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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0716-14T2
A-1342-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAMIEN JOHNSON,

Defendant-Appellant.

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STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRIAN JOHNSON,

Defendant-Appellant.

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Submitted (A-0716-14) and Argued (A-1342-14)
October 24, 2017 — Decided January 18, 2018

Before Judges Reisner, Hoffman and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 10-01-0059.

Joseph E. Krakora, Public Defender, attorney for appellant Damien Johnson (John A. Albright, Designated Counsel, on the briefs).

Stephen W. Kirsch, Assistant Deputy Public Defender, argued the cause for appellant Brian Johnson (Joseph E. Krakora, Public Defender, attorney; Stephen W. Kirsch, of counsel and on the brief).

Jennifer M. Eugene, Assistant Prosecutor, argued the cause for respondent in A-1342-14 (Angelo J. Onofri, Mercer County Prosecutor, attorney; Jennifer M. Eugene, of counsel and on the brief in both appeals).

Brian Johnson filed a pro se supplemental brief.

PER CURIAM

Defendants Brian Johnson and Damien Johnson[1] were tried together and were convicted by a jury of the following offenses: murder, N.J.S.A. 2C:11-3(a)(2) and N.J.S.A. 2C:2-6; two counts of felony murder, N.J.S.A. 2C:11-3(a)(3) and N.J.S.A. 2C:2-6; three counts of robbery, N.J.S.A. 2C:15-1 and N.J.S.A. 2C:2-6; burglary, N.J.S.A. 2C:18-2 and N.J.S.A. 2C:2-6; and possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4 and N.J.S.A. 2C:2-6. The trial court sentenced each defendant to sixty years in prison subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

[1] Despite having the same last name, defendants are not related to each other. Intending no disrespect, we will generally refer to defendants by their first names to avoid repetition.

We have consolidated the appeals for purposes of this opinion and we now affirm the convictions in each appeal. However, as the State concedes, we must remand both cases for resentencing before a new sentencing judge, pursuant to State v. McFarlane, 224 N.J. 458, 469 (2016).

I

The charges arose from a home invasion robbery in which two armed men entered a house on South Clinton Avenue in Trenton, apparently intending to steal heroin from a drug dealer named Pullen, who lived there. One of the robbers was armed with a large silver handgun. During the incident, the intruders fatally shot a victim named Joe Costanzo, forced several other victims to empty their pockets at gunpoint, and robbed Pullen. Prior to the trial, the judge denied defendants' severance motion and held that the State would be permitted to introduce certain evidence under N.J.R.E. 404(b), on the issues of motive and identity. Specifically, he permitted the State to introduce evidence that defendants were drug dealers, operating in the same market as the dealer they robbed. The judge also allowed the State to introduce evidence linking both defendants to a large silver handgun, similar to the type of gun used in the shooting.

The following trial evidence is most pertinent to the legal issues on appeal. In the early evening of December 1, 2008, Ms.

Tesauro[2] drove to a house on South Clinton Avenue, to deliver food from a local church. She parked at the back of the house and entered through the kitchen. Mr. Negron, Joe Costanzo, Mr. Cochran and Mr. Shaw were in the living room at the front of the house watching football. Tesauro sat on the arm of a couch near the front door, across from Costanzo.

Tesauro testified that, soon after she arrived, two men wearing ski masks and thickly padded black or navy blue snowsuits walked through the front door. The stitching on one of the men's jackets looked as if it was meant to keep "the feathers" or inner material from "mov[ing]." Both men were about six feet tall and were built like football players. The larger of the two men was carrying a gun, which he pointed at Costanzo. Tesauro said the man's hand was "very large" and covered most of the gun. From what she could see, the gun was "very shiny," "nickel plated, or silver," and it had a "long barrel."

The man said something to Costanzo, but Tesauro was "so startled" by the weapon, she did not hear what he said. Costanzo responded "I don't have any money" and "pulled himself up" as if to show the man that he had nothing in his pockets. The man

[2] Mindful that our opinion will be disseminated on the internet, we do not use the first names of the surviving victims in order to protect their privacy. Nor do we provide the specific addresses of the houses mentioned in this opinion.

immediately shot Costanzo. Tesauro said the sound was so loud, she "still [had] problems with [her] ears." Cochran jumped up and tried to give the men his cell phone. One of the men looked at it, but did not take it.

The men ordered everyone to go upstairs. When they got to the top of the stairs, they went into a well-lit bedroom where Mr. Pullen was lying on a bed, hiding his face. Cochran grabbed Pullen's foot and shook it. Pullen turned to see the man with the gun, who told Pullen to not look at him. At that point, Tesauro also turned away. "A short time" later, Tesauro heard someone say that the men had left. She, along with Negron, Cochran and Pullen, quickly went downstairs to Costanzo, who was bleeding and moving his head. Negron repeatedly said: "Can you hear me, Joe?" Costanzo did not answer. Pullen called for an ambulance, and after checking to be sure that the robbers were gone, Tesauro left the house with Cochran and Negron. Tesauro said the entire incident lasted seven to ten minutes.

On cross-examination, Tesauro testified that she was not familiar with guns and their distinguishing characteristics. Her knowledge of them was limited to what she had seen in the movies. When asked to describe the gun the shooter used, she said: "I didn't see any spindle where you put the bullets. I don't know if the gun had one or not. His hand was so big, I don't know. I

just seen the barrel of the gun." When asked if it was a semi-automatic weapon or a revolver, Tesauro said: "[F]rom what I saw it just looked like the gun might have had a clip or something, but I didn't seen any spindle that held the bullets. So I can't be sure of what kind of a gun that was, because I only seen a part of the gun." Tesauro acknowledged that at a previous hearing, she had described the gun as "Arnold Schwarzenegger's gun" from the movie Terminator. She said the gun "wasn't a cowboy gun."

