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BRIEF AND APPENDIX (Da 1-18)
ON BEHALF OF DEFENDANT-APPELLANT

March 27, 2023
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-03806-21T4

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Judgment of Conviction Entered in the Superior Court of New Jersey, Law Division, Monmouth County.
v.	:	
JONATHAN M. MARVINE,	:	Ind. No. 19-10-1452
Defendant-Appellant.	:	Sat Below: Hon. Ellen Torregrossa-O'Connor, J.S.C. Hon. Jill G. O'Malley, J.S.C.
	:	

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

In October 2019 a Monmouth County grand jury returned Indictment Number 19-10-1452 charging the co-defendant, Gary Brooks, and Appellant, Jonathan Marvine, with: two counts of attempted murder, in violation of N.J.S.A. 2C:5-1 and 2C:11-3 (Counts One and Two); "sentencing enhancers" charging both men with possessing or using a firearm while committing the offense charged in Count One, in violation of N.J.S.A. 2C:43-6c; conspiracy to commit attempted murder, in violation of N.J.S.A. 2C:5-2, 2C:5-1 and 2C:11-3 (Count Three); possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a) (Count Four); and unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5b (Count Five). Brooks was solely charged with certain persons not to have weapons, in violation of N.J.S.A. 2C:39-7b(1) (Count Six), and that count was severed for trial purposes. (Da 1-4)[1]

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[1] "Da" – Defendant's appendix;
1T – 9/29/20 transcript of pretrial motions;
2T – 10/7/21 transcript of pretrial conference;
3T – 10/12/21 transcript of jury selection;
4T – 10/13/21 transcript of jury selection;
5T – 10/14/21 transcript of jury selection;
6T – 10/15/21 transcript of jury selection;
7T – 10/18/21 transcript of jury selection;

On September 29, 2020, the Honorable Ellen Torregrossa-O'Connor, J.S.C., heard defendants' motions to suppress evidence seized from the home at 427 Myrtle Avenue, Neptune Township, and from two vehicles, a white Toyota Corolla and a silver Hyundai Tuscon, or, alternatively, for an evidentiary hearing on the issue. (1T) The court denied the motions on November 5, 2020. (Da 5)

On April 30, 2021, Judge Torregrossa-O'Connor granted the defense motion to suppress statements of Gary Brooks. (Da 6)

Jury selection in this jointly tried case began before the Honorable Jill G. O'Malley, J.S.C., on October 12, 2021. The trial, conducted before Judge O'Malley and a jury, concluded on November 4, 2021 with the jury's verdicts convicting Gary Brooks of all charges (17T 55-12 to 57-2) and convicting Mr.

8T – 10/19/21 transcript of jury selection;
9T – 10/22/21 transcript of jury selection;
10T – 10/25/21 trial transcript;
11T – 10/26/21 trial transcript;
12T – 10/27/21 trial transcript;
13T – 10/28/21 trial transcript;
14T – 10/29/21 trial transcript;
15T – 11/1/21 trial transcript;
16T – 11/3/21 transcript of summations and jury charge;
17T – 11/4/21 transcript of deliberations and verdict;
18T – 6/20/22 sentencing transcript.

Marvine of conspiracy, as charged in Count Three, but acquitting him of all other charges. (Da 7-9)

On June 20, 2022, Judge O'Malley heard argument on the defendants' motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. By Order issued that same date (Da 10) Judge O'Malley denied the motions.

Also on that date, Judge O'Malley heard Mr. Marvine's guilty pleas to violations of probation, and discharged him from probation on those matters without improvement. (18T 135-16 to 146-20) She thereupon sentenced Mr. Marvine on the sole remaining count in the instant matter to an 11-year term of incarceration subject to the provisions of the No Early Release Act. All requisite fines and penalties were imposed. (Da 11-14)

On August 11, 2022, Mr. Marvine filed a Notice of Appeal as within time. (Da 15-18)

STATEMENT OF FACTS

At about 10:55 a.m. on August 2, 2019 (11T 89-7 to 18), Quamere Smith was driving a rented silver Hyundai Tuscon through Asbury Park with his brother, J'Kier Perry, seated in the passenger seat. (14T 37-23 to 38-10) The driver's side window was open. (14T 56-24 to 57-1)When they were in the area of Monroe and Ridge Streets, a white Toyota Corolla approached them, heading in the opposite direction, and pulled up next to their car, driver's side to driver's side. (10T 26-1 to 5; 11T 29-10 to 23; 11T 40-6 to 44-6) The driver of the Corolla rolled down his window, reached out holding a gun, and shot multiple times into the interior of the Tuscon. (14T 61-3 to 9) Smith was struck in the shoulder and had a graze wound in his neck. (11T 20-20 to 21; 14T 61-7 to 11) Perry was shot in the chin. (11T 20-17 to 19; 14T 61-16 to 62-6)

Smith drove to Jersey Shore Medical Center and parked directly outside the emergency room entrance. (14T 63-17 to 20) Both Smith and Perry entered the hospital on foot and received medical treatment for their gunshot wounds. (11T 12-22 to 13-10; 11T 152-1 to 15; 14T 62-19 to 64-2)

Meanwhile, police responded to Monroe and Ridge Streets on a report of shots fired. No cars or people involved in the incident were present, but two shell

casings were found on the ground along with broken glass. (11T 10-24 to 11-11) The citywide, police-affiliated surveillance camera system in Asbury Park had recorded the minutes before the shooting as well as the shooting itself (11T 27-7 to 28-5), and a similar surveillance system in the adjoining township of Neptune had recorded some relevant activity that took place afterward. (11T 53-24 to 54-1)

The videotapes revealed that the Corolla had been driving around near the scene a few minutes before the shooting and had done a loop around the block. (11T 46-14 to 23) According to Detective Wayne Raynor of the Monmouth County Prosecutor's Office, the videos appeared to depict two men in the Corolla (11T 72-12 to 22): an African- American driver with a beard, midlength hair and a medium complexion, wearing a multicolored blue shirt and blue pants (11T 72-23 to 73-5), and an African-American passenger with a beard and a darker complexion than the driver, wearing a black T-shirt with a white Nike insignia on the left breast. (11T 73-6 to 18)

At 11:52 a.m., a Neptune police officer spotted the white Corolla parked behind the house at 427 Myrtle Avenue in Neptune Township. (11T 113-6 to 10) Surveillance tapes later revealed that the car had arrived at that address at 11:00

a.m. (11T 89-21 to 90-10) The house was only a few minutes' drive away from the scene of the shooting. (11T 54-24 to 55-15)

A police perimeter was secured around the house at 11:56 a.m. (11T 113-11 to 13) Four men were found on the porch: Sudan Harris, Izais Normil, Mr. Brooks and Mr. Marvine. Two other men were found inside the house: Damond Poland and Mark Carter. (11T 55-21 to 36-4; 11T 135-6 to 10) Marvine did not live at that house. (11T 126-16 to 127-5) Brooks had reportedly lived there at one time. (11T 135-11 to 136-3)

All six men were detained by police. They were all photographed, their clothing was collected, and their buccal swabs were obtained. (11T 177-5 to 179-9) No charges were filed against any of the men other than Brooks and Marvine, and the other four were released that same night. (11T 82-9 to 22)

When detained by police, Brooks was wearing blue jeans and a white T-shirt. (11T 76-3 to 7) Marvine was wearing a black short-sleeved T-shirt with a white Nike insignia on the left breast. (11T 76-11 to 17)

A search of the house revealed a red jacket hanging on the door of a bedroom close to the house's front entrance. The jacket had two guns in one of its pockets, a Smith & Wesson .9 mm. and a Taurus .9 mm. (11T 51-2 to 18) The

magazine inside the Smith & Wesson was loaded, but no bullets were chambered. (12T 23-11 to 18) The Taurus had bullets in its magazine and one bullet in the chamber. (12T 26-21 to 27-12)

A search of the white Corolla revealed two spent shell casings resting on top of the front windshield wipers. (11T 187-10 to 19) It also revealed a backpack in the rear seat containing a jury summons for Brooks; a car rental agreement for the Corolla made out to Brooks; and a multicolored shirt matching the one worn by the driver in the videos. (11T 36-8 to 25; 11T 81-7 to 82-3)

The silver Tuscon seen in the surveillance videos was later determined to be the same one found outside the hospital emergency room. (11T 34-3 to 12; 11T 42-6 to 13) Its driver-side window was broken, there were two bullet holes in the driver-side door, and a bullet was lodged in the interior frame of one of the windows. (11T 14-11 to 15-2; 11T 16-13 to 19) A hospital security guard showed the police a bullet fragment that had been found on the floor of the emergency room. The police recovered it as evidence. (11T 25-18 to26-8)

The State did not call either of the two victims as a witness. The defense presented the testimony of one of them, the passenger, J'Kier Perry. Perry testified that during the shooting he was able to clearly see both the driver and

passenger in the Corolla, and neither one had been either Brooks or Marvine. (14T 38-13 to 21; 14T 41-3 to 42-4)

The parties entered into a stipulation that (1) both of the guns were operable and (2) all bullet casings, discharged bullets and cartridges found in this case had been fired from the Smith & Wesson firearm. (13T 5-5 to 6-20)

Brooks presented the testimony of Izais Normil, one of the men who was on the porch of 427 Myrtle Street when the police arrived. Normil testified that he had arrived at the house at about 9:00 on the morning in question in a black Hyundai Sonata. When he arrived, Brooks's white car was already there. (13T 43-10 to 21; 13T 50-17 to 51-9; 13T 62-1 to 17) The Sonata belonged to Sateri Ellis, a girl with whom Normil was involved. (13T 63-5 to 16) Normil and Brooks had a conversation (13T 46-1 to 7), after which Dennis Powers or Powell (Normil was unsure of the surname) arrived. (13T 46-8 to 16) A conversation ensued between Normil, Brooks and Dennis (13T 47-24 to 48-3), after which, at about 9:45 a.m., Brooks and Normil got in the Sonata, Dennis got in the Corolla, and they all drove away. (13T 48-21 to 49-17)

Normil and Brooks went to pick up Sudan Harris and the three proceeded to Asbury Park Municipal Court, where Normil and Harris had court appearances

scheduled. Brooks stayed in the car and waited for them. (13T 49-18 to 50-16) After they were done in court, Normil and Harris got back in the car, Brooks was now driving because Normil did not have a driver's license and did not want to be seen driving away from the municipal court. (13T 51-10 to 18) Normil asked Brooks to drive him to the outlet stores where all three men shopped for 20 to 40 minutes. (13T 51-20 to 53-6) They then returned to 427 Myrtle Street. The white Corolla was there again, but Dennis was not there. (13T 53-7 to 24)

Brooks began to look for the keys to the Corolla inside the car. Normil never saw him locate the keys. (13T 54-24 to 55-4) Mr. Marvine's girlfriend then dropped Marvine off at the house. (13T 60-13 to 19) Normil did not see anyone enter the house. (13T 61-8 to 9) About a minute and a half after Marvine's arrival, the police arrived and blocked off the street. (13T 55-8 to 56-5; 13T 61-15 to 22) Normil saw one of the officers find the keys to the Corolla in a trash can on the porch, and heard him announce this fact to the other officers. (13T 56-6 to 57-11)

Buccal DNA swabs were taken of all six men detailed at 427 Myrtle Street, although only those of the two defendants were later submitted for testing. (11T 178-12 to 179-9) DNA swabs of the Corolla's steering wheel and of various parts of the Smith & Wesson firearm were also taken. (11T 106-9 to 18) No DNA

matches were reported (11T 131-11 to 132-2; 11T 140-23 to 141-20), nor were any fingerprint matches reported. (11T 132-3 to 6; 11T 141-21 to 142-13)

The State produced the testimony of a detective from the New Jersey State Police that neither Marvine nor Brooks had ever applied for a New Jersey gun permit, and that neither of the two guns found at 427 Myrtle Street were registered firearms in New Jersey. (10T 53-12 to 56-21)

This appeal follows.

