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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3265-22T4
INDICTMENT NOS 20-03-402, 20-03-403

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from an Order of the Superior Court of New Jersey,
v.	:	Law Division, Morris County.
JAKI N. HOOKS-LEWIS,	:	Sat Below:
Defendant-Appellant.	:	Hon. Benjamin S. Bucca, Jr., J.S.C.,
	:	and a jury.

Your Honors:

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

DEFENDANT IS CONFINED

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REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

In March 2020, Jaki Hooks-Lewis was charged, in one indictment, with possession of a gun without a permit and hollow-point bullets and hindering his own apprehension, and in a second indictment, with certain persons not to have guns. (Da 1-3)[2] Following a jury trial in July 2021, he was convicted of the hindering, gun, and certain-persons charges and acquitted of the bullet charge. (Da 4-5) In August 2021, he was sentenced to an aggregate term of 13 years, five years without parole (Da 7-12).

Hooks-Lewis's plenary brief, filed in June 2024 raised three points. This reply brief focuses on Point II, which argued that the limiting instruction concerning the evidence about an unrelated robbery was inadequate. The state filed a responding brief on August 12, 2024. Hooks-Lewis now files this reply brief to correct the state's mistaken characterization of the inadequate-jury-instruction claim as invited-error.

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[1] Due to the limited nature of this reply brief, the procedural history and statement of facts are consolidated.

[2] Da – appendix to defendant's plenary brief
Pb – state's responding brief
1T – suppression-hearing transcript – November 4, 2020
2T – trial transcript – July 1, 2021
3T – trial transcript – July 2, 2021
4T – trial transcript – July 6, 2021

LEGAL ARGUMENT

REPLY POINT I[3]

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ISSUED AN INADEQUATE LIMITING INSTRUCTION REGARDING HOW TO CONSIDER TESTIMONY IMPLICATING DEFENDANT IN AN UNRELATED ROBBERY. (Not Raised Below)

Hooks-Lewis was stopped while driving his mother's car, allegedly because the car had tinted windows. (1T 11-3 to 4; 4T 29-1 to 5, 38-24 to 39-13) But violation of the "tinted-windows" statute, N.J.S.A. 39:3-74, which provides that certain car windows must be transparent, is a motor-vehicle infraction, and, as a rule, would not justify the warrantless search of a vehicle.[4] To conduct a warrantless motor-vehicle search, the police must have "probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous." State v. Witt, 223 N.J. 409, 447 (2015).

At the time of this incident, the odor of marijuana could provide probable cause for a warrantless motor-vehicle search.[5] See State v. Cohen, 254 N.J. 308,

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[3] This argument is raised in Point II of defendant's plenary brief and replies to Point II of respondent's brief.

[4] Point I of defendant's plenary brief challenged the initial stop on the ground that that the state did not establish a violation of N.J.S.A. 39:3-74.

[5] This incident occurred before February 22, 2021, the effective date of (footnote cont'd)

324 (2023). Consequently, the state sought to defend the warrantless search of Hooks-Lewis's SUV based on Officer Soulias's testimony that he detected the odor of marijuana in the car. (2T 83-20 to 24)

Hooks-Lewis had a different theory of the case. He challenged the officer's claim that he smelled marijuana and maintained that the police wanted to search the car because they suspected that he was the "young, [B]lack male" who committed an armed robbery the night before in a nearby town. (1T 35-5 to 6; PSR 1) Accordingly, counsel made a reasonable, strategic decision to introduce the MVR recording in which, prior to the search, officers at the scene discussed their strong suspicion that Hooks-Lewis was involved in the earlier robbery. (3T 45-20 to 22). Counsel maintained that the recording was relevant to "the defense's theory of the case that this is all about targeting," "[t]his is all about profiling" (3T 41-20 to 47-10), and that the police would have handled the case very differently and would not have searched the car, if, rather than a young, Black male, "this was a soccer mom" (3T 190-14 to 17).

Counsel argued in his opening statement that the police were "fishing" for a legal reason to search the car without a warrant (2T 49-6 to 12) because they

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CREAMMA, N.J.S.A. 2C:35-10, "which largely decriminalized the possession of … marijuana" and provides that "'the odor of cannabis or burnt cannabis,' shall not 'constitute reasonable articulable suspicion of a crime' except on school property or at a correctional facility. N.J.S.A. 2C:35-10c." Cohen, 254 N.J. at 328.

were eager to find evidence that tied Hooks-Lewis to the earlier robbery. Counsel pointed out that it was not until Officer Soulias spoke to Hooks-Lewis for eight minutes and spotted the "bong mask" on the floor of the car that he landed on the "smell [of] marijuana" as a reason to conduct the warrantless search. (2T 49-22 to 50-9, 51-9 to 15) On cross-examination of Soulias, counsel confirmed the eight-minute delay (2T 160-16 to 24; 3T 17-17 to 20) and highlighted the fact that the officer initially testified that, with both front windows rolled down (2T 75-8 to 11), he did not detect the odor of marijuana when he was stationed at the passenger door and did not notice it until he crossed to the driver's side (2T 74-20 to 22), but, contradicting himself minutes later, Soulias also said that he noticed the odor "as soon as [he] approached the vehicle" (2T 104-21 to 22). In addition, counsel pointed out that the only marijuana found in the car was some residue on the mask that was likely used to smoke it. (1T 20-1 to 21-5)

Consistent with the defense theory that the police were looking to tie Hooks-Lewis to the earlier robbery, counsel argued that the MVR recording was relevant because it revealed that, before they decided to search the car, the officers at the scene noted that Hooks-Lewis was "dressed all in black" and had "a ski mask on

top of his head,"[6] and opined that he "fits the bill" for the previous armed robbery. (3T 41-20 to 47-10)[7]

On appeal, Hooks-Lewis argued that the court did not give an adequate instruction limiting the jury's use of the prior-robbery evidence to the specific purpose for which it was admitted – to support the profiling theory of the case. According to the state, however, Hooks-Lewis having argued for admission of the evidence of the prior robbery, "invited" the instructional error. (Pb 10-13) Contrary to the state's claim, this was patently not a case of invited error.

Invited error "applies when a defendant in some way has led the court into error." State v. Williams, 219 N.J. 89, 100 (2014) (quotations omitted); see State v. Jenkins, 178 N.J. 347 (2004) (explaining that defendant cannot claim error on appeal where trial court adopted defendant's "course of action"). Hooks-Lewis does not claim on appeal that the trial court's adoption of his request to admit evidence of the robbery for a limited purpose was error. His claim is that the instruction limiting the jury's use of the robbery evidence was deficient.

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[6] While Soulias wrote in his police report that "'the ski mask … was rolled up on [Hooks-Lewis's head] with the intent to conceal what it was" (3T 152-19 to 24), at trial, the officer described the "ski mask" as a "winter hat" similar to hats worn by other officers at the scene on that "below freezing" January evening. (2T 74-12 to 16; 3T 48-9 to 11, 51-15 to 16)

[7] Hooks-Lewis was never charged with the earlier robbery. (PSR 10-11)

Because evidence that a defendant has committed other crimes is highly prejudicial, N.J.R.E. 404(b) provides that such evidence is not admissible to prove that the defendant has a propensity to commit crimes, but is admissible where, as here, it is relevant to a material issue in dispute. See State v. Willis, 225 N.J. 85, 97 (2016) (recognizing that other-crime evidence suggests that defendant has propensity to commit crimes and likely committed the crime for which he is on trial). As discussed in Point II of defendant's brief, when other-crime evidence is admitted, it must be accompanied by a carefully worded instruction explaining that the jury can only use the evidence for a particular purpose and cannot use it to impugn defendant's character. See State v. G.S., 145 N.J. 460, 472 (1996) (holding that Rule 404(b) instruction must explain proper and improper uses of other-crime evidence).

Hooks-Lewis's complaint in Point II is that the limiting instruction was inadequate.[8] He acknowledges in his plenary brief that, as he did not complain at trial that the limiting instruction was inadequate, this is a case of plain error. However, this is not a case of invited error as Hooks-Lewis did not induce the trial court to give a deficient limiting instruction.

[8] Defendant relies on the discussion of the instructional deficiencies in Point II of his plenary brief.

CONCLUSION

For the reasons discussed in defendant's plenary brief and this reply, his convictions must be reversed. If the Court declines to reverse the convictions, it should find, as raised in Point III of his plenary brief, that the errors at the sentencing hearing warrant a remand for a new hearing.

Respectfully submitted,

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LETTER BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

RE: STATE OF NEW JERSEY (Plaintiff-Respondent) v.
JAKI N. HOOKS-LEWIS (Defendant-Appellant)

Indictment Nos. 20-03-00402-I, 20-03-00403-I; App. Div. Docket No. A-003264-22-T7

Criminal Action: On Appeal From a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Middlesex County.

Sat Below: Hon. Benjamin S. Bucca, Jr., J.S.C.; and a Jury.

Honorable Judges:

Pursuant to Rule 2:6-2(b), this letter brief is submitted in lieu of a formal brief on behalf of the State of New Jersey.

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PRELIMINARY STATEMENT

Defendant received a fair trial and a commensurate sentence. He was deprived of neither right nor process and was subject to no prejudice. The motor vehicle stop was justified by the observations of an officer whose credibility was endorsed by the trial court. Relying on that testimony, the trial court denied defendant's motion to suppress: a decision this court should now ratify.

At trial, defendant's gambit failed: consciously and deliberately provoking the admission of evidence over the State's objection and in defiance of the court's warning. The prejudice, if any, was nominal and more importantly, self-inflicted.