According to Negron, he went to the house on South Clinton Avenue to watch football on the evening of December 1, 2008, after he drank two or three beers, sniffed heroin and smoked marijuana. The game had just begun when he arrived. He sat on a couch with his back towards the front door. Costanzo sat across from him about five feet away. Shaw, Cochran, and Tesauro were also in the living room. Pullen was upstairs.

Soon thereafter, two men came into the house with "a revolver" that was "chrome or nickel plated," "silver," and "very shiny" with "a large barrel," about six inches in length. It was the kind of gun "you'd see in a Clint Eastwood movie." It "looked like a Dirty Harry type of gun, maybe .44, .45 even."

Both men were "fully covered." They wore gloves, face masks, and jumpsuits, and tried to disguise their voices by making them "raspy." One of the men had "a lazy eye." He ordered Negron to

not look at him, and Negron put his head down. Tesauro became "hysterical." Negron told her to put her head down too, and to give them no reason to shoot. He felt her cower behind him.

Negron said, "before I knew it I heard the gunshot." "The sound was excruciating." He said that he could tell the weapon "was a large caliber gun . . . by the muffling in [his] ear. It was almost deafening." He was familiar with guns, as he had shot "many different weapons" including ".44s," ".35s" and "Glocks."

One of the men said "everyone riffle your pockets." The people in the room emptied their pockets, but "no one really had anything." One of the intruders asked who was upstairs, and ordered everyone to go there. Negron believed that he had followed Tesauro up the stairs with Cochran and the two men behind them.

The group went into a small room where Pullen was in a bed, and the men said "everyone get down on your hands and knees, put your hands behind your head." The room was not large enough for everyone to get on the floor, so Negron and Tesauro sat on a cot and put their heads down. Negron believed they were all going to die. One of the men told Pullen to strip and "give me all you got." A short time later, Negron heard the back door slam. Believing the men had left, he looked up and saw Pullen getting dressed.

Negron, Tesauro, Cochran, and Pullen ran downstairs and saw

Costanzo "gurgling, holding his face in the couch." Pullen was "freaking out." Tesauro was "hysterical," and Pullen told Negron and Cochran "get her [Tesauro] out of here." Cochran and Negron walked Tesauro out the front door and down the street to her car. The three of them then drove away.

Negron testified that the police questioned him the day after the shooting. They asked if cocaine was sold out of the home, and he said no, but heroin was involved. Negron did not recall telling police that one of the men had a lazy eye and that the men had ordered Pullen to take off his clothes. He said he remembered those details while undergoing therapy for post-traumatic stress disorder. Negron admitted that he had a prior criminal record and had been charged with violating probation, but denied that anyone had promised him leniency in exchange for his testimony.

According to Medical Examiner Raafat Ahmad, Costanzo was a thirty-eight-year-old male who suffered a fatal gunshot wound to the head, neck and shoulder. Ahmad recovered a "large caliber bullet" from Costanzo's left upper arm. James Storey, the State's expert in the caliber of projectiles and ballistics, testified that based on weight, diameter, length and circumference, the bullet recovered from Costanzo's shoulder was a ".44 caliber class, discharged, metal jacketed, expanding type bullet."

The State also presented evidence directly connecting

defendants to the gun used in the shooting, the sale of drugs, and the clothing worn by the robbers. The State also presented evidence that defendants told two witnesses about their participation in the crime.

Muhammad Al-Barr, a federal informant, testified that he had known Damien since 1996. In 2008, Damien weighed about 260 or 270 pounds and stood about six feet tall. At some point, Al-Barr saw Damien with a silver .44 revolver.

On December 2 or 3, 2008, Al-Barr spoke with Damien at a barber shop Al-Barr owned in Camden. According to Al-Barr, Damien said that he was "involved in a home invasion in Trenton and [that] he shot someone in the face and took their heroin" because "the individual owed him money from seven grams of cocaine." However, Al-Barr admitted that at one time, he told investigators that Damien told him he shot two people, a man and a woman, and that he shot one person in the face and one person in the leg.

According to Al-Barr, when he met with Damien at the barbershop, Damien had with him "[l]ike a sleeve and a half [or about 400 bags] of heroin with the name Burberry on it," and he wanted Al-Barr to sell it for him in Camden. Because the heroin was stamped Burberry, Damien said that he could not sell it in Trenton because people would know that he was connected to the shooting. Damien also told Al-Barr that he needed a new weapon

because he had "throw[n] the other one away" "in a lake – body of water somewhere." Al-Barr understood that the discarded gun was the silver .44 revolver he had seen earlier. Al-Barr testified that he gave the heroin to "Mike" to sell, but Mike had difficulty getting rid of it because of its poor quality.

Detective Sergeant Thomas Watters testified, without objection, that during the murder investigation, Pullen admitted buying, from a distributor, a large amount of heroin stamped "Burberry," which he intended to re-sell. Pullen also told the police that the robbers stole the "Burberry" heroin from him.

On January 27, 2009, Trenton Police Officer Sean Gaither executed a warrant to search Brian's home, which was located on South Clinton Avenue, a few doors away from the house where the shooting occurred. Hanging from a hook in the basement stairway, Gaither found a garbage bag that contained a shirt, sweatshirt, and "large black [coverall] similar to a Carhartt jumpsuit." The jumpsuit "had stitching that made it look like . . . a quilted like blanket."

Mark Walker, a friend of Brian and Damien, testified that between August 2008 and January 2009, he saw Brian three to four times a week. When asked what they did together, Walker said they rode around the city in a "little gold car" that belonged to Brian's girlfriend, played video games, drank alcohol, and

packaged heroin to sell at Annette Bozeman's apartment. Sometimes Damien was with them. Damien had "lopsided eyes" — "one looked bigger than the other" — and he drove a black Ford Explorer.

