

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1966-24
INDICTMENT NO. 23-06-1300-I

STATE OF NEW JERSEY, : CRIMINAL ACTION

Plaintiff-Respondent, v. : On Appeal from a Judgment of
ROBERT D. REED aka : Conviction of the Superior Court
ROBERT REED : of New Jersey, Law Division,
Defendant-Appellant. : Atlantic County.
: Sat Below:
: Hon. Dorothy Incarvito-Garrabrant,
: J.S.C., and a jury.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Robert Reed has a prior conviction from 2009, for which he was sentenced to probation. The conviction was fifteen years old when he stood trial in 2024 for robbery and related offenses. At this 2024 trial, the State and the court both recognized that the 2009 conviction was inadmissible to impeach Reed when he testified. Nevertheless, the court ruled that the 2009 conviction was admissible to impeach Reed's character witnesses if he called any.

This ruling was erroneous for two reasons. First, under Rule 403, the remoteness of the fifteen-year-old conviction, with no intervening convictions, meant that its probative value was negligible and far outweighed by its undue prejudice. Second, the ruling was contradictory and irreconcilable regarding the admissibility of Reed's fifteen-year-old conviction to impeach himself versus his character witnesses. The conviction, which was too remote to bear on his own credibility, was similarly unlikely to have any probative effect on the credibility of his character witnesses.

Reed was prepared to call four character witnesses but he ultimately did not call them. The court's ruling plainly could have impacted that decision. Accordingly, the ruling deprived Reed of the opportunity to present a complete defense, denying him a fair trial and necessitating reversal.

Alternatively, this Court must remand so that Reed's Judgment of Conviction can be corrected to merge several convictions and to reflect that the jury convicted him of second-degree robbery – not first-degree.

PROCEDURAL HISTORY

On June 15, 2023, Atlantic County Indictment No. 23-06-1300-I charged Defendant-Appellant Robert D. Reed with second-degree aggravated assault under N.J.S.A. 2C:12-1(b)(1) (Count One), first-degree robbery under N.J.S.A. 2C:15-1(a)(1) (Count Two), third-degree theft of moveable property under N.J.S.A. 2C:20-3(a) (Count Three), third-degree possession of a weapon for an unlawful purpose under N.J.S.A. 2C:39-4(d) (Count Four), and fourth-degree unlawful possession of a weapon under N.J.S.A. 2C:39-5(d) (Count Five). (Da1-7)¹

Reed was tried before the Honorable Dorothy Incarvito-Garrabrant, J.S.C., and a jury over five days in May 2024. (1T to 5T) On Count One, the

¹ The following abbreviations will be used:

Da – Defendant-Appellant's Appendix

1T – May 13, 2024 (Trial)

2T – May 14, 2024 (Trial)

3T – May 16, 2024 (Trial)

4T – May 20, 2024 (Trial)

5T – May 21, 2024 (Trial)

6T – December 2, 2024 (Sentencing)

7T – January 27, 2025 (Restitution Hearing)

Psr – Defendant-Appellant's Presentence Report

jury found Reed not guilty of second-degree aggravated assault but guilty of the lesser-included offense of third-degree aggravated assault. (Da8-9) On Count Two, the jury found Reed not guilty of first-degree robbery but guilty of second-degree robbery. (Da11) The jury found Reed guilty of Counts Three, Four, and Five as charged. (Da12-14)

On December 2, 2024, the Honorable Jeffrey R. Wilson, J.S.C., sentenced Reed to recovery court. (Da15; 6T:24-9 to 29-6) Judge Wilson sentenced Reed to an alternative sentence of nine years of incarceration, subject to the No Early Release Act (NERA). Ibid. On January 27, 2025, the court held a restitution hearing where it imposed \$2,500 in restitution. (7T:22-14 to 15)

Reed filed a timely notice of appeal on March 7, 2025. (Da19-21)

STATEMENT OF FACTS

On March 3, 2023, Robert Reed and Dilip Hayban each visited the Hard Rock Hotel & Casino in Atlantic City to gamble. (3T:16-9 to 25; 4T:41-1 to 43-13) At some point in the evening, the two men got to talking, and engaged in friendly conversation on and off throughout the night. (3T:23-6 to 10, 30-2 to 5, 86-3 to 9; 4T:43-23 to 45-9) Around 9:00 p.m., Hayban won a poker jackpot worth \$20,000. (2T:244-18 to 246-2; 3T:18-22 to 19-16) Later that night, Hayban went to sleep in a comped room alone, and Reed remained downstairs. (3T:17-6 to 12, 34-16 to 35-

10; 4T:54-23 to 55-6) The next morning, March 4, 2023, the two men engaged in some more friendly conversation. (3T:35-21 to 36-4; 4T:45-13 to 46-10) Hayban bought them both breakfast, it was agreed that Hayban would give Reed a ride to the train station, and the two walked to the parking lot together. (3T:35-25 to 36-4, 41-2 to 42-17; 4T:45-22 to 47-7)

Reed and Hayban have different recollections of many of the details of these interactions. Reed testified that the two first met around 5:00 p.m. the evening of March 3. (4T:43-14 to 44-6) Hayban testified that they did not meet until after Hayban had won his jackpot, hours later. (3T:21-8 to 22) Reed testified that he was not with Hayban when he won his jackpot, but Hayban testified that Reed was less than four feet away. (3T:19-17 to 20-23; 4T:56-16 to 20) Reed testified that Hayban offered him a ride to the train station; Hayban insisted that it was Reed who requested the ride. (3T:35-25 to 36-4; 4T:45-22 to 47-7)

Most importantly, Reed and Hayban have different recollections of what happened once the two arrived in the lot where Hayban's car was parked.

Reed testified that, when they reached Hayban's car, Hayban grabbed Reed's penis and asked to perform oral sex on him. (4T:39-2 to 10, 50-19 to 25) In reaction, Reed hit Hayban with his fist, and a fight erupted. (4T:39-2 to 3, 40-11 to 12, 71-10 to 15) Reed testified that he reacted so strongly because

he had been sexually abused as a child when he was in foster care. (4T:50-22 to 51-14) In the skirmish, a wine bottle fell out of Reed's jacket pocket and broke open. (4T:82-20 to 83-6) As the two fought, Hayban hit the ground; Reed saw blood, got scared, and ran. (4T:40-12 to 14) Reed testified that he did not go through Hayban's pockets or personal belongings; he simply ran. (4T:36-15 to 39-1, 40-12 to 19)

Hayban told the jury a completely different version of events. According to Hayban, when they reached his car, Reed hit Hayban on the head with the wine bottle, Hayban fell to the ground, Reed went through his pockets, and then Reed ran. (3T:51-17 to 52-7, 58-17 to 59-4) Hayban testified that he lost \$10,000, two credit cards, his driver's license, and his casino "comp card."² (3T:59-5 to 8, 61-2 to 3) None of these items were ever recovered.

