STATE OF NEW YORK
ERIE COUNTY SUPREME COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

REPLY

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

., an attorney licensed to practice law in this State, affirms the truth of the following statements under penalties of perjury.

1. Along with co-counsel ., I am the attorney for the defendant, , who was convicted, following a jury trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]).
2. I make this affirmation in reply to the affidavit of which opposes the defendant's motion to set aside the verdict (CPL 330.30[1]).
3. This affirmation is made upon information and belief, the source of which is my review of the case file, transcripts, and motion papers. It also fully incorporates all arguments made in my original motion.
4. The sole ground for the 330 motion was that the admission of statement violated the defendant's rights under the Confrontation Clause (US Const Amend VI). a non-testifying witness, stated that she saw a gun-like object in the defendant's hand. The statement, offered for its truth and made in response to police interrogation, was unconfronted testimonial hearsay.

5. This argument was made in the form of a motion for a mistrial. In a written decision, the Court denied the motion on the ground that the evidence was properly admitted under New York's "opening the door" rule – even though the U.S. Supreme Court has held that the door can never be opened to unconfronted testimonial hearsay (*Hemphill v. New York*, 595 US 140, 156 [2022]).
6. Much of this reply rests on a fundamental principle: under CPL 470.15(1), an appellate court cannot affirm a conviction on a ground not decided adversely to the appellant (*People v. Concepcion*, 17 NY3d 192, 196 [2011]). As an appellate substitute, a ruling on a 330 motion is bound by this principle.
7. The only ground decided adversely to the defendant – i.e., the only ground upon which the Court denied the motion for a mistrial – was that I opened the door to the admission of [redacted] statement by referencing it on cross-examination.

The claim is preserved for appellate review.

8. First, the prosecution argues that the defendant's claim is unpreserved for appellate review because my original objection was on hearsay grounds.
9. A question of law with respect to a ruling of the court is preserved "when a protest thereto was registered, by the party claiming error, at the time of such ruling ... or at any subsequent time when the court had an opportunity of effectively changing the same" (CPL 470.05[2]). A protest is sufficient "if the party made [her] position with respect to the ruling or instruction known to the court, or if in response to a protest by a party, the court expressly decided the question" (*id.*).
10. Later that same day, I moved for a mistrial on Confrontation Clause grounds, putting the Court in a position to effectively change its ruling. A written

memorandum of law, nearly identical to the 330 motion, was submitted before the next court session (attached, Exhibit A).

11. Most decisively, the Court expressly decided the question in its denial of my motion for a mistrial. The last line of the decision reads, "the Court finds the Confrontation Clause arguments unpersuasive under these facts."
12. The claim is fully preserved for appellate review.

The "rule of completeness" argument is without merit and not properly before this Court.

13. Second, the prosecution argues that [REDACTED] statement was admissible under the rule of completeness. This rule provides that where one party has introduced part of a declarant's statement, the opposing party may put the entire statement into evidence (Guide to NY Evid rule 4.03, Completing and Explaining Writing, Recording, Conversation or Transaction).
14. This is a different justification than the one the Court relied on in denying my motion for a mistrial, so CPL 470.15(1) bars its use as a ground for denying the motion.
15. The rule is also not applicable here, as I did not introduce any part of [REDACTED] statement.

The "nonhearsay purpose" argument is without merit and not properly before this Court.

16. Third, the prosecution argues that the statement was admissible for the nonhearsay purpose of showing PO [REDACTED] state of mind – why she treated [REDACTED] as a victim.
17. Again, the Court did not rule on this ground, so CPL 470.15(1) bars its use as a ground for denying the motion.

18. It is also without merit, as the Fourth Department recently rejected a similar argument.
19. In *People v. Coley*, the trial court admitted unconfronted testimonial statements "for the nonhearsay purpose of showing the state of mind of the investigators" (2023 NY Slip Op 04855 [4th Dept. 2023], slip op. at 1). But the Fourth Department rejected this reasoning, finding that the investigators' state of mind "was simply not relevant to any issue in the case" (*id.*).
20. The same logic applies here. PO [redacted] state of mind was not relevant to the issue of whether the defendant possessed the firearm.

The error was not harmless.

21. Finally, the prosecution argues that any error was harmless.
22. As I pointed out in the original motion papers, "Confrontation Clause violations are subject to a constitutional harmless error analysis. Constitutional error requires reversal unless the error's impact was harmless beyond a reasonable doubt ... however overwhelming may be the quantum and nature of other proof, the error is not harmless if there is a reasonable possibility that the error might have contributed to the conviction" (*People v. Hardy*, 4 NY3d 192, 198 [2005]).
23. In spite of the differences between [redacted] statement and [redacted] testimony, [redacted] put the gun in the defendant's hand, and "it is reasonably possible that the admission of this powerful, crucial corroborating evidence influenced the factfinder adversely to the defendant" (*People v. Lewis*, 208 AD3d 595, 602 [2nd Dept. 2022]).
24. The error was not harmless.

DATED: [redacted]
Buffalo, New York

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[redacted]

TO:

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