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May 10, 2012

Hon. Glenn Berman, J.S.C.
Middlesex County Courthouse
Courtroom 302
New Brunswick, NJ 08901

RE: State v. Dharun Ravi
Prosecutor File No. 10002681
Indictment No. 11-04-00596

Dear Judge Berman:

Please accept this letter memorandum in lieu of a more formal brief in opposition to defendant's motion for a judgment of acquittal, new trial and bail pending appeal in the matter of State v. Dharun Ravi.

This Court was careful to litigate all potential foreseeable trial issues long before this case came to trial. The central proofs in this case were therefore well known to the defense and prosecution, as well as this Court and there was unlimited opportunity to litigate all foreseeable issues pretrial. This Court requested and accepted briefs on all issues of substance, and there were multiple briefs offered on certain issues. The Court gave full hearing to each of these issues as they were raised. There were issues raised directly by the Court and they too were given full hearing. This Court has been proactive and thorough from the start of this case to ensure that all issues were fully and fairly evaluated both factually and legally. Due to the meticulous pretrial rulings, there were limited legal issues raised during the trial. This Court handled each and every issue with fairness and expertise, and there is no doubt that defendant received a fair trial.

The majority of defendant's arguments in this new trial motion are arguments that were raised and litigated on many prior occasions. Thus, the points addressed in Sections IA, B, C, D, E, F, G, IIA, B(1), B(2) of defendant's new trial brief are all arguments that were raised and briefed six months before trial in defendant's motion to dismiss the indictment. This Court heard oral arguments on this motion and this Court decided each of defendant's motions regarding the validity of the Indictment. Defendant raised these same arguments in a motion to the Appellate Division for Leave to File an Interlocutory Appeal and the Appellate Division declined to accept that motion for review. The State will not attempt to recount the substance of all documents and

all arguments previously submitted and asks this Court to incorporate those prior pleadings and arguments in review of this motion.

At the close of the State's evidence at trial, this Court heard defendant's application for a Judgment of Acquittal on the indictment and this Court denied defendant's application on each and every count. The State therefore submits that the majority of issues raised in this motion have been litigated, and relitigated, and continue to be without merit. The jury verdicts in this case confirmed that the evidence proved all charges beyond a reasonable doubt. The "errors" alleged by defendant at trial are without merit and in no way meet the standard for recognizable error on review. Alleged error regarding jury charges and limiting instructions were not even raised as error by defendant at the time of trial, and certainly will not meet a plain error standard on review.

"The standard for deciding a R. 3:18-2 motion for a judgment of acquittal notwithstanding the verdict is the same as that used to decide a R. 3:18-1 motion for acquittal made at the end of the State's case or at the end of the entire case." State v. Speth, 323 N.J. Super. 67, 81 (1999). "When evaluating a R. 3:18-2 motion the courts must therefore view the totality of evidence, be it direct or circumstantial, in a light most favorable to the State, giving the State the benefit of all favorable testimony as well as the favorable inferences that reasonably could be drawn therefrom." State v. Reyes, 50 N.J. 454, 459 (1967); State v. Perez, 177 N.J. 540, 549 (2003). In the case at bar, this Court denied defendant's motion for a judgment of acquittal at the close of the State's case and there was no evidence offered in the defense case that had any capacity to alter the Court's analysis on that motion.

Per R. 3:20-1, the trial court may grant defendant a new trial if required in the "interest of justice", however the trial judge "shall not [...] set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law." On review of a motion to set aside a verdict as against the weight of the evidence, the "object is to correct clear error or mistake of the jury," which means "the judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion." Dolson v. Anastasa, 55 N.J. 2, 6 (1969). The trial judge must "canvass the record, not to balance the persuasiveness of the evidence on one side as against the other, but to determine whether reasonable minds might accept the evidence as adequate to support the jury verdict." Id. Pressler and Verniero, Rules Governing the Courts of the State of New Jersey, R. 3:20-1[3.1]. The evidence should be sifted to determine whether any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present. State v. Carter, 91 N.J. 86, 96 (1982).

The fact that this Court denied defendant's motion for judgment of acquittal on all counts at the end of the State's case, and the fact that defendant did not present proofs that would in any way alter the Court's conclusions on that motion, indicate that there is no "manifest denial of justice" in the findings of this jury. See State v. Perez, 177 N.J. 540, 555 (2003). As will be set forth with particularity below, there is no trial error that would otherwise meet the "interest of justice" standard under R. 3:20-1. As such, defendant's request for a new trial is without merit and should be denied.

I. A. Count 1 – Invasion of Privacy

Defendant argues that he did not "know" that he was not "licensed or privileged" to access his own room via his webcam. Defendant argues that he could not be charged with trespass or peering into his own room because he had "license or privilege" to do so. This argument was made from the beginning of this case and this Court has denied a motion to dismiss this count of the indictment on this basis. The Appellate Division has denied defendant's motion for leave to file an interlocutory appeal that included this argument and this Court denied defendant's motion for a judgment of acquittal after hearing the proofs at trial. This statute addresses a "sexual offense" and is directed at whether one has "license or privilege" to observe another, without their consent, under circumstances where a reasonable person would know that another may engage in sexual contact or expose intimate body parts, under circumstances where a reasonable person would not expect to be observed. Defendant believed Tyler to be gay. (E.g. Defendant's IM chat: "FUCK MY LIFE. He's gay"). Defendant observed Tyler enter the room with M.B. (a male). Defendant observed Tyler and M.B. "making out" and "groping each other" and defendant admitted that "it was obvious that they were being intimate." The jury clearly believed that defendant was not licensed or privileged to observe during this time period and defendant's actions after seeing Tyler and M.B. clearly evidenced his intent to invade Tyler and M.B.'s privacy when he accessed his webcam. Defendant tweeted minutes later that: "Roommate asked for the room till midnight. Went into Molly's room and turned on my webcam. I saw him making out with a dude. Yay."

Defendant's Twitter message of September 21, 2010 expressly admitted that Tyler had "asked for the room till midnight" and defendant, in his formal statement, admitted same. There is the proper inference that defendant consented to Tyler's request for privacy by agreeing to give Tyler privacy in the room until midnight.