During sentencing, the trial court established a record sufficient to justify its sentence. A sentence that, if not in fact favoring leniency, fell squarely within the prescribed statutory punishment and was supported by appropriate facts and considerations. Defendant's appeal is therefore without merit and the trial court's decisions should be affirmed.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

Middlesex County Indictment Nos. 20-03-402-I charged defendant, Jaki N. Hooks-Lewis ("defendant"), with Hindering Apprehension or Prosecution, third degree, contrary to N.J.S.A. 2C:29-3(b) (Count 1), Unlawful Possession

of a Handgun, second degree, contrary to N.J.S.A. 2C:39-5(b)1 (Count 2), and Possession of Hollow Point Ammunition, fourth degree, contrary to N.J.S.A. 2C:39-3(f) (Count 3). (Da1 to 2).[1] Middlesex County Indictment No. 20-03-403-I charged defendant with Certain Persons Not to Possess Weapons, second degree, contrary to N.J.S.A. 2C:39-7(b)1. (Da3). Both indictments are derivative of the same factual circumstances.

Defendant filed a motion to suppress evidence seized pursuant to a warrantless motor vehicle search, which was heard on November 4, 2020, by Hon. Benjamin S. Bucca, J.S.C. (1T). Judge Bucca denied the motion on the record and in a written order. (1T95-1 to 105-24).

Defendant was tried before Judge Bucca and a jury from July 1, 2021, through July 7, 2021, after which he was convicted of Counts 1 and 2 of Indictment 20-03-00402-I and Count 1 of Indictment 20-03-403-I. Defendant was acquitted of Count 3 of Indictment 20-03-00402-I. (5T44-19 to 46-14, 66-2 to 67-14; Da4 to 6).

[1] The record is cited as follows:
Db = Defendant's brief.
Da = Defendant's appendix.
1T = Transcript of suppression hearing, November 4, 2020
2T = Transcript of jury trial, July 1, 2021
3T = Transcript of jury trial, July 2, 2021
4T = Transcript of jury trial, July 6, 2021
5T = Transcript of jury trial, July 7, 2021
6T = Transcript of sentence, August 24, 2021

On August 24, 2021, defendant was sentenced to an aggregate term of thirteen years in New Jersey State Prison with a five-year period of parole ineligibility. (6T28-14 to 37-4; Da7 to 12). On June 29, 2023, defendant filed this appeal. (Da14).

COUNTER-STATEMENT OF FACTS

A. Facts Germane to Whether the Motor Vehicle Stop was Justified

On the night of January 1, 2020, Officer Thomas Soulias ("Soulias") of the East Brunswick Police Department ("EBPD") was on patrol in an unmarked police vehicle near the intersection of Route 18 and Eggers Street. (1T7-7 to 8, 12 to 13, 22 to 23, 24 to 25). He was positioned on the southbound side of the highway and perpendicular to the roadway. (1T8-7 to 25). At approximately 10:50PM, Soulias observed a Chevrolet Suburban drive past him in the southbound lane at a "high rate of speed" in the center lane. (1T9-3 to 8). The vehicle was passing other cars on both the left and right sides. (1T9-17 to 18).

Soulias, however, was initially unable to identify the driver because the front windows of the vehicle were shut and "completely tinted." (1T10-7 to 13). Consequently, Soulias began to follow the vehicle, ultimately engaging his overhead emergency lights and performing a motor vehicle stop. (1T10-25

to 11-4). Soulias approached the vehicle, which had since lowered its windows, observed an open bottle of whiskey, and detected the odor of marijuana. (1T11-11 to 15)[2].

The driver was unable to convey his requested paperwork and provided a false name and date of birth. (1T12-7 to 14, 19 to 21). Upon arrival of a backup officer, Soulias shifted to the driver side of the vehicle where he detected a more potent smell of marijuana. (1T13-8 to 20). After sparring with Soulias over his identity, the driver ultimately revealed that he was, in fact, Jaki N. Hooks-Lewis, the defendant. (1T15-10 to 22). The officers subsequently asked for consent to search the vehicle based on the scent of marijuana, which defendant refused. (1T16-2 to 6). Officers then notified defendant that, in light of the probable cause to believe marijuana was present in the vehicle, they would be performing a search thereof. (1T16-7 to 15).

Contemporaneously, a search of defendant's actual identifiers revealed that he was the subject of suspended driving privileges and an active municipal court warrant, and accordingly placed in custody. (1T17-9 to 18-2). The search of the vehicle turned up a loaded, nine-millimeter handgun and a modified gas mask. (1T18-19 to 19-19). Given the training and experience of

[2] The facts of this case pre-date the partial decriminalization of marijuana. State v. Cohen, 254 N.J. 323 (2023).

the officers, the gas mask was suspected to be a conduit for facilitating the use of marijuana. (1T19-24 to 20-25).

B. Facts Germane to the Adequacy of the Court's Limiting Instruction

During the motor vehicle stop which led to the charges being tried, a discussion was captured on an MVR between the responding officers concerning the potential that defendant was involved in an unrelated robbery the night prior. (3T42-4 to 44-13). Although not part of the State's case-in-chief, defendant made references to this conversation in its opening statement, cross-examination, recross, and closing argument. (2T50-10 to 14, 2T51-2 to 3; 3T36-9 to 14, 3T37-4 to 11, 3T41-11 to 19, 3T42-4 to 48-1, 3T152-6 to 12, 3T153-21 to 24, 3T154-3 to 7; 4T22-25, 4T113-18 to 20, 4T124-24 to 127-20).

During the State's redirect, the assistant prosecutor asked a clarifying question about the context of that conversation. (3T137-17 to 21). Defendant did not object. Following the witness's answer, the Court – *sua sponte* – issued an instruction to the jury. (3T137-22 to 138-6). This instruction made clear that the only reason that this conversation was being mentioned was to "give context" to a particular turn of phrase used by the officer. (Ibid.). The Court emphasized that the discussion of another crime being committed "does not have any reference to your deliberations in this particular case." (Ibid.)

Consequently, the assistant prosecutor then confirmed with the witness that defendant was not charged with any conduct related to the incident the night before. (3T138-9 to 12).

Stressing the notion, the Court's final instructions to the jury included the following imperative:

> In this case, one of the limiting instructions I provided you had to deal with the testimony of an armed robbery that allegedly occurred in South River. That testimony was allowed in this case solely to provide context for statements made by the police. You cannot use any reference of alleged criminal activity that occurred in South River to determine the guilt or innocence of the defendant as to the particular charges in this case.
> [(5T11-7 to 15.)]

C. Facts Germane to the Propriety of the Court's Sentence

On August 24, 2021, sentencing was held before Judge Bucca. (6T). Given the defendant's prior conviction for an aggravated assault involving the use of a firearm, the State moved for the imposition of an extended term. (6T4-12 to 7-20). The Court granted this motion. (6T33-2). The State also moved for the imposition of a consecutive sentence. (6T7-7 to 8-16). The Court denied this motion, finding such a sentence to be "unnecessarily harsh." (6T35-24 to 25-9). During the Court's sentence, Judge Bucca found aggravating factors 3, 6, and 9, and mitigating factor 14. (6T30-5 to 32-21). The Court also found that the aggravating factors "clearly outweigh[ed]" the

mitigating factors. (6T32-24 to 25). For each factor, the Court articulated the source of its findings from the facts presented. (6T30-5 to 32-21).

Ultimately, the Court sentenced defendant to a four-year, flat term of incarceration on Count I of Indictment 03-20-402-I and a ten-year term of incarceration with a five-year term of parole ineligibility on Count I of Indictment 03-20-403-I, all to run concurrent to a thirteen-year term of incarceration with a five-year period of parole ineligibility on Count II of Indictment 03-20-402-I. (6T33-25 to 36-25).

LEGAL ARGUMENT

POINT I

THE MOTOR VEHICLE STOP PRECIPITATING THE CHARGES WAS LAWFUL AND THE COURT'S DENIAL OF THE MOTION TO SUPPRESS WAS PROPER

A motor vehicle stop is justified if the attending officer establishes an articulable and reasonable suspicion that a motor vehicle infraction occurred. Delaware v. Prouse, 440 U.S. 648, 663 (1979); State v. Smith, 251 N.J. 244 (2022); State v. Robinson, 228 N.J. 529, 548 (2017). A stop for speeding therefore can be justified based on an officer's observations giving rise to an objectively reasonable belief that the driver exceeded the speed limit. State v. Locurto, 157 N.J. 463, 466-467, 470 (1999). It is important to note that a subsequent conviction for the offense is not necessary, so long as an

objectively reasonable belief that it occurred existed at the time of the stop. State v. Oliveri, 336 N.J. Super. 244, 247 (App. Div. 2001).

While this standard is fairly low, the State must provide some evidence that can be tested through the adversarial process to support the reasonableness of the suspicion that led to the stop. State v. Atwood, 232 N.J. 433, 448 (2018). In a word, the State needs to have something.

Further, an appellate court is traditionally loath to disturb a lower court's findings of fact. Indeed, an appellate court reviewing a motion to suppress evidence "must uphold the factual findings underlying the trial court's decision, so long as those findings are supported by sufficient credible evidence in the record." State v. Evans, 235 N.J. 125, 133 (2018) (internal quotations omitted). See also, State v. Cohen, 254 N.J. 308 (2023) (noting that an appellate review will defer to the findings of the trial court absent a mistake so egregious that justice demands correction.)

At both the motion to suppress and at trial, Officer Soulias testified that he observed defendant's vehicle traveling "at a high rate of speed" in the center lane of traffic while passing vehicles on the left and right. (1T9-7 to 18; 2T71-9 to 11). He added that he could not identify the driver of the vehicle because the windows were tinted to the point of obscuring his view into the cabin. (1T9-19 to 10-13; 2T72-16 to 73-4). The trial court found this

testimony "credible" and "believable" and incorporated those findings into its decision. (1T102-3 to 15, 104-4-16).

Following these observations, Officer Soulias performed a motor vehicle stop of defendant's vehicle.