Walker recalled a time when Damien showed him, Brian and "a few other people" a "big ass silver gun" while they were at a home where Damien stayed "off of South Broad." He recalled that Damien passed the gun around to Brian and the others in the group. Walker described the gun as "like a Joker gun, like it's supposed to have a bang flag come out of it or something." It was "[l]ike — one long cowboy gun, like Clint Eastwood would have or something," and it was "[s]hiny silver, chrome." Walker estimated that it weighed three to four pounds. He also drew a picture of the gun, which was introduced in evidence. Walker did not recall "how many days before" the shooting this incident occurred, but he was sure it occurred before the shooting.

Walker testified that one or two days before the shooting, he was in Brian's car when Brian drove past the house on South Clinton Street where the shooting later occurred. As they drove past, Brian told Walker that the residents were "eating in there," which Walker understood to mean that the people inside the house were "getting money, like hustling, you know, prospering . . . ." Brian then remarked that someone "probably got to run up in there . . . I might have to run up in there." According to Walker, "run

up in there" meant "go up in there, take their shit." Walker did not recall if Damien was in the car with them at the time.

A couple of days after the shooting, while Walker, Brian and Damien were in Brian's car, Brian told Walker that he had to "blow [someone's] face off 'cause [he] flinched and shit like he was reaching for something." Then Damien said he had to "get rid of the ratchet." Walker testified that "ratchet" was slang for "gun." He understood this conversation to mean that Brian stole heroin from, and shot, a man at the neighboring house on South Clinton Avenue, and Damien got rid of the gun.

According to Walker, during that same conversation with Brian and Damien, Brian also described robbing a drug dealer at the house on South Clinton Avenue. Brian said that the "old boy[3] tried to hide that [he] had heroin and shit. He tried to hide, but he eventually gave that shit up." Brian stated that the "old boy" was "upstairs, high, and he gave that shit up." Damien then said that he tried to "get rid of" the heroin in Camden, but "that shit turned bad. It was like a bad deal." In other words, Damien did not get the money he thought he would get for the stolen heroin.

Walker testified that, two or three days after the shooting,

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[3] On redirect examination, Walker explained that the term "old boy" did not refer to a person's age but was "just saying he or she."

he was with Brian and Damien when Brian drove them to a park near the river in Trenton. Brian looked over the railing near the river and asked Damien: "[Y]ou sure that shit went down?" Brian said he "wanted to make sure that shit went down." Walker understood the comment as meaning that Damien threw the gun in the river and Brian wanted to be sure it "went down" in the water.

Walker acknowledged that his nickname was Gambino and that he had a prior record for a 1984 burglary conviction, a 1997 possession of a defaced firearm, and a 2002 possession of drugs with intent to sell on school property.

Annette Bozeman testified that she lived in the Nottingham Apartments in Hamilton. In the summer of 2008, defendants packaged heroin at her apartment "just about every day or every other day." Sometimes a man named "Gambino" or "Bino" was with them. Bozeman said that Damien sometimes spent the night at her apartment with Kathiana Dorismond, who lived in a nearby apartment.

Bozeman recalled a time when she drove with Damien to a barbershop in a "bad area" of Camden to pick up drugs. Damien told her "it was his barbershop." In the summer of 2008, Damien asked her to go to Camden with him to get a "Desert Eagle." Bozeman did not know what that was, and he told her it was a "big gun." She suggested that he ask Dorismond to go because she did not want to. Around the same time, a large purse that Bozeman's daughter

had bought her in Italy went missing. The purse had "different pictures of ladies . . . and scenery on it. It was like a collage on the outside." The last time Bozeman saw the purse was in the back of the black truck that Damien drove. The truck belonged to his girlfriend "Joanna," who lived on Hart Avenue in Trenton.

Dorismond testified that from June to September 2008, she had a casual sexual relationship with Damien. She saw him daily, and spent weekends with him at Bozeman's apartment. She described him as about six feet tall, "heavy" with a "lazy eye," or a right eye that was smaller than the left eye. About half of the time she saw Damien, Brian was with him, and Walker was "sometimes" with him.

In August 2008, Damien drove Dorismond to a barbershop in Camden, that Damien said he owned. They left her apartment at about 8:00 a.m. in the dark-colored SUV that he drove. When they got to the barbershop, Damien went upstairs and seemed to be "taking forever." Dorismond was nervous that she would not get home in time to meet her younger brother at a bus stop between 3:30 and 3:45 p.m. She went outside to wait for Damien in the SUV.

When Damien returned, he drove them to a nearby row home and parked near an alley. He took something from the trunk of the SUV and walked to the alley, where he met an African-American man who

Dorismond had seen at the barbershop "for a split second." The man wore gloves and retrieved something from a bush, then handed the object to Damien. Damien put it in a pocketbook made of a "thick and rough material" that had one strap and one zipper down the middle.

As Damien walked towards the truck, Dorismond saw "[a] couple of inches" of the handle of a silver and black gun sticking out of the purse. Damien put the pocketbook in the trunk then drove around Camden "for a minute" before heading back to Trenton.

When they got to Dorismond's apartment, her neighbor was waiting for her brother at the bus stop. As Dorismond was talking to the neighbor, she heard Damien call her name. Dorismond turned to look at Damien and saw him holding the gun. She testified: "I could see the whole frame of the gun." It was the "shiny silver" and black gun the man gave Damien in the alley.

According to another State witness, Renee Sampson, Damien lived with her on Hart Avenue in Trenton from August to mid-November 2008. She had met him in the summer of 2008 through Brian, whom she had known for a couple of years. Damien and Brian were "companions" who spent a lot of time together. Brian told her Damien was "his right hand man." Sampson described Damien as weighing 230 to 240 pounds and having a lazy right eye. She said Damien would typically drop her off at work in her 2004 black and

gray Ford Explorer, and then use the vehicle the rest of the day.

