To be argued by
T. CHARLES WON
(10 MINUTES REQUESTED)

New York Supreme Court

Appellate Division - First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

FABIAN COKE,

Ind No. 70-2015
Appellate Case Nos.
2023-4374, 2018-2162

Defendant-Appellant.

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- FABIAN COKE, Defendant-Appellant.

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

Fabian Coke appeals from a judgment of Supreme Court, Bronx County (Neary, J.), rendered on September 6, 2017, convicting him, following a jury trial, of Second-Degree Murder (Penal Law § 125.25(1)), and Second-Degree Criminal Possession of a Weapon (Penal Law § 265.03(1)(b)), and sentencing him to an indeterminate term of imprisonment of from twenty-five years to life and, as a second felony offender, to a determinate term of fifteen years plus five years of post-release supervision, respectively, to be served concurrently.

Defendant also appeals, by permission of the Honorable Troy K. Webber, from an order of the Supreme Court, Bronx County (Clancy, J.), entered on October 14, 2002, denying his motion to vacate the judgment of conviction pursuant to Criminal Procedure Law § 440.10.

Defendant is currently incarcerated pursuant to this judgment.

INTRODUCTION

Fabian Coke and his two co-defendants spent the hours preceding the shooting of the victim together driving to various stores. At one of the stops, they bought multiple bottles of expensive champagne and other liquor. They apparently planned to celebrate after the shooting, since the bottles were left still unopened and in the bags, and boxes inside their vehicle, which they abandoned after being chased by the police following the shooting.

Upon spotting the victim, Dune Jacobs, walking alone down 213th Street in the Bronx, and no other pedestrians or vehicles on the street, Jenkins, the driver stopped the vehicle. Brown and defendant stepped out of the vehicle and approached the victim from behind her. Meanwhile, Jenkins kept his foot on the brake pedal, ready to drive quickly away, once Brown and defendant returned after shooting the victim. Sergeant Thomas Casey pointed out that the security camera recording of the vehicle showed the brake lights turning on and off.

Although the shooting itself was not caught on the security camera, defendant's DNA was recovered from the murder weapon's slide, which had to be pulled back to load a cartridge into the chamber and ready the handgun to be fired. Either Brown or defendant fired the handgun multiple times—one of the shots striking the victim's brain and causing her death.

After Brown and defendant returned to the vehicle, Jenkins casually drove away within the speed limit to avoid drawing attention. Fortunately, Sergeant Casey's vehicle was a block away and heard the gunshots. Sergeant Casey drove up to the defendants' vehicle, which was the only one on the streets, and followed it. Jenkins, at first, maintained driving slowly and drove in a circle; Sergeant Casey returned to where he first heard the gunshots. Upon realizing Sergeant Casey's unmarked vehicle must be the police, Jenkins sped away from Sergeant Casey. The sergeant could not keep up with the defendants' vehicle, but found it abandoned on the streets. The police also recovered the handgun, which apparently had been tossed from the vehicle onto the street.

QUESTION(S) PRESENTED

1. Whether defendant's guilt was proven beyond a reasonable doubt by legally sufficient evidence, and the verdict was supported by the weight of the evidence.

The court below did not have an opportunity to address defendant's claim that the evidence was legally insufficient to establish his presence at the crime scene because defendant's motion for trial order of dismissal only addressed the intent element.

2. Whether the court below properly determined that the trial attorney rendered meaningful representation when it denied defendant's CPL § 440.10 motion.

STATEMENT OF THE CASE

The Indictment

By Indictment Number 70/2015, filed on January 23, 2015, the Bronx County Grand Jury charged defendant with acting in concert with others[1] to commit the crimes of Second-Degree Murder, First-Degree Manslaughter, and Second-Degree Criminal Possession of a Weapon.

The People's Case

Shortly before one a.m., on December 2, 2014, in the vicinity of 213th Street and Carlisle Place in the Bronx, Sergeant THOMAS CASEY heard approximately three gunshots. At the time, he was seated in the front passenger seat of an unmarked vehicle driven by Police Officer Whelan; the vehicle was on Barnes Avenue, by 213th Street—one block away from Carlisle Place (Casey: T. 77-79, 82, 429-431).[2]

Upon turning onto 213th Street, the sergeant saw a white Nissan driving slowly and turning onto Carlisle Place. The sergeant did not see any other moving vehicles nor any pedestrians (Casey: T. 79-80, 82, 90, 435-436).

Sergeant Casey's vehicle drove up to the white Nissan and followed it; the

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[1] Defendant and co-defendants Devon Jenkins and Brendrick Brown had a joint trial, except that a separate jury rendered the verdict for Jenkins. Brown was acquitted of all charges. Jenkins was found guilty of second-degree murder and second-degree criminal possession of a weapon. This Court affirmed the judgment of conviction. *See People v. Jenkins*, 198 A.D.3d 488 (1st Dept. 2021), *lv. denied*, 37 N.Y.3d 1146 (2021).

[2] Numerical references preceded by "T." refer to the trial minutes; and those preceded by "A." refer to defendant's appendix.

sergeant's vehicle drove up to the bumper of the Nissan, which drove within the speed limit—going less than 20 miles per hour. The Nissan kept making turns and the two vehicles came back to Barnes Avenue—the vicinity of where the sergeant heard the gunshots; the sergeant's vehicle made a "full circle." Sergeant Casey saw three males inside the Nissan. Two of them sitting in the front, and the third sat in the rear passenger side (Casey: T. 80-82, 90-91, 429-432).

Upon turning onto 213th Street, the white vehicle increased its speed up to 70 to 80 miles per hour. Sergeant Casey's vehicle tried to keep up, but the gap between the two vehicles increased. A car pulled out from an intersection and caused the sergeant's vehicle to abruptly stop. The sergeant lost sight of the white Nissan (Casey: T. 82-85, 91, 432).

Eventually, Sergeant Casey saw the white Nissan parked diagonally on the crosswalk in the vicinity of Gunther and Givan Avenues with its engine still running; it was unoccupied (Casey: T. 85-86, 433). The sergeant recovered two cell phones from inside the white vehicle (Casey: T. 92, 433-435).

Meanwhile, between 12:50 to 1:00 a.m., Officers DERRICK VIRUET and WILLIAM NOHALESKY, separately, arrived in the vicinity of 213th Street and Carlisle Place. The officers saw the victim, Dune Jacobs, bleeding and lying on the sidewalk on 213th Street. Ms. Jacobs was taken to Jacobi Hospital, where she was pronounced dead (Viruet: T. 33-39; Nohalesky: T. 399-402).

Pursuant to a stipulation, videos from a video surveillance system at 747 E. 213th

Street were played for the jury. The system had two exterior cameras facing E. 213th Street; one faced the area including the intersection with Carlisle Place (T. 100-101). In clip number one, Sergeant Casey identified the white vehicle that he had chased on December 2, 2014; it made a right turn onto Carlisle Place. It also showed an individual walk across the street. The second clip showed the same intersection with the white vehicle's taillights on the right-hand side of the video. The clip also had the white vehicle drive away, and Sergeant Casey's vehicle with the headlights on driving down from top of the screen. Sergeant had heard the gunshots before his vehicle's headlights appeared on the screen. The last clip showed the same individual walking across the intersection with the white vehicle's taillights on the right-hand side (Casey: T. 102-104).

Sergeant Casey stated that the white vehicle "looks like it's getting ready to move," because "[i]t looked like the brake lights weren't [*sic*] going on and off" (Casey: T. 105).

In the early morning hours of December 2, 2014, Detective WENDY ENOS, and her partner Detective Vincent Falista—both with the crime scene unit—went to the area of 213th Street and Carlisle Place. They recovered two spent shell casings and two bullet fragments from the sidewalk on 213th Street, and a third shell casing from the street. The detective also retrieved a firearm by the curb line on the street pavement between a car and the sidewalk in the vicinity of 213th Street and Paulding Avenue (Enos: T. 131-137, 141-148, 151, 155, 159, 164-166, 171, 174, 179, 182).

