APPELLATE DIVISION
DOCKET NO. A- 3335-23
INDICTMENT NO. 22-07-5901-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Union County.
RALPH G. BOUZY,	:	
Defendant-Appellant.	:	Sat Below:
	:	Hon. Daniel Roberts, J.S.C., and a Jury

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Ralph Bouzy was tried and convicted on charges stemming from an incident where he allegedly arrived at the house of his former friend, Jefferson Servil, and threatened him with a gun. At trial, no one other than Servil could identify Bouzy or testify that he drew a gun. There was no video evidence of Bouzy near Servil's house or any forensic evidence corroborating Servil's account. Police made no effort to search the scene or Servil's person for any weapons. As a result, at trial the State relied on Servil's testimony, and his credibility was a vital consideration for the jury. However, Bouzy's trial was marred by a number of incorrect and inconsistent rulings that served to stack the deck against him, depriving him of a fair trial and due process.

First, the trial court prohibited Bouzy from fully presenting evidence that Servil had made threats and statements about wanting to ruin Bouzy's life leading up to the incident. The court found this important evidence of bias to be irrelevant, incorrectly reasoning that anything that occurred prior to the incident had no bearing on the case.

Second, the court mishandled "other-crimes" evidence by admitting highly prejudicial testimony and failing to properly instruct the jury on its permitted use. The court allowed testimony that Bouzy allegedly stole Servil's prized jacket and sold him fake shoes. While defense counsel conceded that

testimony about the jacket could be admissible, he objected to evidence of the sale of the shoes. The court nonetheless allowed evidence of the sale of the shoes to explain the context of how Bouzy arrived at Servil's door that day. However, the court failed to perform the correct legal analysis and, had it done so, would have found the testimony minimally probative yet highly prejudicial. Moreover, admitting other-crimes evidence for the sake of context while at the same time excluding threats and statements made by Servil that go to bias and credibility as irrelevant to the events of the day was an inconsistent and unfair application of the rules of evidence. Not only did the court err in allowing other-crimes testimony, but it failed to properly instruct the jury on its permitted use, further compounding the error.

Third, during cross-examination, Servil twice made statements referencing Bouzy's previous incarceration. Defense counsel immediately requested a mistrial, but the court declined, opting instead to give a curative instruction. This was reversible error, as the reference to Bouzy's incarceration irreparably prejudiced him, and the court's curative instruction was woefully inadequate.

Fourth, the court erred when it allowed an investigating officer to testify as a lay witness even though he offered an expert opinion. The officer was allowed to testify as to the type of firearm the magazine found at the scene was

compatible with, and how the magazine release on this firearm would function. This error resulted in the jury being inadequately instructed and in the defense being deprived of vital procedural safeguards and discovery applicable when an expert testifies.

These errors individually and cumulatively deprived Bouzy of his rights to a fair trial and due process. Accordingly, this Court must reverse his convictions and remand for a new trial.

PROCEDURAL HISTORY

On January 24, 2022, a Union County Grand Jury returned Indictment Number 22-07-5901, charging Ralph G. Bouzy with: second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b(1) (Count 1); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a(1) (Count 2); third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3a and/or 3b (Count 3); and fourth-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(4) (Count 4). (Da1-2)[1]

[1] "Da" – Defendant's appendix
"1T" – Motion transcript (June 26, 2023)
"2T" – Motion transcript (February 29, 2024)
"3T" – Transcript of trial (March 12, 2024)
"4T" – Transcript of trial (March 13, 2024)
"5T" – Transcript of trial (March 14, 2024)
"6T" – Transcript of trial (March 19, 2024)
"7T" – Transcript of trial (March 20, 2024)

Trial commenced before the Honorable Daniel Roberts, J.S.C., and a jury on March 13, 2024. (4T) On March 25, 2024, the jury convicted Bouzy on all counts. (10T; Da3-2)

Judge Roberts sentenced Bouzy on May 10, 2024. (11T) The court merged Counts 2, 3, and 4. (Da5) On Counts 1 and 2, the court imposed concurrent sentences of six years imprisonment subject to 42 months of parole ineligibility under the Graves Act, N.J.S.A. 2C:43-6c. (11T 20-7 to 20-8; 11T 20-10 to 20-14) On Count 3, the court imposed a concurrent three-year term of imprisonment. (11T 20-15 to 20-18) On Count 4 the court imposed a concurrent term of 18 months of imprisonment subject to 18 months of parole ineligibility under the Graves Act. (11T 20-18 to 20-23)

Bouzy filed a Notice of Appeal on June 28, 2024. (Da15-18)

STATEMENT OF FACTS

Bouzy and the alleged victim, Jefferson Servil, were childhood friends before they had a falling out several years ago. (5T 34-9 to 12) Servil testified the rift stemmed from a disagreement over a jacket he leant Bouzy in 2017 or

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"8T" – Transcript of trial (March 21, 2024)
"9T" – Transcript of trial (March 22, 2024)
"10T" – Transcript of trial (March 25, 2024)
"11T" – Transcript of sentence (May 10, 2024)

2018 that Bouzy refused to return. (5T 35-2 to 35-23) According to Servil, he had recently seen Bouzy wearing the jacket despite Bouzy's claim that he had left it at an ex-girlfriend's house and was unable to return it. (5T 36-12 to 37-12) Servil also alleged that he paid Bouzy $500 for a pair of shoes that ended up being fake.[2] (5T 39-4 to 39-18) Upset after seeing Bouzy wearing the jacket, Servil told Bouzy, "if you want to fight about it, we can fight about it," and began telling mutual friends he wanted to fight Bouzy. (5T 102-9 to 102-20)

On January 24, 2022, at around 5:00 p.m., Jefferson was at home in Linden with his then-girlfriend, Jemma George, when someone knocked on his apartment door. (5T 21-2 to 3; 5T 21-17 to 21; 5T 22-5 to 6) He testified that when he opened the door, Bouzy grabbed him by his neck and pointed a gun at him and said, "I heard you was looking for me". (5T 26-3 to 27-6; 5T 28-3 to 28-14) After about ten seconds, Servil tried to grab the gun, and a struggle ensued. (5T 28-17 to 20)

George testified she was upstairs in the apartment when Servil went to answer the door and soon heard sounds of a struggle. (4T 86-22 to 87-4) George went over to the staircase but could not see what was happening, only hearing that Servil was fighting with someone outside their door. (4T 89-13 to 90-5)

[2] Servil doesn't provide a specific date for this transaction, just that it was "during the pandemic." (5T 38-10)

Meanwhile, Servil and Bouzy continued to struggle and Servil placed Bouzy in a headlock. (5T 30-19 to 21) A neighbor who lived in an apartment next door, Holroyd Ffife, heard a commotion and someone saying, "You come to fight me." (5T 160-160 to 20; 5T 163-13 to 15) Ffife opened his door to investigate and saw Servil putting someone in a headlock and shouting for his girlfriend to call the police because the person had a gun. (5T 163-21 to 164-2) Ffife thought he saw a gun, although he testified he did not have a clear view, and quickly went back inside his apartment. (5T 174-18 to 24; 5T 32-7 to 15) Geroge called 911 and spoke to an operator. (4T 88-23-24; Da9-13) During the 911 call, which was played for the jury, George reported a fight happening in the house and that her boyfriend saw a gun and told her to call the police. (Da9-13)

During the struggle, the magazine ejected from the gun, and Servil threw the magazine up the stairs toward Geroge, who put it in her pocket. (5T29-1 to 5; 4T 90-6 to 90-25) Eventually, the two separated and Bouzy left the area. (5T 32-13 to 15; 5T 33-14 to 17) Ffife, looking through his window, saw someone run away and heard Servil shouting, "I should have . . . kill you guys, you shouldn't have come to my house to fight" and "You lucky I didn't kill you." (5T 177-16 to 178-8) Servil reentered the apartment and spoke to the 911 dispatcher until police arrived. (Da11-12)

Officer Nicholas Scanlon of the Linden Police Department was one of the responding officers. (6T 42-12 to 16; 6T 45-23 to 46-23) Scanlon testified that he spoke to George, who gave him the magazine. (6T 49-15 to 19) He did not check Servil for weapons or pat him down. (6T 114-19 to 115-3) Later that night, Scanlon went to Bouzy's mother's house and spoke with his parents and sister and told them Bouzy was wanted for questioning. (6T 94-17 to 95-11; 6T 107-8 to 107-19) While speaking with Bouzy's sister, Scanlon learned that Servil had previously made threats towards Bouzy and had said he wanted to make his life miserable. (6T 111-3 to 112-4) Scanlon never spoke with Servil about the threats or other statements made towards Bouzy. (6T 112-18 to 25) Scanlon also testified, over defense objection, that while there was no firearm recovered in this case, he believed the magazine would fit into a 9-milimeter Smith & Wesson. (6T 56-24 to 58-14) Scanlon also testified, again over defense objection, as to how a magazine is released from such a firearm. (6T 58-15 to 61-24)

On direct examination, Servil testified to his version of events that included Bouzy arriving at his door to point a gun at him before running away after a scuffle.[3] (See 5T 20-20 to 46-7) On cross-examination, defense counsel

[3] Trial was scheduled to start on March 12, 2024; however, the State requested (and received) a one-day adjournment, explaining Servil was unavailable to testify due to hospitalization for a 24-hour mental health hold. (3T 3-23 to 4-

asked Servil, "Mr. Servil, you had made threats to Mr. Bouzy prior to this incident, correct?" (5T 144-22 to 23) The State objected, but before the objection could be addressed, Servil said, "What about the threat he made to me after he got out of jail?" (5T 144-25 to 145-1) When defense counsel asked for a curative instruction, the court responded, "I didn't hear what he said." (5T 145-4) Servil then repeated the same statement, saying, "What about the threat he made to me after he got out of jail?" (5T 145-6 to 7) Defense counsel immediately requested a mistrial but the court disagreed, finding a curative instruction was sufficient. (5T 145-18 to 146-8)

Turning to the State's objection, the State argued that evidence of any threats Servil had made to Bouzy were inadmissible as "prior bad acts when there's no self-defense claim here" and "outside the scope of direct." (5T 146-22 to 147-6) When defense counsel offered to call Servil as a witness, the court declined, sustaining the objection, ruling, "This isn't going to come in, and we're going to give a curative instruction to the jury." (147-7 to 14) The court gave the following instruction:

> Mr. Servil said some things that are not part of this case and should not be part of your consideration in terms of rendering a verdict in evaluating the evidence

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16; 3T 5-15 to 6-11) Later that day, Servil was released from the hospital and brought before the court for a hearing pursuant to a material witness warrant, after which the court ordered that Servil remain in custody until he finished testifying. (Da14).

> in this case, and I'm telling you to disregard the last things that Mr. Servil said, as they are not relevant to these proceedings.
>
> [(147-24 to 148-4)]

During summations, the defense argued that neither the neighbor nor George could place Bouzy at the scene, and that there was no video or forensic evidence corroborating Servil's account, who was not a credible witness. (See, e.g., 8T 21-2 to 12) Instead, the defense offered the theory that the gun could have belonged to Servil, who had motive to place blame on Bouzy. (8T 24-1 to 29-12)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED BY PROHIBITING DEFENSE COUNSEL FROM CROSS EXAMINING THE ALLEGED VICTIM ON THE KEY ISSUE OF BIAS, DENYING BOUZY A FAIR TRIAL. (5T 146-22 to 147-17; 5T 148-9 to 151-10)

During cross examination of Servil, defense counsel attempted multiple times to question him on the issue of pre-existing bias against Bouzy. However, each time the trial judge sustained the State's objection. First, defense counsel asked Servil about threats he had made to Bouzy before the incident. (5T 144-22 to 24) The State argued the question would elicit inadmissible prior bad acts and was outside the scope of direct, and the court agreed, sustaining the

objection. (5T 146-22 to 147-17) Shortly after, defense counsel attempted to ask Servil about telling others that he wanted to make Bouzy's life "miserable." (5T 148-9 to 148-14) The court again sustained the State's objection, ruling it to be "beyond the realm of relevance" and that "the only thing that should be in consideration before the jury [is] the happening of the event on the day in question." (5T 150-17 to 150-23)

The court's rulings were plain misapplications of relevance standards and the rules of evidence. Criminal defendants have a constitutional right to present a complete defense, and evidence of a material adverse witness's bias is clearly relevant and admissible evidence. Because Bouzy did not have full opportunity to present vital evidence of Servil's bias, he was denied a fair trial and therefore his convictions must be reversed. See U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

The ability to present evidence of an adverse witness's bias is well established. "'[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense'" State v. Blazas, 432 N.J. Super. 326, 339 (App. Div. 2013) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)) (alteration in original) (internal quotation omitted). New Jersey courts have "long found the use of bias to attack a witness's credibility proper." State v. Scott, 229 N.J. 469, 481 (2017). Moreover, "[w]here a party seeks to

demonstrate bias, it may do so by introducing extrinsic evidence." Id. at 481-82 (citing State v. R.K., 220 N.J. 444, 459 (2015)).

This Court has previously recognized the vital role of bias evidence in a case with strikingly similar circumstances. In State v. Gorrell, the defendant was convicted of assaulting the alleged victim with a knife during a brawl. 297 N.J. Super. 142, 145 (App. Div. 1996). The State relied on two pieces of evidence to prove defendant was the one who stabbed the victim, one of which was testimony by a witness that the defendant came to his home shortly after the stabbing and made inculpatory statements. Id. at 146. The defendant claimed this witness was fabricating his testimony, and attempted to show the witness harbored bias against him by attempting to call four witnesses to testify about a recent incident during which the State's witness threatened to kill or injure the defendant. Id. at 148. The State objected, and the trial court agreed to bar the testimony, finding it to be hearsay without an exception and that the witness was not asked about the threats while on the stand. Ibid.

The Appellate Division held the ruling was reversible error. Ibid. This Court reasoned that if the witness was "hostile enough toward defendant to want to kill him, that could reasonably have raised a doubt in the minds of the jurors about whether [his] testimony was truthful or whether it was fabricated to serve his hostility." Ibid. The Gorrell Court continued, stating "[c]ommon sense

therefore strongly suggests that evidence of the threats should be admissible . . . because the threats themselves may be strong evidence of the state of mind of the person who threatened and therefore may shed material light on the question whether his testimony should be believed." Id. at 148-149. This Court reversed the defendant's conviction, holding the "erroneous exclusion of evidence which bears on [the witness's] credibility requires that defendant be given a new trial." Id. at 150.

Here, the trial court erred by prohibiting the defense from inquiring into threats Servil made against Bouzy or statements he made about wanting to make Bouzy's life miserable. The circumstances in this case are remarkably similar to those in Gorrell, where the court concluded that evidence of a key witness's bias or animosity toward the defendant should have been admitted. These lines of inquiry were vital to the presentation of the defense theory that Servil was not credible and had motive to fabricate allegations against Bouzy. Without being able to properly present evidence of Servil's bias, Bouzy was denied the opportunity to present a complete defense. See Blazas, 432 N.J. Super. at 339.

The judge's reasons for curtailing defense counsel's cross-examination do not hold up under scrutiny. In response to the first State objection, the court did not state its reasoning, only ruling that "[t]his isn't going to come in." (5T 147-12 to 17) However, the State argued the line of questioning related to

inadmissible prior bad acts when there is no self-defense claim, and that it was outside the scope of direct. (5T 146-24 to 147-2) When defense counsel next attempted to question Servil as to comments about wanting to ruin Bouzy's life, the court ruled it was "beyond the realm of relevance" and that the defense sought "to open up the door to the entire prior history of the parties and we're not going to open the door and we're not going to go down that road." (5T 150-17 to 151-5)

The trial court's reasoning is plainly flawed. First, the State's argument at trial that evidence of threats Servil made against Bouzy or statements he made about wanting to make Bouzy's life miserable were inadmissible prior bad acts under N.J.R.E. 404(b) is inapposite and misplaced. When a defendant seeks to use other-crime evidence defensively (sometimes referred to as "reverse 404(b)" evidence), the defendant "is free to present such evidence unconstrained by the admissibility requirements [] promulgated in Cofield.[4]" State v. Williams, 240 N.J. 225, 234-34 (2019). Instead, "to determine whether a defendant may use other crime evidence, courts must apply the 'simple' relevance standard of Rule 401." Id. at 235 (quoting State v. Cook, 179 N.J. 533, 566 (2004)). The trial court misapplied this standard, as the credibility of a key witness is plainly relevant. See N.J.R.E. 401; N.J.R.E. 607; see also Gorrell, 297 N.J. Super. at

[4] State v. Cofield, 127 N.J. 328 (1992)

149. "It is elementary that a party may show bias, including hostility, of an adverse witness." State v. Smith, 101 N.J. Super. 10, 13 (App. Div. 1968). As to the State's argument that the questioning was outside the scope of direct examination, the rules of evidence allow that "any party . . . may examine the witness and introduce extrinsic evidence relevant to the issue of credibility." N.J.R.E. 607(a). Moreover, defense counsel offered to call Servil as a witness to alleviate any concerns, but the court still excluded the evidence of bias. (5T 147-7 to 17).

