APPENDIX

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

MEMORANDUM

No. 66 SSM 5

The People &c.,
Respondent,
v.
Darryl Hemphill,
Appellant.

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

[DECIDED June 25, 2020]

Submitted by Claudia Trupp, for appellant.
Submitted by Noah J. Chamoy, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

Defendant appeals from the judgment of Supreme Court, Bronx County convicting him after trial of murder in the second degree and sentencing him to twenty-five years to life in prison. The defense was third-party guilt. On appeal, defendant renews his challenges to the sufficiency of the evidence, the integrity of the grand jury proceedings and various trial rulings.

While there was evidence of third-party culpability, a rational jury nevertheless could have concluded that defendant was guilty (*see People v Danielson*, 9 NY3d 342, 349 [2007]). The jury was

free to reject defendant's claims about the witnesses' initial identifications of someone else as the shooter (*cf. Ando v Woodberry*, 8 NY2d 165, 171 [1960]). Contrary to defendant's claim that the indictment should be dismissed based on the prosecutor's failure to alert the grand jury to exculpatory evidence that implicated another, the People were not obligated to present evidence that someone else was initially identified as the shooter (*see People v Mitchell*, 82 NY2d 509 [1993]; *People v Lancaster*, 69 NY2d 20, 25-26 [1986]).

With respect to the other claims raised by defendant, we note that trial courts possess broad discretion to make evidentiary rulings and control the course of cross-examination (*see People v Rouse*, 34 NY3d 269, 278-279 [2019]; *People v Jones*, 24 NY3d 623, 629 [2014]). Here, the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pled guilty to possessing a firearm other than the murder weapon. Nor did the court abuse its discretion in its treatment of a controversy concerning counsel's attempt to impeach a witness with her prior grand jury testimony. Notably, counsel failed to request that the witness be recalled for questioning relating to the particular appearance on which counsel relied. Similarly, the trial court acted well within its discretion in admitting photographs of the victim's body as not simply introduced to inflame the jury (see *People v Stevens*, 76 NY2d 833, 835 [1990]), and in determining that their relevance was not outweighed by danger of undue prejudice to defendant (*see People v Primo*, 96 NY2d 351, 355 [2001]). The trial court's other evidentiary rulings were similarly

within the court's discretion, as was the court's denial of defense counsel's same-day oral request to adjourn sentencing to investigate grounds for a possible motion to set aside the verdict (*cf. People v Spears*, 64 NY2d 698, 699-700 [1984]).

Defendant's remaining contentions are unpreserved or without merit.

FAHEY, J. (dissenting):

I would reverse. The trial court abused its discretion in denying defense counsel's request to call as a witness the court reporter in a 2007 grand jury proceeding.

I.

The underlying events began with a street fight in March 2016 between two men, including trial witness Ronnell Gilliam, on the one side, and a group of three men and two women, including trial witness Brenda Gonzalez, on the other. Gilliam's accomplice was described by eyewitnesses as a thin black man wearing a blue shirt or sweater. After the fight broke up, a slim black man in a blue top returned to (or arrived on) the scene with a gun and opened fire. The gunfire killed a two-year-old passenger in a minivan that happened to be in the vicinity.

An eyewitness named Michelle Gist, who had observed the initial fight, but not the shooting, told the police that Gilliam and his best friend Nicholas Morris had been at the scene. Morris was arrested, and ammunition consistent with the type of bullets used in the shooting was found at his apartment. Gonzalez and two of her companions identified

Morris in a lineup as the shooter. Meanwhile, at Gilliam's apartment, the police had found a blue sweater inside a plastic bag.

Gilliam turned himself in and spoke with the police. He identified Morris as the shooter. Later, Gilliam returned to the police station, recanted his identification of Morris, and now stated that the shooter had been defendant Darryl Hemphill. During this second interview, Gilliam received a phone call from Morris.

Grand juries were convened in 2006 and 2007, at which witnesses identified Morris as the shooter. At the 2006 grand jury proceedings, held on the basis of the evidence against Morris, Gonzalez did not identify Morris by name as the shooter. At the 2007 grand jury proceedings, Gonzalez expressly identified Morris by name as the shooter.

Morris went to trial for the killing. After a mistrial and a negative DNA swab of the sweater found in Gilliam's home, the People decided to abandon prosecution of Morris. Then, after the DNA on the sweater was found to match Hemphill instead, defendant was arrested.

At the second trial, Gilliam testified, pursuant to a cooperation agreement, that defendant had been the shooter. Gist identified defendant as the thin black man present at the initial fight, but she was impeached with her prior statements to the police that Morris, not Hemphill, had been at the scene. Gonzalez and the others in her party described the shooter as a tall, thin black man in a blue sweater or shirt, without identifying Hemphill specifically.

Defense counsel cross-examined Gonzalez by, among other things, reading her 2007 grand jury testimony, in which she had testified that there was no doubt in her mind that she had seen Morris fire the shot that killed the child. Counsel momentarily confused the dates of the two grand jury proceedings and asked Gonzalez to recall her "2006" grand jury testimony, in which she had not identified Morris by name as the shooter. Gonzalez denied giving the testimony that defense counsel read to the jury. In addition, defense counsel put broader questions to Gonzalez, such as "Did you ever tell . . . any district attorney that there was no doubt in your mind that Nicholas Morris fired that shot . . .?", to which Gonzalez untruthfully replied, "No I didn't."