LEGAL ARGUMENT

POINT I

THE IMPACT OF THE PROSECUTOR'S IMPROPER BOLSTERING OF THE TESTIMONY OF HIS WITNESSES CREATED REVERSIBLE ERROR, WHICH WAS NOT CURED BY THE COURT'S LIMITING INSTRUCTION. (16T 116-7 to 121-15)

In his summation, the prosecutor informed the jury that he had not called either of the victims to testify because "[a]s I told you earlier, we have an obligation to present testimony we know to be the truth [sic: the truthful]." (16T 98-6 to 8) A few minutes later, he stated, "We don't put J'Kier Perry on [the stand] because <u>we're responsible and we have an obligation to present witnesses we know are going to tell the truth."</u> (Emphasis added) (16T 103-24 to 104-2)

As soon as the prosecutor concluded his remarks, defense counsel objected to this portion of the summation, arguing that the prosecutor had not only improperly vouched for the credibility of his own witnesses, but had also, slightly more subtly, accused defense counsel of suborning perjury. (16T 116-7 to 117-23)

The court agreed that the remarks had been improper (16T 118-9 to 120-10) and provided the jury with a limiting instruction as follows:

> Ladies and gentlemen, as I'm going to explain in my jury charge, closing arguments are not evidence, they are just that: argument. Evidence comes from the testimony that you have heard and the physical evidence that has been admitted. During closing, the State indicated that it did not call certain witnesses because the State has an obligation to present only truthful testimony. All attorneys, whether they be for the State or the defense, have an obligation to only present truthful testimony. The credibility of any witness is for you to determine, and for only you to determine. You are the sole judges of the facts.

(16T 121-4 to 15)

This instruction was not sufficient to solve the problem. The prosecutor's unameliorated misconduct denied Mr. Marvine his right to due process and a fair trial. U.S. Const. amend. V, XIV; N.J. Const. art. I, para. 1, 10, and reversal of the conviction is required.

By telling the jurors that he was obligated to only present witnesses whom he *knew* to be truthful, the prosecutor strongly implied that he, by virtue of his position, had some secret inside knowledge as to who was telling the truth and who was not. He had not called either of the victims because he *knew* that if he

did, they would lie. While he could not share the source of that knowledge with the jurors, he could still let them know of its existence.

By the same token, he also conveyed to the jury that he called the witnesses he did call, all of whom happened to be police officers, because he *knew* that they would tell the truth. Although all the jurors indicated during jury selection that they would evaluate the testimony of police officers the same as they would that of any other witness, they had not been contemplating a situation in which the prosecutor, a figure of authority in the courtroom, indirectly advised them that he had personal knowledge that these officers were all telling the truth.

Conversely, the prosecutor's statement also suggested that he knew that the defense witnesses, whose testimony ran contrary to the State's theory of the case, were lying.

It is well-settled that "the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done." State v. Ramseur, 106 N.J. 123, 320 (1987). "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." State v. Farrell, 61 N.J. 99, 105 (1972) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). Although prosecutors are expected to "represent vigorously

the state's interest in law enforcement[,]" they must also "help assure that the accused is treated fairly and that justice is done ...." Ramseur, 106 N.J. at 323-24. Thus, they must "confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence[,]" State v. Smith, 167 N.J. 158, 178 (2001) (citations omitted), and should not "vouch for the credibility of a witness[,]" State v. Bradshaw, 195 N.J. 493, 510 (2008) , or "cast unjustified aspersions" on the defense. State v. Lazo, 209 N.J. 9, 29 (2012). A conviction should be reversed where misconduct was "so egregious that it deprived the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999).

A prosecutor's improper bolstering of his own witnesses can constitute reversible error when the case presents a credibility battle. State v. R.K., 220 N.J. 444, 458, 461 (2015). In the case at bar, the defense presented an alibi witness, Mr. Normil, and an inference of third-party guilt, along with the exculpatory testimony of J'Kier Perry. Thus, credibility of witnesses was squarely in issue.

In determining whether a prosecutor's misconduct was sufficiently egregious, an appellate court "must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred."

State v. Marshall, 123 N.J. 1, 153 (1991); see also State v. Scherzer, 301 N.J. Super. 363, 433 (App. Div.), certif. den., 151 N.J. 466 (1997).

Specifically, an appellate court must consider (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Marshall, 123 N.J. at 153; Ramseur, 106 N.J. at 322-23; State v. G.S., 278 N.J. Super. 151, 173 (App. Div. 1994), rev'd on other grounds, 145 N.J. 460 (1996); State v. Ribalta, 277 N.J. Super. 277, 294 (App. Div. 1994), certif. den., 139 N.J. 442 (1995). Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial. Ramseur, 106 N.J. at 323. The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made and also deprives the court of an opportunity to take curative action. State v. Bauman, 298 N.J. Super. 176, 207 (App. Div.), certif. den., 150 N.J. 25 (1997).

Here, defense counsel's objection was promptly made, after counsel courteously waited for the prosecutor to complete his summation. The prosecutor did not "withdraw" his remarks; rather, the judge chose to deliver a limiting instruction in order to ameliorate their impact. But she did not order the remarks

to be stricken from the record, nor did she instruct the jurors to disregard them; she merely instructed them that all counsel have the obligation to present truthful testimony, and that credibility determinations are to be made by the jurors alone.

This instruction actually created more problems than it solved. To begin with, if all counsel had the obligation to present truthful testimony, how then could defense counsel and the prosecution present witnesses whose versions of events were diametrically opposed to each other? Some of the testimony presented at trial, by definition, had to have been false. But the prosecutor told the jurors that he knew that all his witnesses were truthful, while defense counsel made no such claims. In fact, jurors might conclude that if all counsel had the obligation to present truthful testimony, that made the situation even worse for the attorneys whose witnesses were not deemed credible by the prosecutor. Not only were their witnesses liars, but they themselves were flouting their own obligations to the court (and presumably to the public) by putting those witnesses on the stand. Counsel and their witnesses would have been painted with the same unsavory brush.

Yes, the jurors were instructed that they needed to make their own determinations as to the credibility of witnesses; but since the judge failed to tell

them to disregard the prosecutor's improper remarks, the overwhelming likelihood is that they factored those remarks into their determinations.

Defense counsel did not object to the judge's limiting instruction. Nonetheless, an error in instructing the jury constitutes plain error when it raises "a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Daniels, 182 N.J. 80, 102 (2004) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). Errors in a jury instruction that are "crucial to the jury's deliberations on the guilt of a criminal defendant . . . are presumed to be reversible" and "are poor candidates for rehabilitation under the plain error theory." State v. Jordan, 147 N.J. 409, 422 (1997) (internal quotation marks and citation omitted). The limiting instruction given here met that test.

Although in this matter the State's case largely hinged on surveillance videos and other tangible evidence, the credibility of the officers definitely played a role in some of their testimony. For example, Detective Raynor testified, based on his observations of the videos, that there had been two occupants of the Corolla, and he described what he believed to be their appearances and clothing. (11T 72-21 to 73-18) Because of the prosecutor's improper bolstering of his witnesses, any juror whose observations based on the videos had differed from

Raynor's would have been inclined to question the accuracy of his own observations and substitute Raynor's for them. For another example, Raynor testified to a hearsay[2] statement allegedly made to him by Marie Poland, a resident of 427 Myrtle Street, that at one time Brooks had lived in the house. (11T 135-11 to 136-3) This testimony served to establish that Brooks had more than a casual connection to the house and its occupants, and to explain why he would have felt comfortable driving to that house after the shooting.

There was no other evidence produced at trial to corroborate Poland's second-hand statement. Thus, the jury was required to evaluate the credibility of both Poland, who had not been present at trial for critical observation and had not been cross-examined, and Raynor. Was Raynor truthfully reporting a statement that had been made to him? And if so, had the statement itself been truthful? Although the prosecutor's bolstering would not have affected the jurors' assessment of Poland's credibility, about which they knew nothing, it certainly

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[2] Hearsay is not admissible unless an exception to the general rule applies. N.J.R.E. 802. The prohibition of hearsay "ensure[s] the accuracy of the fact-finding process by excluding untrustworthy statements, such as those made without the solemnity of the oath, and not subject to cross-examination by the accused or the jury's critical observation of the declarant's demeanor and tone." <u>State v. Engel</u>, 99 N.J. 453, 465 (1985).

would have had an impact on their judgment as to whether or not Raynor was telling the truth about what she had said to him.

In addition, the credibility of witnesses offered by the defense was squarely in issue. Obviously, the flip side of the prosecutor's assertion that he knew his witnesses were entirely truthful was that any witnesses presented by the defense who described a contrasting version of events were, by definition, lying. Although the judge instructed the jurors that they must make their own credibility determinations, she did not instruct them to disregard the prosecutor's comments while doing so. Thus, the door was left wide open for the jurors to factor in the prosecutor's credibility assessments when they "independently" evaluated the testimony of Mr. Normil and Mr. Perry.

In sum, there is a clear likelihood that the effects of the prosecutor's comments bolstering his own witnesses, and somewhat indirectly disparaging the defense witnesses, were for the most part exacerbated, rather than cured, by the judge's limiting instruction. There is a very real possibility that they influenced the jury's decision to convict Mr. Marvine of conspiracy. Consequently, reversal is required.

POINT II

THE PROSECUTOR COMMITTED MISCONDUCT BY TESTIFYING DURING HIS SUMMATION AS TO THE SIGNIFICANCE OF THE VARIETY OF BULLETS FOUND IN THE TWO GUNS. (16T 86-16 to 87-7)

As argued in Point I, the prosecutor suggested to the jury that he possessed knowledge that they did not as to the credibility of witnesses due to his position of authority. But he did not stop there. In his summation, regarding a different subject, he came right out and told the jury what he claimed to know based, presumably, on his personal and/or professional experience. In essence, he offered his own testimony.

The prosecutor began this segment of his summation by noting that each of the guns found had contained mixtures of ammunition from several different manufacturers, as had the recovered shell casings. (16T 86-4 to 87-4) He went on to say:

> Why do I say that this is important? When you're a proper gun owner, when you're a proper shooter, somebody who follows the rules of the state in terms of purchasing and registering guns, common sense tells you that you buy guns and bullets in en masse [sic]. You buy a box of Winchester. You buy a box of FCs. You buy a box of TulAmmos. And you shoot those

> til you're done and you buy yourself another box.