The court's improper curtailment of inquiry into Servil's bias and hostility requires reversal. At trial, Bouzy should have been able to present the extent of Servil's animosity toward him leading up to the incident, including extrinsic evidence. See Scott, 229 N.J. at 481-82. Servil's testimony that Bouzy arrived at his door with a gun and pointed it at him was vital to the State's case. No other witness identified Bouzy or could testify that he drew a gun on Servil. There was no video evidence of Bouzy near the crime scene or forensic evidence corroborating Servil's version of events. Police did not make an effort to search the scene or Servil's person in an attempt to locate a firearm. As such, the State relied exclusively on Servil's testimony and his credibility was a key issue for the jury to determine. Just as the court ruled in Gorrell, knowledge that Servil was hostile toward Bouzy "could reasonable have raised a doubt in the minds of

the jurors" about whether Servil's testimony was "truthful or whether it was fabricated to serve his hostility." Gorrell, 297 N.J. Super. at 148. Therefore, reversal is required.

POINT II

THE TRIAL COURT ERRED BY ALLOWING THE JURY TO HEAR UNNECESSARY AND IRRELEVANT EVIDENCE OF OTHER BAD ACTS AND FAILING TO PROPERLY INSTRUCT THE JURY. (PARTIALLY RAISED BELOW AT 4T 18-24 to 19-1)

At a pretrial conference on February 29, 2024, the parties addressed two pieces of 404(b) evidence the State planned to elicit from Servil: that Bouzy failed to return a jacket he had borrowed and that Bouzy had sold him fake sneakers. (2T 29-2 to 38) Defense counsel agreed that some limited testimony about the jacket was relevant to establishing background, but that testimony about the shoes was unnecessary and unfairly prejudicial. (2T 30-19 to 31-8) The court erred by admitting testimony regarding the sale of the sneakers and by failing to properly instruct the jury on how to consider the evidence. Evidence that Bouzy sold Servil fake sneakers had no probative value and also significantly prejudiced Bouzy. Furthermore, the court failed to immediately give a limiting instruction to the jury after each piece of evidence as required, and did not give the full model instruction during the final jury charge. These errors deprived Bouzy of a fair trial and require reversal of his convictions.

A. The court erred by allowing the State to introduce evidence that Bouzy previously sold Servil fake sneakers. (4T 18-24 to 19-1)

During a pretrial conference, the trial court ruled testimony regarding the jacket was admissible but that it would revisit the issue of the shoes prior to opening statements. (2T 36-24 to 37-16) When it came time for the court to rule on the issue, defense counsel renewed his objection to the admission of testimony regarding the sale of shoes under N.J.R.E. 404(b). (4T 10-8 to 11) The court began its analysis stating it "must first determine whether the evidence relates to a prior bad act or if it is extrinsic[5] evidence related to the charged crime." (4T 18-12 to 15) The court found that the testimony was "extrinsic evidence related to the charged crime," and ended its analysis, ruling the testimony admissible. (4T 18-24 to 19-1)

The court ultimately allowed Servil's testimony that Bouzy sold him fake sneakers. After Servil testified about the jacket, the prosecutor asked him, "This jacket, was this the only reason you guys had a falling out? What else happened?" to which Servil responded, "Yes." (5T 37-13 to 15) Moments later, the prosecutor again asked, "[W]as there any other interaction or experience you had with him?" (5T 38-8 to 9) Defense counsel objected, arguing, "He already

[5] The analysis requires the court to determine whether the evidence is intrinsic to the charged crime. State v. Canfield, 470 N.J. Super. 234, 337-38 (App. Div. 2022) aff'd as modified, 252 N.J. 497 (2023). The court's quoted language is reproduced as it appears in the record.

answered that nothing else happened that caused this incident." (5T 38-17 to 18) Despite Servil previously answering in the affirmative that the jacket was the only reason the two had a falling out, the court nonetheless stated, "I understand [counsel's] objection, but I'm going to overrule it because—well, I'm going to overrule the objection." (5T 38-21 to 23) Servil then went on to testify that he paid Bouzy $500 for a pair of sneakers he later learned were fake. (5T 39-4 to 18)

The trial court erred in ruling the evidence was admissible, failing to perform the necessary analysis under Cofield. While the court seemed to correctly characterize the evidence as not intrinsic to the charged crime, it did not perform the four-part test to determine admissibility. Had the court done the proper analysis, it would have concluded that the prejudice caused by the admission of evidence about the sneaker sale easily outweighed any probative value and excluded the evidence.

"The standard and prerequisites for admitting 'other crimes' evidence pursuant to Rule 404(b) are more rigorous than the relevance standard that generally applies." Canfield, 470 N.J. Super. at 337. Rule 404(b) prohibits admission of "evidence of other crimes, wrongs, or acts . . . to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." N.J.R.E. 404(b)(1). "The danger of prejudice

expressed in Rule 404(b) is that the jury may view evidence of any such bad act or other crime as proof of the defendant's propensity to violate the law." Canfield, 470 N.J. Super. at 337. Such evidence may only be admitted for a non-propensity purpose such as motive or intent. N.J.R.E. 404(b)(2).

"The threshold determination under Rule 404(b) is whether the evidence relates to 'other crimes,' and thus is subject to continued analysis under Rule 404(b), or whether it is evidence intrinsic to the charged crime, and thus need only satisfy the evidence rules relating to relevancy, most importantly Rule 403." State v. Rose, 206 N.J. 141, 179 (2011). "Evidence that is intrinsic to the crime for which the defendant is being tried need not satisfy the requirements of Rule 404(b), but rather need only satisfy the general rules of relevance and prejudice." Canfield, 470 N.J. Super. at 338 (citing Rose, 206 N.J. at 177–78). "Intrinsic evidence encompasses two categories: (1) evidence that 'directly proves' the charged offense and (2) evidence that, when performed contemporaneously with the charged crime, facilitates the commission of the charged crime." Ibid. (quoting State v. Brockington, 439 N.J. Super. 311, 327-28 (2015)).

On the other hand, if the proffered evidence is extrinsic to the charged crime, it must pass a "rigorous test." State v. Garrison, 228 N.J. 182, 194 (2017).

In Cofield, the court adopted a four-part test to determine the admissibility of other-crimes evidence:

> (1) The evidence of the other crime must be admissible as relevant to a material issue;
>
> (2) It must be similar in kind and reasonably close in time to the offense charged;
>
> (3) The evidence of the other crime must be clear and convincing; and
>
> (4) The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [Cofield, 127 N.J. at 338.]

"Trial courts must apply that test on a case-by-case basis 'in order to avoid the over-use of extrinsic evidence of other crimes or wrongs.'" Green, 236 N.J. at 82 (emphasis added) (quoting Cofield, 127 N.J. at 338). "N.J.R.E. 404(b) is a rule of exclusion and . . . the trial judge bears the burden of scrutinizing the proffered evidence to determine if it satisfies the Cofield rule." State v. J.M., 225 N.J. 146, 165 (2016); see also Cofield, 127 N.J. at 337 (characterizing N.J.R.E. 404(b) as "exclusionary" and cautioning that "evidence of other crime[s] or wrongs is generally not admissible"). The party seeking to admit other-crime evidence bears the burden to establish each of the four prongs. J.M., 225 N.J. at 158.

Here, the trial court failed to undertake the proper Cofield analysis. While the court correctly found the proffered testimony to be extrinsic evidence of other bad acts, it failed to continue with the necessary analysis of the Cofield prongs. Even though evidentiary decisions are typically reviewed for abuse of discretion, "if the trial court fails to apply the proper legal standard in determining the admissibility of proffered evidence" the court's rulings will be reviewed de novo. State v. Williams, 240 N.J. 225, 234 (2019).

In this instance, the first and fourth prongs cannot be met by the State and therefore the evidence was inadmissible. To satisfy the first prong of the Cofield test, the "proffered evidence must be 'relevant to a material issue genuinely in dispute.'" Ibid. (quoting State v. Gillispie, 208 N.J. 59, 86 (2011)). In determining relevance, "the inquiry should focus on 'the logical connection between the proffered evidence and a fact in issue.'" State v. Darby, 174 N.J. 509, 519 (2002).

The fourth Cofield prong—the probative value must not be outweighed by its apparent prejudice—is "the most difficult to overcome." Rose, 206 N.J. at 160. This prong "requires an inquiry distinct from the familiar balancing required under N.J.R.E. 403: the trial court must determine only whether the probative value of such evidence is outweighed by its potential for undue prejudice, not whether it is substantially outweighed . . . as in the application of

Rule 403." Green, 236 N.J. at 83-84 (internal citation omitted). "[I]f other less prejudicial evidence may be presented to establish the same issue, the balance in the weighing process will tip in favor of exclusion." Green, 236 N.J. at 84 (quoting Rose, 206 N.J. at 16).

The State failed to establish prongs one and four of the Cofield test because evidence that Bouzy sold Servil fake shoes was not probative to a material issue and carried an immense potential for undue prejudice. The State's proffered purpose of the testimony was to explain the context of Servil and Bouzy's relationship and show the jury how the incident in question came about. However, Servil's animosity toward Bouzy was already established by his testimony that he was upset Bouzy did not return his jacket. Indeed, Servil initially testified that the jacket was the reason for their falling out, only mentioning the shoes when further prompted by the prosecutor over objection. (See 5T 37-13 to 38-23) The jury thus had ample context to understand the events leading up to the incident. The added detail that Servil also felt slighted because of this transaction in no way assisted the jury in determining if Bouzy was guilty of the charged crimes. See State v. Sheppard, 437 N.J. Super. 171, 190 (App. Div. 2014) ("Cofield made it clear that the State's need for the evidence is a factor important to relevance under prong one."). As such, the probative value of the testimony about the sale of the shoes was miniscule.

On the other hand, under prong four, the apparent prejudice towards Bouzy was substantial. The suggestion that Bouzy may have purposefully sold Servil counterfeit sneakers paints Bouzy as a scam artist who repeatedly sought to profit at Servil's expense. Because the evidence was not necessary and instead served to pile-on unflattering evidence against Bouzy, the apparent prejudice easily outweighed any probative value.

The admission of this evidence was clearly harmful in a case in which the State's proofs against Bouzy were far from overwhelming. The risk of admitting such evidence is well recognized. See Cofield, 127 N.J. at 336 ("The underlying danger of admitting other-crime evidence is that the jury may convict the defendant because he is a bad person in general." (internal quotation marks omitted)). Furthermore, the admission of this evidence required defense counsel to spend significant time on cross-examination and in summation to attempt to mitigate the prejudice, creating an unnecessary mini trial on this irrelevant issue. (See 5T 96-12 to 99-15; 8T 14-24 to 15-13) Meanwhile, the prosecutor also highlighted this evidence during summation. (8T 33-23 to 24) The prejudice inherent in these statements was compounded by the court's failure to properly instruct the jury.

Bouzy was deprived of a fair trial because evidence of the sneaker sale piled on other wrongs Bouzy may have done to cast him in a bad light as a person

who generally does bad things. In other words, the evidence only served to establish that Bouzy had a propensity to commit bad acts, in direct violation of 404(b). This was especially true given the trial court's one-sided rulings which simultaneously deprived Bouzy of the opportunity to present similar contextual evidence of Servil's bias and animosity. Reversal is therefore required.

B. The court failed to properly instruct the jury on other-crimes evidence. (Not raised below)

The trial court failed to properly instruct the jury on the limited purposes of other-crimes evidence, further increasing the risk the jury used the evidence for an improper propensity purpose. First, the court failed to immediately give a limiting instruction as to the permissible purpose for which the other-crimes evidence was being admitted, allowing the jurors to assume the evidence was admissible for propensity purposes. Second, although the court provided an instruction addressing the evidence during the final jury charge, it failed to read the entirety of the model charge for other-crimes evidence. The failure to properly instruct the jury exacerbated the error of admitting testimony about the sale of the shoes, and created an unacceptable risk the jury would misuse the evidence about the jacket. As such, reversal is required.

Appropriate and proper jury instructions are "essential for a fair trial." State v. Scharf, 225 N.J. 547, 581 (2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). As a result, "[i]t is the independent duty of the court to ensure

that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case . . . ." Id. at 580 (quoting Reddish, 181 N.J. at 613). "[M]odel jury charges should be followed and read in their entirety to the jury." State v. R.B., 183 N.J. 308, 325 (2005).

To minimize the "inherent prejudice" of other-crimes evidence, "a carefully crafted limiting instruction 'must be provided to inform the jury of the purposes for which it may, and for which it may not, consider the evidence of defendant's [other crimes], both when the evidence is first presented and again as part of the final jury charge.'" Green, 236 N.J. at 84 (quoting Rose, 206 N.J. at 161) (emphasis added) (alteration in original). This Court has held that the timing of the instruction is a key consideration, and "that a swift and firm instruction is better than a delayed one." State v. Herbert, 457 N.J. Super. 490, 505-506 (App. Div. 2019) (citing State v. Winter, 96 N.J. 640, 648 (1984)). An immediate limiting instruction is vital because "[d]elay may allow prejudicial evidence to become cemented into a storyline the jurors create in their minds during the course of the trial." Id. at 506. As such, our Supreme Court has reasoned the repetition of giving an instruction both when the evidence is presented and again in the final charge "prevents the jurors from 'indelibly brand[ing] the defendant as a bad person' and blinding them from careful

consideration of all the evidence in deliberations." Ibid. (quoting State v. Blakney, 189 N.J. 88, 93 (2006) (alteration in original)).

Here, the trial court failed to issue a limiting instruction when the evidence was first presented at trial. Instead, the court only addressed the evidence during its final jury charge. (8T 63-21 to 64-22) Moreover, the court's instruction to the jury failed to comport with the model instruction in a key aspect. The court failed to include the portion of the model charge that reads:

> Whether this evidence does in fact demonstrate [state the specific purpose for which the State offers it] is for you to decide. You may decide that the evidence does not demonstrate [state the purpose] and is not helpful to you at all. In that case, you must disregard the evidence. On the other hand, you may decide that the evidence does demonstrate [state the purpose] and use it for that specific purpose.
>
> [Model Jury Charges (Criminal), "Proof of Other Crimes, Wrongs, or Acts (N.J.R.E. 404(b))" (rev. Sept. 12, 2016).]

The court should have given a limiting instruction immediately after Servil testified about the jacket and again after he testified about the shoes, and it should not have departed from the model jury charge. Without being immediately charged as to how it may consider the evidence, there was ample

time for the jury to form an inappropriate "storyline" based on the testimony.[6] Herbert, 457 N.J. Super. at 506. Having heard that Bouzy had both allegedly stolen Servil's prized jacket and sold him fake shoes, there was significant risk the jurors would "indelibly brand[] the defendant as a bad person" and "blind[] them from careful consideration of all the evidence in deliberations." Ibid. (quoting Blakney, 189 N.J. at 93).

Furthermore, the language from the model charge that was excluded was necessary because the jury was not told that it "must disregard" the evidence if it found it did not serve the specific purpose for which it was offered. Because the testimony, particularly as it related to the shoes, had limited probative value, the jury should have been told it was required to disregard the evidence if it found the evidence did not serve the purpose for which it was offered. It was vital for the trial court to properly instruct the jury because "the inherently prejudicial nature of other-crimes evidence 'casts doubt on a jury's ability to follow even the most precise limiting instruction.'" Green, 236 N.J. at 84 (quoting Reddish, 181 N.J. at 611).

Bouzy was deprived of a fair trial because the court allowed significant undue prejudice to permeate the proceedings through its handling of 404(b)

[6] Servil testified about the jacket and shoes on March 14, 2024. (See 5T) The court provided its final instructions to the jury one week later on March 21, 2024. (See 8T).

evidence. The State was allowed to pile on other-crimes evidence without proper instructions to the jury; this pile on served only to cast Bouzy in a bad light and created significant risk that the jury may use the evidence for an improper propensity purpose. The court's treatment of this evidence was especially egregious given that it simultaneously deprived Bouzy of the opportunity to present similar contextual evidence of Servil's bias and animosity. Reversal is therefore required.

POINT III

THE TRIAL COURT ERRED BY DENYING THE DEFENSE'S MOTION FOR A MISTRIAL AFTER THE JURY HEARD BOUZY WAS PREVIOUSLY INCARCERATED. ADDITIONALLY, THE COURT'S CURATIVE INSTRUCTION WAS INADEQUATE TO REMEDY SERVIL'S HIGHLY PREJUDICIAL STATEMENTS. (5T 145-18 to 146-8)

During Servil's cross examination, in response to defense counsel's question about threats he had made to Bouzy, Servil responded, "What about the threat he made to me after he got out of jail?" (5T 144-22 to 145-1) Then when defense counsel requested a sidebar, Servil again repeated the same statement. (5T 145-6 to 7). Defense counsel immediately moved for a mistrial. (5T 145-18) The trial court denied the request at sidebar, disagreeing that a mistrial was necessary and instead deciding to give the following curative instruction to the jury:

> Mr. Servil said some things that are not part of this case and should not be part of your consideration in terms of rendering a verdict in evaluating the evidence in this case, and I'm telling you to disregard the last things that Mr. Servil said, as they are not relevant to these proceedings.
>
> [(5T 145-19 to 146-8; 147-19 to 148-4)]

The two references to Bouzy's prior incarceration were inherently prejudicial and required a mistrial. The knowledge that Bouzy was previously incarcerated created an unacceptable risk the jury would convict him based on a belief that he had a propensity for committing crimes. Additionally, the court's curative instruction failed to cure the prejudice of Servil's statements.