The trial court then permitted the People to call the 2006 grand jury court reporter to testify that Gonzalez in 2006 had not been asked the questions and had not given the answers that defense counsel had read in court (when reading from Gonzalez's 2007 grand jury testimony). In response, defense counsel sought to introduce testimony from the 2007 court reporter that the questions had in fact been asked and answered in 2007. The trial court did not grant counsel's request, and instead suggested that defense counsel recall Gonzalez, question her about her 2007 testimony, and then call the 2007 court reporter if necessary. Defense counsel declined this alternative to the request.

On summation, the prosecutor argued that defense counsel had "tried to get Brenda Gonzalez to admit she said things before the grand jury in 2006 she never said" and that the People had called the reporter "to prevent facts from being manipulated." During deliberations, the jury repeatedly asked to

rehear the testimony from the 2006 grand jury reporter. At this point, the parties discussed the fact that the trial court had precluded the defense from calling the 2007 grand jury court reporter, and the trial court told defense counsel, "[o]kay. I understand your position. You have an exception."

II.

Defendant preserved for our review the issue whether counsel should have been permitted simply to call the reporter (see CPL 470.05 [2] ["a party who without success has . . . sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure"]). Indeed, the majority agrees. While it is true, as the majority notes, that "counsel failed to request that [Gonzalez] be recalled for questioning" on her 2007 grand jury appearance (majority op at 2), the majority does not assert that defendant failed to preserve his challenge to the trial court's ruling on calling the court reporter.

III.

The trial court committed reversible error and denied defendant a fair trial by refusing to allow defense counsel to call the 2007 grand jury court reporter, without recalling Gonzalez. This would have enabled the defense to impeach Gonzalez by confirming that she had in fact identified Morris, by name, as the shooter in 2007. Notably, Gonzalez was asked whether she had ever told a district attorney that Morris was the shooter, and denied doing do, even though she had testified as much in 2007. The trial court issued its ruling despite the fact that the

People were permitted to call the 2006 court reporter to testify, in effect, that defense counsel's questioning was disingenuous.

The trial court's refusal to allow defense counsel to correct the record by calling the 2007 court reporter was prejudicial. The ruling left the jury with the impression that the defense had fabricated grand jury testimony, even though it was Gonzalez whose testimony was false. The jury was prevented from learning that Gonzalez had identified Morris as the shooter, by name and under oath, at the 2007 grand jury proceeding. This was error. Although "trial courts have broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters," evidence that tends to show that a witness is fabricating her testimony "is never collateral and may not be excluded on that ground" (*People v Hudy*, 73 NY2d 40, 56 [1988]). Put another way, "there is no risk of diversionary excursions into collateral matters where '[t]he substance of th[e] contradiction goes to a material, core issue in the case' " (*People v Bradley*, 99 AD3d 934, 937 [2d Dept 2012], quoting *People v Cade*, 73 NY2d 904, 905 [1989]).

For these reasons, I dissent.

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On review of submissions pursuant to section 500.11 of the Rules, order affirmed, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Garcia, Wilson and Feinman concur. Judge Fahey dissents in an opinion.

Decided June 25, 2020

APPENDIX B

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

The People of the State of New York, Respondent, -against- Darryl Hemphill, Defendant-Appellant.	Ind. No. 1221/13 [ENTERED: June 11, 2019]

Robert S. Dean, Center for Appellate Litigation, New York (Claudia Trupp of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered January 6, 2016, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, affirmed.

Defendant was charged with two counts of second-degree murder in connection with an April 6, 2006 incident in which two-year-old was shot and killed by a stray bullet that had entered his mother's minivan as they were driving on Tremont Avenue in the Bronx.

On the date of the incident, which was Easter Sunday, Ronell Gilliam, along with a black male who was wearing a blue sweater or blue shirt, got into a physical fight with a group of men and women in the

street around Tremont Avenue. At some point shortly after that altercation, the fatal stray bullet was fired. The police interviewed eyewitnesses, including Michelle Gist, who identified Gilliam as one of the men involved. Police searched Gilliam's apartment and found a blue sweater in a plastic bag.

Soon thereafter, the police suspected that Gilliam's best friend, Nicholas Morris, had been with Gilliam and had committed the shooting. Police searched Morris's apartment and found guns and ammunition, including a 9 millimeter cartridge, the type of ammunition used in the shooting. The next day, Morris appeared on a television news broadcast on Bronx News 12, proclaiming his innocence. Morris was arrested, and police observed bruises on his knuckles consistent with his having been in a fistfight. At the time of Morris's arrest, at least three witnesses had identified Morris to police as the shooter.

In 2008, Morris was indicted and the prosecution proceeded to trial against him. However, when Morris's DNA was compared to DNA taken from the blue sweater recovered from Gilliam's apartment in 2006, it was determined that there was no match. Thus, in April 2008, the court declared a mistrial in Morris's case with the prosecution's consent. In May 2008, after having served two years in prison, Morris pleaded guilty, against his counsel's advice, to possessing a .357 caliber gun on the day of the shooting, in exchange for his immediate release from prison.

In 2011, the prosecution obtained the DNA of defendant, Gilliam's cousin, and tested it against the

DNA found on the blue sweater recovered from Gilliam's apartment in 2006. Defendant's DNA was a match for the DNA found on the sweater. Two years later, in 2013, defendant was arrested and indicted.