(16T 87-4 to 11) From there, the prosecutor went on to discuss the testimony of the State Police detective who had checked whether the guns were registered and whether the defendants had gun permits. (16T 87-12 to 25) But he had not yet finished with his own testimony:

> You have the two guns that are found at the same spot in the house where these two men are out front, on the front porch, and it's a mixture of ammunition that is the same. What I mean to say, the Blazers are in both guns, the Winchesters are in both guns. That's shared ammunition. And when you have an illegal handgun, you use what you can get.

(16T 88-1 to 7)

Our Supreme Court has stressed "that prosecutors should confine their summations to a review of, and an argument on, the evidence, and not …[engage] in collateral improprieties of any type, lest they imperil otherwise sound convictions." State v. Frost, 158 N.J. 76, 88 (1999) (citing State v. Thornton, 38 N.J. 380, 400 (1962), cert. denied sub nom., Thornton v. New Jersey, 374 U.S. 816 (1963)).

It is a fact that in New Jersey, purchasers of handgun ammunition must be registered handgun owners. N.J.S.A. 2C:58-3.3b. But there was no evidence in the case to that effect, aside from the prosecutor's testimony. He advised the

jurors to make inferences about the ammunition used in the case based on their "common sense," but common sense often bears little connection to American gun laws, and state laws vary widely across the country. Moreover, common sense does not dictate that "proper" gun owners would necessarily buy a box of ammunition, use it up, and then buy another box. There was nothing in the record to suggest that a "proper" gun owner would not possess several different kinds of ammunition, or would not combine those different kinds when loading their weapon. In short, there was no evidence in the record at all about the practices of gun owners with regard to their purchase or use of ammunition.

But the prosecutor went on to testify to something equally improper and even more damaging to the defense. He informed the jurors that because the two guns in question contained mixtures of the same kinds of bullets, "[t]hat's shared ammunition." In other words, the similarity of bullets between the two guns created an inference that (1) the two guns had been possessed by different people, and that (2) those two people had loaded their guns together, or at least from the same stash of ammunition.

The fact that this assertion did not make much sense does not mean that there were not jurors who believed it. After all, it was the prosecutor, who was an

authority figure and presumably professionally familiar with all things ammunition-related, who told them it was so. Of course, the mixing of bullets in the two guns would suggest just the opposite of what the prosecutor asserted: namely, that the two guns were both possessed by the *same* person who had loaded them both with whatever kind of ammunition he had on hand. But because the prosecutor said so, there were likely to have been at least some jurors who accepted that the evidence supported a conclusion that there had been "shared ammunition" between two people, each of whom had possessed one of the guns and loaded it in conjunction with the other person from a common stash.

Mr. Marvine was acquitted of both counts of weapons possession. Thus, the jury was unable to unanimously conclude beyond a reasonable doubt that he had possessed the Taurus handgun. Unfortunately, that does not compel the conclusion that the prosecutor's improper remarks had no impact on the jurors' deliberations. It is entirely reasonable to suppose that one or more jurors, while voting to acquit Mr. Marvine of gun possession, had nonetheless been swayed, whether consciously or not, by the prosecutor's improper comments, particularly the one about shared ammunition. This effect could in turn reasonably have

contributed to those jurors voting to convict Mr. Marvine of conspiracy, a more amorphous charge which by its nature relies on inferences.

Defense counsel failed to object to this instance of prosecutorial misconduct. Nonetheless, the misconduct was so egregious that it was clearly capable of producing an unjust result, and thus constituted plain error. R. 2:10-2. Reversal is required.

POINT III

THE COURT ERRED IN REFUSING TO PROVIDE AN ADVERSE INFERENCE INSTRUCTION AS TO THE STATE'S FAILURE TO PRODUCE THE TESTIMONY OF EITHER OF THE TWO VICTIMS. (15T 173-11 to 176-21; 18T 84-19 to 89-4)

On October 26th, while the State was still presenting its case, the court addressed on the record defense counsel's request to have Quamere Smith produced from state prison to obtain his testimony. The judge reported that, in part due to the active Covid situation, it was "in a bit of a bind" and would not be able to prepare a writ to bring Smith from prison. (11T 107-20 to 108-24) She announced her intention to request of the presiding judge permission to ask the First Assistant Prosecutor for assistance in securing the presence of Mr. Smith. (11T 110-9 to 111-4) Apparently that permission was received, because on October 28th, the judge was expecting Mr. Smith's arrival on the following day. (13T 118-10 to 12)

October 29th did not bring an appearance by Mr. Smith, and the record does not indicate why not. During an informal charge conference at the end of the day, the judge stated her intention to include an adverse-inference charge: "After that,

the Court did include witness – the Clawans charge, a witness – failure of the State to produce specifically as it pertains to Quamere Smith." (14T 81-6 to 9)

When a more formal charge conference was conducted on November 1st, defense counsel requested a Clawans[3] instruction based on the State's decision not to present Quamere Smith, which would have allowed the jury to infer that the State chose not to call him because he would have testified unfavorably for the State. (15T 172-7 to 173-8)

The prosecutor argued that because he had personally prosecuted Quamere Smith in the recent past, resulting in his current prison sentence, it was "questionable" that Smith would be "truthful" in his dealing with the State. (15T 168-11 to 169-8) He further argued that Smith was equally available or unavailable to both sides. (15T 169-14 to 24)

The trial court denied counsels' request. In so doing, she observed for the record that "interestingly, that did not go well when the Court tried to get Mr. – Mr. Smith here." (15T 175-1 to 3), suggesting that on the date transport had been arranged for him, Mr. Smith had refused to cooperate.

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3 State v. Clawans, 38 N.J. 162 (1962).

The court referred to the four factors that must be considered in deciding whether to give an adverse-inference charge, as set forth by the New Jersey Supreme Court in State v. Hill, 199 N.J. 545, 561 (2009). Those factors are: (1) whether the party to receive an adverse charge against it has a special relationship, superior knowledge, or control over the uncalled witness; (2) the practical and physical availability of the witness; (3) the quality of the witness's potential testimony; and (4) whether the testimony would be superior to that already provided. Id.

The judge addressed each of these factors in turn. As to factors (1) and (2), she found that Smith was not "particularly accessible to the State in this case," nor would he have been inclined to "be accommodating" to the same prosecutor who had recently prosecuted him. (15T 174-19 to 175-22)

> The defense did properly, appropriately, seek the Court's assistance in getting Mr. Smith here by use of a subpoena and a writ. That it did not work is of no fault of the defense, the State, or the Court. That is solely within Mr. Smith's control.

(15T 175-16 to 20) In actuality, factor (1) required only a showing that the State had some degree of *control over* Mr. Smith; it did not require a showing that Mr. Smith would be "accommodating." As to factor (2), certainly Smith was physically available, since he was incarcerated in state prison and could be transported. His

"practical availability" should have been deemed the same, because there is no reason to believe that his appearance could not have been compelled, regardless of how accommodating he was or was not.

As to factor (3), the judge found that Smith might have been able to testify to relevant and critical facts in issue. (15T 175-23 to 176-9) But as to factor (4), she found that the evidence of the videos was superior to whatever Smith's testimony would have been. (15T 176-9 to 18) Thus, although she had initially contemplated giving a Clawans charge as to Smith, she now decided against it. (15T 176-19 to 21)

In defense counsels' post-trial motion for judgment notwithstanding the verdict or for a new trial, one of the arguments raised was the court's refusal to provide a Clawans instruction. (18T 34-11 to 36-22) The judge denied the motions. As to the Clawans issue, she essentially restated everything she had placed on the record in deciding not to give the instruction. (18T 84-19 to 89-4)

The court's failure to give the jury charge was error that denied Mr. Marvine his right to due process and a fair trial. U.S. Const. amend. V, XIV; N.J. Const. art. I, para. 1, 10.

Appropriate and proper jury charges are necessary for a fair trial. State v. Savage, 172 N.J. 374, 387 (2002). The judge has an "independent duty" to plainly,

clearly and accurately explain "the law as it pertains to the facts and issues of each case." State v. Reddish, 181 N.J. 553, 613 (2004); accord State v. Concepcion, 111 N.J. 373, 379 (1988).

An adverse inference instruction, also known as a Clawans charge, is grounded in the principle that the "failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him." State v. Clawans, 38 N.J. 162, 170 (1962).

Clawans itself illustrates the circumstances under which an adverse inference charge against the State is appropriate. Clawans, 38 N.J. at 174. There, the defendant, an attorney, appealed from her conviction that she directed a jail inmate to testify falsely on her client's behalf. The attorney's conversation with the inmate allegedly occurred in the presence of a jail staff member, whom the State failed to call at trial. Id. at 165-67.

The New Jersey Supreme Court held that because a party's failure to produce a witness who "would serve to elucidate the facts in issue" raises an inference that the party did so because the testimony would have been unfavorable, the jury should be so instructed unless the witness is unavailable, prejudiced against the party, or if the

"testimony would be cumulative, unimportant or inferior to what had been already utilized." Id. at 170-71. In Clawans, the jail staff person was available, not prejudiced against the State, and "an eyewitness to the entire transaction -- a status which could make her testimony superior to that of anyone except" the inmate. Id. at 174.

As in Clawans, the missing witness in the instant case – Quamere Smith – was "an eyewitness to the entire transaction," a status which by its very nature was likely to have made his testimony superior to other evidence. Moreover, he was a victim, and this Court can take judicial notice of the fact that victims who can be physically located are called as witnesses by the State in virtually 100% of its trials. While it is possible that Smith would have been prejudiced against the State, the fact that he refused to cooperate with the subpoena of the court – one that he presumably would have known from speaking with his brother J'Kier Perry had been issued on behalf of the defense – strongly suggests that he was recalcitrant in general and was not eager to cooperate with any of the parties. Thus, there was no reason to conclude without direct evidence to that effect that he would have been "prejudiced against the State" as contemplated by the Clawans Court. And there was no evidence that Smith was not "available" to the State because the State had never even attempted to obtain a

writ for him, and the prosecutor was simply speculating without supporting evidence that he would not have complied.

The trial judge's analysis of the four Hill factors in this case was erroneous. The prosecutor had "control" over Smith that the defense did not, in that he could have issued a subpoena for him, prepared a writ, and compelled him to comply. Mr. Smith's location in state prison was well known; his status as an eyewitness strongly enhanced the potential value of his testimony, and that testimony would have been superior to that of the videotape because, unlike the videotape, his view of the shooter was unobstructed. In addition, his testimony would have been subjected to cross-examination, "the greatest legal engine ever devised for the discovery of truth." Wigmore on Evidence, §1367.