When officers arrived, they found what appeared to be both wine and blood on the ground, as well as the top part of a wine bottle. (2T:86-21 to 89-4)

Hayban was eventually taken to AtlantiCare Regional Medical Center ("AtlantiCare") to receive medical treatment. (2T:62-15 to 20) He had three

² Before trial, Hayban reported that a room key and his wallet were also stolen, but walked that back at trial. (2T:62-6 to 11, 145-20 to 23, 147-24 to 148-2; 3T:106-14 to 16; 4T:28-10 to 12) Hayban may also have reported at one point that only \$7,000 had been stolen. (4T:28-10 to 12)

cuts on his head – two were treated with medical staples and one was treated with medical glue. (2T:174-3 to 176-3) Hayban was alert, oriented, and conscious while he was being treated, and he was not admitted to the hospital. (2T:178-13 to 179-3, 192-2 to 20)

LEGAL ARGUMENT

POINT I

REED WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE COURT ERRONEOUSLY RULED THAT HIS PRIOR CONVICTION WAS ADMISSIBLE, NOT TO IMPEACH REED’S OWN TESTIMONY, BUT TO IMPEACH HIS CHARACTER WITNESSES. (3T:122-3 to 126-15)

Reed had one prior indictable conviction, and it was fifteen years old at the time of trial.³ (Psr6) The State conceded – and the court agreed – that this conviction was inadmissible to impeach Reed when he testified. (3T:116-5 to 7, 123-22 to 25, 125-24 to 126-7) Nevertheless, the court erroneously ruled that this prior conviction was admissible to impeach Reed’s character witnesses if any were called. (3T:124-1 to 125-23) This ruling was erroneous

³ The prosecutor proffered – and Reed’s Presentence Report reflects – that Reed may have also had three Maryland convictions in the 1990s. (Psr5-6; 3T:115-23, 122-8 to 14) But the prosecutor never provided the court any official documentation of these convictions. (Psr5-6; 3T:116-19 to 24) For that reason, the court ruled that the Maryland convictions were inadmissible for any purpose. (3T:123-19 to 21)

for two reasons: (1) its Rule 403 analysis was faulty, and (2) it came to contradictory and irreconcilable conclusions regarding the admissibility of the conviction to impeach Reed and his character witnesses. Reed was prepared to call four character witnesses but he ultimately did not call them. (Da23; 3T:124-2 to 3) The court’s ruling plainly could have impacted Reed’s decision whether to call those character witnesses. Accordingly, the ruling deprived Reed of the opportunity to present a complete defense, denying Reed a fair trial and necessitating reversal. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. Reed’s Fifteen-Year-Old Conviction Was Inadmissible under Rule 403 Because It Was Too Remote.

Under Rule 403, relevant evidence can be excluded by the court if “its probative value is substantially outweighed by the risk of . . . [u]ndue prejudice.” N.J.R.E. 403. A trial court’s Rule 403 ruling is generally reviewed under the abuse-of-discretion standard. State v. Cole, 229 N.J. 430, 449, 453 (2017); cf. State v. Higgs, 253 N.J. 333, 367 (2023) (applying abuse-of-discretion standard in reviewing the admission of a prior conviction). Nevertheless, this Court “do[es] not defer to a ruling that is based on a mistaken interpretation of an evidence rule, or that misapplies the rule.” State v. R.J.M., 453 N.J. Super. 261, 266 (App. Div. 2018).

Here, Reed’s prior conviction was inadmissible under Rule 403 because it was fifteen years old, and therefore too remote in time. See Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 3 on N.J.R.E. 403 (2025) (“In evaluating whether or not particular evidence has sufficient probative value to survive a N.J.R.E. 403 challenge, the ‘remoteness’ of the evidence is often discussed.”). When a defendant’s prior conviction is too remote in time, the court can bar a prosecutor from using it to impeach the defendant’s character witnesses. Michelson v. United States, 335 U.S. 469, 484 (1948) (“Events a generation old are likely to be lived down and dropped from the present thought and talk of the community and to be absent from the knowledge of younger or more recent acquaintances. The court in its discretion may well exclude inquiry about rumors of an event so remote[.]”).

This basic principle – that remoteness of a defendant’s prior conviction impacts its admissibility to impeach character witnesses – is recognized across the country. See, e.g., Nuchols v. Com., 226 S.W.2d 796, 799 (Ky. 1950) (reversing where character witnesses were impeached regarding the defendant’s ten-year-old conviction because the conviction was too remote); People v. Whitfield, 388 N.W.2d 206, 213-14 (Mich. 1986) (“[A]mong the factors the trial court should consider [is] . . . the temporal relationship between the misconduct in question and the offense charged.”); State v.

Carroll, 188 S.W.2d 22, 24 (Mo. 1945) (“In ordinary circumstances it is improper to cross-examine such a [character] witness as to remote or ancient charges . . . particularly when the defendant’s evidence of good reputation has been confined to a time reasonably coterminous with the offense for which he is on trial.”); State v. Heine, 544 P.2d 1212, 1214 (Mont. 1976) (observing that where a character witnesses was impeached with the defendant’s twenty-five year-old conviction, “the potential for prejudice becomes great unless some mitigating factors are shown to exist.”); State v. Ewing, 638 P.2d 1080, 1083 (N.M. 1982) (“The trial court in its discretion may exclude inquiry [of character witnesses regarding the defendant’s] convictions such as these that are so remote, unless recent misconduct causes a revival.”); Com. v. Farrior, 458 A.2d 1356, 1361 (Pa. Super. 1983) (precluding cross-examination of character witnesses regarding nineteen-year-old conviction because the witnesses had known the defendant “for substantially shorter periods of time” and therefore “the impeachment value of the questions . . . would be negligible and would be overwhelmingly outweighed by their prejudicial effect”); State v. Jackson, 383 S.E.2d 79, 82 (W. Va. 1989) (holding character witness testimony “was improper because it involved [defendant’s criminal activity] too remote from the crimes charged”); United States v. Lundy, 416 F. Supp. 2d 325, 337 (E.D. Pa. 2005) (recognizing that, under Federal Rule of Evidence

403, “courts may find questions with regard to remote conduct to be overly prejudicial,” and holding that a character witness could not be asked about the defendant’s twenty-year-old conviction); United States v. Tagliaferro, 530 F. Supp. 3d 295, 298-99 (S.D.N.Y. 2021) (precluding impeachment of character witness with the defendant’s twenty-four year-old conviction under Federal Rule of Evidence 403).

Long before New Jersey’s Rule 403 was drafted, this Court established a multi-factor test for when courts consider whether impeachment of character witnesses with a defendant’s prior crimes is permissible; remoteness is one of those factors. See State v. Steensen, 35 N.J. Super. 103, 107-09 (App. Div. 1955). This Court held:

In determining whether to allow the cross-examination, the trial court should conduct a preliminary inquiry out of the presence of the jury and he should satisfy himself:

- (1) that there is no question as to the fact of the subject matter of the rumor, that is, of the previous arrest, conviction, or other pertinent misconduct of the defendant;
- (2) that a reasonable likelihood exists that the previous arrest, conviction or other pertinent misconduct would have been bruited about the neighborhood or community prior to the alleged commission of the offense on trial;
- (3) that neither the event or conduct nor the rumor concerning it occurred at a time too remote from the present offense;

(4) that the earlier event or misconduct and the rumor concerned the specific trait involved in the offense for which the accused is on trial; and

(5) that the examination will be conducted in the proper form, that is: ‘Have you heard,’ etc., not ‘Do you know,’ etc.

[Id. at 109 (emphasis added); see also State v. Hinton, 479 P.2d 910, 917 (Kan. 1971) (adopting Steensen test); State v. Johnson, 389 So. 2d 372, 376 (La. 1980) (same).]

In State v. Campbell, the Law Division applied the Steensen test, as well as N.J. Evid. R. 4, the predecessor to Rule 403,⁴ and concluded that the defendant’s convictions were too remote to be used to impeach the defendant’s character witnesses. 212 N.J. Super. 322, 325-28 (Law. Div. 1986).

The Campbell court reaffirmed that, for a defendant’s prior conviction to be admissible to impeach a character witness, the court must “be satisfied that the conviction . . . was not too remote in time, place, or character.” Id. at 325. The court recognized that “[o]rdinarily, it would be improper to confront a reputation character witness with remote convictions, particularly when [a] defendant’s evidence of a good character has been confined to a time reasonably near the time of the offense for which he is on trial.” Id. at 326. It

⁴ See Supreme Court Committee Comment on N.J.R.E. 403 (1991), reprinted in Biunno, Weissbard, & Zegas, Current N.J. Rules of Evidence 213 (2025) (“Rule 403 contains the principles established by both N.J. Evid. R. 4 and Fed. R. Evid. 403. Although the formulation is closer to the federal rule than the 1967 New Jersey rule, the intention was to retain the principles of N.J. Evid. R. 4 as construed by New Jersey courts.”).

held that “[t]he concept of remoteness with respect to credibility . . . serves a link that connects the Sands^[5] rule limiting cross-examination of a defendant to a similar exclusionary rule respecting a reputation character witness.” Ibid.