Sampson remembered that in late September 2008, Damien showed her a "silver and brown" gun. He sat across from her on her bed and took the gun out of a "colorful" "medium" sized handbag. Sampson testified: "I can't remember if it was a bag that had like different places of like Paris or South Carolina, or whatever, but it had some kind of indication, pictures on the front of it." Damien told her: "[T]his is my baby" as he showed it to her. Dorismond did not "know anything about guns," but Damien said it was "a .44 caliber gun."[4] The handle was brown, and "the rest" was silver. It was about seven inches long.

Sampson saw the gun again when her son had "an altercation" outside her home with about twenty kids who were going to "jump" him. She called Damien for help. When he got to her house, he went upstairs and then came back downstairs carrying the gun.

The defense's only witness, a private investigator, testified to the layout of the Nottingham Apartment complex. Using photographs and a drawing of the complex, the investigator said Dorismond would not have had a clear view of Damien's vehicle parked on the street because bushes would have obstructed her

[4] At the trial, an expert witness testified that the .44 caliber bullet recovered from the victim could only have been fired from a .44 caliber weapon.

view. However, on cross-examination, he admitted that there was a break in the bushes that allowed for an unobstructed view.

II

On this appeal, defendants raise several of the same issues, as well as issues unique to their respective appeals.

In his appellate brief, and a supplemental letter brief, Damien Johnson presents these points of argument:

> POINT I: DEFENDANT WAS DENIED A FAIR TRIAL WHEN HIS CO-DEFENDANT'S UNCHALLENGED OUT-OF-COURT HEARSAY STATEMENTS WERE ADMITTED AND USED AGAINST HIM AT TRIAL.
>
> POINT II: THE TRIAL COURT ERRED IN PERMITTING VAGUE ACCOUNTS OF DEFENDANT'S AND CO-DEFENDANT'S EARLIER POSSESSION OF AN AMORPHOUS HANDGUN TO IDENTIFY THEM COLLECTIVELY AS "THE SHOOTER," AND EVIDENCE THAT THEY WERE DRUG DEALERS, NEITHER OF WHICH SATISFIED THE CRITERIA FOR ADMISSIBILITY OF "OTHER CRIMES" UNDER N.J.R.E. 404(B) AND STATE V. COFIELD, 127 N.J. 328 (1992).
>
> POINT III: THE TRIAL COURT'S JURY INSTRUCTIONS DEPRIVED DEFENDANT OF A FAIR TRIAL (NOT RAISED BELOW).
>
> POINT IV: THE SENTENCE MUST BE REMANDED FOR RECONSIDERATION.
>
> POINT V: THE RECENT PUBLISHED APPELLATE DIVISION DECISION IN STATE V. VICTOR GONZALEZ MANDATES REVERSAL OF THE DEFENDANT'S CONVICTIONS FOR THE SAME REASON AS IN THAT CASE: THE REPEATED USE OF "AND/OR" LANGUAGE IN THE ACCOMPLICE-LIABILITY JURY INSTRUCTION COULD HAVE EASILY LED TO AN IMPROPER VERDICT FROM IMPROPER JURY DELIBERATION.

In his counseled appellate brief and supplemental letter brief, Brian Johnson presents these points of argument:

> POINT I: "OTHER CRIMES" EVIDENCE THAT, PRIOR TO THE CHARGED CRIME IN QUESTION, EITHER DEFENDANT OR THE CODEFENDANT POSSESSED A LARGE, SILVER HANDGUN SHOULD HAVE BEEN EXCLUDED UNDER N.J.R.E. 404(B); THE WILDLY VARYING DESCRIPTIONS OF THAT GUN, WHICH FAILED TO AGREE EVEN ON WHETHER IT WAS A REVOLVER OR A SEMI-AUTOMATIC PISTOL, NECESSARILY SHOULD HAVE EXCLUDED IT FROM THE JURY'S CONSIDERATION ON THE ISSUE OF [IDENTITY] OF THE SHOOTER.
>
> POINT II: MUHAMMAD AL-BARR'S RECITATION OF THE CODEFENDANT'S CONFESSION WAS INADMISSIBLE AGAINST DEFENDANT AS A STATEMENT AGAINST THE CODEFENDANT'S INTEREST. CONSEQUENTLY, THE DEFENDANT'S MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED, OR, ALTERNATIVELY, THE JUDGE SHOULD HAVE BARRED THE TESTIMONY OF AL-BARR; AL-BARR'S TESTIMONY THAT THE CODEFENDANT CONFESSED TO THE CRIME COULD NOT BE USED AGAINST DEFENDANT.
>
> POINT III: THE INSTRUCTION TO THE JURY TO DELIBERATE FURTHER WAS FATALLY FLAWED BECAUSE IT APPEARED TO PRECLUDE FURTHER DELIBERATION ON ANY COUNT ON WHICH THE JURY HAD PREVIOUSLY THOUGHT ITSELF TO BE UNANIMOUS. (NOT RAISED BELOW)
>
> POINT IV: THE JURY INSTRUCTION IMPROPERLY TOLD THE JURY: "A DEFENDANT IN A CRIMINAL CASE HAS AN OBLIGATION OR DUTY TO PROVE HIS INNOCENCE OR OFFER ANY PROOF RELATING TO HIS INNOCENCE." (NOT RAISED BELOW)
>
> POINT V: A REMAND FOR RESENTENCING IS WARRANTED.
>
> POINT VI: THE RECENT PUBLISHED APPELLATE DIVISION DECISION IN STATE V. VICTOR GONZALEZ MANDATES REVERSAL OF THE DEFENDANT'S

CONVICTIONS FOR THE SAME REASON AS IN THAT CASE: THE REPEATED USE OF "AND/OR" LANGUAGE IN THE ACCOMPLICE-LIABILITY JURY INSTRUCTION COULD HAVE EASILY LED TO AN IMPROPER VERDICT FROM IMPROPER JURY DELIBERATION.