"Both the state and federal constitutions guarantee defendants the right to a fair trial before an impartial jury." State v. Artwell, 177 N.J. 526, 533 (2003); U.S. Const. amend. V, VI, and XIV; N.J. Const. art. I. If inadmissible evidence is revealed to the jury, sometimes a curative instruction that is "firm, clear, and accomplished without delay," can cure the prejudice caused by the improper testimony. State v. Prall, 231 N.J. 567, 586 (2018) (quoting State v. Vallejo, 198 N.J. 122, 134 (2009) and citing Winter, 96 N.J. at 647). However, where a curative instruction cannot cure the prejudice, a mistrial is required. See Winter, 96 N.J. at 646-47; see Pressler & Verniero, Current New Jersey Court Rules, cmt. 5.1 on R. 3:20-1 (2025) (noting a manifest-injustice standard for new-trial motion). The decision whether to grant a mistrial is reviewed for abuse of

discretion, Winter, 96 N.J. at 646-47, and not every error in a trial will result in a mistrial, since things happen in a trial which "cannot be completely controlled," Vallejo, 198 N.J. at 132. Yet, there are some situations where only the granting of a mistrial can eliminate the very real danger of an unfair trial and a verdict based on factors other than the evidence produced.

As an initial matter, there can be no argument that Servil's statements were admissible. The State did not argue as much at the time, and under N.J.R.E. 404(b), there was no proper purpose for which information about Bouzy's prior incarceration could be introduced. See Cofield, 127 N.J. at 341. Testimony about his incarceration had no evidentiary value; it was purely prejudicial. This matter presents somewhat of a different case, then, compared to a more traditional one in which an errant reference may have some evidentiary value that must be balanced against the risk of undue prejudice. See id. at 334 ("The evidence . . . must have probative value that is not substantially outweighed by the danger of unfair prejudice."). Here, that balancing test tips entirely to one side, and it is clear the testimony was not admissible.

Mistrial was the proper remedy to address the inadmissible statements about Bouzy's prior incarceration. "The decision to opt for a curative or limiting instruction, instead of a mistrial or new trial," depends on "at least" three factors: (1) "the nature of the inadmissible evidence heard, and its prejudicial effect";

(2) the timing and substance of the instruction and its likelihood of success; and (3) the risk of jurors' noncompliance with the instructions. Herbert, 457 N.J. Super. at 505-08. Here, each prong supports a mistrial.

First, the nature of Servil's two statements that Bouzy had previously been in jail were extremely prejudicial and warranted a mistrial. It is not clear whether Servil's statements about Bouzy's time in jail refered to pretrial detention in the current matter or a previous term in jail on an unrelated matter. As such, the jury was free to speculate that either or both may be true. Each of these conclusions was highly prejudicial. A jury's knowledge of a defendant's pretrial detention carries significant inherent prejudice. See State v. Gonzalez, 444 N.J. Super. 62, 81 (App. Div. 2016) (recognizing the fact defendant "was incarcerated prior to trial had no particular relevance" but rather served "merely to cause prejudice to defendant."). Similarly, "[e]vidence of past criminality risks conviction because the jury may conclude defendant is a bad person with a propensity to commit crimes." Herbert, 547 N.J. Super. at 509 (citing State v. Skinner, 218 N.J. 496, 514 (2014)). Testimony that a defendant was previously incarcerated is akin to other-crimes evidence, which "poses a distinct risk that it will distract a jury from an independent consideration of the evidence that bears directly on guilt itself." State v. G.S., 145 N.J. 460, 468 (1996); See also State v. Cooper, 165 N.J. Super. 57, 64 (App. Div. 1979) (acknowledging other-crimes evidence

has been "historically considered extremely prejudicial to defendants in criminal cases because of the great potential for abuse."). For example, in Cooper, this Court held that a single reference by a State's witness that she had seen the defendant "at the courthouse after . . . they had apprehended him" on an unrelated crime warranted a mistrial. 165 N.J. Super. at 62. Servil's statements warranted a mistrial because they created an unacceptable risk that the jury would convict Bouzy because he is a "bad person" that had previously committed crimes meriting incarceration. Therefore, the nature of the prejudice supported a mistrial.

Second, the substance of the trial court's instruction lacked the firmness and specificity needed for a reasonable likelihood of success. The language of a curative instruction must be "clear enough [and] sharp enough to achieve its goal." Vallejo, 298 N.J. at 137. "Although trial judges may understandably try to avoid repeating and thereby reinforcing an offending remark, a court must describe it with enough specificity to enable the jury to follow the instruction." Herbert, 547 N.J. Super. at 507. For example, in Vallejo, the court gave a limiting instruction similar to the one offered in this case. Id. at 136. It instructed the jurors that "things were blurted out that have nothing to do with this case" and that they "can't use any of that blurted out information because that's not part of this case" but should "consider only that which was dealt with in this

courtroom relating to [the] incident." Ibid. The court held that this instruction was inadequate because it failed to identify what was "blurted out" or what was "not part of this case." Ibid. The Vallejo Court reversed the convictions and remanded for a new trial because the instruction lacked the certainty and clarity required to ensure the jury did not consider the inadmissible evidence. Ibid.

Not only must the instruction clearly identify the offending remark, but it must "clearly and sharply address the prejudicial aspect of the inadmissible evidence." Herbert, 457 N.J. Super. at 508. A "specific and explanatory" instruction is "often more effective than a general, conclusory one." Id. at 506. For example, in Cooper, a witness made reference to defendant being in custody for an unrelated robbery. 165 N.J. Super. at 62. This Court held that the curative instruction given was insufficient, partly because "the jury was told to disregard the testimony, not because of the great potential for prejudice which 'other crimes' evidence possesses . . . but because there was a disagreement about what was said." Id. at 63. This Court held the prejudice of the comment was not cured because the jury was "not forcefully told what to ignore and why to ignore it." Ibid (emphasis added).

Additionally, in Herbert, a detective gave inadmissible testimony that the defendant was a member of a gang. 457 N.J. Super. at 499. The judge gave lengthy instructions, telling the jury, in part:

> Sometimes during the course of the trial, information comes to the attention of the jury and it has no place in this trial. In other words, it's prejudicial. As I told you from the beginning, fair and impartial means not being prejudicial; it means fair.
>
> Now, [the detective] mentioned gangs a few minutes ago, unintentionally. I tell you now there's no information in this case whatsoever there's any gangs involved in this case whatsoever. Nothing whatsoever. You've heard nothing beforehand, you've heard nothing now, and that statement by Detective Crawley obviously was unintentional, number one.
>
> . . .
>
> I direct that you not use this stricken testimony in your deliberations. By my striking the answer and directing that you disregard and not use this information, I'm not asking you to forget it. To the contrary, I'm asking that you remember what was stricken and understand that if, during your deliberations, you realize that the information is necessary to your decision, you may not use it.
>
> [Herbert, 457 N.J. Super. at 500.]

This Court found this instruction "only partly addressed the prejudice of [the detective's] comment that defendant was a gang member." Id. at 510. The defendant's convictions were reversed, and this Court further reasoned the instruction "did not contradict the truth of the detective's statement," thus failing to "directly address defendant's membership." Ibid.

Here, the trial court's limiting instruction lacked the specificity needed to be effective. Just as in Vallejo, the court did not specifically identify what

statements it was referring to, merely telling the jury "Mr. Servil said some things that are not part of this case . . . . I'm telling you to disregard the last things that Mr. Servil said." (5T 147-24 to 148-4) This was inadequate because this instruction was given after a sidebar, so it was not immediately clear what Servil had last said. Notably, the last thing that Servil had said prior to the instruction was not the offending statements, but the statement, "I just want to go home. Y'all keep telling me to stop talking. I'm answering the question. I don't understand." (5T 145-9 to 145-11) It is safe to say that the cross-examination of Servil was contentious and riddled with frequent outbursts that required admonishment and redirection by the court.[7] As such, the statements about Bouzy's prior incarceration would not have necessarily stood out enough for the jury to know what the court was addressing through its instruction. The instruction therefore did not adequately identify what statements to disregard.

Moreover, even if the court had correctly identified the problematic statements for the jurors, the court did not explain why they must not consider the statements and did nothing to cure the prejudice created. The court did not give a reason why the statements were inappropriate, just that they are "not relevant to these proceedings." (5T 148-4) Irrelevancy was not the primary issue that required the instruction—it was the prejudice caused by hearing Bouzy was

[7] (See, e.g., 5T 141-3 to 20; 5T 140-2 to 19; 5T 117-21 to 121-4)

incarcerated. Just as in Cooper, the court failed to state explicitly and forcefully what the jury was to ignore and why to ignore it. See 165 N.J. Super. at 63. Similarly, the court did not "contradict the truth" of Servil's statements nor "directly address" Bouzy's incarceration. Herbert, 457 N.J. Super. at 510. Not only was this instruction inadequate, but it was only given once, as the court did not reinstruct the jury during the final charge. See Blakney, 189 N.J. at 93. Therefore, because the instruction did not identify the offending statements or forcefully address the prejudice, the instruction had a low likelihood of success.

Third, the risk of the jury's noncompliance was unacceptable, requiring a mistrial. "[A] court must ultimately consider its tolerance for the risk of imperfect compliance." Id. at 507. In Herbert, this Court recognized "tension in our case law governing curative and limiting instructions." 457 N.J. Super. at 503. While "authority is abundant that courts presume juries follow instructions," that presumption is "founded in part on necessity." Ibid. In fact, Justice Jackson once acknowledged "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). Notably, in Herbert, this Court held the risk of the jury's non-compliance to be "intolerably high" in part because the State's case "was far from overwhelming." 457 N.J. Super. at 511-12.

Here, the risk of noncompliance was unacceptable. Just as in Herbert, the State's proofs were not overwhelming, as they relied primarily on Servil's inconsistent and incredible testimony to place Bouzy at the scene with a gun. The remaining witnesses could not place Bouzy at the scene, and there was no video or forensic evidence presented. Because the State's case against Bouzy was not strong, the risk that the jury might be prejudiced by Servil's statements and decide to convict Bouzy on grounds other than the competent evidence presented at trial was clearly unacceptable.

All three Herbert prongs supported a mistrial. The court should have granted defense counsel's motion, as Servil's comments could not have been admitted for any legitimate purpose and could not have been remedied by a curative instruction. Even if a more detailed and precise curative instruction could have better addressed Servil's prejudicial testimony, the instruction given here was nonetheless wholly inadequate to cure the highly prejudicial statements. As such, Bouzy's convictions must be reversed.

POINT IV

THE COURT IMPROPERLY ADMITTED EXPERT TESTIMONY OF OFFICER SCANLON AS LAY OPINION TESTIMONY. (2T 21-7 to 24-10)

Shortly prior to the start of trial, the State submitted that Scanlon, who was the arresting officer, would testify as to what a magazine is and how it

functions. (2T 13-24 to 14-8) Defense counsel objected, arguing the State did not provide a report as to what Scanlon's testimony would encompass, and that it was unclear whether he would be called to give expert testimony. (2T 17-4 to 19-10) The State clarified that it intended to ask Scanlon what a magazine is, what it does, and how it functions. (2T 20-3 to 18) The court ruled that this "is something that could be very simply explained by a lay witness" and that Scanlon could testify without being qualified as an expert. (2T 21-17 to 22-3). At trial, Scanlon testified (over defense objections both before and during trial) as to the magazine, the specific type of ammunition found in it, what kind of firearm the magazine would fit into, and how a magazine might come out of a firearm. (6T 56-8 to 23; 6T 58-11 to 14; 6T 61-15 to 24) This was error because Scanlon's testimony was expert opinion outside the ken of the average juror. As such, Scanlon was required to be qualified as an expert witness, the State was required to provide an expert report pretrial, and the trial court was required to instruct the jury on how to evaluate expert testimony. Because none of that was done here, reversal of Bouzy's convictions is required.

Our Supreme Court in State v. Mclean explained that there are three distinct categories of testimony a witness can give: (1) fact testimony; (2) lay opinion testimony; and (3) expert opinion testimony. 205 N.J. 438, 456-62 (2011). Fact testimony is what a witness "perceived through on or more of the

senses" and does not include an opinion, "lay or expert, and does not convey information about what the [witness] 'believed,' 'thought,' or 'suspected.'" Id. at 460.

The second category, lay opinion testimony, is only admissible if it falls within "the narrow bounds" erected by N.J.R.E. 701. Id. at 456. As such, a lay witness may only give an opinion when it is rationally based on their "personal observations and perceptions" and will assist the jury in understanding the witness's testimony or determining a fact in issue. Id. at 459. These requirements mean that a lay witness may offer opinion testimony only "on matters of common knowledge and observation." State v. Bealor, 187 N.J. 574, 586 (2006). A lay witness is not allowed to opine on something not within his "direct ken" or something "as to which the jury is as competent as he to form a conclusion." McLean, 205 N.J. at 459. Examples of lay opinion testimony include the speed at which car was travelling, State v. Locurto, 157 N.J. 463, 471-72 (1999); the distance of a vehicle from the intersection where an accident occurred, State v. Haskins, 131 N.J. 643, 649 (1993); and signs and behaviors indicative of an individual's intoxication, State v. Guerrido, 60 N.J. Super. 505, 509-11 (App. Div. 1960).

The final category, expert opinion testimony, is governed by N.J.R.E. 702, 703, and 704, and allows experts to use their special "knowledge, skill,

experience, training, or education" to draw inferences from observed events. Id. at 449. Only those with appropriate qualifications may testify as experts, and several safeguards, including the use of hypotheticals and careful jury instructions, must be employed by the trial court when expert opinion testimony is admitted. Id. at 455, 460.

The Supreme Court made clear that these categories are mutually exclusive and rejected the argument that there are categories of opinion testimony that lie between lay and expert. Id. at 461. Lay opinion testimony under N.J.R.E. 701 is also not a substitute for expert testimony under N.J.R.E. 702. See id. at 463. ("[A] question that referred to the officer's training, education and experience, in actuality called for an impermissible expert opinion.").

Here, Scanlon's testimony included expert opinions beyond the ken of the average juror. For example, Scanlon testified: that the ammunition found inside the magazine was 9-milimeter ball-tipped ammunition, (6T 54-24 to 25); what "ball-tipped ammunition" meant, (6T 56-19 to 23); that the magazine recovered would fit into a 9-milimeter Smith & Wesson firearm, (6T 58-11 to 14); that a magazine would come out of that particular firearm via a button above the trigger, (6T 61-15 to 24); and how to load and unload a magazine with the aid

of a demonstration firearm,[8] (6T 81-21 to 82-5). These were far from lay opinions which the average juror is "competent as [the witness] to form a conclusion." McLean, 205 N.J. at 459. Rather, Scanlon's testimony was directly born from his "knowledge, skill, experience, training, or education" as a police officer trained to use firearms. Id. at 449. Scanlon testified as to his qualifications, stating he had extensive training with firearms, served as a pistol and shotgun instructor, helped run the police department's annual firearms qualifications for all officers, and helped maintain the department's arsenal of firearms. (6T 43-7 to 44-23) Because Scanlon based his opinion on this specialized experience and training and not his own observations and perceptions, [9] his opinion was expert testimony. See State v. Hyman, 451 N.J. Super. 429, 448-49 (App. Div. 2017) (finding a police officer testified as an expert when he was asked to render opinions based on his training and experience and not "'his own senses,' perceptions, and observations").

[8] Because no firearm was ever recovered, the court allowed the use of a demonstration firearm that was not the one alleged to be possessed by Bouzy. (6T 71-15 to 76-5) Defense counsel objected to the use of the demonstration firearm. (6T 69-7 to 13)

[9] During the pretrial conference on February 29, 2024, the State acknowledged that Scanlon's knowledge of magazines and ammunition stems from his training and experience as a police officer. (2T 20-14 to 20-18)

While it might be possible Scanlon could have qualified as an expert in firearms, the court's failure to recognize this testimony as an expert opinion nonetheless prejudiced Bouzy in two key ways. First, the jury was not properly instructed on the weight to be given to expert testimony. Second, Bouzy was deprived of vital notice procedures that hampered his ability to prepare a defense.

Though the Supreme Court has emphasized that trial courts must instruct juries on the proper weight to be given to an expert opinion and to emphasize that the ultimate decision about a defendant's guilt rests solely with the jury, State v. Nesbitt, 185 N.J. 504, 513 (2006), the trial court failed to do so in this case, as Scanlon's expert testimony was admitted under the guise of lay opinion testimony. When allowing expert testimony, the trial court "should give a limiting instruction to the jury 'that conveys to the jury its absolute prerogative to reject both the expert's opinion and the version of the facts consistent with that opinion.'" Hyman, 451 N.J. Super. at 455 (quoting State v. Torres, 183 N.J. 554, 580 (2005)); see also State v. Green, 86 N.J. 281, 287 (1981) ("Appropriate and proper charges to a jury are essential to a fair trial.").

Here, Scanlon's testimony was vital to the State's theory that Bouzy arrived at Servil's apartment with a gun, and the magazine was ejected during the struggle. In regard to Scanlon's testimony, our Supreme Court has

recognized the expert opinion of an investigating officer presents "significant danger of undue prejudice because the qualification of the officer as an expert may lend credibility to the officer's fact testimony." Torres, 183 N.J. at 580. As such, it was vital for the jurors to be given the model charge for expert testimony which instructs that they are "not bound by such expert's opinion" but should give "the weight you deem it is entitled." Model Jury Charges (Criminal), "Expert Testimony" (rev. Nov. 10, 2003). The model instruction further advises that the "value or weight of the opinion of the expert is dependent upon, and is no stronger than, the facts on which it is based." Id. This particular instruction was especially relevant given that Scanlon did not know for a fact what specific firearm was alleged to have been possessed and therefore how its magazine release functioned.