With those principles in mind, the court found that the defendant’s twenty-two- and seventeen-year-old convictions “would have negligible bearing” on the character witness’ credibility, because he had only known the defendant for five or six years. Id. at 327. Accordingly, the court “concluded that the convictions were too remote in time to be material on the issue of the witness’ knowledge of defendant’s reputation. Expressed another way, the prejudicial effect of putting defendant’s convictions before the jury far outweighed their probative relevance as to [the character witness’] credibility.” Ibid. (citing N.J. Evid. R. 4).

At Reed’s trial, after the State rested, the court held a Sands/Brunson⁶ hearing. (3T:113-10 to 11, 115-25 to 116-3) At the outset, the State conceded that, if Reed elected to testify, his prior New Jersey conviction was inadmissible to impeach him. (3T:116-5 to 7) The prosecutor stated: “Judge, I know the case law. Your Honor knows the case law, so does [defense counsel].

⁵ State v. Sands, 76 N.J. 127 (1978). Sands only applies to impeachment of a defendant with his own prior convictions, but it similarly emphasizes that, under N.J. Evid. R. 4, “[t]he key to exclusion is remoteness.” Id. at 144.

⁶ State v. Brunson, 132 N.J. 377 (1993).

I don't think it – that it would be permitted in Judge.” (3T:116-8 to 10)

Nevertheless, the prosecutor requested to use a sanitized version of the prior conviction “if character witnesses were to take the stand.” (3T:116-14 to 18)

Defense counsel opposed, on the grounds that the Judgment of Conviction for the old conviction was missing. (3T:120-20 to 121-1) The entirety of the court's Rule 403 analysis on this issue was as follows:

[W]e have the secondary issue, which is the character witnesses which have been posited as – or as proffered to – to be testifying. . . . [I]f the character witnesses, [defense counsel], were to get up and testify that they know the defendant to be law abiding, that opens a door for this because . . . the defense's responsibility is to be candid with the Court. And to ask a question, knowing that there is a conviction or whether or not this person is law abiding, it – it sort of implies . . . you know a fact that would be contradicted by that question. So, I don't know that questioning the witness and saying, “Do you know him to be law abiding,” or having or soliciting that testimony is necessarily candid with this Court, knowing that there is a conviction out there. So . . . if that door is opened, knowing that it is out there, I probably would let [the prosecutor] . . . cross-examine the – the character witness relative to that, in which [the prosecutor] would be able to reference that there was a -- a conviction in 2009 . . . third degree, and the three years of probation. . . . And it – so, it would be 2009, third degree, three years probation for the character witness, [defense counsel], with the caution that I've already given you, that they really can't be asked that question because you know that there is a conviction Okay? So, that's my ruling.

[(3T:124-1 to 125-23)]

The court's Rule 403 analysis was fundamentally flawed. The court failed to apply the Steensen test, and it gave no consideration to any of the five

enumerated factors. See 35 N.J. Super. at 109. Most importantly, the court’s analysis was insufficient because it failed to consider the remoteness of Reed’s 2009 conviction. For his 2009 conviction, Reed was sentenced to probation (Psr6; 3T:126-14) Therefore, when he was tried in 2024, his conviction was fifteen years old. Reed had no intervening convictions over those fifteen years. (Psr6) Because of the remoteness of this conviction, it had “negligible bearing” on the credibility of his character witnesses – some of whom may not have even known Reed for fifteen years. See Campbell, 212 N.J. Super. at 327. Any minimal probative value of the prior conviction, if it existed, was far outweighed by its undue prejudice. See ibid. Accordingly, the court’s ruling that Reed’s prior conviction was admissible under Rule 403 was error.

B. The Court Came to Contradictory and Irreconcilable Conclusions Regarding the Admissibility of Reed’s Prior Conviction to Impeach Himself and His Character Witnesses.

The court’s character-witness ruling was also erroneous because it cannot be reconciled with the fact that Reed’s prior conviction was inadmissible to impeach his own testimony. Reed’s prior conviction was either admissible in both contexts or in neither.

On this point, two cases are instructive: Campbell, 212 N.J. Super. at 324-28, and State v. Abril, 444 N.J. Super. 553 (App. Div. 2016).

In Campbell, the court found that a defendant's two prior convictions were inadmissible to impeach the defendant's own testimony. 212 N.J. at 323-24. Then, when asked to consider whether those same convictions could be introduced to impeach the defendant's character witnesses, the court found that they were also inadmissible in that context. Id. at 327-28. In its analysis, which is discussed in more detail in part A, the court emphasized this crucial point: "Convictions which are too remote to have any bearing on defendant's credibility are unlikely to have any probative effect on the credibility of such a character witness." Id. at 326 (emphases added).

In Abril, the inverse situation occurred. This Court found that a defendant's prior conviction "was not so remote as to be excluded under a Sands analysis," and therefore the defendant could be impeached with that conviction if she testified. 444 N.J. Super. at 562 (emphasis added). Accordingly, it was not error for the trial court to allow character witnesses to be impeached with that same conviction. Id. at 560-62; see also State v. Whittle, 52 N.J. 407, 410-11 (1968) (finding no error where the State cross-examined the defendant's character witnesses regarding the defendant's old conviction, but the defendant also took the stand and was also impeached with the same conviction).

These cases make a simple rule clear: when a prior conviction is not too remote to impeach a defendant, it is not too remote to impeach his character witnesses. But when a prior conviction is too remote to impeach a defendant, it is also too remote to impeach his character witnesses. It is either in, or it is out.

Here, at the close of the Sands/Brunson hearing, the court summarized its ruling as follows:

What that means for you, Mr. Reed, is that, relative to Sands/Brunson, this motion that we had about your prior conviction, that I would – if you choose to testify . . . that I would not allow the State to cross-examine you and put your prior . . . third-degree conviction in front of this jury. [The prosecutor] won't be able to use it. However, should strategically you and your attorney choose to have character witnesses who come in, and they open the door through law abiding or some other way in their description of you, I would then allow [the prosecutor] to put that information before the jury insofar as it's a conviction in 2009, third degree, and you got three years probation.

[(3T:125-24 to 126-14)]

This ruling – admitting Reed's prior conviction to impeach any character witnesses, while acknowledging that the conviction was inadmissible to impeach Reed's own testimony – is inconsistent and erroneous, and it provides no cause to depart from the principles in place in published New Jersey caselaw. Reed's prior conviction, which it was undisputed was "too remote to have any bearing on [his] credibility," was similarly "unlikely to have any probative effect on the credibility of . . . character witness[es]." See Campbell,

212 N.J. Super at 326. The trial court’s inconsistent ruling, admitting Reed’s prior conviction to impeach in one context but not the other, was error.

C. The Court’s Ruling, Which Led to the Exclusion of Reed’s Four Character Witnesses, Was Harmful and Prejudicial.

Reed’s convictions must be reversed, because this error was not harmless. “Rule 2:10-2 directs reviewing courts to disregard ‘[a]ny error or omission . . . unless it is of such a nature as to have been clearly capable of producing an unjust result.’” State v. Scott, 229 N.J. 469, 483-84 (2017).

“Exclusion of testimony, however, which is central to a defendant’s claim or defense, ‘if otherwise admissible, cannot be held to be harmless error.’” Id. at 484 (quoting State v. Kelly, 97 N.J. 178, 202-03 (1984)).