At defendant's trial in 2015, 29 witnesses testified for the People, including, among others, the group of people that were involved in the altercation before the shooting; Gist, an eyewitness who had known defendant from the neighborhood and saw him during the fight; three other eyewitnesses to the fight and shooting; Gilliam, defendant's cousin and accomplice; members of defendant's family and one of defendant's friends; and certain police officers and experts. Photographs, reports, ballistic evidence from the scene and the blue sweater containing defendant's DNA were admitted at trial. One of defendant's friends testified for the defense.

At the trial, the eyewitnesses all described the shooter as a thin African American man wearing a blue shirt or blue sweater and a hat. Some of the eyewitnesses also testified that they observed that the shooter had a tattoo on his right forearm. At some point after these witnesses testified, defendant displayed to the jury his arms revealing "D.A," defendant's nickname and "10453," a zip code, tattooed on his right arm. Additionally, the video of Morris's interview at the News 12 Bronx office was introduced and played to the jury without sound to show that Morris had no tattoos on his arms.

One of the detectives testified that after the shooting, he spoke to Gist, who had recognized two men involved in the fight, Gilliam and Morris. The detective testified that the police gained access to

Gilliam's apartment, where they recovered from a closet the blue sweater in a plastic bag. He testified that when he opened the plastic bag, he smelled burnt gunpowder residue. However, lab testing of the sweater was inconclusive as to whether it contained gunpowder residue.

Gist testified that she first told police that three people were present at the initial altercation with the other group – Gilliam, Morris and defendant - but that she only saw Gilliam and defendant involved in the fighting. She denied telling the police that only Gilliam and Morris were involved. She identified defendant in court and testified that she knew him from the neighborhood. Defendant's grandmother testified that on Easter Sunday in 2006, the date of the incident, defendant had been wearing a blue sweater.

Police officers testified that when they were searching Gilliam's apartment, an officer overheard a phone call between Gilliam's brother William, who was present in the apartment during the search, and Gilliam, who was evading the police, in which Gilliam asked William if the police were there and told William to get rid of "the shirt."

Gilliam testified as follows. After the shooting, he saw Morris, his brother William, defendant and defendant's girlfriend in the lobby of his apartment building, and defendant took off the blue sweater once inside the apartment and told Gilliam to hold two guns, Morris's .357 caliber and defendant's 9 millimeter. A friend called Gilliam and told him that the police were looking for someone matching his description for a shooting, and Gilliam relayed this

information to defendant. Defendant told him to get rid of the blue sweater and guns, so Gilliam took the guns to a nearby crack house but left the sweater behind in the apartment. Gilliam attempted to go home, but he learned that the police were at his building. When defendant later called to confirm that Gilliam had gotten rid of the sweater, Gilliam told him that he forgot. Gilliam then went to the home of one of defendant's friends, as directed by defendant, where defendant told him they would flee to North Carolina. That night, Gilliam, defendant, defendant's girlfriend and defendant's son went to North Carolina in a blue car. In North Carolina, they stayed in several hotels and homes, changing location each night. Gilliam cut his hair to alter his appearance and threw away his cell phone. Defendant later told Gilliam that he heard that Morris had told police that Gilliam committed the shooting. He told Gilliam to return to New York and to tell police that Morris was the shooter. Defendant promised to hire Gilliam a lawyer. Gilliam then returned to New York.

Thereafter, Gilliam met with detectives and identified Morris as the shooter. However, Gilliam testified that this first identification of Morris was untrue and that when he learned that Morris had not implicated him in the crime, as defendant had suggested, Gilliam gave a second, truthful statement to detectives that defendant was the actual shooter, not Morris. Gilliam then made a third statement at the District Attorney's Office with his attorney present that defendant was the shooter and that Gilliam had disposed of the murder weapon. Gilliam was thereafter arrested and charged with hindering prosecution and tampering with physical evidence.

As an initial matter, we find that the verdict was supported by legally sufficient evidence and was not against the weight of the evidence. "A verdict is legally sufficient when, viewing the facts in the light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt'" (*People v Danielson*, 9 NY3d 342, 349 [2007]). "A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof" (*id.*). When assessing a weight of the evidence claim, the appellate court must first ascertain "[i]f based on all the credible evidence a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). If so, 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'" (*id.*). Although this Court has the authority to set aside the verdict if it determines that the jury "failed to give the evidence the weight it should be accorded," it should not substitute itself for the jury, as "[g]reat deference is accorded to the factfinder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*id.*).

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence because the People proved, through their witnesses and forensic evidence, that defendant was correctly identified as the shooter, the only issue at

trial. First, the People provided evidence that defendant was the shooter with the blue sweater containing DNA matching defendant's DNA and not the DNA of Morris or Gilliam. Several different witnesses testified that the shooter was wearing a blue sweater during the fight and the shooting. Although there were slight variations in the description of that item of clothing, with one witness describing it as a blue short-sleeved shirt or polo, most of the eyewitnesses described it as a blue sweater. Both Gist and defendant's grandmother testified that on the day of the shooting, defendant was wearing a blue sweater. Finally, one of the detectives testified that the bag containing the blue sweater smelled of gunpowder residue when he recovered it from Gilliam's apartment several hours after the shooting and that he overhead Gilliam tell his brother to discard the sweater.