The police recovered five usable fingerprints from the white vehicle. Jenkins'

fingerprint was taken from the driver's door and another print came from the interior window frame on the driver's door. Two of Brown's prints were obtained from the exterior of the front passenger door, and his palm print came off of the rear passenger-side interior door frame. The prints from one of the recovered cell phones matched an individual named Arvey Valderrama (Detective ROBERT SALERNO: T. 108-111, 115-116; Detective MARVIN MILLER: T. 195-196, 200-201; Detective JERRY REX, latent print section: T. 352, 357-358, 362-367).

The vehicle had unopened liquor bottles, still in their store bags and boxes, in both the front and rear seat areas (Detective GREG MULLARKEY: T. 381-382, 385, 392).

The recovered semiautomatic handgun was operable, and the three cartridge casings recovered from the crime scene were fired from it (Detective JONATHAN FOX, firearms examiner for operability and microscopy: T. 404, 411-412, 415, 420, 424-425). The bullet fragments received from the medical examiner's office, along with the ones found at the scene, were all inconclusive as to that handgun (Fox: T. 420-422). To fire a semiautomatic handgun, one "need[s] to pull that slide [on top of the handgun] rearward and then release the slide, thus the cartridge from the top in the magazine would then be placed into the chamber," ready to be fired. Every time a semiautomatic handgun is fired, it is designed to "eject a cartridge casing to the right and to the rear of the firearm where you are holding it, generally three to six feet" (Fox: T. 410-411).

KENDRA HARDY, a criminalist with the Office of the Chief Medical Examiner

("OCME"), examined the DNA samples. The swab from the textured area of the slide of the recovered handgun had a mixture of DNA from three different individuals; it was the only swab from the gun that could be tested (Hardy: T. 237-238, 250-251, 262, 265-267, 274, 282). She obtained DNA samples for defendant and co-defendant Devon Jenkins from a bottle and a cigarette butt, respectively (Hardy: T. 253-255, 270). Jenkins was excluded as a source for any of the DNA swabs from the gun (Hardy: T. 254, 268-269, 292).

Ms. Hardy could not exclude defendant as a contributor to the DNA mixture from the slide. The glossary attached to the DNA reports defined "cannot be excluded as a contributor to the mixture" to mean that "for locations where comparisons could be made most of the DNA alleles seen in the individual's DNA profile were also seen in the mixture" (Hardy: T. 261, 293-294). Ms. Hardy explained that if a person "just handle[d] an item for a brief moment, it's more likely that [person] will not leave enough DNA behind or as much DNA behind than someone" who repeatedly handled the item (Hardy: T. 260). The DNA mixture from the slide revealed it was approximately one hundred sixty-two billion times more probable—"very strong support"—that it came from defendant and two unknown individuals than three unknown individuals (Hardy: T. 262-263, 295). On cross, Ms. Hardy acknowledged that secondary transference—an individual's DNA being deposited on an item without direct contact—was real, and that a contamination is possible even in a lab (Hardy: T. 274-275, 277).

The victim suffered entry and exit gunshot wounds on the right side of her scalp, and also a gunshot wound to her left foot. The cause of death was gunshot to the head, causing injury to the brain (Dr. MICHAEL GREENBERG, OCME: T. 456, 459, 462-463, 466, 471-472). The victim had an entrance wound just behind her right ear, and an exit wound just in front of the right ear; the bullet traveled from her back to her front and her right to her left. The bullet fragmented with one part striking the brain, and the other exiting her head (Greenberg: T. 463-464).

Dr. Greenberg explained that he cannot state where the muzzle of the gun was in relation to where the victim was standing because a person's head is in constant motion; he could not affirmatively state that the gun was positioned behind the victim when it was fired. Dr. Greenberg stated only that "whatever direction her head was facing, the muzzle of the bullet [*sic*] was to the back and to the right of the head at that particular moment" (Greenberg: T. 470-471).

Detectives took receipts found in the white vehicle to look for surveillance videos from the stores to check who made the purchases (Mullarkey: T. 381-382). Pursuant to a stipulation, series of photographs and videos were shown to the jury, including a video surveillance from a Burger King located at 3445 Baychester Avenue for November 30, 2014, at approximately 11:53 a.m. (T. 439-440). Additional photographs and videos displayed for the jury were from Popeyes fast food restaurant, located at 1201 East 233rd Street, for December 1, 2014, at approximately 1:37 p.m.; Target store, located at 195 North Bedford Road, Mount Kisco, New York, for

December 1, 2014, at 1:03 p.m.; Wet and Wild Liquor video at approximately 9:13 p.m.—the date was not mentioned on record; and Sunoco gas station, located at 1945 Bartow Avenue, in the Bronx, for December 1, 2014, at 11:04 p.m.; the time on the video was one hour and two minutes faster than real time (T. 441-449).

Defendant, Brendrick Brown and Devon Jenkins were all taken into custody in relation to this case (Mullarkey: T. 379, 382-383).

The Defense

The defense presented no evidence.

Post-Conviction Proceedings

In papers dated February 10, 2021, defendant, through counsel, filed a motion to vacate the judgment of conviction, pursuant to CPL § 440.10, on the grounds of ineffective assistance of counsel and an alleged *Brady* violation. Defendant claimed that trial counsel should have sought a *Frye* hearing to challenge the admissibility of the DNA evidence, and that counsel had failed to consult, or call as a witness, an expert on DNA evidence (A. 28-102). In support, defendant submitted an affidavit from Keith Inman, a criminalist (defendant's CPL § 440.10 motion exhibit B, Keith Inman affidavit dated May 28, 2021; A. 41-61). Motion counsel's affirmation detailed a telephone conversation with trial counsel, James Koenig, regarding his preparation on the DNA issue for trial (Julia P. Kuan's affirmation dated August 18, 2021, ¶ 12; A. 34).

Initially, the court had ordered an hearing, but subsequently, learned that trial counsel had passed away. The People agreed to defense proposal that the court consider

trial counsel's hearsay statements about the case, contained in motion counsel's affirmation, in deciding the motion without a hearing. Upon receiving additional information from the People, defense informed the court that a *Brady* issue no longer existed in the case. The court stated that its decision will be limited to the ineffective assistance of counsel claim, and will be decided on the papers (Interim CPL § 440.10 Decision, dated July 29, 2022; A. 167-168).

In a decision dated October 14, 2022, the Supreme Court, Bronx County (Clancy, J.), denied the CPL § 440.10 motion, based upon the papers submitted (CPL § 440.10 decision, dated October 14, 2022, hereinafter "440.10 decision;" A. 169-178). The court noted that Mr. Koenig had informed motion counsel that, although he did not hire a DNA expert, he had consulted an attorney with the Legal Aid Society's DNA Unit to prepare for cross-examination of Kendra Hardy, the OCME criminalist. Motion counsel informed the court that the Legal Aid attorney was Clint Hughes, whom the court "recognize[d] . . . is a seasoned attorney and is known for being well-versed on the scientific and legal issues pertaining to the admissibility of DNA evidence at trial" (440.10 decision, p. 5; A. 173).

The court stated that, according to motion counsel's affirmation, Mr. Koenig "was unaware that FST evidence had been previously successfully challenged on *Frye* grounds (*see People v. Collins*, 49 Misc.3d 595 (Sup Ct, Kings County 2015)), and that OCME had discontinued the use of FST at the time of defendant's trial in this case." Recognizing that Mr. Hughes was one of the lead attorneys in the *Collins* case, the court

noted that the "fact that [Mr. Koenig] consulted with one of the lead attorneys in the *Collins* case begs the question as to how Mr. Koenig could not have known about it" (440.10 decision, p. 5; A. 173).

The court held that counsel's "failure to move to preclude the FST evidence, or for a *Frye* hearing in the alternative, does not establish that [defendant] was deprived of a fair trial by less than meaningful representation. Nor does it establish that he was prejudiced in any way because it was unlikely to have changed the result" (*id.* at 8; A. 176). The court explained that, at the time of trial, all but one court (*Collins*) had denied *Frye* hearings in similar cases, and that the Court of Appeals decision in *People v. Williams*, 35 N.Y.3d 24 (2020), holding that trial courts should hold *Frye* hearings on the admissibility of FST evidence was decided three years after defendant's conviction in 2017. The court determined that trial counsel was not ineffective for not making a motion that had no chance of success (440.10 decision, pp. 7-8; A. 175-176).