The content and tone of defendant's tweets clearly indicate that defendant knew that Tyler expected exclusive use of the room, and that he turned on the webcam without permission and saw what he fully expected to see. Defendant's actions thereafter gave further circumstantial evidence of defendant's knowledge that he was invading Tyler and M.B.'s privacy: knowingly and purposely maintaining the open line to the webcam so that others could further view Tyler and M.B. Defendant's actions on the 21st again gave circumstantial evidence of his state of mind on the 19th; Tyler asked for use of the room and defendant posted a Twitter message daring others to iChat between 9:30 and 12, "Yes, it's happening again." Defendant also sent texts that said: "do it for real", "I have it pointed at his bed", and "it's set to automatically accept, I just tested it and it works."

The verdict rendered on this count was not against the weight of the evidence and there was no "manifest denial of justice" in this verdict. The State highlights the above facts but asks this Court to assess this verdict based on the totality of the evidence adduced at trial.

I. B. Count 3 – Invasion of Privacy

The State submits that the verdict on this count was well supported by the evidence and that there was no "manifest denial of justice" with this verdict. Defendant argues that he did not

disclose an image of intimate parts exposed or sexual contact. Again, this issue was litigated pre-trial, was raised on the motion for interlocutory appeal, and again on motion for judgment of acquittal.

Defendant was the only person who possessed the ability to set up his webcam for remotely accessing and viewing the encounter. He accessed his webcam from Molly Wei's room, with Molly Wei present, and thereby disclosed the image of Tyler and M.B. kissing and groping each other. Defendant continued disclosure of the images of Tyler and M.B. by knowingly and purposely maintaining the open line on his computer system for others to view and also encouraged others to view the events via his webcam. There is no basis whatsoever for defendant's contention that the jury must have convicted defendant based on his Twitter message; the jury charge accurately set forth the elements of this offense as requiring disclosure of an image.

Further, and contrary to defendant's argument at Db5, accomplice liability was not a necessary argument to sustain this count. The State's proofs showed defendant's direct disclosure of images and continued disclosure of images by maintaining direct, open access to his webcam. The State refers this Court to its initial brief on the motion to dismiss the Indictment at page 18, which further reviews these facts in the context of State v. Lyons, 417 N.J. Super. 251 (App. Div. 2010) which dealt with a peer-to-peer file sharing network on the Internet that was used to offer or distribute child pomography. Defendant argued that merely placing the child pornography in a shared folder made available to other network users did not satisfy the State's requirement of a knowing distribution of that pornography. The Court rejected defendant's arguments that "passive conduct" was not enough to achieve the "active" knowledge required by the language of the statute and ruled that he did act affirmatively. Id. at 263. Lyons argued to the Court that if he was not physically present when the files were passed, he could not be guilty of "providing" or "delivering" as required by N.J.S.A. 2C:24-4(b)5(a). The Court soundly rejected that argument and found that defendant's conduct was the "cyberspace functional equivalent" of handing something to someone or offering it to someone directly. The State continues to rely on the law established in Lyons and the facts established in the matter at bar.

I. C. Count 5 – Attempted Invasion of Privacy

Defendant's arguments on this count are, again, the same arguments previously made and decided by this Court. Additionally, this argument was part of defendant's prior application for leave to appeal and the motion for judgment of acquittal that was denied by this Court. Defendant again argues here that he did not attempt to view anything on the 21st. The State disagrees that an alternate theory of accomplice liability was necessary to sustain this charge. As stated, on the 19th, defendant observed Tyler and M.B. and disclosed the images of Tyler and M.B. and tweeted what he had seen. On the 21st Tyler asked defendant for use of the room and defendant sent out a Twitter message: "Anyone with iChat, I dare you to video chat me between the hours of 9:30 and 12. Yes, it's happening again." Further, defendant went into Lokesh Ojha and Alissa Agarwal's respective rooms to check on the angle of the webcam and its operability. Defendant told members of the Ultimate Frisbee team that prior to going to Frisbee practice he had set up his webcam again, as he had on the 19th. Defendant also texted Michelle Huang that she should "do it for real", "I have it pointed at his bed", and "it's set to automatically accept, I just tested it and it

works." Thus, defendant had set up his computer to invade Tyler and M.B.'s privacy. Defendant had the intent to invade their privacy and in fact took substantial steps toward that act by setting up the webcam, testing the angle, and testing that it was working properly. Defendant therefore took substantial steps toward the invasion of privacy.

Tyler had seen defendant's Twitter postings from the 19th and 21st and shut down defendant's computer from inside the room before the time that defendant returned to Davidson C and he was told by Lokesh Ojha and others that they were not able to access the webcam. The jury clearly found, in accord with the law and jury charge on attempt, that defendant purposely committed an act, which, under circumstances as a reasonable person would believe them to be, was an act constituting a substantial step in the course of conduct planned to culminate in the commission of that crime, and that the step taken was strongly corroborative of criminal purpose. Moreover, this Court sua sponte raised the possible applicability of "renunciation of criminal purpose" and charged the jury on that affirmative defense. In this regard it is the State's recollection that this Court had been disinclined to present this defense because defendant had failed to present proof that the defense existed by a preponderance of the evidence. Thus, it can not be argued that the jury committed a "manifest denial of justice" by rejecting this defense as well.

I. D. Count 7 – Attempted Invasion of Privacy

Defendant argues that his actions on the 21st did not constitute a substantial step toward disclosure because defendant never expected to have any items to share. The State reiterates here the substantial evidence that proves defendant attempted to invade Tyler and M.B.'s privacy on the 21st and was not attempting to set it up only for his own personal enjoyment; after tweeting what he saw on the 19th defendant gave Tyler use of the room on the 21st and then dared anyone with iChat to video chat him between those hours because "it's happening again". Others in fact attempted to access defendant's iChat in response to that invitation. Forensic evidence proved that Tyler had shut down defendant's computer from within the room. As set forth in the last point, defendant in fact took steps toward the commission of disclosure and it was not renunciation of purpose that thwarted the commission of the offense. The jury charge on renunciation properly indicated that if mere abandonment of the criminal effort is not enough to prevent the offense, then the defendant must have taken further affirmative steps to have prevented the commission of the offense. In this regard the State again refers this Court to its earlier arguments supported by State v. Lyons. Defendant committed many "voluntary acts" in preparation to invade Tyler and M.B.'s privacy and sent out the Twitter message regarding the webcam being open to view Tyler and his guest. Defendant's Twitter message is another similarity to an important point noted by the Court in Lyons at 267-268 concerning the naming of the files to be shared so that viewers know what they are going to view. Defendant's tweet announced what the viewers could see later, just as Lyons did by naming the file he intended to share. Defendant's acts were meant to accomplish the transfer of digital images through cyberspace from defendant's computer to other viewers' computers, similar to the acts committed by Lyons.

