

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0045-24T1

STATE OF NEW JERSEY, : CRIMINAL ACTION  
 :  
 Plaintiff-Respondent, : On Appeal from a Judgment of  
 : Conviction of the Superior Court  
 v. : of New Jersey, Law Division, At-  
 : lantic County.  
 THOMAS J. FOX, :  
 : Indictment No. 23-07-01607  
 Defendant-Appellant. :  
 : Sat Below:  
 : Hon. Dorothy M. Incarvito-Garra-  
 : brant, J.S.C.

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BRIEF FOR DEFENDANT-APPELLANT

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September 30, 2025

DEFENDANT IS NOT CONFINED

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**PRELIMINARY STATEMENT**

At trial, the most serious charges against defendant Thomas Fox were two fourth-degree counts for driving while suspended. An essential element of these charges was that Fox knew his license was suspended when he was caught driving. To prove Fox's knowledge, the prosecutor relied entirely on two documents. First, a driver's abstract showed the prior date that Fox was ticketed and the corresponding date that a court ordered his license suspended. Second, a "confirmation of suspension" -- containing the date and length of the suspension -- was mailed by the Motor Vehicle Commission to the address on file for Fox. The address was redacted from the confirmation introduced at trial; indeed, the prosecutor made no attempt to prove specifically where the confirmation was mailed or where Fox lived at the time.

The defense correctly argued in a motion for judgment of acquittal that these documents did not sufficiently prove that Fox knew he was suspended. Nothing showed that Fox was present in court when his license was suspended or, if he was, what he was told. Nothing showed that the confirmation was mailed to Fox's then-current address. Even if the address was current, nothing showed that Fox received, read, and understood the confirmation. Because the prosecutor failed to sufficiently prove Fox's knowledge of his suspension, the fourth-degree driving-while-suspended charges should have been dismissed.

Alternatively, Fox should have a new trial on the fourth-degree charges. The trial court committed plain error in admitting a large quantity of irrelevant prior bad acts through Fox's abstract. As admitted, the abstract was eight pages long. The first three pages contained the prior offenses that the prosecutor was required to prove as part of the fourth-degree charges. Everything else was redacted from those three pages. On the other five pages, all of the entries were redacted. However, a juror would have deduced from the number of blacked-out lines that those five pages contained about forty-three entries.

The five extra pages should have been omitted. The approximately forty-three blacked-out entries served no purpose except to show the jurors that Fox appeared to have a long record of driving infractions. These copious, irrelevant prior bad acts clearly might have been decisive, given the otherwise slim evidence. Fox should have a new trial on the fourth-degree charges.

A new trial should also occur on the fourth-degree charges because of a plain error during deliberations. In a note, the jurors requested a transcript of all the testimony. The trial judge correctly told them that a transcript didn't exist, but that any testimony specified by the jurors could be played back. Then the judge's response veered into strange territory: the judge told the jurors that any follow-up request for a playback had to be unanimous; in effect, the judge

stated that every juror had to want the playback. After the jurors returned to deliberations, they never sent a follow-up note.

The unanimity instruction was incorrect. If even one deliberating juror wanted clarification of the testimony, that juror should have been allowed to make a request of the judge. And no individual juror should have had a veto on a playback that the other eleven jurors wanted. The judge's instruction improperly discouraged playbacks. This plain error warrants a new trial on the fourth-degree charges.

As a final alternative, Fox's illegal sentence should be corrected by merging two traffic violations -- for which Fox was also found guilty -- into the fourth-degree convictions. First, a traffic violation for driving while suspended should have merged because it was a lesser included offense of the two fourth-degree driving-while-suspended convictions. Second, a traffic violation for driving without a license should have merged. Because a suspended driver's license is taken away, someone who is driving while suspended must also be driving without a license. Thus, in a practical sense, the charge of driving without a license is included in the more aggravated charge of driving while suspended. Merger is required.

## PROCEDURAL HISTORY

Atlantic County Indictment 23-07-1607 charged defendant-appellant Thomas Fox with two fourth-degree counts of driving while suspended stemming from an incident on February 14, 2018. Count one charged that Fox committed his second driving-while-suspended offense when his license was suspended for driving while intoxicated (“DWI”). See N.J.S.A. 2C:40-26a. (Da 2)<sup>2</sup> Count two charged that Fox committed driving while suspended when his license was suspended for his second DWI. See N.J.S.A. 2C:40-26b. (Da 3)

Fox also received three traffic tickets stemming from the same incident. Number 011-E18-000998 charged improper loading so as to spill. See N.J.S.A. 39:4-77. (Da 5) Number 011-E18-000999 charged driving without a license. See N.J.S.A. 39:3-10. (Da 6) Number 011-E18-001000 charged driving while suspended. See N.J.S.A. 39:3-40. (Da 7)

On April 8 and 9, 2024, Fox went to trial with the Honorable Dorothy M. Incarvito-Garrabrant, J.S.C., presiding. The fourth-degree charges were tried to a jury, while the traffic violations were tried to the court. On April 9,

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<sup>2</sup> “Da” refers to defendant’s appendix.

The transcript volumes will correlate with the following dates:

1T - March 7, 2024 (conference)

2T - April 8, 2024 (suppression hearing and trial)

3T - April 9, 2024 (trial)

4T - June 27, 2024 (sentencing)

the jury found Fox guilty of the fourth-degree charges, and the court found Fox guilty of the traffic violations. (Da 8 to 9, 16 to 18; 3T 216-24 to 218-4, 241-3 to 245-16) The defense moved for a judgment of acquittal on the fourth-degree charges because of insufficient evidence to prove that Fox had known his license was suspended. The court denied the motion. (3T 223-6 to 236-17)

Before sentencing, the defense moved for a new trial, again raising the insufficient evidence of Fox's knowledge. (Da 10 to 11) At sentencing on June 27, 2024, the court denied the motion. (4T 4-12 to 14-9) The court then sentenced Fox on the fourth-degree charges to concurrent fifteen-month sentences, with a 180-day parole bar. The aggregate financial obligation on these charges was \$280. (Da 12 to 13; 4T 32-21 to 33-25) The court sentenced Fox on the improper-loading traffic violation to a \$250 fine and \$40 of costs and surcharges; on the driving-without-a-license traffic violation to a \$250 fine and \$40 of costs and surcharges; and on the driving-while-suspended traffic violation to a \$1000 fine and \$40 of costs and surcharges. On the last violation, Fox also received a concurrent 10-day jail sentence and a six-month license suspension. (Da 16 to 18; 4T 34-5 to 15)

On September 5, 2024, the Office of the Public Defender filed a notice of appeal for Fox. (Da 19 to 20)

## STATEMENT OF FACTS

### **A. Evidence at the Trials**

In taking the testimony on April 9, 2024, the court essentially conducted two separate trials. The court first heard a witness with the jury present for a jury trial on the fourth-degree charges; then the court again heard the same witness without the jury present for a bench trial on the traffic violations. The same testimony was generally repeated, although some variations occurred. This brief will deal with the situation by recounting the testimony in one narrative, with citations in regular type to the jury-trial testimony and in italics to the bench-trial testimony. The exhibits cited herein were admitted at both trials.

Officer David LaSassa testified for the prosecution. On the afternoon of February 14, 2018, LaSassa was parked beside a road in Galloway, watching traffic. (3T 44-20 to 46-7, 47-1 to 3, 51-13 to 24, *70-24 to 71-20, 85-25 to 86-5*) He saw a pickup truck drive by. (3T 46-8 to 11, 51-25 to 52-11, *71-10 to 12, 72-13 to 16, 86-4 to 7*) LaSassa believed that he saw a man in the driver's seat. (3T 46-20 to 25, *71-21 to 25*) LaSassa believed that he saw a woman in the passenger's seat. (3T 46-20 to 25) The pickup bed was loaded with furniture. (3T 46-12 to 16, 52-23 to 53-5, *86-10 to 15*) A length of rope, approximately

twenty yards long, stuck out from the truck and dragged along the road. (3T 46-12 to 19, 53-10 to 56-18, 71-10 to 16, 72-13 to 16, 86-18 to 87-4)

LaSassa pulled out, intending to stop the pickup because of the rope. (3T 47-6 to 11, 71-17 to 20, 72-20 to 73-1, 87-5 to 10) By the time LaSassa caught up, the pickup had already stopped in the parking lot of a business. (3T 47-12 to 18, 58-23 to 59-5, 73-5 to 7, 87-10 to 21) Defendant Thomas Fox -- who was a stranger to LaSassa at the time of the stop -- was outside the truck, and a woman was in the passenger seat. (3T 48-6 to 13, 59-8 to 24, 64-11 to 13, 71-21 to 72-7, 87-22 to 88-7, 91-18 to 23) LaSassa drew Fox's attention to the rope and asked for Fox's driver's license. (3T 47-22 to 48-1, 59-25 to 60-6, 73-20 to 23, 88-8 to 88-21) Fox replied that he didn't have the license on him. (3T 48-2 to 5, 60-5 to 8, 73-24 to 25, 88-19 to 21) Fox provided his name and date of birth. (3T 48-2 to 5, 60-9 to 11, 73-5 to 11, 88-22 to 23) At that point, LaSassa received a call from the dispatcher telling him to respond to a nearby incident. (3T 48-15 to 18, 60-13 to 15, 61-1 to 9, 88-24 to 89-10) LaSassa left the scene. (3T 48-19 to 20, 60-16 to 17, 89-1 to 2, 92-17 to 19)

LaSassa was away for about ten to twenty minutes. (3T 48-21 to 23, 61-13 to 62-1, 89-11 to 14) During this time, LaSassa provided Fox's information to the dispatcher and also did research in his patrol car's mobile data terminal. (3T 48-24 to 49-7, 62-4 to 7, 73-12 to 15, 89-17 to 20) LaSassa learned that

the pickup truck was not registered to Fox. (3T 67-8 to 13) LaSassa also learned that Fox's license was suspended. (3T 48-8 to 10, 62-8 to 10, 73-16 to 19, 89-17 to 20) LaSassa returned to the business where the pickup had parked. (3T 62-2 to 3, 89-11 to 16) Fox was no longer there. (3T 90-18 to 20) LaSassa obtained a phone number for Fox from a worker at the business. (3T 49-11 to 19, 62-11 to 21, 89-21 to 90-1) LaSassa called Fox's number, and no one answered. (3T 49-11 to 19, 62-11 to 21, 74-5 to 9, 90-2 to 5, 91-2 to 5) LaSassa then wrote the traffic tickets and mailed them to the last address connected with Fox's license. (3T 49-20 to 23, 62-22 to 64-8, 74-5 to 85-8, 92-20 to 23)