Finally, Bouzy was further prejudiced by the failure of the State to abide by court rules governing expert testimony, namely Rule 3:13-3(b)(1)(I), which requires the State to provide a defendant with certain disclosures about anticipated expert testimony 30 days in advance of trial. The rule requires the defendant be provided with the names of witnesses the State expects to call as an expert witness along with their qualification and a copy of their report. Ibid. If no report exists, the State must provide a statement of the facts and opinions

to which the expert is expected to testify and a summary of the grounds for each opinion. Ibid.

Here, the discovery provided in no way allowed for defense counsel to be able to conduct research to determine the weakness in Scanlon's testimony or to consult with a defense expert on the weaknesses of that approach. Defense counsel was provided Scanlon's CV, but no other information. (2T 20-9 to 20-16). In the words of trial counsel, "I would only ask . . . the State to provide a report from Officer Scanlon detailing what it is that he's going to be talking about . . . . Because I have nothing to cross-examine him with because I have nothing." (2T 26-12 to 17) Because the court ultimately ruled that Scanlon's testimony would not be an expert opinion, the State was not ordered to comply with the discovery rules, depriving Bouzy of an opportunity to fully prepare a defense. See State v. Gilchrist, 281 N.J. Super. 138, 144 (App. Div. 2005) (Acknowledging a defendant's right to confront and "effectively cross-examine the State's witnesses is essential to the due process right to a fair opportunity to defend against the State's accusations, and is one of the minimum essentials of a fair trial." (emphasis added) (internal quotation marks removed)).

The trial court erred by mischaracterizing Scanlon's expert testimony as a lay opinion. As a result, the State did not submit an expert report, limiting defense counsel's ability to effectively cross-examine Scanlon. Additionally,

because Scanlon was not recognized as an expert, the jury was not properly instructed on how to weigh his expert opinion. Therefore reversal and remand for a new trial is required.

POINT V

THE CUMULATIVE EFFECT OF THE ERRORS DENIED BOUZY A FAIR TRIAL. (Not raised below)

Even if this Court does not agree that the previously discussed errors merit reversal individually, Bouzy's convictions should be reversed because the cumulative effect of the errors fundamentally deprived him of a fair trial. The errors outlined above served to paint Bouzy in a negative light while simultaneously precluding him from presenting evidence vital to his defense. The trial court's inconsistent and incorrect rulings rendered Bouzy's trial deficient, and a new trial is necessary.

"When legal errors cumulatively render a trial unfair, the Constitution requires a new trial." State v. Weaver, 219 N.J. 131, 155 (2014) (citing State v. Orecchio, 16 N.J. 125, 129 (1954)). "[E]ven if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018).

The court's errors in handling the 404(b) evidence and Servil's statements about Bouzy's previous incarceration combined to unfairly cast Bouzy in a negative light in front of the jury. As discussed above, the danger of other-crimes evidence is well recognized, and the court's ruling to admit testimony regarding the sale of fake shoes introduced unnecessary prejudice into the trial which was not appropriately addressed due to the court's failure to properly instruct the jury. Bouzy was additionally prejudiced when the jury heard that he had previously been incarcerated. These statements were inherently prejudicial and were not adequately addressed by the court's instructions. Together, these errors created an unacceptable risk the jurors would convict Bouzy because they believed him to be a bad person with a propensity for committing crimes.

Not only was the trial permeated by unfair prejudice, but the court's errors prevented Bouzy from presenting a complete defense, creating an uneven playing field and further stacking the deck against Bouzy. Most egregiously, the court employed an inconsistent and incorrect relevance standard to find evidence of Servil's bias irrelevant because it was focused on the day of the incident even though it had previously ruled testimony about the sale of the shoes could come in for the sake of context. Moreover, the defense was denied fair opportunity to prepare for and rebut officer Scanlon's vital testimony due to the court's

incorrect ruling that he did not offer an expert opinion. Together, these errors combined to deny Bouzy a fair trial and due process and require reversal.

POINT VI

BOUZY'S SENTENCE IS EXCESSIVE AND A REMAND FOR RESENTENCING IS NECESSARY. ALTERNATIVELY, AT A MINIMUM, THE SENTENCES AND MONETARY PENALTIES IMPOSED ON THE MERGED COUNTS MUST BE VACATED. (Partially raised below at 11T 6-21 to 21-22)

A. The court erred in considering the aggravating and mitigating factors, resulting in an excessive sentence.

The court erred in its consideration and weighing of aggravating and mitigating factors resulting in an excessive sentence. At sentencing, the parties agreed to aggravating factors three (risk the defendant will commit another offense), six (extend of defendant's prior criminal record), and nine (the need for deterrence), as well as mitigating factor fourteen (defendant was under 26 years of age at the time of the offense). N.J.S.A 2C:44-1a(3), (6), (9), and 2C:44-1b(14). Bouzy additionally argued for application of mitigating factors three (defendant acted under strong provocation), five (the victim of the defendant's conduct induced or facilitated its commission), and twelve (the willingness of defendant to cooperate with law enforcement), N.J.S.A. 2C:44-1b(3), (5), and

(12). (11T 8-19 to 9-8) The court declined to find the additional mitigating factors.[10] (11T 16-15 to 19-10)

"[O]ur case law and the court rules prescribe a careful and deliberate analysis before a sentence is imposed." State v. Fuentes, 217 N.J. 57, 71 (2014). First, the sentencing court must identify whether any of the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1 apply. Id. at 71-72. Rather than merely listing the applicable factors, the court must provide "the factual basis supporting a finding of particular aggravating and mitigating factors[.]" R. 3:21-4(h); see N.J.S.A. 2C:43-2e. The court's "explanation should thoroughly address the factors at issue." Fuentes, 217 N.J. at 73. "The finding of any factor must be supported by competent, credible evidence in the record." State v. Case, 220 N.J. 49, 64 (2014).

Once the relevant aggravating and mitigating are identified, the court "must qualitatively assess the relevant aggravating and mitigating factors, assigning each factor its appropriate weight." Id. at 65. Finally, it must engage in "a case-specific balancing process" of the weighted factors. Fuentes, 217 N.J. at 72-73. A simple count of whether one set of factors outnumbers the other is not enough. Ibid. To facilitate meaningful appellate review, the court must

[10] While the Judgment of Conviction reflects that the court found mitigating factor five, this is presumed to be a clerical error, as the court declined to find this factor at sentencing.

instead provide a detailed explanation of the balancing process and the reasons for the ultimate sentence imposed. Ibid.; Case, 220 N.J. at 65. In the end, "when the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." State v. Natale, 184 N.J. 458, 488 (2005).

Here, the court erred by declining to find mitigating factor three. The court stated that "the threats that were made . . . in no way would justify the ultimate event that occurred" and that if the court were to "condone that, I would in essence be condoning one taking the law into their own hands." (11T 17-9 to 19) The court's reasoning constitutes an abuse of discretion because there is ample support in the record that Servil provoked Bouzy by having made numerous threats and negative statements towards him. Mitigating factor three permitted the court to consider these circumstances and differentiate this case from one in which a defendant acts without provocation. However, the court declined to find this factor because it mistakenly considered whether the provocation "justified" the offense, and believed finding the factor would "condone" the offense. When considering mitigating factor three, the court is not considering whether a legal defense was established at trial. Bouzy had already been tried for the offense, and as such the question of whether Bouzy's actions were justified under the law was already settled. However the court is

instead meant to consider provocation or inducement by the victim that does not rise to a complete justification. It follows that follows that applying this factor is not "condoning" the illegal act that was done in response. Given the evidence that Servil had repeatedly threatened and made antagonistic statements toward Bouzy, there was ample support in the record to find this factor. Therefore, the court erred by declining to find mitigating factor three. A proper weighing of the mitigating and aggravating factors would have resulted in the trial court having found that the mitigating factors outweighed the aggravating factors. Remand for resentencing is thus required.

B. The sentences and monetary assessments imposed on the merged counts must be vacated.

After merging Counts 3 and 4 into Count 2, the court sentenced Bouzy to a term of three years imprisonment on Count 3 and a term of 18 months on Count 4. The court also imposed a $50 Victims of Crime Compensation Board (VCCB) assessment for each count for a total of $200, as well as a $75 Safe Neighborhood Services Fund assessment for each count, totaling $300. (11T 20-25 to 21-5; Da6)

Because Counts 3 and 4 merged with Count 2, Bouzy's sentences for these counts must be vacated. State v. Trotman, 366 N.J. Super. 226, 237 (App. Div. 2004) ("In a case of merger . . . a separate sentence should not be imposed on the count which must merge with another offense."). Additionally,

the duplicative assessments must be vacated. See N.J.S.A. 2C:1-8(a)(1); State v. Miller, 108 N.J. 112, 116 (1987) (noting that merger is based on the principle that an accused cannot be punished twice for the same offense); State v. Huff, 292 N.J. Super. 185, 187 n.1 (App. Div. 1996) (noting that no separate assessments should have been attributed for merged offenses). Remand for a corrected Judgment of Conviction is necessary.

CONCLUSION

For the reasons discussed in Points I through V, Bouzy's convictions must be reversed and remanded for a new trial. Alternatively, as discussed in Point VI, a remand for resentencing is necessary, and the sentences and monetary penalties imposed on merged counts must be vacated.

Respectfully submitted,

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Public Defender
Attorney for Defendant-Appellant

BY: /s/ *Michael Kenney*
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Assistant Deputy Public Defender
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Dated: March 19, 2025

Appellate Division
Docket No. A-3335-23
Indictment No. 22-07-5901-1

State of New Jersey,
plaintiff - Respondent

v.

Ralph G. Bouzy
Defendant - Appellant

Criminal Action

On Appeal from a judgment of conviction of the Superior Court of New Jersey, Law division, Union County

Sat Below:

Hon. Daniel Roberts, J.S.C
and a jury

Pro se brief by the defendant - Appellant

Before I begin, I'd just like to say that this brief is done pro se. And in saying this, I ask that I am afforded any lapses in procedure. Further, this brief is intended to supplement Mr. Kenney's brief, and so, I ask that this Court considers these additional points alongside Appellant Counsel's. Finally I will adopt Mr. Kenney's stated preliminary statement, procedural history, and statement of facts.

Ralph L Bee

05/22/25

Legal argument

Point #1: The trial court committed error allowing the State to introduce prior bad act allegations that Mr. Bouzy sold the alleged victim fake shoes, violating the confrontation clause.

The State proffered prior bad act or wrong evidence to give the jury "background" to the alleged incident. The state alleged that Mr. Bouzy Knowingly **and** willfully sold the alleged victim fake Sneakers for $500. (Please see "Sep 11 direct" page 39, lines 8-18)

The alleged victim says: "There's another friend named Joha; he's friends with me, he's friends with Ralph Bouzy. I sold him the shoes for $300. Then a couple months later I hit him up, I'm like 'bro [redacted] do you still got the shoes?' He told me nah, Ralph came to him, he told him those shoes was fake. I was like 'bro, why didn't you tell me those shoes was fake? because I would have never did that to you. I didn't know they was fake.' He told me 'Ralph give him the $300 that he paid me and Ralph never give me my $200, because I give him $50

The state did not and could not produce this third person, "Joha", to neither confirm nor deny the alleged victim's claims.

"The Confrontation Clause is commonly implicated when a witness refers to specific information from a non-testifying third party." - Turner v. Warden, no

CS 18-17384 2022 WL 951309 at 8

We'd also like to point out that Mr. Bouzy's defense did object as to relevance. The alleged victim had already testified that nothing else happened that led to the alleged incident. (See "SeaSil direct" page 38, lines 2-18)

The trial court overruled the objection. (See "SeaSil direct" page 38, lines 16-23)

It is without a doubt that the introduction of this prior bad act was completely unnecessary, but more than that, it was nothing but incompetent hearsay. Mr. Bouzy was denied due process, being unable to effectively defend against the State's allegations, as the third party was not made available to cross-examine.

The right of confrontation is an essential attribute of a fair trial, requiring that a defendant have a fair opportunity to defend against the State's accusations." - State V. Garron 177 N.J. 147, 169 827 A 2d 243 (2003) quoting Chambers V. Mississipi 410 U.S. 284, 294 93 S. Ct. 1038 35L 2d 297 (1973)

Prior to the introduction of this "evidence," Mr. Bouzy had already been alleged to have stolen the alleged victim's jacket that kept him warm when he was homeless... The resulting prejudice is undeniable.

For these reasons, reversal is required.

Point #2: The trial court erroneously ruled evidence of the alleged victim's mental health history inadmissible.

The alleged victim was apprehended on a material witness warrant, during which he made several statements that resulted in him being placed in 24 hour involuntary psychiatric hold.

On March 13, 2024, a discussion was had regarding these statements. (Please see page 19, line 14 to page 20, line 11)

Mr. Kean: "I just want to put on the record that I know your Honor said yesterday that your Honor will hold a very tight leash with regard to any testimony about what came out at the proceeding today regarding Mr. Servil. I would just note that this is also extrinsic evidence which is directly related to the reliability and credibility and motive of Mr. Servil, which all of that should--"

The court: "But when I said a tight leash, we're not going to get into the nuts and bolts of everything that came out with regard to everything that occurred. You more than--" Isn't it true, Mr. Servil, you didn't want to come here today? Isn't it true, Mr. Servil, that in order for you to come they had to come and get you?" There you go. But we're not going to get into the medical aspect of it, we're not going to get into that, that is well outside. It's not relevant to the ultimate issue of the case."... (rest of ruling ommitted)

The ultimate issue of this case is the alleged victim's cre-

dibility, and so, the medical aspect of it is absolutely relevant. It is relevant to the witness' state of mind, his mental capacity and overall veracity. The jury is absolutely privy to that information.

Please see Velazquez v. City of Camden, 442 N.J. Super. 224-225 (App. Div) certif. den. 228 N.J. 451 (2016) "Defect of capacity" - Evidence of officer's mental health should have been admitted to assess credibility, as it may have impacted his perception of threat.

Any witness may be cross-examined "with a view to demonstrating the improbability or even fabrication of his testimony." - State v. Silva, 131 N.J. at 445

For these reasons, reversal is required.

Point #3: The trial court erroneously excluded impeachment evidence offered under rule 607, to contradict the alleged victim's statement that he was evicted due to the alleged incident.

On direct, the alleged victim states that he lives at 1002 Chandler avenue. Then on cross, the alleged victim claims that he lives, pays rent and has an agreement with the landlord at 1002 Chandler avenue. (See "Servil direct" page 23, line 12 and "Servil cross" page 55 to page 57 line 3)

The alleged victim then further affirms his supposed truthfulness to the jury. (See "Servil cross" page 57 line 14-25 to page 58, lines 1-4) But realizing he was caught in a lie, the alleged victim reneged. (See "Servil cross" page

58, lines 14-20)

Yet and still, the alleged victim maintained that he had permission to be at 1002 Chandler, but that he had been evicted due to the alleged incident.

Mr. Bouzy's defense attempted to introduce court documents, publicly available on Fcourts, that directly contradicts the alleged victim's story.

The trial court's opinion was that this publicly available document needed to be turned over to the prosecution as per the reciprocal discovery rules, citing 3:13(2)(b). (See Sersil cross page 69, lines 1-15) Further, the trial court also cited rules 403 and 401 as his reasonings to exclude this evidence. (See Sersil cross page 71, lines 3-8)

First, the reciprocal discovery rules only require evidence that is otherwise only available to the defense be turned over. Moreover, as Mr. Bouzy's defense counsel argued, State v. Williams 80 N.J. 472 (1979) stands for the proposition that the defense has no obligation to produce discovery materials that it doesn't intend to use at trial. (See "Sersil cross" page 70, lines 13-17) The defense had no way of knowing what the witness would say on the stand.

Second, rule 607 is extrinsic evidence offered for the purpose of impeachment." Rule 607 is not subject to rule 403 or 401. Moreover, "an attack on credibility using extrinsic evidence to contradict prior testimony at trial is clearly not subject to rule 405 or 608 as referenced in 607(a)(1)." - Green v. N.J. Mfrs Ins Co, 160

N.J. 480, 495 (1999) citing State v. Burris, 145 N.J. 509, 535 (1996)

Mr. Bouzy's defense counsel states clearly for the record that he was not looking to prove a specific instance of the witness' conduct, but rather, that he had lied under oath, in the presence of the jury. (Please see Sersil cross page 68 lines 3-23)

Extrinsic evidence may be in the form of an omission from a document, such as a police report that would be expected to have the witness' version of an accident if it had been provided. See Marata v. Pereira, 436 N.J. Super. 330, 345 (App. Div. 2002)

Finally, the trial court also barred [redacted] Mr. Bouzy from producing Mr. Daniel, the landlord at 1002 Chandler avenue as a witness, as an alternate means to impeach the alleged victim. Eventhough he was listed as a defense witness. (See "Sersil Cross" page 86, lines 20-23 to 88, lines 24)

This is a clear violation of the 6th amendment of the U.S Constitution and New Jersey Constitution. A defendant is entitled to produce witnesses in his defense.

The alleged victim's statement directly puts blame on Mr. Bouzy for making him homeless once more. This is in addition to allegedly stealing his jacket and selling him fake shoes. The undue prejudice is undeniable.

For these reasons, reversal is required.