In a supplemental pro se brief, Brian Johnson presents the following points of argument:

POINT I: THE TRIAL COURT ERRED BY REFUSING TO GRANT DEFENDANT[']S ORAL MOTION FOR THE COURT TO CONDUCT A VOIR DIRE OR REMOVE JUROR #6 ROBIN JOLLY AND JURY #9 JEROME INMAN FOR CAUSE WHEN THERE WAS EVIDENCE THAT TWO OF THE JURORS HAD WORKED AT THE SAME TRANE COMPANY AS THEIR COWORKER KATHIANA DORI[S]MOND WHO WAS AN IMPORTANT STATE[']S WITNESS.

POINT II: THE PROSECUTOR COMMITTED MISCONDUCT BY FALSELY SUGGESTING THAT DEFENDANT WAS WEARING COVERALL[S] THAT BELONG TO THE SHOOTER IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

POINT III: THE TRIAL JUDGE FAILED TO DEFINE THE ELEMENTS OF A CRIMINAL ATTEMPT IN HIS INSTRUCTION ON COUNT 4 ROBBERY; THUS DEFENDANT[']S ROBBERY AND FELONY MURDER CONVICTIONS MUST BE REVERSED BECAUSE THERE WAS NO JURY FINDING ON THE ELEMENTS OF ATTEMPT. (NOT RAISED BELOW)

POINT IV: DEFENDANT[']S CONVICTION ON COUNT 5 CHARGING ROBBERY MUST BE REVERSED BECAUSE THE STATE FAILED TO PROVE A THEFT FROM [] PULLEN, [] NEGRON AND [] TESAURO [].

POINT V: IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY DEFENDANT[']S MOTION FOR A JUDGMENT OF ACQUITTAL PURSUANT TO R. 3:18 AS THERE WAS INSUFFICIENT EVIDENCE TO WARRANT A CONVICTION ON COUNT 1 MURDER; COUNT 2 FELONY MURDER; COUNT 4 ROBBERY; COUNT 5 ROBBERY;

COUNT 6 BURGLARY; AND POSSESSION OF A WEAPON FOR AN UNLAWFUL PURPOSE.

POINT VI: CUMULATIVE ERROR DEPRIVED DEFENDANT OF A FAIR TRIAL.

After reviewing the entire record, we find no merit in any of defendants' arguments challenging their convictions. Brian Johnson's pro se appellate arguments are without sufficient merit to warrant discussion, beyond the following comment. See R. 2:11-3(e)(2). As is clear from Part I of this opinion, the State's evidence was more than sufficient to support a conviction. See State v. Wilder, 193 N.J. 398, 406 (2008). We agree with the trial judge's March 25, 2014 statement of reasons for denying defendants' motions for a judgment of acquittal, pursuant to Rule 3:18-1, at the close of the State's case.

We will address defendants' additional arguments together where they relate or overlap, and separately where they do not.

III

A. N.J.R.E. 404(b) issues

We begin by addressing defendants' N.J.R.E. 404(b) arguments concerning evidence linking them to a large silver handgun, and Damien's arguments concerning evidence of defendants' drug dealing activity. The trial judge thoroughly and correctly addressed both of these issues in a forty-five page written opinion dated August 22, 2013. His opinion describes in detail the N.J.R.E. 104(c)

hearing testimony, which was similar to the trial testimony we previously summarized. There is no need to repeat the judge's factual findings or his legal reasoning in detail. We affirm on this point for the reasons stated in the judge's opinion. We add only these brief comments.

In his opinion, the judge found the State's witnesses credible, and determined that the State satisfied the Cofield factors as to the gun and the drug dealing. See State v. Cofield, 127 N.J. 328, 338 (1992). We review a trial judge's evidentiary determinations for abuse of discretion. State v. Scharf, 225 N.J. 547, 572 (2016). We owe particular deference to the judge's evaluation of witness credibility, and to his factual findings reached after a testimonial hearing. State v. Hubbard, 222 N.J. 249, 269 (2015). We will only disturb a judge's decision on a Cofield issue if we find "a clear error of judgment." State v. Barden, 195 N.J. 375, 391 (2008) (citation omitted); see also State v. Weaver, 219 N.J. 131, 149 (2014).

Having read the entire transcript of the N.J.R.E. 104 hearing, we find no basis to second-guess the judge's evaluation of the witnesses. Their testimony, if believed, supports the judge's factual findings by clear and convincing evidence. And the facts, as the judge found them to be, strongly support his legal conclusions.

We agree with the judge that the testimony about the handgun was material evidence, tending to show the identity of the two men who committed the home invasion and murder. See N.J.R.E. 404(b); State v. Gillispie, 208 N.J. 59, 88-89 (2011). We cannot agree with defendants that the witnesses' descriptions of the large silver handgun they saw were too vague or contradictory. In important respects, the descriptions of the gun were consistent. Additionally, one witness testified that Damien told her it was a ".44 caliber" gun. A .44 caliber bullet was recovered from the victim, and expert testimony confirmed that such a bullet would have been fired from a .44 caliber gun. Defendants' arguments on this point do not warrant further discussion.[5] R. 2:11-3(e)(2).