Additionally, the court rejected the claim that trial counsel was ineffective for not having consulted, or called to testify at trial, a DNA expert. The court explained that the "People correctly note that Professor Inman [defendant's expert witness for the motion] does not opine that trial counsel was mis-informed or improperly cross-examined the OCME expert on the subjects of DNA and FST" (*id.* at 9; A. 177). The court further determined that Mr. Koenig was well-prepared to cross-examine Ms. Hardy after consulting with Mr. Hughes, whom the court described as a "forensic attorney who was, and still is, known for his expertise in challenging DNA forensic

evidence in court," and had "raise[d] the same issues that defendant now raises in the instant motion" (*id.* at 9-10; A. 177-178).

POINT I

Defendant's Guilt Was Proven Beyond A Reasonable Doubt And Was Supported By The Weight Of The Evidence.

Defendant contends that the evidence at trial was legally insufficient to prove that he was present at the time of the shooting, or that he intended, either as a principal or as an accessory, to kill the victim. Defendant further contends that the guilty verdict was against the weight of the evidence. The claims are partially preserved and entirely meritless.

Trial counsel made a motion for a trial order of dismissal only on the ground that "[t]here is absolutely no evidence that [defendant] had any intent" (T. 596). Counsel also claimed that the "circumstantial facts that have been put forth in this case, as a matter of law I submit do not make out the only inference or they don't support only one inference that being guilt," but never specifically raised the argument that the evidence failed to establish defendant's presence at the crime scene (T. 596). Consequently, while defendant's claim that the evidence of his intent was legally insufficient is preserved, his claim as to the evidence establishing his presence is unpreserved for appellate review, as a matter of law. *See* CPL § 470.05(2); *People v Hawkins*, 11 N.Y.3d 484, 492 (2008) ("To preserve for [appellate] review a challenge to

the legal sufficiency of a conviction, a defendant must move for a trial order of dismissal, and the argument must be 'specifically directed' at the error being urged") (citations omitted); *People v. Myles*, 2024 WL 47994872024, at *1 (4th Dept. Nov. 15, 2024) ("Defendant's contention that the conviction is not supported by legally sufficient evidence that he was present at the scene and committed the offenses is not preserved for our review"); *People v. Brown*, 224 A.D.3d 922, 922-923 (2d Dept. 2024) ("The defendant's contention that the evidence was legally insufficient to establish his identity as the shooter is unpreserved for appellate review since he did not specify this ground in his motion to dismiss at trial").

Contrary to defendant's contention (see defendant's brief, p. 29), the defense did not preserve the issue prior to trial. His reliance upon *People v. Finch*, 23 N.Y.3d 408 (2014), is misplaced. In *Finch*, at arraignment, the court denied the defendant's motion to dismiss, which claimed that the police had lacked probable cause to arrest the defendant. The Court of Appeals decided that the defendant did not have to raise the same specific claim again at the end of trial to preserve the issue for appeal. The Court explained that, "[a]s a general matter, a lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected," since "the trial court could not, without abandoning the ruling it had already made, have accepted" the motion to dismiss raising a claim that was already rejected. *Id.* at 412-413.

Here, the pre-trial proceedings defendant refers to involved bail application. The issue of whether the trial evidence established defendant's presence at the crime scene was not discussed; it certainly was not decided by the court (A. 4-20).

Regardless of what arguments trial counsel made during summation—which was done prior to defendant making his motion for a trial order of dismissal—counsel did not re-iterate them all as he moved for a dismissal of the case. Nor did counsel request that the court consider his summation arguments as part of his motion for trial order of dismissal; the issue of whether the evidence of defendant's presence was legally sufficient was never brought before the court below (T. 596). Consequently, counsel's summation failed to preserve the issue for appellate review as a matter of law. *See* CPL § 470.05(2) (a party must make "his position with respect to the ruling or instruction known to the court"); *People v. Perry*, 213 A.D.3d 492 (1st Dept. 2024) ("Counsel did not direct the court's attention to the insufficiency arguments defendant now advances as required by CPL 470.05"). Nevertheless, the claim is meritless.

The evidence at trial is legally sufficient if a rational trier of fact, in viewing the evidence in a light most favorable to the prosecution, drawing "all reasonable evidentiary inferences" for the People, could have found the essential elements of the crime beyond a reasonable doubt. *People v. Lamont*, 25 N.Y.3d 315, 318 (2015) (internal quotation marks and citation omitted); *People v. Delamota*, 18 N.Y.3d 107, 113 (2011) (citations omitted); *People v. Danielson*, 9 N.Y.3d 342, 349 (2007). So long as there exists "any valid line of reasoning and permissible inferences which could lead a rational

person to the conclusion reached by the jury," that conclusion, embodied in the verdict, should be upheld. *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987).

In determining whether the verdict is against the weight of the evidence, this Court must first ascertain whether "based on all the credible evidence a different finding would not have been unreasonable." *People v. Romero*, 7 N.Y.3d 633, 643 (2006) (citing *People v. Bleakley*, 69 N.Y.2d 490, 495 [1987]). If a different finding would not have been unreasonable, then the court must, "like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." *Romero*, 7 N.Y.3d at 643 (internal quotes and citations omitted); *see also Danielson*, 9 N.Y.3d at 349 (the Court must consider the elements of the crime as charged to the jurors in making that determination). Only if it appears the trier of fact "failed to give the evidence the weight it should be accorded," should the verdict be set aside. *People v. Mateo*, 2 N.Y.3d 383, 410 (2004) (internal quotes and citations omitted).

In conducting a weight of the evidence review in a circumstantial evidence case, such as this, "the Appellate Division must satisfy itself that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence." *People v. Baque*, _N.Y.3d_, 2024 WL 4556545, at *2 (Ct.App. Oct. 24, 2024) (internal quotation marks and citation omitted). It "does not impose a greater burden of proof than the traditional beyond a reasonable doubt formulation; rather, it merely draws attention to

the rigorous function which must be undertaken by the finder of fact when presented with a case of purely circumstantial evidence." *Id.* at *1 (internal quotation marks and citation omitted). Here, the evidence supports the jury's guilty verdict.

In the early morning hours of December 2, 2014, defendant, along with Devon Jenkins and Brendrick Brown, drove around the vicinity of 213th Street and Carlisle Street. Shortly before 1 a.m., they spotted the victim Dune Jacobs walking alone on the street; the streets were empty of both pedestrians and vehicular traffic.

Jenkins, the driver, stopped the car on 213th Street. Defendant and Brown exited the vehicle. One of them fired a handgun three times at the victim, hitting her once each in her head and foot, causing her death.

As defendant and Brown exited the vehicle and approached the victim, Jenkins had the vehicle prepared to leave soon as the others returned. Upon seeing a security video footage of the vehicle stopped on 213th Street, Sergeant Casey noted that the vehicle appeared to be preparing to leave, since the "brakes lights [were] going on and off" (T. 105).

After defendant and Brown returned, at first, Jenkins drove slowly away from the scene. Upon hearing the gunshots, Sergeant Casey's unmarked vehicle quickly came down 213th Street and turned onto Carlisle Place in pursuit of the three defendants' white vehicle. The sergeant saw three individuals in the white vehicle.

Sergeant Casey's vehicle followed the white vehicle bumper-to-bumper. Likely to avoid drawing attention to themselves, Jenkins drove at a speed of approximately 20

miles per hour. Upon finally realizing that the police were behind him, Jenkins sped up away from Sergeant Casey's vehicle. After losing Sergeant Casey's vehicle, the three defendants abandoned the vehicle on a crosswalk and fled on foot.