Point # 4 : The trial court erroneously ruled hearsay evidence admissible

The State proffered 911 call audio evidence to be played for the jury as an excited utterance, "not offered for the truth of the matter asserted." (See "Murphy" direct page 64, line 12-15) But as the 911 call the witness received that's being played." (See "Murphy direct" page 64, lines 16-20)

Mr. Bouzy's defense objected, arguing that the audio was nothing but hearsay and that the State couldn't meet any exception. The trial court overruled the objection. (See "Murphy direct" page 64 on)

First, N.J.R.E 803(c)(1) states "a present sense impression is a statement describing or explaining an event or condition made while or immediately after the declarant perceived it and without opportunity to deliberate and fabricate." Further, this exception is subject to Crawford V. Washington, 541 U.S. 36 50-59 (2004) which held that where a statement is testimonial, it is subject to the confrontation clause and may only be admitted if the declarant is <u>unavailable</u> and the defendant has had a <u>prior</u> opportunity to cross-examine.

Likewise, in the case of 803(c)(2), excited utterance, a judge must determine whether the declarant had the opportunity for deliberation, reflection or misrepresentation before he made the statements or whether the statements were truly spontaneous. Please see State V. Branch, 182 N.J. 338, 366-367 (2005); State V. Cotto, 182 N.J. 316, 327-330 (2005) and

Gonzales v. Hugelmeyer, 441 N.J. Super. 451, 455 (App. Div.) Certif. den. 223 N.J. 356 (2015)

And so, it can not and should not simply be assumed that evidence offered as present sense impressions and excited utterances were truly spontaneous, without opportunity to deliberate.

The 911 call audio was never played in court prior to trial for the trial court to make the required determinations. In fact, the trial court didn't so much as take the time to consider defense counsel's argument.

In reiterating the importance of this element, the trial court in State v. Branch, 182 N.J. at 370 proceeded to hold as inadmissible statements by a juvenile witness made 15-20 minutes after seeing a burglar in her home. Despite the witness' continued state of excitement, the court found that the witness had an opportunity to deliberate.

In their opening statement the State tells the jury that they'll hear the alleged victim and girlfriend's voices in "real time, as the incident is taking place." This was really a bold statement because there were no testimony that these were present sense impressions. (Please see opening statements page 49, line 21-24) Moreover, this does in fact imply that this evidence comes in [redacted] for the "fact" of the matter asserted."

Further, as Mr. Bouzy's defense argued, the witness, Ms. Murphy, the 911 dispatcher, was not present for the alleged incident. And so, she could not possibly

have a present sense impression, perceiving the alleged incident, so as to explain it, nor describe it as the rule requires. (See Murphy direct page 65, line 8-23)

In fact, Ms. George, whom placed the 911 call, stated that she herself didn't see the alleged incident.

In addition, Palmer V. Hoffman, 318 U.S. 109, 116-116, 87L Ed 645 648-651 (1943) stands for the proposition that if a record was prepared for the anticipation of or the use in litigation, it is "subject to special scruting for truthfulness."

The State also claimed that the 911 call audio comes in under "business records." We wont waste this Court's time arguing this, except to say that this is clearly not the case. Emergency services are not "businesses" expected to make such records as the rule actually intends. Moreover, this exception is subject to rule 808, "expert opinion included in a hearsay statement admissible under an exception."

Ms. Murphy did not testify as an expert. And even if she did, the evidence would still be subject to Palmer V. Hoffman.

Never was there any testimony to establish a timeframe between when the call was placed and when the alleged incident took place.

The 911 call does nothing but subject the jury to the alleged victim's emotions that may very well had been a performance. The evidence did not prove any fact

in dispute, but illicited feelings and emotions from the jury. A jury's verdict should be based on <u>facts</u> in evidence.

For these reasons, reversal is required.

Point #5: The trial court failed to tell the jury that verdict does not have to be unanimous.

Jury deliberations lasted several days, with the jury asking "what if we can't come to a unanimous decision?" (Please See Jury questions page 10 line to Page 13, line 15)

The trial court responded stating that "any decision reached must be unanimous with regards to guilt." Clearly failing to mention that verdict does not have to be unanimous, as in State v. Brown, 138 N.J. 481, 651, fl 2d 19 (1993) and State v. Crisforo Montalvo, Super. 229 N.J. 300, 162 A 2d 270 (2017)

Even with the numerous egregious errors committed throughout this trial, it was in no way a "slam dunk" case for the prosecution. At least one juror clearly had reservations. The trial court's incomplete instruction may have had the effect of pressuring said juror to vote "guilty," Even if this was not their original inclination.

For these reasons, reversal and remand is required.

Conclusion

For the reasons discussed in point I to 5, Mr. Bouzy's convictions must be reversed and remanded for a new trial.

Respectfully submitted,

Ralph G. Bouzy
Defendant - Appellant

Dated: 05/22/25

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-3335-23T1
Indictment No.: 22-07-00590

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	Criminal Action
v.	:	On Appeal from a Final Judgment of Conviction of the Superior Court
RALPH G. BOUZY,	:	of New Jersey, Law Division, Union County.
	:	
Defendant-Appellant.		
	:	Sat Below: Hon. Daniel Roberts, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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DATED: September 19, 2025

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COUNTER-STATEMENT OF PROCEDURAL HISTORY[1]

On January 24, 2022, a Union County Grand Jury returned Indictment Number 22-07-5901, charging defendant-appellant Ralph G. Bouzy with: second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b(1) (count one); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a(1) (count two); third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3a and/or 3b (count three); and fourth-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(4) (count four). (Da1 to 2)

From March 13, 2024 to March 25, 2024, defendant was tried before the Honorable Daniel Roberts, J.S.C., and a jury. (4T to 10T). On March 25,

[1] "Da" refers to Defendant's appendix.
"Db" refers to Defendant's brief.
1T refers to the motion transcript dated June 26, 2023.
2T refers to the motion transcript dated February 29, 2024.
3T refers to the trial transcript dated March 12, 2024.
4T refers to the trial transcript dated March 13, 2024.
5T refers to the trial transcript dated March 14, 2024.
6T refers to the trial transcript dated March 19, 2024.
7T refers to the trial transcript dated March 20, 2024.
8T refers to the trial transcript dated March 21, 2024.
9T refers to the trial transcript dated March 22, 2024.
10T refers to the trial transcript dated March 25, 2024.
11T refers to the sentencing transcript dated May 10, 2024.

2024, the jury found defendant guilty of all charges in the indictment. (10T4-8 to 9-20; Da3 to 4).

On May 10, 2024, defendant appeared before Judge Roberts for sentencing. Judge Roberts found aggravating factors three, six and nine, and mitigating factor fourteen, (11T16-15 to 19-5), and sentenced defendant as follows: as to count one, unlawful possession of a weapon, to a term of six years with a period of forty-two months parole ineligibility; the court merged counts three and four into count to and imposed a sentence as to count two, possession of a weapon for unlawful purpose, to a term of six years imprisonment with a period of forty-two months parole ineligibility, to run concurrent with the term imposed for count one. The court also imposed sentence as to count three, terroristic threats, to a term of three years imprisonment to run concurrent to the term imposed for count one; and, as to count four, aggravated assault by pointing a firearm, to a term of 18 months imprisonment, to run concurrent to the term imposed for count one. (11T19-12 to 21-8)(Da5 to 8). The court imposed the applicable fines and penalties. (11T20-24 to 21-8)(Da5 to 8).

Defendant filed a Notice of Appeal on March 12, 2024. (Da15 to 16). This appeal follows.

COUNTER-STATEMENT OF FACTS

On January 24, 2022, the Linden Police Department received a 9-1-1 call regarding a physical fight, possibly involving a handgun, at 1002 Chandler Avenue. (Da9 to 10). Officer Nicholas Scanlon and other Linden Police officers arrived at that location and made contact with the 9-1-1 caller, Jemma George and Jefferson Servil. Mr. Servil appeared very shaken by what had just happened and Ms. George turned over to police a gun magazine loaded with ten rounds of ammunition. (6T46-21 to 48-5; 6T49-5 to 19). Officer Scanlon secured the magazine in an evidence bag and subsequently placed it in an evidence locker at police headquarters. (6T50-18 to 23). Mr. Servil and Ms. George were transported to the police station where they provided statements to police.

According to Mr. Servil, on January 24, 2022, he lived in the attic apartment at 1002 Chandler Avenue. (5T21-2 to 7). At about 5:00 p.m., he was in his apartment with his then girlfriend, Ms. George. (5T21-17 to 21). Mr. Servil went downstairs to get water and as he was walking back upstairs, he heard a knock on the door leading to the attic steps. (5T22-1 to 7; 5T24-6 to 19). When he opened the door, he saw a person he knew as Ralph Bouzy, defendant, standing at the doorway. (5T25-9 to 27-2). Defendant stated, "I heard you was looking for me," and Mr. Servil responded, "My jacket."

Defendant then grabbed Mr. Servil by the neck and held a gun to his face for approximately 10 seconds. (5T27-16 to 28-15).

Mr. Servil then tried to grab the gun from defendant and the two began "tussling" over the gun. (5T29-1 to 6). Ms. George heard the commotion and heard Mr. Servil yelling to her to call the police. She got dressed and went to the top of the stairs. (4T87-1 to 88-24).

During the struggle with the gun, defendant pressed a button on the gun and the magazine fell out. (5T29-1 to 6). Mr. Servil bent down, picked up the magazine and threw it to Ms. George, who was half-way down the steps leading from his apartment. (5T29-4 to 6; 5T29-12 to 16; 4T90-8 to 10). Ms. George did not know at the time what the object was, but she picked it up and put it in her pocket. (4T90-12 to 91-7).

While Ms. George was calling the police, defendant attempted to flee. Mr. Servil indicated that he put defendant in a headlock and tried to hold him until the police arrived, but defendant was able to break away and run from the scene. (5T30-19 to 31-2). Mr. Servil also recounted that a resident of one of the apartments opened his door and observed the scuffle, but he went back into his apartment. (5T31-11 to 21). When the police arrived, Ms. George gave them the magazine that Mr. Servil had tossed to her during the interaction with defendant. (4T92-14 to 15). Ms. George acknowledged that she never saw

anyone holding the magazine, she only picked it up from the floor after Mr. Servil tossed it to her. (4T104-5 to 16). Mr. Servil had bruises on his leg and back as a result of the struggle for the gun. (5T39-25 to 40-5).

Mr. Servil stated that he knew defendant from elementary school and they were close at one time. (5T34-5 to 16). He explained that they were no longer close because Mr. Servil had loaned a jacket to defendant and he refused to give it back. (5T34-25 to 35-17). Mr. Servil also stated that on another occasion, he bought a pair of "Jordan Travis Scott" shoes for $500, but later found out that they were "fake." (5T38-8 to 39-18). These interactions made Mr. Servil mad and he had told defendant and some of his friends that he wanted to fight defendant as a result. (5T102-3 to 22). Mr. Servil stated that prior to this incident, he and defendant had cursed at each other and were disrespectful to each other, and that defendant had "blocked" him on social media. (5T103-3 to 5).

Holroyd Ffife also lived at 1002 Chandler Avenue on January 24, 2022. At approximately 5:00 p.m., he was watching television in his living room when he heard a loud banging at his door. (5T159-24 to 160-18). He turned down the volume on the television and went to the door. (5T163-10 to 13). He then heard someone yell. "You come to fight me." (5T163-13 to 15). Mr. Ffife did not open the door but banged on his side of the door and yelled, "Get

away from the door." (5T163-16 to 20). The commotion continued outside of his apartment, but away from his door. He then cracked his door open and looked out to see his upstairs neighbor, Mr. Servil, holding another man in a chokehold; Mr. Servil was shouting, "Babe, call the police." (5T164-5 to 13; 5T163-21 to 25). Mr. Ffife observed that while Mr. Servil was holding another person by the neck, the other person had a magazine and was trying to put it into the gun that was on his lap. (5T166-10 to 18; 5T169-10 to 170-2). After seeing the gun, Mr. Ffife was scared and went back into his apartment. (5T174-18 to 24). Shortly thereafter he looked out the window and saw the police had arrived. (5T170-4 to 11).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CERTAIN EVIDENTIARY RULINGS LIMITING THE CROSS-EXAMINATION OF THE VICTIM. (5T146-22 to 147-17; 5T148-9 to 151-10).

Defendant claims that the trial court erred in denying him the opportunity to question the victim, Mr. Servil, about his purported pre-existing bias against defendant. Specifically, defendant claims that the trial court would not allow defense counsel to question Mr. Servil about alleged threats he had made to defendant before defendant went to Mr. Servil's apartment on January 24, 2022. Defendant also claims that the trial court would not allow counsel to question Mr. Servil about his statement after the offense that he wanted to make defendant's life "miserable." (Db9 to 10). In making this argument however, defendant points to an isolated point in the trial and not the overall testimony. The record clearly established the ongoing animosity Mr. Servil had towards defendant and that he had made threats toward him and stated that he was going to make defendant's life "miserable." Thus, even if this Court finds that the trial court erred in this specific evidentiary ruling, the

error is harmless. Accordingly, defendant's claims should be rejected by this Court.

"The admission or exclusion of evidence at trial rests in the sound discretion of the trial court." State v. J.M., 225 N.J. 146, 157 (2016) (citing State v. Gillispie, 208 N.J. 59, 84 (2011)). Accordingly, a trial court's evidentiary ruling is reviewed "under the abuse of discretion standard" State v. Prall, 231 N.J. 567, 580 (2018) (quoting Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). "Under that deferential standard, [appellate courts] review a trial court's evidentiary ruling only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). To set aside such a ruling, a reviewing court "must be convinced that 'the trial court's ruling is so wide of the mark that a manifest denial of justice resulted.'" Prall, 231 N.J. at 580 (quoting State v. J.A.C., 210 N.J. 281, 295 (2012)). Appellate courts will "afford no special deference to the trial court's interpretation of the law or the legal consequences that flow from established facts." State v. Hyland, 238 N.J. 135, 143 (2019).

"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. at 483-84 (alteration in original). "Known as the harmless error doctrine, that rule 'requires that there

be "some degree of possibility that [the error] led to an unjust result.'"" Id. at 484 (alteration in original) (quoting State v. R.B., 183 N.J. 308, 330 (2005)). In discussing the extent of error required for reversal, the Scott Court noted "'[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'" Ibid. (alterations in original)(quoting R.B., 183 N.J. at 330).

At trial, a party may introduce evidence that an adverse witness is biased. State v. Gorrell, 297 N.J. Super. 142, 149 (App. Div. 1996) ("It is elementary that a party may show bias, including hostility, of an adverse witness." (quoting State v. Smith, 101 N.J. Super. 10, 13 (App. Div. 1968), certif. denied, 53 N.J. 577 (1969))); see also Clayton v. Freehold Twp. Bd. of Educ., 67 N.J. 249, 253 (1975); State v. Pontery, 19 N.J. 457, 472 (1955) ("[I]t is proper for either the defense or the prosecution to show the interest of a witness as bearing upon the witness' credibility."). Parties may demonstrate bias through extrinsic evidence. N.J.R.E. 607. Such extrinsic evidence may include statements or "utterances."

In this case, over defense counsel's objection, the trial court limited defendant's cross-examination of Mr. Servil about purported threats he had previously made towards defendant. Although the court's ruling at that specific point in the trial may not have comported with N.J.R.E. 607, a review

of the record reveals that defendant in fact questioned Mr. Servil and other witnesses about the threats Mr. Servil had made and the animosity he felt towards defendant. Accordingly, given the extensive evidence of Mr. Servil's animosity towards defendant, the trial court's ruling at that specific point in the trial was harmless error and not capable of changing the outcome of the trial.

Specifically, defendant points to one portion of Mr. Servil's cross-examination, wherein defense counsel asked Mr. Servil if he had threatened defendant. (5T144-22 to 23). The trial court sustained the State's objection to this question, finding it was not relevant. (5T146-10 to 148-8). Defense counsel then asked Mr. Servil if he had told people he wanted to make defendant's life "miserable;" Mr. Servil denied making that statement. (5T148-9 to 11). The trial court again sustained the State's objection to defense counsel using a document that was not turned over to the State to impeach Mr. Servil. (5T148-23 to 151-6). However, as the trial court noted, earlier in the cross-examination of Mr. Servil, he admitted that he threatened defendant. The court further noted, the testimony established the history between Mr. Servil to the jury and that defense counsel had impeached Mr. Servil's credibility with regard to statements he made to the officer. (5T150-23 to 151-5).

In particular, during the cross-examination of Mr. Servil, the following exchange transpired:

> Counsel: And then what did you say?
> Mr. Servil: I told him if you want to fight about it, we can fight about it.
> Counsel: And you told other people that you wanted to fight about it, right?
> Mr. Servil: Yes, I did.
> Counsel: You were telling people all around town that --
> Mr. Servil: No, I wasn't telling people around town, I was telling my friends. John; that's about it.
> Counsel: That you wanted to fight Ralph?
> Mr. Servil: Yeah, because that was my jacket, that was my property. I also told him I wanted to fight him.
> Counsel: You told Ralph?
> Mr. Servil: Yes.
> Counsel: That you wanted to fight Ralph?
> Mr. Servil: Yes.
> Counsel: That was before he blocked you? Before he blocked you?
> Mr. Servil: Yes, before he blocked me he was cursing me out, I was cursing him out. I got disrespectful, he got disrespectful, and then he blocked me.
>
> (5T102-9 to 103-5)

Clearly, the jury was made aware that Mr. Servil did not like defendant and had made it known among his friends that he wanted to fight him.