Moreover, in this specific case, the judge's analysis should not have been limited to the four Hill factors. She had a special obligation to provide the charge because, in his summation, the prosecutor had given the jury inaccurate and prejudicial information as to his reason for not calling Smith as a witness. As argued in Point I, supra, at the time the judge was about to deliver her charge, the jury had just been advised by the prosecutor, completely improperly, that he had not called Smith because he (apparently alone among counsel) was honoring his obligation to

only produce truthful witnesses, and Smith would not have been one. Defense counsel objected to that statement and the court agreed that the prosecutor's remarks had been improper. (16T 116-7 to 121-15) This unique situation created a similarly unique obligation on the part of the judge to revise her previous decision not to give a Clawans charge. The jurors had to be told that they could infer that the prosecutor's failure to call Smith was based not on the fact that he knew Smith would lie, but on the fact that he knew *that Smith's testimony would be unfavorable to the State.* Those two inferences are very different. In light of the prosecutor's misconduct in making a misleading, if not outright false, statement to the jury to explain his failure to call Smith, the court was under a heavy obligation to correct the impression he had thus created.

For all of the foregoing reasons, the court's error required reversal because it deprived Mr. Marvine of his Constitutional rights to due process and a fair trial. U.S. Const. amend. V, XIV; N.J. Const. art. I, para. 1, 10.

POINT IV

THE JUDGE ERRED IN REFUSING TO GRANT THE DEFENSE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, ON THE CONSPIRACY CHARGE. (18T 60-12 to 84-18)

A. Rulings on Prior Motions for Dismissal

At the end of the State's case, counsel for both co-defendants moved pursuant to R. 3:18-1 for a judgment of acquittal. Counsel for Mr. Marvine argued that the only thing the State had even arguably proven with regard to his client was that he had been a passenger in the Corolla, and that there was no evidence that could establish beyond a reasonable doubt that he had committed any offense, "certainly not for a conspiracy where there's no evidence by any witness, by inference, direct or otherwise, that there was an agreement or that there was some type of assistance by Mr. Marvine in committing an attempted murder." (13T 23-5 to 25-15)

Although the prosecutor had told the jurors in his opening statement that Brooks had been the shooter (10T 26-5 to 9), he argued in opposing the motions that a reasonable jury could infer that it had been Marvine, rather than Brooks, who had done the shooting (13T 32-6 to 12) – a rather farfetched notion, since

why would the Corolla have pulled up to the Tucson with the intended shooter on the far side, so that he would have to reach across the driver to shoot out of the driver's side window? – but one to which the court apparently lent some degree of credence.

The judge denied the motion as to both defendants. (13T 32-25 to 35-17) Specifically with regard to the conspiracy charge, she noted that "the Toyota Corolla is observed on the video doing that loop around the scene of Ridge and Monroe prior to the shooting…. A reasonable juror can infer from that evidence that that was part and parcel of an agreement or a plan…" (13T 34-8 to 17) The court also noted that it could not be discerned from the video which of the car's occupants had done the shooting. (13T 34-18 to 35-5) The judge further noted that the two men had proceeded together to the Myrtle Avenue address in which the guns were found. (13T 35-6 to 11) Accordingly, she found the conspiracy charge to be viable.

After the defense rested, counsel renewed their motions. (15T 141-15 to 143-10) The judge again denied them. (15T 144-16 to 147-2) In doing so, specifically with regard to the conspiracy charge, she referred to the "loop-around" by the Corolla prior to the shooting (15T 145-21 to 146-1); to "the

State's theory that perhaps even Mr. Brooks was not the shooter but Mr. Marvine was" (15T 146-1 to 6); and to the two men having been found together at a house in which an effort had apparently been made to conceal the guns and possibly also the keys to the Corolla[4]. (15T 146-7 to 21)

B. Ruling on the Instant Motions

Immediately prior to sentencing, both defense counsel moved for judgment notwithstanding the verdict pursuant to R. 3:18-2, or in the alternative, for a new trial pursuant to R. 3:20-1. By this time, the prosecutor in his summation had abandoned his temporary theory that Marvine might have been the shooter. In fact, he unequivocally advised the jury twice that Brooks had done the shooting. (16T 83-24 to 84-4; 16T 84-10 to 12) And, of course, the jury had acquitted Mr. Marvine of accomplice liability for the attempted murder, as well as of both of the weapons possession offenses.

As a result, the judge could no longer apply the contrary inference as part of her rationale in denying the motion. Instead, she limited her decision as to the

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[4] Interestingly, the only testimony about an effort having been made to conceal the car keys came from Azais Normil, whom the judge did not appear to find credible in any other regard.

conspiracy charge to the aforementioned "loop-around" (18T 60-12 to 61-2) and to the fact that the two defendants had remained together after the shooting, from which she found that a reasonable jury could infer that [Mr. Marvine] "was part of the plan." (18T 61-14 to 62-15) She ruled that the verdict had not been against the weight of the evidence and denied both forms of the relief requested. (18T 69-16 to 73-4)

C. Motion for Judgment Notwithstanding the Verdict

The standard for deciding a motion for judgment NOV is

> whether the [State's] evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt…. On such a motion the trial judge is not concerned with the worth, nature, or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State.

State v. Kluber, 130 N.J. Super. 336, 341-42 (App. Div. 1974), certif. den., 67 N.J. 72 (1975), overruled on other gds, United States v. Martin Linen Supply Company, 430 U.S. 564 (1977). When, as here, a defendant has been convicted of

a lesser-included offense, the appellate Court may in deciding a motion for judgment NOV review the entire record, including the defendant's case. State v. Sugar [IV], 240 N.J. Super. 148 (App. Div.), certif. den., 122 N.J. 187 (1990).

In the case at bar, even giving the State the benefit all its favorable evidence and of all the favorable inferences that could reasonably be drawn therefrom, there was simply not enough for the jury to find beyond a reasonable doubt that Marvine had known of Brooks's intention to attempt to kill Perry and Smith, let alone that he had conspired with Brooks to commit that offense.

Even if, for the sake of argument, Marvine knew before entering the Corolla that Brooks possessed two loaded guns and was searching for the victims, there is no evidence that he knew what Brooks intended to do when he found them. Brooks could have intended, for example, to engage Perry and/or Smith in an argument and to shoot in the air to threaten them; to shoot out their tires; to shoot at them with the intention of causing them minor injuries; or to shoot at them with the intention of killing one or both of them. The record is devoid of any evidence as to the history between Brooks, and possibly Marvine, and the two victims; there was no way for the jury to determine whether Brooks felt aggrieved by a minor slight, which might call for a lesser response, or by something more

serious. Nor was there any way to determine whether or not Brooks's grievance was in any way shared by Marvine.

There is likewise no record of the history between Brooks and Marvine. The record only shows, giving the State the benefit of all inferences, that Marvine was a passenger in Brooks's car before, during and after the shooting, and that after the shooting the two of them proceeded to, and remained in, the same location as each other for slightly less than an hour. The absence of evidence as to Marvine's state of mind or reaction to the shooting demonstrates that there is no legitimate way to determine or even infer beyond a reasonable doubt why he acted (or failed to act) as he did.

The prosecutor argued in summation that a conspiracy must have existed because Mr. Marvine "doesn't exit the car. He doesn't get away from Brooks." (16T 107-19 to 21)

> Listen. Any reasonable person, any of you sitting here, if the discussion of shooting someone, taking another person's life, comes up, as a friend of yours is driving you around town, are you going to say I want out, stop the car, I'm going to stop at a red light, I'm going to get out, hold on a second….

* * *

> There's clearly talk between the two men because
> Marvine doesn't stop. He doesn't say let me
> out. He doesn't say listen, I'm not going to
> get involved in anything. He doesn't wave to
> the guys, try to give them a signal, that are
> in the Tucson.

(16T 107-21 to 108-2; 16T 108-21 to 25)

The prosecutor's contention that Brooks and Marvine had discussed what Brooks was about to do, as evidenced by the fact that Marvine did not jump out of the car or try to warn Perry and Smith, does not hold water. The prosecutor seems to be suggesting that if Marvine had not been part of a conspiracy with Brooks but had learned of the plan either only during the car ride or when Brooks began shooting, the only reasonable action for Marvine to take was to promptly exit the car, and possibly to warn the intended victims. But even if there had been no prior discussion, and Marvine had not anticipated the shooting and been shocked by it, that reaction would not necessarily dictate that he immediately jump out of the car after he watched it occur. It is certainly a reasonable possibility that prior to that day he knew and had accepted the fact that Brooks had a tendency toward violence and was capable of acting on that tendency at any time, and yet Marvine decided to associate with him anyway and to remain with him after the shooting. Marvine's choosing to spend time with someone he knew to be dangerous would

not constitute a conspiracy to commit a dangerous act with him, whether or not Marvine had any personal animosity toward Perry and/or Smith. A lack of moral outrage after the fact cannot be equated with a previously-formed conspiracy. As the judge correctly instructed the jury, "[m]ere association… with an alleged coconspirator is not enough to establish a defendant's guilt of conspiracy…" (16T 160-22 to 24)

The preceding only applies to the question of whether or not Marvine knew in advance that Brooks intended to try to kill Perry and/or Smith. Mr. Marvine submits that there was no evidence from which the jury could have reasonably inferred that he had prior knowledge. But even if this Court finds otherwise, it must conclude that there was insufficient evidence to prove beyond a reasonable doubt that Marvine had *conspired* with Brooks in that attempt. The most a reasonable jury could have found was that he had chosen to go along for the ride.

The prosecutor argued, presupposing that Brooks had previously told Marvine of his plan, that Marvine must have been part of a conspiracy with Brooks because he had to have known that there was a gun in the car. "You're talking about shooting somebody. And how do I know you're serious? I know you're serious because there's a gun in that car." (16T 108-2 to 5) The prosecutor

argued that there had in fact been two guns in the car, one of which was visible in the video. (16T 108-5 to 8) But the fact that there was at least one gun in the car does not require a conclusion that Marvine had conspired with Brooks to commit an attempted murder. It is reasonably likely that Marvine knew that traveling armed was a matter of routine for Brooks, and not necessarily an indication of an immediate plan to use a weapon. But even if Marvine had known both that Brooks was armed and that he had a plan to use the gun against Perry and Smith, that would not have amounted to proof beyond a reasonable doubt of his participation in a conspiracy.

Returning again to the jury charge, the judge correctly instructed the jurors that for them to find that either defendant had been guilty of conspiracy, the State would have to prove beyond a reasonable doubt that "*it was his conscious object or purpose to promote or make it easier to commit the crime*." (16T 161-7 to 13) (Emphasis added) Since the record contained no evidence that Marvine had done anything whatsoever to promote or make it easier for Brooks to commit the crime – or anything at all other than remain in the passenger seat - there was no basis for the jurors to conclude that it had been his conscious object or purpose to do so.

N.J.S.A. 2C:5-2 provides as follows:

> 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 a solicitation to commit such a 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.

Up until the time the jury returned its verdict, all parties seemed to be proceeding on the tacit assumption that if Marvine were to be convicted of any of the charged offenses, those convictions would be based at least in part on a finding that he had possessed one of the two guns while in the car. It was certainly what the prosecutor argued in his summation.

> First, it does not make any sense that defendant Brooks, the shooter in this case, would have been armed with two handguns. There's no possible way for him to drive armed with two handguns. Remember, he's the driver of the Toyota Corolla…. Defendant Marvine was armed with this second gun that was found, the Taurus 9 millimeter. He simply does not have a chance to pull the trigger.