"Viewing the evidence . . . in the light most favorable to the People, a reasonable jury could infer that a community of purpose existed between defendant" and the two co-defendants. *People v. Scott*, 25 N.Y.3d 1107, 1110 (2015). The pattern of conduct exercised by the three co-defendants, "viewed as a whole, had no reasonable explanation other than a shared [homicidal] intent." *People v. Cornachio*, 179 A.D.3d 498, 499 (1st Dept. 2020). "Therefore, legally sufficient evidence exists to support the conclusion that defendant . . . act[ed] in concert and caused the death of" Dune Jacobs. *Scott*, 25 N.Y.3d at 1110.

This Court explained the rule for accessorial liability in *In re Tatiana N.*, 73 A.D.3d 186, 190-191 (1st Dept. 2010):

> Accessorial liability does not require that the person charged either possess or have control over the dangerous instrument or deadly weapon, or that [he] give it to the person who uses it, or even that [he] importunes its use aloud. While mere presence at the scene of a crime, even with knowledge that the crime is taking place, or mere association with a perpetrator of a crime, is not enough for accessorial liability, the necessary knowledge and intent need not be admitted directly or verbally acknowledged. They may be established through the actions of the accused, based on the entire series of events.

As the prosecutor pointed out during summation, defendant's DNA was not recovered from just any part of the murder weapon. It was found on the slide, which needs to be drawn back to load the handgun and have it ready to fire:

> When Detective Fox testified and he talked about how you load a gun and you put the cartridges in the magazine, the magazine in the grip, and then I asked him so when you do all that, is that gun ready to be fired? No, you have to do one more thing to make a semiautomatic gun ready to fire. You have to pull that slide back so that the first cartridge gets loaded into the barrel and bring that slide forward, and that is where the DNA was found.

(T. 587). Regardless of who the shooter was, defendant primed the gun to be fired. Accordingly, "[t]here was ample evidence to support defendant's accessorial liability. Among other things, defendant . . . apparently racked the weapon's slide in preparation for firing. There is no reasonable explanation for defendant's conduct, viewed in totality, other than that he shared his companion's homicidal intent." *People v. Williams*, 123 A.D.3d 527, 528 (1st Dept. 2014).[3]

And, the evidence supported the reasonable inference that defendant was one of the individuals Sergeant Casey saw in the white vehicle driving away after the victim was shot and killed. The jury saw various video clips showing the three defendants

[3] Defendant refers to the statement co-defendant Jenkins made to the police to argue that only Brown exited the vehicle, and that Brown was the shooter (see defendant's brief, p. 38, fn. 5). Respondent's identification of Brown as the shooter in the brief filed in Jenkins' appeal was based upon Jenkins' statement. Jenkins was tried separately before a different jury, and his statement was not introduced into evidence at defendant's trial. Defendant's references to the contents of Jenkins' statement are *dehors* the record and should not be considered on appeal.

together during the hours before the shooting, including one showing defendant purchasing expensive liquor bottles that he left unopened in the vehicle when he fled from the police.

During her summation, the prosecutor referred to the bottles of liquor still in the vehicle as additional proof that the three defendants were the individuals Sergeant Casey saw:

> [I]f you go to the Wet and Wild video and you watch the store clerk pack that alcohol, and then you come back and you look at the photographs of the interior of the car that are in evidence, it's People's 63, People's 59, and there are a bunch of others, but these two show what I'm speaking off [*sic*]. Those liquor bottles are in the same packaging as they were when Fabian Coke and Devon Jenkins left Wet and Wild Liquors at nine something in the evening
>
> . . . They're buying Moet, Dom Perignon, Patron, and I'm getting out of the car and leaving it there? . . . When I left under non-police case circumstances, I'm taking my stuff with me.

(T. 587-588).

Additionally, the prosecutor offered this theory of why the People believed that both Brown and defendant exited the vehicle and approached the victim and one of them shot her:

> Now why do I submit to you that both Mr. Coke and Mr. Brown got out of the car? . . . I submit to you that what you learned from Detective Fox, the ballistics expert, and Dr. Greenberg who came here Friday and told us what Miss Jacobs' wounds were like, there is a reason to believe that Miss Jacobs was pretty much ambushed from behind.
>
> And why do I say that? She had two wounds. She had a gunshot wound to her head . . .

> And what could the doctor tell us about that wound? He said that it went from back to front, from right to left, and that it was at a very shallow angle. So when the bullet hit her head on the right side, it kind of split and part of the bullet immediately exited, and the other part traveled through the skull . . .
>
> . . . She's walking, walking, walking. At some point she's struck by the bullet in her head. She's struck at a shallow angle and it doesn't go -- the whole bullet does not go through. I submit to you the reason that the bullet veers off the skull like that is because in all probability Miss Jacobs was turning her head while the bullet struck her. So it was hitting her in her right side. Someone with a gun is somewhere back off to her right. If someone with a gun is back off to her right, why is she turning to her left?
>
> * * *
>
> Detective Fox told us that when you fire a semiautomatic weapon . . . the shell casings are ejected to the right and rear of the shooter. . . . And they travel in an arc six to ten feet.
>
> Based on where those shell casings are the shooter would be standing to the left because the shell casings are going over the shooter's back. . . .
>
> But when you look at where these items are, you can see that they are going out into the street, indicating that the shooter would have been off to her right side.

(T. 583-585). The prosecutor implied that, as the shooter stood to the right side and to the back of the victim, a second individual stood to the left side of the victim, who likely heard a sound from her left or felt the presence of someone and was turning to her left when she was shot. The prosecutor also reminded the jury that: "You have a 911 call that is also in evidence, the man whose car was struck, and he's calling the police. And he says, 'I don't think they were shooting at me.' They" (T. 589).

Defendant contends that the "crime-scene surveillance video shows the shadow of a single person alighting from and returning to the car" (defendant's brief, p. 34). The surveillance videos--assuming defendant is referring to trial exhibit 9 which he forwarded to this Court—show only a partial view of the white vehicle and the area immediately adjacent to it on the sidewalk. Even assuming, *arguendo*, that the videos showed a single shadow—it is not clear on the videos whether any shadow can be seen—it does not preclude the possibility that a second shadow was not captured on the videos, nor the possibility that the shadow was cast by defendant. As the videos show only a partial view of the street corner where the defendants' vehicle waited during the shooting, it is possible that a second individual's shadow simply was not captured by the cameras. When the videos were played at trial, none of the witnesses nor attorneys argued about how many shadows were shown in the video.

Referring to snippets of the recorded 911 call, defendant argues that it "was clear the caller never saw any perpetrator, single or multiple," in attempting to refute the prosecutor's summation remark that 911 caller mentioned multiple individuals (defendant's brief, p. 22). The jury heard the 911 call (T. 116), and thus, it was for the jury to decide what the caller said to the 911 operator. "Where the defendant has been convicted, [however,] [t]he proof must be viewed in the light most favorable to the prosecution, recognizing that the People are entitled to all reasonable evidentiary inferences." *Lamont*, 25 N.Y.3d at 318. All the evidence noted above—defendant's

DNA on the slide of the handgun, the videos showing the three defendants together for hours preceding the shooting, the expensive bottles of liquor defendant bought remaining unopened in the white vehicle, and the ballistics and the medical evidence—"provided a valid line of reasoning and permissible inferences from which the jury could rationally conclude beyond a reasonable doubt that" defendant and Brown, acting in concert, "had a loaded handgun and used it to shoot the victim with the requisite intent to kill." *People v. Miley*, 229 A.D.3d 969, 972 (3d Dept. 2024).

In protesting that the DNA evidence was lacking to prove "that he was the one who used it to shoot Jacobs," defendant contends that "the DNA of two other people also was found on the gun, and Brown never was excluded as one of these people" (defendant's brief, p. 34). The People's theory at trial, however, was that defendant acted in concert with Brown and Jenkins. The prosecution never argued that defendant had sole possession of the gun. Regardless of Brown's acquittal, the People did not have to prove that defendant was the actual shooter, since defendant was charged under the acting in concert theory. *See In re Tatiana N.*, 73 A.D.3d at 190-191.