Further, though Mr. Servil was asked and denied saying that he wanted to make defendant's life miserable, (5T148-9 to 11), counsel was permitted to

question Officer Scanlon about information he learned that Mr. Servil had made such a statement. (6T101-8 to 17). In this regard, the following exchange occurred:

Counsel:	So you received **information that Mr. Servil had made threats towards Ralph**?
Off. Scanlon:	Correct.
	* * * *
Counsel:	And so you received information that **Jefferson had said that he wanted to make Ralph's life miserable.**
Off. Scanlon:	Correct.
	* * * *
Counsel:	You did not speak with Jefferson about these allegations of him making threats towards Ralph, correct?
Off. Scanlon:	Correct, I did not.
Counsel:	**You did not address Jefferson about him allegedly saying he wanted to make Ralph's life miserable**?
Officer Scanlon:	Correct, I did not.

(6T111-3 to 112-25)(Emphasis added).

Moreover, defense counsel used this evidence in his closing arguments to question Mr. Servil's motive to accuse defendant of possessing a gun. Counsel stated:

> Remember when [Officer Scanlon] also went to the Bouzy home he talked about the Bouzy family. He said he spoke with Nadage Bouzy, who is Ralph's sister. **And remember she told them Jefferson had been making threats, remember**? Didn't tell any detectives, didn't do any follow-up, didn't ask Jefferson about it. He also talked about that he was aware that Jefferson had said he wanted to make Ralph's life miserable. **Don't you think accusing someone of possessing a gun in the state of New Jersey would make someone's life miserable?**
>
> (8T24-22 to 25-6).

Counsel further argued:

> I ask that you demand proof beyond a reasonable doubt. That's what's required here. Not a frantic 911 call by someone who didn't see anything and is just parroting things told by her boyfriend **who's motivated to lie because he's upset and wants to make Ralph's life miserable because he stole his jacket and he sold him fake sneakers.**
>
> (8T31-4 to 10)(Emphasis added.)

Thus, defendant brought out substantial evidence to suggest that Mr. Servil had made threats towards defendant and that he had a motive to falsely accuse defendant of this offense. His claim that he was prejudiced by the trial court's ruling in limiting portions of his cross-examination of Mr. Servil are without merit.

Further, the evidence against defendant was significant. Notably, the evidence established that defendant went to Mr. Servil's apartment and

confronted him. A neighbor witnessed the altercation between Mr. Servil and defendant and testified that he observed Mr. Servil was trying to put "a guy" in a chokehold and the person "had a magazine trying to put it into a gun in his lap, he tried to load the magazine in the gun." (5T166-14 to 16). Additionally, the magazine was recovered by police. Thus, there was overwhelming evidence establishing defendant's guilt.

Considered in its entirety, the trial record does not suggest that the brief limitation of counsel's cross-examination of Mr. Servil "led to an unjust verdict -- that is, a possibility 'sufficient to raise a reasonable doubt' that 'the error led the jury to a result it otherwise might not have reached.'" State v. J.L.G., 234 N.J. 265, 306 (2018) (quoting State v. Macon, 57 N.J. 325, 335-36 (1971)); see also Pressler & Verniero, cmt. on R. 1:7-5. Accordingly, any error in the trial court's ruling limiting defense counsel's questioning was harmless as Mr. Servil's alleged bias was before the jury and counsel was able to attack his credibility on this and other basis. Defendant's claim should be rejected by this Court and his conviction affirmed.

POINT II

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PRIOR "BAD ACTS" AS EVIDENCE PROVIDING CONTEXT AND MOTIVE. (Partially Raised Below at 4T18-24 to 19-1).

Defendant contends that the trial court erred in permitting evidence of defendant's "prior bad acts." Specifically, defendant claims that it was error to admit evidence the defendant sold Mr. Servil "fake" sneakers. Defendant also claims that the trial court erred in not properly charging the jury on how to consider this evidence. Defendant's claims are without merit and should be rejected by this Court.

Foremost, defendant agreed that it was proper to admit testimony regarding Mr. Servil's assertion that defendant borrowed his jacket and never returned it because it provided context and background to the incident that followed. (2T30-19 to 23). That is to say, it was important for the jury to learn why there was animosity between the two men which led to a violent confrontation. Indeed, defense counsel used evidence of the un-returned jacket to his advantage to show defendant's bias against defendant and motive to lie. Accordingly, this evidence was properly before the jury.

Defendant, however, claims that the inclusion of another incident, namely, the sale of fake sneakers which occurred after Mr. Servil and

defendant had a dispute over the un-returned jacket, was error that unfairly prejudiced him. However, the trial court properly evaluated the proffered evidence in a Rule 104 hearing (2T), and correctly determined that it was admissible under Rule 404(b), as it was part of the history between Mr. Servil and defendant which led to the breakdown in their friendship and defendant's motive. Thus, it was clearly probative and did not unfairly prejudice defendant.

Generally, all relevant evidence is admissible unless specifically excluded by rule or by law. N.J.R.E. 402; State v. Koskovich, 168 N.J. 448, 480 (2001); State v. Wilson, 135 N.J. 4, 13 (1994). N.J.R.E. 404 (b) provides as follows:

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

The standard for admissibility of other crimes evidence has been set forth by the New Jersey State Supreme Court in State v. Cofield, 127 N.J. 328 (1992), and State v. Marrero, 148 N.J. 469 (1997). Other-crime evidence may

be admitted to establish "a common scheme or plan, a signature crime," or to impeach a defendant who testifies on his own behalf. State v. Weeks, 107 N.J. 396, 406 (1987). In Cofield, the court set forth a four-part test governing the admissibility of other-crime evidence is as follows:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
> 2. It must be similar in kind and reasonably close in time to the offense charged;
> 3. The evidence of the other crime must be clear and convincing; and
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [State v. Cofield, 127 N.J. at 338; see also State v. Marrero, 148 N.J. at 483].

In addition to being relevant to an issue which is genuinely in dispute, the other-crime evidence must be necessary to prove that issue. State v. Marrero, 148 N.J. at 482, citing State v. Stevens, 115 N.J. 289, 300 (1989). Thus, "in determining the probative worth of other-crime evidence, 'a court should consider ... whether its proffered use in the case can adequately be served by other evidence.'" State v. Marrero, 148 N.J. at 482.

Courts have recognized that a defendant may be prejudiced by the admission of other-crime evidence where the possibility exists that the jury may convict the defendant because he is "a 'bad' person in general." State v.

Gibbons, 105 N.J. 67, 77 (1987). Thus, even if the other-crime evidence is relevant to prove some legitimate trial issue, the trial court must still conduct an analysis under N.J.R.E. 403, to determine if its probative value outweighs its prejudicial impact. State v. Clausell, 121 N.J. 298, 322 (1990); State v. Lumumba, 253 N.J. Super. 375, 390-91 (App. Div. 1992).

N.J.R.E. 404(b) specifically permits a court to allow other-crime evidence as proof of motive, provided the evidence is found to be admissible in accordance with the Cofield test. State v. Covell, 157 N.J. 554, 564 (1999). Notably, our courts have allowed a wider range of evidence admissible to establish motive, provided there is a logical connection between the proffered motive and the other-crimes evidence. State v. Williams, 190 N.J. 114, 125 (2007); State v. Long, 173 N.J. 138, 162 (2000); State v. Koskovich, 168 N.J. at 448, 483-84 (2001). Further, when a defendant asserts his innocence, motive becomes a material issue in dispute. State v. Amodio, 390 N.J. Super. 313, 330 (App. Div.), certif. denied, 192 N.J. 477 (2007).

In State v. Covell, the Court addressed the wider range of evidence allowable to show motive or intent and stated, "that includes evidentiary circumstances that 'tend to shed light' on a defendant's motive and intent or which 'tend fairly to explain his actions,' even though they may have occurred before the commission of the offense." 157 N.J. at 565, quoting State v.

Rogers, 19 N.J. 218, 228 (1955)(emphasis added). Motive evidence has the "unique capacity to provide a jury with an overarching narrative, permitting inferences for why a defendant might have engaged in the alleged criminal conduct" State v. Calleia, 206 N.J. 274, 294 (2011).

To aid courts and litigants in making the threshold determination of whether the evidence relates to "other crimes" or is intrinsic to the charged crime, the Supreme Court in State v. Rose, 206 N.J. 141 (2011), looked to the Third Circuit's statement of the test in United States v. Green. 617 F.3d 233 (3d Cir.2010). The Court observed that Green provides a workable, narrow description of what makes uncharged acts intrinsic evidence of the charged crime, and therefore not subject to Rule 404(b)'s directed purpose requirements. As the Court of Appeals explained,

> we . . . reserve the "intrinsic" label for two narrow categories of evidence. First, evidence is intrinsic if it "directly proves" the charged offense. This gives effect to Rule 404(b)'s applicability only to evidence of "other crimes, wrongs, or acts. "If uncharged misconduct directly proves the charged offense, it is not evidence of some "other" crime. Second, "uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime." But all else must be analyzed under Rule 404(b).
>
> As a practical matter, it is unlikely that our holding will exclude much, if any, evidence that is

> currently admissible as background or "completes the story" evidence under the inextricably intertwined test. We reiterate that the purpose of Rule 404(b) is "simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, implying that the jury needn't worry overmuch about the strength of the government's evidence." "No other use of prior crimes or other bad acts if forbidden by the rule," and one proper use of such evidence "is the need to avoid confusing the jury."

[Id. at 248-49 (emphasis in original) (internal citations omitted)].

The Rose court reasoned that Rule 404(b) should not be read as containing an exhaustive list of the non-propensity purposes permitted of other crime evidence. Just as the Third Circuit recognized in Green, our Supreme Court found "here is no reason that our courts cannot allow, under our Rule 404(b), evidence to be admitted for a similar "necessary background" or, as otherwise stated, "the need to avoid confusing the jury," non-propensity purpose. See Green, 617 F.3d at 249.

Here, defendant asserts that the trial court erred in permitting Mr. Servil to testify that defendant previously sold him counterfeit sneakers for $500, in addition to testimony regarding defendant's failure to return Mr. Servil's coat. He claims that the portion of the history involving the shoe dispute between Mr. Servil and defendant was not probative. However, prior to ruling, the trial

court conducted a Rule 104 hearing to determine whether the testimony was admissible under Rule 404(b) to give the fact-finder background and show motive.

At that time, the trial court reviewed Mr. Servil's statement to police, wherein Mr. Servil stated that he told defendant: "whenever I see you, it's on sight, I'm gonna beat you up. Because he got my jacket and sold me shoes. I paid him $500 for the shoes" (4T14-15 to 16-3)(emphasis added). The court further read a portion of Mr. Servil's statement to police into the record as follows:

> "Yeah, the sneakers. I sold them. He sold me these shoes and they were fake. A friend don't do that to friends. You can ask all my friends, I'm not. That's why I'm so pissed, because a guy, I'm really into fashion, thrifting and all that stuff, that's why I really find my joy, and the fact that when I was homeless I had the jacket with me, as it's not even about the jacket, it's the, it's the, it's the memory I have of the jacket and the hard time."
> [4T17-9 to 17.]

Based upon the court's review of the evidence proffered by the State, the trial court found that the events that led to the ill will between Mr. Servil and defendant were issues with Mr. Servil's jacket and the sale of alleged fake sneakers. The court noted that these issues explained why Mr. Servil made comments about defendant and his family, and threatened to beat up defendant,

and, in turn, why defendant may have gone to Mr. Servil's apartment to confront him. (4T10-12 to 11-7). The trial court found that evidence of both alleged incidents was probative and admissible as necessary background evidence, i.e., intrinsic evidence related to the offense.

Further, though the court did not conduct an explicit Rule 404(b) analysis, it is clear that the elements of the test have been met. Foremost, as the trial court recognized, evidence of the dispute over the jacket and the sneakers were relevant to a material issue, namely what caused defendant to confront Mr. Servil. Indeed, without background evidence of the history between Mr. Servil and defendant, namely the issues with the jacket and the shoes, and Mr. Servil's subsequent statements about wanting to fight defendant, the jury is left to speculate why defendant would go to Mr. Servil's apartment and confront him with a handgun. Thus, the evidence was relevant to a material issue.

Additionally, evidence of the incident involving the sale of sneakers was clear and convincing. During argument about the admissibility of the evidence, there was no claim by defendant that the incident did not occur. In fact, counsel acknowledged that there was a dispute between defendant and Mr. Servil about the authenticity of the sneakers. Accordingly, the third prong of the Cofield test is met.

Finally, the probative value of the testimony clearly outweighed any prejudice. As the trial court found, evidence of the shoe sale was important for the jury to understand the history between defendant and Mr. Servil and their actions towards each other. The prejudice, however was minimal, if at all. Notably, during trial, the jury heard that while Mr. Servil purchased the shoes from defendant for $500, he later sold them to John, a friend, for $300 after he had worn them. (5T39-4 to 18; 5T99-8 to 15). The jury also heard that when defendant learned the shoes were fake, he reimbursed John the $300 he paid Mr. Servil. Ibid. Importantly, Mr. Servil testified that he was angry with defendant because he was not reimbursed the difference of $200, which he believed he was owed. (5T39-16 to 18). Thus, it is clear that this incident was informative and lay the foundation with regard to the disputes that occurred between the two, however, this interaction was hardly the type of "prior bad act" that would cause a jury to believe defendant had the propensity to commit crime. Thus, the fourth prong of Cofield is satisfied in that any possible prejudice was greatly outweighed by the probative value of the information set before the jury.

The court's ruling that the evidence regarding the shoe exchange between defendant and Mr. Servil was admissible is amply supported by the record and relevant case law and should not be disturbed on appeal.

Defendant also claims that the trial court failed to properly charge the jury with regard to this evidence. Defendant's assertion, however is belied by the record and his claim should be rejected.

As an initial matter, prior to the final charge to the jury, the trial court conducted a charge conference and both parties discussed the charge regarding "other crimes or bad acts" evidence. (7T59-25 to 63-12). Though defense counsel stated that he objected to the introduction of the underlying evidence, he participated in the crafting of the charge as to how the jury should consider this evidence.

When a defendant does not request an instruction or fails to object to its omission in the final jury charge, we review the omission of that instruction for plain error. State v. Funderburg, 225 N.J. 66, 79 (2016). The plain error standard requires a twofold determination: (1) whether there was error; and (2) whether that error was "clearly capable of producing an unjust result," R. 2:10-2; that is, whether there is "a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached," Funderburg, 225 N.J. at 79 (omission in original) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)). If both conditions are met, reversal is warranted. See State v. Walker, 203 N.J. 73, 89 (2010); R. 2:10-2.

When other crimes, wrongs or bad acts have been admitted into evidence, the court must instruct the jurors on the specific, limited purpose, relevant to a genuine, disputed issue, for which they may consider the evidence. N.J.R.E. 404(b); State v. Oliver, 133 N.J. 141, 153, 156-58 (1993); State v. Cofield, 127 N.J. at 340-42; State v. Stevens, 115 N.J. at 301. Additionally, the court must relate the abstract exception to the specific facts of the case. Oliver, 133 N.J. at 158-59; Cofield, 127 N.J. at 341; Stevens, 115 N.J. at 304.

Here, after reviewing the proposed charge with the parties, the court delivered the agreed upon instruction for "other crimes, wrongs or acts" evidence. During the charge to the jury, the trial court delivered the appropriate charge, tailored from the Model Jury Charge. The court stated:

> The State has introduced evidence that the defendant had allegedly taken a jacket from Jefferson Servil and not returned it, and had allegedly sold Jefferson Servil counterfeit sneakers.
>
> Normally, such evidence is not permitted under our rules of evidence. Our rules specifically exclude evidence that a defendant has committed other crimes, wrongs, or acts when it is offered only to show that he has a disposition or tendency to do wrong and therefore must be guilty of the charged offenses.
>
> Before you can give any weight to this evidence, you must be satisfied that the defendant committed the other crime. If you are not so satisfied, you may not consider it for any purpose. However, you may not use this evidence to decide that the defendant has a

> tendency to commit crimes or that he is a bad person. That is, you may not decide that just because the defendant has committed other crimes, wrongs or acts, he must be guilty of the present crimes. I have admitted the evidence only to help you decide the specific question of context of the events and/or defendant's motive. You may not consider it for any other purpose and may not find the defendant guilty not simply because the State has offered evidence that he committed other crimes, wrongs or acts.
>
> [8T63-21 to 64-22.]

There were no objections to the charge after it was given to the jury. (8T93-22 to 94-10).

It is clear from the charge that the trial court appropriately instructed the jury that specific evidence of prior 'wrongs or bad acts' were introduced, namely the alleged failure of defendant to return Mr. Servil's jacket and the alleged sale of counterfeit sneakers, and that they were not to consider them as evidence that defendant had a propensity to commit crime. The court further appropriately instructed as to the sole purpose they were to consider this evidence – to place the events in context and to show defendant's motive. The court also advised the jury that they could only consider the evidence for that limited purpose if they were convinced that defendant committed those acts. Thus, all of the requirements of the instruction were communicated to the jury in a clear and straightforward manner. Because the jury was properly

instructed, defendant cannot show that any purported defect in the charge led the jury to a result it otherwise might not have reached. There was no error in the jury charge, let alone plain error. Defendant's claim must be rejected and his conviction affirmed.

POINT III

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL AFTER A WITNESS INADVERTENTLY COMMENTED THAT DEFENDANT HAD BEEN IN JAIL BECAUSE THE COURT IMMEDIATELY PROVIDED THE JURY WITH A CURATIVE INSTRUCTION AND STRUCK THE COMMENT FROM THE RECORD. (5T145-18 to 146-8).