As set forth, the State submits that the jury verdict was in accord with the weight of the evidence on defendant's actions on the 21st and the jury's rejection of a renunciation defense in no

way constitutes a "manifest denial of justice". Further, the law regarding disclosure clearly supports conviction on these facts.

I. E. Counts 4, 6, 8 – Purposeful or knowing Bias Intimidation

As to Counts 4, 6 and 8, where the jury found purposeful and knowing Bias, defendant contends that there was no evidence of bias or intimidation presented to the jury, "other than a couple of private jokes with friends". (Db 7) Defendant then cites to two short lines from an IM chat and from a text message exchange that were presented to the jury. In those references, defendant fails to even admit to the full import of those exchanges: in the first, his initial research of his roommate and his immediate reaction upon finding Tyler Clementi on a gay forum, is to say "FUCK MY LIFE. He's gay.", and, with the text message exchanges, the import of the complete exchange was talking about his gay roommate, what was going to happen, having the camera pointed at his bed to keep the gays away, talk of the viewing party and encouraging the friend to "do it for real". These are hardly innocent "private jokes" as characterized by defendant. This seems to be a corollary to the "prank" theory proposed throughout the trial by defendant to explain and excuse what the jury could reasonably consider as anti-gay remarks. It is also noteworthy that the witnesses defendant cites to (as saying he never "expressed hostility" toward Tyler or homosexuals) were mostly individuals who knew defendant for three weeks at most. Similar to defendant's character witnesses, there was no testimony on whether defendant and these witnesses had ever even had discussions about homosexuality. Furthermore, the nature of defendant's actions and the accompanying tweets, along with telling others in person about the events, were in and of themselves proof of defendant's purposeful and/or knowing conduct and offered more than ample evidence to the jury for a finding of guilt under the Bias Intimidation statute.

As to the intimidation element, the jury charge defines intimidation as putting another in "fear". It does not require fear of "violence" as defendant alleges in his brief. The quote from a juror, found in defense Exhibit B, should not be considered by this Court because it is outside the record in this matter. Further, there is no reliable explanation for the juror's statement and the Court should not speculate concerning what the juror was referencing. (One explanation could be that the juror was addressing Count 2 where the jury did not find purposeful or knowing conduct by defendant.) The fact that its content and its accuracy cannot be determined is reason enough for this Court to disregard same.

Defendant's reliance on State v. Castagna, 387 N.J. Super. 598 (App. Div. 2006) has been previously addressed by the Court. The holding in Castagna is not applicable here because in Castagna the offense charged, harassment, requires communication. It is an element of that offense. That is not true with the Bias Intimidation statute where the underlying offense provides the elements; here it was Invasion of Privacy. Further, there is a permissive inference in this statute that is applicable to the "purpose" to intimidate. N.J.S.A. 2C:16-1(b).

The State respectfully submits that the verdicts rendered on Count 4, 6, and 8 were not against the weight of the evidence for the reasons specifically set forth above and based upon the totality of the evidence presented during the trial which the State asks the Court to consider without specifically setting forth herein.

I. F. Counts 2, 4, 6, and 8 – Reasonable belief Bias Intimidation

Defendant argues the finding of "reasonable belief" Bias under these counts could not be proven "because he was completely unaware that T.C. would learn about the events of September 19 and September 21." (Db 9) That argument defies logic and common sense. Not only did defendant's conduct on the 19th involve actively soliciting Molly Wei and other residents of Davidson C, as well as other Rutgers students who resided in other dorms, to view via webcam what was occurring in Room 30, but he also told other students in the lounge of Davidson C about what he had viewed. In addition, defendant then sent out a tweet, not only to his followers (some of whom were students at Rutgers and others who were students in other parts of New Jersey and in other states) that described some portion of the events viewed and told everyone that it was his roommate he had viewed. That tweet was sent directly to defendant's followers and also automatically posted on his **public** Twitter page for anyone to view. For defendant to claim that Tyler, his own roommate and a resident of Davidson C, would not encounter someone who would tell him about the events, overhear it in the dorm, or go to defendant's public Twitter page (which the evidence proves he did) and learn of defendant's conduct defies logic. The evidence established that the purpose of a tweet is to convey information to others, including the public. The same holds true for the argument that when Tyler learned of the events of the 19th, and then subsequently learned of the events planned by defendant to occur on the 21st that he, as would any reasonable person, believed that he was selected as a target of the invasion because of his homosexual orientation. Without recounting other pertinent and relevant evidence, the State relies on the trial record which thoroughly supports the State's position. On that basis, the State respectfully submits that defendant's request to set aside the verdicts on these counts lacks any merit whatsoever and should be denied.

I. G. Count 12 – Hindering Apprehension

Defendant argues here, once again, that he cannot be guilty of hindering his own apprehension unless he is successful in preventing or obstructing a witness or informant from providing testimony or information. Defendant argues his interpretation of State v. D.A., 191 N.J. 158 (2007) precludes application of this statute once defendant believes that he is the focus of an official proceeding.

The jury in this case found that this offense occurred in that defendant obstructed Molly Wei from providing information which might aid in his apprehension. It is noteworthy that the statute, N.J.S.A. 29-3(b)(3), uses the terms "prevents or obstructs." (emphasis added) Obstruct is defined as blocking or impeding. The State submits that there was no manifest denial of justice on this count; with a purpose to hinder his own apprehension defendant obstructed Wei's providing of information to law enforcement through texting her while she was in police headquarters. The information in those texts was misleading or false and defendant knew Wei was with the police and his actions were designed to and did impede their interaction with Wei.