Brian Beke also testified for the prosecution. He was a supervising analyst for the Motor Vehicle Commission ("MVC"). (3T 96-19 to 97-2, 134-6 to 134-22) His function at trial was to present and explain MVC documents relating to Fox. Beke testified that a driver's abstract is a history of violations based on information that the courts provide to the MVC. (3T 97-7 to 18, 135-5 to 7, 138-4 to 17; Da 21 to 28) The date and type of a violation is listed in one entry. If a court suspends the driver's license as a result, that is indicated in a second entry, along with the date of the suspension. (3T 100-10 to 101-21, 135-5 to 137-25; Da 21 to 23)

A confirmation of suspension is a letter that the MVC generates when a court suspends a driver's license. (3T 101-22 to 102-12, 138-4 to 25; Da 29 to

32) The letter is addressed to the driver and contains, among other information, the name and address of the court and the date and length of the suspension. (3T 108-9 to 25, *139-11 to 140-19*; Da 29 to 32) In Beke's words at the jury trial, the letter is "system-generated," and the "system" mails the letter to the most recent address on file for the driver. (3T 121-6 to 17) The letter travels by normal mail. (3T 121-11 to 14) At the bench trial, Beke only said that "we send out" confirmations, without explaining further. (3T *142-9 to 15, 144-19 to 25*)

Fox's abstract showed that he committed a DWI violation on March 29, 2009, and that a court suspended his license on May 14, 2009. (3T 101-4 to 21, *137-6 to 15*; Da 23) On May 27, 2009, the MVC prepared a confirmation of suspension addressed to Fox, stating that a municipal court suspended Fox's license on May 14, 2009, for two years. (3T 108-6 to 22, 110-1 to 6, *139-11 to 140-19*; Da 29)

Fox's abstract next showed that he committed the violations of DWI and driving while suspended on September 3, 2010. (3T 110-18 to 111-15, *141-2 to 16*; Da 22) A court ordered license suspensions for both violations on January 5, 2011. (3T 111-16 to 20, *141-17 to 24*; Da 22) On February 2, 2011, the MVC prepared two confirmations of suspension addressed to Fox. The one for the DWI violation stated that a municipal court suspended Fox's license on

January 5, 2011, for ten years.<sup>3</sup> The one for the driving-while-suspended violation stated that the municipal court suspended Fox's license on January 5, 2011, for one and one-half years. (3T 112-6 to 115-16, 142-9 to 145-18, 148-14 to 149-5; Da 30 to Da 31)

Fox's abstract next showed that he committed a driving-while-suspended violation on October 3, 2016, and that a court suspended his license on November 7, 2016. (3T 116-2 to 18, 145-25 to 146-15; Da 21) On November 18, 2016, the MVC prepared a confirmation of suspension addressed to Fox, stating that a municipal court suspended Fox's license on November 7, 2016, for one year. (3T 117-4 to 118-5, 146-25 to 148-1; Da 32)

Fox's mailing address was redacted from all of the confirmation letters introduced at trial. (Da 29 to 32) Moreover, the prosecutor presented no testimony showing specifically where the confirmations were mailed. Nor did the prosecutor present any testimony showing what Fox's mailing address was at the time of the confirmations. Nor did the prosecutor present any evidence of what occurred in municipal court, besides the documentary evidence of court-ordered suspensions. (3T 43-17 to 149-5)

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<sup>3</sup> This ten-year suspension from 2011 is the only one that still would have been in effect on February 14, 2018.

## **B. Arguments and Rulings Regarding Fox’s Knowledge**

In her summation during the jury trial, defense counsel argued that the prosecutor failed to prove that Fox knew his license was suspended on February 14, 2018. She pointed to the absence of evidence that Fox ever signed any document acknowledging that his license was suspended; the absence of evidence that the confirmations were mailed to an address that was “accurate or up to date”; and the absence of evidence that Fox verbally acknowledged to LaSassa that his license was suspended. (3T 167-24 to 169-10)

Immediately after the jury returned a guilty verdict, defense counsel moved for judgment of acquittal. Defense counsel argued that the proof of Fox’s knowledge of his suspension was legally insufficient. Counsel referred to her summation. (3T 223-6 to 20) Counsel added that the documents submitted by the prosecutor proved only that the MVC had been aware of suspensions and had mailed notices. But the prosecutor had failed to present evidence that Fox had been present in court for the suspensions or had otherwise received notice. (3T 224-14 to 225-12, 226-2 to 8) The prosecutor responded that the jurors could infer Fox’s knowledge from the documents. (3T 223-22 to 224-12, 225-15 to 25)

The court denied the motion. At the outset, the court cited the standard for deciding motions for judgment of acquittal: whether, “giving the state the

benefit of all of its favorable testimony, as well as all of the favorable inference which could reasonably be drawn, that a reasonable jury could find guilt of the charges beyond a reasonable doubt.” (3T 226-16 to 227-1) Yet when the court disposed of the specific defense argument, the court couched the determination in terms of what the court -- not the jury -- could reasonably determine. (3T 234 -16 to 235-19) With that framing, the court refused to infer Fox’s knowledge from the confirmations of suspension that Fox “may or may not have received.” (3T 235-11 to 14) Instead, the court inferred -- based on its own personal knowledge of municipal court practice -- that Fox would have learned during court appearances that his license was suspended:

Further, the court can reasonably infer from the driver’s abstract that the defendant had convictions for driving under -- for driving while intoxicated, or under the influence of alcohol and drugs as it is listed. Those convictions would have been done in the court, and at that time the defendant was given notice of his suspensions. His license was taken from him if he had a license, and if he did not have a license he was given documents in the courts, as the courts do, to suspend his license. When he left the Municipal Court, he knew that the -- that the -- his license privileges in New Jersey had been suspended, and for how long they had been suspended, and whatever other sentences he received that it was attendant to his DWI.

This court can take notice that the municipal courts, when the conviction is entered and the suspensions are entered in the municipal courts, they batch to DMV [sic -- MVC] directly through the computer system which then creates the entries on the abstracts which have been provided in this case. Mr. -- the

question is not whether or not Mr. Fox knew that his driving privileges were -- were suspended because he may or may not have received a confirmation of suspension. Mr. Fox, in fact, knew at the time that he was convicted that his driving privileges were suspended. And to that end, the Court finds the defense argument unpersuasive at this time that Mr. Fox was unaware, or didn't have notice that his driving privileges were suspended.

(3T 234-16 to 235-19)

In a motion for a new trial, defense counsel again argued that the proof of Fox's knowledge was insufficient. (Da 10 to 11) Defense counsel argued: "The driver's abstract and confirmation of driver's license documents do not confirm Mr. Fox's appearance in court for adjudication. It is defense's position that an inference regarding Mr. Fox's presence in court absent any court records or documents to confirm same is improper." (Da 11) Moreover, no proof showed that Fox "received the mailed notice." (Da 11)

The court denied the motion. (4T 4-12 to 14-9) Regarding Fox's knowledge, the court did not add anything to its previous reasoning. (4T 13-1 to 13-23)

## LEGAL ARGUMENT

### POINT I

**THE DRIVING-WHILE-SUSPENDED CONVICTIONS SHOULD BE DISMISSED BECAUSE DOCUMENTS SHOWING ONLY THAT A PRIOR COURT HAD SUSPENDED DEFENDANT'S LICENSE AND THAT A CONFIRMATION HAD BEEN MAILED TO A REDACTED ADDRESS DID NOT SUFFICIENTLY PROVE THAT DEFENDANT KNEW HIS LICENSE WAS SUSPENDED. U.S. CONST. AMEND. XIV; N.J. CONST. ART. 1, ¶ 1. (ruling below at 3T 226-9 to 236-17; 4T 4-12 to 14-9)**

As defense counsel argued, the evidence was legally insufficient to prove that Fox knew his license was suspended. Therefore, judgment of acquittal should be entered on the fourth-degree charges.

In deciding whether the evidence is legally insufficient, the evidence should be viewed in the light most favorable to the prosecution, which means that the prosecution should have the benefit of favorable inferences that can reasonably be drawn. Taking that view, the evidence is legally insufficient if a jury could not reasonably find the defendant guilty beyond a reasonable doubt. State v. Lodzinski, 249 N.J. 116, 144 (2021); see Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The element at issue is whether Fox knew that his license was suspended when he allegedly drove on February 14, 2018. Both fourth-degree charges

shared the common element that the actor may not “operate a motor vehicle during the period of license suspension in violation of R.S. 39:3-40.” N.J.S.A. 2C:40-26a, -26b. In addition, each count required proof of certain priors: one count required proof that the actor’s license was suspended for DWI and that the actor had previously been convicted of driving while suspended for that DWI. N.J.S.A. 2C:40-26a. The other count required proof that the actor’s license was suspended for a second DWI. N.J.S.A. 2C:40-26b.

The applicable statutes do not state a mens rea connected with operation during a period of license suspension. By law, this gap must be filled with the requirement that the person acted “knowingly.” See N.J.S.A. 2C:2-2b(2), -2c(3); State v. Sewell, 127 N.J. 133, 138-39 (1992). Therefore, the model jury charge -- which the trial court duly provided to the jury -- requires the prosecutor to prove “that the defendant knew that his license was suspended or revoked.” Model Criminal Jury Charges, “Operating Motor Vehicle During Period of License Suspension (N.J.S.A. 2C:40-26)” (rev. August 18, 2025) at 1, 3. (3T 188-20 to 21, 191-5 to 7, 192-24 to 25, 195-7 to 9) In short, the knowledge element required sufficient proof that Fox was “aware” that his license was suspended or was “aware of a high probability” that his license was suspended on February 14, 2018. See N.J.S.A. 2C:2-2b(2).

In deciding whether this knowledge element was sufficiently proven, the trial court refused to rely on a confirmation of suspension that Fox “may or may not have received” in the mail. (3T 235-11 to 14) This part of the decision was wise. Although New Jersey law seems undeveloped on the knowledge element, precedent elsewhere refuses to allow an inference of the defendant’s knowledge merely because the motor vehicle authority had mailed a notice to the last address on file. People v. Boulden, 381 P.3d 454, 456-57 (Colo. App. 2016). Such a mailing provides “no evidence that defendant had ever seen or was aware” of the document. Id. at 457. This decision makes sense because people commonly change addresses, spend time away from home, overlook a letter, or scan a letter quickly and miss its significance.

A mailed notice might carry some weight if combined with proof that the defendant actually received it. For example, this additional proof could be testimony from the defendant that she resided at the mailing address at the time, Anderson v. State, 87 So.3d 774, 776 780 (Fla. 2012); proof that the defendant had provided the mailing address to an officer, State v. Herrera, 807 P.2d 744, 746, 750 (N.M. Ct. App. 1991); or proof that the motor vehicle authority sent the notice through certified mail<sup>4</sup> and that it had not been returned, id.