Further, the People provided evidence that defendant was the shooter with the overwhelming evidence demonstrating defendant's consciousness of guilt. This evidence included that defendant fled to North Carolina shortly after the incident with his girlfriend, his son and Gilliam; that the group stayed in several hotels and homes, changing location each night; that defendant leased a residence under a false name; that defendant sent Gilliam to New York to implicate Morris as the shooter; that defendant continued to hide out in North Carolina with his girlfriend, despite the fact that defendant owned a music studio in New York and defendant's girlfriend worked as a paramedic in New York; and that defendant was ultimately apprehended in North Carolina avoiding law enforcement.

Additionally, the People provided evidence that defendant was the shooter with the testimony of multiple witnesses that the shooter had a tattoo on his right arm and showed the jury that defendant did indeed have a tattoo on his right arm. Moreover, the People introduced at the trial the video of Morris's interview at the News 12 Bronx office showing that Morris had no tattoos on his arms.

Finally, the People provided evidence that defendant was the shooter with Gilliam's testimony that he had identified defendant as the shooter and that defendant asked him to get rid of the blue sweater that was later found by police in Gilliam's apartment and that contained DNA matching that of defendant. Additionally, Gilliam provided credible testimony as to why he initially identified Morris as the shooter instead of defendant. He stated that he only identified Morris as the shooter at the behest of defendant after defendant told him that Morris had implicated him in the crime. However, once he learned that Morris had not implicated him in the crime, he told detectives the truth, that defendant was actually the shooter.

The assertion that Gilliam's testimony should be rejected because he was defendant's accomplice and a cooperating witness is without merit. An accomplice's testimony can be used to support a defendant's conviction if it is corroborated by other evidence (*see People v Besser*, 96 NY2d 136, 143-144 [2001]). "Independent evidence need not be offered to establish each element of the offense or even an element of the offense; the People's burden is merely to offer some nonaccomplice evidence 'tending to connect' defendant to the crime charged" (*id.*). In

addition to Gilliam's testimony that defendant was the shooter, the People elicited testimony from other witnesses who identified defendant as being involved in the altercation and testified that the shooter wore a blue sweater, and provided physical and forensic evidence, including the blue sweater found in Gilliam's apartment, which contained defendant's DNA. All of this evidence corroborated Gilliam's testimony and connected defendant to the crime charged.

The fact that Morris was initially mistakenly prosecuted for the murder and that several witnesses initially identified Morris as the shooter does not alter the conclusion that the verdict was supported by legally sufficient evidence. The misidentifications by the witnesses were explained by the circumstances, including that they may have seen Morris's name and face through media coverage of the murder before they made their identifications. Moreover, at the trial, defense counsel emphasized the theory that Morris had committed the shooting and the jury properly rejected that theory based on the trial evidence.

The court properly permitted the People to introduce portions of Morris's plea allocution, in which he pleaded guilty to weapon possession and admitted that at the time and place of the murder, he possessed a .357 caliber handgun. Morris did not testify at defendant's trial and his plea allocution would normally be inadmissible as testimonial hearsay. However, the admission of portions of Morris's plea allocution did not violate defendant's right of confrontation because defendant opened the door to this evidence (*see generally People v Reid*, 19

NY3d 382, 387 [2012]). During the trial, defendant created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression.

Defense counsel failed to preserve any claim that the court precluded him from calling the court reporter who transcribed the 2007 grand jury minutes of the testimony of Brenda Gonzalez, a witness to the incident who had attempted to break up the fight between the shooter and her friend, and we decline to review it in the interest of justice. As an alternative holding, we find that the court properly precluded defense counsel from calling the 2007 grand jury reporter.

The facts as they relate to Gonzalez are as follows. Shortly after the shooting, Gonzalez identified Morris in a lineup. She testified as to her interactions with Morris in both a 2006 grand jury proceeding and a 2007 grand jury proceeding. During her testimony in the 2006 grand jury proceeding, Gonzalez did not mention Morris by name. However, during her testimony in the 2007 grand jury proceeding, Gonzalez did mention Morris by name.

At defendant's trial, during cross-examination by defense counsel, Gonzalez testified that she never previously identified Morris by name. Defense counsel then asked if she recalled answering a question in the grand jury "back in 2006" in which she identified Morris by name. Gonzalez responded that she "never said that" and claimed that someone must have inserted Morris's name into the transcript.

Defense counsel then attempted to impeach her by reading from Gonzalez's 2007 grand jury testimony, in which Gonzalez had identified Morris by name. However, defense counsel never questioned Gonzalez about her 2007 grand jury testimony before attempting to impeach her testimony with the 2007 grand jury transcript. The prosecutor objected to defense counsel impeaching Gonzalez with the 2007 grand jury transcript, and the court sustained the objection at that time.

The prosecutor then stated that he was going to call the court reporter who transcribed the 2006 grand jury minutes because those were the only grand jury minutes about which defense counsel questioned Gonzalez and the 2006 grand jury minutes did not make any reference to Gonzalez identifying Morris by name. Defense counsel then admitted on the record that perhaps he had made a mistake as to which grand jury proceeding he questioned Gonzalez about, but he asserted that the difference in dates did not matter. Defense counsel requested that the jury be told that the statements he read and that were attributed to the 2006 grand jury proceeding were actually made by Gonzalez during the 2007 grand jury proceeding. However, the prosecutor refused on the ground that Gonzalez had not been properly confronted with the 2007 transcript because defense counsel never questioned Gonzalez about her 2007 grand jury testimony.