The State submits that the correct interpretation of State v. D.A. has been previously briefed and argued before this Court. As argued in the State's brief to the Court of February 17, 2012, defendant's reading of State v. D.A. is incorrect. In State D.A., a friend of a sexual assault victim observed acts by the defendant and defendant threatened that if she told what she saw, she

would never see her friend again. Defendant was eventually charged with sexual assault and witness tampering based on the above statement. The Court held that the witness tampering statute, requiring that defendant believe that an official proceeding or investigation was pending or about to be instituted, was not satisfied because at the time of the threat he had no belief that an investigation would occur and was in fact trying to keep it from occurring. The Supreme Court did find that a Hindering charge would have been appropriate on these facts; defendant was trying to hinder his own detention/ investigation by suppressing evidence or intimidating someone from performing an act which might aid in his apprehension. The Court never said that these two statutes could not be charged together. The Court indicated that Witness Tampering was under Chapter 28, title "Perjury and other Falsification in Official Matters," where the unifying element is wrongful interference with ongoing proceedings. Hindering falls under Chapter 29 regarding "Obstruction; Escapes." There was no discussion or holding in D.A. that found the two crimes were inapposite in any way. Rather, the Court found that for Tampering the proof needs to include the temporal element of having a belief that official action has been or is about to be instituted. These two crimes clearly have distinct elements; one addressing the effort to hinder one's own apprehension or prosecution and the other by interfering with an official investigation. Again, State v. D.A. recognizes the distinction between these two statutes; it also recognized that in the context of the facts of the case before it that the temporal issue was relevant.

Further, N.J.S.A. 2C:29-3(b)(3) provides for an offense if, with purpose to hinder his own detection, apprehension, investigation, prosecution, conviction or punishment he prevents or obstructs by means of intimation or deception any witness or informant from providing testimony or information which might aid in his discovery or apprehension. There is simply no way to conclude that this statute, by its express terms, was not meant to apply once there is the possibility of a criminal charge.

For these reasons the State submits that the jury's verdict on this count does not constitute a manifest denial of justice.

II. A. Pretrial Discovery Motions

Defendant requested the discovery discussed in this point through a pre-trial motion in August 2011. At the hearing on that motion this Court adopted defendant's position that the trial court should be the final arbiter of discovery. This Court then granted defendant's motion and ordered an in camera inspection of all documents sought by defendant. In fact, the Court expanded the time period of review beyond that requested by defendant to cover July 1st – September 23rd. This Court was fully aware of the factual and legal issues being raised by defendant and had the ability to make a reasoned decision regarding the relevancy of that material. State v. Krivacska, 341 N.J. Super. 1, 26-29 (App. Div.), certif. denied, 170 N.J. 206 (2001), cert. denied, 535 U.S. 1012 (2002). Following that in camera review of all documents, this Court determined that there was no material that had any relevancy whatsoever to these charges. Defendant filed a motion for leave to file an interlocutory appeal and that motion for review was denied by the Appellate Division. During trial, even upon hearing additional evidence and with renewed requests by defendant, this Court correctly and repeatedly maintained that the materials

reviewed had no relevance whatsoever to any of the issues presented. State v. Krivacska, Id.; State v. Gilchrist, 381 N.J. Super. 138, 145-147 (2005). These decisions were correct on the law and the facts.

II. B. The Business Record of Raahi Grover

1. Grover's Entries as a Business Record

Defendant does not contest that the incident report filed by Resident Assistant Raahi Grover was made in the regular course of business as a Resident Assistant and that it was prepared within a short time of the events being described. (Db 15). Defendant argues that Grover did not feel a duty to make an entirely truthful record. Defendant mischaracterizes the totality of Grover's testimony on his interaction with Tyler which formed the basis for this report. The evidentiary issues in this case were extensively briefed and the State references here its briefs to the Court dated January 13 and February 24, 2012. The third "Liptak" factor under the business record exception is that "the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence." Liptak v. Rite Aid, Inc., 289 N.J. Super. 119, 219 (App. Div. 2006). Under N.J.R.E. 803(c)(6) there is a "general acceptance of reliability" of business records unless the Court "maintains serious doubt as to whether they are dependable or worthy of confidence." Defendant's limited argument here in no way undermines the document's admissibility under this standard. If the circumstances of the record and manner of their preparation tend to establish its trustworthiness, the record is admissible and the final decision regarding the credibility or trustworthiness of the document is then left for the jury. Id. at 220. Defendant's arguments here are therefore only relevant to the jury's evaluation of the weight of the evidence and not its admissibility.

2. Tyler Clementi's Unredacted Statements

The issue of the admissibility of Tyler's email to Grover was, again, extensively briefed and argued before this Court. This Court took a very conservative approach to Tyler's email and only admitted the one, last sentence that unequivocally fell within the parameters of N.J.R.E. 803(c)(3). The Court even redacted this one sentence by deleting the word "wildly" in conjunction with "inappropriate" to excise anything potentially unnecessary in any regard. This hearsay exception allows for admission of extrajudicial statements to show the state of mind of a declarant when it is in issue in the case or otherwise relevant to prove or explain the declarant's conduct. State v. McLaughlin, 204 N.J. 185, 203 (2001). Particularly where the declarant is deceased, the rule is rooted in necessity and justified on the basis that the circumstances giving rise to the state of mind provide a rational substitute for the benefit of cross-examination. State v. McGuire, 419 N.J. Super. 88, 138 (App. Div. 2011). Of particular note here is that the circumstances were known and extremely corroborative of this state of mind statement; there was independent proof that Tyler had discovered defendant's tweet, had already requested the room change through the online system, and had already reported the incidents to Grover. As fully set forth in the State's brief of January 13, 2012, this statement did not implicate Crawford. The state of mind statement was not "testimonial", it was a statement of feeling. Further, statements that were made before police were even contacted, made to someone who was not law enforcement, are not the equivalent of "testimony" under Crawford. State v. Coder, 198 N.J. 451 (2009); State

v. Buda, 195 N.J. 278 (2008). There was no error in this Court's decision admitting this statement.