The jury heard Ms. Hardy, the OCME criminalist, explain there was "very strong" likelihood that the DNA mixture from the slide of the handgun came from defendant and two unknown individuals rather than three unknown individuals; it was approximately one hundred sixty-two billion times more probable (T. 262-263, 295). Although Ms. Hardy could not definitively conclude that defendant's DNA was part of the mixture, her conclusion that defendant could not be excluded as a contributor

meant that "for locations where comparisons could be made most of the DNA alleles seen in [defendant's] DNA profile were also seen in the mixture" (T. 293-294). It was unlikely that defendant had briefly touched the slide at some time prior to the shooting, since then it was "more likely" that defendant would "not leave enough DNA behind" for testing (T. 260).

The jury's acquittal of Brown "is only a finding of reasonable doubt, not a finding that [Brown] is in fact innocent." *People v. O'Toole*, 22 N.Y.3d 335, 338 (2013). Nor does it mean that the jury believed defendant acted alone, instead of, acted in concert with another. *See People v. Larregui*, 164 A.D.3d 1622, 1623 (4th Dept. 2018) ("the jury verdict acquitting that codefendant does not negate a necessary element of the crimes of which defendant was convicted"). Indeed, the trial court instructed the jury that, "It's your obligation to evaluate the evidence as it applies or fails to apply to each defendant separately. . . . You must return a separate verdict for each defendant. Those verdicts maybe, but need not be the same. It's your sworn duty to give separate consideration to the case of each individual defendant" (T. 616).

Defendant's contention that the DNA evidence was the sole factor for why the jury found him guilty, as opposed to Brown, "is premised upon, and asks [this Court] to engage in, speculation regarding the jury's deliberations and thought processes, a practice from which the courts consistently have been instructed to refrain precisely because the unpredictability of jury deliberations renders such intrusion into this realm an exercise fraught with uncertainty." *People v. Clark*, 129 A.D.3d 1, 20 (2d Dept 2015)

(citations omitted), *aff'd*, 28 N.Y.3d 556 (2016); *see People v. Rayam*, 94 N.Y.2d 557, 563 (2000) ("Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake") (internal quotation marks and citations omitted). Defendant obviously fails to accept the fact that the jury verdict was based upon all the evidence—the ballistics and medical evidence, Sergeant Casey's testimony, the bottles of unopened liquor bottles sill inside the white vehicle, and the various activities captured by security cameras—instead of just the DNA evidence.

Defendant's reliance upon *People v. Wright*, 25 N.Y.3d 769 (2015), and *People v Powell*, 165 A.D.3d 842 (2d Dept. 2018), to argue that the jury was "unduly influenced by the DNA evidence," is misplaced (see defendant's brief, pp. 39-40). In both cases, the issue was whether the prosecutor had misrepresented the DNA evidence during summation. *See Wright*, 25 N.Y.3d at 781-782; *Powell*, 165 A.D.3d at 843-844. The cases did not discuss how much weight the jury should give to the DNA evidence.

In arguing lack of evidence that defendant shared the murderous intent, defendant contends that he "had no motive: there was no evidence that he had any previous connection to Jacobs, let alone desired or planned her death" (defendant's brief, p. 28). But, "since motive is not an element of the crime of murder, the People were not required to prove the [defendant's] motive for committing the murder." *People v. Mitchell*, 117 A.D.3d 971, 971 (2d Dept. 2014).

Defendant's reliance upon *People v. Nelson*, 178 A.D.3d 1395 (4th Dept 2019), to argue that the evidence of intent was lacking is misplaced (see defendant's brief, p. 35). In *Nelson*, 178 A.D.3d at 1396, "both the testifying witness and defendant asked the codefendant following the assault why he had used the knife against the victim. The evidence further established that defendant specifically told the codefendant immediately after the assault that he had not given the codefendant the knife to be used in such a manner." Here, assuming, *arguendo*, that defendant was not the shooter, there was no evidence that defendant expressed any shock that the victim was shot nor that defendant questioned why the victim was shot.

Instead, defendant stepped out of the vehicle, and was present on the sidewalk when the shots were fired—he likely either distracted the victim or shot her himself. Moreover, defendant pulled back the slide on the handgun himself—likely before stepping out of the car—and loaded the cartridge into the chamber and had the gun ready to be fired; his DNA was recovered from the slide. The evidence established that defendant was an active participant and shared an intent to kill. *See Williams*, 123 A.D.3d at 528.

The cases defendant cites to argue that mere presence alone is insufficient are inapplicable here. Unlike the defendants in *People v. Cummings*, 131 A.D.2d 865, 867 (2d Dept. 1987) (the evidence "established nothing more than that the defendant was a passenger in the vehicle from which the shots were fired"), *People v. Burke*, 126 A.D.2d 938, 938 (4th Dept. 1987) (the defendant was "present in the car outside the residence

while it was burglarized by her alleged accomplices"), and *People v. Jones*, 89 A.D.2d 876, 877 (2d Dept 1982) (the evidence "established nothing more than that appellant was a passenger, in an automobile from which the [culprit] alighted in order to get something and into which he returned a short time later"), plainly, Coke had greater involvement in this crime than being a mere passenger in the vehicle with the culprit.

Defendant's reliance upon *People v. Bruno*, 144 A.D.3d 413 (1st Dept. 2016), and *People v. McLean*, 107 A.D.2d 167 (1st Dept. 1985), is also misplaced (see defendant's brief, p. 36). In *Bruno*, 144 A.D.3d at 413, the evidence presented different inferences as to the defendant's intent for accompanying the codefendant to an apartment where drugs were sold, and where the codefendant shot and killed the victim. Here, there is no other reasonable inference for defendant and his codefendants' actions in stopping the car, having it ready to leave quickly, and defendant and Brown exiting the vehicle and approaching the victim. Their intent was to kill; as noted, defendant readied the gun to be fired.

Defendant cites to the *McLean* decision for the purpose of referring to the Court of Appeals decision in *People v. Ligouri*, 284 N.Y. 309 (1940). Instead of discussing the *McLean* decision, defendant references the decision's discussion of the *Ligouri* case (see defendant's brief, p. 36). In *Ligouri*, the decision makes no mention of whether co-defendant Panaro knew that defendant Ligouri was armed when they went to a meeting called for by the victim. Both defendants testified that Ligouri shot the deceased in self-defense after the deceased first pulled out a gun. The prosecution presented

conflicting witness testimony concerning whether only one or both individuals seen confronting the deceased held a gun, and which defendant stated, "We let him have it," when asked what had happened. *Id.* at 311-315. In setting aside Panaro's conviction, the Court explained that, Panaro "was with Ligouri before the shooting, accompanied him to the place where the tragedy occurred and fled with him. That is all that was established beyond a reasonable doubt. Such proof falls far short of establishing that he aided, abetted or otherwise participated in the homicide." *Id.* at 318.

Here, defendant had readied the gun to be fired and knew the purpose for approaching the victim—to kill her; the evidence does not lead to any other reasonable inference.

In sum, defendant's guilt was proven beyond a reasonable doubt, and the guilty verdict was supported by the weight of the evidence.

POINT II

The Court Below Properly Determined That Defense Counsel Had Rendered Meaningful Representation, And Therefore, Denied Defendant's CPL § 440.10 Motion.

In claiming that trial counsel rendered ineffective assistance, defendant raises various arguments, most of which were rejected by the CPL § 440.10 motion court. Dissatisfied with trial counsel's tactic of attacking the prosecution's DNA evidence by vigorously cross-examining the prosecution's DNA witness, after having consulted an attorney in the Legal Aid Society's DNA unit, defendant contends that trial counsel, instead, should have called a DNA expert to testify.

Even though, at the time of defendant's trial, no appellate authority had decided that a *Frye* hearing should be held to test the admissibility of FTS DNA evidence, defendant contends that counsel was ineffective for not having sought to suppress the evidence, or alternatively, sought a *Frye* hearing. Defendant also argues, for the first time on appeal, that counsel should have objected to certain summation remarks by the prosecutor. The CPL § 440.10 motion court properly denied defendant's ineffective assistance claims, except for the one related to the prosecutor's summation. All of the issues raised are meritless.