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<sup>4</sup> Certified mail requires a signature for delivery, and the sender can require that delivery be restricted to the addressee. See United States Postal Service,

None of these additional types of proof were presented here. The most important mailing was the 2011 confirmation of Fox's ten-year suspension, which would have been the suspension that was still effective in 2018. (Da 30) MVC representative Beke testified that, in general, the "system" sends confirmations through regular mail -- not certified mail -- to the last address on file for the driver. (3T 121-6 to 17, 121-11 to 14) But Beke did not testify to the specific addresses where Fox's confirmations were sent. Moreover, all of the addresses were redacted from the confirmations. (Da 29 to 32) Nor was any evidence presented to show what Fox's address was at the time of any confirmation. In short, the evidence about the mailings was not sufficient to prove beyond a reasonable doubt that Fox knew he was under suspension in 2018.

While refusing to rely on the mailings, the trial court made an unwise decision in inferring -- based only on the court's own personal knowledge of municipal court practice -- that Fox would have learned during a court appearance that his license was suspended. In a disquisition about municipal court, the trial court essentially reasoned that Fox would have been present in municipal court when his license was suspended for DWI; that the municipal judge would have told Fox of the suspension; and that the municipal judge would

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have taken Fox's license or would have given Fox documents stating his license was suspended. (3T 234-16 to 235-19) The trial court's conclusion was that Fox would have left municipal court knowing "his license privileges in New Jersey had been suspended, and for how long they had been suspended." (3T 234-25 to 235-3)

The problem is that none of this information was presented to the jurors at Fox's trial. The jurors had nothing beyond the MVC documents showing the final result of the municipal court proceedings in 2011: license suspension for ten years. The jurors were not presented with any documents, transcripts, or recordings from the municipal court proceedings. They heard no testimony from anyone connected with the municipal court proceedings. They were not even presented with testimony of what customarily happens in municipal court. Cf. Johnson v. United States, 232 A.3d 156 (D.C. App. 2020) (allowing a court clerk to testify to what customarily happens in court and to interpret the court records in the defendant's case).

Moreover, the jurors could not reasonably infer from the final result that Fox must have been present in municipal court and that he must have been notified of the suspension at that time. In one persuasive case, a prosecutor was similarly required to prove that the defendant had been notified of his license suspension. The prosecutor entered into evidence a docket sheet from a prior

DWI case. That document was sufficient to prove that the defendant had been present in court, that the defendant had pleaded guilty to DWI, and that the court had suspended the defendant's license. Commonwealth v. Oyewole, 21 N.E.3d 179, 180-81 (Mass. 2014).

Nevertheless, the Massachusetts Supreme Judicial Court decided that the evidence was insufficient to prove that the defendant was informed of the license suspension:

While the docket sheet from the [DWI] case, which was in evidence, permits an inference that the defendant was present when his license was suspended, the Commonwealth did not offer any evidence demonstrating that the suspension was communicated to him. The docket sheet itself does not state that the defendant was notified of the suspension. The Commonwealth did not present evidence that the judge in the [DWI] case announced the suspension in open court. There is no evidence in the record that the docket sheet was shown to the defendant or that any other written notification was sent to him. Even on the assumption that to do so was the regular practice when accepting a plea -- a proposition unsupported by the record -- the Commonwealth may not rely on a presumption of regularity as a substitute for evidence proving an element of its case beyond a reasonable doubt. . . . There was also no evidence that the defendant acknowledged, at the time of the stop or at any other time, that he was aware of the suspension.

Id. at 181 (citations omitted and emphasis in original). The Supreme Judicial Court lamented that the problem might have been avoided if the prosecutor had simply introduced a transcript of the DWI proceedings. Id. at 181 n.3.

Fox's case is worse. Our jurors didn't even have evidence that Fox was present in municipal court -- much less evidence of what he was told if he was present. In life, especially life in a municipal court, anything can happen. Standard municipal court procedures are not matters that can be inferred through jurors' common experience and common sense; nor can jurors be expected to infer the exceptions and mistakes that might cause standard procedures not to be followed. In short, jurors here simply had zero evidence of what had happened in municipal court surrounding the ten-year license suspension in 2011; in particular, they had no evidence that Fox was had been present or that he had been told of the suspension.

Because the evidence was legally insufficient to prove beyond a reasonable doubt that Fox knew that his license was suspended in February 2018, the fourth-degree convictions should be reversed, and judgment of acquittal should be entered on those charges.

**POINT II**

**DEFENDANT SHOULD HAVE A NEW TRIAL ON THE FOURTH-DEGREE CHARGES BECAUSE A LARGE QUANTITY OF IRRELEVANT PRIOR BAD ACTS WERE ADMITTED THROUGH HIS DRIVER'S ABSTRACT. U.S. CONST. AMENDS. XIV; N.J. CONST. ART. 1, ¶ 1. (not raised below)**

As admitted at trial, Fox's driver's abstract had five extra pages containing what appeared to be approximately forty-three redacted entries. These entries served no purpose except to show the jurors that Fox appeared to have a long record of driving infractions. The plain error in admitting these five extra pages requires a new trial.

The basic principles are well-known. Evidence of prior offenses or bad acts is generally inadmissible in a trial of the charged offenses. See N.J.R.E. 404(b)(1). Such evidence is uniquely prejudicial because jurors are thereby distracted from the evidence -- or lack of evidence -- of the charged offenses; instead, jurors will be prone to convict simply because the defendant is a bad person who has a propensity to commit offenses: "It is thought that proof of a previous crime will distract the jury, leading them to forego an independent analysis of the evidence and to rely merely on the tendency they possess in common with most people of saying 'once a thief -- always a thief.'" State v. Stevens, 115 N.J. 289, 300 (1989). Research has shown that jurors are significantly more likely to convict after learning "that the defendant had a criminal

record or had been charged with even a minor crime.” Id. at 302-03. In short, other-bad-acts evidence is “inflammatory” and “explosive.” Id. at 303, 304.

Other-bad-acts evidence can be admissible in exceptional cases for non-propensity purposes, such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” See N.J.R.E. 404(b)(2). The trial court must first carefully determine that the non-propensity issue is genuine and that the probative value of the bad acts outweighs the well-known prejudice. State v. Cofield, 127 N.J. 328, 338-40 (1992). This preliminary determination should be made at an evidentiary hearing outside the presence of the jury. State v. Hernandez, 170 N.J. 106, 127 (2001). Upon admission, the court must give a limiting instruction explaining “precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.” Stevens, 115 N.J. at 304, 309.

In Fox’s case, copious prior bad acts were improperly admitted through his driver’s abstract. As is apparent from Point I, the prosecutor introduced the abstract as an exhibit to prove the prior offenses that were required for the fourth-degree convictions. The admitted abstract was eight pages long. (Da 21 to 28) The first three pages contained the relevant prior offenses. Everything

else was redacted from those three pages. (Da 21 to 23) On the remaining five pages, all of the entries were redacted. However, the jurors would have deduced from the number of blacked-out lines that those five pages contained forty-three entries with an event date, event type, and description. Thus, the extra pages appeared to have forty-three entries regarding prior traffic violations. (Da 24 to 28)

The five extra pages should have been omitted from the abstract. Moreover, they could have been easily omitted: given that the pages were not numbered, the jurors would not have known that pages were removed. (Da 21 to 28) As it was, the approximately forty-three blacked-out entries served no purpose except to show the jurors that Fox appeared to have a long record of driving infractions.

The prosecutor had no possible non-propensity reason to introduce this long record of driving infractions and never claimed that he did. The inclusion of the five entirely blacked-out pages seemed to be an oversight. While the lawyers for both sides agreed that irrelevant entries in the abstract should be redacted, no one proposed or even seemed to consider the expedient of simply removing the five entirely redacted pages. (2T 63-3 to 67-22; 3T 5-24 to 8-15)

The introduction of Fox's long record of driving infractions was plain error that was clearly capable of producing an unjust result. See R. 2:10-2. In

accordance with the normal procedure, the exhibits were sent back to the jurors during deliberations. (3T 174-24 to 175-13, 205-10 to 213-11) There the jurors would have been exposed to Fox's long and irrelevant record of driving infractions as reflected in the abstract. They clearly would have been prone to convict because Fox appeared to have a propensity to commit driving offenses. Meanwhile, they would have been prone to ignore the slim-to-nonexistent evidence on an essential element of the charged fourth-degree offenses: that Fox knew that he was under suspension in February 2018. See Point I.

Accordingly, the fourth-degree convictions should be reversed, and Fox should have a new trial on those charges.

### POINT III

**DEFENDANT SHOULD HAVE A NEW TRIAL ON THE FOURTH-DEGREE CHARGES BECAUSE THE COURT IMPROPERLY INSTRUCTED THE DELIBERATING JURORS THAT THEY HAD TO BE UNANIMOUS IN REQUESTING A PLAY-BACK. U.S. CONST. AMENDS. XIV; N.J. CONST. ART. 1, ¶ 1. (not raised below)**

A new trial should occur on the fourth-degree charges because of another plain and damaging error: during deliberations, the court instructed the jurors that they had to be unanimous in requesting playbacks.

The episode began when the deliberating jurors sent a note requesting a transcript of the testimony. (3T 214-16 to 21) The trial court correctly responded by instructing the jurors that a transcript didn't exist, but that any testimony specified by the jurors could be played back. But then the instruction veered into highly unusual unanimity territory:

There isn't a court transcript, so what you are allowed to do, and what we may do for you, is we can replay portions of the testimony for you, okay? In order for me to do that, we don't replay the whole trial. So what I need is that unanimously that you all go back into the jury room, and you're going to send me out another note of what portions of the testimony you would like to have replayed, okay? So it would be best if you told me which witness and what portions.

And I need it to be something that's unanimous, that you all agree that that's the portions you need. And we can't replay -- we don't -- we don't -- we would prefer not to replay a two-hour trial, or two-

and-a-half hour trial. So you know, when I say portions, you know, you can -- you can limit it by subject matter or time or whatever, whatever you have that can tell me so I can identify in the Court's record what it is that you're looking for, okay?

So you're going to go back into the jury room. Send me out another note through the jury officer, and then we will determine where we go from here, okay?

(3T 214-21 to 215-18) (emphasis added)

The unanimity instruction -- "that you all agree that that's the portions you need" -- made no sense. If even one deliberating juror wanted clarification of the testimony, that juror should have been allowed to make a request of the judge. No juror who is confused and wants the judge's assistance should be deprived of that assistance.

The judge's instruction, however, took the opposite approach and suggested that each individual juror had a veto on playbacks: if any one juror thought that a playback was a waste of time, that juror could deprive the other eleven of a playback. This couldn't possibly be the law. Moreover, the jurors would have had no reason not to apply the same unfortunate unanimity principle to any question that they might have, including legal questions.