Defendant relies here on Smith to argue that Officer Soulias lacked the reasonable suspicion to stop defendant's vehicle based on a violation of the window tint statute. That reliance, however, is misplaced. In Smith, the observing officer testified that, despite the tint on the defendant's vehicle, he could yet see that there was 1) a single person in the vehicle, and 2) that the individual was "making movements." Smith, 251 N.J. at 265-66. The Court emphasized the officer's ability to "see both the number of people in the vehicle and their movements" in ruling that there was no reasonable suspicion that the statute had been violated. Ibid.

Here, however, Officer Soulias is asked – directly – "[c]ould you see the driver as he passed you?" Answer: "No, sir. The front windows were tinted." (1T9-19 to 21). The officer testified both that the defendant appeared to be speeding and that his windows were tinted beyond the point where the officer could see into the passenger compartment – both justifiable causes to stop the vehicle. Furthermore, the trial court explicitly found that the officer's testimony was both "credible" and "believable." (1T101-22 to 23).

Additionally, the trial court's own findings, being in the position to view the evidence and listen to the testimony, establish that the officer possessed the requisite suspicion to stop the vehicle. (1T102-3 to 15).

The record establishes that Officer Soulias had an objective reason to suspect that defendant committed a motor vehicle infraction, and his stop was therefore justifiable. Consequently, any evidence derived from that stop was properly admitted.

POINT II

THE TRIAL COURT'S LIMITING INSTRUCTION WAS SUFFICIENT AND NEVERTHELESS DEFENDANT INVITED THE PERCEIVED ERROR WHICH PROVOKED ITS NECESSITY[3]

A. Defendant Invited What He Now Despairs

Under settled principles of law, 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. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)). If, therefore, a party has "invited" the error, he is barred from raising an objection for the first time on appeal. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342 (2010).

[3] As defendant acknowledges in its brief, this issue was neither raised below nor properly preserved by defense counsel.

This doctrine is roused "when a defendant in some way has led the court into error." Id. at 340-421. Indeed, an appellate court will not review a claim of error if the party asserting the error on appeal "urged the court to adopt the proposition now alleged to be error." Brett v. Great American Recreation, 144 N.J. 479, 503 (1996).

Here, defendant criticizes the trial court for issuing an "inadequate limiting instruction regarding how to consider testimony implicating defendant in an unrelated robbery." (Db24). However, neither the State, nor the Court introduced this information to the jury. Truly, both took every precaution to prevent it.

Indeed, the jury knew nothing about this interaction until defense counsel opened with an accusation that the investigating officers "insinuate[ed] [defendant] was a robber or burglar." (2T50-10 to 14). The State, appropriately, objected and was overruled, though with admonition from the Court that defense counsel "be careful with that." (2T50-15 to 22). Heedless of that warning, defendant insisted on continuing his parody of the officers' exchange by paraphrasing: "Oh, [defendant] looks like he's going to do a robbery." (2T51-2 to 3).

At no point during the State's case-in-chief did it refer to an alleged robbery. Defendant, however, was not so discreet. During the cross-

examination of Officer Soulias, counsel asked whether the witness recalled "references" to defendant looking like "either a burglar or robber" and whether the witness agreed with other officers that defendant "looks like he's ready to do a robbery[.]" (3T36-9 to 37-7). Defendant then sought permission from the Court to play – the previously redacted portions of — the MVR related to this conversation. (3T37-14 to 38-15).

The Court, in overruling the State's objection, warned defense counsel that he will be "open[ing] the door through allowing this[.]" (3T39-5 to 9). Counsel acknowledges as much and then played the part of the MVR recording portraying the conversation where the officers discuss the similarities between defendant and a robbery suspect from the night prior. (3T42-3 to 12; 44-6 to 15). This, within the context of a much more comprehensive discussion between counsel and the witness about the recording. (3T42-4 to 48-1).

In its redirect, the State mentioned this conversation with the sole and explicit purpose of refocusing the jury and emphasizing that defendant was never charged in any robbery. (3T137-17 to 138-12). The Court then provided its instruction on the limited use of that evidence. (3T137-22 to 138-6). Nowhere during this exchange did defendant object, nor did defendant express any dissatisfaction with the Court's instruction.

Instead, seemingly despite that instruction, defendant revived the subject in his recross. (3T152-6 to 12; 153-21 to 24; 154-3 to 7). During closing argument, defendant actually mocked the assistant prosecutor for attempting to restrain the use of the very statement defendant now argues on appeal was prejudicial to its interests. (4T92-22 to 25). In fact, the State began its own closing by advising the jury not to consider any evidence of that sort in its deliberations. (4T150-1 to 18). The Court then similarly enjoined the jury in its final instruction. (5T11-7 to 16).

The doctrine of invited error forces defendants to accept the ill-outcomes of their trial strategy. Here, defendant did not merely accept passively the admission of evidence barred by the Court, but actively pursued its exposure to the jury. Given the frequency and repetition of its reliance on this evidence, it was by any measurement a deliberate, tactical play by defendant. Yet, a "disappointed litigant cannot argue on appeal that a prior ruling was erroneous when that party urged the lower court to adopt the proposition now in error." Div. of Youth & Family Servs. v. M.C. III, 201 N.J. at 342. See also State v. Williams, 219 N.J. 89, 101 (2014) ("The doctrine of invited error does not permit a defendant to pursue a strategy…and when the strategy does not work out as planned, cry foul and win a new trial.") Defendant gambled and lost.

That is not the State's problem; it is not the Court's problem. Accordingly, reversal is inappropriate.

B. The Court's Instructions were Adequate

When the jury is exposed to "other crime" evidence, "the court must instruct the jury on the limited use of the evidence." State v. Cofield, 127 N.J. 328, 340-41 (1992). The Court's instruction "should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable to the jury to comprehend and appreciate the fine distinction." Ibid.

Disputes as to the adequacy of these instructions are subject to the "plain error rule" of Rule 2:10-2, which provides that any error not "clearly capable of producing an unjust result" must be disregarded. State v. Marrero, 148 N.J. 469, 494 (1997). With respect to jury charges, even erroneous charges will be upheld if they are incapable of prejudicing a substantial right. Boryszewski v. Burke, 380 N.J.Super. 361, 374 (App. Div. 2005).

Here, the Court twice gave a limiting instruction to the jury. The final instruction read as follows:

> In this case, one of the limiting instructions I provided you had to deal with the testimony of an armed robbery that allegedly occurred in South River. That testimony was allowed in this case solely to provide context for statements made by the

> police. You cannot use any reference of alleged criminal activity that occurred in South River to determine the guilt or innocence of the defendant as to the particular charges in this case.
> [(5T11-7 to 15.)]

By specifying that the evidence was allowed "solely to provide context" and may not be used "to determine the guilt or innocence of the defendant," it explained with sufficient "precision" the "permitted and prohibited" uses of the evidence. Similarly, by couching the instruction with the factual circumstances within which the pertinent event appeared, the jury was likewise able to "appreciate the fine distinction" of its application.

Defendant's top count was a possessory offense. A possession captured on video. The charge was neither "clearly capable of producing an unjust result" nor capable of prejudicing a substantial right. The jury was told exactly what it needed to know and what it had to disregard, largely in spite of defendant's insistence that they consider it anyway. Reversal on this issue is inappropriate.

POINT III

THE TRIAL COURT'S SENTENCE WAS APPROPRIATE AND ITS REASONING ADEQUATELY ARTICULATED[4]

Defendant argues that the trial court "double counted" its justifications for imposing both an extended term and aggravating factors 3, 6, and 9. (Db33). This, defendant offers, constitutes grounds for resentencing. However, defendant's reliance on the "double counting" standard exceeds, by a wide margin, the boundaries of its application. The Court's reasoning for its sentence was articulate and its decision justified by the sentencing structure by which it was bound. Resentence is therefore inappropriate.

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). An appellate court "must not substitute its judgment for that of the sentencing court," State v. Fuentes, 217 N.J. 57, 70 (2014), and is bound to affirm the sentence absent a "clear abuse of discretion." State v. Roth, 95 N.J. 334, 363 (1984); see State v. Bolvito, 217 N.J. 221, 228 (2014).

As our Supreme Court has explained:

> Appellate courts must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not "based upon competent credible evidence in the record;"

[4] As defendant acknowledges in its brief, this issue was neither raised below nor properly preserved by defense counsel.

> or (3) "the application of the guidelines to the facts" of the case "shock[s] the judicial conscience."
>
> [Bolvito, 217 N.J. at 228 (alteration in original) (quoting Roth, 95 N.J. at 364- 65).]

In general terms, judges are given wide but not unconstrained discretion at sentencing. State v. Case, 220 N.J. 49, 53-54 (2014). The New Jersey Supreme Court has articulated the extent and limit of that discretion as follows:

> When the aggravating and mitigating factors are identified, supported by competent, credible evidence in the record, and properly balanced, we must affirm the sentence and not second-guess the sentencing court, provided that the sentence does not shock the judicial conscience. On the other hand, if the trial court fails to identify relevant aggravating and mitigating factors, or merely enumerates them, or forgoes a qualitative analysis, or provides little insight into the sentencing decision, then the deferential standard will not apply.
> [Id. at 65 (internal citations and quotation marks omitted).]

Here, defendant was found guilty of second-degree Unlawful Possession of a Weapon, N.J.S.A. 2C:39-5, second-degree Certain Persons Not to Have Weapons, N.J.S.A. 2C:39-7, and third-degree Hindering Apprehension or Prosecution, N.J.S.A. 2C:29-3(b)1. At the time of his conviction, defendant had been previously convicted of Aggravated Assault with a Deadly Weapon, contrary to N.J.S.A. 2C:12-1(b)2, the Judgment of Conviction for which was submitted to the Court. (6T4-23 to 5-1).