II. **C. The first mistrial application**

The State disputes that the mistrial application made during trial had any merit whatsoever, because the State does not concede that this was a violation of the sequestration order. A sequestration order, N.J.R.E. 615, relates to "sequestration of witnesses" and is put in place to avoid potential contamination by witnesses hearing or discussing with each other the testimony they have given during the trial. This would include an attorney discussing testimony of one witness with another. State v. DiModica, 40 N.J. 404, 413 (1963). However, that was simply not the case here in any way, shape or form. The limited conversation with the witness was to advise the witness that the State has the opportunity for re-direct, that it would be exercising that right, and that it would address an issue that the State neglected to address during direct – the identification by this witness of the photographs of defendant's computer monitor with the webcam attached and another close up of the webcam itself. Nothing in defendant's cross-examination of this witness either before or after the court recess was in any way related to a challenge of this witness' knowledge of defendant's computer and/or webcam. Therefore, advising the witness of the nature of the re-direct could not and did not influence the witness in providing answers to the cross-examination that the defendant was engaged in.

The case relied on by defendant, State v. Vergilio, 261 N.J. Super. 648 (1993), specifically acknowledges that sequestration orders do not pro forma apply to attorney/witness out-of-court communications. The Court recognized that a trial court may put specific limitation on communication between the witness or defendant and attorney under the circumstances of a given case. Id. at 657. That was not the case here. See Also State v. Tillman, 122 N.J. Super. 137, 143 (App. Div.) certif. denied, 62 N.J. 428 (1973), recognizing the appropriateness of an attorney speaking to a witness under a sequestration order, mid-testimony, albeit not in the presence of other witnesses. Further, the witness in this case revealed the conversation in its entirety during the cross-examination, the defendant had the opportunity to cross-examine the witness on all the circumstances, and the jury heard that testimony. Thus, there could be no prejudice to defendant. Id. at 140.

There was no violation of the general principles of sequestration, nor was there any specific order which was violated. This was a baseless motion for a mistrial during the trial and remains an unsupported issue in this post-trial forum.

II. D. The second mistrial application

Defendant's arguments and representations in support of this point are factually inaccurate. By letter dated July 5, 2011, the State provided to defendant a complete roster of all students assigned to Davidson C residence hall in September 2010. (see copy of letter and roster attached) Under Room 3 on this list is Manan Patel. Under Room 27 on the list is Frank Licato. So, well before trial defendant had the names of these two students, as well as the information that they were residents of Davidson C during the relevant time period of the dates covered by the charges in the Indictment. In addition, defendant was provided with numerous copies of surveillance

videos taken by cameras in Davidson C, again during the relevant time periods. Based upon defendant's extensive use of those surveillance videos during trial, it is obvious that they were viewed and reviewed meticulously by defendant. As a resident of Davidson C himself during that time period, and being one of the more social residents according to testimony, defendant would have known Mr. Patel and Mr. Licato and been able to identify Mr. Patel and Mr. Licato himself when he viewed the surveillance video. Therefore, there was clearly no violation of the discovery obligations of the State and the State again respectfully submits that this aspect of defendant's motion is totally without merit.

II. E. (Under Separate Cover)

II. F. The Court's Charge to the Jury

The State submits that the Court's charge to the jury was accurate as to all points of law, followed accepted Model Jury Charge language where same existed, was artfully crafted to enhance the ability of the members of the jury to understand the charges in the fifteen-count Indictment (many of which duplicated each other legally with only dates or certain other minor factual distinctions), and afforded defendant a fair, impartial and legally correct recitation of law in the final phase of a nearly flawless trial. The State submits that there is absolutely no basis whatsoever to grant a new trial based upon the Court's charge to the jury.

1) No limiting instruction on T.C.'s suicide

Before jury selection even began, the Court gave instructions to all potential jurors that it was possible that they might become aware of information concerning the suicide of Tyler Clementi. However, the Court instructed the jurors that such information had no relevance whatsoever to the upcoming trial and had no relevance whatsoever to the charges. Further, the Court specially noted that in no way was defendant being charged with responsibility for Tyler's suicide and no aspect of information on same, if any, that they heard was to be considered by them. At times during jury selection this issue was addressed again if juror responses dictated a reminder. On several occasions during the trial, when requested by the defendant or when the Court felt testimony or evidence so warranted, there was a "reminder" by the Court of those earlier instructions. The trial court is in the best position to gauge the need for cautionary instruction and the substance and adequacy of any such instruction in the context of the case and that decision is entitled to deference. State v. Denmon, 347 N.J. Super. 457, 464 (App. Div.), certif. den. 174 N.J. 41 (2002).

Defendant also claims there were "repeated references to the fact that T.C. committed suicide". (Db 23) The State takes exception to any inference that this was caused by the State's presentation of evidence. In fact, it was through cross-examination of witnesses by defendant that the few mentions of the suicide that occurred came out before the jury. For example, while the State was careful to stop the testimony of witness Michelle Huang and her identification of text message communications with defendant before they got into the discussion of his roommate's suicide, including having the last page of the text messages cut off at mid-page when it was displayed before the jury, it was defendant who went into those additional messages with Ms.

Huang. Further, prior to the start of trial, the State submitted a redacted version of defendant's statement to the police both to the Court and to defendant. The redactions were of questions, answers or discussion that in any way touched on the fact that defendant's roommate was missing or might have committed suicide. It was defendant who objected to the redactions from the statement and asked for the statement to be played in its entirety because defendant wanted the jury to be able to assess the full context of the circumstances under which he gave that statement to the police.

Finally, this Court, on more than one occasion, solicited from both sides any requests to charge. Defendant never submitted a limiting instruction to the Court to include in the formal charge and never requested such a charge when given the opportunity by this Court before the jury retired to deliberate. This claim by defendant is not only factually inaccurate but also legally lacks merit.