The court's unanimity instruction was so unusual that authority is difficult to find. But the little existing authority suggests that the instruction was indeed improper. In one case, the California Supreme Court did not interpret the trial judge's remarks as preventing individual requests; at the same time,

the Supreme Court clearly stated that any such remark would have been improper because “any juror may request a readback of testimony.” People v. Burgener, 62 P.3d 1, 35 (Cal. 2003); see also State v. Best, 467 S.E.2d 45, 56 (N.C. 1996) (rejecting the argument that the judge had required unanimity for jury questions, but implying that such a requirement would have been improper.) Conversely, this writer has been unable to find authority anywhere endorsing an instruction that a request for a playback must be unanimous.

The improper unanimity instruction here was plain error that was clearly capable of producing an unjust result. See R. 2:10-2. The request for a transcript establishes that at least some of the jurors were trying to find something in the testimony. Given the lack of evidence that Fox knew that he was under suspension in February 2018, see Point I, we might make an educated guess that some jurors wanted to comb the entire record for evidence on that element. At any rate, after the court told the jurors that any follow-up request for a playback had to be unanimous, no follow-up request ever came. Instead, after approximately forty-five minutes, the jurors returned the verdict. (3T 215-23 to 216-7)

In short, the curiosity of the jurors about the record disappeared after they were instructed that any playback request had to be unanimous. This disappearance was mysterious -- unless the jurors, in fact, were not unanimous in

their curiosity about the record. Under the circumstances, the improper unanimity instruction had the clear capacity to produce an unjust result. The fourth-degree convictions should be reversed, and Fox should have a new trial on those charges.

**POINT IV**

**DEFENDANT’S ILLEGAL SENTENCE SHOULD BE CORRECTED BY MERGING THE LESSER TRAFFIC VIOLATIONS FOR DRIVING WHILE SUSPENDED AND DRIVING WITHOUT A LICENSE INTO THE GREATER FOURTH-DEGREE CONVICTIONS FOR DRIVING WHILE SUSPENDED. U.S. CONST. AMENDS. V, XIV; N.J. CONST. ART. 1, ¶¶ 1, 11. (not raised below)**

The court below imposed sentence on all of the charges -- both the fourth-degree charges and the traffic violations. This was improper because the traffic violations for driving while suspended and driving without a license should have merged into the fourth-degree convictions for driving while suspended.

The failure to merge convictions where necessary results in an illegal sentence that can be corrected at any time, even without a previous objection. See State v. Romero, 191 N.J. 59, 80 (2007).

Merger is based on the principle that an accused who has committed one offense cannot be punished for two. State v. Cole, 120 N.J. 321, 325-26 (1990); State v. Davis, 68 N.J. 69, 77 (1975). The analysis of whether two offenses should be merged is flexible and relies on no single test. Cole, 120 N.J. at 326-27; see Davis, 68 N.J. at 81. Indeed, courts should avoid an analysis that focuses strictly on the legal elements of the offenses. See State v. Tate, 216 N.J. 300, 307 (2013). Rather, the primary focus should be on the particular

facts of the case. See Cole, 120 N.J. at 327; Davis, 68 N.J. at 81. A sentencing court should flexibly consider several factors:

the time and place of each purported violation;  
whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.

Cole, 120 N.J. at 327; Davis, 68 N.J. at 81.

In short, a sentencing court should merge “lesser-included offenses, offenses that are a necessary component of the commission of another offense, or offenses that merely offer an alternative basis for punishing the same criminal conduct.” State v. Brown, 138 N.J. 481, 561 (1994) (emphasis omitted).

First, the traffic violation for driving while suspended was a lesser included offense of the two fourth-degree driving-while-suspended convictions. The fourth-degree subsections explicitly incorporate the traffic violation and add elements regarding the defendant’s prior record to raise the violation to indictable charges. See N.J.S.A. 2C:40-26a, -26b (citing and incorporating N.J.S.A. 39:3-40). As a lesser included charge, the traffic violation for driving while suspended must merge.

Second, the traffic violation for driving without a license should have merged. Because a suspended driver’s license is taken away, someone who is

driving while suspended must also be driving without a license. See N.J.S.A. 39:5-35 (requiring surrender of a driver's license upon suspension). Thus, in a practical sense, both charges are forms of driving without authorization, and the charge of driving without a license is included in the more aggravated charge of driving while suspended. Moreover, driving while suspended has more severe penalties, further confirming that it is essentially a more aggravated form of driving without a license. Compare N.J.S.A. 39:3-40a through j, N.J.S.A. 2C:43-6a(4), and N.J.S.A. 2C:43-3b(2) with N.J.S.A. 39:3-10u. Merger of the driving-without-a-license violation is required.

Accordingly, the sentences should be vacated on the traffic violations for driving while suspended and driving without a license, and those violations should be merged into the convictions for fourth-degree driving while suspended.

**CONCLUSION**

For the reasons stated in Point I, the convictions for fourth-degree driving while suspended should be reversed, and judgment of acquittal should be entered on those charges. Alternatively, for the reasons stated in Points II and III, the convictions for fourth-degree driving while suspended should be reversed, and a new trial should occur on those charges. As a final alternative, for the reasons stated in Point IV, the sentences should be vacated on the traffic violations for driving while suspended and driving without a license, and those violations should be merged into the convictions for fourth-degree driving while suspended.

Respectfully submitted,

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Dated: September 30, 2025

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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-000045-24T1**

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**STATE OF NEW JERSEY,  
Plaintiff-Respondent,**

**v.**

**THOMAS J. FOX,  
Defendant-Appellant.**

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**: CRIMINAL ACTION**  
**: On Appeal from a Judgment of**  
**Conviction Superior Court of New**  
**Jersey, Law Division, Atlantic**  
**County.**  
**Indictment No. 23-07-001607**  
**:**  
**Sat Below:**  
**: Hon. Dorothy M. Incarvito-**  
**Garrabrant, J.S.C., and a jury**

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**BRIEF ON BEHALF OF THE STATE OF NEW JERSEY**

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**December 17, 2025**

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**COUNTERSTATEMENT OF PROCEDURAL HISTORY**<sup>1</sup>

On or about July 18, 2023, the Atlantic County Grand Jury charged defendant, Thomas J. Fox (aka Thomas J. Fox, III and Thomas J. Fox, Jr.), under superseding Indictment No. 23-07-01607, with fourth-degree operating a motor vehicle for a second time during his license suspension for driving while intoxicated (“DWI”), contrary to N.J.S.A. 2C:40-26a (Count 1); and, fourth-degree operating a motor vehicle while his license was suspended for his second DWI, contrary to N.J.S.A. 2C:40-26b (Count 2).<sup>2</sup> (2T39-9 to 20; Da1-3; Da12).

Defendant was also issued three related motor vehicle tickets: Number E18-000998, loading a vehicle in a wrongful manner allowing spillage, contrary to N.J.S.A. 39:4-77; Number E18-000999, driving without a license, contrary to N.J.S.A. 39:3-10; and, Number E18-001000, driving during a period of driver’s license suspension, contrary to N.J.S.A. 39:3-40. (Da5-7).

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<sup>1</sup> “Db” refers to defendant’s brief.  
“Da” refers to the appendix to defendant’s brief.  
“1T” refers to the pre-trial transcript, dated 3/7/24.  
“2T” refers to the suppression motion and trial transcript, dated 4/8/24.  
“3T” refers to the trial transcript, dated 4/9/24.  
“4T” refers to the new-trial motion and sentencing transcript, dated 6/27/24.

<sup>2</sup> After an initial indictment on September 7, 2018, it was determined that defendant was driving during the period of license suspension for a second time, and so, the State superseded the indictment on July 20, 2023 to add a charge under N.J.S.A. 2C:40-26b. (2T39-9 to 20).

On April 9, 2024, following a two-day jury trial with the Honorable Dorothy M. Incarvito-Garrabrant, J.S.C., presiding, the jury convicted defendant on both fourth-degree charges, and the court found defendant guilty of the traffic violations. (3T216-24 to 219-15; 3T241-3 to 345-16; Da12-18). That same day, the judge denied defendant's motion for judgment of acquittal. (3T226-10 to 236-15).

On August 6, 2024, Judge Incarvito-Garrabrant denied defendant's motion for a new trial, and imposed an aggregate fifteen-month term of imprisonment, with a 180-day parole bar on the fourth-degree convictions, consisting of equal concurrent terms, along with eighty-five days of jail credit. (4T4-12 to 14-9; 4T32-10 to 34-5; Da12-15). With respect to the traffic citations, the court sentenced defendant on the improper-loading violation to a \$250 fine and \$40 of costs and surcharges; on the driving-without-a-license violation to a \$250 fine and \$40 of costs and surcharges; and, on the driving-while-suspended citation, defendant received a \$1,000 fine and \$40 of costs and surcharges, along with a concurrent 10-day jail sentence and a six-month license suspension. (4T34-5 to 15; Da16-18).

On or about September 5, 2024, defendant filed a notice of appeal with this Court. (Da19-20).

This appeal follows.

**COUNTERSTATEMENT OF FACTS**

On February 14, 2018, defendant, Thomas J. Fox, was still under a ten-year driver's license suspension order from a 2011 second DUI violation, when he was observed driving for a second time in defiance of that suspension order. The resulting fourth-degree charges were tried before a jury, while the three traffic citations were tried before the judge. Both the jury and the judge convicted defendant on all counts and citations.

At about 2:30 p.m. on the afternoon of February 14, 2018, eight-year veteran Officer David LaSassa was on patrol in Galloway Township. (3T43-17 to 47-3). As the officer was sitting in the parking lot of a firehouse monitoring the traffic on Philadelphia Avenue, defendant's passing pickup truck caught his attention. (3T46-3 to 16). From only ten yards away, the officer observed a male driver, later identified as defendant, driving the truck fully loaded with wooden furniture from the front to the back of the pickup bed, and dragging a rope in the roadway at least sixty feet behind it. (3T46-9 to 25; 3T51-25 to 53-25).

Concerned about the safety issue presented given the traffic on the road, the officer entered the roadway about a block or two behind defendant, with the intent to conduct a motor vehicle stop. (3T47-6 to 11; 3T54-1 to 9; 3T58-13 to 22). However, before the officer could get behind the truck, defendant pulled into the parking lot of the E.B. Auto Shop on the corner of Philadelphia and Atlantic

Avenues. (3T47-14 to 16; 3T58-8 to 59-2). Officer LaSassa entered the parking lot and pulled up behind the truck; defendant already had exited the vehicle and was standing at the back of the truck. (3T47-18; 3T59-3 to 10). The officer approached defendant and advised him of the rope he was dragging. (3T47-18 to 25; 3T59-8 to 60-4). Officer LaSassa asked for identification, and defendant stated he did not have his driver's license on him, but provided the officer with his name and date of birth. (3T47-25 to 48-5; 3T60-5 to 12).

Before the officer could run the information, he had to respond to a burglary call for service in the area and dismissed defendant from the scene. (3T48-16 to 18; 3T60-14 to 61-7; 3T92-19). When the officer returned to the auto shop after ten to twenty minutes, dispatch had advised that defendant's driver's license had been suspended, which the officer then confirmed on his mobile data terminal. (3T48-16 to 49-10; 3T60-22 to 62-10).