The prosecutor then called the 2006 grand jury reporter, who testified that Gonzalez did not mention Morris at that proceeding. Thereafter, defense counsel made an application to the court to call the 2007 grand jury reporter. The court did not make a

ruling on defense counsel's request. Instead, it advised the parties to prepare to address the issue at some point in the future. For the remainder of the trial, defense counsel never sought to obtain a ruling from the court on whether he could call the 2007 grand jury reporter and he also never made an application to the court to recall Gonzalez as a witness to question her properly about her 2007 grand jury testimony.

During jury deliberations, the jurors requested a portion of the 2006 grand jury reporter's testimony. At that point, defense counsel argued that the jury was left with an inaccurate and unfair impression about Gonzalez's testimony because he was precluded from calling the 2007 grand jury reporter. The court noted defense counsel's "exception."

Based on the foregoing, we find that defendant abandoned and failed to preserve his claim that he was denied the right to call the 2007 grand jury reporter in order to properly confront Gonzalez (*see e.g. People v Martinez*, 257 AD2d 479, 480 [1st Dept 1999], lv denied 93 NY2d 876 [1999]). The court never actually ruled against defendant on the issue of whether he could call the 2007 grand jury reporter. Rather, the court stated that it would have to think about it. However, defense counsel did not seek a subsequent ruling on this issue during the testimonial portion of the trial. It was not until the jury asked a question about the 2006 grand jury reporter's testimony that defense counsel raised the issue again about wanting to call the 2007 grand jury reporter. Defendant's untimely request, during jury deliberations, to call the 2007 grand jury reporter did not preserve his claim (*see e.g. People v Guilliard*,

309 AD2d 673 [1st Dept 2003], *lv denied* 1 NY3d 597 [2004]).

Our alternative holding is that the court properly precluded defense counsel from calling the 2007 grand jury reporter in order to impeach Gonzalez because defendant never properly confronted Gonzalez with her 2007 grand jury testimony before seeking to call the 2007 grand jury reporter. Despite being made aware that he mistakenly questioned Gonzalez about her 2006 grand jury testimony, defense counsel never questioned Gonzalez about her 2007 grand jury testimony and never made an application to the court to recall Gonzalez to question her properly about her 2007 grand jury testimony.

None of the other evidentiary rulings challenged by defendant warrant reversal. These various rulings were provident exercises of the trial court's discretion in admitting and excluding evidence, in which the court exercised its discretion in accordance with the applicable legal standards relating to each issue. We find that none of these rulings deprived defendant of a fair trial, or of his right to present a defense.

Defendant failed to preserve his challenges to the prosecutor's opening statement and summation by failing to object, or by failing to request further relief after the court sustained an objection and gave a curative instruction, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118–119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

The court did not violate defendant's right to be present when, following his outburst upon hearing the guilty verdict, it immediately ordered him removed from the courtroom before the jury was polled. Earlier in the trial, the court had warned defendant that any further outbursts by him would result in his removal from the courtroom while his trial continued (*see People v Branch*, 35 AD3d 228, 228-229 [1st Dept 2006], *lv denied* 8 NY3d 919 [2007]).

The court properly declined to dismiss the indictment based on the People's decision not to present evidence to the grand jury about Morris, the person who had originally been charged with the murder. The prosecution has broad discretion in presenting its case to the grand jury and is not obligated to present exculpatory evidence (*People v Mitchell*, 82 NY2d 509, 515 [1993]).

The court properly declined to hold a hearing pursuant to *Franks v Delaware* (438 US 154 [1978]) to address the validity of statements made in the affidavit filed in support of the search warrant for defendant's DNA swab. Defendant failed to show that the affidavit was "knowingly false or made in reckless disregard of the truth" (*People v Tambe*, 71 NY2d 492, 504 [1988]).

The court properly denied defendant's constitutional speedy trial motion after considering the factors enumerated in *People v Taranovich* (37 NY2d 442 [1975]).

The court providently exercised its discretion in denying defense counsel's request for an adjournment of sentencing to allow the defense to further

investigate an alleged jury issue, and the ruling did not result in any prejudice (*see People v Rivera*, 157 AD3d 545 [1st Dept 2018], lv denied 31 NY3d 1016 [2018]).

We perceive no basis for reducing the sentence.

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

I do not believe that defendant's identity as the shooter was proven beyond a reasonable doubt. At a minimum, he is entitled to a new trial. Defendant was prejudiced when he was prevented from cross examining an eyewitness concerning her prior identification of another man, Nicholas Morris, as the shooter, and the prosecution was allowed to elicit testimony from the grand jury reporter in 2006 that left the impression that the witness had never previously identified another man as the shooter. I therefore dissent.

Witnesses had occasion to observe Ronnell Gilliam, a/k/a "Burger," and another man, described as a "taller" and "slimmer" man, in broad daylight, at close range, for a 10-minute period during the initial encounter. Words were exchanged, and the men engaged in a fistfight. When the fight broke up, John Erik gave chase but was unable to catch up with the slender man. When he encountered Gilliam on the way back to his friends, he was threatened that he was "going to get shot for that." The slim man returned in a car with a gun. Witnesses testified that

the slim man pointed the gun at Juan Carlos, who was just emerging from a store, and began shooting.