2) Failure to emphasize the State's burden of proof

Even the choice of words by defendant to characterize this point should inferentially show that the point lacks merit – the law does not require the Court to "emphasize" certain parts of a charge over other parts. If that was the case, appellate review of jury charges would require review of an audio taped version. The Court is required to properly instruct the jurors on certain fundamental legal principles, instruct them on the law related to the charges themselves and, of course, tell the jury that the burden of proof is on the State and that the burden is beyond a reasonable doubt. In fact, starting with jury selection, the jurors are told about the burden of proof, the burden is explained to them and they are individually questioned about accepting that burden. So the jury charge is really a reminder of that previously stated principle of law. A complete reading of this Court's charge to the jury, not the select, isolated citations mentioned by defendant in his brief (Db 24-25), can leave no doubt whatsoever that the jury was properly instructed on the burden of proof, what that burden was and that it was the State's burden. The jury was instructed on the burden of proof word for word as adopted in Supreme Court decision. State v. Medina, 147 N.J. 43, 61 (1996), cert. denied, 520 U.S. 1190 (1997). There is no piecemeal dissection of a trial court's reasonable doubt charge; the charge is looked at in its entirety. State v. Wakefield, 190 N.J. 397, 474 (2007). The defendant saw no error at the time of trial and clearly understood at the time of trial that the burden of proof was properly instructed. This claim by defendant is also factually inaccurate and lacks merit.

3) The separate offenses were improperly blended together

Again, defendant mischaracterizes a review of the complete jury charge in this matter. The Court actually simplified the charge by crafting a charge that did not needlessly repeat duplicate legal charges when the only difference in the indictment was the date in many cases or some minor factual distinction. Common sense must come into play here – members of any jury are ordinary citizens from the community who most times have no experience whatsoever with the justice system, let alone criminal charges themselves on the legal elements that constitute such charges. The charge was 90 minutes in length. Merely repeatedly reading the same criminal charge over and over would have lengthened the charge itself and most probably have led to juror

disinterest and lack of attention. A review of the transcript of the jury charge supports a thorough, well-explained and legally supported explanation of all elements of all charges.

Finally, it must be considered in conjunction with a review of the charge itself, that the jurors then went into the jury room with a verdict sheet that separately identified all elements of certain charges so that the jury had to separately review elements of the charges and separately vote on them. There were 35 questions to answer on the jury verdict sheet, and the fact that there were guilty and not guilty verdicts among those 35 questions, undeniably supports the conclusion that the jurors were not confused. Defendant's claim that the jury charge led to an unjust result in this case is simply without basis.

4) **The Charge on Invasion of Privacy was Correct**

Defendant argues that the jury charge did not make clear that there was a distinction between knowing that he was not "licensed or privileged" to observe and whether he observed the victims without their consent. Defendant argues that the definition given of "license or privilege" as "permission or authority" as well as the structure of the court's charge minimized the difference between these two parts of the statute. The State disagrees.

The State submits that the court's instruction in no way confused these two concepts; the Court read from the indictment which properly recited the statute. The statute was then read in its entirety. Thereafter the Court stated the requirements for conviction and then at T.23-24 properly provided each of the elements. The Court's restatement of the elements did not confuse the elements because it addressed license or privilege as completely separate from consent: that the State must prove beyond a reasonable doubt that defendant observed either or both victims knowing that he was not licensed or privileged to do so. It was not until after the final elements that the Court then defined consent; the substance of the court's charge therefore clearly kept these two elements distinct. Further, the State submits that the definition given by the Court was equivalent and proper. The State notes that defendant's request to charge did not include any definition of "license or privilege" whatsoever.

The State also stresses that the court gave counsel the opportunity to be heard after the charge, requests were made, and the court reinstructed the jury based on requests made. After offering additional clarification the court again asked if counsel was satisfied and counsel offered additional argument, directed at this charge but at no time raised the issue argued here.

The charge as a whole was proper and in no way prejudiced the defense. State v. Chapland, 187 N.J. 275, 289 (2006). Defendant never objected to the charge as given and there was no plain error in this charge, nor basis for a new trial on this count. Id.

5) **The Charge on Bias Intimidation – Reasonable Belief of the Victim – Was Proper**

Defendant argues that N.J.S.A. 2C:16-1(a)(3) does not include a mens rea requirement and that the mental state of "knowing" should have been added to the instruction per N.J.S.A. 2C:2-2.

The State notes that defendant offered a proposed jury charge to the Court on this count and in no way proposed such a change to the state of mind element as provided for in the model charge.

First, the State disagrees that there is no mental state required because the crime of Bias Intimidation requires that a person be guilty of the commission of the underlying offense, which has a clear mental state attached. This statute was enacted in 2001 and the Model Jury Charge on Bias Intimidation was reviewed by the Supreme Court Committee on jury charges as recently as May 16, 2011.

The Code of Criminal Justice requires that its provisions "shall be construed according to the fair import of their terms . . . ." N.J.S.A. 2C:1-2c. The Legislature's intent is best demonstrated by the statutory language. DiProspero v. Penn, 183 N.J. 477, 492 (2005). This Court should attribute to the words their "ordinary and accepted meaning." State v. Shelley, 205 N.J. 320, 323 (2011); accord DiProspero, 183 N.J. at 492.

Likewise, "It is not the function of the Court to 'rewrite a plainly-written enactment of the Legislature [] or presume that the legislature intended something other than that expressed by way of the plain language.' " DiProspero, 183 N.J. at 492; (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)) (alteration included). Legislative history or other extrinsic evidence are only sought when the statute is ambiguous. Shelley, 205 N.J. at 323; DiProspero, 183 N.J. at 492.

The State disagrees that this is a "strict liability" crime because it requires proof not only of the subjective belief of the victim but also the objective standard of the reasonableness of that belief. This formulation, requiring the State to prove both the victim's subjective belief and that it was objectively reasonable, redounds to defendant's benefit in that it is harder, of course, for the prosecution to establish both prongs than to satisfy a purely objective test alone. It is not a novel concept for the Legislature to grade the seriousness of a crime by considering its reasonably foreseeable impact on the victim, regardless of whether such harm was actually intended by the offender. Thus, there are many examples of statutes premised on the victim's objectively reasonable perception of the defendant's conduct. (E.g. Robbery, N.J.S.A. 2C:15-1, the definition of a deadly weapon in N.J.S.A. 2C:11-1c, Terroristic Threats, N.J.S.A. 2C:12-3b, Stalking, N.J.S.A. 2C:12-10.)