The officer went into the auto shop to see if they had any contact information for defendant, and they provided him with a phone number. (3T49-13 to 17). The officer got no answer after trying three times to reach defendant, and so he mailed the traffic citations to the address listed on defendant's driver's license. (3T49-17 to 23; 3T62-11 to 64-5; 3T66-23 to 67-2). Three months later, when defendant was appearing in court on those very traffic citations, the officer responded to charge and

process defendant in person with fourth-degree charges relating to driving while suspended. (3T50-1 to 4; 3T65-10 to 25).

The State also presented Brian Beke, a supervising Driver Improvement Analyst from the New Jersey Motor Vehicle Commission (“MVC”), with forty years of experience. (3T96-2, et seq.). Mr. Beke testified that he reviewed the certified complete motor vehicle abstract of defendant’s driver history, a redacted version of which was admitted at trial without objection. (3T98-11 to 99-4; S-6 in Evidence). Mr. Beke explained that defendant’s abstract revealed that on May 14, 2009, defendant sustained a violation for operating a vehicle while under the influence of liquor or drugs on March 29, 2009, for which a two-year suspension was ordered on May 27, 2009. (3T101-4 to 21; 3T108-6 to 110-14; S-9 in Evidence; Da29).

Mr. Beke continued that on September 3, 2010, defendant received two additional violations, for once again operating a vehicle while under the influence of alcohol or drugs, and also for operating while suspended, court orders for which were entered on January 5, 2011. (3T110-18 to 111-20). On February 2, 2011, the court ordered a suspension of defendant’s driver’s license for a period of ten years, beginning on January 5, 2011, on the operating-while-under-the-influence violation. (3T113-6 to 115-1; S-10B in Evidence; Da22). Defendant’s license was additionally suspended for one-and-one-half years on the driving-while-suspended violation. (3T112-6 to 115-16; Da30-31).

Finally, Mr. Beke confirmed that on October 3, 2016, defendant received yet another violation for operating while suspended, for which a one-year suspension was imposed on November 7, 2016. (3T116-11 to 118-5; S-11 in Evidence; Da32).

Specifically, Mr. Beke explained that each violation on a driver's abstract references both the administrative action taken in court, as well as a confirmation of suspension by the court, which is a letter that the MVC generates confirming when a court suspends a driver's license. (3T101-22 to 102-15). The letter is system-generated, addressed to the driver and contains, among other information, the name and address of the court and the date and length of the suspension. (3T121-6 to 17).

Defendant elected not to testify at trial. (3T157-18 to 159-1).

## LEGAL ARGUMENT

### POINT I

**THE TRIAL JUDGE PROPERLY DENIED DEFENDANT’S MOTION FOR A JUDGMENT OF ACQUITTAL, AS THERE WAS SUFFICIENT, IF NOT OVERWHELMING, EVIDENCE THAT DEFENDANT KNEW HIS LICENSE WAS SUSPENDED (3T226-10 to 236-15; 4T4-12 to 14-9). [Raised Below.]**

Defendant submits that the trial judge should have granted his motion for judgment of acquittal on the fourth-degree charges, challenging only the “knowledge” element, arguing that the evidence was legally insufficient to find that defendant “knew” his license was suspended. (Db14-20). The State respectfully maintains that defendant’s claim lacks merit. The trial court properly denied defendant’s motion for a judgment of acquittal, as the State’s evidence against defendant regarding knowledge was in fact substantial.

Rule 3:18-1 governs motions for a judgment of acquittal. In determining whether the motion should be granted, the trial judge must decide whether “a reasonable jury could find guilt of the charge beyond a reasonable doubt.” State v. Reyes, 50 N.J. 454, 459 (1967). The judge must view the State’s evidence, both direct and circumstantial, in its entirety and give “the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn” from that testimony. Ibid. This test was reaffirmed in State v. Brown, 80 N.J. 587 (1979), where the Supreme Court explained that “a jury may draw an

inference from a fact whenever it is more probable than not that the inference is true; the veracity of each inference need not be established beyond a reasonable doubt in order for the jury to draw the inference.” Id. at 592. The court is not concerned with the worth, nature, or extent (beyond a scintilla) of the evidence but only its existence, viewed most favorably to the State. State v. Brooks, 336 N.J. Super. 447, 453 (App. Div. 2004). Indeed, “The power to enter a judgment of acquittal cannot be invoked because a judge has a mere difference of opinion with the outcome of a trial; it can be invoked only to prevent a miscarriage of justice.” State v. Lodzinski, 249 N.J. 116, 143-44 (2021).

An appellate court uses the same standard in its review of a denial of this motion. State v. Kittrell, 145 N.J. 112, 130 (1996); State v. Moffa, 42 N.J. 258, 263 (1964). As the Supreme Court has reaffirmed, in reviewing whether the trial court properly denied the motion for a judgment of acquittal, the reviewing court must view the State’s evidence “‘in its entirety and giv[e] the State the benefit of all its favorable testimony and all of the favorable inferences’ to be drawn from that testimony to determine whether a jury could find guilt beyond a reasonable doubt.” State v. Spivey, 179 N.J. 229, 236 (2004) (quoting Moffa, 42 N.J. at 263).

When considering the jury’s verdict in light of circumstantial evidence, the court must recognize that it is not necessary for the veracity of the inferences drawn by the jury to be established beyond a reasonable doubt. Kittrell, 145 N.J. at

131. Rather, it need only be “more probable than not” that the inferences are true. Ibid. (quoting State v. Brown, 80 N.J. 587, 592 (1979)).

Here, the trial judge properly denied defendant’s same claim raised in both a motion for a judgment of acquittal and a motion for a new trial. Defendant first moved for a judgment of acquittal after the jury returned a guilty verdict, arguing that there was insufficient evidence presented to support defendant’s knowledge through actual notice that his driver’s license had been suspended when he drove on February 14, 2018. (3T223-6 to 225-12). The trial judge properly denied the motion, finding that the State had presented sufficient evidence to satisfy its burden of proof. (3T226-10 to 236-15). The trial judge viewed the State’s evidence in its entirety, including all favorable inferences that could reasonably be drawn from the evidence, and concluded that a reasonable jury could find guilt on all charges beyond a reasonable doubt. (3T236-6 to 14).

Specifically, the judge found that a jury “did conclude beyond a reasonable doubt, and could have concluded beyond a reasonable doubt,” that defendant was guilty, given the State’s evidence with all reasonable inferences being drawn on each element of each offense charged. (3T236-4 to 14). Finding the State’s witnesses to be credible, the judge reasoned:

“[T]he Court can reasonably infer from the driver’s abstract that the defendant had convictions for driving...while intoxicated, or under the influence of alcohol or drugs as it is listed. Those convictions would have been done in the court, and at that time the defendant was given

notice of his suspensions. His license was taken from him if he had a license, and if he did not have a license he was given documents in the courts, as the courts do, to suspend his license. When he left the Municipal Court, he knew that...his license privileges in New Jersey had been suspended, and for how long they had been suspended, and whatever other sentence he received that it was attendant to his DWI.

This Court can take notice that the municipal courts, when the conviction is entered and the suspensions are entered in the municipal courts, they batch to DMV directly through the computer system which then creates the entries on the abstracts which have been provided in this case.”

[3T234-16 to 235-11.]

The judge continued, “[T]he question is not whether or not [defendant] knew that his driving privileges...were suspended because he may or may not have received a confirmation of suspension. [Defendant], in fact, knew at the time that he was convicted that his driving privileges were suspended. And to that end, the Court finds the defense argument unpersuasive at this time that [defendant] was unaware, or didn’t have notice that his driving privileges were suspended.” (3T235-11 to 19). Accordingly, the judge properly denied defendant’s motion for a judgment of acquittal. (3T236-14 to 15).

Before sentencing, the trial judge similarly rejected defendant’s motion for a new trial on the same ground, specifically rejecting defendant’s claim that there was insufficient evidence of defendant’s knowledge of his suspension because there was allegedly no evidence presented that defendant was actually the person in municipal

court to have received the notice memorialized on the certified driver's abstract.

(4T5-1 to 11). Rather, the trial judge found:

“Contrary to the defendant’s arguments...the certified abstract is a document which will memorialize and records the action taken by the Courts or the Motor Vehicle Commission when a violation, offense, or suspension is ordered.

...[R]ecords and testimony from the various Municipal or Superior Court employees or Motor Vehicle Commission employees was not required to demonstrate that the entries on the abstract are accurate....

It is reasonable for the jury to rely upon the certified abstract and make all reasonable inferences from it to determine whether a defendant’s driving privileges were suspended at the time of the incident –and for what his driving privileges were suspended.”

[4T13-1 to 23.]

Accordingly, the trial judge properly denied defendant’s same claim raised in his motion for a new trial. (4T14-8 to 9).

The N.J.S.A. 2C:40-26 crimes of which defendant has been convicted were designed to “create [] criminal penalties for persons whose driver’s licenses are suspended for drunk driving offenses and who, while under suspension for these offenses, unlawfully operate a vehicle.” Assembly Law and Public Safety Committee, Statement to A. 4303 (Dec. 3, 2009). The strengthened fourth-degree penalty was legislatively prompted “by reports of fatal or serious accidents that had been caused by recidivist offenders with multiple prior DWI violations, who

nevertheless were driving with a suspended license.” State v. Carrigan, 428 N.J. Super. 609, 614 (App. Div. 2012), certif. denied, 213 N.J. 539 (2013).

To support a conviction, the pertinent element at issue requires that the State prove beyond a reasonable doubt that “the defendant knew their driver’s license was suspended or revoked.” Model Jury Charge (Criminal), “Operating Motor Vehicle During Period of License Suspension (N.J.S.A. 2C:40-26)” (rev. 8/18/25). Although the statute itself does not expressly designate a mens rea requirement, pursuant to N.J.S.A. 2C:2-2(c)(3), the culpability requirement is “knowingly,” as reflected in the model jury charge, and defined by N.J.S.A. 2C:2-2(b). As the model charge instructs, proof of “knowledge” is “rarely susceptible of direct proof but must ordinarily be inferred from the facts.” Model Jury Charge (Criminal), “Operating Motor Vehicle During Period of License Suspension (N.J.S.A. 2C:40-26)” (rev. 8/18/25).