During a canvass following the shooting, detectives interviewed a witness who saw the altercation but not the initial shooting. She identified Gilliam and Nicholas Morris as the two men she saw.

Three of the four witnesses present identified Nicholas Morris – who does not resemble defendant – as the shooter in a lineup two days after the shooting.[1] Another witness from the neighborhood who viewed a photo array stated that Morris "look[ed] like the shooter."

The eyewitness identifications, together with a 9 millimeter cartridge (of the same type recovered from the victim), recovered during a search of Morris' apartment, furnished probable cause to arrest Morris and charge him with the murder. Morris was observed to have bruising on his knuckles, indicating to detectives that he had recently been in a fight.

Defendant was not arrested until 2013, some seven years after the murder. He was never identified by any of the initial eyewitnesses as the shooter. The only witness who identified defendant as the shooter at trial was Gilliam, the accomplice. Accomplice testimony lacks the inherent trustworthiness of the testimony of a disinterested witness and must be viewed with a "suspicious eye," particularly where, as here, the accomplice hopes to receive immunity or lenient treatment (*see People v Berger*, 52 NY2d 214, 218-219 [1981]). Such testimony must be regarded with "utmost caution"

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[1] The fourth was unable to make an identification.

(*id.* at 219). Not only was Gillam a cooperating witness seeking to avoid a murder sentence,[2] but he also changed his story repeatedly. First, he identified Morris as the shooter. Later, and apparently at the behest of Morris,[3] his best friend, he identified defendant as the shooter. By Gilliam's own admission, he failed to tell the police that Morris had a .357 for fear of "implicating him." He admitted that he lied when he said defendant threw the gun in the river. He testified that he had "come clean" during his third interview with the police, but admitted on cross that he had lied about disposing of the gun in the river himself.

Significantly, while eyewitnesses described the shooter's sweater/shirt as blue, not one of them was able to identify the blue garment in evidence as the one worn by the shooter.[4] The sweater had been turned over by Gilliam's brother during a search of the apartment. The investigating detective testified that he smelled gunpowder when he opened the bag containing the sweater.

Yet Gilliam's brother was never called as a witness, despite being available; no gunpowder or residue consistent with the discharge of a firearm was detected on the shirt, although it was examined

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[2] Gilliam was promised a five-year sentence in exchange for his cooperation.

[3] Witnesses testified that Morris called Gilliam and spoke to him while Gilliam was being interviewed at the police station.

[4] Details also varied by witness, from "polo shirt" to "sweater" and from long-sleeved to short-sleeved. Some described the shirt as having a logo or "embroiderment" design; others did not observe a logo or design.

for trace evidence shortly after the incident; and the detective did not record his observation in the contemporaneous DD-5 report or any of the paperwork in the case, despite what he agreed was its obvious significance.

In its recitation of the events of the day in question, the majority does not sufficiently differentiate the initial, 10-minute encounter from the subsequent, fatal encounter during which the shooter and his friends returned in a car. The sequence of events is critical, however, because none of the eyewitnesses was able to identify defendant as the shooter during the second, fast-moving encounter. They testified only that the shooter wore a blue sweater/shirt. The prosecution thus relied on a theory that the blue-shirted shooter was the same slim man as had been observed during the initial encounter. Enough time elapsed between the encounters, however, that he simply cannot be presumed to be the same person.

The majority also implies that Gist identified defendant as the shooter; however, she did no such thing. Gist admitted that she observed only the initial encounter and did not observe the shooting. Further, during a canvass following the shooting, she identified Gilliam and Morris as the two individuals she saw during the initial encounter.

Defendant was denied his right to confrontation when the court prevented counsel from cross-examining a critical witness to establish that she had identified Morris unequivocally as the shooter in testimony before the grand jury in 2007. The witness had testified before the grand jury twice, in 2006 and

2007; the latter time she identified Morris by name as the shooter. When the witness maintained at trial that she never identified Morris as the shooter before the grand jury, defense counsel attempted to impeach her with prior inconsistent statements she made to the grand jury in 2007. Defense counsel asked the witness whether she wouldn't agree that events were fresh in her mind when she testified before the grand jury in "2006," referring to the incorrect year, but reading verbatim from the transcript of the 2007 proceedings, in which the witness unequivocally identified Morris as the slender man involved in the shooting.

The People asked to call the grand jury reporter from 2006 so that the jury would be left with the mistaken impression that the witness had identified Morris by name as the shooter in 2006. Defense counsel asked that the jury be instructed that the statements he cited during cross-examination of the witness had been made in the 2007 proceedings so as not to leave an unfair impression that the statements had never been made. The prosecutor objected and refused to so stipulate, asserting that defense counsel had "made specific reference to 2006, and that is what is in the record."

The People called the 2006 reporter as a witness, eliciting testimony via extended question-and-answer that left the jury with the distinct impression that the witness had never identified Morris as the shooter, as defense counsel had suggested during his cross examination. This testimony had the effect of vouching for an untruthful witness and subverting what was in fact the truth – that the witness had identified Morris, albeit in 2007 – and left the jurors

with the impression that defense counsel himself was being disingenuous.