Defendant contends that the trial court erred in denying his Motion for a Mistrial after Mr. Servil inadvertently commented that defendant had been in jail. However, the trial court correctly assessed the comment, and determined that it did not arise to the level of a mistrial and provided the jury with a curative instruction and struck the comment from the record. The court's remedy to the situation was appropriate and defendant was not denied a fair trial. Defendant's claim should be rejected by this Court.

It has long been held that mistrials are to be ordered with the "greatest caution." State v. Witte, 13 N.J. 598, 611 (1953). Thus, a mistrial should only be granted when evidentiary errors during trial cannot be ameliorated by curative instructions. State v. Winter, 96 N.J. 640, 647 (1984). A jury is generally presumed to be "capable of following a curative instruction to ignore prejudicial matter." Williams v. James, 113 N.J. 619, 632 (1989); see also

State v. Herbert, 457 N.J. Super. 490, 503-08 (App. Div. 2019) (recognizing the "abundant" authority that courts presume juries will follow instructions, albeit also recognizing that instructions may be inadequate to cure prejudice in some situations).

"[A]n appellate court will not disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice." State v. Harvey, 151 N.J. 117, 205 (1997) (citing State v. DiRienzo, 53 N.J. 360, 383 (1969)); see also State v. Smith, 224 N.J. 36, 47 (2016); R. 3:20-1. Evidentiary errors that prompted an unsuccessful motion for a mistrial should be disregarded unless they were "clearly capable of producing an unjust result." Winter, 96 N.J. at 648; see also R. 2:10-1. Where, as here, multiple errors are alleged, "the predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair." State v. Wakefield, 190 N.J. 397, 538 (2007).

The decision as to whether curative instructions will be sufficient in curing the introduction of inadmissible evidence is "peculiarly within the competence of the trial judge . . . ." Winter, 96 N.J. at 646-47. A reviewing court should give "equal deference to the determination of the trial court" when weighing the effectiveness of curative instructions issued by the trial judge. Ibid.

Here, defendant's requests for a mistrial emanated out of the potential prejudice to him caused by the jury learning from the testimony of Mr. Servil that he had been in jail—for some unspecified reason at some point in time—before the present trial commenced. Specifically, during cross-examination, counsel asked: "Mr. Servil, you had made threats to Mr. Bouzy prior to this incident, correct?" The prosecutor objected and before the court could rule on the objection, Mr. Servil responded, "What about the threat he made to me after he got out of jail?" (5T144-22 to 145-7). At sidebar, defense counsel requested a mistrial because the jury had heard that defendant had been incarcerated. The court denied counsel's motion, finding the comment did not rise to the level of a mistrial and could be cured with an instruction. The court then addressed the jury as follows:

> Ladies and gentlemen of the jury, you heard Mr. Servil say some things that were not part of this case. I am not sure whether you heard them or didn't hear them -- you can't hear me? I thought everybody could hear me.
>
> Mr. Servil said some things that are not part of this case and should not be part of your consideration in terms of rendering a verdict in evaluating the evidence in this case, and I'm telling you to disregard the last things that Mr. Servil said, as they are not relevant to these proceedings.
>
> [5T147-19 to 148-4.]

After the instruction, counsel did not object or request any additional instruction.

As the record reflects, the references to defendant's incarceration were fleeting, without any details as to time, place or charge. See Jackowitz v. Lang, 408 N.J. Super. 495, 505 (App. Div. 2009) (noting that "[f]leeting comments, even if improper, may not warrant a new trial, particularly when the verdict is fair"); see also State v. Herbert, 457 N.J. Super. at 508. All that the jury heard from Mr. Servil was that defendant threatened him when he got out of jail, without elaboration or specifying that he had committed a separate crime. These glancing references, which were quickly objected to by defense counsel before any further elaboration, were not pervasive or sustained. Further, as the trial court noted, the record was rife with references to the animosity and threats between Mr. Servil and defendant, as that was the background that led to the ultimate altercation.

Further, the trial court appropriately instructed the jury that they were to disregard the comments and not consider them. The court did not draw attention to the comment or elaborate on what was said, but rather promptly advised the jury that they were not to consider the comment. This was particularly appropriate because it is unclear whether the jury even heard the comment, where the judge indicated that he did not hear what was said.

Hence, the curative instruction was sufficient, and mistrial was not warranted. See Herbert, 457 N.J. Super. at 505-08. Because the trial court did not err in denying defendant's Motion for a Mistrial, and the curative instruction provided to the jury was adequate, defendant's claim that he did not receive a fair trial is without merit and should be rejected. Defendant's conviction should be affirmed by this Court.

POINT IV

THE TRIAL COURT PROPERLY PERMITTED THE LAY TESTIMONY OF OFFICER SCANLON WITH REGARD TO THE HANDGUN MAGAZINE THAT WAS RECOVERED AS EVIDENCE AT THE SCENE. (2T21-7 to 24-10)

Defendant claims that the trial court erred in permitting Officer Scanlon to testify as to the fact that he recovered a loaded handgun magazine at the scene and how a magazine fits into a handgun. However, prior to the officer's testimony, the trial court ruled that the proffered testimony was within the knowledge of the average juror and therefore an expert was not necessary. The court's finding is supported by the record. Further, even if this Court were to find that the testimony presented by Officer Scanlon was that of an expert in nature, any error was harmless because Officer Scanlon could have been qualified as an expert based upon his training. Moreover, there was no dispute that the item recovered was a handgun magazine was and it was repeatedly emphasized throughout the trial that no gun was recovered. Accordingly, the trial court did not err in permitting Officer Scanlon to testify about the components of the handgun as a lay witness and any error in admitting such testimony was harmless.

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." State v. Cotto, 471 N.J. Super. 489, 531 (App. Div. 2022) (quoting Townsend v. Pierre, 221 N.J. 36, 52 (2015)). "Absent a clear abuse of discretion, an appellate court will not interfere with the exercise of that discretion." Nicholas v. Hackensack Univ. Med. Ctr., 456 N.J. Super. 110, 117 (App. Div. 2018) (quoting Carey v. Lovett, 132 N.J. 44, 64 (1993)). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling was so wide of the mark that a manifest denial of justice resulted.'" State v. Kuropchak, 221 N.J. 368, 385-86 (2015) (quoting State v. Marrero, 148 N.J. at 484).

"N.J.R.E. 702 governs the admissibility of expert testimony." State v. Olenowski, 253 N.J. 133, 143 (2023). That rule "provides that '[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.'" State v. Derry, 250 N.J. 611, 632 (2022) (alteration in original) (quoting N.J.R.E. 702). "[T]he trial court must act as a gatekeeper to determine 'whether there exists a reasonable need

for an expert's testimony.'" State v. Covil, 240 N.J. 448, 465 (2020) (quoting State v. Nesbitt, 185 N.J. 504, 514 (2006)).

A lay witness is permitted to "'give an opinion on matters of common knowledge and observation'" based on his perception. State v. Bealor, 187 N.J. 574, 586 (2006) (emphasis added) (quoting State v. Johnson, 120 N.J. 263, 294 (1990)). In State v. McLean, 205 N.J. 438, 457-58 (2011), the Court noted "[t]raditional examples of permissible lay opinions," citing numerous cases where such testimony was permissible. See State v. Locurto, 157 N.J. 463, 471-72 (1999) (permitting lay opinion about speed of vehicle based upon observation); Pierson v. Frederickson, 102 N.J. Super. 156, 161-63 (App. Div. 1968) (permitting lay opinion about speed of vehicle based upon auditory perception); State v. Haskins, 131 N.J. 643, 649 (1993) (listing traditionally permitted subjects of lay opinion testimony); State v. Guerrido, 60 N.J. Super. 505, 509-11 (App. Div. 1960) (holding that lay witness opinion was sufficient evidence of intoxication); Searles v. Public Serv. Ry. Co., 100 N.J.L. 222, 223 (Sup. Ct. 1924) ("[T]he rule is settled that the average witness of ordinary intelligence may testify whether a certain person was sober or otherwise, without making it appear that the witness was an expert in judging of intoxication."); see also State v. Bealor, 187 N.J. at 588-89 (permitting police officer to testify about observations of defendant's behavior indicative of

narcotics intoxication, but noting preference for expert chemical proofs); Penbara v. Straczynski, 347 N.J. Super. 155, 162 (App. Div. 2002) (permitting landlord to testify about value of carpet damaged by tenant seeking return of security deposit); Lane v. Oil Delivery, Inc., 216 N.J. Super. 413, 420 (App. Div. 1987) (requiring that estimate not be speculative); State v. Romero, 95 N.J. Super. 482, 487 (App. Div. 1967) (permitting owner to testify about value of personal property as part of criminal prosecution for larceny); See also Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 2 on N.J.R.E. 701 (2015). In other words, if the subject matter is within the ken of average jurors, a lay witness may render an opinion based upon his or her own perceptions.

Here, the trial court conducted a hearing prior to the admission of Officer Scanlon's testimony. The State proffered that the officer would be testifying he arrived at the scene and was given a loaded handgun magazine by Mr. George, which he placed into evidence. The State further proffered that the officer would explain that the item is a magazine and it was loaded with ten rounds of ammunition. The officer also would explain that a magazine is inserted into a handgun. (2T19-25 to 20-18; 2T26-20 to 28-2). Defense counsel objected to the testimony about the function of a magazine because Officer Scanlon was not offered as an expert witness in firearms and that this

type of testimony is outside the ken of the average jury. (2T21-1 to 22-16). The court disagreed and stated:

> Right, but you're -- you're saying it would be outside the ken of the average juror. But we're talking about something simplistic. We're not talking about something that is difficult to understand. That is not -- we're not talking about something that it's necessary for an expert to explain. We are talking about a -- a magazine for a gun. And I believe that it is well within. That expert testimony is not something that is necessary in order to explain that to a jury. As I said, the main focus really, I believe, is the carrying mechanism for the bullets. The bullets were in the magazine. That's the key. The key is that there were bullets in it. And that just happens to be the storage -- excuse me. The storage device for the magazine, I mean, for the bullets.
>
> [2T22-17 to 23-6.]

The record shows that the trial court assessed the proffered testimony and determined that the information Officer Scanlon was going to provide was not outside the ken of the average juror and therefore, expert testimony was not necessary. Importantly, the trial court acknowledged that a gun was not recovered in this case and that the officer had no knowledge of what transpired before he arrived at the scene. The trial court further noted that Officer Scanlon would not be opining as to whether or not there was a gun and that the State would have to meet its burden through other witnesses to establish that defendant possessed an actual gun. (2T25-18 to 26-11). As a result of the trial

court's ruling, the State presented the lay opinion testimony of Officer Scanlon at trial.

During his testimony, Officer Scanlon described the actions he took related to his response to 1002 Chandler Avenue that day. Officer Scanlon stated that he made contact with Ms. George and Mr. Servil who told him about what had happened. Officer Scanlon further testified that Ms. George removed from her back pocket a gun magazine that was loaded with ammunition. (6T49-5 to 9). He indicated that he took the magazine and eventually tagged it into evidence. He recognized it as a gun magazine because he is a police officer and handles guns as part of his job. (6T49-6 to 14).

During his testimony he presented the magazine and noted that it was manufactured by Smith & Wesson and held 10, 9-millimeter rounds. (6T49-15 to 19). Officer Scanlon also testified that a magazine, like the one introduced into evidence, holds ammunition and is inserted into the handgrip of 9-millimeter semi-automatic handgun and can be released by pressing a button on the gun. (6T61-15 to 24). On cross-examination, Officer Scanlon agreed that there are many different types of semi-automatic handguns and not all magazines are released with a button mechanism, though most are. (6T83-18 to 84-5). Further, Officer Scanlon agreed that he had no knowledge as to where

the magazine came from and that no gun was recovered. (6T82-23 to 83-7). Indeed, the parties stipulated that no gun is in evidence. (6T76-1 to 5).

Clearly this testimony was not beyond the ken of the average juror. Indeed, the average citizen has seen a semi-automatic handgun as they are worn by many if not all police officers in their municipalities. In fact, many citizens own similar, if not the same, style of gun. Further, these types of handguns and their components, i.e., magazines and ammunition, are prominent in many genres and mediums of entertainment, likely seen by the average juror. Thus, the court correctly found that Officer Scanlon's limited testimony with regard to the basic components of a handgun was not outside the ken of the average juror. The evidentiary decision of the trial court should be given deference and affirmed by this Court.

Nonetheless, even if this Court were to find that the trial court erred in its determination that Officer Scanlon could testify as a lay opinion witness, that error was harmless. It is clear from Officer Scanlon's testimony during trial that he possessed sufficient education, training, and experience to qualify as an expert in the field of basic handgun operation. This testimony laid the proper foundation for Officer Scanlon's qualification as an expert.

Specifically, Officer Scanlon testified that he has been a police officer over ten years with training in firearms, crisis response and field training.

Officer Scanlon further testified that he has pistol, shotgun and pistol mounted optics instructor certifications. (6T43-13 to 25). The officer stated that he also conducts maintenance and inspection on the department's handguns, making sure all the guns are serviceable and operable. (6T44-15 to 23). Thus, this testimony laid the proper foundation for Office Scanlon's qualification as an expert in basic handgun components.

Moreover, Officer Scanlon was thoroughly cross-examined as to the many types of handguns manufactured by Smith & Wesson, as well as the many types of ammunition made[2]. (6T82-18 to 85-14). Additionally, the evidence with regard to the gun magazine coming from a handgun was overwhelming. In addition to Mr. Servil's testimony about defendant putting a gun to his head and the loaded handgun magazine being recovered at the scene, a neutral witness, Mr. Ffife, testified that when he opened the door of his apartment to see what was happening in the hallway, he observed Mr. Servil in a physical altercation with another man. Mr. Ffife stated that he observed Mr. Servil with his hands around the man's neck trying to place him in a chokehold, while the man was trying to put a magazine into a gun that was on

[2] Though the State did not call Officer Scanlon as an expert witness, the State presented the officer's resume in advance of the 104 hearing on the issue. (2T19-25 to 20-18).

his lap. (5T166-10 to 18; 5T168-11 to 17)(Emphasis added). Clearly, any error in admitting the testimony of Officer Scanlon was harmless as there was another witness who explained what he observed, namely defendant attempting to put the magazine into the handgun as well as the testimony of Mr. Servil that the magazine fell out of the gun during his struggle with defendant. Accordingly, defendant's argument that the trial court erred in admitting this testimony should be rejected.

POINT V

THERE WAS NO CUMULATIVE ERROR WARRANTING REVERSAL. (Not Raised Below).

Defendant claims that his conviction should be reversed because the cumulative effect of errors denied him a fair trial. Because there were no errors, let alone cumulative errors, defendant's claim is without merit.

Where any one of several errors assigned would not in itself be sufficient to warrant a reversal, a new trial may be warranted if their effect, when taken together, justifies the conclusion that defendant was not accorded a fair trial. State v. Orecchio, 16 N.J. 125, 129 (1954). However, if a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair. See State v. D'Ippolito, 22 N.J. 318, 325-26 (1956) (rejecting application of Orecchio because none of alleged errors prejudiced defendant nor impaired fair trial). In assessing whether a defendant received a fair trial, courts are guided by the following principle: "'[D]evised and administered by imperfect humans, no trial can ever be entirely free of even the smallest defect. Our goal, nonetheless, must always be fairness. A defendant is entitled to a fair trial but not a perfect one.'" State v. Wakefield, 190 N.J. at 537 (quoting State v. R.B., 183 N.J. at 333-34).

All of defendant's claims of error are meritless and, even if this court finds otherwise, any errors, considered alone or cumulatively, were harmless. Defendant received a fair trial. The jury heard from Mr. Servil, from Gemma and from Mr. Ffife, a bystander witness, all of whom were vigorously cross-examined by defense counsel. Nonetheless, given the fact that the loaded gun magazine was recovered and the altercation involving a gun was witnessed by a neighbor, the jury clearly believed Mr. Servil and found defendant guilty. The alleged errors did not deprive defendant of his right to confrontation and they did not have the capacity to change this result. Accordingly, his claim of cumulative error similarly must fail.

POINT VI

THE TRIAL COURT ADEQUATELY WEIGHED THE AGGRAVATING AND MITIGATING FACTORS IN THIS CASE AND SENTENCED DEFENDANT TO AN APPROPRIATE, LEGAL SENTENCE, HOWEVER THE STATE AGREES THAT THE CASE SHOULD BE REMANDED TO AMEND THE JUDGEMENT OF CONVICTION AND VACATE THE SENTENCES IMPOSED FOR THE MERGED COUNTS. (Partially raised below at 11T6-21 to 21-22).

Defendant claims that the trial court erred in not adequately considering the aggravating and mitigating factors in this case and imposing an excessive sentence. Defendant's claim is without merit. The trial court properly weighed the aggravating and mitigating factors and sentenced defendant to a term within the guidelines. Accordingly, his sentence should be affirmed. However, the State agrees that the trial court erred in imposing sentences on merged counts. Accordingly, this case should be remanded for the judgement of conviction to be amended and the sentences for those counts be vacated.

"Appellate courts review sentencing determinations in accordance with a deferential standard." State v. Fuentes, 217 N.J. 57, 70 (2014). The reviewing court must not substitute its judgment for that of the sentencing court. State v. O'Donnell, 117 N.J. 210, 215 (1989). The sentence must be affirmed unless:

> "(1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Fuentes, 217 N.J. at 70 (quoting State v. Roth, 95 N.J. 334, 364-65 (1984))].