Here, as the trial judge properly recognized, in viewing the State’s evidence in its entirety and giving the State the benefit of all its favorable testimony and evidence, as well as all of the favorable inferences which could reasonably be drawn from that evidence, it is clear that a reasonable jury could have found that defendant knew that his driver’s license was suspended on February 14, 2018. The State presented a redacted version of the certified complete motor vehicle abstract of defendant’s driver history that documented both the court’s adjudication of

defendant's prior violations, as well as the resulting term of suspensions of his license. Not only did that evidence and testimony support the inference that defendant had notice from having endured the court procedure resulting in the adjudication, but also, that defendant received the subsequent confirmation of suspension notices mailed to his last known address, as recorded on his license. The fact that the MVC analyst with forty years of experience testified that that was how things were routinely and effectively handled was part of the tapestry of facts from which the jury could credit that defendant received notice of the ten-year suspension, as he had of all of the other suspensions he incurred. Indeed, the very fact that defendant made it to the Superior Court in response to Officer LaSassa's mailing of the instant traffic citations to defendant's last known address, was further support of a fair inference that defendant received notices sent in that manner in the past. Finally, the fact that the defendant could not produce his driver's license at the time he was driving the vehicle was further factual support which the jury could use to conclude that it had been seized due to the suspension, thus supporting an inference of knowledge.

Contrary to defendant's claim on appeal, there is no magic formula in New Jersey's statutory scheme as to the type of proof required to satisfy the "knowing" element of N.J.S.A. 2C:40-26, as evidenced by the model jury charge's general definition of "knowing." For precisely this reason, defendant's reliance on

Colorado’s statutory scheme is inapposite. (Db16). The Colorado Court of Appeals expressly recognized the difference between states that even allow for a strict liability scheme, as opposed to Colorado’s statutory requirement of “subjective awareness.” See People v. Boulden, 381 P.3d 454, 456 (Colo. App. 2016). Nevertheless, even in Boulden, that court acknowledged that having a previous record of “convictions of multiple traffic offenses ([such that] he would necessarily have known of those convictions)” could contribute to a sufficient finding of knowledge. Id. at 457 (distinguishing People v. Espinoza, 195 P.3d 1122, 1128 (Colo. App. 2008) (recognizing that driving record is relevant to establish knowledge of status as a habitual traffic offender). Certainly in the instant case, defendant’s lengthy record of court adjudications would similarly satisfy permissible inferences, even under Colorado’s statutory scheme. Indeed, the instant offense was not the first operating while suspended violation that defendant sustained during the very 10-year suspension period at issue here.

Accordingly, the trial judge properly denied defendant’s motion for a judgment of acquittal.

**POINT II**

**THERE WAS NO ERROR, LET ALONE PLAIN ERROR, IN REDACTIONS MADE BY AGREEMENT TO OMIT PRIOR BAD ACTS FROM DEFENDANT’S “CERTIFIED COMPLETE” DRIVER’S HISTORY ABSTRACT, ACCOMPANIED BY REPEATED PROPHYLACTIC JURY INSTRUCTIONS (S-6A in Evidence; Da21-28). [Not Raised Below.]**

For the first time on appeal, defendant argues that the redactions to defendant’s “Certified Complete” driver’s history abstract, which defense counsel affirmatively sought and agreed to, constituted plain error—not for what it left in, but apparently for prior bad acts it omitted. (Db21-24). Defendant newly maintains that including five fully-redacted pages somehow translated to forty-three “entries” that jurors could impermissibly speculate were omitted prior traffic violations. (Db21-24). Defendant’s claim lacks merit. The removal of prior bad acts cannot constitute the admission of prior bad acts, particularly where the jury was properly instructed not to speculate about redactions and cautioned against using prior motor vehicle violations as evidence or propensity. Defendant’s belatedly pure speculation that any such redactions unduly prejudiced defendant at trial should be rejected.

When reviewing a trial court’s decision to exclude or admit evidence pursuant to N.J.R.E. 404(b), this Court employs an abuse of discretion standard. State v. Rose, 206 N.J. 141, 157-58 (2001) (citing State v. Barden, 195 N.J. 375, 391 (2008)). “However, if the party appealing did not make [an] objection to admission known to the trial court, the reviewing court will review for plain error, only reversing if the

error is ‘clearly capable of producing an unjust result.’” Id. at 518 (quoting R. 2:10-2). In weighing the effect of improperly admitted evidence, the reviewing court may assess “if the State’s case is particularly strong.” State v. R.K., 220 N.J. 444, 456 (2015); see also State v. Chapland, 187 N.J. 275, 289 (2006) (“any finding of plain error depends on an evaluation of the overall strength of the State’s case”). The mere possibility that evidence could be prejudicial does not justify its exclusion. N.J.R.E. 403; State v. Wakefield, 190 N.J. 397, 428 (2007).

Where, as here, there was not only a lack of objection below, but also, affirmative acquiescence, the newly minted argument on appeal is reviewed under the invited error doctrine. Under that doctrine ““trial errors that “were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal....”” State v. Munafo, 222 N.J. Super. 480, 487 (2015) (quoting State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987))). It is well-settled that “[a] defendant cannot request the trial court to take a course of action, and upon adoption by the court take his chance on the outcome of the trial, and, if unfavorable, then condemn the very procedure which he urged, claiming it to be error and prejudicial.” State v. Sykes, 93 N.J. Super. 90, 95 (App. Div. 1966) (citing State v. Pontery, 19 N.J. 457, 471 (1955)); State v. Williams, 219 N.J. 89, 101 (2014). The doctrine of invited error “is designed to prevent defendants from manipulating the system.” State v. Jenkins, 178 N.J. 347,

359 (2004). When considering whether an invited error requires reversal, courts engage in “a close, balancing examination of the nature of the error, its impact on the...jury’s verdict, and the quality of defendant’s motives and conduct in bringing about the error.” State v. Harper, 128 N.J. Super. 270, 278 (App. Div. 1974).

But to the extent the *redaction* of prior bad acts could somehow constitute *admission*, N.J.R.E. 404(b), Other Crimes, Wrongs, or Acts, states:

Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

This Rule “seeks to strike a balance between the prejudice to a defendant that is inherent in other-crimes evidence and the recognition that the evidence may be highly relevant to prove a defendant's guilt of the crime charged.” Barden, 195 N.J. at 388. “Thus, evidence of uncharged misconduct would be inadmissible if offered solely to prove the defendant's criminal disposition, but if that misconduct evidence is material to a non-propensity purpose such as those listed in Rule 404(b), it may be admissible if its probative value is not outweighed by the risk of prejudice.” Rose, 206 N.J. at 159; see also State v. Cofield, 127 N.J. 328, 336 (1992). If evidence is admitted pursuant to N.J.R.E. 404(b), then the court must give a limiting instruction

specifically directing the jury on the limited use of the evidence. State v. Nance, 148 N.J. 376, 391 (1997). Likewise, when inadmissible evidence is admitted in error, a curative instruction may sometimes be a sufficient remedy. State v. Prall, 231 N.J. 567, 586 (2018).

Here, any evidence of uncharged misconduct was expressly omitted, rather than admitted. Indeed, trial counsel strategically sought the very outcome about which defendant now cries foul. As critical evidence of the elements of the offenses with which defendant was charged, the prosecutor sought to admit defendant's "Certified Complete" driver's abstract. (Da21-28; S-6A in Evidence). The prosecutor limited the timeframe to include only the relevant offenses from 2009 to 2016, with additional personal identifiers otherwise redacted from the seven-page document. (2T63-7 to 17; 3T241-11 to 15).

Prior to trial, the prosecutor and defense counsel came to an agreement regarding the final redactions to defendant's "Certified Complete" driver's abstract, with the express understanding that that redacted document would go to the jury. (2T57-7 to 11; 2T63-3 to 64-3; 3T7-6 to 8-15; 3T98-22 to 99-4; 3T104-24 to 105-2; 3T149-18 to 150-17; S-6A in Evidence; Da21-28). Notably, defense counsel successfully used the admission of the redacted driver's abstract to persuade the trial judge not to allow the State to admit an otherwise admissible Judgment of Conviction ("JOC") on defendant's prior 2C:40-26b conviction for impeachment

purposes should defendant have elected to testify at trial. (2T52-14 to 62-22; 3T8-16 to 9-8). Specifically, recognizing that the JOC was relevant to establish an element of the offense, defense counsel argued instead that the redacted driver's abstract was sufficient and fair: "Judge, the state could certainly use [the JOC] to go towards the element...They could certainly use it. Defense's position is that there are other ways that the state could get that element, ways that we have reviewed and redacted, and I think been very fair in terms of our redactions that are...not prejudicial as this is." (2T57-1 to 11). In response, the trial judge credited the defense position as to prejudice, and did not permit the JOC itself to go back with the jurors. (2T62-2 to 22; 3T8-16 to 9-8).

Accommodating and protective of defendant, the trial judge further issued appropriate limiting instructions to the jury, both during the trial as well as in the final charge. After the MVC employee's testimony regarding defendant's "Certified Complete" driver's abstract, the judge first issued the redaction limiting instruction, which she then repeated during the final charge:

"I know you could see some of the documents when the witness was testifying, Mr. Beke. This is an instruction for redacted documents.

You may receive some items of evidence that have been redacted in various ways. There are many reasons why such redactions are required. You should not speculate as to what those redactions entail or why they were made. The document as it currently appears is the only evidence for your consideration."

[3T122-20 to 21; 3T125-18 to 126-2; 3T186-11 to 17.]

The trial judge further properly issued limiting instructions restricting how the jury could use any evidence of defendant's prior motor vehicle infractions. (3T190-17 to 191-4; 3T194-8 to 195-6). The judge admonished the jury, "You may not use this evidence to decide that the defendant has a tendency to commit crimes o[r] that he is a bad person. That is, you may not decide that just because the defendant has committed prior motor vehicle violations he must be guilty of the present crime." (3T190-19 to 24). Juries are presumed to understand and follow the court's instructions. State v. Vega-Larregui, 246 N.J. 94, 126 (2021); State v. Smith, 167 N.J. 158, 212 (2001); State v. Feaster, 156 N.J. 1, 65 (1998) ("We will presume that the jury adhered to the court's instruction."), cert. denied, 532 U.S. 932 (2001).

Here, there was no error much less plain error in the redactions, but even if there were, it was invited error and therefore also not a basis for reversal. At the outset, put simply, the *removal* of prior bad acts cannot constitute the *admission* of prior bad acts. Rule 404(b) is wholly inapplicable as no prior bad acts were admitted, thanks to the very careful redactions belatedly at issue.

Rather, defendant merely speculates that the blacked-out portions of the abstract could have operated like a phantom limb, reverberating with bad acts that simply are not there. There are several problems with this logic, beginning with the idea that it is pure speculation, which cannot form the basis for plain error in which the defendant must prove something had a clear capacity to produce an unjust result.

Defendant challenges the “five extra pages” of blacked-out content in the abstract, surmising that jurors could import as many as “43 entries” of driving infractions never discussed at trial. Of course, as part of the State’s burden, the “Certified Complete” abstract was necessary to present, so omitting whole pages from the abstract would have prejudiced the State in its proofs.