When proceedings reconvened, defense counsel again asked that the jury be instructed or informed that the passages he had read were accurate reflections of the witness's testimony before the grand jury in 2007. The prosecutor opposed, asserting that defense counsel had never properly confronted the witness with her 2007 statements. The court was inclined to agree, noting that "because the witness was not impeached by reference expressed to 2007 and because the questions could reasonably be interpreted as being 2006 grand jury testimony, there is no basis for calling the stenographer from 2007."

The court's ruling left the jury with the impression that the witness had never previously identified Morris as the shooter and that the defense was fabricating evidence. The jury indeed appeared to be confused as it twice asked to rehear the 2006 court reporter's testimony concerning the witness's prior testimony.

While the court initially appeared to recognize that it would be unfair for the jury to hear only a portion of the eyewitness's prior testimony, that is exactly what transpired when the court allowed the testimony of the 2006, but not the 2007 court reporter. The prosecutor argued extensively during summation that defense counsel had attempted to mislead the jury when he "tried to get Brenda Gonzalez to admit she said things before a grand jury in 2006 that she never said . . . That's why [the People] had to call the grand jury reporter to prevent the facts from being manipulated." These arguments

were designed to mislead the jury to conclude that the witness had never identified Morris under oath to the grand jury. Indeed, the jury never learned that the witness had identified Morris as the shooter under oath at the 2007 grand jury proceeding. The failure to allow cross-examination of the witness concerning her prior identification of Morris as the shooter deprived defendant of a fair trial, which warrants reversal and remand for a new trial (*see People v. McLeod*, 122 AD3d 16 [1st Dept 2014]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 11, 2019

/s/ Susanna Rojas
CLERK

APPENDIX C

COURT OF APPEALS OF NEW YORK

The People of the State of New York,
Appellant,
v.
Lamarr Reid,
Respondent.

Argued May 1, 2012
Decided June 5, 2012

OPINION OF THE COURT

Pigott, J.

This appeal raises the question whether a defendant can open the door to the admission of testimony that would otherwise be inadmissible under the Confrontation Clause of the United States Constitution. We hold that he can, and, in this case, he did.

On June 8, 2001, a man was shot dead at the door of an Albany apartment where marijuana was being sold. Neighborhood residents saw two young men running away from the area. Four rifle casings were found at the murder scene—ammunition that is used in an AK-47 assault rifle. Four years later, in 2005, a friend with whom the victim had been watching television on the night of the murder identified Shahkene Joseph as a suspect, telling the police that Joseph had bought marijuana from the apartment shortly before the shooting. After further investigation, Joseph and defendant Lamarr Reid

were arrested, and charged with murder in the second degree.

Joseph confessed to his involvement in the killing. He admitted that he and Reid had intended to rob residents of the apartment, that he saw the victim standing in the doorway, and that he and Reid fired their weapons through the door. In response to an omnibus motion by Reid, County Court severed Reid's and Joseph's trials, citing *Bruton v United States* (391 US 123 [1968]).

During Reid's trial, the jury heard evidence concerning the events on the night of the killing—that Joseph visited the apartment before the killing, asking to buy marijuana; that Joseph and Reid gave a rifle or shotgun to a person who had once been in the same street gang as Reid; and that Reid told this person that he had "caught a jux" and "[c]aught a vic," meaning that he had robbed someone. Two neighborhood residents testified that they had seen "two young men running with hooded sweat shirts" a block away from the crime scene.

The jury also heard that the day after the murder Reid told another acquaintance that "[h]e had caught a body" the previous night, *i.e.*, that he had killed someone. Reid told this acquaintance that he had intended to carry out a robbery but met with resistance, that he had shot through the door or through the crack of the door, and that he had been with Shahkene Joseph and Charles McFarland. Reid said he had used a weapon he called the "Chopper," which the jury learned was the name given to a particular AK-47 rifle used by Reid's gang.

During cross-examination of this acquaintance, defense counsel had the witness confirm that McFarland himself had been present at this conversation. Defense counsel elicited that the witness had told the police about McFarland, and then asked him, "But you are aware that Charles McFarland has never been arrested for this, right? . . . Only Lamarr Reid and Shahkene Joseph, right?"—to which the witness assented.*

Reid himself testified, and the defense also called a detective and a federal agent involved in the investigation. During direct examination of the detective, defense counsel asked questions designed to suggest that the investigation had been inadequate, a theme first outlined in counsel's opening statement. On direct examination of the federal agent, defense counsel asked whether he had received information, during the course of his investigation, that McFarland was involved in the shooting. The agent agreed he had, and questioning followed concerning the source of that information, during which defense counsel suggested that there was more than one source.

On cross-examination of the agent, the prosecutor elicited that the information that McFarland had been present at the murder was from Reid's acquaintance "saying what he had heard, not what he had seen or anything." The prosecutor then

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* The jury was also told that Reid and a friend had been walking past the site of the murder some two years later when Reid told the friend "to get off the sidewalk, have some respect for the dead." Reid explained that he had tried to rob someone there and ended up shooting the man.

said to the agent, "But in fact you also received eye witness testimony about who exactly was at the murder didn't you?" The agent responded in the affirmative. The prosecutor then added, "And that eye witness testimony was that Charles McFarland certainly wasn't there; isn't that true?" Again, the agent assented.