The court may modify a defendant's sentence only when convinced that the sentencing judge was clearly mistaken. State v. Johnson, 118 N.J. 10, 15 (1990); State v. Jabbour, 118 N.J.1, 6 (1990).

In sentencing, consideration of aggravating and mitigating factors must be part of the deliberative process, provided such factors are supported by credible evidence. State v. Dalziel, 182 N.J. 494, 505 (2005); accord State v. Cassady, 198 N.J. 165, 180 (2008) (citing State v. O'Donnell, 117 N.J. at 215-16). Indeed, a trial judge "is required to consider all of the aggravating and mitigating factors and to find those supported by the evidence." Dalziel, at 505. When the trial court fails to provide a qualitative analysis of the relevant sentencing factors on the record, an appellate court may remand for resentencing. State v. Kruse, 105 N.J. 354, 363 (1987). An appellate court may also remand for resentencing if the trial court considers an aggravating factor

that is inappropriate to a particular defendant or to the offense at issue. State v. Pineda, 119 N.J. 621, 628 (1990).

In this case, before imposing sentence, the trial court properly merged counts three and four, third-degree terroristic threats and fourth-degree aggravated assault (pointing), with count two, second-degree possession of a weapon for an unlawful purpose. (11T15-8 to 19). The court then properly conducted a deliberate and thoughtful analysis of the aggravating and mitigating factors which were supported by the credible evidence in the record.

First, the court properly applied aggravating factor three, "the risk that defendant will commit another offense." N.J.S.A. 2C:44-1(a)(3). In applying this factor, the trial court found that defendant had a prior conviction involving a handgun and thus, this was not his first offense involving a handgun. (11T19-12 to 17). The court found that there was a risk that defendant would commit another offense. (11T16-15 to 19).

Likewise, the trial court appropriately found aggravating factor six, N.J.S.A. 2C:44-1(a)(6), the defendant's prior criminal record and the seriousness of the offenses for which he has been convicted. As the court noted, defendant had a prior conviction involving a handgun under N.J.S.A. 2C:39-10a(1). (11T16-17 to 23). Notably, the court declined to consider a prior disorderly persons conviction, finding it did not impact the sentencing. Ibid.

Although defendant's record was not excessive, he did have a prior conviction and, therefore, the court properly found this factor applied.

The court also correctly found aggravating factor nine applied. The court noted that defendant and those comparably situated must be deterred from engaging in activities such as this. The court later explained, that to condone defendant's behavior would be condoning individuals taking the law into their own hands. (11T17-15 to 19). Accordingly, the trial court correctly found that there was a particular need to deter defendant and others from similar criminal conduct.

Further, the trial court specifically addressed all of the proposed mitigating factors and explained the reasons for rejecting all but mitigating factor 14. In this regard, the trial court found that at the time of the offense, defendant was under the age of 26 and, therefore mitigating factor 14 applied. (1T17-4 to 6). See N.J.S.A. 2C:44-1(b)(14). As to the other proposed mitigating factors: factor three, defendant acted under strong provocation, factor five, the victim's conduct induced or facilitated the commission of the offense, and factor twelve, the willingness of defendant to cooperate with law enforcement authorities, the trial court appropriately found that the facts of the case and defendant's conduct did not support the application of these factors. (11T17-6 to 19-5).

In sum, the trial court properly sentenced defendant in accordance with the sentencing guidelines. Notably, as a Graves Act offense, the minimum sentence the court could have imposed as to counts one and two, unlawful possession of a handgun and possession of a handgun for an unlawful purpose, was five years with a period of forty-two months of parole ineligibility. See N.J.S.A. 2C:44-6c. Here, the court imposed a sentence slightly higher than the minimum, six years imprisonment with a period of forty-two months of parole ineligibility. Accordingly, the sentence was not excessive but was at the lower end of the sentencing range and appropriate given the fact that the aggravating factors outweighed the one mitigating factor. The court correctly weighed and balanced the aggravating and mitigating factors. The court's findings were supported by the record and, therefore, the court's ruling was not an abuse of discretion. Thus, defendant's sentence should not be disturbed on appeal.

Finally, the State agrees that the trial court erred in imposing a sentence of imprisonment as to the counts that merged. Specifically, defendant was sentenced to a term of three years' imprisonment as to counts three and four, despite those counts merging into count two. Therefore, this case should be remanded for correction of the judgment of conviction to vacate the sentences on the merged offenses. See State v. Trotman, 366 N.J. Super. 226, 237 (App.

Div. 2004)(In "a case of merger, . . . a separate sentence should not be imposed on the count which must merge with another offense").

CONCLUSION

For the foregoing reasons, the State respectfully requests that defendant's conviction and sentence be affirmed. Further, the State agrees that this case should be remanded to the trial court to correct the judgement of conviction to vacate the sentences imposed on the merged offenses.

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3335-23
INDICTMENT NO. 22-07-590-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division,
RALPH G. BOUZY,	:	Union County.
Defendant- Appellant.	:	Sat Below:
	:	Hon. Daniel Roberts, J.S.C. and a Jury.
		DEFENDANT IS 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 Ralph G. Bouzy relies on the procedural history and statement of facts set forth in his opening brief.[1]

LEGAL ARGUMENT

Bouzy relies on all the legal arguments raised in his opening brief. He adds the following.

POINT I

THE TRIAL COURT'S ERROR IN CURTAILIING CROSS EXAMINATION OF THE COMPLAINING WITNESS DEPRIVED BOUZY OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHT AND IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The trial court's limitation of counsel's constitutional right to cross-examine Servil was harmful error and requires reversal. The State concedes the trial court erred in limiting the cross-examination of Servil on the key issue of bias. (Sb9-10) However, the State argues this was harmless error because Servil testified about the animosity between him and Bouzy, and Scanlon testified

[1] Bouzy retains the abbreviations and transcript designations used in his opening brief and adds the following:
Db = defendant's appellant brief
Sb = State's respondent brief

regarding Servil's comment that he wanted to make Bouzy's life miserable. (Sb9-12) However, this framing discounts the indispensable function of cross-examination.

A fair trial is only possible when a defendant is able to confront and cross-examine the witnesses against them. "The Confrontation Clause of the Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" State v. Castagna, 187 N.J. 293, 308-09 (2006) (quoting U.S. Const. amend VI). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Id. at 309 (quoting Maryland v. Craig, 497 U.S. 836, 845 (1990)). "The essential purpose of confrontation is to secure the opportunity of cross examination" which is "a fundamental aspect of a fair trial." State v. Crudup, 176 N.J. Super. 215, 219-20 (App. Div. 1980) (first citing State v. King, 112 N.J. super. 138, 141 (App. Div. 1970), then citing Pointer v. Texas, 380 U.S. 400, 403 (1965)). The right of cross-examination is "often described as 'the greatest legal engine ever invented for the discovery of the truth.'" State v. Hockett, 443 N.J. Super. 605, 619 (App. Div. 2016) (quoting California v. Green, 399 U.S. 149, 158 (1970)).

The court's curtailment of Bouzy's cross-examination of Servil denied him a fair trial, and the State's contention that this violation of his fundamental right was harmless error because Bouzy was nonetheless able to elicit certain facts of bias is meritless. While the State submits that during cross-examination Servil "admitted that he threatened" Bouzy, (Sb10), he did not explicitly do so. Specifically, Servil testified that he wanted to fight Bouzy and that he told him as much. (5T 102-8 to 24) However, whether Servil's animosity and threats of violence went beyond offers to fight is unknown because defense counsel was not permitted to pursue the line of questioning. The full picture of Servil's feelings towards Bouzy is thus ultimately incomplete.

Additionally, defense counsel attempted to question Servil on his statements that he wanted to make Bouzy's life miserable. While Servil was allowed to answer the question in the negative, defense counsel was then immediately denied the opportunity to impeach Servil, allowing his denial to stand unopposed. (5T 148-9 to 148-14). Notably, defense counsel alluded to being prepared to impeach Servil with extrinsic evidence of text conversations. (148-23 to 151-10) Counsel should have been able to pursue this line of questioning. See Hockett, 443 N.J. Super. at 619 ("Cross-examination necessarily includes the right to impeach or discredit a witness."). The State, however, suggests that hearing evidence of these statements from Officer

Scanlon is sufficient. (6T 112-1 to 112-4) This disregards the vital roll of cross-examination and the role of the jury in determining credibility of witnesses. See, e.g., Craig, 492 U.S. at 846 (Outlining the key elements of a defendant's right of confrontation as "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact" (emphasis added)); State v. Jamerson, 153 N.J. 318, 341 (1998) ("[T]he jury is charged with making credibility determinations based . . . upon observations of the demeanor and character of the witness.")

The jury should have been permitted to hear Servil's responses and the resulting impeachment if applicable, rather than the mere second-hand report relayed by a different witness. "One of the essential purposes of cross-examination is to test the reliability of testimony given on direct-examination." State v. Cabbell, 207 N.J. 311, 328-29 (2011) (quoting State v. Feaster, 184 N.J. 235, 248 (2005)). Testimony by an officer that Bouzy's sister told them about certain statements was not a sufficient replacement to being able to hear Servil's testimony about the issue. See Cabbell, 207 N.J. at 330 (holding the opportunity to question the witness at a hearing outside the presence of the jury was not a proper substitute for the defendants' right to cross-examine witnesses before the jury).

The curtailment of Bouzy's constitutional right to fully cross-examine Servil requires reversal. "The violation of defendants' federal constitutional

right is a fatal error, mandating a new trial, unless we are 'able to declare a belief that it was harmless beyond a reasonable doubt.'" State v. Cabbell, 207 N.J. 311, 337–38 (2011) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)); see also State v. Garcia, 195 N.J. 192, 205 (2008) (recognizing the same standard applies to determinations under our Sate Constitution). The court's violation of Bouzy's right raises reasonable doubt as to whether it led the jury to a result it otherwise might not have reached. See Hockett, 443 N.J. Super. at 620 ("In considering a restraint on an accused's right to cross-examine, a court must recognize that it does not matter that the likelihood of defendant's contention might be slim." (internal quotation marks omitted)). Servil was the State's star witness. Bouzy should have been able to fully cross Servil on the issue of animosity and motive to fabricate. Because questioning of Servil was limited, the specific nature of his threats and the extent of his determination to make Bouzy's life "miserable" is unknown. What is known is that the jury was denied the full story of Servil's bias and an opportunity to observe his demeanor in response to a complete cross-examination. A new trial is necessary.

POINT II

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER BAD ACTS AND FAILING TO PROPERLY INSTRUCT THE JURY.

The court erred by admitting evidence that Bouzy sold Servil a pair of fake sneakers and did not reimburse him. When it comes to evidence of other crimes and wrong doings, simply being relevant to background is not enough. It must pass muster under Cofield.[2] Had the court performed the proper analysis,[3] it would have found that the prejudice of the evidence outweighs the limited probative value, rendering the evidence inadmissible.

First, the testimony regarding the sale of the shoes had limited probative value. Trial counsel agreed some background of the relationship between the two was necessary, which is why he agreed the disagreement over the jacket was sufficiently probative. It was this jacket that was the primary explanation for the falling out between Bouzy and Servil. While Servil did also complain about the sale of the shoes, it was a secondary consideration to the jacket, evidenced by Servil failing to mention it on direct examination until further prompted by the prosecutor. (5T 37-

[2] State v. Cofield, 127 N.J. 328, 338 (1992).

[3] While the State submits the court "properly evaluated the proffered evidence," (Sb16), this is not the case, as the State also acknowledges the court did not perform the necessary analysis under Cofield. (4T 18-12 to 19-1)

13 to 38-23) It is therefore not enough that the sale of the shoes contributed to the background of their relationship. "In addition to being relevant to an issue genuinely in dispute, the other-crime evidence must be necessary for [the disputed issue's] proof. Because of its damaging nature . . . 'a court should consider . . . whether its proffered use in the case can adequately be served by other evidence.'" State v. Marrero, 148 N.J. 469, 482 (1997) (quoting State v. Stevens, 115 N.J. 289, 301, 303 (1989)) (internal citation omitted) (emphasis added).

Here, evidence of the sale of the shoes was an unnecessary piling-on of an additional wrong that did not offer any additional substance or insight to the jury. Because the main driver of animosity—the jacket—was introduced at trial, the jury was not "left to speculate," (Sb22), about the history between Servil and Bouzy. Instead, the evidence was more prejudicial than probative as the evidence only served to paint Bouzy as a bad person. The State essentially argues for a double standard—that it didn't matter the court limited the cross-examination of Servil because there was already "extensive evidence" of the animosity between the two, while simultaneously arguing the evidence of the shoe sale is necessary for the jury to understand the context of their relationship despite the disagreement over the jacket serving as extensive evidence of their falling out. There is, in fact, two distinct standards, although they are inverse of how they were applied at trial; a defendant has a right to cross-examine a witness on a relevant issue such as bias, State v. Scott,

229 N.J. 469, 481 (2017), while other-crimes evidence must pass a heightened, "rigorous test," State v. Garrison, 228 N.J. 182, 194 (2017). The evidence of the sale of the shoes should not have been admitted. It was plainly prejudicial, as other-crime evidence carries the distinct risk "that the jury may convict the defendant because he is a bad person in general." Cofield, 127 N.J. at 336.

The prejudice was heightened by the court's failure to properly instruct the jury. It is true that both parties participated in the charge conference and agreed to include the model charge for other-crimes and bad acts. Defense counsel did not, however, agree to only read a portion of the model charge. "[M]odel jury charges should be followed and read in their entirety to the jury." State v. R.B., 183 N.J. 308, 325 (2005). Moreover, the court did not instruct the jury at the time the other-crime evidence of the jacket or shoes was first presented to the jury. This is vital to minimize the inherent prejudice that accompanies such evidence, as "[d]elay may allow prejudicial evidence to become cemented into a storyline the jurors create in their minds during the course of the trial." State v. Herbert, 457 N.J. Super. 490, 506 (App. Div. 2019). These errors deprived Bouzy of a fair trial and require reversal.

POINT III

THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENDANT'S MOTION FOR A MISTRIAL OR ISSUE A SUFFICIENT CURATIVE INSTRUCTION.

Bouzy was significantly prejudiced by Servil's outburst stating he had been previously incarcerated. Although brief, the comments invited speculation into Bouzy's criminal history. These comments carry significant prejudice, as discussed in Bouzy's plenary brief. (Db30-31)

The State notes that the court "did not draw attention to the comment or elaborate on what was said, but rather promptly advised the jury that they were not to consider the comment." (Sb31) As discussed in Bouzy's plenary brief, this Court has previously held this is precisely the opposite course to take. Herbert, 457 N.J. Super. at 507 ("Although trial judges may understandably try to avoid repeating and thereby reinforcing an offending remark, a court must describe it with enough specificity to enable the jury to follow the instruction.") The court's instruction was woefully inadequate, and failed to effectively identify the remark and address its prejudicial effect.

Additionally, while the State argues it "is unclear whether the jury even heard the comment" because the judge seemingly did not hear Servil the first time, this is pure speculation. It must be presumed the jury heard these comments, especially

when Servil repeated the comment and it was clear enough to be transcribed. Reversal is required.

POINT IV

THE TRIAL COURT ERRED BY ADMITTING EPXERT TESTIMONY AS LAY OPINION TESTIMONY.

Officer Scanlon's testimony went far beyond his lay opinion. He did not merely testify that he was handed a magazine by George. He also testified as to the type of ammunition found inside the magazine, the brand and type of firearm the magazine would fit into, and how a magazine would be ejected from that specific firearm. (6T 54-24 to 61-24) He also performed a demonstration for the jury. (6T 81-21 to 82-25) This is far beyond the ken of the average juror. While the state argues the average juror "has seen a semi-automatic handgun," (Sb39) Scanlon's testimony was not limited to identifying a handgun. He identified a magazine and gave an opinion as to the specific firearm it would be used with and how that firearm's magazine eject would operate. This was not common knowledge he possessed from entertainment mediums, but rather from his training and experience as a police officer and firearm instructor. (2T 20-14 to 20-18)

This error is not harmless, even if Scanlon could have been qualified as an expert. The importance of properly instructing the jury on how to evaluate expert testimony has been well recognized. See State v. Nesbitt, 185 N.J. 504,

513 (2006). If Scanlon was qualified to be an expert and gave expert testimony, the jury needed to be instructed on how to weigh his opinion. State v. Hyman, 451 N.J. Super. 429, 455 (App. Div. 2017); State v. Green, 86 N.J. 281, 287 (1981) ("Appropriate and proper charges to a jury are essential to a fair trial."). Moreover, the failure to recognize Scanlon as an expert allowed for the neglect of court rules that govern expert testimony. This error further prejudiced Bouzy and requires reversal.

POINT V

BOUZY'S SENTENCE ON MERGED COUNTS MUST BE VACATED.

Noting the State's agreement that sentences of imprisonment on merged counts must be vacated, Bouzy respectfully resubmits that the fines and fees imposed on such counts must similarly be vacated.

CONCLUSION

For the reasons stated in Points I through V of his opening brief and I through IV of this reply brief, Bouzy's convictions must be reversed. Alternatively, for the reasons stated in Point VI of Bouzy's opening brief, the convictions should be vacated and the matter should be remanded for resentencing.

Respectfully submitted,

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