A “defendant enjoys a fundamental constitutional right to a fair trial, which necessarily includes the right to present witnesses and evidence in his own defense.” State v. Jenewicz, 193 N.J. 440, 451 (2008) (citing Washington v. Texas, 388 U.S. 14, 19 (1967)). Moreover, “[t]he law is settled in New Jersey that ‘[e]vidence of good character may be sufficient in itself to raise a doubt as to the guilt of the defendant, and it must be considered along with all the other evidence in the case.’” State v. Bogus, 223 N.J. Super. 409, 430 (App. Div. 1988) (quoting State v. Siciliano, 21 N.J. 249, 260-61 (1956)); see Michelson, 335 U.S. at 476 (“[Character evidence] alone, in some circumstances, may be enough to raise a reasonable doubt of guilt.”). Indeed, a

defendant who presents character evidence is entitled to a jury instruction telling the jurors that evidence of good character can create a reasonable doubt, and that if it does, the defendant is “entitled to an acquittal.” See Model Jury Charge (Criminal), “Testimony of Character Witness” (1992).

“The relevance of evidence of good reputation in the community, or ‘character testimony’ as sometimes it is called, is firmly imbedded in the law, and the wrongful rejection of competent evidence thereof amounts to a deprivation of a substantial element of the defense.” State v. Micci, 46 N.J. Super. 454, 459 (App. Div. 1957). Accordingly, when he was a member of this Court, Chief Justice Hughes wrote that character witness testimony is not simply “a sheer makeweight thrown into the balance to arouse sympathy,” but it is instead, when presented to a jury, “essential” that the jury be advised that such testimony may establish reasonable doubt. Id. at 459-60.

In Micci, the trial court excluded two character witnesses’ testimony. Id. at 458-59. This Court noted that the State’s case “hung on the testimony of two witnesses, countered by strong disaffirmation of guilt by the defendant (whose credibility stood unaffected by proof of any previous conviction of crime).” Id. at 460. In that context, this Court found that the exclusion of both character witnesses was a “manifest wrong and injury” requiring reversal, because it forced “the exclusion of the offered proofs in this substantial element of the

defense.” Id. at 463 (internal quotation omitted). And in State v. Gambutti, a case “where there [we]re but two direct witnesses involved, the complainant and the defendant,” this Court concluded that “reputation evidence may well take on a significance beyond that which a jury might accord to it in the ordinary criminal trial.” 36 N.J. Super. 219, 232 (App. Div. 1955).

Accordingly, this Court found that it was reversible error to strike just one of the defendant’s multiple character witnesses. Ibid.

Before trial, Reed was prepared to call four character witnesses. (Da23; 3T:124-2 to 3) But Reed ultimately called none of these character witnesses. This strategic decision was undoubtedly impacted by the court’s ruling, warning that Reed’s prior conviction was admissible if he called them. Although the jury ultimately never heard about Reed’s prior conviction, Reed “paid a price to keep it out.” State v. P.S., 202 N.J. 232, 260 (2010) (finding harmful error where an evidentiary ruling caused the defendant to change his trial strategy). Much like in Gambutti, there were only two witnesses to the alleged robbery at Reed’s trial: “the complainant and the defendant.” See 36 N.J. Super. at 232. In that context, character witness testimony could have “take[n] on a significance beyond that which a jury might accord to it in the ordinary criminal trial.” Ibid. In a case that rose and fell on the credibility of two diametrically opposed versions of events, the testimony of four character

witnesses regarding Reed’s standing in his community could have been sufficient to raise a reasonable doubt as to his guilt, and it could have changed the jury’s verdict. See Bogus, 223 N.J. Super. at 430; Michelson, 335 U.S. at 476. The court’s de-facto exclusion of all four character witnesses requires reversal, because it forced “the exclusion of the offered proofs in this substantial element of the defense,” depriving Reed of the opportunity to present a complete defense. See Micci, 46 N.J. Super. at 463 (internal quotation omitted). This error was “clearly capable of producing an unjust result,” and Reed’s convictions must therefore be reversed. See R. 2:10-2.

POINT II

COUNTS THREE AND FOUR MUST MERGE WITH COUNT TWO. (Not Raised Below)

The sentencing judge failed to merge Count Three, theft, and Count Four, possession of a weapon for an unlawful purpose, with Count Two, robbery. This Court must correct this error.

“[T]he doctrine of merger is based on the precept that ‘an accused [who] committed only one offense . . . cannot be punished as if for two.’” State v. Herrera, 469 N.J. Super. 559, 565 (App. Div. 2022) (second alteration in original) (quoting State v. Davis, 68 N.J. 69, 77 (1975)). Merger is governed by N.J.S.A. 2C:1-8, which provides that a defendant may not be convicted of

more than one offense if one offense is “included in the other.” Whether one offense is “included in the other” turns on whether that offense “is established by proof of the same or less than all the facts required to establish the commission of the offense charged.” N.J.S.A. 2C:1-8(d)(1). When assessing whether two offenses should merge, the court must engage in:

[an] analysis of the evidence in terms of, among other things, 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.

[State v. Hill, 182 N.J. 532, 543 (2005) (quoting State v. Diaz, 144 N.J. 628, 637-38 (1996)).]

Reed’s theft conviction must merge with his robbery conviction.

“[T]heft, by definition, is a lesser-included offense of robbery.” State v. Ingram, 196 N.J. 23, 39 (2008). “A person is guilty of robbery if, in the course of committing a theft, he . . . [i]nflicts bodily injury or uses force upon another.” N.J.S.A. 2C:15-1(a)(1). The facts, as presented by the State, were that Reed struck Hayban, took several of Hayban’s personal effects, and ran off. The facts establishing that Reed committed a theft are “a necessary ingredient” to his robbery conviction. See Hill, 182 N.J. at 543. Accordingly, Reed’s theft conviction is “included in” his robbery conviction, and the two

must merge. See N.J.S.A. 2C:1-8. Reed’s Judgment of Conviction must be corrected to merge Count Three with Count Two.

Reed’s conviction for possession of a weapon for an unlawful purpose must also merge into his robbery conviction. On this point, Diaz controls. 144 N.J. at 636-42. In Diaz, the defendant was convicted of second-degree passion/provocation manslaughter and second-degree possession of a firearm for an unlawful purpose and sentenced separately for each conviction. Id. at 633-34. The Court emphasized that “[w]hen the only unlawful purpose in possessing [a weapon] is to use it to commit the substantive offense, merger is required.” Id. at 636. Moreover, when a “jury is explicitly instructed that the unlawful purpose was to use the [weapon] against the victim of the substantive offense . . . merger is required[.]” Id. at 641 (citing State v. Williams, 213 N.J. Super. 30, 36 (App. Div. 1986)). In the defendant’s case, because “the only unlawful purpose submitted to the jury was possession of the gun to use it in the killing,” the convictions had to merge. Id. at 642; see also State v. Tate, 216 N.J. 300, 313 (2013) (applying Diaz to require merger because the “case contains no evidence to support a separate unlawful purpose, and, significantly, the jury was specifically instructed that [the] defendant’s unlawful purpose was ‘to assault [the victim].’”).

Here, during the jury instruction on possession of a weapon for an unlawful purpose, the judge told the jury: “In this case, the State contends that the defendant’s unlawful purpose in possessing the weapon was to hit Dilip Hayban on the head to cause – to cause bodily injury.” (4T:188-21 to 24) The State’s robbery theory was that Reed inflicted bodily injury on Hayban with the wine bottle during a theft, and the State presented to the jury no evidence of any other unlawful purpose for Reed’s possession of the wine bottle. Therefore, under Diaz, Reed’s conviction for possession of a weapon for an unlawful purpose must merge with his robbery conviction. 144 N.J. at 641-42; Tate, 216 N.J. at 313. Reed’s Judgment of Conviction must be corrected to merge Count Four with Count Two.