Defense counsel objected, arguing that no eyewitness had testified to seeing the men who had carried out the shooting and that the jury would infer that Shahkene Joseph was the eyewitness who had told the police "who exactly was at the murder." County Court overruled the objection, reasoning, inter alia, that defense counsel had "opened the door about McFarland being there."

The prosecutor introduced letters that Reid had written from prison. Most pertinently, the letters alluded to Joseph, whom Reid was trying to contact. They also contained a reference to "catch[ing] bodies," words similar to the expression Reid had been heard to use to describe the June 8, 2001 killing.

During summation, defense counsel returned to the theme that the police investigation had been inadequate and generated insufficient evidence. The jury was unpersuaded, finding Reid guilty of murder in the second degree (Penal Law § 125.25 [1]).

Reid filed a motion under CPL 330.30 seeking to set the verdict aside on several grounds, including the admission of testimony concerning an eyewitness to the crime who did not testify. County Court denied the motion, and Reid, duly convicted, was sentenced to imprisonment for 25 years to life.

Defendant appealed, raising a number of issues. The Appellate Division reversed County Court's judgment and ordered a new trial, holding that Reid's constitutional right to confront witnesses had been violated. "Because Joseph was unavailable and his pretrial statement to the police regarding who was present at the murder scene was testimonial, admission of that statement violated defendant's right to confront his accusers" (82 AD3d 1495, 1497-1498 [3d Dept 2011], citing *Crawford v Washington*, 541 US 36, 53-54 [2004]; *People v Rawlins*, 10 NY3d 136, 147-148 [2008]). The Appellate Division rejected the People's contention that defendant had opened the door to the prosecutor's questions, and concluded that the error identified was not harmless (82 AD3d at 1498).

The Appellate Division also addressed some, but not all, of Reid's remaining challenges to his conviction, ruling that "the introduction to the grand jury of some improper evidence did not require dismissal of the indictment" (*id.* at 1496), that Reid's conviction was supported by legally sufficient evidence and not against the weight of the evidence (*id.* at 1496-1497), and that County Court properly admitted the letters written by Reid from prison (*id.* at 1497).

A Judge of this Court granted the People leave to appeal. We now reverse.

As the People concede, the admission of the testimony that a nontestifying eyewitness told the police who had been present at the murder violated the Confrontation Clause, unless the door was opened to that testimony by the defense counsel's

questioning of witnesses. The question then becomes whether a defendant can open the door to testimony that would otherwise violate his Confrontation Clause rights. Several United States Courts of Appeals have held that "a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause" (*United States v Lopez-Medina*, 596 F3d 716, 733 [10th Cir 2010]; *see also e.g. United States v Holmes*, 620 F3d 836, 843-844 [8th Cir 2010]; *United States v Cruz-Diaz*, 550 F3d 169, 178 [1st Cir 2008]; *United States v Acosta*, 475 F3d 677, 683-684 [5th Cir 2007]; *but see United States v Cromer*, 389 F3d 662, 679 [6th Cir 2004]). We agree with this consensus.

If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury "by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context" (*People v Ko*, 15 AD3d 173, 174 [1st Dept 2005]). A defendant could do so with the secure knowledge that the concealed parts would not be admissible under the Confrontation Clause. To avoid such unfairness and to preserve the truth-seeking goals of our courts (*see Tennessee v Street*, 471 US 409, 415 [1985]), we hold that the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission.

Today's holding is consistent with our precedent that statements taken in violation of *Miranda v Arizona* (384 US 436 [1966]) are admissible if a

defendant opens the door by presenting conflicting testimony. Just as "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances" (*Harris v New York*, 401 US 222, 226 [1971]), so the Confrontation Clause cannot be used to prevent the introduction of testimony that would explain otherwise misleading out-of-court statements introduced by the defendant.

This does not complete our inquiry, however. Whether a defendant opened the door to particular, otherwise inadmissible evidence presented to the jury must be decided on a case-by-case basis. The inquiry is twofold—"whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression" (*People v Massie*, 2 NY3d 179, 184 [2004]).

Here, by eliciting from witnesses that the police had information that McFarland was involved in the shooting, by suggesting that more than one source indicated that McFarland was at the scene, and by persistently presenting the argument that the police investigation was incompetent, defendant opened the door to the admission of the testimonial evidence, from his nontestifying codefendant, that the police had information that McFarland was not at the shooting.

Moreover, we conclude that the specific, otherwise inadmissible evidence heard by the jury—that an eyewitness to the shooting, who knew exactly who was there, had told the police that McFarland

was not present—was reasonably necessary to correct defense counsel's misleading questioning and argument. There is justification for the view that the prosecutor could most effectively prevent the jury from reaching the false conclusion that McFarland had been present at the murder by eliciting that a person with immediate knowledge of the situation—an eyewitness who knew exactly who was at the murder—had told the police McFarland was not there. We conclude that County Court acted within its discretion in permitting the testimony.

Finally, we agree with the Appellate Division that the integrity of the grand jury was not impaired, that Reid's letters were properly admitted, and that his conviction was supported by legally sufficient evidence. The Appellate Division should now consider the facts and issues raised by Reid that it declined to reach.

Accordingly, the order of the Appellate Division should be reversed and the case remitted to the Appellate Division for consideration of the facts and issues raised but not determined on the appeal to that court.

Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Order reversed, etc.