Under the federal standard, defense counsel will be found to have rendered ineffective assistance if his performance fell below prevailing professional norms and, but for counsel's deficient performance, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S.

668, 694 (1984). The New York standard for ineffective assistance of counsel focuses on the "fairness of the process as a whole." *People v. Benevento*, 91 N.Y.2d 708, 714 (1998). Hence, the New York standard "offers greater protection than the federal test because, under [New York] State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial." *People v. Honghirun*, 29 N.Y.3d 284, 289 (2017) (internal quotation marks and citation omitted). Nevertheless, "[u]nder both standards, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. In other words, a defendant must demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings." *Id.* (internal quotation marks and citations omitted). Here, defendant received the effective representation of counsel.

Defendant contends that *People v. Collins*, 49 Misc.3d 595 (Sup. Ct. Kings Cty. 2015)—which held that FST evidence was not admissible following a *Frye* hearing—"clearly set the stage for [counsel] to challenge the viability of [the evidence] via *Frye*" because the Court of Appeals subsequently held in *People v. Williams*, 35 N.Y.3d 24 (2020) that a *Frye* hearing should be held before admitting FST evidence (defendant's brief, p. 52). Defendant's claim essentially is that counsel should have predicted that—almost three years after trial—the Court of Appeals would hold that a *Frye* hearing should be conducted before FST evidence is admitted at trial.

Trial counsel, however, "is not ineffective when the success of the argument the defendant claims should have been made by counsel depended on the resolution of novel questions, or when, at the time of the defendant's trial, there was no clear appellate authority supporting the argument the defendant claims that counsel should have made." *People v. Hayward*, _N.Y.3d_, 2024 WL 4556533, at *1 (Ct. App. Oct. 24, 2024) (internal quotation marks and citations omitted). "[A]n attorney is not ineffective for failing to anticipate a change in the law." *People v. Lewis*, 102 A.D.3d 505, 506 (1st Dept. 2013), *aff'd*, 23 N.Y.3d 179 (2014).

Recently, this Court decided that a trial counsel's decision not to request a *Frye* hearing on the use of the FST system does not constitute ineffective representation:

> At the time of defendant's trial, the use of . . . forensic statistical tool (FST) software to calculate likelihood ratios for possible contributors to DNA mixtures was found by almost every court to satisfy the *Frye* standard of having gained general acceptance in the relevant scientific community. Thus, defendant's attorney's failure to make a *Frye* motion was not ineffective, since at the time of the trial, such a challenge would almost certainly have been rejected based on the existing law. While the Court of Appeals subsequently held that the trial court decisions finding . . . FST DNA evidence admissible without a *Frye* hearing were flawed, an attorney is not ineffective for failing to anticipate a change in the law.

People v. Morris, 231 A.D.3d 552 (1st Dept. 2024) (citations omitted). The judgment of conviction in *Morris* was rendered in May 2016—almost one year after the *Collins* decision.

In denying the claim, the CPL § 440.10 motion court pointed out that, at the time of trial, except for a single decision (*People v. Collins*, 49 Misc.3d 595 (Sup. Ct, Kings

County, July 2, 2015)), "all other courts were routinely denying *Frye* hearings in cases such as this one" (440 decision, p. 8; A. 176) Observing that "the state of law at the time was clearly not in defendant's favor," the court decided that trial counsel was not ineffective for not having sought to preclude the forensic statistical tool (FST) evidence, or a *Frye* hearing, since such a motion had "no chance of success" (*id.*).

Prior to the *Williams* decision in 2020, this Court had held that the "trial court's denial of defendant's renewed motion for a *Frye* hearing in December 2013, which motion was recast to include evidence relating to . . . then-recently issued FST DNA testing report, was a provident exercise of discretion." *People v. Gonzalez*, 155 A.D.3d 507, 508 (1st Dept. 2017). This Court explained that the "trial court's ruling was consistent with prior determinations of courts of coordinate jurisdiction that these procedures were not novel scientific techniques and were generally accepted by the relevant scientific community." *Id.*; *see People v. Degracia*, 173 A.D.3d 1199, 1200 (2d Dept. 2019) (same).

The cases defendant cites to argue that counsel should have recognized that a motion for a *Frye* hearing had merit do not support the contention (see defendant's brief, pp. 46-47). While recognizing that the Court in *People v. Wilson*, 164 A.D.3d 1012 (3d Dept. 2018), "found counsel ineffective for not making a *Frye* challenge, since no court had yet decided whether TrueAllele evidence was admissible, and thus the court could 'not find that it would have been futile for defense counsel to have requested a *Frye* hearing,'" defendant still insists that the decision is instructive to deciding the issue

in this case (defendant's brief, p.46). By defendant's own admission, the *Wilson* decision is distinguishable. Unlike the TrueAllele evidence, the courts had rejected the *Frye* challenge to the FST evidence, and found it admissible. *See Gonzalez*, 155 A.D.3d at 508; *Degracia*, 173 A.D.3d at 1200.

In *State v. Kenneth H.*, 190 A.D.3d 33 (3d Dept. 2020), a mental hygiene case, the Court pointed out that two separate Court of Appeals decisions had "clearly set the stage to challenge the viability of" the diagnosis at issue. Therefore, the Court concluded that, "it cannot be said that a motion for a pretrial *Frye* hearing would have had little or no chance of success." *Id.* at 47. By contrast, here, "there was . . . [no] clear *appellate* authority supporting the argument the defendant claims that counsel should have made." *Hayward*, _N.Y.3d_, 2024 WL 4556533, at *1 (emphasis added). As noted, the appellate authority, at the time of trial, held defendant's claim to be meritless. *See Gonzalez*, 155 A.D.3d at 508; *Degracia*, 173 A.D.3d at 1200.

"Because the issue was not 'so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it,' defendant's claim of ineffective assistance must fail." *People v. Saenger*, 39 N.Y.3d 433, 442 (2023) (citations omitted). "'There can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success.'" *People v. Caban*, 5 N.Y.3d 143, 152 (2005) (citation omitted).

In denying the CPL § 440.10 motion, the court explained, "Although Mr. Koenig may not have consulted with a forensic scientist, he did consult with Clint Hughes, a

forensic attorney who was, and still is, known for his expertise in challenging DNA forensic evidence in court. Clearly, Mr. Koenig was prepared to cross-examine the People's expert after he consulted with Mr. Hughes, raising the same issues that defendant now raises in the instant motion" (440.10 decision, p. 10; A. 178).

The motion court further explained,

> The record demonstrates that trial counsel cross-examined the OCME expert regarding the People's failure to obtain a known DNA sample from defendant. Trial counsel also questioned the OCME's reliance on the profile developed from the soda bottle that was submitted by the police, including the fact that the OCME expert could not state with certainty that the DNA from the bottle came from defendant. Trial counsel also challenged this evidence on summation.
>
> Trial counsel's failure to challenge FST as not generally accepted in the scientific community has already been addressed in this decision. Trial counsel cross-examined the OCME Criminalist about her conclusion that the DNA mixture found on the gun was a three-person mixture as opposed to a four-person mixture, as well as whether she could tell, with any certainty, how or when defendant's DNA got there. Mr. Koenig effectively cross-examined the OCME expert at trial about "secondary transference" and the possibility of defendant's DNA being found on the gun by some other means than him touching it, and that transference is possible through contamination from the person collecting the evidence while handling other evidence at the same location. Trial counsel also continued to challenge this evidence in his summation.

(440.10 decision, p. 9; A. 177).