The Court found Aggravating Factors 3, 6, and 9. With respect to 3, the risk defendant will commit another offense, the Court discussed defendant's criminal history, including a recent conviction for another firearm-related offense. (6T29-6 to 30-22). Pertinent to 6, the extent of the defendant's prior criminal record and the seriousness of that record, the Court found that defendant's history with weapons was sufficiently dangerous to the public to warrant the application of the factor. (6T30-23 to 31-7). Germane to 9, the need to deter this defendant and others from violating the law, the Court found both a specific need to deter this defendant, as well as a generalized need to deter others from committing crimes involving weapons. (6T31-12 to 20). The Court also found that the aggravating factors "clearly outweigh the mitigating factors[.]" (6T32-22 to 25).

N.J.S.A. 2C:44-3 requires a sentencing court to impose an extended term of imprisonment when a defendant who has previously been convicted of an assault with a firearm is subsequently convicted of unlawfully possessing a firearm. The choice, therefore, was removed from the trial court and cannot be considered excessive or inappropriate.

This is especially true considering the Court's restraint: an extended term on a second-degree conviction would subject defendant to upwards of twenty years in prison, while the Court elected to impose thirteen. The Court

also imposed the minimum possible term of parole ineligibility and ran defendant's sentences for Hindering and being a Certain Person concurrently to the thirteen on the conviction for an Unlawful Possession of a Weapon.

The sentence of the Court actually defied the theory of State v. Case, which held that "when the mitigating factors preponderate, sentences will tend towards the lower range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." 220 N.J. At 64-65. Here, the aggravating factors preponderated but nevertheless defendant was sentenced in the lower range.

With respect to "double counting," a sentencing Court may not cite an element of an offense as an aggravating factor to increase punishment. State v. Fuentes, 217 N.J. at 74-75; State v. Kromphold 162 N.J. 345, 353 (2000); State v. Yarbough, 100 N.J. 627, 633 (1985), as amended by N.J.S.A. 2C:44-5(a). The sentencing Court did no such thing.

The Court imposed an extended term on Count 1, Unlawful Possession of a Weapon. To justify that sentence, the Court relied on defendant's prior conviction for a weapons offense. That conviction is not an element of the crime – it cannot therefore be subject to reversal for double counting. See State v. McDuffie, 450 N.J. Super. 554, 576 (App. Div. 2017) (rejecting as meritless defendant's claim that "the court impermissibly double-counted his

criminal record, when granting the State's motion for a discretionary extended term, and again, when imposing aggravating factor six").

More importantly, however, it triggers a mandatory extended term: the Court not only can, but must rely on that prior conviction.

For the aggravating factors, the Court relied on defendant's criminal history to establish that he is a risk to reoffend (3), that he did in fact have a criminal history (6), and that his continued resort to weapons offenses was worthy of deterring (9). It is difficult to imagine how else one could arrive at such conclusions. Nevertheless, the defendant's criminal history is not an element of the offense for which the extended term was imposed. It is therefore neither duplicative nor improper.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm defendant's conviction and sentence.

Respectfully submitted,

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By: _____
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Date: August 12, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3265-22T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New
v.	:	Jersey, Law Division, Middlesex County.
JAKI N. HOOKS-LEWIS,	:	Indictment Nos. 20-03-402, 20-03-403
Defendant-Appellant.	:	Sat Below:
	:	Hon. Benjamin S. Bucca, Jr., J.S.C., and a jury.

BRIEF & APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

Middlesex County Indictment 20-03-402-I charged defendant Jaki Hooks-Lewis with: third-degree hindering apprehension or prosecution, contrary to N.J.S.A. 2C:29-3b(4) (Count 1); second-degree unlawful possession of a handgun, contrary to N.J.S.A. 2C:39-5b(1) (Count 2); and fourth-degree possession of a prohibited device (hollow point ammunition), contrary to N.J.S.A. 2C:39-3f (Count 3). (Da 1-2) Middlesex County Indictment 20-03-403-I charged Hooks-Lewis with second-degree certain persons not to have weapons, contrary to N.J.S.A. 2C:39-7b(1). (Da 3)

Hooks-Lewis filed a motion to suppress evidence seized as a result of a warrantless motor vehicle search, which was heard by the Honorable Benjamin S. Bucca, J.S.C., on November 4, 2020. (1T) Judge Bucca denied Hooks-Lewis's motion on the record and in a written order. (1T 95-1 to 105-24; Da 13)

Hooks-Lewis was tried before Judge Bucca and a jury from July 1 to July 7, 2021. On Indictment 20-03-402-I, the jury convicted Hooks-Lewis of hindering and unlawful possession of a handgun, but acquitted him of possessing a prohibited device. (5T 44-19 to 46-14, 66-2 to 67-14; Da 4-5) In a

bifurcated trial, the jury convicted Hooks-Lewis of the certain persons offense. (5T 63-19 to 66-1; Da 6)

On August 24, 2021, Hooks-Lewis was sentenced to an aggregate term of 13 years in prison with five years of parole ineligibility. (6T 28-14 to 37-4; Da 7-12)

Hooks-Lewis filed a notice of appeal, as within time. (Da 14-18)

STATEMENT OF FACTS

A. The Suppression Hearing

The State presented one witness at the suppression hearing, Officer Thomas Soulias. (1T 5-1 to 74-19) Soulias testified that he is a patrolman with the East Brunswick Police Department, and that on January 1, 2020, he was patrolling Route 18. (1T 5-10 to 16, 7-7 to 19) Soulias stated that he was in an unmarked vehicle at the intersection of Route 18 and Eggers Street, perpendicular to the traffic on Route 18. (1T 7-20 to 9-2) At around 10:50pm, he pulled over a Chevy Suburban. (1T 7-24 to 8-1, 9-3 to 5)

Soulias testified that the Suburban initially caught his attention because "[i]t was traveling at a high rate of speed in the center lane." (1T 9-6 to 8) Soulias did not have a radar gun, but he noticed that the Suburban was passing the vehicles in the right and left lanes. (1T 9-9 to 18) Soulias admitted that the vehicle was not going fast enough to issue a speeding ticket. (1T 46-17 to 47-4)

Soulias testified that he followed the vehicle and pulled it over not because of its speed, but because "the front windows were tinted." (1T 9-19 to 11-4, 46-17 to 47-4, 51-20 to 25, 73-21 to 74-1) When Soulias started following the vehicle, he did not turn on his overhead lights. (1T 10-14 to 11-2, 53-24 to 55-5) Rather, he waited until the vehicle exited the highway. (Ibid.)

The activation of Soulias's overhead lights caused his motor vehicle recorder (MVR) to start recording, as well as capture the 30 seconds prior to activation. (1T 23-2 to 18; Da 20)

The MVR was played at the suppression hearing. (1T 22-20 to 41-1; Da 20) The front windows of the Suburban are down for the duration of the MVR. (1T 11-3 to 12, 55-6 to 11, 71-25 to 74-14; Da 20) Soulias testified that the MVR does not capture when he first saw the Suburban with the front windows up. (1T 11-3 to 12, 23-5 to 18, 74-6 to 14)[1] Approximately eleven minutes into the stop, when Soulias told Hooks-Lewis that he pulled him over for tinted windows, Hooks-Lewis responded, "my windows are down." (1T 35-17 to 26-10; Da 20 at 10:45 to 11:30)

The State did not introduce any photographs of the allegedly tinted front windows at the suppression hearing. Soulias testified that photographs of the Suburban were taken at the scene but "I don't have them with me today." (1T 46-2 to 9) Thus, the only evidence of the tinted windows came from Soulias's testimony.

On direct, when asked if he could see the driver of the Suburban as it passed him on Route 18, Soulias stated, "No, sir. The -- the front windows

[1] Soulias also testified that the Suburban would not have known it was being followed by an officer until the lights were activated, since Soulias was in an unmarked car. (1T 53-20 to 55-4)

were tinted." (1T 9-19 to 21) The prosecutor confirmed, "so, you couldn't see the driver because the windows were tinted; is that what you said?" (1T 10-7 to 9) Soulias responded, "Completely tinted, yes." (1T 10-10) It was nearly 11:00pm and dark outside. (1T 7-24 to 8-1, 44-5 to 6)

On cross examination, when asked about the degree of tint on the front windows, Soulias responded, "His were dark. You're not allowed to have any tint on the front . . . driver's side or front passenger side window." (1T 47-5 to 17) Defense counsel asked, "Even if the car comes from the manufacturers with the tint, you're not allowed to have that?" (1T 47-18 to 20) Soulias replied, "No, sir." (1T 47-20) Soulias reiterated that it is illegal to drive a car with the front two windows tinted "to any degree." (1T 48-25 to 49-4); see also (1T 52-9 to 21) (testifying that unlike the front windows, the back windows can be tinted).