Contrary to Damien's argument on the drug issue, we agree with the judge that the testimony about defendants' drug activity was highly relevant to show their motive to rob a rival dealer. See N.J.R.E. 404(b). The evidence tended to show that defendants were drug dealers, and that Pullen, who was also a drug dealer, lived only a few doors away from Brian's house. There was also direct testimony of a statement Brian made to his friend Walker, that people living in the South Clinton Avenue house were making

[5] We decline to consider evidence outside the trial record, including citations in Brian's brief to internet research about types of handguns.

money and that someone needed to go in and rob them. Both defendants later told Walker about how they stole the victim's heroin. The testimony about the drug dealing was highly relevant and not unduly extensive. See Barden, 195 N.J. at 391-92. In light of the facts as the judge found them to be, we find no abuse of discretion in his determination that the evidence was admissible under N.J.R.E. 404(b).[6]

B. Testimony of Mohammed Al-Barr/severance

Next, we consider the issue of the admissibility of incriminating statements that Damien allegedly made to Al-Barr in Camden, a day or two after the shooting. According to Al-Barr, Damien told him that the previous day, he had shot someone in Trenton and stolen drugs from a drug dealer. He also allegedly told Al-Barr that the stolen drugs had a distinctive stamp — "Burberry" - and, therefore, Damien could not sell them in Trenton without risking discovery of his involvement in the shooting and robbery. For that reason, Damien stated, he intended to sell the drugs in Camden.

In arguing a pre-trial motion concerning this evidence, Brian

[6] During the trial, the judge repeatedly gave the jury clear, specific, and appropriate instructions about the limited purposes for which they could consider the evidence about the gun and the drug dealing.

contended that because Damien and Al-Barr were gang members competing with a rival gang in drug sales, Damien's statements were not statements against his interest, under N.J.R.E. 803(c)(25), but rather, were a way to "brag[]" about himself to "elevate [himself] within [the] ranks of the gang."[7]

Brian also contended that if the statements were admissible, then the court should sever the trials in accordance with Bruton v. United States, 391 U.S. 123 (1968). In Bruton, the Court held that the Sixth Amendment right to confront witnesses precluded a court from admitting into evidence at a joint trial a co-defendant's out-of-court statement implicating the defendant in the crime. Id. at 126. Brian argued that Damien's confession "indirectly implicated" him in light of "certain corroborat[ing]" evidence, including Walker's testimony.

The trial judge held that Damien's statements to Al-Barr constituted intrinsic evidence, because they tended to directly prove Damien's guilt of the crimes with which he was charged. Relying on State v. Rose, 206 N.J. 141, 180 (2011), the judge concluded that the statements did not constitute evidence of "other crimes" within the meaning of N.J.R.E. 404(b), and a N.J.R.E. 104(c) hearing was not required. The trial judge concluded that,

[7] The jury was not told about defendants' gang affiliation.

because the statements, on their face, subjected Damien to criminal prosecution for murder and robbery, they were admissible as statements against interest under N.J.R.E. 803(c)(25).

The judge also reasoned that the statements were not "testimonial" hearsay, because they were not made to a law enforcement officer. The judge found no Bruton issue because Damien's confession did not implicate Brian; it only implicated Damien. Citing State v. Brown, 170 N.J. 138, 162 (2001), he reasoned that, to the extent a joint trial risked a jury's finding guilt by association, that risk existed in every joint trial and, standing alone, did not justify severance. The judge also considered that defendants did not have competing defenses and a joint trial would not deny them a fair trial.

On this appeal, Brian argues that Damien's statements were not admissible against Brian, under N.J.R.E. 803(c)(25), because they were not statements against Brian's interests. However, he claims that Damien's confession indirectly implicated him and allowed for guilt by association. He contends that the judge should have severed the trials, barred Al-Barr's testimony about the statements, or instructed the jury that Damien's confession to Al-Barr could not be considered against Brian. We find no merit in any of those contentions, and we affirm substantially for the reasons stated by the trial judge. We add these comments.

Pursuant to the Sixth Amendment Confrontation Clause, the State may not rely on testimonial hearsay — typically, a statement made by a witness to the police during an investigation — in lieu of presenting the trial testimony of the witness who made the statement. See Davis v. Washington, 547 U.S. 813, 822 (2006); Crawford v. Washington, 541 U.S. 36, 68 (2004). However, "[o]ut-of-court nontestimonial statements, although subject to a State's hearsay rules, [are] 'exempted . . . from Confrontation Clause scrutiny.'" State v. Basil, 202 N.J. 570, 592 (2010) (quoting Crawford, 541 U.S. at 68). We agree with the trial judge that Damien's statement to Al-Barr was non-testimonial hearsay, which was not barred by the Confrontation Clause and was admissible against Damien under our State's hearsay rules, N.J.R.E. 803(c)(25).

Pursuant to Bruton, 391 U.S. at 135-36, a co-defendant's out-of-court confession that also implicates the defendant is not admissible against the defendant. However, as the Court acknowledged in State v. Weaver, 219 N.J. 131, 159 (2014), this rule does not apply to a co-defendant's statements that do not directly implicate the defendant. "If the co-defendant's incriminatory statement requires the jury to make an inferential step to link the statement to the defendant, the statement is admissible." Ibid. Thus, "Bruton, which involved a co-defendant's

expressly incriminatory confession, does not apply to a statement that is linked to the defendant only through other evidence and is 'not incriminating on its face.'" Id. at 153; see Gray v. Maryland, 523 U.S. 185, 195-96 (1998); Richardson v. Marsh, 481 U.S. 200, 208 (1987). That is the case here, where Damien's statement neither mentioned nor implicated Brian.

Brian's reliance on State v. Gentry, 439 N.J. Super. 57 (App. Div. 2015), is misplaced. In that case, the jury had to decide whether the defendant killed the victim in self-defense during a one-on-one fight, or whether the defendant, his brother Jarrod, and his girlfriend ganged up on the victim and beat him to death. In that context, we held that the brother's confession to the police - that he participated in the fight - was inadmissible hearsay:

> The State argues that Jarrod's statement was admissible because it only incriminated him. Putting aside the obvious Crawford issue, which the State does not address, we find the State's argument unpersuasive. Given the issues in this case, if Jarrod admitted participating in the fight, that evidence clearly incriminated defendant. The evidence was admitted in error, and the error went to the heart of the dispute between the defense and the State—whether Haulmark's death occurred as the result of a one-on-one fight or a three-against-one attack.
>
> [Id. at 76-77.]