As part of his CPL § 440.10 motion, defendant had submitted an affidavit from Criminalist Keith Inman concerning the FST system and the DNA analysis done by Kendra Hardy, a criminalist with OCME (defendant's CPL § 440.10 motion exhibit B,

Keith Inman affidavit dated May 28, 2021, hereinafter "Inman affidavit;" A. 41-61). Mr. Inman stated that:

> The OCME analyst inferred three contributors to the evidence sample, but the literature cited above suggests that this is likely to be an underestimate of the true number of donors. In other words, a substantial likelihood exists that the evidence profile contains four, rather than three, contributors. For example, Coble (2015) reported that four-person mixtures are erroneously inferred to be three-person mixtures about 70% of the time when using a 13-locus kit, and as low as about 15% for a 21-locus kit. The evidence sample in this case was run using a 15-locus kit so the estimate for misclassification is much closer to 70% than 15%. But in any event, the probability that this sample has been misclassified as a three-person mixture, when it is in fact a four-person mixture, is substantial and cannot be ignored.
>
> It is not clear whether the FST was even capable of calculating a likelihood ratio with four contributors. Again, from the Mitchell paper: "FST is currently online for analysis of two- or three-person mixtures. Validation of fourperson models is currently in progress." (Mitchell, 2012). I am not in possession of any information that would clarify whether a four-person likelihood ratio could be run on the evidence sample.

(Inman affidavit, ¶¶ 23-24; A. 53).

The defense expert did not affirmatively refute Ms. Hardy by stating that there were four contributors nor state that FST cannot be used on four-people mixture. Instead, he merely stated that, according to some publications, Ms. Hardy may have underestimated the number of contributors, and that FST does not work on four-people mixtures. Defendant's claim that "counsel inexcusably neglected to elicit, through cross-examination of OCME analyst Hardy or through a defense expert, that the FST evidence was likely invalid . . . because the FST software could not be used on

four-person DNA mixtures" (defendant's brief, p. 52), is an exaggeration of Mr. Inman's statement.

Crucially, defendant fails to grasp that regardless of whether there were three or four contributors, and any change in the likelihood ratio, it would not refute Ms. Hardy's testimony that defendant cannot be excluded as a potential donor to the DNA mixture. At most, it would lower the likelihood ratio, but, as a statistical tool or ratio, it cannot establish that defendant should be excluded as a potential donor.

In fact, trial counsel had Ms. Hardy acknowledge that the DNA mixture could have been four, instead of three, individuals, and that there is a degree of subjectivity to Ms. Hardy's interpretation of the data. Moreover, instead of presenting complex arguments over statistics and ratios, counsel focused on arguing how much weight or credibility the jurors should place on the DNA evidence based upon how it was collected, and how much certainty even the prosecution's own expert could place upon it:

> Q. Let's talk about this mixture. You said it appeared to be three people, correct?
>
> A. Yes.
>
> * * *
>
> Q. And on certain of the loci we're talking about we had five numbers, correct?
>
> A. Yes.
>
> Q. Five alleles?

A. Yes.

Q. Could that be from four people each leaving not two, but say someone would leave just one?

A. Right, so if three people each had just one number each location, then it's possible that it would be that five numbers would indicate four people. However, remember when I said when I'm doing the comparison as well as when I'm doing the interpretation of the evidence results, it's looking at the profile overall, not just at one location specifically. So overall this was described and reported to be a three person mixture.

Q. But you cannot in actuality rule out that was a four person mixture?

A. It was my conclusion and interpretation that it was a three person mixture.

Q. There is an element of subjectivity in this to interpret the data?

A. Yes, I interpret the data and then report my interpretation and conclusion, which goes through a technical review of another qualified individual who reviews my interpretations and conclusions before the report is sent out.

Q. And then given the amount of DNA that was here, you had to put this -- and you're saying that the person from the bottle cannot be excluded from the mixture, correct?

A. Correct.

Q. You're unable to state with scientific certainty that the person from the bottle is included in the mixture, just that he cannot be excluded?

A. Right. The way I mean our reports are a template and that's the way that this conclusion was phrased for the report, that he cannot be ruled out as a contributor.

Q. That's why you use that forensic statistical tool to determine a likelihood ratio?

A. Yes. Anytime there's a positive association between an individual and a DNA profile, as well as my interpretation that someone either matches being a single source profile or can't be excluded as a contributor, a statistic is required to be generated to give a weight to that conclusion to better explain the data and my reported result.

(T. 282-285).

On summation, counsel remarked,

DNA. I assume it's a big part of [the prosecutor's] summation, all right. Her opening statement, saying that Fabian Coke had his DNA on the gun, all right.

Well, that's not accurate. That's not accurate folks, right. What do we know? We know there's a mixture.

Now again the science is important here because it's not about what I think DNA is or [the trial prosecutor] or even any of you, but you heard from the expert, okay, the mixture of three persons, and a small amount of DNA, five or six skin cells' worth, and that's what was there. And that sample was not compared with Fabian Coke, it was compared with a soda bottle submitted by Mullarkey, unspecified time, right. He said he got a bottle and sent it to the lab. So Miss Hardy had to say the bottle that was submitted came back and there was -- I believe it was very strong support for the finding that it's that person plus two unknowns in that mixture. That's the exact words. And there's a high probability on that. Probability. All right.

We're talking here about proof beyond a reasonable doubt. It's not an identification, it's not saying that person is part of the mixture. Very clear on that. I'm not saying that, she's not saying that, she can't say that. And different levels of what she could say. She couldn't give any higher level. All she can say on that evidence is he cannot -- that person on that bottle cannot be excluded. And

> there's a ratio, comes up on the computer algorithm program. You saw the chart in evidence put on the screen with DNA numbers, different locations, and there's a whole mathematical formula for this, percentages of an Asian population, Caucasian population, all right. Look at the diagram, it's right there in evidence, but it's not an identification.

(T. 571-572). Instead of debating whether there could have been three or four contributors, counsel questioned the expert in a manner suggesting that it was certainly possible that it was a four-person mixture, before focusing on attacking how much weight should be given to the ratio, emphasizing that "it's not an identification." Counsel had Ms. Hardy admit that she could not state with scientific certainty that defendant was one of the donors of the DNA mixture, but, only that he could not be excluded as a potential donor. This was an effective line of attack upon the DNA evidence.

Defendant grossly mischaracterizes trial counsel's summation in arguing that, "counsel damagingly conceded that the FST evidence was 'very strong support' for [defendant's] DNA being on the gun" (defendant's brief, p. 53, citing T. 571). Viewed in full context, the record is evident that defense counsel simply quoted Miss Hardy's testimony—counsel did not make any concession—in arguing that, regardless of how she viewed it, the evidence did not establish defendant's guilt beyond a reasonable doubt:

> So Miss Hardy had to say the bottle that was submitted came back and there was -- I believe it was very strong support for the finding that it's that person plus two unknowns in that mixture.

> That's the exact words. And there's a high probability on that. Probability. All right.
>
> We're talking here about proof beyond a reasonable doubt. It's not an identification, it's not saying that person is part of the mixture. Very clear on that. I'm not saying that, she's not saying that, she can't say that.

(T. 571).

Defendant contends that counsel, instead, should have "elicit[ed] the many doubts about the FST's reliability detailed in *Collins*" (defendant's brief, p. 53). As the motion court stated, this claim "has already been addressed" by the discussion on whether counsel should have sought a *Frye* hearing.(440.10 decision, p. 9; A. 177). Yet, defendant contends that "the issue of general acceptance went only to the pretrial legal question of whether the FST evidence should have been excluded; the court never addressed counsel's failure to elicit testimony before the jury about numerous experts' doubts about the FST" (defendant's brief, p. 54). Defendant, however, fails to explain why the jury would have accepted the alleged deficiencies in the FST evidence that were rejected by other experts and the courts.

"Defendant's claims, amounting to no more than a simple disagreement with [counsel's] strategies, tactics or the scope of possible cross-examination, do not satisfy his burden of establishing ineffective assistance." *People v. Matthews*, 228 A.D.3d 521, 522-523 (1st Dept. 2024). "*Strickland* does not requir[e] for every prosecution expert an equal and opposite expert from the defense. In many instances cross examination will be sufficient." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). Moreover, "[t]here is

nothing to indicate that" calling one's own expert witness to testify "had any greater chance of success than the strategy actually employed by trial counsel." *People v. Robins*, 177 A.D.3d 571, 572 (1st Dept. 2019). "That counsel's strategy was ultimately unsuccessful," does not support a claim of ineffectiveness, because "a reviewing court must avoid confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis; counsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective." *Honghirun*, 29 N.Y.3d 284, 290 (2017) (internal quotation marks and citations omitted).