In response to questioning from the court, Soulias testified that the front windows – when raised – looked similar to the back windows. (1T 72-15 to 22)

After pulling the Suburban over, Soulias approached the passenger side of the vehicle. (1T 11-5 to 8) Soulias identified Jaki Hooks-Lewis as the driver in court. (1T 11-16 to 12-4) Soulias testified that he observed an open bottle of Jack Daniels in the cup holder and the faint odor of marijuana. (1T 11-9 to 15,

28-6 to 8) Hooks-Lewis denied having anything to drink (1T 28-6 to 18), and Soulias testified that he had no reason to believe Hooks-Lewis was intoxicated or smoking marijuana. (1T 58-24 to 60-20, 71-1 to 18)

Soulias asked Hooks-Lewis for his license, registration, and insurance. (1T 12-7 to 12, 24-2 to 3) Hooks-Lewis looked around the car but was unable to provide the requested documents. (1T 12-7 to 14, 24-1 to 25-16) Soulias asked for a name and date of birth, and Hooks-Lewis provided the name Malcom Lewis with the birthday July 7, 1989. (1T 12-17 to 21, 25-17 to 26-19) Another officer arrived on the scene, and Soulias moved to the driver's side of the car. (1T 12-22 to 13-2, 25-9 to 12) Soulias testified that the smell of marijuana was stronger from the driver's side. (1T 13-18 to 20)

Soulias asked Hooks-Lewis to exit the vehicle. (1T 13-21 to 14-1, 28-8 to 24) Soulias was advised that a DMV inquiry for the name and date of birth provided returned nothing on file. (1T 14-4 to 11, 29-17 to 18) Hooks-Lewis told the officers that he had a North Carolina license and only a New Jersey permit. (1T 29-18 to 30-13) Hooks-Lewis denied having any documentation with his name on it. (1T 13-12 to 18, 30-14 to 16, 31-8 to 10) Hooks-Lewis also told the officers that a medical card in his wallet with the name "Jaki Hooks-Lewis" referred to his daughter. (1T 15-11 to 16, 30-17 to 31-5)

Another backup officer – Officer Longhitano – asked Hooks-Lewis how old he was, and Hooks-Lewis said 28 years old. (1T 14-16 to 15-9, 31-11 to 32-2) Longhitano pointed out that the birthday provided would make him 30 years old, and Hooks-Lewis then admitted that he was in fact Jaki Hooks-Lewis with a birthday of June 23, 1996. (14-16 to 15-22, 32-3 to 33-13)

Hooks-Lewis explained that the car belonged to his mother (1T 15-23 to 16-1, 33-24 to 25), and he denied consent to search the car. (1T 16-2 to 6, 34-1 to 4)[2] Soulias testified that he asked for consent to search the car even though he already had probable cause to search the car based on the smell of marijuana. (1T 16-7 to 17-1, 34-5 to 11) Notably, the MVR shows that there was no mention of the smell of marijuana until approximately ten minutes into the motor vehicle stop; it was only when Soulias asked Hooks-Lewis for consent to search the car that another officer spoke up and said consent was unnecessary due to the smell of marijuana. (1T 34-1 to 13; Da 20 at 9:50 to 10:00)

Soulias requested a DMV inquiry for Jaki Hooks-Lewis, and he discovered that Hooks-Lewis had a suspended license and an active warrant out of New Brunswick for $200. (1T 17-10 to 23, 38-22 to 39-6) Hooks-Lewis

[2] The car did in fact belong to Hooks-Lewis's mother. (4T 29-1 to 5, 38-24 to 39-13)

was arrested, and the officers conducted a search of the Suburban. (1T 17-24 to 18-5) During the search, Officer Longhitano discovered a handgun in the center console of the car. (1T 18-19 to 19-2, 39-23 to 40-14) Longhitano did not use gloves when handling the weapon. (1T 41-14 to 42-2)

The officers also recovered a "gas mask" on the floor behind the driver's seat. (1T 19-4 to 11) Soulias testified that, based on his training and experience, the gas mask had been modified so that it could be used to ingest marijuana. (1T 19-5 to 20-24) No marijuana was recovered during the search; however, Soulias testified that he observed "marijuana residue" in the pieces of the gas mask that had been modified. (1T 21-2 to 5, 57-8 to 13) At the suppression hearing, Soulias smelled the gas mask, which had been hermetically sealed since the day of the stop. (1T 57-18 to 68-9) Soulias testified that the mask smelled like marijuana, and when asked to rate the odor of marijuana on a scale from one to ten, one being weak and ten being strong, Soulias testified, "it's a strong odor of marijuana. It's an 8 or a 9." (1T 66-23 to 68-23) The gas mask was resealed inside the bag. (1T 68-9 to 12)

The trial court denied Hooks-Lewis's suppression motion. (1T 95-1 to 105-24; Da 13) Regarding the stop, the court found that Soulias lawfully stopped the Suburban based on his reasonable belief that there was a violation of the tinted windows statute. (1T 100-15 to 102-20) The court stated, "The

law on tinted windows is clear. . . . The rear windows can be tinted. However, the front window and the front driver and the front passenger windows cannot." (1T 101-12 to 16) Regarding the search, the court found that the officers lawfully searched the Suburban based on the smell of marijuana, as Soulias credibly testified that he smelled marijuana, and the smell of marijuana provided probable cause for the search. (1T 10-21 to 105-19)[3]

B. The Trial

At trial, the State called four witnesses. Officer Soulias testified mostly in line with his testimony from the suppression hearing, again claiming that he pulled the Suburban over for a tinted windows violation and searched the car based on the smell of marijuana. (2T 67-25 to 88-13)[4] Soulias's testimony regarding the odor of marijuana, however, suffered from several inconsistencies. Soulias initially testified that he did not smell any marijuana when he approached the passenger side of the Suburban and noticed the odor

[3] The New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:6I-31 to -56, now precludes police from using the odor of marijuana to establish probable cause to search. CREAMMA took effect on February 22, 2021. State v. Cohen, 254 N.J. 308, 328 (2023). The stop in this case occurred in January of 2020.

[4] At trial, in addition to Soulias's MVR, the State introduced two photos of the Suburban with the front windows up; Soulias testified that the photos were taken on the scene. (2T 106-5 to 107-22, 108-18 to 136-21; Da 22-23)

of marijuana only when he got to the driver's side. (2T 74-19 to 22, 83-20 to 84-3) Soulias then changed his testimony to say that he smelled marijuana "as soon as I approached the vehicle." (2T 104-18 to 24); see also (2T 160-12 to 161-23; 3T 9-5 to 17-22) (defense counsel drawing attention to inconsistency and fact that there was no mention of marijuana odor during first eight minutes of stop).

When asked to smell the gas mask (which had been sealed in a bag since the suppression hearing) and rank the strength of the odor of marijuana, Soulias testified that it was a one or two, as opposed to the eight or nine he gave it at the suppression hearing. (3T 60-24 to 64-7, 108-4 to 134-2) Soulias's explanation of the discrepancy was that at the suppression hearing, he meant "[i]t smells like an 8 or a 9 as -- as in the fact that it's marijuana and it doesn't smell like cigarette smoke; it doesn't smell like anything else besides that odor of marijuana." (3T 145-16 to 146-1) He testified that the overall potency of the smell of marijuana, however, was only a one or a two. (3T 146-2 to 7) The marijuana flakes that Soulias allegedly observed inside of the gas mask were never tested. (3T 124-24 to 126-13)

The State also called Officer Christian Longhitano, who testified that he participated in the search of the Suburban and found a silver and black handgun in the center console. (3T 155-7 to 158-21) Longhitano testified that

the gun was loaded with hollow-point ammunition. (3T 169-12 to 14) Longhitano did not use any gloves when handling the gun. (3T 165-5 to 166-2, 173-3 to 177-9) His MVR was played for the jury and admitted into evidence. (3T 166-3 to 169-21; Da 21)

The officers admitted that there was no evidence aside from what happened on the MVR linking Hooks-Lewis to the gun. (2T 140-5 to 143-16; 3T 178-13 to 179-13) The gun was tested for Hooks-Lewis's fingerprints and DNA, and neither was found. (2T 143-5 to 16) Hooks-Lewis never made any statements regarding the gun, his cell phone was never searched, and there were no third-party statements connecting him to the gun. (2T 140-5 to 143-4; 3T 178-13 to 179-13)

The State also called Detective Edward Burek, a detective with the New Jersey State Police Ballistics Unit, who authored a report about the gun found in the Suburban. (3T 208-7 to 21, 215-6 to 218-4) Burek testified that the gun was a "9-millimeter Luger caliber Bryco Arms semi-automatic pistol," and that it was operable and capable of being discharged. (3T 219-9 to 224-11) Burek also testified that he examined a bullet cartridge, which he identified as "9-millimeter Luger caliber, metal-jacketed hollow-point bullet cartridge." (3T 224-12 to 228-14)

Finally, the State called Detective James Hearne, a detective with the New Jersey State Police Firearms Investigation Unit. (3T 232-13 to 233-8) Hearne testified that he conducted database inquiries in this case, which revealed that Hooks-Lewis did not have a permit to carry a weapon, and that the gun found in the Suburban was not registered with the State of New Jersey. (3T 233-9 to 237-5)

At trial, the defense theory was that Hooks-Lewis did not know that the gun was in the Suburban, as the car was not his and was used by many people. (2T 43-24 to 47-9, 51-16 to 52-8; 4T 93-1 to 102-5) Hooks-Lewis's mother, Kemper Lewis, testified at trial, and her testimony supported that theory. (4T 25-1 to 56-9) Ms. Lewis testified that the Chevy Suburban was her truck. (4T 29-1 to 5) It was registered and insured in her name. (4T 38-24 to 41-4)[5] She and her husband each had their own vehicle, and the Suburban was a spare. (4T 29-23 to 30-17)

Ms. Lewis explained that she has five children, all of whom were living with her at the time of the incident, and that they all had access to the Suburban. (4T 29-9 to 30-25) She stated that they could not drive the Suburban without getting her permission, and that Hooks-Lewis would drive the

[5] Ms. Lewis found the registration and insurance on the floor of the vehicle when she retrieved it from police custody. (3T 24-21 to 25-20; 4T 38-24 to 41-4)

Suburban about once or twice a month. (4T 31-1 to 14) When asked who else drove the Suburban, Ms. Lewis explained "anybody that asks me," as she has a "very large family," and she and her husband tried to be nice by allowing family and friends to use the car. (4T 31-15 to 32-16, 35-6 to 19)