(16T 83-24 to 84-4; 16T 84-10 to 12)

After the verdict was returned, making clear that the jury did not believe beyond a reasonable doubt that Marvine had possessed the second gun, or that he had acted as an accomplice to Brooks in the attempted murder, the only remaining evidence relating to conspiracy on Marvine's part was his having been in the car while Brooks was driving a loop before the shooting, and his having remained with Brooks after the shooting. As argued earlier in this point, this paltry evidence could not reasonably qualify as proof beyond a reasonable doubt that Marvine had entered into a conspiracy with Brooks.

As the judge accurately instructed the jury, "[a]n inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence." (18T 129-5 to 7) That Marvine was a passenger in the Corolla at the time of the shooting might be such a logical and reasonable inference from the evidence in this case. That he had even known of Brooks's plan, let alone that he had conspired with Brooks to commit attempted murder was certainly not.

D. Alternative Motion for a New Trial

The standard on appellate review of a new trial motion under R. 2:10-1 is that "[t]he trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." This standard is also applicable to proceedings under R. 3-20-1. See Pressler & Verniero, Current N.J. Court Rules, Comment R. 3:20-1[2]. See also Dolson v. Anastasia, 55 N.J. 2, 6 (1969). "The trial judge shall grant the motion [for a new trial] if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law"…. However, a motion for a new trial "may be properly granted although the state of the evidence would not justify the direction of a verdict." Id. To address a motion for a mistrial, to which a new trial motion is analogous, trial courts must consider the unique circumstances of the case. State v. Allah, 170 N.J. 269, 280 (2002); State v. Loyal, 164 N.J. 418, 435-36 (2000).

For all of the reasons set forth in the preceding subsection, Mr. Marvine contends that even if the Court rejects his argument as to the motion for judgment NOV, his conspiracy conviction represents a clear and convincing example of a miscarriage of justice.

E. Conclusion

The judge's ruling denying the motion for judgment notwithstanding the verdict pursuant to R. 3:18-1 was erroneous, in that even giving the State the benefit of all reasonable inferences, there was insufficient evidence from which a reasonable jury could deduce beyond a reasonable doubt that Mr. Marvine had been guilty of conspiracy. Accordingly, the verdict must be reversed. This Court is respectfully requested to exercise original jurisdiction and grant the requested judgment.

In the alternative, the Court is respectfully urged to find that the verdict on the conspiracy charge was unsupported by sufficient credible evidence in the record, pursuant to R. 3:20-1, and that it represented a clear miscarriage of justice. The matter must be remanded for a new trial.

CONCLUSION

For the reasons set forth in Points I, II and III of this brief, the Court is respectfully requested to vacate defendant's conviction and sentence and remand the matter for a new trial. For reasons set forth in Point IV, the Court is respectfully requested to enter a judgment of acquittal notwithstanding the verdict. As to Point IV, in the alternative, the Court is urged to vacate the conviction and remand the matter for a new trial.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3806-21T4

INDICTMENT NO. 19-10-1452
CASE NO. 19003124

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	
v.	:	ON APPEAL FROM A FINAL JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION (CRIMINAL), MONMOUTH COUNTY
JONATHAN M. MARVINE,	:	
Defendant-Appellant.	:	

SAT BELOW: Honorable, Ellen Torregrossa-O'Conner, J.S.C.,
Honorable, Jill G. O'Malley, J.S.C.
and a Jury

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT PROCEDURAL HISTORY

The State accepts the Procedural History of this case as accounted for in the brief of Jonathan M. Marvine (hereinafter "defendant"). (Db 1-3).

COUNTERSTATEMENT OF FACTS [1]

On August 3, 2019, at approximately 11:00 a.m., police were alerted to a report of shots fired in the area of Monroe and Ridge Avenues in Asbury Park. (11T:10-17 to 11-5). In a cooperative investigation, Detective Wayne Raynor from the Monmouth County Prosecutor's Office, along with Detective Davis from the Asbury Park Police Department, were assigned as lead detectives. Upon arrival at the scene, detectives immediately observed a crime scene had been established and further observed two shell casings on the ground (in the

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[1] 1T – Transcript of Pretrial Motions, dated September 29, 2020;
2T – Transcript of Pretrial Conference, dated October 7, 2021;
3T – Transcript of Jury Selection, dated October 12, 2021;
4T – Transcript of Jury Selection, dated October 13, 2021;
5T – Transcript of Jury Selection, dated October 14, 2021;
6T – Transcript of Jury Selection, dated October 15, 2021;
7T – Transcript of Jury Selection, dated October 18, 2021;
8T – Transcript of Jury Selection, dated October 19, 2021;
9T – Transcript of Jury Selection, dated October 22, 2021;
10T – Transcript of Trial, dated October 25, 2021;
11T – Transcript of Trial, dated October 26, 2021;
12T – Transcript of Trial, dated October 27, 2021;
13T – Transcript of Trial, dated October 28, 2021;
14T – Transcript of Trial, dated October 29, 2021;
15T – Transcript of Trial, dated November 1, 2021;
16T – Transcript of Summations and Jury Charge, dated November 3, 2021;
17T – Transcript of Jury Deliberations and Verdict, dated November 4, 2021;
18T – Transcript of Sentencing, dated June 20, 2022;
Db – Defendant's Brief in Support of Appeal;
Da – Defendant's Appendix.

intersection) amongst broken glass. (11T:11-2 to 11; 18 to 12-13).

Not long after, detectives were advised that two victims had arrived in the emergency room of the Jersey Shore Medical Center with gunshot wounds. (11T:11-12 to 17; 18-5 to 12). At approximately 11:45 a.m., Detectives Raynor and Davis responded to the emergency room area of the hospital and observed the area had been marked off with cautionary tape – indictive that another crime scene had been established – and observed a silver 2017 Hyundai Tucson with Texas license plates parked right in front of the emergency room doors. (11T:12-19 to 13-10; 21 to 14-5; 50-7 to 8).

Based on the condition of the Tucson, detectives determined that the vehicle was involved in the shooting. More specifically, the driver's side window had shattered glass hanging from where the window would go down into the door and bullet holes were observed on the driver's side door. (11T:14-21 to 15-17). Detectives also observed a bullet lodged in the inside frame on the passenger side of the vehicle. All of these observations were made without going inside, touching, or moving anything inside of the vehicle. (11T:17-9 to 13).

Detectives then entered the hospital to try and identify the two gunshot victims. They learned that one victim, Quamere Smith, was shot in the left shoulder and had a graze wound to his neck. The other victim, J'Kier Perry, was shot in the face and head area. (11T:18-19 to 19-2; 20-4 to 21). By the time detectives arrived at the hospital, Perry was unconscious, intubated and in critical condition. (11T:20-24 to 21-4).

As detectives were leaving the hospital, they were notified by hospital staff that a security guard found what appeared to be a bullet on the floor in the

emergency room within the same path that Smith and Perry had entered the emergency room. So, detectives established another crime scene. (11T:25-16 to 26-8).

Detective Raynor and Davis then left the hospital and arrived at a satellite location of the Monmouth County Prosecutor's Office, located in Asbury Park, around 12:30 p.m. During this time, detectives were notified that the shooting had been captured on video from a city-wide surveillance camera system located in Asbury Park. One specific surveillance camera was located at the intersection of Monroe and Ridge Avenues. (11T:27-4 to 28-5; 29-10 to 16; 50-13 to 14). Detectives were also notified that Neptune City, a municipality that is directly adjacent to Asbury Park, also had a similar city-wide surveillance system and it, too captured the vehicles involved in the shooting. (11T:27-17 to 18; 53-14 to 54-4).

Detectives began immediately reviewing the videos as they came in. (11T:50-13 to 17). On the Asbury Video, detectives observed two vehicles at the intersection of Ridge and Monroe at approximately 11a.m. on the day of the shooting, one was a Silver Tucson – the same vehicle detectives found at the Jersey Shore Medical Center emergency room entrance. The second vehicle observed was a white Toyota Corolla. (11T:33-18 to 34-18). That vehicle would later be found by police parked in the back of a residence – 427 Myrtle Avenue in Neptune Township hours after the shooting. (11T:48-10 to 49-7). Through their investigation, police determined that the Corolla was rented from Enterprise Rental by Gary Brooks, Jr. on July 30, 2019 - four days before the shooting. (11T:36-19 to 38-9; 77-10 to 12).

On the Neptune video, detectives observed the white Corolla, with a license plate that matched the vehicle rented to Brooks, driving around the vicinity of Monroe and Ridge Avenues at 10:58 a.m., minutes before the shooting. (11T:54-4 to 23; 57-2 to 59-7). Inside the Corolla, detectives observed two occupants. The driver was an African-American male of medium complexion with a beard and not cropped short hair, but not long hair, wearing a multi-colored shirt and long blue pants. The passenger was an African-American male of a darker complexion than the driver, with a beard wearing a black shirt with a white Nike insignia on the left breast. (11T:72-12 to 75-7). In an effort to identify the driver and the passenger, detectives made close-up stills from the video. (11T:75-9 to 20).

Detectives also learned that several individuals had been taken into custody and transported to the Asbury Park satellite office. Those individuals were Damon Poland, Susan Harris, Izais Normil, Mark Carter, and defendants Jonathan Marvine and Gary Brooks, Jr. (11T:34-13 to 36-5).[2] Police encountered these individuals at a residence located at 427 Myrtle Avenue, mere blocks from the shooting.[3] Notably, neither defendant nor Brooks lived at 427 Myrtle Avenue, yet Brooks rented Corolla, which was observed by police in the video as being involved in the shooting, was parked in the rear of that residence. (11T:36-5 to 7).

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2 Of the six individuals detained, only defendant and Brooks were charged. The others were released that same night. (11T:82-16 to 22).

3 Detective Raynor testified that the intersection where the shooting occurred in Asbury Park and 427 Myrtle Avenue in Neptune Township were only blocks away from each other and it would take only minutes to drive from the scene of the shooting to 427 Myrtle Avenue. (11T:82-16 to 22).

A search warrant for 427 Myrtle Avenue was submitted, approved, and thereafter executed by police. Two handguns – a Smith & Wesson 9mm and a Taurus 9mm – were recovered from the pocket of a red jacket that was hanging on the inside of a bedroom door. (11T:50-23 to 53-13).

Police also seized Brooks' white Toyota Corolla and applied for a search warrant, which was granted. The search revealed a spent shell casing on the exterior windshield and a black backpack in the back seat. A search of the backpack revealed a shirt that matched the description of the shirt being worn by the driver of the Corolla in the video, the rental agreement for the Corolla, and a court summons addressed to Gary Brooks, Jr. (11T:79-6 to 82-11).

Meanwhile, at the satellite office in Asbury, Detectives Raynor and Davis encountered defendant and Brooks. At that time, Brooks was wearing blue jeans and a white T-shirt. Defendant was wearing a black short sleeve T-shirt with a white Nike insignia on the left breast. (11T:76-3 to 17).