Defendant argues, for the first time on appeal, that trial counsel was ineffective for not having objected to certain summation remarks by the prosecutor (see defendant's brief, pp. 55-56). Such claims "are unreviewable on direct appeal because they involve matters outside the record concerning possible strategic explanations for not objecting." *People v. Drame*, 185 A.D.3d 455, 456 (1st Dept. 2020).

Here, defendant already made a CPL § 440.10 motion raising a claim of ineffective assistance of counsel, but the claim did not include this issue (see defendant's CPL § 440.10 memorandum of law, dated August 18, 2021; A. 68-102). If defendant raises this issue in a second CPL § 440.10 motion, the claim would be procedurally barred, pursuant to CPL § 440.10(3)(c), "on the ground that defendant had filed a previous CPL 440.10 motion and could have raised the issue[] set forth in the second application on the first but failed to do so." *People v. Dominguez*, 257 A.D.2d 511, 512

(1st Dept. 1999); *see* CPL § 440.10(3)(c). Under the circumstances, including the fact that trial counsel has passed away, this Court should resolve this issue on the record.

A prosecutor has a wide latitude in commenting upon the evidence and may fairly respond to the arguments raised in counsel's summation while staying "within the four corners of the evidence." *People v. Williams*, 29 N.Y.3d 84, 88 (2017); *People v. Overlee*, 236 A.D.2d 133, 136 (1st Dept. 1997). Here, none of the challenged remarks strayed beyond the "four corners of the evidence," and called for an objection from defense counsel.

In *People v. Wright*, 25 N.Y.3d 769 (2015), the prosecution expert's testimony was very much lacking compared to that in the instant case. The expert could not state how many individuals had contributed to the DNA mixture, and "no wide statistical comparisons were made to identify the potential number of men who would be included in the pool of possible contributors." *Id.* at 781. The expert testified only that the defendant could not be excluded as a potential donor to the recovered DNA mixture. The Court determined that the prosecutor misrepresented the DNA evidence on summation by "suggest[ing] that the evidence directly linked defendant to the murder although it did not," arguing that the defendant's DNA "conclusively matched" the DNA found at the scene, and attempting to portray defendant as the sole contributor. *Id.* at 780-782. Therefore, the Court decided that trial counsel was ineffective for not having objected to the prosecutor's summation remarks. *Id.* at 784.

By contrast, here, the expert testified that defendant was one of three contributors to the DNA mixture recovered from handgun, and that it was approximately one hundred sixty-two billion times more probable—"very strong support"—that it came from defendant and two unknown individuals than three unknown individuals (T. 262-263, 295). "The expert testimony regarding the 'likelihood ratio' here contrasts with the testimony at issue in *People v. Wright*, 25 N.Y.3d 769 (2015)." *People v. Ramsaran*, 29 N.Y.3d 1070, 1071 (2017) (deciding that counsel was not ineffective for not objecting to the prosecutor summarizing the expert testimony that it was "1.661 quadrillion times more likely that the defendant and his deceased wife . . . were contributors to a DNA mixture," by arguing on summation "that the victim's DNA was 'on' defendant's sweatshirt"). Contrary to defendant's assertions (see defendant's brief, p. 55), the prosecutor's remark that "[defendant's] DNA is on the side of the gun that fired those three shell casings," was a proper characterization of the expert testimony. *See Ramsaran*, 29 N.Y.3d at 1071.

After discussing the DNA evidence, Detective Fox's ballistics testimony, and the medical examiner's testimony (T. 583-587), the prosecutors argued,

> Ladies and gentlemen, when you compare the evidence in the case and you examine, you cannot leave your common sense aside. It is a circumstantial case. There is no eyewitness. And I submit to you if there was an eyewitness, they would have stood up here and argued people can make mistakes, it was dark, it was far, it was cold.
>
> * * *
>
> *Science in very many ways is more reliable than people*. We have science here and we have video footage which I'm submitting to you is just

> as good as having somebody say that that person -- the people in these videos are the people you see when you go back there and you examine.

(T. 589) (emphasis added). Defendant takes the italicized remark above out of context to claim that trial counsel should have objected that the prosecutor "overstate[d] and misrepresent[ed]" the DNA evidence (see defendant's brief, pp. 55-56). The prosecutor did not argue during summation that the DNA evidence alone "finds [defendant] guilty," or make other similar over-characterization of the DNA evidence as happened in *People v. Powell*, 165 A.D.3d 842, 843 (2d Dept 2018). In fact, in the above excerpt, the prosecutor did not specifically mention the DNA evidence.

In contrast to defendant's assertions (see defendant's brief, p. 56), trial counsel did object to the prosecutor's argument that the evidence established that both Brown and defendant exited the vehicle:

> [The Prosecutor]: Now why do I submit to you that both Mr. Coke and Mr. Brown got out of the car? According to them it's because I have a vivid imagination, but I submit to you that what you learned from Detective Fox, the ballistics expert, and Dr. Greenberg who came here Friday and told us what Miss Jacobs wounds were like, there is a reason to believe that Miss Jacobs was pretty much ambushed from behind. . . . I submit to you the reason that the bullet veers off the skull like that is because in all probability Miss Jacobs was turning her head while the bullet struck her. So it was hitting her in her right side. Someone with a gun is somewhere back off to her right. If someone with a gun is back off to her right, why is she turning to her left?
>
> [Defense counsel]: Judge, I object, it's complete fantasy right now. No evidence whatever.

> The Court: The People are entitled to make a fair interpretation of the evidence. The jury can either accept it or reject it as they see fit.

(T. 583-584).

Defendant claims that "the prosecutor misquoted the 911 caller," and that her argument that the autopsy somehow proved that two people exited the car was baseless" (defendant's brief, p. 56). The prosecutor's remarks describing the content of the 911 call recording constituted "fair comment on the evidence, and reasonable inferences to be drawn therefrom," and "did not deprive defendant of a fair trial," especially since the jury had heard the recording themselves. *People v. Frasier*, 211 A.D.3d 487, 488 (1st Dept. 2022), *lv. denied*, 40 N.Y.3d 928 (2023); *see People v. Smith*, 187 A.D.3d 1652, 1655 (4th Dept. 2020) ("The videos were admitted in evidence and . . . the prosecutor's comments during summation were based on matters in evidence or were 'fairly inferrable' from the testimony as well as the videos themselves"); *People v. Parris*, 1 A.D.3d 134, 134 (1st Dept. 2003) ("The prosecutor's summation argument concerning the interpretation of certain photographs drew a reasonable inference from the evidence"), *aff'd*, 4 N.Y.3d 41 (2004).

As the trial court held in rejecting counsel's objection, the prosecutor's remarks about how the ballistics and the medical evidence proved that defendant and Brown stood behind the victim when she was shot constituted reasonable inferences to be drawn from the evidence. The prosecutor did not argue that the evidence conclusively established the presence of the two individuals. Instead, the prosecutor first laid out

what the evidence proved. The prosecutor then told the jury that it was reasonable to infer from the evidence that both defendant and Brown stood behind her.

Once again, defendant refers to matters *dehors* the record—Jenkins' statement and Jenkins' counsel's actions at his trial—to argue that counsel should have been prepared to object to any arguments by the prosecutor that both Brown and defendant exited the vehicle (see defendant's brief, p. 56, n. 9). As argued earlier, defendant should not be heard to use Jenkins' statement, which was not introduced into evidence at defendant's separate trial, to argue that only Brown stepped out of the car. *See People v. Seidenshner*, 210 N.Y. 341, 358 (1914) ("The record cannot now be changed, nor can testimony be read into it from another trial, even if the record in such other trial is on file as a part of the records of this court"); *People v. Rodriguez*, 195 A.D.3d 491, 492 (1st Dept. 2021) ("because defendant did not raise the issue at trial, he did not create a sufficient factual record").

In sum, motion court properly found that trial counsel rendered effective representation.

CONCLUSION

The conviction and sentence should be affirmed.

Respectfully submitted,

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