Ms. Lewis testified that on the day of the incident, January 1, 2020, her cousin was hosting a New Years party. (4T 32-17 to 33-22) She and her family drove the Suburban to the party. (4T 33-23 to 34-5) On the drive, Ms. Lewis did not smell any marijuana in the Suburban, nor did she see a gas mask. (4T 38-16 to 23) There were about 20 people at the party when they arrived. (4T 34-6 to 14) On that day, Ms. Lewis's daughters, their boyfriends, and their friends all used the car to make trips to the store and pick up friends. (4T 34-15 to 35-5) The car was also used by others in the lead up to January 1. (4T 35-20 to 25) Ms. Lewis testified that she was no longer loaning the truck out after what happened with her son. (4T 35-6 to 9, 38-2 to 15) She also testified that she did not know her son's license was suspended, and she would not have let him drive the car if she knew. (4T 45-3 to 9)

In addition to Ms. Lewis's testimony, defense counsel focused on the lack of evidence connecting Hooks-Lewis to the gun. (2T 51-16 to 52-12, 56-20 to 25, 58-20 to 60-21; 4T 93-16 to 103-8) Defense counsel posited that law enforcement conducted an inadequate investigation because they made

assumptions about Hooks-Lewis based on his race. (2T 58-20 to 59-7) ("[T]he East Brunswick and the Middlesex County Prosecutor[]s . . . jumped to conclusions, which ties into why they didn't investigate . . . [a]nd that's because . . . [y]oung, black male equals guns. Jaki Hooks-Lewis is a young, black male. Therefore, Jaki, the gun is his."). Defense counsel also highlighted inconsistencies in the officers' testimony and suggested that the officers were not credible in smelling marijuana and just wanted an excuse to search the Suburban. (2T 49-6 to 51-15; 4T 105-1 to 113-4, 117-2 to 120-18)

In support of the theory that law enforcement made assumptions about Hooks-Lewis, defense counsel drew attention to conversations the officers had during the stop in which they expressed their belief that Hooks-Lewis was involved in a robbery. (2T 50-10 to 19, 56-23 to 65-9; 4T 113-5 to 131-4) On Soulias's cross-examination, defense counsel played a portion of the MVR in which one of the officers told Soulias, "the kid is wearing a ski mask on top of his head," he's "wearing all black," and "he fits the bill." (3T 41-7 to 44-20)[6] Soulias explained both on cross and redirect that Hooks-Lewis's clothing and race matched the description of a suspect in an armed robbery that occurred the previous night in South River. (3T 44-21 to 46-22, 137-2 to 21)

[6] In fact, Hooks-Lewis was wearing a black jacket with colorful patches all over the front. (3T 104-18 to 21); see, e.g., (Da 20 at 6:45).

After the testimony on redirect, the judge interjected with the following instruction:

> Okay. With that, let -- just let me just say, ladies and gentlemen, I -- I think I'm going to be stating the obvious, but sometimes you need to state the obvious. The fact that there is discussion about another crime being -- another crime that was allegedly committed does not have any -- any reference to your deliberations in this particular case. It's just -- the only reason it is coming up is to give context as to what was meant by the phrase, "Fits -- fits the bill."
>
> [(3T 137-22 to 138-6)]

The State then clarified with Soulias that Hooks-Lewis was never charged with "anything to do with anything" in South River. (3T 138-9 to 14)

During Longhitano's cross-examination, he testified that during the stop, another officer said to him, "This was the kid who did the robbery last night," and Longhitano responded, "Oh, yeah, 100 percent." (3T 202-5 to 19) Longhitano then told the officer, "This is going to be the guy who robbed the gas station last night," and the other officer said, "Oh, yeah. He's got a ski mask and gloves in the car." (3T 202-20 to 203-1) On redirect, Longhitano explained that the previous night there was an armed robbery in South River, the description of the suspect was "a black male with a black jacket and black pants that furnished a silver and black handgun," and the officers thought Hooks-Lewis "could be the guy" who did the armed robbery. (3T 203-21 to

204-16) Longhitano testified that South River was contacted but declined to investigate. (3T 204-17 to 205-11) The court did not give the jury any instruction after Longhitano's testimony.

In its final charge to the jury, the court issued the following instruction regarding the robbery in South River:

> In this case, one of the limiting instructions I provided you had to deal with the testimony of an armed robbery that allegedly occurred in South River. That testimony was allowed in this case solely to provide context for statements made by the police. You cannot use any reference of alleged criminal activity that occurred in South River to determine the guilt or the innocence of the defendant[] as to the particular charges in this case.
>
> [(5T 11-7 to 15)]

LEGAL ARGUMENT

POINT I

REVERSAL IS REQUIRED BECAUSE THE STATE FAILED TO MEET ITS BURDEN OF PROVING THAT TINTING ON THE FRONT SIDE WINDOWS INHIBITED THE OFFICER'S ABILITY TO CLEARLY SEE INSIDE DEFENDANT'S VEHICLE. (1T 95-1 to 105-24; Da 13)

At the motion hearing, the prosecutor failed to "present evidence that tinting on the front side windows inhibited officers' ability to clearly see the vehicles' occupants or articles inside." State v. Smith, 251 N.J. 244, 266 (2022). Thus, the State did not meet its burden of proving that the vehicle was violating N.J.S.A. 39:3-74 and that a warrantless stop was justified. Accordingly, defendant's suppression motion should have been granted, and reversal of his convictions is required. U.S. Const. amends. IV, XIV; N.J. Const. art. I, ¶ 7.

Both the United States and New Jersey Constitutions guarantee "[t]he right of the people to be secure against unreasonable searches and seizures." U.S. Const. amends. IV, XIV; N.J. Const. art. I, ¶ 7. A warrantless stop or search is prima facie invalid unless it falls within one of the specific exceptions to the warrant requirement. State v. Patino, 83 N.J. 1, 7 (1980). The State bears the burden of proving by a preponderance of the evidence that a

warrantless search or seizure is legal. State v. Edmonds, 211 N.J. 117, 128 (2012).

A motor vehicle stop is a "seizure of persons" under both the Federal and State Constitutions. State v. Scriven, 226 N.J. 20, 33 (2016). To justify such a seizure, "a police officer must have a reasonable and articulable suspicion that the driver of a vehicle, or its occupants, is committing a motor-vehicle violation or a criminal or disorderly persons offense." Id. at 33-34.

N.J.S.A. 39:3-74, which serves as the "basis for tinted windows citations," actually predates automotive window tinting and thus does not directly proscribe tinting. Smith, 251 N.J. at 251-52. Rather, the statutory language only prohibits operation of a vehicle with "non-transparent material" on the front windshield or front side windows. Id. at 251.

In Smith, our Supreme Court interpreted "th[is] plain language of N.J.S.A. 39:3-74" to mean "that reasonable and articulable suspicion of a tinted windows violation arises only when a vehicle's front windshield or front side windows are so darkly tinted that police cannot clearly see people or articles within the car." Id. at 253, 265. That is because, in common parlance, the statutory term "non-transparent" only means not "able to be seen through." Id. at 265, 265 n.3 (citing the Merriam-Webster dictionary definition). The Court thus affirmatively rejected the State's contrary argument that under

N.J.S.A. 39:3-74, "drivers … may not add any tint to front windows or windshields." Id. at 257.

The Court emphasized that, for a warrantless stop of a motor vehicle for "non-transparent" windows to be upheld, it is insufficient for the State to prove that windows were tinted, or even darkly tinted. Id. at 265-66. As the facts in Smith demonstrated, detectives may be able to see through even dark automotive window tinting. Id. at 252. Consequently, the Court underscored repeatedly that, "In order to establish a reasonable suspicion of a tinted windows violation under N.J.S.A. 39:3-74, the State will therefore need to present evidence that tinting on the front windshield or front side windows inhibited officers' ability to clearly see the vehicle's occupants or articles inside." Id. at 266.

At the hearing on Hooks-Lewis's motion to suppress, the State failed to satisfy its burden of proving a violation of N.J.S.A. 39:3-74 because Soulias's testimony did not demonstrate that front window tint – as opposed to back window tint or external factors – was responsible for obstructing Soulias's ability to see inside the car. Smith, 251 N.J. at 253, 265-66. When asked whether he could see the driver of the Suburban as it passed, Soulias said, "No, sir. The -- the front windows were tinted." (1T 9-19 to 21) But Soulias did not testify that the front window tint alone was responsible for obstructing his

view. See also (1T 10-7 to 10) (responding, "Completely tinted, yes," when asked whether he "couldn't see the driver because the windows were tinted," but offering no testimony that the front tinted windows were responsible for his inability to see the driver); (1T 73-15 to 74-11) (testifying that he could not see inside the car as it passed but offering no testimony that this was because of the front tinted windows).

Unambiguous testimony connecting the front window tint to an inability to see inside the car was particularly important in this case because other evidence undermined Soulias's tinted windows testimony. First, it was nearly 11:00pm, it was dark outside, and Hooks-Lewis was driving in the center lane with cars in between him and Soulias. (1T 7-24 to 8-1, 9-6 to 18, 44-5 to 6) Thus, it was particularly important for the State to prove that front window tint – and not external factors like the time of day or the placement of Soulias's car – was responsible for Soulias's inability to see inside. Second, there was no evidence corroborating Soulias's testimony. Hooks-Lewis's front windows were down from the outset of the MVR, even though Soulias admitted that the MVR started recording 30 seconds before Hooks-Lewis became aware of his presence. (1T 23-2 to 18, 53-20 to 55-11, 71-25 to 74-14; Da 20) While Soulias testified that the front windows looked like the back windows when raised (1T 72-15 to 22), the State presented no photographs of the allegedly

tinted windows at the suppression hearing, despite Soulias's testimony that such photographs existed. (1T 46-2 to 9) Put simply, Soulias's testimony regarding the tint on the front windows needed to be particularly strong for the State to meet its burden under Smith. It was not.