Moreover, our Supreme Court has upheld the constitutionality of statutory schemes relying on the victim's reasonable belief. Thus, the Court recently upheld the stalking statute and found that the

> "legislative choice to introduce a reasonable-person standard undercuts defendant's argument that the plain language of the statute calls for application of a subjective standard or knowing or purposeful intent to cause that specific result by the perpetrator. To the contrary, the reasonable-person standard demonstrates a legislative preference for the objective perspective of the fact-finder to assess a reasonable person's reaction to the course of conduct engaged in by the accused stalker."

State v. Ghandi, 201 N.J. 161, 170, 180 (2010). Although the statute is clear on its face and there is no need to examine the legislative history, such evidence bolsters why N.J.S.A. 2C:16-1a(3) is rational and necessary. Notably, the Court in State v. Mortimer, 135 N.J. 517, 525-30, cert. denied, 513 U.S. 970 (1994); and the United States Supreme Court in Wisconsin v. Mitchell, 508 U.S. 476 (1993), recognized that bias crimes "by nature, have distinct harmful effects," 135 N.J. at 529, and are likely to "provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." 508 U.S. at 529; accord 135 N.J. at 529.

As set forth, the model jury charge regarding subsection (3) of the Bias Intimidation statute is proper and the jury charge on this count was likewise proper in all respects.

III. Bail Pending Appeal

Rule 2:9-4 pertains to bail after conviction. That rule provides that a criminal defendant shall be admitted to bail on motion and notice to the county prosecutor pending the prosecution of an appeal only if it appears that the case involves a "substantial question that should be determined by the appellate court, that the safety of any person or of the community will not be seriously threatened if the defendant remains on bail and that there is no significant risk of defendant's flight."

It is undeniable that this case does not present any "substantial questions" for appeal. The jury had the opportunity to pass upon the credibility of the witnesses and the verdicts rendered cannot be regarded as a "manifest denial of justice under the law." Most "errors" alleged by defendant pertain to discretionary rulings of this Court that were made after full consideration of the relevant facts and law. The trial court has broad discretion on matters regarding the admissibility of evidence, the extent of cross-examination, issues of discovery, issues regarding limiting instructions in the context of evidence given, and denial of requests for mistrial. These decisions are entitled to deference and do not raise substantial questions for appeal. See, State v. Marshall (I),123 N.J. 1, 130 (1991); State v. Pontery, 19 N.J. 457, 472-473 (1955); State v. Winter, 96 N.J. 640, 646-47 (1984); State v. Dennan, 348 N.J. Super. 457, 464 (App. Div. 2002); State v. Goodman, 415 N.J. Super. 220, 285 (App. Div. 2010) certif. denied, 205 N.J. 78 (2011). Further, the "errors" raised regarding the jury charge are entirely without merit. Defendant never perceived error at the time of instruction, despite the fact that other claims of errors were raised and responded to by this Court. Defendant's current challenges to the charge are without merit and do not raise any substantial issue for appeal.

Further, the State does not concede that defendant does not pose a serious threat to the community and the State does not concede that defendant poses no significant risk of flight, especially in light of the substantial sentence defendant faces on these convictions and his immigration status.

The State therefore submits that defendant does not meet the standard for bail pending appeal and that this application should be denied by this Court.

CONCLUSION

For the reasons articulated on each of the issues above, the State respectfully submits that defendant's motion for a judgment of acquittal, new trial and bail pending appeal be denied.

Respectfully submitted,

JULIA L. McCLURE
First Assistant Prosecutor

Susan Berkow-Boser, Esq.
of Counsel and on brief

/rm
Attachment
C: Steven D. Altman, Esq.
Assistant Prosecutor Christopher Schellhorn

MIDDLESEX COUNTY PROSECUTOR'S OFFICE

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July 5, 2011

Hand Delivered

Philip Nettl, Esq.
Benedict and Altman
247 Livingston Avenue
New Brunswick, New Jersey 08901

RE: State v. Dharun Ravi
Prosecutor File No. 10002681
Indictment No. 11-04-00596

Dear Mr. Nettl:

In response to your June 21, 2011 letter in the above matter, enclosed please find a **duplicate** copy of CD-R #86, Results of examination of Dharun Ravi computer system. The embedded hyperlinks should work properly on this copy. To avoid confusion, and pursuant to our telephone conversation today, the original CD-R #86 will be returned to the investigator who has hand-delivered this letter, additional enclosures, and the duplicate of #86.

As to your additional requests, I have responded below and referenced the numbers used in your letter:

2. Enclosed is a CD-R of photos taken on September 23, 2010 during execution of Search Warrant of Room 30, Davidson C. CD-R is labeled #87. Also please find an updated "List of Discovery on DVD or CD-R" showing #87 as Photos/Search Warrant on September 23, 2010.

5. "S.C." is Sam Cruz, whose audio taped statement was provided on CD-R #24. His address and date of birth are in the statement.

6. Enclosed is a two-page list of Davidson C residents, provided by Rutgers University Police Department to Investigator Frank DiNinno, on or about September 30, 2010, marked for discovery as pages 1593 and 1594.

7. Pursuant to an additional telephone conversation concerning your request for "a complete copy of the forensic image of Dharun Ravi's desktop computer", two (2) cloned hard drives from the computer of Dharun Ravi will be supplied on or about Monday, July 11, 2011.

10. All items observed or reviewed during this investigation on behalf of the State which were not retained as evidence have been referred to and documented in reports and/or statements previously supplied in discovery.

Additionally, enclosed please find a two-page supplemental report from Timothy E. Hayes of the Rutgers Office of Information Technology, marked for discovery as pages 1595 and 1596. This report was received by Middlesex County Prosecutor's Office on or about June 24, 2011.

Also enclosed is a signed and filed copy of the previously submitted Order concerning the defendant's surrender of his passport and added bail condition.

Very truly yours,

JULIA L. McCLURE
First Assistant Prosecutor

/rm
Enclosures
C: Assistant Prosecutor Nicole Albert
Steven D. Altman, Esq.