The video of the shooting was played for the jury. (11T:40-1 to 14). The parties also stipulated that both guns found at 427 Myrtle were operable and that all the shell casings, bullets and cartridges found at the crime scenes had been fired from the Smith & Wesson firearm. (13T:5-5 to 6-20). Testimony from Detective James Hearne from the New Jersey State police revealed that neither Brooks nor defendant had ever applied for a gun permit and that neither of the two guns recovered from 427 Myrtle Avenue were registered firearms. (10T:53-12 to 56-21).

The State did not call either victim to testify. However, the defense presented the testimony of one of the victims, J'Kier Perry. Perry testified that on August 2, 2019, he and his brother, Quamere Smith, were driving in Asbury

Park. Perry was the passenger and Smith was the driver. (14T:37-23 to 38-10).

According to Perry, a car pulled up and stopped next to their car. The driver rolled down the window, pulled out a gun and started shooting. (14T:38-11 to 14; 40-13 to 22). Perry testified that as the passenger, he was able see both individuals inside the vehicle, even though shots were being fired at him. (14T:39-12 to 14; 40-13 to 25). Perry did not remember (1) what time the shooting happened (14T:42-21 to 43-7), (2) the color of the vehicle that pulled up next to them, although he testified that the vehicle was "close enough for me to see" (14T:48-11 to 16; 54-22 to 24), or (3) the make or model of the car he was riding in that day (14T:43-21 to 44-4). However, Perry testified that he saw the person who shot him and it was not Brooks. He also testified that he saw the passenger and it was not defendant. (14T:38-17 to 21; 40-23 to 42; 67-20 to 68-1).

Brooks defense called Izais Normil, who was one of the six individuals present at 427 Myrtle Avenue when police arrived. Normil was Brooks' alibi witness. (13T:10 to 14). Normil testified that on August 2, 2019, he drove to 427 Myrtle Avenue and met up with Brooks and another male – Dennis Power. (13T:43-10 to 17; 45-1 to 46-16). Normil testified that the white vehicle belonging to Brooks was at the residence when he arrived; however, at around 10:00 a.m., Normil and Brooks got into the vehicle Normil arrived in and Powers drove off the white vehicle belonging to Books. (13T:43-18 to 45-13; 48-21 to 49-17; 64-12 to 18).

According to Normil, he and Brooks then went and picked up Sudan Harris because Normil and Sudan both had court appearances in Asbury Park

municipal court. (13T:49-22 to 50-10). They drove to the municipal court in Asbury Park. Normil and Sudan went inside the courthouse and Brooks remained in the vehicle. Their court appearance lasted about 20-30 minutes (13T:50-12 to 51-18). Afterwards, they went to an outlet store – "like a clothing store." Normil did not recall the name of shopping complex or where it was located, but he supposed it was the Jersey Shore Outlet. Brooks was now driving Normil's vehicle because Normil did not have a driver's license, so he did not want to drive out of the police station. (13T:51-19 to 52-21). They shopped for approximately 40 minutes, then went back to 427 Myrtle Avenue. (13T:53-2 to 9).

Normil further testified that when they arrived at the residence, Brooks white Corolla was there; however, Mr. Powers was not. Normil testified that Brooks went over to the Corolla to look for the keys, which he claims Brooks never found. Sometime thereafter, police arrived at the residence. (13T:53-20 to 55-13). Normil testified that he was on the porch, sitting on the steps when the officers began looking for the keys to the Corolla, which were ultimately found in a trash can on the porch. (13T:56-3 to 57-11).

Notably, on cross examination, Normil testified to different events prior to retuning to Myrtle Avenue. When pressed on the timeline of events that day, he testified that they also stopped to his daughter's house to drop off the clothes he bought at the outlet stores. This was not part of his timeline during direct examination. (13T:70-7 to 23). Normil also admitted that his testimony in court was different than the two statements he gave to detective. He claimed someone had subsequently altered his words. (13T:75-16 to 78-19; 79-15 to 86-1). When pressed further, Normil changed his story again and

stated that "the whole given statement that day wasn't true. I didn't want to talk. They wouldn't let me go." (13T:91-6 to 12). Then when asked if the officers manipulated his statement, Normil switched gears again and testified that "Yes. I didn't say the majority of that." (13T:91-14 to 16).

Brooks defense did not call Sudan Harris. Likewise, Quamere Harris was subpoenaed by the trial court to appear on behalf of the defense; however, Smith refused to come from state prison to testify. (15T:20-16 to 22-3).

The State called detective Wayne Raynor as a rebuttal witness. Detective Raynor testified that once Mr. Normil was identified as a potential witness in October of 2021, he was tasked with interviewing Mr. Normil again. Detective Raynor testified that Mr. Normal did not want to provide a statement to police. (15T:135-25 to 137-10).

LEGAL ARGUMENT

POINT I

THE STATE'S SUMMATION DID NOT INFRINGE ON DEFNDANT'S RIGHT TO HAVE THE JURY FAIRLY EVALUATE THE MERITS OF HIS DEFENSE.

Under his first point, defendant argues that the State improperly bolstered the credibility of its witnesses during summation, thus depriving him of a fair trial. The State disagrees and submits that the remarks made during summation regarding who called what witnesses and why was in direct response to defense counsel's allegations made against the State during their summations.

As representatives of the State, prosecutors must act according to certain principles of fundamental fairness. State v. Wakefield, 190 N.J. 397, 436 (2007). Prosecutors have a "duty to ensure that justice is achieved" and are afforded considerable flexibility during opening statements and summations. State v. Williams, 113 N.J. 393, 447-48 (1988). With respect to summation, "[p]rosecutors are expected to make vigorous and forceful closing argument to the jury." State v. Rose, 112 N.J. 454, 517 (1988). Prosecutors "may comment on the facts shown by or reasonably to be inferred from the evidence." Wakefield, 190 N.J. at 457. In that same vein, "Prosecutors are permitted to respond to arguments raised by defense counsel as long as they do not stray beyond the evidence." State v. Vasquez, 374 N.J. Super. 252, 260 (App. Div. 2005) (citing State v. Goode, 278 N.J. Super. 85, 90 (App. Div. 1994); State v. Staples, 263 N.J. Super. 602, 604-06 (App. Div. 1993); State v. Morais, 359 N.J.

Super. 123, 131, (App. Div. 2003)). No error exists "so long as the [prosecutor] confines himself in that fashion." Vasquez, 374 N.J. Super. at 260; Wakefield, 190 N.J. at 457.

A criminal conviction should not be overturned unless the prosecutor's conduct was "so egregious as to deprive defendant of a fair trial." Id. at 437. Therefore, a reversal will only be justified if the prosecutor's conduct is "clearly and unmistakably improper [and] substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 575 (1999). In determining whether comments in summation require reversal, an appellate court "must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred." State v. Marshall, 123 N.J. 1, 153, 586 A.2d 85 (1991), cert. denied, 507 U.S. 929 (1993). A reviewing court should never consider a prosecutor's questions or argument in a vacuum. Rather, a reviewing court should evaluate the prosecutor's comments in context with defense counsel's "opening salvo." State v. Munoz, 340 N.J. Super. 204, 216 (App. Div.) (quoting. United States v. Young, 470 U.S. 1, 12, (1985)), certif. denied, 169, N.J. 610 (2001); State v. Engel, 249 N.J. Super. 336, 379 (App. Div.), certif. denied, 130 N.J. 393 (1991). Every prosecutorial misstep will not warrant a new trial.

In the instant case, the theme of the State's summation was two-fold. First, the State detailed the testimony of detectives and the physical evidence presented, including the video of the shooting. Then, the State switched to specifically rebut the defense collective claims that the State could not have met their burden by producing only three witnesses. Likewise, the State

responded to the defense assertion that State denied the jury the whole story. And while the defense did object to the State's summation at its conclusion, the trial court gave a limiting instruction reminding jurors that closing arguments were not evidence. As such, defendant has not made any showing that the jury's ability to rationally evaluate the evidence was impaired.

From the very inception of their summation, the collective defense strategy was to forego a direct attack on the evidence and instead, attack how the State chose to present the evidence. In doing so, the defense stressed to the jury that the lack of witnesses called, including one of the victims, J'Kier Perry deprived the jury of the "whole story". Defense counsel for defendant began his summation by reminding the jury of the "[h]uge list of witnesses or potential witnesses or potential names that may [have been] mentioned in this case during the very long and arduous voir dire process;" and then preceded to assert, "And then the State called three witnesses." (16T:13-6 to 16). When defendant's counsel was ready to talk about the evidence, he first interjected, "Now, I want to start off before I go into the actual witnesses, not that there's many...." (16T:14-16 to 17).

In speaking to the testimony to J'Kier Perry, defendant's counsel referred to him as "the most important witness, the most striking witness" and then specifically stated, "Now, here's a witness who's a victim. He wasn't called by the State, he was called by the defense. And his testimony proves that they got it wrong. That Johnathan Marvine should not be sitting here today." (16T:27-20 to 25). Later, and in the face of inculpatory video evidence shown to the jury, defense counsel termed Perry's testimony as, "It's the strongest piece of evidence in this trial." (16T:28-24). Defendant's

counsel then informed the jury as to how to determine credibility – as judges of the facts – and then suggested that Perry's status as a victim automatically made him believable, thus credible. Defendant's counsel opined:

> This is the victim. He wants the person who shot him caught, just like any other victim would. His interest in the outcome of the trial? Here, he is telling you that justice is being – done here (sic). That this man didn't do it. His testimony is pleading to you, hey, they got the wrong guys. Don't find these guys guilty.
>
> . . .
>
> And his ability to recollect what happened that day is clear. I did get to see them. I did see who was in the vehicle. It wasn't them. The possible bias, if any, in favor of the side for whom the witness testified. How can it be a bias against I think you're a victim?
>
> . . .
>
> Well, J'Kier Perry is the key to this case.
>
> [16T:29-6 to 31-2).

As the record amply reflects, defendant's counsel directly attacked the State's decision not to call the victim and insinuated the State was not really seeking justice because naturally "[Perry] wants the person who shot him caught, just like any other victim would." (16T:29-13 to 15). In other words, in order for the victim to receive justice, the defense had to call him to the stand because the State did not. This statement was not based on any evidence in the record, but instead, was the theme of the defense summation and a calculated attempt to slight the State in front of the jury.

In continuation of the same strategy and theme, defense counsel for Brooks went further and insinuated that the State not only hampered justice, but also withheld evidence to mislead the jury. Defense counsel for Brooks

stated:

> ***We didn't hear the rest of the story from the State***...and now we're going to talk about the rest of the story, which is the whole story. I'll talk about Mr. Perry in a moment, who I agree with Mr. Diaz-Cobo. He is the young man shot in the face, has absolutely nothing to gain, you can imagine would have no sympathy or bias in favor of someone who just shot him in the face. And he comes in here, knows Gary, recognizes Gary. I looked in the car, I saw the guy that shot me, and I'm telling you it's not Gary.

[16T:54-7 to 19][Emphasis and bolding added].