Instead, Soulias's testimony conveyed his erroneous belief that any tint to the front windows justified the stop, without regard to whether he could see inside. Soulias incorrectly testified that "[y]ou're not allowed to have any tint on the front . . . driver's side or front passenger side window" and that it is illegal to drive a car with the front two windows tinted "to any degree." (1T 47-5 to 49-4, 52-9 to 21) But the Supreme Court has rejected interpreting N.J.S.A. 39:3-74 to mean that "drivers … may not add any tint to front windows or windshields." Smith, 251 N.J. at 257.

After the testimony concluded, the prosecutor erroneously argued that "[t]he officer testified that he saw a car pass him with tinted windows in the front," and "that's all we need." (1T 85-24 to 86-10) Defense counsel, on the other hand, argued that "there was no proof in this case that the windows were not only illegally tinted, that they were tinted at all." (1T 76-24 to 77-1) The trial court adopted the prosecutor's incorrect interpretation of N.J.S.A. 39:3-74, concluding, "The law on tinted windows is clear. . . . The rear windows can be tinted. However, the front window and the front driver and the front

passenger windows cannot." (1T 101-12 to 16) The trial court found that because Soulias credibly testified that the front windows were tinted, the stop was lawful. (1T 101-9 to 102-20) The trial court's rationale for upholding the stop was therefore based on a mistaken understanding of the law, and the court never found that the correct standard was met. See State v. Carter, 247 N.J. 488, 531 (2021) ("[W]e count on judges to interpret and uphold laws as written – not to validate an officer's mistaken view of the law, even if reasonable, that intrudes on a person's liberty.") Had the court applied the proper test for a tinted windows violation, it would have found that the State failed to meet its burden.

In sum, the trial court erred by denying the defendant's motion to suppress because the State failed to justify the motor vehicle stop at the hearing. Soulias testified that he stopped the vehicle because the front windows were tinted, but he failed to provide sufficient testimony that it was the front tinted windows that inhibited his ability to clearly see inside the vehicle, which is the test for establishing reasonable suspicion of a tinted windows violation under N.J.S.A. 39:3-74.

Notably, the State chose not to present any photographs of the allegedly tinted windows, despite Soulias's testimony that such photographs existed. (1T 46-2 to 9) By strategically rejecting the opportunity to present critical evidence

about the degree of tint, the State invited its own failure to meet its burden of proving an N.J.S.A. 39:3-74 violation, and must be bound by the consequences of its own strategy. See generally United States v. Nicholson, 721 F.3d 1236, 1246 (10th Cir. 2013) ("We have often instructed district courts to vacate convictions upon our reversing the denial of a motion to suppress. We see no reason the government should receive the benefit of relitigating this motion as a result of its own failure[.]") (citations omitted); State v. Atwood, 232 N.J. 433, 449 (2018) ("The State's refusal to present [relevant] evidence at the motion hearing amounted to a failure to carry its burden as to the stop."); State v. Wilson, 178 N.J. 7, 17 (2003) ("[W]e cannot fill in gaps in the record to supply the requisite proofs required of the State under constitutional standards.").

The only permissible remedy is to reverse the trial court's erroneous denial of the defendant's motion to suppress and vacate his convictions. The State failed to present sufficient evidence that the front windows inhibited the officer's ability to clearly see occupants or articles inside of the vehicle. Smith, 251 N.J. at 266. Absent such proof of "non-transparency," the State failed to meet its burden of proving that the warrantless stop was justified.[7]

[7] In State v. Haskins, 477 N.J. Super. 630, 644-46 (App. Div. 2024), this Court held that Smith should be afforded pipeline retroactivity. As in Haskins, while

POINT II

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ISSUED AN INADEQUATE LIMITING INSTRUCTION REGARDING HOW TO CONSIDER TESTIMONY IMPLICATING DEFENDANT IN AN UNRELATED ROBBERY. (Not Raised Below)

In order to attack the credibility of the officers, the adequacy of the investigation, and the ability of the State to meet its burden of proof, defense counsel highlighted statements made during the motor vehicle stop in which the officers expressed their belief that Hooks-Lewis was involved in an armed robbery from the night before. On redirect, the State brought out additional evidence about the robbery. This evidence, while relevant to defense counsel's theory, was also highly prejudicial, as it created a risk that the jury would speculate that Hooks-Lewis was involved in the armed robbery and was therefore guilty of the charged crimes. This risk required the trial court to give a clear and specific limiting instruction informing the jury about the permissible and impermissible uses of the robbery evidence. The court's

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Hooks-Lewis's appeal was not filed until after Smith was decided, this Court granted Hooks-Lewis's leave to file his notice of appeal as within time. (Da 14-18) Thus, as in Haskins, "his appeal was deemed filed within forty-five days from the sentence date, which was . . . prior to the Smith decision. Defendant's case, for all practical purposes, was accordingly 'on direct appeal' at the time Smith was issued." 477 N.J. Super. at 646. Accordingly, it "should be deemed within the 'pipeline.'" Ibid.

instruction in this case, however, was wholly inadequate – the court failed to instruct the jury about the permissible use of the evidence; did not repeat the limiting instruction at all necessary times; and neglected to tell the jury that Hooks-Lewis was never charged with the armed robbery. In a case where the evidence connecting Hooks-Lewis to the gun was weak, the court's inadequate limiting instruction plainly could have "led the jury to a result it might otherwise not have reached." State v. Macon, 57 N.J. 325, 336 (1971). Thus, the court's error deprived Hooks-Lewis of a fair trial, and reversal of his convictions is required. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; R. 2:10–2.

Rule 404(b) sharply limits the admission of evidence of other crimes or wrongs. Under this Rule, "evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition," but such evidence "may be admitted for other purposes," if "such matters are relevant to a material issue in dispute." N.J.R.E. 404(b). This limiting principle recognizes that prior-conduct evidence "has the effect of suggesting to a jury that a defendant has a propensity to commit crimes, and, therefore, that it is more probable that he committed the crime for which he is on trial." State v. Willis, 225 N.J. 85, 97 (2016) (internal quotation marks and citation omitted); see also

State v. Blakney, 189 N.J. 88, 93 (2006) (noting "the danger that other-crimes evidence may indelibly brand the defendant as a bad person and blind the jury from a careful consideration of the elements of the charged offense").

When such prejudicial evidence is admitted at trial, the jury charge must be precisely worded to explicitly tell the jury that "the proper use of such evidence is to prove a relevant issue in dispute and not to impugn the character of the defendant." Blakney, 189 N.J. at 92; see also State v. G.S., 145 N.J. 460, 472 (1996) ("On admission of other-crime evidence, the court must not only caution against a consideration of that evidence for improper purposes, it must through specific instruction direct and focus the jury's attention on the permissible purposes for which the evidence is to be considered."). The instruction "must include . . . '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.'" State v. Hernandez, 170 N.J. 106, 131 (2001) (citation omitted). Moreover, a limiting instruction should be given "not only at the time that other-crimes evidence is presented, but also in the final jury charge." Blakney, 189 N.J. at 93.

Here, the trial court made several critical errors in its limiting instruction regarding the robbery evidence. First, the court failed to instruct the jury on the permissible use of the evidence. After Soulias's testimony that one of the

officers said "he fits the bill" because Hooks-Lewis's clothing and race matched the description of a suspect in an armed robbery that occurred the previous night, the court told the jury, "the only reason [the discussion about another crime] is coming up is to give context as to what was meant by the phrase, 'Fits -- fits the bill.'" (3T 41-7 to 46-22, 137-2 to 138-6) In its final charge to the jury, the court stated that "the testimony of an armed robbery that allegedly occurred in South River. . . . was allowed in this case solely to provide context for statements made by the police." (5T 11-8 to 12)

But the testimony about the robbery was not allowed to provide context for police statements – that was not the "relevant issue in dispute." Blakney, 189 N.J. at 92. In other words, there was no dispute that the officers were discussing Hooks-Lewis's possible involvement in an armed robbery from the night before. Rather, the relevant issue in dispute was the officers' state of mind. Defense counsel argued that the officers' statements and testimony about the robbery showed that they made assumptions about Hooks-Lewis, which contributed to an inadequate investigation that precluded the State from meeting its burden of proof. (2T 50-10 to 19, 56-23 to 65-9; 4T 113-5 to 131-4) The State countered that the officers did not target or make assumptions about Hooks-Lewis. (4T 150-6 to 153-12)

Thus, in instructing the jury on the permissible use of the other-crimes evidence, the trial court should have instructed the jury that the evidence about the robbery could be considered only to shed light on the officers' state of mind. Instead, the court's instruction erroneously communicated to the jurors that they could use the robbery evidence to provide "context" for the officers' suspicions – i.e., to provide support for the officers' suspicions. The trial court's incorrect instruction permitted the jury to speculate that Hooks-Lewis was involved in a robbery from the night before and was thus highly problematic.[8]

While the court told the jury in its final charge that it "cannot use any reference of alleged criminal activity that occurred in South River to determine the guilt or the innocence of the defendant[] as to the particular charges in this case" (5T 11-12 to 15), this instruction was insufficient to focus the jury on the "fine distinction" between the prohibited and permitted uses of the evidence. Hernandez, 170 N.J. at 131.[9] Time and time again, our Supreme Court has held

[8] Notably, the State was not allowed to introduce evidence about the robbery during its case in chief. It was only once defense counsel decided to introduce the evidence as proof of the officers' state of mind that it became relevant and admissible. (3T 36-5 to 39-21)

[9] After Soulias's testimony, the court attempted to provide a similar instruction but confusingly told the jury that the robbery "does not have any [] reference to your deliberations in this particular case." (3T 137-25 to 138-4)

that when a limiting instruction informs the jury only about the impermissible use of the other-crimes evidence, the limiting instruction is insufficient. See, e.g., Hernandez, 170 N.J. at 133 (holding that "[a]lthough the court did caution the jury against considering the testimony as evidence of defendant's propensity to commit the charged crimes," the court "did not explain specifically its permissible use in connection with the facts of this case," requiring plain error reversal of defendant's conviction); G.S., 145 N.J. at 462, 469-72 (agreeing with the Appellate Division that the trial court's limiting instruction was insufficient because, although it informed the jury that "such evidence may not be considered as demonstrating that defendant had a predisposition to commit the offenses charged," it "failed to indicate the specific purposes for which the other-crime evidence could be considered"); State v. Oliver, 133 N.J. 141, 156-60 (1993) (finding reversal appropriate where the trial court instructed the jury only on the impermissible use of the other-crimes evidence); State v. Cofield, 127 N.J. 328, 339-42 (1992) (same). These cases demonstrate that when the trial court "fail[s] to focus the jury's attention on the limited purpose for which the evidence [is] admissible," the court gives the jury "free reign" to confuse propensity with guilt. Cofield, 127 N.J. at 341-42. That is precisely what happened here.