ROOM	RUID	LAST NAME	FIRST NAME	SEX	DOB	AGE
0001	134000857	Reed	Jonathan	Male	3/1/1989	21.6
0002	136001032	Moore	Ana	Female	1/11/1987	23.7
0003	133008345	Ojha	Lokesh	Male	10/6/1992	18
0003	132000919	Patel	Manan	Male	3/16/1992	18.5
0004	134003490	Alm	Rachel	Female	2/11/1992	18.6
0004	134002387	Kwon	Christine	Female	12/14/1991	18.8
0005	135007553	Malcolm	Stanley	Male	3/18/1991	19.5
0005	132005941	Patel	Kevin	Male	6/30/1992	18.2
0006	134007895	Patel	Vishal	Male	4/8/1992	18.4
0006	133007613	Rojas	Timothy	Male	4/11/1992	18.4
0007	134006865	Hinds	Jullissa	Female	8/18/1992	18.1
0007	133001912	Chau	Diana	Female	9/24/1992	18
0008	132006843	Knight	Kristina	Female	3/4/1992	18.5
0008	132000764	Chen	Ada	Female	8/14/1992	18.1
0009	133004266	Cabredo	Enrico	Male	1/3/1992	18.7
0009	132005653	Sorkin	Dylan	Male	6/18/1992	18.3
0010	132001757	Simini	Matthew	Male	7/29/1992	18.1
0010	132000571	Shafiei	Immon	Male	11/13/1991	18.9
0011	133002092	Leung	Michelle	Female	5/10/1992	18.4
0011	132005612	Palombo	Amanda	Female	2/24/1992	18.6
0012	117006312	Grover	Raahi	Male	7/23/1989	21.2
0013	134006551	Wang	Henry	Male	2/18/1993	17.6
0013	134001066	Richa	Georges	Male	4/7/1992	18.5
0014	135006297	Choi	Rebecca	Female	11/4/1992	17.9
0014	133001351	Agarwal	Alissa	Female	4/28/1992	18.4
0015	134000484	Parekh	Jessica	Female	2/3/1992	18.6
0015	131009072	Dibernard	Kristen	Female	11/22/1991	18.8
0016	132008309	Brown	Chalmers	Male	4/17/1992	18.4
0016	132006328	Spencer	Kevin	Male	8/24/1992	18.1
0017	134004391	Nadtochiy	Ksenjya	Female	10/10/1991	18.9
0017	133005501	Patterson	Sarah	Female	10/15/1991	18.9
0018	132009166	Freeden	Brittany	Female	3/7/1992	18.5
0018	132008574	Mody	Roshni	Female	1/15/1992	18.7
0019	134004831	Shah	Anuj	Male	5/29/1992	18.3
0019	132006753	Parikh	Pratik	Male	1/16/1992	18.7
0020	134002358	Pennington	Kirill	Male	6/4/1993	17.3
0020	133009555	Aptekarev	Ilya	Male	5/12/1992	18.4
0021	133000408	Artha	Alvin	Male	5/14/1992	18.4
0021	131007521	Marcus	Nathan	Male	3/23/1992	18.5
0022	132007239	Kazmi	Raza	Male	7/14/1992	18.2
0022	132007198	Swaminathan	Siva	Male	10/22/1991	18.9
0023	131007664	Shaw	Joel	Male	5/24/1989	21.3
0024	131003706	Lee	Shawna	Female	1/15/1984	26.7
0026	116002036	Desai	Malav	Male	8/5/1989	21.1
0027	132009790	Marrone	Christophe	Male	10/31/1992	17.9
0027	131009204	Licato	Frank	Male	7/9/1992	18.2
0028	134002524	Jia	Xiaopeng	Male	4/7/1992	18.5
0028	132002818	Gaglio	Paul	Male	6/25/1992	18.2
0029	133007361	Cicco	Cassandra	Female	6/2/1992	18.3
0029	132002480	Wei	Molly	Female	2/1/1992	18.6
0030	136005519	Clementi	Tyler	Male	12/19/1991	18.8

0030	132006316	Ravi	Dharun	Male	2/28/1992	18.6
0031	133005608	Lopez	Stephanie	Female	2/3/1992	18.6
0031	133000067	Conter	Nicole	Female	12/14/1991	18.8
0032	134001705	Birnbohm	Danielle	Female	6/6/1992	18.3
0032	132009820	Cannova	Ciara	Female	9/2/1992	18
0033	133006615	Gabriel	Francine	Female	6/19/1992	18.3
0033	133002596	De Leon	Margaret	Female	3/31/1992	18.5
0034	132006762	He	Lefan	Male	4/9/1992	18.4
0034	131002157	Patel	Parth	Male	8/14/1992	18.1
0035	136003633	Hani	Shaban	Male	4/1/1992	18.5
0035	134001204	Barbuto	Joseph	Male	4/12/1992	18.4
0036	120001035	Liou	Kairi	Female	3/31/1990	20.5
0037	132008069	Byun	Peter	Male	2/13/1991	19.6
0037	131008697	Lee	San	Male	5/17/1992	18.3
0038	132008562	Nahrwold	Johanna	Female	12/10/1991	18.8
0038	132006812	Kubal	Monika	Female	3/4/1992	18.5
0039	134002594	Vanbuskirk	Alannah	Female	1/24/1992	18.7
0039	132004430	Patel	Nikita	Female	9/8/1992	18
0040	134007951	Raucci	Kyle	Male	5/4/1992	18.4
0040	133008574	Pena	Jonathan	Male	12/5/1992	17.8
0041	133005422	Gibbons	George	Male	12/30/1991	18.7
0041	132002034	Mathers	Kevin	Male	5/15/1992	18.3
0042	134003071	Bhavsar	Darshil	Male	9/13/1992	18
0042	133000065	Patel	Yogin	Male	11/5/1991	18.9
0043	134001522	Passero	John	Male	6/22/1992	18.2
0043	133001203	Catelli	Nicholas	Male	12/26/1991	18.7
0044	133006876	Garcia	Lauren	Female	3/23/1992	18.5
0044	133004132	Petruzzella	Nina	Female	11/11/1991	18.9
0045	133001152	Critchlow	Kenneth	Male	9/13/1991	19
0045	132004162	Srinivasan	Vikram	Male	8/7/1992	18.1
0046	133000431	Patel	Khushbu	Female	5/22/1992	18.3
0046	131009815	Modh	Erika	Female	4/7/1992	18.5
0047	057005223	Conklin	Timothy	Male	9/1/1988	22.1
0048	135008494	Beckett	Joseph	Male	6/9/1991	19.3