Both defense attorneys, during their summation, vouched for and put the truthfulness of Perry's testimony at issue, not the State. However, in doing so, defense counsel took specific aim at the State and suggested to the jury that because the State did not call Perry, it was hiding valuable evidence that the defense had to bring forth to effectuate justice. In sum, the defense told the jury what the State should have done and suggested a dubious motive in the State's presentation of evidence. Therefore, in response to these direct attacks, the State was permitted to rebut defense counsel's accusations and skewed sermon about the State's motives. Vasquez, 374 N.J. Super. at 260; Wakefield, 190 N.J. at 457. As such, the State's summation was not improper bolstering, it was proper rebuttal.

The defense further argued that the State told jurors that it "knew that all [its] witnesses' were truthful, while defense counsel made no such claims." (Db 16). This assertion is simply incorrect. At no time during its entire summation did the State ever comment on the truthfulness of its own witnesses, nor put forth any argument making such an implication. In fact, the State did not point to or even highlight any of the police testimony. The

State told the jury the video they saw of the actual crime being committed was the best evidence, and not that of the detectives. (16T:75-12 to 77-23). The State reiterated that they – the jury – would supply the ultimate answer as to what they saw and what they believed happened. Ibid.

However, the defense specifically vouched for and specifically touted the truthfulness of their witnesses. They argued that such truthfulness made their witnesses the superior evidence. More specifically, in arguing against the State's rebuttal testimony, counsel for Brooks opined:

> What else was offered on rebuttal? Well, let's hear from Detective Radnor (sic) again. Let's try this. All right. What did we hear from Detective Radnor (sic)? Do you know – do you know that in September, we wanted speak to Mr. Normil, and he said he didn't want to. Imagine that. And that's the rebuttal testimony to try and somehow say that ***this guy who put his hand on the Bible and his other hand raised, told you what happened.*** That's the rebuttal testimony ***that is somehow going to disprove it.***"

[16T66-19 to 67-3][emphasis and bolding added].

As evidenced by the record, defendant's arguments are simply an unpersuasive veiled attempt to divert attention away from the fact that the jury did not believe their witnesses or their defense as a whole. And directly attacking the State's decisions as to who to call as witnesses opened the door for the State to respond as to their motives. This response was proper and does not constitute prejudicial error. Vasquez, 374 N.J. Super. at 260; Wakefield, 190 N.J. at 457.

Defendant also argues that the limiting instruction, ask for and approved by the defense prior to being read to the jury, somehow now, on appeal, constitutes plain error because the trial judge did not *sua sponte* strike the

State's comments from the record and instruct the jury to disregard them. (Db 16-17). This argument is also unpersuasive. There was no need to strike any part of the State's summation from the record because the instruction given was properly tailored to remind the jury that the summations were not evidence they could consider – they were the arguments of the lawyers. Additionally, the judge stated that she had met with the parties and the language of the instruction was "run by all counsel." (16T:119-13 to 15). The instruction was then read for the record and its language directly tracked and addressed defense counsel's objection:

> Ladies and gentlemen, as I'll explain in my charge, closing arguments are not evidence. They are just that, argument. Evidence comes from testimony you've heard and the physical evidence that has been admitted. During closings, A.P. Luciano indicated he did not call certain witnesses because the State has an obligation to only present truthful testimony. All attorneys, whether they are from the State or the defense, has an obligation to present only truthful testimony. The credibility of any witness is for you to determine, and only you to determine. You are the sole judges of the facts.
>
> [16T:119-16 to 120-3; see also 121-3 to 15; compare, 116-3 to 117-5].

The judge gave an appropriate instruction based on the collective objection of the defense directing that what the lawyers said was argument, not evidence and that only their credibility determinations controls. The instruction was read aloud to all the parties and subsequently accepted by both defense counsels. There is nothing in this record to indicate or to seriously doubt the juror's capacity to follow instructions. See State v. Winter, 96 N.J. 640, 649, (1984) (noting that "[t]he record lends no support to the suggestion that the jurors were unable to comply with the court's instruction"); State v. Catlow,

206 N.J. Super. 186, 193 (App. Div. 1985) (noting that the record revealed "no reason to believe that the jury was unable to follow the court's sharp and complete curative instruction"), certif. denied, 103 N.J. 465, 511 A.2d 648 (1986).

In that same vein, to suggest the jurors would listen to the State's summation and assume – on their own, as defendant suggests – that the State was really "bolstering" the testimony of Detective Raynor to inflate his credibility is pure speculation, at best. Then, to further suggest that "any juror whose observations based on the videos had differed from Raynor's would have been inclined to question the accuracy of his own observations and substitute Raynor's for them" is nonsensical. (Db 17-18). It is simply not believable that the jurors would disregard what they saw with their own eyes on the video and instead, rely only on Detective Raynor's testimony.

This jury convicted defendant of conspiracy because they saw him – with their own eyes – in the same vehicle with the shooter – Brooks. The jury saw defendant driving around with Brooks prior to, and during the shooting. (11T:54-4 to 23; 57-2 to 59-7). The jury then heard undisputed evidence that the vehicle in the video – a Toyota Corolla – was found parked at a residence blocks from the shooting and defendant was also found at that residence hanging out with Brooks. (11T:33-18 to 34-18; 48-10 to 49-7; 34-13 to 36-5).

The video evidence and defendant's presence with Brooks after the shooting was the overwhelming evidence that convicted defendant, not the State's summation and not any error in the limiting instruction. Clearly, the jury did not believe defendant's witnesses or their defense, in general. The State's summation and this result does not now equate to error requiring reversal. In sum, defendant's arguments are as unpersuasive as they are

meritless.

POINT II

THE STATE DID NOT TESTIFY ABOUT THE BALLISTIC EVIDENCE.

Defendants next argues that the State "testified" and "suggested to the jury that he possessed knowledge that they did not as to the credibility of the witnesses due to his position of authority." (Db 20). However, this argument is based on an incorrect reading of the record. What is more, defendant was acquitted of the weapons charges by the jury, so defendant's attempt to once again label the State's summation as misconduct in order to weave error into his conviction for conspiracy, is substantively meritless.

The State is permitted wide latitude in advocating its position before the jury. State v. DiFrisco, 137 N.J. 434, 474 (1994); State v. Dixon, 125 N.J. 223, 259 (1991); State v. Shelton, 344 N.J. Super. 505, 519 (App. Div.), cert. denied, 171 N.J. 43 (2001). This broad latitude is available so long as counsel stays within the evidence and the legitimate inferences to be drawn therefrom. E.g. Timmendequas, 161 N.J. at 587. Within that limitation, the prosecutor may vigorously and forcefully argue the State's case. Id.; State v. Chew, 150 N.J. 30, 84 (1997); State v. Tilghman, 345 N.J. Super. 571, 575 (App. Div. 2001).

Here, defendant plucks out a single paragraph – a mere excerpt – from an entire section of the State's summation regarding the ballistic evidence and claims misconduct. However, put in its proper context, the State argued:

> Finally, ladies and gentlemen, what I would ask you to do is take a look at all of the exhibits, including I believe its exhibits S-6, which are the bullets from the Smith & Wesson, and exhibits 8 and 9, which are the rounds from the Taurus.

Now, when you look at the rounds that are found inside the Smith & Wesson, you're going to find one round which is entitled as FC Luger with a (indiscernible). You're going to find a bullet that says Blazer Luger on it. You're going to find three TulAmmos, .9-millimeter Luger bullets, as well as Winchester .9 -millimeter bullet.

Now, at the scene, out at Ridge and Monroe, amidst the shatter glass, there are two shell casings found, retrieved, documented by detective Cordoma. One is S-10. That's a Winchester. The second shell casing is a TulAmmo. Again, matching the bullets that are found in the Smith & Wesson. Remember also that two shell casings are found on the windshield wiper of the Toyota Corolla. Once of those is a Winchester. The other is a FC, FC .9-millimeter Luger.

When you look at the bullets that are found in the cars, you'll find that there are four Winchester bullets as well as one Blazer Luger bullet. And in the chamber of that Taurus .9-millimeter is another Winchester bullet.

[16T:86-4 to 87-4].

Then, following the specific excerpt defense points to, the State argued:

With these two weapons, illegal weapons – and again, you heard from Detective-Sergeant Hearne who said not only did these two men not have any other the requisite paperwork required for ownership of a gun, but he did more than what was argued by Mr. Diaz-Cobo, And it's on his affidavit. He also checked to see if those guns were registered to anybody in the state of New Jersey, and they weren't. That's on his affidavit...You have the two guns that are found at the same spot in the house where these two men are out front, on the front porch, and it's a mixture of ammunition that is the same. What I mean to say, the Blazers are in both guns, the Winchesters are in both guns. That's shared ammunition. And when you have an illegal handgun, you use what you can get.

[16T:87-12 to 88-7; compare, 16T:87-4 to 11; Db 21].

As the record reflects, the State's ballistic argument was centered around the physical and testimonial evidence presented at trial. (See 13T:5-1 to 6-15; 12T:18-23 to 43-25). As evidenced above, the State argued that the bullets found at the scene and on defendant Brooks' Corolla matched the same bullets in the two guns recovered at the residence where both defendants were found after the shooting. Id. The testimony by the New Jersey State Police was that neither defendant had a permit to own a gun and that the guns recovered were not legally registered to anyone. (10T:53-12 to 56-21). Based on the fact that there were different types of bullets and two clearly illegal guns, a reasonable inference could be made, and properly made during summation based on the evidence in the record, that the two defendants found whatever ammunition they could and put them into the two guns. This was not testimony, it was a proper summation argument.

Defendant touts the "authority" of the prosecutor as a basis to assume the jury would believe anything he said. Clearly, that argument bears no merit because even if the jury found the prosecutor to be an "authority" on ammunition, they discounted such authority when they acquitted defendant of the gun charges.

Additionally, defendant's assertion that the State's comments during summation about "shared ammunition" could have "reasonably contributed to those jurors voting to convict [defendant] of conspiracy, a more amorphous charge which by its nature relies on inferences," ignores the video evidence in this case. (Db 23-24). Likewise, it ignores the fact that even if defendant did not know Brooks had a gun and was planning to shoot the victims that day, the

fact that he was hanging out with Brooks at 427 Myrtle Avenue, mere hours after the shooting, and did not flee as soon as he could, was powerful evidence of a conspiracy. As the jury rejected the State's theory that defendant possessed the other gun, they also could have rejected the State's theory that remaining with Brooks was evidence that they both agreed to commit the shooting. However, based on the jury's verdict, they clearly believed defendant was involved in the agreement and planning of the shooting. It is therefore not plausible that the State's summation on "shared ammunition" swayed the jurors to convict defendant of conspiracy. Defendant's difficult plight is the overwhelming video evidence of his crime, and not the State's summation.

POINT III

THE TRIAL COURT DID NOT ERR IN DECIDING AGAINST PROVIDING AN ADVERSE-INFERENCE CHARGE.

Defendant's argument under this point simply ignores the record in this case. As such, his due process argument is without merit.

In order for an inference to be available from the nonproduction of a witness, the trial court must find:

> (1) that the uncalled witness is peculiarly within the control or power of only the one party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts in issue; and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven.

State v. Hill, 199 N.J. 545, 561, 562 (2009)(quoting State v. Hickman, 204 N.J. Super. 409, 414 (App. Div. 1985); State v. Clawans, 38 N.J. 162, 171 (1962).