Moreover, the court issued no limiting instruction whatsoever after Officer Longhitano's testimony, even though a limiting instruction should be given every time other-crimes evidence is presented, as well as in the final jury charge. Blakney, 189 N.J. at 93. A limiting instruction was particularly important after Longhitano's testimony, as his testimony was even more prejudicial than Soulias's testimony. Longhitano testified that the robbery suspect "furnished a silver and black handgun" (3T 204-3), and that he found "a silver and black handgun" in the center console of the Suburban. (3T 158-12 to 21) Without a clear limiting instruction from the court, Longhitano's testimony plainly could have left the jury speculating that Hook-Lewis was responsible for the South River robbery and was thus guilty of knowingly possessing the handgun found in the Suburban.

Notably, none of the court's limiting instructions communicated the essential message that Hooks-Lewis was never charged with the South River robbery. While the prosecutor did elicit this fact from Soulias on redirect (3T 138-9 to 14), this fleeting testimony was not a substitute for a firm, repeated instruction from the court itself. See State v. Martin, 119 N.J. 2, 15 (1990) (noting that "[c]orrect charges are essential for a fair trial," and that "without an appropriate charge a jury can take a wrong turn in its deliberations").

The court's inadequate limiting instructions in this case require reversal of Hooks-Lewis's convictions. In deciding whether an insufficient limiting charge requires plain error reversal, a reviewing court must look both at the extent of the inadequacies and the strength of the evidence against the defendant. G.S., 145 N.J. at 473-76. Here, both weigh in favor of reversal. As discussed above, the court's limiting instructions were seriously flawed. The court issued one limiting instruction after Soulias's testimony, and one in its final charge. (3T 137-22 to 138-6; 5T 11-7 to 15) Neither properly charged the jury on the permissible use of the robbery evidence, and in fact, the instruction on permissible use encouraged the jury to contemplate Hooks-Lewis's involvement in an armed robbery. Furthermore, no limiting instruction was given after Longhitano's testimony, and the court failed to instruct the jury that Hooks-Lewis was never charged with the armed robbery. In sum, the court's failure to deliver a clear instruction about the permissible and impermissible use of the robbery evidence at each necessary point in the trial created a serious risk that the jury would consider such evidence improperly.

Reversal is further warranted because the evidence against Hooks-Lewis was weak. The officers admitted that there was no evidence aside from what happened on the MVR footage linking Hooks-Lewis to the gun. (2T 140-5 to 143-16; 3T 178-13 to 179-13) The gun was tested for Hooks-Lewis's

fingerprints and DNA, and neither was found. (2T 143-5 to 16) Hooks-Lewis never made any statements regarding the gun, his cell phone was never searched, and there were no third-party statements connecting him to the gun. (2T 140-5 to 143-4; 3T 178-13 to 179-13) Moreover, defendant's mother testified that the Suburban belonged to her and that many different people drove the car, particularly on the day in question. (4T 25-1 to 56-9) Against this backdrop, the jury heard evidence that Hooks-Lewis matched the description of a suspect in an armed robbery from the night before – and that the gun found in the Suburban was similar to the gun used in the armed robbery – without a proper instruction about how to consider that evidence. The court's error created a real risk that the jury convicted Hooks-Lewis of the charged offenses because of its belief that he was involved in an armed robbery the previous night. The court's error was thus clearly capable of producing an unjust result, and reversal is required. R. 2:10–2.

POINT III

RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT IMPERMISSIBLY DOUBLE-COUNTED AND USED THE SAME CONVICTION AS JUSTIFICATION FOR THE EXTENDED TERM AND FOR AGGRAVATING FACTORS 3, 6, AND 9. (Not Raised Below)

The trial court sentenced Hooks-Lewis to an extended term of 13 years of incarceration with five years of parole ineligibility for unlawful possession of a weapon, concurrent to a 10-year sentence with five years of parole ineligibility on the certain persons count and to a four-year sentence on the hindering count. (6T 32-22 to 37-4; Da 7-12) In imposing this sentence, the trial court erred in double-counting Hooks-Lewis's prior aggravated assault conviction – his only prior indictable conviction – as both the basis for the extended term and for the aggravating factors used to set his sentence. The sentence imposed was thus the result of an improper application and weighing of factors, and resentencing is required.

An appellate court has wide-ranging authority to review sentencing determinations to ensure that the sentencing court properly applied the standards and guidelines of the Criminal Code. State v. Hodge, 95 N.J. 369, 376 (1984). The court on appeal must review whether the finding of aggravating and mitigating factors was based on competent, credible evidence. State v. Roth, 95 N.J. 334, 363-64, 369 (1984). The role of aggravating and

mitigating factors is to identify "individual circumstances which distinguish the particular offense from other crimes of the same nature." State v. Yarbough, 195 N.J. Super. 135, 143 (App. Div. 1984), rev'd on other grounds, 100 N.J. 627 (1985). Therefore, the sentencing court should afford less weight to offender-oriented factors than to factors that are specific to the offense. Hodge, 95 N.J. at 378-79.

This is especially critical when the sentencing court has imposed an extended term based on prior convictions because the defendant's record is the reason for the imposition of the extended term. See State v. Vasquez, 374 N.J. Super. 252, 267 (App. Div. 2005) (holding that court could not use defendant's prior drug conviction as basis for imposing maximum sentence within extended range when defendant's prior drug conviction subjected him to mandatory extended term). When assessing the aggravating and mitigating circumstances used to set the length of that term, a judge must be careful not to double-count the prior offenses which triggered the imposition of the extended term. State v. Dunbar, 108 N.J. 80, 89-92 (1987). A remand for resentencing is required when the court double-counts, or otherwise errs in its consideration of aggravating or mitigating factors. State v. Carey, 168 N.J. 413, 424 (2001); State v. Dalziel, 182 N.J. 494, 504-06 (2005).

Here, the trial court granted the State's motion for a mandatory extended term based on its finding that Hooks-Lewis was a second offender with a firearm, pursuant to N.J.S.A. 2C:44-3d. (6T 3-11 to 5-24, 6-6 to 20) Defense counsel conceded that Hooks-Lewis met the criteria for the extended term. (6T 3-22 to 4-8) The relevant prior conviction was a third-degree aggravated assault conviction from 2017 in which Hooks-Lewis pleaded guilty to using a firearm during the assault. (6T 4-12 to 5-24; PSR 8) Hooks-Lewis was sentenced to three years of probation for the offense. (6T 29-11 to 15; PSR 8) The third-degree aggravated assault conviction was Hooks-Lewis's only prior indictable conviction. (6T 29-6 to 30-4; PSR 8)

In imposing a 13-year extended-term sentence, the Court found three aggravating factors under N.J.S.A. 2C:44-1a: (3) the risk that the defendant will commit another crime; (6) the extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted, and (9) the need to deter. (6T 30-5 to 31-20; Da 7-9)[10] The court's findings for each of these factors turned substantially on Hooks-Lewis's prior aggravated assault conviction, which the court had already considered in subjecting him to the mandatory extended term. The court found aggravating factor 3 based on

[10] The Court also found mitigating factor 14, N.J.S.A. 2C:44-1b(14), based on the fact that Hooks-Lewis was under 26 at the time of the offense. (6T 30-5 to 8, 31-20 to 32-21; Da 7-9)

"this being his second offense with a weapon, especially when he was given probation on the first one." (6T 30-12 to 18) The court reasoned that "[h]e was given an ample opportunity to change his ways and then, unfortunately, was found, a couple years later, in possession of another weapon." (6T 30-18 to 22) The court found aggravating factor 6 because of "the seriousness that this state [] treat[s] the illegal possession of guns" and the fact that guns "pose a significant risk to the public." (6T 30-23 to 31-7) Finally, the court found aggravating factor 9 because Hooks-Lewis, "in a short period, picked up a second gun charge knowing, without any doubt, the seriousness of being in possession of a gun," and because the court wanted to "send a message to the community in general to deter the illegal possession of a weapon." (6T 31-8 to 21)

The court's statements reveal that it relied heavily on the fact that this was Hooks-Lewis's second gun conviction to find each of the three aggravating factors. Thus, the court impermissibly double-counted Hooks-Lewis's prior conviction by using it both to sentence Hooks-Lewis to an extended term and to find the only three factors in aggravation. See Vasquez, 374 N.J. Super. at 267. Aside from the aggravated assault conviction that subjected Hooks-Lewis to the extended term, he had no prior indictable convictions. (6T 29-6 to 30-4; PSR 8) Accordingly, had the court not engaged

in improper double-counting, there is a significant chance Hooks-Lewis would have received a shorter sentence. This Court should remand for a resentencing in which the trial court does not inappropriately consider Hooks-Lewis's prior indictable conviction in aggravation. Dunbar, 108 N.J. at 89-92.

CONCLUSION

For the foregoing reasons, this Court should reverse Jaki Hooks-Lewis's convictions. Alternatively, this Court should remand the case for resentencing.

Respectfully submitted,

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