But also, as true with any redaction, because the lines are fully blacked-out there is no way to know what content was omitted. If the speculation is that jurors may have been impermissibly reading into it, then they just as well may have read the blacked-out content to have been benign additional personal identifiers, such as addresses, phone numbers, age, date of birth, social security numbers, driver’s license numbers, etc. Indeed, the fact that basically one violation appears per page in the first three pages of the abstract, including redactions made in between visible lines regarding the same violation, one would likely think that is how the entire abstract proceeds, and may well just present with related but irrelevant and/or boilerplate content regarding only the three visible violations. Particularly as Mr. Beke discussed at trial that each entry reflected the tripartite of violation, court order, and confirmation of suspension, these entries obviously did not constitute just one line per violation, so any speculation as to one line equals one violation is patently flawed.

Moreover, the trial itself centered on a very specific period of suspension. Indeed, defendant never challenged the fact that his license was suspended on the day of operation. Rather, he largely challenged the State's proof that defendant had notice of the suspension. In that regard, speculation about omitted portions of the driver's abstract was even less compelling.

But of course the pointed jury instructions would have quelled any concern about jury speculation as to the redactions, as the jury was twice admonished not to do so. The jury further was instructed not to consider prior motor vehicle infractions as evidence of propensity to commit crime, addressing the very concern defendant now belatedly raises.

Finally, the record is clear that the agreement to redact the defendant's abstract was mutual and beneficial to defendant. In defense counsel's own words, the redactions were "very fair." (2T57-1 to 11). Moreover, defense counsel strategically and successfully traded upon the redaction agreement in order to seek exclusion of the JOC in the Sands ruling. (2T57-1 to 11). Accordingly, there was no error much less plain error, but even if there were error, it was unavailing as invited on this point of mutual agreement. Defendant received a fair trial.

**POINT III**

**AS THE LACK OF OBJECTION BELOW INDICATES, THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION IN REQUIRING THE DELIBERATING JURY TO AGREE ON THE PORTION OF TESTIMONY TO BE READ BACK AFTER IT POSED AN OVERLY-BROAD REQUEST, AND NEVERTHELESS ANY ERROR WAS HARMLESS (3T214-21 to 215-21). [Not Raised Below.]**

For the first time on appeal, defendant claims that the trial judge’s response to a blanket request by the deliberating jury for “Court transcripts” constituted plain error, when the judge required the jury to agree unanimously on the portion of testimony it wanted read back. (Db25-28). Without support, defendant maintains that the instruction was improper, and speculates that it had a clear capacity to produce an unjust result. (Db25-28). The State respectfully submits that defendant’s claim is specious. As the lack of objection below indicates, a trial judge retains broad discretion to instruct the jury that they must agree on the specific testimony to be re-read, particularly where, as here, the jury’s request was overly broad and vague in simply seeking “court transcripts.” (3T214-20 to 21; C-6). Nevertheless, the clearly unanimous verdict based upon overwhelming evidence of guilt obviates any concern that the isolated instruction caused an unjust result.

“The jury holds a high and esteemed place in our system of justice, and the greatest deference is rightly afforded to a jury verdict.” State v. Lodzinski, 249 N.J. 116, 157 (2021) (citation omitted). Where a defendant does not object to a jury

instruction, that instruction is reviewed on appeal for plain error. State v. Cole, 229 N.J. 430, 455 (2017); R. 1:7-2. Importantly, where a defendant does not object to the charge, “there is a presumption that the charge was not error and was unlikely to prejudice the defendant’s case.” State v. Montalvo, 229 N.J. 300, 320 (2017) (quoting State v. Singleton, 211 N.J. 157, 182 (2012)). In the jury charge context, any alleged error must be reviewed in the context of the entire charge. State v. Chapland, 187 N.J. 275, 289 (2006) (citation omitted); see also State v. Gartland, 149 N.J. 456, 473 (1997) (“[P]ortions of a charge alleged to be erroneous cannot be dealt with in isolation but the charge should be examined as a whole to determine its overall effect.”) (quoting State v. Wilbely, 63 N.J. 420, 422 (1973)). Any alleged error must also be evaluated in light of “the overall strength of the State’s case.” Chapland, 187 N.J. at 290.

“To warrant reversal, the unchallenged error must have been ‘clearly capable of producing an unjust result.’” State v. Alexander, 233 N.J. 132, 142 (2018) (quoting R. 2:10-2). “The mere possibility of an unjust result is not enough.” State v. Funderburg, 225 N.J. 66, 79 (2016). Instead, “[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.” Alexander, 233 N.J. at 142 (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

Our courts have long recognized that trial judges have broad discretion as to whether and how to conduct read-backs and playbacks. See State v. Miller, 205 N.J. 109, 122 (2011); State v. Wilson, 165 N.J. 657, 660 (2000); State v. Wolf, 44 N.J. 176, 185 (1965). In particular, trial judges retain discretionary authority to try to narrow a jury's request if it calls for the playback of extensive testimony. Miller, 205 N.J. at 122. For instance, when a deliberating jury asked to ““see the testimony of officers”” in a sound-recorded trial and the trial judge's response of “no” was technically correct, this Court reversed, advising that “further questioning by the judge surely would have helped to isolate the specific area of the jury's concern and the particular question it had on the testimony it wanted to hear again.” State v. Middleton, 299 N.J. Super. 22, 29, 31 (App. Div. 1997).

In this case, the trial judge instructed the jury during the final charge: “If during your deliberations you have a question, or feel that you need further assistance or instructions from me, or wish to have certain testimony read or played back, or a video or audio exhibit played back, write your question or request on a sheet of paper and give it to the sheriff's officer who will be standing at the jury room door, who in turn will give it to me.” (3T198-6 to 13). Forty-eight minutes after the jury was discharged to deliberate, the judge reassembled the parties and the jury, to respond to the jury's question: “Can we have Court transcripts?” (3T213-12 to 214-21; C-6).

The judge responded to the jury:

“There isn’t a Court transcript, so what you are allowed to do, and what we may do for you, is we can replay portions of the testimony for you, okay? In order for me to do that, we don’t replay the whole trial. So what I need is that unanimously that you all go back into the jury room, and you’re going to send me out another note of what portions of the testimony you would like to have replayed, okay? So it would be best if you told me which witness and what portions.

And I need it to be something that’s unanimous, that you all agree that that’s the portions you need. And we can’t replay—we don’t—we don’t—we would prefer not to replay a two-hour trial, or two-and-a-half hour trial. So you know, when I say portions, you know, you can – you can limit it by subject matter or time or whatever, whatever you have that can tell me so I can identify in the Court’s record what it is that you’re looking for, okay?

So you’re going to go back into the jury room. Send me out another note through the jury officer, and then we will determine where we go from here, okay?”

[3T214-21 to 215-18.]

The trial judge then expressly asked counsel, “Counsel, anything for the record?” Defense counsel responded, “No, Your Honor.” (3T215-19 to 21). The judge replied, “Soon as I have their note I’ll come back out.” (3T215-24 to 25). Forty-five minutes later, the jury instead returned with a unanimous verdict. (3T216-3 to 219-25).

Contrary to defendant’s belated claim of error, nothing in New Jersey law precludes the judge’s response in this case, as the law recognizes a trial judge’s broad discretion in this area, and indeed, an obligation of the judge to clarify exactly what

help a jury may be seeking. Initially, in the final charge, the judge made it clear to the jury that the court was receptive to requests for help, and that testimony could be read or played back. Importantly, it was only after the jury made an overly broad request for all of the trial transcripts that the judge needed to exercise her broad discretion to clarify with the jury a single, clear request. As the lack of objection evidenced, it was a reasonable exercise of discretion under the circumstances to ask the jury to come to a consensus.

Moreover, viewing the instructions as a whole, as required, the instructions were compatible with offering assistance. From the totality of the instructions, it was clear that the judge was receptive to requests for a read-back, and willing to accommodate the jury's needs. Consistent with the Model Jury Charge (Final Charge), the judge initially properly instructed the jury of its willingness to accommodate a request if they "wish to have certain testimony read or played back, or a video or audio exhibit played back...." (3T198-8 to 9); Model Jury Charge (Criminal), "Criminal Final Charge, Jury Questions" (rev. 9/1/2022). But after the jury failed to adhere to the instruction of seeking "certain testimony," the trial judge was well within her discretion to try to clarify and focus on what the jury specifically wanted. This was consistent with the Miller Court's guidelines that trial judges retain discretionary authority to try to narrow and specify a jury's request if it calls for the playback of extensive testimony. Miller, 205 N.J. at 122-23.

Defendant's reliance on dictum and inference from two cases from California and North Carolina is misplaced, and not on all fours. (Db26-27). Neither case was dealing with a judge who was following up on a jury's overly-broad request, and California case law in this area is partially controlled by statute which is inapposite here. See Cal. Penal Code § 1138 (Information for jury after retirement). Of course, even the California Supreme Court recognized that providing readbacks are not without limitation. The full statement cited by defendant in his brief includes, "Although any juror may request a readback of testimony (§ 1138), a request may not be used solely to vex or annoy the other jurors or to delay the proceedings." People v. Burgener, 62 P.3d 1, 35, 29 Cal. 4th 833, 880 (2003); (Db27).

Finally, even if the judge's later instruction seeking a collective request from the jury was error, it was harmless given the overwhelming evidence of guilt. Defendant's admittedly mere speculation as to why the jury returned with a unanimous verdict rather than a specified readback request is not sufficient to rise to the level of causing an unjust result. (Db27-28).

Viewing the instructions as a whole, the lack of objection, and in light of the overwhelming evidence of defendant's guilt, any error in the isolated instruction was not clearly capable of producing an unjust result. Defendant received a fair trial.

**POINT IV**

**THE STATE ACKNOWLEDGES THAT TWO OF THE TRAFFIC TICKETS SHOULD HAVE MERGED WITH THE INDICTABLE OFFENSES BUT MAINTAINS THAT THE MANDATORY PENALTIES SHOULD SURVIVE WITHOUT AFFECTING THE AGGREGATE CONCURRENT TERM OF DEFENDANT’S SENTENCE. [Not Raised Below.]**

For the first time on appeal, defendant maintains that the traffic violations for driving while suspended based on a second DWI violation (N.J.S.A. 39:3-40) and driving without a valid license (N.J.S.A. 39:3-10) should have merged with the fourth-degree convictions for driving while suspended for the second time during his license suspension for driving while intoxicated (“DWI”) (N.J.S.A. 2C:40-26a), and for driving while his license was suspended for his second DWI (N.J.S.A. 2C:40-26b). (Db29-31). Specifically, defendant relies upon the notion that the traffic violations should merge as they are lesser-included offenses of the fourth-degree convictions. (Db29-31). The State agrees that the tickets should have merged with the criminal convictions, but the State clarifies that it is not because they are lesser-included offenses; nevertheless, the mandatory traffic violation penalties should survive even though merger will not affect the aggregate term of defendant’s sentence.

As the New Jersey Supreme Court has observed, merger is based on the principle that “an accused [who] has committed only one offense...cannot be punished as if for two.” State v. Davis, 68 N.J. 69, 77 (1975). However, our courts

have rejected “technisms and inflexibility” when resolving merger issues. State v. Cole, 120 N.J. 321, 326 (1990); Davis, 68 N.J. at 81. Instead, in ensuring that defendants are not punished twice for the same conduct, courts focus their flexible inquiry on the specific facts of each case, and the “episodic fragments of the events.” State v. Truglia, 97 N.J. 513, 521 (1984); State v. Miller, 108 N.J. 112, 116-17 (1987). Of course, this Court has defined “same conduct” as meaning “identical conduct,” recognizing that a defendant should not be rewarded just by virtue of proximity in time or place of the crimes. State v. Fraction, 206 N.J. Super. 532, 536-39 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986).

Merger can be statutorily prescribed for criminal code offenses. N.J.S.A. 2C:1-8(a)(1) provides that merger is required where one offense is included as defined in subsection d. However, contrary to defendant’s position on appeal, Title 39 violations ““fall within the generic category of petty offenses that do not fit within the Code’s definition of a lesser-included criminal offense.”” State v. Frank, 445 N.J. Super. 98, 108 (App. Div. 2018) (quoting State v. Stanton, 176 N.J. 75, 98 (2003), cert. denied, 540 U.S. 903 (2003)). Thus, N.J.S.A. 2C:1-8 does not apply to motor vehicle violations, only criminal offenses. Frank, 445 N.J. Super. at 108 (citing Stanton, 176 N.J. at 99).

And while a motor vehicle violation may be consolidated for trial with indicted offenses, it is “not because they are lesser-included criminal offenses of the

crimes charged in the indictment, but because our jurisprudence and Rule 3:15-3(a)(1)<sup>3</sup> require consolidation of even Title 39 offenses to avoid double jeopardy problems.” Stanton, 176 N.J. at 100-01 (citations omitted). So where there is consolidation, it is appropriate to merge the conviction of an offense and motor vehicle violation only where their elements and the evidence presented to establish these elements correspond. Frank, 445 N.J. Super. at 108 (citing State v. Mara, 253 N.J. Super. 204, 214 (App. Div. 1992) (no merger of the criminal offense of aggravated assault and driving while intoxicated (DWI) violation because intoxication was not an element of the assault)).

Finally, even where merger is determined to be appropriate, mandatory penalties attached to a merged violation survive merger, even if the elements of the merged violation are completely encompassed in the surviving violation. Frank, 445 N.J. Super. at 109 (citing State v. Reiner, 180 N.J. 307, 319-20 (2004) (holding that DWI violation merges into DWI-school zone violation, but enhanced penalties for the former, in case of second offender, survive merger)); see also State v. Faison, 452 N.J. Super. 390, 396 (App. Div. 2017) (in the absence of a sentencing transcript, “assum[ing] the judge merged the N.J.S.A. 39:3-40 conviction into the N.J.S.A.

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<sup>3</sup> Rule 3:15-3(a)(1) provides, in pertinent part, “the court shall join any pending non-indictable complaint for trial with a criminal offense based on the same conduct or arising from the same episode.”

2C:40-26(b) conviction”); State v. Baumann, 340 N.J. Super. 553, 557 (App. Div. 2001) (finding that the Title 39 DWI mandatory penalties must survive merger).

Here, the State acknowledges that merger is appropriate since the two tickets at issue arose from the same criminal episode as the fourth-degree criminal charges, and the elements and evidence presented correspond. However, the mandatory penalties attached to a merged violation should survive merger. In particular, the penalties levied based on N.J.S.A. 39:3-40(c) and (d), including a \$1,000 fine, six-month driver’s license suspension, and concurrent ten days of jail, and on defendant’s N.J.S.A. 39:3-10 violation, including a \$250 fine, should survive any merger. (4T34-8 to 15; Da17-18).

Nevertheless, the State maintains that defendant’s aggregate term should not change, as all of the sentences were imposed concurrently to one another, and the remaining N.J.S.A. 39:4-77 ticket violation remains unchallenged.

CONCLUSION

For the reasons expressed, the State respectfully requests that this Court affirm defendant's conviction, and sentence other than regarding merger as noted in Point IV.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0045-24T1  
Ind. No. 23-07-01607

**REPLY BRIEF FOR DEFENDANT-APPELLANT**

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Respondent,	:	On Appeal from an Order of the Superior Court of New Jersey, Law Division, Atlantic County
v.	:	
THOMAS J. FOX,	:	Sat Below:
Defendant-Appellant.	:	Hon. Dorothy M. Incarvito-Garbrant, J.S.C.

DEFENDANT IS NOT CONFINED

Your Honors: Pursuant to R. 2:6-2(b), this letter is filed in lieu of a formal reply brief on behalf of the defendant-appellant.

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**PROCEDURAL HISTORY AND STATEMENT OF FACTS**

This brief is filed on behalf of defendant-appellant Thomas Fox and in reply to plaintiff-respondent's brief. Defendant relies on the procedural history and statement of facts in his main brief filed on September 30, 2025.

**LEGAL ARGUMENT**

**POINT I**

**THE DRIVING-WHILE-SUSPENDED CONVIC-  
TIONS SHOULD BE DISMISSED BECAUSE  
DOCUMENTS SHOWING ONLY THAT A PRIOR  
COURT HAD SUSPENDED DEFENDANT’S LI-  
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BEEN MAILED TO A REDACTED ADDRESS DID  
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U.S. CONST. AMEND. XIV; N.J. CONST. ART. 1,  
¶ 1. (ruling below at 3T 226-9 to 236-17; 4T 4-12 to  
14-9)**

We reassert and rely upon Point I of our main brief.

**POINT II**

**DEFENDANT SHOULD HAVE A NEW TRIAL ON  
THE FOURTH-DEGREE CHARGES BECAUSE A  
LARGE QUANTITY OF IRRELEVANT PRIOR  
BAD ACTS WERE ADMITTED THROUGH HIS  
DRIVER’S ABSTRACT. U.S. CONST. AMENDS.  
XIV; N.J. CONST. ART. 1, ¶ 1. (not raised below)**

Contrary to the respondent’s contention, defense counsel did not invite the error of allowing the jury to see the five extra pages of Fox’s abstract. In general, the invited error doctrine prevents reversal where a party purposefully urges a course of action upon a trial court, but then complains on appeal about the adoption of that course of action: “The defendant cannot beseech and request the trial court to take a course of action, and . . . then condemn the very

procedure he sought and urged.” State v. Corsaro, 107 N.J. 339, 345 (1987) (quoting State v. Pontery, 19 N.J. 457, 471 (1955)).

Before applying the invited error doctrine, the party’s “motives and conduct in bringing about the error” must be examined. Corsaro, 107 N.J. 346 (quoting State v. Harper, 128 N.J. Super. 270, 278 (App. Div. 1974)). A party that purposefully requests an action thinking “to secure a trial or tactical advantage” has invited the action and will rarely be able to complain on appeal that it was error. Corsaro, 107 N.J. 345 (quoting Harper, 128 N.J. Super. at 277). See also State v. Williams, 219 N.J. 89, 100 (2014) (explaining that the invited error doctrine prevents parties who pursue “a tactical advantage that does not work as planned” from “manipulating the system”). But a party that consents to an erroneous action out of “confusion,” rather than “guile,” has not invited the error and may complain that plain error occurred. Corsaro, 107 N.J. at 347-48. See also State v. Bailey, 231 N.J. 474, 490 (2018) (refusing to apply the invited error doctrine when the party did not engage in “gamesmanship” in requesting the erroneous action).

Here, Fox’s counsel and the prosecutor agreed that irrelevant entries in Fox’s abstract should be redacted before it was admitted. No one proposed or even mentioned the alternative of simply removing the five entirely redacted pages. (2T 63-3 to 67-22; 3T 5-24 to 8-15) Considering the circumstances,

Fox's counsel was obviously not seeking any tactical advantage in failing to protest the admission of the five redacted pages. Indeed, it is fanciful to suggest that counsel in any sense wanted the five pages admitted: to the contrary, counsel was obviously trying to prevent the information in those five pages -- which involved copious uncharged and irrelevant offenses -- from reaching the jury. Counsel simply overlooked that removing the five pages was the only course of action that would have effectively prevented the jury from realizing that Fox had a long history of prior offenses.

In short, Fox's counsel acted inadvertently and out of confusion -- not out of guile or gamesmanship -- in failing to protest the admission of the five extra redacted pages. The invited error doctrine has no place here. What occurred was a plain error that should lead to reversal.

### **POINT III**

**DEFENDANT SHOULD HAVE A NEW TRIAL ON THE FOURTH-DEGREE CHARGES BECAUSE THE COURT IMPROPERLY INSTRUCTED THE DELIBERATING JURORS THAT THEY HAD TO BE UNANIMOUS IN REQUESTING A PLAY-BACK. U.S. CONST. AMENDS. XIV; N.J. CONST. ART. 1, ¶ 1. (not raised below)**

We reassert and rely upon Point III of our main brief.

**POINT IV**

**DEFENDANT’S ILLEGAL SENTENCE SHOULD BE CORRECTED BY MERGING THE LESSER TRAFFIC VIOLATIONS FOR DRIVING WHILE SUSPENDED AND DRIVING WITHOUT A LICENSE INTO THE GREATER FOURTH-DEGREE CONVICTIONS FOR DRIVING WHILE SUSPENDED. U.S. CONST. AMENDS. V, XIV; N.J. CONST. ART. 1, ¶¶ 1, 11. (not raised below)**

Respondent agrees that the traffic violations for driving while suspended and driving without a license should merge. But respondent observes that mandatory penalties attached to the traffic violations should survive merger. (Respondent’s brief at 31 to 32)

One clarification is necessary. “Mandatory penalties” that survive merger are those that “the court must impose, as a minimum.” See State v. Frank, 445 N.J. Super. 98, 109-10 (App. Div. 2016). The penalty for driving without a license is a “fine not exceeding \$500.” N.J.S.A. 39:3-10u. There is no mandatory minimum fine. Thus, the \$250 fine that the court here imposed for driving without a license should not survive merger. That fine must be vacated.

**CONCLUSION**

For the reasons stated in Point I of Fox’s main brief, the convictions for fourth-degree driving while suspended should be reversed, and judgment of acquittal should be entered on those charges. Alternatively, for the reasons stated in Points II and III of Fox’s main brief and this reply brief, the convictions for fourth-degree driving while suspended should be reversed, and a new trial should occur on those charges. As a final alternative, for the reasons stated in Point IV of Fox’s main brief and this reply brief, the non-mandatory sentences should be vacated on the traffic violations for driving while suspended and driving without a license, and those violations should be merged into the convictions for fourth-degree driving while suspended.

Respectfully submitted,

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Dated: December 23, 2025