"A witness is within the power of the party to produce when that party has superior knowledge of the existence or 'identity of a witness or what testimony might be expected or where a certain relationship . . . exists.'" State v. Wilson, 128 N.J. 233, 244 (1992) (quoting State v. Carter, 91 N. J. 86, 127-28 (1982)). Also, "it must appear that the absent witness's testimony, if given, would have been more than merely cumulative, that is, the witness's testimony on a point would have been superior to the testimony actually developed on that point." Wilson, 128 N.J. at 244 (citing Clawans, 38 N.J. at 171). An appellate court reviewing the failure to issue an adverse-inference charge is for abuse of discretion. State v. Dabas, 215 N.J. 114, 132 (2013).

Here, the trial judge issued a comprehensive oral decision in denying defendant's request for an adverse-inference charge. In doing so, the judge cogently applied the Hill factors. (15T:174-6 to 18). First, as the State argued during the Clawans motion, and the judge recognized, Smith was serving a State prison term at the time of the instant trial. (See 15T:168-11 to 169-8; 174-19 to 175-12). Importantly, the court further recognized that not only the Monmouth County Prosecutor's Office, but specifically the Assistant Prosecutor in the instant case, was directly involved in the previous prosecution of Smith, for which he was serving a prison term. (15T:175-7 to 12; see also, 15T:168-14 to 169-12). As such, the State was not in a peculiar position more so than the defense, or the court. (15T:174-21 to 175-5). And simply because Smith was housed in State prison does not automatically equate to the State having control over him, as defendant suggests. (Db 27).

Indeed, even when the court issued an order and a writ for Smith to appear, he refused to leave State prison and be transported to the Monmouth County courthouse. (15175-1 to 3). Smith was no more in the custody, control, or power of the State than the defense, thus the court properly concluded that factors one and two did not weigh in favor of a Clawans charge. (15T:175-13 to 22).

As to factor three, Smith's statement to police was that he did not see anything or the person who shot him because he was watching a rap video on his phone. Therefore, as the court correctly determined, the only relevant information he could have told the jury was regarding his specific injuries, which the State had already shown pictures of said injuries to the jury. As Smith would have not provided "critical" information to the facts at issue – mainly was defendant involved in the shooting – factor three did not weigh in favor of a Clawans charge. (15T:175-23 to 176-9).

Under factor four, the fact that the shooting had been captured on video was clearly the superior evidence in the case. It showed the jurors exactly what happened. So, Smith's testimony, even if consistent with or contradictory to his statement to police, was clearly not superior to that of the video. As such, factor four did not weigh in favor of a Clawans charge.

Finally, defendant – once again – leans on the State's summation as a basis for error for not giving a Clawans charge. Not only is this argument legally misplaced, but the State did not give any "inaccurate and prejudicial information as to his reason for not calling Smith during summation," as defendant suggests. (Db 31). As argued above, the there was no misconduct in the State's summation because the Assistant Prosecutor was properly

responding to the mischaracterizations – made by both defense counsel during their summations. The State responded to the defense telling the jury that the State had an alleged lack of candor by not telling the "whole story." Likewise, the State responded to the defense own bolstering of Perry, claiming he was a victim who was only seeking justice, which only the defense was offering by calling him to the stand. The State's summation did not create a "unique situation" whereby the trial court was required to give a Clawans charge. (Db 32). The jury was to determine Perry's credibility, not the trial judge. The fact that the jury did not believe Perry does not now equate to an inference – after-the-fact – that Perry's testimony was unfavorable to the State within the Hill factors, giving segue way for a Clawans charge. Defendant's legal stretch here on appeal does not make it so.

The trial court's decision, viewed through the lens of the facts and evidence in this case, along with the court's thorough analysis within the relevant and proper standard was not error. As such, this Court should not disturb the well-reasoned exercise of the trial court's discretion in denying the request for a Clawans charge.

POINT IV

DEFENDANT'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT WAS PROPERLY DENIED, AS WAS HIS MOTION FOR A NEW TRIAL.

A. Motion for Judgment Not Withstanding the Verdict

The standard for appellate review on motion for judgment notwithstanding the verdict is the same that is applicable to a motion of acquittal – whether "viewing the State's evidence in its entirety, be that

evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Kluber, 130 N.J. Super. 336, 341-342 (App. Div. 1974) certif. denied, 67 N.J. 72 (1975) overruled on other grounds, United States v. Martin Linen Supply Company, 430 U.S. 564 (1977) (see also, 18T:56-25 to 57-5). Thus, the appellate standard and the standard required of the trial court are one and the same. It comes down to a determination of whether any rational factfinder could find that the State proved the essential elements of the crime beyond a reasonable doubt.

Pursuant to N.J.S.A. 2C:5-2:

> 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 of more of them, will engage in conduct which constitutes such crime or an attempt or a solicitation to commit such a 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.

Here, as the trial court properly found by viewing the State's evidence in its entirety:

> But importantly in this case, there was sufficient evidence to suggest that Mr. Marvine was not a mere – not merely present at the scene of this offense. Related to that, of course, as the State correctly points out today, Mr. Marvine was present before the shooting, before the loop around, or as the State describes it as the hunting, he was present at the shooting, and extremely importantly he was present after the shooting.

> As described in great detail during the testimony of this trial, both Mr. Marvine and Mr. Brooks were located with the suspect car and two handguns at a residence on Myrtle Avenue. The fact that Marvine was in the car with Brooks during the shooting may not have been enough to support a conspiracy charge, but that information combined with the fact that he was driving around with Marvine beforehand, and the fact that he remained with Brooks for a significant period of time after the shooting suggests that he was part of the plan, that he lent his continence and approval to it, and he aided Mr. Brooks in the shooting.
>
> . . .
>
> Now, while Perry and Normil provided a different version of events for the jury to consider, the jury apparently chose to reject that version.
>
> [18T:61-14 to 62-10; 62-16 to 18].

Based on the foregoing, defendant's argument that the State did not present any motive evidence is legally misplaced. (Db 37-38). The State is not required to prove motive. So, any history between defendant and the two victims or history between defendant and Brooks is of no moment when looking through the lens of N.J.S.A. 2C:5-2 and the standard for a motion for judgment notwithstanding the verdict. Likewise, defendant's "reaction to the shooting" is also legally of no moment. (Db 38). To prove conspiracy, the State is not required to prove defendant acted or failed to act – in any way. Rather, conspiracy only requires the State to prove agreement. Ibid.

Defendant also tries to temper the strongest evidence against him – his presence with Brooks after the shooting. Defendant argues that there was no evidence that defendant had prior knowledge of the shooting. (Db 40). This argument is negated by the record. As the trial judge stated when she denied

defendant's motion, defendant was with Brooks before, during and most significantly, after the shooting. Defendant's own actions in remaining with Brooks following the shooting, and likely aiding in the hiding of the guns in the house, was strong evidence of his agreement to the crime. The same facts directly prove defendant's "conscious object" regarding the conspiracy. As such, defendant's assertions that the record contained no evidence to support the conspiracy conviction simply ignores the clear record in this case. (Db 41).

As the verdict in this case was based on thee sufficient and credible evidence presented, the trial court properly denied the defendant's motion for judgment notwithstanding the verdict. Kluber, 130 N.J. Super. at 341-342.

B. Motion for New Trial

Defendant also contends that the trial court erred in denying his motion for a new trial. However, this motion was properly denied.

A trial court's ruling refusing to set aside a jury verdict will not be reversed on appeal unless it clearly and convincingly appears that there was a miscarriage of justice under the law. R. 2:10-1; R. 3:20-1; e.g., State v. LaBrutto, 114 N. J. 187, 207 (1989); State V. Carter, 91 N.J. 86, 96 (1982); State v. Cook, 330 N.J. Super. 395, 419 (App. Div.), certif. denied, 165 N.J. 486 (2000). As our Supreme Court has said, "Faith in the ability of a jury to examine the evidence critically and to apply the law impartially serves as a cornerstone of our system of criminal justice." State v. Afanador, 134 N.J. 162, 178 (1993). Hence, a reviewing court ought not disturb jury findings merely because it might have found otherwise upon the same evidence. Ibid. Indeed, "a jury verdict, from the weight of the evidence

standpoint, is impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice." Carrino v. Novotny, 78 N.J. 355, 360 (1979); accord State v. Landeros, 20 N.J. 69, 82-83 (1955).

Here, defendant's asserts that the jury verdict handed down in this case was a "miscarriage of justice." (Db 44). However, for all the reasons argued above, the verdict in this case did not go against the weight of the evidence. As the trial court properly determined in denying the motion:

> [T[he Court has carefully considered the record in this matter. It cannot and does not conclude that the verdict is against the weight of the evidence. In contrast, the Court finds that there was more than sufficient evidence before the jury upon which the jury could properly find beyond a reasonable doubt the defendants guilty of the offenses for which they were convicted.
>
> While it is not possible for this Court to determine the precise evidence upon which the jury has made their findings of guilt, the record contains ample evidence which supports the jury's verdicts. While defendants contain – contend that the State's motion was – I'm sorry, the State's case was insufficient, that is simply not true. To be sure, the video surveillance was damning evidence. It clearly depicted the motor vehicle and its occupants.
>
> Also clearly depicted on the video was the shooting. But to buttress the video surveillance the State presented ballistic evidence, still photos of the scene of the victims, and the items recovered from defendants, and the locations where they were found, including the firearm which matched the casings at the scene.
>
> As the defense points out, the jury was presented with the testimony of Izais Normil and J'Kier Perry, who contradicted the State's version of events. The jury had the opportunity to assess

> the credibility of these witnesses who testified for the defense and were subject to vigorous cross-examination by the State. Having been provided with that opportunity, the jury appears to have rejected their testimony. In so doing, the jury made a determination that the State's version of events was more believable, more credible, more probable…This finds nothing in the record which would support a conclusion that the jury's credibility and determination resulted in a miscarriage of justice or was not supported by the evidence in the record. Therefore, there is no basis upon which the Court could properly conclude that the jury's verdict was against the weight of the evidence, or that there was not sufficient evidence to support the jury's verdict.
>
> [18T:71-7 to 73-4].

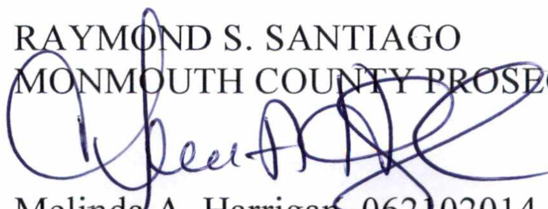
As the record and the trial court's reasoned decisioned reflects, there was sufficient evidence presented for the jury to convict defendant of conspiracy to commit murder. Likewise, the defense presented a case that the jury believed in part and rejected in part. More specifically, defendant was acquitted of accomplice liability for the attempted murder, as well as both of the weapons offenses. Thus, it is not plausible to believe that the jury did not weigh all the evidence in this case and render a just verdict. The record does not support defendant's assertion of a miscarriage of justice and as such, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully submits defendant's conviction and sentence should be affirmed.

Respectfully submitted,

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR



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