See Crawford, 541 U.S. at 52. Unlike the brother's statement in Gentry, in this case, Damien's statement did not directly, or necessarily, implicate Brian.

Contrary to Brian's argument, raised for the first time on appeal, we find no error, plain or otherwise, in the jury charge as it relates to this issue. R. 1:7-2; R. 2:10-2. Nor do we find an abuse of discretion in the judge's decision not to sever the cases for trial. Brian's arguments on those issues do not warrant additional discussion. R. 2:11-3(e)(2).

C. Testimony of Mark Walker/severance

Raising similar issues, Damien contends that he was unfairly prejudiced by Walker's testimony concerning two incidents. The first was the incident in which Brian told Walker that the residents of the South Clinton Avenue house were "eating" (prospering) and someone would have to "run in there" (rob them). The second was the incident in which Walker was in the car with both Damien and Brian, and both defendants told him about shooting someone, robbing a drug dealer, and getting rid of the gun.

We find no error, plain or otherwise, in the admission of that evidence. Walker's testimony about Brian's "run in there" comment was admissible, for the same reasons that Al-Barr's testimony about Damien's statements was admissible. Brian's statement was not testimonial and did not directly implicate

Damien. See Basil, 202 N.J. at 590-91; Richardson, 481 U.S. at 208. The testimony about Damien's and Brian's conversation in the car was admissible as a series of statements against defendants' interest. N.J.R.E. 803(c)(25). Both defendants were present. Neither defendant disagreed with the other or denied the truth of the other's statements about what they had done. There was no basis to grant a severance motion. Damien's arguments on this point are without sufficient merit to warrant further discussion. R. 2:11-3(e)(2).

D. Jury Charge Issues

For the first time on appeal, both defendants argue that the trial court gave an erroneous instruction after the jury reported that it had reached a unanimous verdict as to all but one count. With the agreement of all counsel, the judge decided not to take a partial verdict at that point. Instead, he gave the following instruction:

> I'm going to read to you now an additional instruction to assist you with your further deliberations as to that one count that you have not reached a unanimous verdict. This is an instruction entitled instruction on further jury deliberations.
>
> It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself but do so

> only after an impartial consideration of the evidence with your fellow jurors.
>
> In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. You are not partisan. You are judges. Judges of the facts.
>
> So with that instruction, ladies and gentlemen, I'm going to ask you to return to the jury deliberating room.

Not only was there no objection to this instruction, but both defense counsel asked the judge to give the instruction. Nonetheless, we consider whether the instruction "cut mortally" into defendants' rights. State v. Shomo, 129 N.J. 248, 260 (1992) (citation omitted). We conclude that it did not, and we find no error, plain or otherwise. See R. 1:7-2; R. 2:10-2.

Defendants argue that the court erroneously instructed the jury to only continue deliberations on "the one count" on which it was undecided. Defendants contend that this instruction had the effect of treating the jury's agreement on the other six counts as a partial verdict without giving the requisite partial verdict instruction. See Shomo, 129 N.J. at 258. Defendants do not contend that the court should have issued a partial verdict charge, or that it should have accepted a partial verdict. However, they

argue that the court should have made no reference to "the one [undecided] charge," as that reference effectively instructed the jury to not continue deliberating on the entire case. We cannot agree.

The court's instruction did not have the effect of limiting deliberations or treating the jury's interim decision as a partial verdict. The trial court did not instruct the jury that it could only deliberate on the undecided charge. The reference to "the one charge" upon which the jury had been unable to agree simply placed in context the reason for the charge on further deliberations.

Raising another charging issue, for the first time on appeal, both defendants point out an inadvertent misstatement the judge made in reading the charge on the burden of proof. In the quotation below, we have emphasized the relevant language, however, the word "(sic)" appears in the transcript:

> Let me explain the concepts of presumption of innocence, burden of proof, and reasonable doubt. The defendants on trial are presumed to be innocent and, unless each and every essential element of an offense charged is proved beyond a reasonable doubt, the defendant must be found not guilty of that charge. The burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to a defendant. A defendant in a criminal case has (sic) an obligation or duty to prove his innocence or offer any proof relating to

> his innocence. The prosecution must prove its case by more than a mere preponderance of the evidence yet not necessarily to an absolute certainty. The State has the burden of proving a defendant guilty beyond a reasonable doubt.
>
> [(Emphasis added).]

We certainly do not minimize the seriousness of any mistake that concerns the burden of proof. However, in this case, the sentence containing the error is surrounded by other language that would clearly communicate to the jurors that the State had the burden of proof. For example, the immediately preceding sentence instructs that the burden of proof "never shifts to a defendant." Further, the rest of the charge repeated, dozens of times, that the State had the burden of proof as to each element of each charge. "[P]ortions of a charge alleged to be erroneous cannot be dealt with in isolation but the charge should be examined as a whole to determine its overall effect." State v. Marshall, 123 N.J. 1, 135 (1991) (quoting State v. Wilbely, 63 N.J. 420, 422 (1973)).

The written charge - which was given to the jurors to read while the judge was instructing them, and which accompanied them into the jury room - did not contain the error. Under the circumstances, we consider it highly unlikely that any of the jurors was misled by the judge's inadvertent error in reading one

small portion of the very lengthy charge, particularly when they were following along with the correct, written charge. The fact that none of the attorneys noticed the error gives us further confidence that the error was not capable of producing an unjust result. See R. 2:10-2.

