Maybe, like the State and the trial court, the jury would reject the inference that two people who were selling two versions of the same drug in an

area "well-known" for "drug trafficking" and "weapons offenses" would have a rivalry that lead to a shooting. (9T 124-18 to 125-3) But maybe the jury would credit it. Maybe the jury would think that the presence of that person's fingerprints on the getaway car suggested he was recently in that car, perhaps the day of the murder. Maybe it wouldn't. But that was for the jury to decide. By withholding this information from the jury, the trial court precluded Venable from presenting a complete defense and prevented the jury from a full and fair assessment of his guilt. His convictions must be reversed.

POINT III

PRESENTING THE JURY WITH A LEGALLY INCORRECT THEORY OF ACCOMPLICE LIABILITY, TOGETHER WITH THE FAILURE TO INSTRUCT THE JURY AS TO IDENTIFICATION AND ALIBI, REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

In his initial brief, Venable argued that issues with the summation and with jury instructions required reversal of his conviction. The State's response to each of these issues, individually and cumulatively, is insufficient to sustain Venable's conviction.

First, the State does not seem to deny that the prosecutor argued in summation that Venable could be found guilty of murder as an accomplice if he helped the actual shooter hide the gun after. Nor does the State seem to dispute that that theory is clearly an invalid basis for a murder conviction under State v. Whitaker, 200 N.J. 444 (2009). The State argues instead that "Whitaker's facts are distinguished from this case because defendant is the alleged principle" and Venable has "misrepresente[d]" "the evidence supporting the State's theory that defendant was the principal actor in these offenses." (Sb 24-25).

This argument gives rise to the inescapable conclusion that it was error to instruct the jury on accomplice liability of any sort. "[T]he obligation to provide the jury with instructions regarding accomplice liability arises only in

situations where the evidence will support a conviction based on the theory that a defendant acted as an accomplice." State v. Crumb, 307 N.J. Super. 204, 221 (App. Div. 1997). With no rational basis to find that Venable was an accomplice, by the State's own admission, the instruction never should have been given. Introducing a legally irrelevant theory of guilt into the case is plain error.

To make matters worse, there was not only no basis for the accomplice liability instruction to be given, but the prosecutor then presented a legally erroneous basis for conviction on that basis: that hiding a murder weapon after-the-fact is sufficient for conviction for murder as an accomplice. The State claims that this error is harmless because, in its view, there was sufficient evidence that Venable was guilty as a principal. (Sb 24) When improper jury instructions and argument "permit[] the jurors to convict" a defendant "either upon a valid theory of guilt . . . or upon an invalid theory," a court "cannot know upon which theory the jury found" a defendant guilty. State v. Montalvo, 229 N.J. 300, 324 (2017). Such circumstances constitute plain error. Ibid. See also State v. Roldan, 314 N.J. Super. 173, 186–87 (App. Div. 1998) (when the State presented two theories of guilt to the jury, "unless the State presented sufficient evidence to support a guilty verdict under both theories, defendant's conviction must be reversed.").

Venable relies on his brief for his arguments regarding the missing identification and alibi instructions. He notes only that the State asserts that "here the jury was still instructed that defendant's 'presence at the scene of the crime' and 'his/her participation' in the crime were each elements that the State was required to prove beyond a reasonable doubt for each offense." (Rb 32) The State does not provide a cite for this assertion. These quotes do not appear in the jury instructions. Similar phrases appear in the mere presence instruction, which is part of the accomplice liability charge:

> While mere presence at the scene of the perpetration of a crime does not render a person a participant in it, proof that one is present as the scene of a commission of the crimes without disproving or opposing is evidence from which, in connection with other circumstances, it is possible for the jury to infer that the incentive thereof led to his continuance -- sorry, his continuance -- countenance, I'm sorry, and approval, and was thereby aiding the same.
>
> (14T 165-21 to 166-6)

Although that instruction is potentially helpful—albeit, in this case, confusingly worded and in the middle of an instruction that never should have been given about an inapplicable theory of guilt—it does not explicitly inform the jury about the State's burden to prove the identity and presence of Venable as the shooter beyond a reasonable doubt.

CONCLUSION

For the reasons set forth in this brief and in Mr. Venable's initial brief, his convictions must be reversed.

Respectfully submitted,

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Dated: November 8, 2023