POINT III

REED’S JUDGMENT OF CONVICTION MUST BE CORRECTED TO REFLECT THAT HE WAS CONVICTED OF SECOND-DEGREE ROBBERY – NOT FIRST-DEGREE ROBBERY. (Not Raised Below)

Reed was indicted for first-degree robbery. (Da3) However, the jury acquitted Reed of first-degree robbery, and instead found him guilty of second-degree robbery. (Da11; 5T:9-23 to 10-12) The court and counsel acknowledged as much at sentencing. (6T:17-16 to 18-12, 25-6 to 7, 25-23 to 24) The Judgment of Conviction erroneously states that Reed was convicted of


first-degree robbery, and it must be amended to reflect a conviction for second-degree robbery. (Da15)

CONCLUSION

Reed's convictions must be reversed because the court erroneously ruled that, if he called his character witnesses, they could be impeached with his fifteen-year-old conviction – depriving Reed of the opportunity to present a critical element of his defense. Alternatively, Reed's Judgment of Conviction must be corrected to merge Counts Three and Four with Count Two, and to reflect that he was convicted of second-degree robbery, not first-degree robbery.

Respectfully submitted,

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BY: 
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Dated: October 14, 2025

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November 18, 2025

Honorable Judges of the
Superior Court of New Jersey – Appellate Division
Richard J. Hughes Justice Complex
25 Market Street, Trenton, NJ 08601
ATTENTION: Holly Dellolio – Case Manager, Team 5

RE: State v. Robert D. Reed a/k/a Robert Reed
Atl. Co. Docket No. 23-1110
Indictment No. 23-06-1300-I
App. Div. Docket No. A-1966-24

Criminal Action: On Appeal from a Judgment of Conviction of the
Superior Court of New Jersey, Law Division, Atlantic County
DEFENDANT IS NOT CONFINED

Sat Below: Trial – Hon. Dorothy Incarvito-Garrabrant, J.S.C., and a jury
Sentencing – Hon. Jeffrey Wilson, J.S.C.

Honorable Judges:

Consistent with Rules 2:6-2(b) and 2:6-4(a), please accept this letter brief in
lieu of a more formal response on behalf of the State of New Jersey in opposition to

Defendant Robert D. Reed a/k/a Robert Reed’s (“Defendant”) Brief in support of his appeal of the aforementioned criminal matter (hereafter, “Defendant’s Brief”). Specifically, Defendant seeks by way of his Brief to reverse his convictions stemming from a multi-day jury trial, or in the alternative, to amend the resulting Judgment of Conviction. (Db24)¹. For all of the reasons that follow, the State respectfully urges this Court to deny Points I and II of Defendant’s Brief in their entirety, and with respect to Point III, amend the Judgment of Conviction solely to reflect a guilty conviction for second-degree robbery.

¹ Consistent with Defendant’s Brief, the following abbreviations are used herein:

- Db – Defendant’s Brief
- Da – Defendant’s Appendix
- 1T – Trial Transcript dated May 13, 2024
- 2T – Trial Transcript dated May 14, 2024
- 3T – Trial Transcript dated May 16, 2024
- 4T – Trial Transcript dated May 20, 2024
- 5T – Trial Transcript dated May 21, 2024
- 6T – Sentencing Transcript dated December 2, 2024
- 7T – Restitution Hearing Transcript dated January 27, 2025
- Psr – Defendant’s Presentence Report dated December 6, 2024

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² Hereinafter referred to as, the “2009 Conviction.”

³ As addressed in Defendant’s Brief, Point II was not raised below.

⁴ As addressed in Defendant’s Brief, Point III was not raised below.

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS

On or about March 4, 2023, Defendant viciously attacked D.H. while in a casino parking garage in Atlantic City. (7T4). Specifically, when D.H. was not looking, Defendant struck D.H. over the head with a glass wine bottle and proceeded to steal approximately \$10,000 in cash as well as other personal belongings from D.H.'s person before fleeing the scene and leaving D.H. helpless. (7T4). This led to D.H. being transported to the hospital where he was treated for multiple wounds and scarring to his head. (2T174-76). In response to this heinous attack on D.H., an Atlantic County grand jury returned a multi-count Indictment (23-06-1300-I) against Defendant. (Da1-7; Db2). This matter then proceeded in normal course and a multi-day jury trial was held in May of 2024, presided over by the Honorable Dorothy Incarvito-Garrabrant, J.S.C. (1T-5T; 7T5).

On May 21, 2024, the jury returned a unanimous verdict finding Defendant guilty of five felonies. (Da8-15; Db2-3). Against the objection of the State, Defendant was subsequently permitted entry into the Recovery Court program and was sentenced into Recovery Court treatment by the Honorable Jeffrey Wilson, J.S.C., on January 27, 2025. (Db3; 7T5; 6T24-26). A restitution hearing was then conducted and Defendant was ordered to pay restitution to D.H. in the amount of \$2,500. (7T22). Defendant proceeded to file this appeal, and on October 15, 2025, the State was served with Defendant's Brief and accompanying documents.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN RULING DEFENDANT’S 2009 CONVICTION WAS ADMISSIBLE TO IMPEACH PROSPECTIVE CHARACTER WITNESSES, AND THEREFORE DEFENDANT WAS NOT DENIED DUE PROCESS NOR A FAIR TRIAL (3T122-26).

The record reveals that although the parties conceded that the 2009 Conviction was inadmissible to impeach Defendant should he elect to testify at trial, the parties did not reach the same agreement with respect to whether it could be used to impeach Defendant’s prospective character witnesses. (3T115-16). To resolve this issue, the trial court conducted both a Rule 403 and Sands/Brunson⁵ hearing, and properly determined the 2009 Conviction could be used to impeach Defendant’s prospective character witnesses. (3T115-28). The trial court heard arguments from both parties, and correctly found Defendant failed to satisfy his hefty burden under Rule 403 to keep the 2009 Conviction out for the limited purpose of character evidence. (3T126). To be sure, the trial court clearly explained its ruling, indicating the 2009 Conviction would only come in if Defendant or his prospective character witnesses opened the door to Defendant being law abiding, and even then, it would be subject to sanitization such that only the fact that the 2009 Conviction was for a third-degree crime for which Defendant served three years’ probation would come in. (3T125-

⁵ See State v. Sands, 76 N.J. 127 (1978); see also State v. Brunson, 132 N.J. 377 (1993).

26). Neither Defendant nor his trial counsel had any qualms with the trial court's ruling, claiming it to be "very clear." (3T126).

Although the trial court's ruling on this basis was sound, Defendant now attempts to blame said court for his own strategic decision to not call prospective character witnesses, who by the very nature of his pre-trial memorandum were speculative at best. (Db7; Da23). That speculation, coupled with the trial court's sound aforementioned analysis, reveals Defendant has outright failed to show how he was denied a fair trial consistent with U.S. Const. amends. V, VI, XIV and N.J. Const. art. I, ¶¶ 1, 9, 10. When considering the totality of the record and viewing the evidentiary rulings made by the trial court "through the prism of how they affected [Defendant's] ability to have the jury fairly consider his claims" there can be no doubt Defendant received a fair trial and reversal of his convictions is not warranted as detailed at length herein. State v. Jenewicz, 193 N.J. 440, 447 (2008).

A. DEFENDANT'S 2009 CONVICTION WAS ADMISSIBLE CONSISTENT WITH RULE 403.

Consistent with Rule 403 and as properly found by the trial court, Defendant failed to satisfy his hefty burden under said Rule to exclude relevant evidence in the form of the 2009 Conviction. (3T115-28). At the outset, it is well understood that the test for relevancy of evidence is a broad one and admissibility of evidence is generally favored. See State v. Burr, 392 N.J. Super. 538, 557 (App. Div. 2007). Thus, the burden was on Defendant to show that the probative value of admitting the

2009 Conviction into evidence was substantially outweighed by the risk of undue prejudice to him. See State v. Rose, 206 N.J. 141, 160-61 (2011) (citing Rule 403). However, the sole basis for Defendant’s claim of prejudice is that the 2009 Conviction was “too remote,” but that alone is hardly enough to keep it out of evidence. (Db8).

Although Defendant cites to a multitude of dated and non-binding authorities to support this position, New Jersey courts have long permitted older convictions to be used for purposes of impeachment. See State v. Paige, 256 N.J. Super. 362, 371-73 (App. Div.), certif. denied, 130 N.J. 17 (1992) (permitting introduction of a sixteen-year-old conviction); see also State v. Harkins, N.J. Super. 397, 400-01 (App. Div. 1981) (thirteen-year-old conviction for assaultive conduct and ten-year-old conviction for theft-like conduct admissible for impeachment); State v. Balthrop, 92 N.J. 542, 546 (1983) (holding a trial court abused its discretion in excluding the use of five and eight-year-old convictions for the purposes of attacking credibility of witnesses). Against that backdrop, the trial court’s decision to admit the 2009 Conviction into evidence for the limited purpose of impeachment is well-rooted in binding case law.

Even when considering the Steensen⁶ test, Defendant’s arguments surrounding the “remoteness” of the 2009 Conviction also must fail because not only

⁶ See State v. Steensen, 35 N.J. Super. 103, 107-09 (App. Div. 1955).

is the 2009 Conviction not from “a time too remote,” but the other factors also tip in favor of admissibility. It is clear from said test that not one factor is given more weight over the others, nor do they all need to be present. Ibid. In any event, the trial court conducted its evidentiary hearing regarding admissibility of the 2009 Conviction out of the presence of the jury, and there are no questions as to the facts surrounding the 2009 Conviction considering an ample record of it exists. (Db10; 3T115-28; Da25). Further, although this fact would have been sanitized, the 2009 Conviction involved a theft which concerns a “specific trait” underlying the current offenses Defendant was on trial for. (Db11; Psr1-2).

It is also clear the prospective character witnesses would have been questioned and examined in a manner satisfactory to the Steensen test as evidenced by the trial court’s colloquy with the parties during the Rule 403 and Sands/Brunson hearing. (Db11; 3T123-24). Although the aforementioned test itself was not referenced specifically by the trial court in making its ruling, it is evident the spirit of the test was reflected in the trial court’s decision to admit the 2009 Conviction for the limited purpose of impeachment, indicating the trial court “was satisfied that the [2009 Conviction] . . . was not too remote in time, place, or character.” State v. Campbell, 212 N.J. Super. 322, 325-28 (Law Div. 1986). Defendant also improperly downplays the significance of the 2009 Conviction, for the whole reason Defendant had prospective character witnesses to begin with was to testify to his character, so

it cannot be fairly said the existence of a prior conviction would have had “negligible bearing” on their credibility for testifying on that subject. (Db14).

Against that backdrop, Defendant has outright failed to show that the trial court abused its discretion in making its ruling, and therefore this Court should not disturb Defendant’s convictions. See State v. Jenkins, 356 N.J. Super. 413, 429 (App. Div. 2003). In making its ruling, the trial court also correctly addressed the issue of sanitization, and although the 2009 Conviction never reached the jury, there is nothing to suggest a limiting instruction would not have been provided so it cannot be fairly said the trial court mistakenly interpreted or misapplied Rule 403. See Rose, 206 N.J. at 161 (discussing ways to minimize prejudice to a defendant such as sanitization and limiting instructions). (Da26; Db7). Being Defendant has failed to meet his burden, the relief sought in his Brief on this basis should be denied.

B. THE CONCLUSIONS REACHED BY THE TRIAL COURT REGARDING THE ADMISSIBILITY OF DEFENDANT’S 2009 CONVICTION ARE SOUND.

The character-witness ruling made by the trial court is sound and the “rule” Defendant attempts to create arguing the 2009 Conviction must either be admissible or inadmissible to impeach Defendant and his character witnesses is misplaced and not supported by the case law. To begin, the aforementioned Campbell case as cited by Defendant is not instructive as that is a Law Division case and therefore is not binding on this Court. See Fisher v. Division of Law, 400 N.J. Super. 61,72 (App.

Div. 2008). Regardless, the very language used by the Law Division in Fisher, i.e., “. . . are unlikely to have any probative effect” is opinionated at best and does not discount the fact that a defendant’s prior conviction may be inadmissible as to him while still admissible as to his character witnesses for impeachment purposes. Id. at 326 (emphasis added). With that in mind, Defendant’s citation to State v. Abril in this context is also misplaced, for just because this Court previously determined a prior conviction could come in to impeach a defendant as well as their character witnesses in one instance does not automatically mean that a guilty conviction “is either in, or it is out” in all other contexts. 444 N.J. Super. 553 (App. Div. 2016). (Db14-16).

This restrictive position taken by Defendant flies in the face of the fact that evidentiary rulings concerning admissibility made under Rule 403 are undeniably case-sensitive, and therefore what is “probative” and “unduly prejudicial” in one context may not be in another. See State v. Hernandez, 170 N.J. 106, 126 (2001) (citing the importance of a case-by-case approach concerning admissibility of evidence). It follows logically then that whether a prior conviction is “too remote” could be directly impacted by the individual taking the stand and thereby subjected to impeachment, which could explain why the rules of evidence do not mandate the “in for one, in for all” approach as urged by Defendant. (Db16). The State’s position garners further support from this Court’s ruling in the Harkins case, where it was

determined a trial court has the authority to decide evidentiary issues surrounding admission (or exclusion) of prior convictions offered for the purpose of impeaching the credibility of any witness consistent with the rules of evidence. Id. at 399.

Although Harkins differs somewhat factually from the case at bar in that the guilty convictions at issue were for a witness called to testify, the convictions were determined not to be too remote despite being over ten-years-old, with the decision to admit the convictions for impeachment purposes being upheld on appeal. Id. at 403. In any event, neither the cases cited by Defendant nor the rules of evidence require that when a prior conviction is admitted to impeach in one context it must be admitted to impeach in another as suggested by Defendant. Accordingly, the trial court made no error in its ruling with respect to the 2009 Conviction. (3T125-26).

C. THE TRIAL COURT’S RULING REGARDING ADMISSIBILITY OF THE 2009 CONVICTION WAS NEITHER HARMFUL NOR PREJUDICIAL.

As argued at length above, the trial court’s ruling with respect to the 2009 Conviction was not erroneous and therefore reversal of Defendant’s convictions is not warranted. Even assuming arguendo this Court is convinced that the trial court did err with respect to its ruling, the State submits that such error is harmless consistent with Rule 2:10-2 and can be properly disregarded by this Court. Despite what is trumpeted throughout Defendant’s Brief, it is apparent the evidentiary ruling made by the trial court was not “clearly capable of producing an unjust result,” and

therefore any purported “error” is not cognizable for appellate review. R. 2:10-2, c.1.

Put differently, any alleged “error” committed by the trial court must have been such that it was of “sufficient magnitude to raise a reasonable doubt as to whether it led a jury to a result it would otherwise not have reached.” State v. Allen, 254 N.J. 530, 550 (2023); State v. R.Y., 242 N.J. 48, 71 (2020). Further, any alleged error “must be considered in light of the overall strengths of the State’s case.” State v. Singh, 245 N.J. 1, 14 (2021) (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)). It is also well understood that harmful error, which Defendant incorrectly argues exists here, does not always warrant reversal and is often remedied by way of a less drastic method. See State v. Stubbs, 433 N.J. Super. 273, 289 (App. Div. 2013) (finding harmful error but remanding solely for a Rule 104 hearing).

Against the above backdrop, considered together with the record for this case, it is clear the jury would have reached the result it did (a unanimous guilty verdict) regardless of any alleged “error” committed by the trial court surrounding the 2009 Conviction. (Da8-15). Defendant’s trial took place over several days, during which a multitude of credible witnesses testified (including D.H. and responding officers) and a plethora of evidence was introduced linking Defendant to committing the underlying crimes. (1T-5T; Psr). That being said, the strengths of the State’s case were great and persuasive, and there is nothing to suggest that mere character witness

testimony would have swayed the jury away from its verdict had Defendant elected to call these witnesses. Defendant's counsel also took the opportunity to address Defendant's character and his background during closing arguments. (4T109-10). Even assuming arguendo Defendant elected to call any of his prospective character witnesses, the jury would have been able to hear about his 2009 Conviction which could have hurt Defendant's case. (Db19).

With the foregoing in mind, Defendant's citation to cases such as State v. Kelly is misplaced, for the testimony at issue there was from experts that pertained to the *mens rea* of the defendant as well as her claim of self-defense which is far and away from the testimony any prospective character witnesses may have provided in the case at bar. 97 N.J. 178, 202-03 (1984). Therefore, it can hardly be said that the testimony at issue here was "central" to Defendant's case, as it did not even pertain to an element of any of the crimes or defenses at issue. Ibid. Similarly, State v. Bogus is not relevant here as even though character evidence may in some instances be enough to raise a reasonable doubt of guilt, as detailed at length above, the State's case against Defendant was quite strong and any prospective character witness testimony (if even deemed credible) would have needed to be considered against the State's proofs. 223 N.J. Super. 409, 430 (App. Div. 1988).

Further, this Court's holding in State v. Micci is not applicable here, as the State's case at bar did not "hang" on the testimony of any witnesses, and therefore

even if Defendant called any of his prospective character witnesses, their testimony would not have gotten to the “substantial elements” of the crimes Defendant was charged with or any defenses. Id. at 460-63. In fact, this Court’s ruling in Abril is more on point here, whereby the trial court’s ruling with respect to the 2009 Conviction amounts at worst to harmless error and did not deprive Defendant of a fair trial. Id. at 560. Much like in Abril, Defendant was permitted to call character witnesses but they would have been subject to cross-examination with respect to their knowledge of Defendant’s prior convictions which is permitted under the rules of evidence. Id. at 560-61. Further, it is unclear what specific traits the character witnesses would have testified to and therefore whether those traits were even at issue or relevant in the underlying trial is highly speculative, especially when considering the weight of the evidence against Defendant. Id. at 559-60.

Taking all of the above into account, it is apparent Defendant did not “pay the price” when he elected to not call his prospective character witnesses at trial, nor did the case at bar “rise and fall” on the credibility of opposed versions of events. (Db19-20). As expanded upon at length above, the jury’s unanimous guilty verdict was supported by a plethora of evidence and testimony showing Defendant committed the underlying crimes at issue. (1T-5T; Psr). Therefore, any prospective character testimony would not have taken on much significance and claiming that the testimony would have “been sufficient to raise a reasonable doubt” or gotten to a

“substantial element of the defense” flies in the face of the record and the strengths of the State’s case. Accordingly, any error alleged to have been committed by the trial court with respect to its ruling on the 2009 Conviction is harmless at worst and could not have prejudiced Defendant’s right to a fair trial, so his convictions should not be reversed.

POINT II

MERGER OF THE COUNTS AT ISSUE IS NOT REQUIRED. (NOT RAISED BELOW).

No error was committed by the sentencing court when it did not merge Counts 3 (third-degree theft) and 4 (third-degree possession of a weapon for an unlawful purpose) into Count 2 (second-degree robbery), and therefore there is no need to correct the Judgment of Conviction on this basis. (Db3; Da15). At the outset, as conceded by Defendant, the issue of merger was not raised below and it is well understood that this Court will “frequently decline to consider issues that were not presented at trial . . . even constitutional issues, will not ordinarily be considered on appeal” State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006). Further, because the specific issue of merger was not raised below, the burden falls solely on Defendant to establish merger is warranted on appeal. See State v. Alveras, 213 N.J. Super. 331, 339-40 (App. Div. 1986). Additionally, Defendant “. . . may be convicted of an offense included in an offense charged whether or not the included offense is an indictable offense.” N.J.S.A. 2C:1-8(d).

Against that backdrop, and for the reasons expanded upon at length below, the Judgment of Conviction should not be disturbed on this basis.

On the issue of merger, State v. Davis provides a “flexible approach” for whether merger is required, placing an emphasis on fairness while considering factors including, but not limited to, the nature of the offenses at issue, the status of the victim and the interests to be protected, and consequences of the violation of the criminal standards. 68 N.J. 69, 80-82 (1975); see State v. Hill, 182 N.J. 532, 543 (2005). With these factors in mind, the case law makes clear that the status of the victim should be of great importance to a reviewing court when considering merger, and simply because theft is “a necessary ingredient” of a robbery does not alone mandate merger as argued by Defendant. See State v. Adams, 227 N.J. Super. 51, 62 (App. Div. 1988); see also State v. Allison, 208 N.J. Super. 9, 24-25 (App. Div. 1985). (Db21). This is especially true in situations where the Defendant may have known or had a relationship with the victim, or known the victim to be physically helpless, all of which do not support merger of the underlying offenses. Adams, 227 N.J. Super. at 63-64.

In the case at bar, Defendant befriended D.H. over the course of an evening where he observed D.H. win a large sum of money gambling, and Defendant seized the opportunity to gain D.H.’s trust and take advantage of his kindness. (4T125-26). The following morning, Defendant approached D.H. again and D.H. bought him

breakfast and even offered to drive him to the bus station. (4T126-27). As the two approached D.H.'s vehicle while D.H. was not looking, Defendant violently struck him over the head with a glass wine bottle which knocked him down and resulted in permanent disfigurement to D.H. as well as the need for medical treatment. (4T129). Not only did Defendant go through Defendant's pockets and take thousands of dollars from D.H. before abandoning him, but D.H. also suffered severe scarring which, despite over a year of treatment, did not make the scars go away. (4T129).

With the foregoing in mind, as in the case of Adams, merger of Count 3 into Count 2 is not warranted here and would prove unfair to D.H., as merger of these offenses would not adequately redress the great harm and loss he suffered. Id. at 62. Defendant's arguments to the contrary fail to consider what is fair to the victim and the lasting injuries he suffered due to Defendant's actions, and even though the underlying offenses share similar elements, that is only part of the analysis this Court must undertake. Davis, 68 N.J. at 80-82. Although Davis may take a "flexible approach" on merger, when considering the totality of the circumstances of this case and the harm suffered by D.H., it cannot be fairly said that merger of the aforementioned Counts is warranted here.

Against the above backdrop, merger of Count 4 into Count 2 is also not required here and Defendant's citation to State v. Diaz is mischaracterized. 144 N.J. 628, 636-42 (1996). At the outset, the jury was not explicitly instructed by the trial

court that Defendant's unlawful purpose for possessing the wine bottle was to use it to assault D.H. In fact, the trial court instructed the jury that "[t]he defendant's purpose or conscience objective may be found at any time he is in possession of the object . . . [t]he State need not prove Defendant's original purpose in possessing the weapon . . . the unlawful purpose alleged by the State may be inferred from all that was said or done and from all of the surrounding circumstances of this case." (4T188-89).

This garners further support from the jury's verdict sheet for Count 4, which states only that Defendant was guilty of possessing a wine bottle for an unlawful purpose, but not a specific unlawful purpose, i.e., to assault D.H. (Da13). Accordingly, there was no special verdict and no explicit instruction given by the trial court, so additional analysis is necessary with respect to whether a "broader unlawful purpose" existed for Defendant possessing the wine bottle to determine if merger is warranted. See State v. Tate, 216 N.J. 300, 309 (2013) (citing Diaz, 144 N.J. at 638-40). In this context, reviewing courts consider a four-factor test established in State v. Williams, and consider first whether the underlying indictment charges a defendant with a broader unlawful purpose for possessing the weapon at issue than using the weapon to commit an underlying offense. 213 N.J. Super. 30, 36 (App. Div. 1986). In the case at bar, the language of the Indictment mirrors that of the jury verdict sheet for Count 4 in that it is general and ambiguous

as to what the unlawful purpose was. (Da5, 13). At a minimum, this leaves the unlawful purpose and its breadth up to interpretation by the jury.

As for the next two factors, although the evidence in the case at bar (as the State argued at trial) supports the narrower finding that Defendant possessed the wine bottle with the unlawful purpose to assault D.H., the trial court's instructions did not close off the possibility that a broader unlawful purpose could exist, and even instructed the jury that the unlawful purpose could be "inferred." (4T185-89). Lastly, as indicated above, the jury's guilty verdict for Count 4 does not specifically list a single unlawful purpose and therefore a broader unlawful purpose could have been inferred by the jury from the evidence. (Da13). Thus, unlike in the case of Diaz, when applying the Williams factors to the case at bar, the factors tip in favor of non-merger given the ambiguity surrounding the unlawful purpose for which the wine bottle was possessed and whether a broader unlawful purpose was supported by the evidence either directly or circumstantially. Tate, 216 N.J. at 311.

If, however, this Court is convinced that merger of the aforementioned Counts is appropriate as argued by Defendant, the underlying convictions themselves must survive even though only one sentence would be imposed. See State v. Trotman, 366 N.J. Super. 226, 237 (App. Div. 2004). Further, because Count 2 is the most serious of the convictions at issue, should merger occur, Count 2's corresponding Recovery Court sentence carrying an alternate State Prison

sentence of nine-years subject to NERA should not be disturbed. See N.J.S.A. 2C:1-8, c.9. (Db3; 7T5; 6T24-26).

POINT III

THE JUDGMENT OF CONVICTION MAY BE AMENDED TO REFLECT A CONVICTION FOR SECOND-DEGREE ROBBERY. (NOT RAISED BELOW).

The State concedes that the Judgment of Conviction may be amended to reflect the aforementioned conviction for second-degree robbery under N.J.S.A. 2C:15-1A(1). (Db23; Da15). However, any amendments to the Judgment of Conviction should only be to address that limited issue and it does not appear that discrepancy appears elsewhere in the record.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court deny Points I and II of Defendant's Brief in their entirety, and with respect to Point III, amend the Judgment of Conviction solely to reflect a guilty conviction for second-degree robbery.

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-1966-24

INDICTMENT NO. 23-06-1300-I

STATE OF NEW JERSEY,

:

CRIMINAL ACTION

Plaintiff-Respondent,

:

On Appeal from a Judgment of the
Conviction of the Superior Court of
New Jersey, Law Division,
Atlantic County.

v.

:

ROBERT D. REED a/k/a
ROBERT REED,

:

Sat Below:

:

Defendant-Appellant.

:

Hon. Dorothy Incarvito-Garrabrant,
J.S.C., and a Jury.

DEFENDANT IS NOT CONFINED

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-Appellant Robert D. Reed relies on the procedural history and statement of facts in his opening brief.

LEGAL ARGUMENT

Reed relies on the arguments from his opening brief and adds the following:

REPLY POINT I¹

REED WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE COURT ERRONEOUSLY RULED THAT HIS PRIOR CONVICTION WAS ADMISSIBLE, NOT TO IMPEACH REED’S OWN TESTIMONY, BUT TO IMPEACH HIS CHARACTER WITNESSES. (3T:122-3 to 126-15)

The State argues that Reed’s fifteen-year-old conviction was admissible to impeach his four character witnesses, or – alternatively – harmless. (Sb5-15)² Both arguments miss the mark.

¹ This argument is raised in Point I of Reed’s plenary brief and replies to Point I of the State’s brief.

² The following abbreviations will be used:

Sb – State’s Brief

Db – Defendant-Appellant’s Brief

Da – Appendix to Defendant’s Opening Brief

Dra – Appendix to Defendant’s Reply Brief

3T – May 16, 2024 (Trial)

First, the State argues that the trial court's Rule 403 balancing was sound, despite the court's failure to weigh the remoteness of the conviction, its probative value, or its prejudice. (3T:124-1 to 125-23) On this point, the State's concessions undermine its own argument.

The State concedes that the five-factor Steensen test applies in this case. See State v. Steensen, 35 N.J. Super. 103, 107-09 (App. Div. 1955) (Sb7-8). Under that test, one of those factors the court must consider, before allowing a character witness to be impeached with a defendant's prior conviction, is whether the conviction "occurred at a time too remote from the present offense." Id. at 109. The State also concedes that remoteness is a factor that must be weighed. (Sb8) Nevertheless, the State argues that "[a]lthough the [Steensen] test itself was not referenced specifically by the trial court in making its ruling, it is evident the spirit of the test was reflected in the trial court's decision." (Sb8) For that reason, the State presumes – with no record cite or other proof – that "the trial court 'was satisfied that the [2009 Conviction] . . . was not too remote in time, place, or character.'" Ibid. (quoting State v. Campbell, 212 N.J. Super. 322, 325-28 (Law Div. 1986)).

Here, not only did the court not consider the remoteness of the fifteen-year-old conviction, it failed to explicitly weigh a single Steensen factor. See 35 N.J. Super. at 109. The Court's analysis did not even weigh the probative value of the

prior conviction against its prejudice to Reed. (3T:124-1 to 125-23) This Court should not assume that the trial court silently weighed factors that are not articulated on the record.

When he was tried in 2024, Reed's prior conviction was fifteen years old, and Reed had no intervening convictions over those fifteen years. (Psr6) Any minimal probative value of the prior conviction, if it existed, was far outweighed by its undue prejudice. See Campbell, 212 N.J. Super. at 327. Accordingly, the court's ruling that Reed's prior conviction was admissible to impeach his character witnesses was error.

The State alternatively argues that any error in the court's ruling was harmless, because Reed's four proposed character witnesses – listed in his pretrial memorandum – were “speculative.” (Sb6, 14) But the four character letters prepared before trial illustrate exactly how these witnesses were prepared to testify. (Dra1-6) Krystle Allen's letter details Reed's substantial time working as a volunteer for a Newark nonprofit “Eyes Like Mine” from 2014 to present day. (Dra1-2) Stephen Humphries's letter describes that, in the five years he has known Reed, he has been “nothing less than a pillar of the community” who goes “above and beyond to provide for his family and his community alike through hard work and volunteerism.” (Dra3) Humphries describes Reed as “honest, supporting, enthusiastic, and giving,” with “an incredible ability to inspire those around him.”

Ibid. His aunt, Carrie Reed, describes his volunteer efforts with “Kid Kamp Summer Fun,” as well as his other volunteer efforts, such as serving as Santa Claus around the holidays and participating in Cancer Walks. (Dra4-5) Reed’s adult daughter, Naquela Wright-Prevoe, calls him “a pillar of the community.” (Dra6)

In the end, Reed called none of these character witnesses – a strategic decision that was undoubtedly impacted by the court’s ruling, warning that Reed’s prior conviction was admissible if he called them. In a case that rose and fell on the credibility of two diametrically opposed versions of events, (see Db3-6) the testimony of four character witnesses regarding Reed’s standing in his community could have been sufficient to change the jury’s verdict. See Michelson v. United States, 335 U.S. 469, 476 (1948) (“[Character evidence] alone, in some circumstances, may be enough to raise a reasonable doubt of guilt.”). The court’s ruling forced “the exclusion of the offered proofs in this substantial element of the defense,” depriving Reed of the opportunity to present a complete defense. See State v. Micci, 46 N.J. Super. 454, 463 (App. Div. 1957) (internal quotation omitted). Reed’s convictions must therefore be reversed. See R. 2:10-2.

CONCLUSION

For the reasons discussed here and in his opening brief, Reed's convictions must be reversed.

Respectfully submitted,

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BY: 

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Dated: November 19, 2025