Finally, in supplemental briefs, both defendants challenge the use of "and/or" in the accomplice liability section of the jury charge. Defendants' argument, raised for the first time on appeal, is premised on State v. Gonzalez, 444 N.J. Super. 62 (App. Div.), certif. denied, 226 N.J. 209 (2016). In that case, we reversed the defendant's conviction, because "the judge's repeated use of the phrase 'and/or' when describing many of the issues the jury was obligated to decide" rendered the charge fatally ambiguous. Id. at 66. In denying certification, the Supreme Court included the following language:

> The Court agrees with the Appellate Division's conclusion that the use of "and/or" in the jury instruction in this case injected ambiguity into the charge. See State v. Gonzalez, 444 N.J. Super. 62, 75-76 (App. Div. 2016). The criticism of the use of "and/or" is limited to the circumstances in which it was used in this case. Id. at 71-72.
>
> [Gonzalez, 226 N.J. at 209.]

In Gonzalez, defendant allegedly conspired with two co-defendants — Aponte and Zayas - to rob a drug dealer. Aponte and

defendant pretended that they wanted to buy drugs from the dealer. During the transaction, Zayas emerged from behind a dumpster, and robbed and shot the dealer. Gonzalez, 444 N.J. Super. at 66-67. There was no dispute that defendant was present at the crime scene. The issue was whether defendant shared the co-defendants' intent to commit the crimes or whether his participation was the product of duress. The State's case was essentially a credibility contest between Zayas, who claimed the crime was defendant's and Aponte's idea, and defendant, who claimed that Aponte coerced him into participating.

In the conspiracy portion of the charge, the jury was repeatedly instructed that they had to determine whether Zayas committed robbery and/or aggravated assault, and whether defendant conspired with the co-defendants to commit robbery and/or aggravated assault. The accomplice charge was rendered similarly ambiguous through the use of "and/or." Id. at 75.

We found that, in the context of the case, the use of the term "and/or" impermissibly permitted a non-unanimous jury verdict:

> In considering the possibility that the verdict was the product of less than unanimous findings by the jury, we observe that the nature of the indictment required that the jury decide whether defendant conspired in or was an accomplice in the commission of a robbery, or an aggravated assault, or both.

> By joining (or disjoining) those considerations with "and/or" the judge conveyed to the jury that it could find defendant guilty of either substantive offense — which is accurate — but left open the possibility that some jurors could have found defendant conspired in or was an accomplice in the robbery but not the assault, while other jurors could have found he conspired in or was an accomplice in the assault but not the robbery. In short, these instructions did not necessarily require that the jury unanimously conclude that defendant conspired to commit or was an accomplice in the same crime. Such a verdict cannot stand.
>
> . . . The jury was also told that "to find the defendant guilty of committing the crimes of robbery and/or aggravated assault charges, the State must prove [among other things] that Marcus Zayas committed the crimes of robbery and/or aggravated assault." Assuming the "and/or" in this instruction was interpreted as being a disjunctive, it is entirely possible the jury could have convicted defendant of both robbery and aggravated assault even if it found Zayas committed only one of those offenses, i.e., the jury was authorized, if it interpreted "and/or" in this instance as "or," to find defendant guilty of robbery because it was satisfied the State proved that Zayas committed an aggravated assault.
>
> [Id. at 75-76.]

We conclude that Gonzalez is distinguishable, and the jury charge in this case did not rise to the level of plain error. R. 2:10-2. While the trial court used the phrase "and/or" in the accomplice charge, the phrase did not permeate the charge as a whole and render it clearly capable of producing an unjust result.

Nor did the evidence, or the charge, create the possibility that the jury would reach a guilty verdict as to one or more offenses without agreeing on the elements of the charged offense.

The evidence was considerably stronger than it was in Gonzalez, and did not lend itself to a split verdict for either defendant. The evidence overwhelmingly supported a conclusion that the defendants acted together, with a shared purpose as to the entire incident.

Unlike Gonzalez, the State's case did not turn on the testimony of one co-conspirator. Rather, two eyewitnesses described the incident (Tesauro and Negron), three witnesses testified to Damien's possession of the large silver handgun (Dorismond, Sampson and Walker), two witnesses described confessions defendants made at different times shortly after the crime (Walker and Al-Barr), and Al-Barr testified to the Burberry-labeled heroin that Damien gave him to sell in Camden to avoid detection in Trenton.

Further, the judge clearly instructed the jury that they had to consider each defendant's guilt as to each charge. He instructed them that

> In order to convict the defendant as an accomplice to the crime charged, you must find that a defendant had the purpose to participate in that particular crime. He must act with the purpose of promoting or

> facilitating the commission of the substantive crime with which he is charged. It is not sufficient to prove only that the defendant had knowledge that another person was going to commit the crime charged. The State must prove that it was a defendant's conscious object that the specific conduct charged be committed.
>
> . . . .
>
> You are to consider the accomplice status separately as to each charge; that is, the charge of murder in Count 1, felony murder in Counts 2 and 3, robbery in Count 4 and 5, burglary in Count 6, and/or possession of a weapon for [an] unlawful purpose in Count 7.

In the context of this case, the erroneous use of "and/or" in the accomplice charge did not have a clear capacity to produce an unjust result. R. 2:10-2.

IV

In summary, we affirm the conviction of each defendant. However, as required by McFarlane, due to remarks by this trial judge in an unrelated proceeding, we remand each defendant's case for resentencing before a new sentencing judge. McFarlane, 224 N.J. at 469. On remand, each defendant's sentencing must proceed completely anew, giving no consideration to the sentence previously imposed, and considering each defendant as he stands before the court on the day of the resentencing. See State v. Randolph, 210 N.J. 330, 333 (2012).

Affirmed in part, remanded in part.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION