SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3926-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Burlington County.
CHESTER O. RINES,	:	
Defendant-Appellant.	:	Indictment No. 21-07-0717-I
	:	Sat Below:
	:	Hon. Christopher J. Garrenger, J.S.C.,
	:	Hon. Aimee R. Belgard, J.S.C., and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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PROCEDURAL HISTORY

On July 20, 2021, a Burlington County grand jury returned Indictment No. 21-07-00717-I, charging the defendant, Chester Rines, with two counts of third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (counts 1 (fentanyl) and 2 (methamphetamine)); and two counts of second-degree possession with intent to distribute CDS, N.J.S.A. 2C:35-5(a)(1) (counts 3 (fentanyl) and 4 (methamphetamine)). (Da 1-5)[1] A fifth count, possession with intent to distribute drug paraphernalia, was dismissed by the prosecutor. (2T 8-1 to 11)

On October 7, 2022, the Honorable Christopher J. Garrenger, J.S.C., heard testimony on the motion to suppress evidence found during a warrantless search of Rines's truck. (1T) In a written opinion issued on October 27, 2022, Judge Garrenger denied the motion to suppress drugs and other items found inside a backpack within the vehicle. (Da 6-15)

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[1] Da – defendant's appendix
1T – October 7, 2022 – motion to suppress
2T – May 30, 2023 – pretrial conference
3T – June 7, 2023 – pretrial conference
4T – June 8, 2023 – trial
5T – June 9, 2023 – trial
6T – July 28, 2023 – sentence

Rines was found guilty of all charges by a jury after a two-day trial before the Honorable Aimee R. Belgard, J.S.C., on June 8 and 9, 2023. (5T 95-25 to 103-23; Da 40-41)

On July 28, 2023, Rines was sentenced to an aggregate term of 12 years' imprisonment with 4 years of parole ineligibility: 5 years flat on counts 1 and 2, and 12 years with a 4-year parole disqualifier on counts 3 and 4, all to run concurrently. (6T 12-16 to 14-11)

A Notice of Appeal was filed on August 23, 2023, and an amended Notice was filed on September 18, 2023. (Da 49-57)

STATEMENT OF FACTS

On April 10, 2021, Officer Ryan Miller of the Florence Township Police Department conducted a traffic stop after he observed a truck make a right turn on red. (1T 6-1 to 13) The defendant, Chester Rines, drove the truck with a passenger, co-defendant Jasmine Seaver. (1T 6-20 to 7-5)

1. Motion to Suppress

Footage of the traffic stop from Officer Miller's body-worn camera was played at the suppression hearing. (1T 10-1 to 20-10; Da 16) Miller approached the truck, which had New Hampshire license plates, and asked for Rines's driver's license, registration, and insurance. (Da 16 at 0:00:28 to 0:00:33) Rines provided his license and told Miller that the car's registration was at his hotel.

(Da 16 at 0:00:39) Miller asked for proof of insurance, and Ms. Seaver explained that New Hampshire does not require drivers to carry automobile insurance. (Da 16 at 0:00:50 to 0:01:28) Miller asked the two where they were coming from, and Rines answered, "New Jersey." (Da 16 at 0:01:28 to 0:01:33)

Miller turned away from Rines and Seaver and walked toward the back of the truck, telling his colleague, "I'm going to take him out, I'm going to talk to him, something's wrong." (Da 16 at 0:01:36 to 0:01:39) Miller ordered Rines to step out of the truck. (Da 16 at 0:01:46) Rines complied and the following discussion took place:

> Miller: So, where are you guys coming from?
>
> Rines: The country club in New Jersey, we went down to check it out.
>
> Miller: Country club?
>
> Rines: Yeah.
>
> Miller: Where's it at?
>
> Rines: In New Jersey.
>
> Miller: Do you know what township?
>
> Rines: She could tell you better than I can. (gesturing to the car)
>
> Miller: You don't know where you were just coming from?
>
> Rines: Yeah, I just told you, New Jersey.
>
> Miller: Yeah, where are you at right now?
>
> Rines: I'm not sure, New Jersey, I think maybe.
>
> Miller: Yeah, and where are you heading to then?

(Da 16 at 0:02:06 to 0:02:30)

Rines said, "I just drew a blank," and struggled to respond. (Da 16 at 0:02:59) He told Miller that this was "part of [his] disabilities." (Da 16 at 0:03:02) Rines assured the officer that although he does know where he is going, he got turned around and was trying to get back on the Turnpike. (Da 16 at 0:03:06 to 0:03:11) Miller then radioed for Sergeant Zachary Czepiel, a canine officer, to come to the scene. (Da 16 at 0:03:20; 1T 14-25 to 15-5)

Rines clarified that he was heading to his daughter's house but continued to struggle to come up with the name of the state where she lived. (Da 16 at 0:03:26 to 0:03:29) Miller asked who was in the passenger seat and Rines answered that she was a friend of his. (Da 16 at 0:03:30 to 0:03:34) Miller asked how long Rines had known her and he estimated about six months. (Da 16 at 0:03:35 to 0:03:37) Miller asked how the two met and Rines said they met at a friend's house in New Hampshire. (Da 16 at 0:03:38 to 0:03:45)

Miller asked why they had gone to look at a country club, and Rines answered that they went "to check it out, see what it was all about." (Da 16 at 0:03:55) Miller asked several more questions about what the country club "entails" and whether Rines is a golfer and what he "normally shoot[s]." (Da 16 at 0:04:04 to 0:04:24)

Rines recalled that his daughter lives in Virginia and told Miller that they were headed to Virginia Beach. (Da 16 at 0:04:25 to 0:04:32) Miller moved Rines to a stretch of grass beside the roadway and a second officer stood with him while Miller approached Seaver. (Da 16 at 0:04:34 to 0:04:39) At no point did Miller inform Rines of the reason for the traffic stop.

Miller asked Seaver the same questions he asked Rines. She answered the same way: that they were coming from New Jersey; that they are from New Hampshire; that they came to check out a country club; that they were heading back to Virginia; that Rines has family in Virginia; that she met him through mutual friends; and that they had known each other for a few months. (Da 16 at 0:04:39 to 0:05:59)

Miller took down Seaver's information and then asked Czepiel to run his dog around the car. (Da 16 at 0:06:00 to 0:06:50) Czepiel asked, "what have you got?" and Miller responded, "they're coming from New Jersey, going to New Jersey, came here from New Hampshire to check out a country club, and now they're going back to Virginia. These people have only known each other for a couple months." (Da 16 at 0:06:51 to 0:07:03) Czepiel asked how they knew each other, and Miller said, "mutual friends." (Da 16 at 0:07:05 to 0:07:11) Czepiel led his dog around the truck and the dog alerted to the presence of narcotics. (Da 16 at 0:09:40 to 0:09:50; 1T 27-6 to 22) The officers searched a

backpack located in the passenger seat of the truck and found drugs, a digital scale, and cash. (1T 30-12 to 22)

At the suppression hearing, Miller testified he decided to request a canine sniff because Rines "was inconsistent, showed nervousness, couldn't tell me where he was coming from or going and just was in a state of confusion." (1T 7-14 to 17) He said he also found Rines's statement that he had been to a country club concerning because "the attire he was wearing wasn't consistent with a private country club" and "there was also no golf clubs present in the bed of the pickup truck." (1T 7-20 to 24)

In a written decision, Judge Garrenger found "that the canine sniff did prolong the duration of the stop beyond the time required to complete the stop's mission." (Da 12 (emphasis in original))

> Here, in addition to issuing a ticket for Defendant's violation of [the right-turn-on-red statute], Patrolman Miller could have performed additional procedures while remaining within the scope of the officer's initial traffic mission, such as checking the driver's license, inspecting the vehicle registration and proof of insurance, and checking for warrants. However, the officer's decision to request a canine extended the mission of the traffic stop beyond the time required to issue a ticket for the traffic violation or the time required to conduct additional routine inquiries beyond issuing a ticket.
>
> [Da 12.]

Judge Garrenger concluded, however, that "reasonable and articulable suspicion independent from that which was the basis for the initial traffic violation" had arisen and justified extending the stop to conduct a dog sniff. (Da 13) Rines's motion to suppress was denied. (Da 6, 15)

2. Trial

Judge Belgard presided over Rines's jury trial. In its opening statement, the State highlighted Seaver's role in the case: "Seaver, while she's a threat to herself based on her addiction, Rines happens to be a threat to everyone suffering with addiction in this country battling the opioid pandemic. That's why he's sitting there and Seaver will be sitting up there later today." (4T 28-19 to 24) The assistant prosecutor explained why Seaver received "a really good deal to testify," telling jurors that "the State of New Jersey has a lot more interest in prosecuting drug dealers than they do those addicted to drugs and battling with addiction." (4T 28-15 to 18)

In addition, the State told the jury that Rines and Seaver jointly possessed the drugs found in the car. "I will be clear about something, the defendant and this codefendant, Seaver, are both guilty of possessing these drugs. That's a fact. That's how the laws of joint and constructive possession work[]." (4T 28-9 to 13)

Seaver testified that she met Rines in a trailer park a few months before the April 10 incident, and that she would buy drugs from him. (4T 129-20 to 130-3) She also testified that he would often give her drugs for free. (4T 130-3 to 10) Seaver explained that she accompanied Rines on a trip to Virginia and that he supplied her with free drugs throughout their trip. (4T 130-19 to 23; 132-7 to 21) She stated that when she asked for heroin, Rines would "break off a piece and put it on the scale and then he would give it to me. And he had a little book that he wrote everything down in." (4T 133-1 to 4) Seaver was asked to identify specific entries in the book but she could not, saying, "this is just a bunch of numbers so I wouldn't know what they really mean." (4T 144-20 to 23; 145-3 to 4; 146-4 to 7) Seaver acknowledged that she had pled guilty to a lesser offense in exchange for her testimony against Rines. (4T 136-25 to 137-7; 147-3 to 22)

In closing, the State told jurors that Rines "was feeding the 19-year-old Jasmine Seaver what she believed to be heroin, which is a schedule two narcotic, pure fentanyl. . . . Jasmine was smoking this thinking she was smoking heroin." (5T 49-17 to 25.)

The State urged jurors to "apply [their] common sense" regarding the quantity of drugs found, the cash, and other items such as the digital scale. (5T 50-18 to 51-2) But, the State continued, "[e]ven if you disagree with me and you

find that the worst that the defendant was going to do was break off a little more for Jasmine on the ride home, that is distribution." (5T 51-3 to 6)

At the charge conference, the parties agreed with the court that instructions on actual, constructive, and joint possession were "all . . . appropriate here." (5T 22-10 to 19) Judge Belgard instructed jurors on joint possession. (5T 69-24 to 70-3)

The jury convicted Rines of all charges. (5T 95-25 to 103-23)

LEGAL ARGUMENT

POINT I

THE OFFICER HAD NO REASONABLE AND ARTICULABLE SUSPICION TO PROLONG THE TRAFFIC STOP FOR A CANINE SNIFF. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED. (Da 6-15)

The motion court erred in determining that the officers had reasonable and articulable suspicion to prolong the traffic stop for a canine sniff based on Rines's nervousness, his momentary pause while recalling his destination, and the fact that he said he was coming from New Jersey while still within its borders. (Da 13) The court furthermore erroneously characterized Rines's and Seaver's answers to Miller's questions as "conflicting stories." (Da 13) On the contrary, Rines and Seaver gave entirely consistent responses to Miller's inquiries, despite being separated when questioned. This Court must reverse the decision of the motion court and suppress the evidence found pursuant to the illegal dog sniff. U.S. Const. amends. IV, XIV; N.J. Const. art. I, ¶ 7.

Both the Federal and State Constitutions protect individuals "against unreasonable searches and seizures." U.S. Const. amends. IV, XIV; N.J. Const. art. I, ¶ 7. Warrantless searches and seizures are presumptively unreasonable. State v. Cohen, 254 N.J. 308, 319 (2023).

A traffic stop is a seizure under both constitutions. Arizona v. Johnson, 555 U.S. 323, 333 (2009); State v. Scriven, 226 N.J. 20, 33 (2016). To be constitutionally reasonable, the stop must be based on law enforcement's "reasonable and articulable suspicion that the driver of a vehicle, or its occupants, is committing a motor-vehicle violation or a criminal or disorderly persons offense." State v. Dunbar, 229 N.J. 521, 533 (2017) (quoting Scriven, 226 N.J. at 33-34).

During a traffic stop, "a police officer may make ordinary inquiries incident to [the] stop, . . . such as checking the driver's license, verifying whether the driver has any outstanding warrants, and inspecting the automobile's registration and proof of insurance." Ibid. (cleaned up). Officers may broaden those inquiries if "the circumstances 'give rise to suspicions unrelated to the traffic offense.'" Ibid. (quoting State v. Dickey, 152 N.J. 468, 479-80 (1998)).

In New Jersey, the reasonableness of an investigative detention following a routine traffic stop is evaluated under the standard set out in Terry v. Ohio, 392 U.S. 1 (1968). See Dickey, 152 N.J. at 476. Under that standard, "an officer may not conduct a canine sniff in a manner that prolongs a traffic stop beyond the time required to complete the stop's mission, unless he . . . has articulable reasonable suspicion independent from the reason for the traffic stop that a

suspect possesses narcotics." Dunbar, 229 N.J. at 540. Reasonable suspicion requires police "to articulate something more than an 'inchoate and unparticularized suspicion or hunch.'" State v. Stovall, 170 N.J. 346, 357 (2002) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).

An appellate court reviewing a motion to suppress must defer to the motion court's factual findings "so long as those findings are supported by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015). But a trial court's legal conclusions "and its view of 'the consequences that flow from established facts' are reviewed de novo." State v. Goldsmith, 251 N.J. 384, 398 (2022) (quoting Hubbard, 222 N.J. at 263).

The motion court in this case made a factual finding that the canine sniff "prolong[ed] the duration of the stop beyond the time required to complete the stop's mission." (Da 12) The court noted that "Patrolman Miller could have performed additional procedures while remaining within the scope of the officer's initial traffic mission, such as checking the driver's license, inspecting the vehicle registration and proof of insurance, and checking for warrants." (Da 12) Instead, "the officer's decision to request a canine extended the mission of the traffic stop beyond the time required to issue a ticket for the traffic violation or the time required to conduct additional routine inquiries beyond issuing a ticket." (Da 12-13) That finding is entitled to deference. Rather than concluding

the traffic stop, Miller ordered Rines out of the car and held him on the roadway, without telling him why he had been pulled over, and waited for Czepiel to arrive with a canine.

The question on appeal is whether the court correctly concluded that officers had sufficient independent suspicion to justify prolonging the stop. That is a legal conclusion entitled to no deference. See, e.g., State v. Mellody, __ N.J. Super. __, __ (App. Div. 2024) (slip op. at 32) ("While we defer to the judge's credibility assessment and fact-finding, we view the determination of whether those facts established an emergency sufficient to satisfy the emergency-aid doctrine to be a legal conclusion to which we owe no special deference and instead review de novo.").

At the suppression hearing, Miller testified that Rines "couldn't indicate where he was coming from" and "showed nervousness." (1T 7-14 to 17; 8-13 to 14) He found Rines's mention of the country club concerning because his attire was not "consistent" with a country club and because he could not see any golf clubs in the bed of the truck. (1T 7-20 to 24)[2] Miller relied on vague and conclusory statements -- "I could see nervousness inside the vehicle, some type of deceptive behavior" -- to explain why he decided to turn the routine traffic

[2] Miller explained at trial that he did not suspect Rines was intoxicated. (4T 45-16 to 19)

stop into "[m]ore of an investigation stop at that point" and summon a canine officer. (1T 12-17 to 21; 13-1 to 3) To prolong Rines's detention, however, Miller needed more than an inarticulate hunch. See Goldsmith, 251 N.J. at 399 (Stovall, 170 N.J. at 372).

Nervousness is not enough. "[U]nder the New Jersey Constitution, the appearance of nervousness is not sufficient grounds for the reasonable and articulable suspicion necessary to extend the scope of a detention beyond the reason for the original stop." State v. Carty, 170 N.J. 632, 648 (2002). It is now well understood that many people – including many innocent people – are nervous when they become the object of police attention. Because "[n]ervousness and excited movements are common responses to unanticipated encounters with police officers on the road," they do not by themselves suggest criminal behavior. State v. Rosario, 229 N.J. 263, 277 (2017). Nor is it reasonable to suspect criminal activity based on Rines's attire, which the officer subjectively felt was unsuitable for a private country club, or his apparent lack of golf clubs, because Rines did not claim they were members of the club or that they had been golfing; both he and Seaver were clear that they had been to "check out" the country club.

The motion court also put stock in the fact that "Rines indicated that he was coming from the 'country club down in New Jersey' while being present in

New Jersey," and that "Seaver indicated that she believed she was in New Jersey." (Da 13 (emphasis in original)) While a person familiar with the area may have been able to name specific townships in response to the officer's questions, Rines – who Miller knew by then was from New Hampshire, and who had traveled through several states on this trip – could not. But rather than dishonest or evasive, Rines was merely imprecise when he gave an uncertain answer about his current whereabouts: "I'm not sure, New Jersey, I think." And Seaver, also a New Hampshire native, offered the same unsure, but not untruthful response that she was "pretty sure" they were still in New Jersey. (Da 16)

In addition, Rines told the officer that he had a disability that caused him to draw a blank when asked where they were headed. While he tried to remember, he answered Miller's many questions about the country club, and ultimately told the officer they were on their way to Virginia. Any suspicion that Rines had been dishonest or evasive should have been dispelled moments later when Miller approached Seaver and asked the same question. Seaver told the officer they were heading to Virginia and produced her phone with GPS directions to Virginia still on the screen. (Da 16 at 0:05:25 to 0:05:50)

The motion court erred when it characterized the answers given by Rines and Seaver as "conflicting." There were no inconsistencies whatsoever in their

answers to Miller's extensive roadside questioning, even though the two were interviewed separately. His inquiries and their answers proceeded as follows:

- Where are you coming from? Rines and Seaver both answered, "New Jersey," and both said they were checking out a country club.
- Where are you now? Rines said, "I'm not sure, New Jersey, I think"; Seaver answered, "pretty sure New Jersey."
- Where are you going? Rines, albeit after a long pause, said they were going to Virginia Beach where his daughter lives; Seaver answered that they were going to Virginia, showed Miller that she had directions to Virginia on her phone's GPS application, and said Rines had family there.
- How long have you known each other? Rines said about six months; Seaver said a few months.
- How did you meet? Rines said they met at a friend's house in New Hampshire; Seaver said they met through friends at home.
- Why were you at the country club? Rines said they were checking it out; Seaver said they were exploring and went to look at it.

Rather than contributing to the officer's suspicion, the fact that Rines and Seaver gave virtually identical responses should have countered his hunch that "something [was] wrong." (Da 16)

In denying the motion to suppress, the court additionally noted that Seaver "repeatedly discussed New Hampshire's laws regarding insuring motor vehicles while pulled over in New Jersey" and "that she knew Rines for only a couple months." (Da 13) But Seaver did not "repeatedly" invoke New Hampshire's insurance laws. She did so once, in direct response to Miller's request for proof of insurance, and then answered his follow-up questions. In any case, Seaver was right. "New Hampshire does not require that a motor vehicle be insured prior to the operation of the vehicle." State v. Keenan, 199 A.3d 729, 733-34 (N.H. 2018); see also N.H. Rev. Stat. Ann. §§ 264:2, :3, :21 (requiring proof of financial responsibility after an accident or in other circumstances). Although this information seemed to surprise Miller, it provided no reasonable basis to suspect criminal activity was afoot. It was not suspicious that two people who said they were from New Hampshire, driving a car with a New Hampshire license plate, and who had produced a New Hampshire driver's license would refer to New Hampshire's unique insurance requirements when asked for insurance. Nor was it remotely suspicious for Rines and Seaver to have known each other for a few months.

Being an out-of-state traveler is not suspicious. Not knowing the names of the towns in New Jersey you have traveled through on a road trip is not suspicious. Driving in a car with a friend you have known for a few months is

not suspicious. Checking out a country club without wearing country club attire or presenting golf clubs is not suspicious. And being nervous when pulled over by police, especially out of state, is not suspicious. "Zero plus zero will always equal zero." State v. Nyema, 249 N.J. 509, 535 (2022) (quoting State v. Morgan, 539 N.W.2d 887, 897 (Wis. 1995)). As our Supreme Court has observed, "[t]o conclude otherwise is to lend significance to 'circumstances [which] describe a very large category of presumably innocent travelers' and subject them to 'virtually random seizures.'" Ibid. Because the otherwise valid traffic stop was prolonged for a canine sniff without reasonable and articulable suspicion independent from the stop, the evidence must be suppressed.

POINT II

THE INTRODUCTION OF PAST ACTS OF DRUG DEALING WITHOUT ANY LIMITING INSTRUCTION REQUIRES REVERSAL OF RINES'S CONVICTIONS. (Not Raised Below)

Rines was charged with possession and possession with intent to distribute drugs for his conduct on April 10, 2021. But his passenger and co-defendant, Seaver, was permitted to testify that her relationship to Rines was that of drug dealer and customer – that when she met Rines in a trailer park several months before the incident, she would buy heroin from him, and that "a lot of the time" he would give it to her for free. (4T 129-20 to 130-10) This revelation was highly prejudicial in a trial where the defense's position was that the drugs did not

belong to Rines. The inflammatory effect of the testimony that Rines dealt drugs on unrelated prior occasions was heightened by a recurring theme of the State's presentation: that Rines was responsible for keeping Seaver in the throes of addiction.[3] The admission of this evidence without any limiting instruction violated Rines's rights to due process and a fair trial. U.S. Const. amend. XIV; N.J. Const. art. I, ¶¶ 1, 9, & 10. His convictions must be reversed.

Seaver testified that she began using heroin when she was 18 years old. (4T 127-10 to 14) She explained that she met Rines "three, four months prior to the incident" in a trailer park in New Hampshire. (4T 129-3 to 25) Her testimony on direct examination proceeded as follows:

> Q: Can you characterize the relationship that developed between yourself and Rines?
>
> A: I would just buy drugs from him. A lot of the time he just gave me drugs, I didn't have to buy them.
>
> Q: What kind of drugs?
>
> A: Heroin.
>
> Q: Did he ever say why he wouldn't take your money sometimes?
>
> A: No, he just was very nice about it and just gave me drugs.
>
> [4T 130-1 to 10.]

[3] This inappropriate accusation is the subject of Point IV, infra.

The admission of this prior bad-act evidence violated our Rules of Evidence. Rule 404(b) sharply limits the admission of evidence of other crimes or wrongs.[4] This limitation guards against the risk "that the jury may convict the defendant because he is a 'bad' person in general" rather than because of the evidence adduced at trial. State v. Cofield, 127 N.J. 328, 336 (1992). "Because evidence of a defendant's previous misconduct 'has a unique tendency' to prejudice a jury, it must be admitted with caution." State v. Willis, 225 N.J. 85, 97 (2016) (quoting State v. Reddish, 181 N.J. 553, 608 (2004)). More specifically, prior bad-act evidence "has the effect of suggesting to a jury that a defendant has a propensity to commit crimes, and, therefore, that it is 'more probable that he committed the crime for which he is on trial.'" Ibid. (quoting State v. Weeks, 107 N.J. 396, 406 (1987)).

To ensure such evidence will be used by jurors only for appropriate, limited purposes, and not to demonstrate a defendant has a propensity to commit crime, Cofield set out a four-pronged test for admissibility under N.J.R.E. 404(b):

[4] N.J.R.E. 404(b)(1) prohibits "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." But certain uses of prior bad-act evidence are permitted under N.J.R.E. 404(b)(2): "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."

(1) the evidence of the other crime must be relevant to a material issue in dispute;

(2) the evidence must be similar in kind and reasonably close in time to the offense charged;

(3) the evidence must be clear and convincing; and,

(4) the evidence's probative value must not be outweighed by its apparent prejudice.

Cofield, 127 N.J. at 338. The admission of prior bad-act evidence is therefore the exception, not the rule. Put differently, N.J.R.E. 404(b) favors exclusion. Reddish, 181 N.J. at 608-09.

A limited exception to this rule of exclusion exists for "intrinsic" evidence. See State v. Rose, 206 N.J. 141, 180-82 (2011) (ending the use of the "res gestae" doctrine to circumvent Rule 404(b) and defining the narrower exception for intrinsic evidence). Evidence of bad acts is intrinsic if it falls into one of two narrow categories: (1) the act "directly proves" the charged crime; or (2) the act "contemporaneously" "facilitated" the charged crime. Ibid. (quoting United States v. Green, 617 F.3d 233, 248-49 (3d Cir. 2010)). If the acts fall into one of these categories, then "it does not constitute other-acts evidence" and is not subject to N.J.R.E. 404(b) and the rigors of a Cofield analysis. State v. Santamaria, 236 N.J. 390, 410 (2019). Accordingly, when analyzing prior bad acts, courts must first make the "threshold determination" whether the bad act in question is intrinsic evidence. Rose, 206 N.J. at 179.

Prior to trial, the court ruled that the State could not introduce evidence of a drug deal earlier in the day at the country club, because it was not intrinsic to the charged crimes, and in any case, its admission would violate N.J.R.E. 404(b). The trial court understood that this testimony would require "really going back in time and is evidence of another crime" and "it is really a separate event." (3T 21-4 to 7) In addition, the court correctly noted that the previous drug deal, even if it were not intrinsic, would be introduced "to show that the defendant acted in conformity with this prior act" with "no permitted use exception here under 404(b)(2)." (3T 21-14 to 17) Thus, "the prejudice . . . would be detrimental here to the defendant." (3T 21-20 to 21)

Because the State had been prohibited from introducing the country club transaction, it should have been on notice that Seaver could not testify about prior drug deals between herself and Rines, which were even more remote in time. Her testimony was not intrinsic evidence of the April 10 charges, and her testimony failed to meet all four prongs of the Cofield test. As to prongs (1) and (2), the months-old instances of drug dealing were not relevant to a material issue in dispute and were not reasonably close in time to the charged crimes. The prior drug deals were factually separate and not necessary for the jury to understand the circumstances of the crime alleged to have occurred on April 10.

As to prong (3), Seaver was incentivized to testify by a favorable plea deal that would allow her to escape a custodial sentence,[5] and her uncorroborated testimony lacked detail. It was not clear and convincing evidence that Rines was a drug dealer.

The testimony failed prong (4) because the prejudice overwhelmed the testimony's non-existent probative value. There was no plausible, permissible non-propensity purpose for the admission of prior drug deals. To the contrary, the evidence is highly effective propensity evidence: wouldn't a person who dealt drugs to Seaver on multiple prior occasions be more likely to intend to distribute drugs on the date in question? The tempting answer is yes. But N.J.R.E. 404(b), and Cofield's fourth prong, is designed to protect defendants from exactly that prejudicial inference. Furthermore, the prosecutor seized on Seaver's testimony to develop a narrative that something even more sinister was afoot: that Rines was responsible for keeping Seaver addicted to drugs, tricking her into using fentanyl in place of heroin, and threatening "everyone suffering with addiction in this country battling the opioid pandemic." (4T 28-21 to 22)

The jury was never instructed that it could not consider these prior drug deals as proof of Rines's propensity to deal drugs. In State v. Hernandez, the

[5] Two weeks after the jury returned its guilty verdicts in Rines's case, the assistant prosecutor moved to vacate Seaver's guilty plea entirely and dismissed all charges. (Da 42-44)

admission of propensity evidence of prior drug dealing required reversal of a defendant's convictions, even though the court gave a limiting instruction. 170 N.J. 106, 131-33 (2001). Just like Rines, the defendant in Hernandez was charged with possession and possession with intent to distribute drugs. Id. at 113. The State introduced testimony that defendant had sold drugs in the same manner twenty times during the two months prior to his arrest for the charged crimes. Id. at 129. First, the Court held that "[t]hat extremely prejudicial testimony smacks of prohibited 'propensity' evidence." Ibid. Second, the Court noted that "even if one could hypothesize some weighty probative value to attribute to that troubling testimony that would outweigh its undue prejudicial effect, it is difficult, if not impossible, to divine the limiting instruction that could offset its 'propensity' impact." Id. at 130. In other words, no limiting instruction would be sufficient to offset the impact of that evidence.

Unlike in Hernandez, though, there was no attempt at a limiting instruction at Rines's trial. The Supreme Court has been clear that an explicit instruction on the appropriate use of other-bad-act evidence is necessary in every case where it has been introduced. State v. Oliver, 133 N.J. 141, 158 (1993). The instruction must "explain[] [the issues of intent, motive, or absence of mistake] in context and thus illustrate[] to the jury how it could apply the other-crime evidence to those issues for which the evidence had been admitted." Ibid.

(emphasis in original). In Hernandez, the instruction was inadequate, requiring reversal under the plain error standard; here, there was no instruction at all.

The erroneous admission of prior bad-act evidence combined with the total lack of instruction as to the use of that evidence requires reversal. The jury was not told that it could not conclude that because Rines had dealt drugs before, he was more likely to deal drugs again. Rines's convictions must be reversed.

POINT III

THE FAILURE TO INFORM THE JURY THAT JOINT POSSESSORS CANNOT INTEND TO DISTRIBUTE DRUGS TO ONE ANOTHER ENTITLES RINES TO A NEW TRIAL. (Not Raised Below)

The State told jurors that Seaver jointly possessed the drugs with Rines, and that they could convict Rines of intending to distribute the drugs by finding that he gave some to Seaver. Because there was evidence that the two were joint possessors, the court instructed the jury on the definition of joint possession. But jurors were never told that "a person cannot distribute a controlled dangerous substance to a person with whom he shares joint possession." State v. Morrison, 188 N.J. 2, 12 (2006). The prosecutor's claim that jurors could find intent to distribute solely from the testimony that Rines would "break off" a piece for a joint possessor materially misstated the law, and the court's failure to inform jurors of the correct law -- that joint possessors cannot distribute drugs to one another -- denied Rines a fair trial. U.S. Const. amends. VI & XIV; N.J.

Const. art. I, ¶¶ 1, 9, & 10. His convictions for possession with intent to distribute (counts 3 and 4) must be reversed.

At the start of the case, the State told the jury that "the defendant and this codefendant, Ms. [Jasmine] Seaver, are both guilty of possessing these drugs. . . . That's how the laws of joint and constructive possession work[]." (4T 28-9 to 13) And at the end of the case, the State told the jury that "if . . . you find that the worst that the defendant was going to do was break off a little more for Jasmine on the ride home, that is distribution." (5T 51-3 to 6) The court did not inform the jury that if it believed the drugs were jointly possessed, then finding "that the worst that the defendant was going to do was break off a little more for Jasmine on the ride home," (5T 51-3 to 6) would not constitute an intent to distribute, contrary to the prosecution's claim.

Prosecutors have broad discretion when it comes to opening and closing statements, but that discretion does not permit them to "make inaccurate legal or factual assertions during a trial." State v. Smith, 167 N.J. 158, 178 (2001). In State v. Lopez, the prosecutor told jurors that they could find intent to distribute based on evidence that two defendants who were in joint possession of drugs had shared the drugs with one another. 359 N.J. Super. 222, 228 (App. Div. 2003). This Court determined that "this assertion by the prosecutor was legally incorrect" and held that, "as a matter of law, the sharing of drugs by individuals

in joint possession of the drugs does not constitute 'intent to distribute' within the meaning of N.J.S.A. 2C:35-5." Id. at 228, 233.

A few years later, the Supreme Court endorsed the Lopez decision in Morrison, writing that "a person cannot distribute a controlled dangerous substance to a person with whom he shares joint possession." 188 N.J. at 12. Based on the evidence that the defendant and his companion jointly possessed the drugs in question, the Court dismissed two counts of the indictment involving distribution. Id. at 20.

Jury charges are "a road map to guide the jury and without an appropriate charge a jury can take a wrong turn in its deliberations." State v. Martin, 119 N.J. 2, 15 (1990). "A trial court has an 'independent duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case.'" State v. Cooper, 256 N.J. 593, 608 (2024) (quoting Reddish, 181 N.J. at 613). In criminal cases, failure to provide clear and correct jury instructions on material issues – such as the elements of the crime – is presumed to be reversible error. State v. Jordan, 147 N.J. 409, 422 (1997).

In this case, simple adherence to the model jury charge for possession with intent to distribute could not correct the State's misstatement of the law and the attendant risk that jurors would convict Rines on an erroneous legal basis. State v. Concepcion, 111 N.J. 373, 379 (1988) ("An instruction that is appropriate in

one case may not be sufficient for another case."). They were only told that distribution is "the transfer, actual, constructive, or attempted from one person to another of a controlled dangerous substance," and that "[i]t is not necessary that the drugs be transferred in exchange for payment or promise of payment of money or anything of value," reenforcing the false notion that sharing the drugs with a joint possessor – for free – constituted intent to distribute. (5T 74-18 to 75-1) When the court defined the elements of possession with intent to distribute, it was obliged to correct the State's erroneous legal claim and inform jurors that the other party to the alleged distribution could not be a co-possessor. Because this omission went to the heart of the charged conduct, it is presumed to be reversible error. See State v. Dehart, 430 N.J. Super. 108, 119-20 (App. Div. 2013) (failing to instruct the jury on a critical element is prejudicial error).

Although there was no objection to the prosecutor's comment in Lopez, this Court found it was "clearly capable of producing an unjust result." 359 N.J. Super. at 233. In that case, the prosecutor's theory of possession was joint possession; the jury was instructed on the definition of joint possession; and the State presented evidence that the co-defendants shared the drugs found in their apartment. Id. at 233, 236. Thus, "the trial court's failure to correct [the prosecutor's] material misstatement of law amounted to plain error, R. 2:10-2, requiring reversal of defendants' convictions." Id. at 228. In this case, jurors

were told that Seaver and Rines were joint possessors; they were instructed on the definition of joint possession; and they were told that they could convict Rines of intent to distribute if they believed he gave drugs to Seaver. As in Lopez, it was plain error not to correct the prosecutor's misstatement in this case.

Aside from Seaver's testimony that Rines gave her drugs during their trip, there was a dearth of evidence supporting an intent to distribute. No expert in drug distribution was presented, so there was no expert testimony about the inferences jurors could draw from the items in the car – the scale, razor blade, and notebook – or from the quantity of drugs or the amount of cash found. These inferences are beyond the ken of the average juror. State v. Cain, 224 N.J. 410, 420 (2016) (noting that in drug distribution cases, "expert testimony is necessary to assist the jury in understanding the significance of packaging, weight, and concentration of drugs; drug paraphernalia; the manner in which drugs are concealed; and the peculiar characteristics of a drug-trafficking operation.").

The State attempted to address the significance of the digital scale by inappropriately inviting Sergeant Czepiel to offer his expert opinion on the use of scales by drug dealers without qualifying him as an expert. (4T 69-18 to 71-13); see, e.g., State v. Kittrell, 279 N.J. Super. 225, 236 (App. Div. 1995) (concluding that testimony by a non-expert law enforcement officer that drug

dealers use beepers "exceeded the bounds of proper lay opinion testimony and crossed over into the realm of expert testimony"). As for the razor blade, the State claimed in summation that Seaver saw Rines use the blade to cut up drugs for her, but there was no basis for this in her testimony whatsoever. (5T 46-18 to 23; 49-17 to 23) Seaver's testimony did, however, offer a plausible, innocuous explanation for the cash – Rines had gone to Virginia to buy a Corvette. (4T 133-24 to 134-1; 141-8 to 11)

In sum, there was no testimony that Rines used a blade to apportion drugs for sale; no expert testimony on drug distribution at all, including on the use of blades or scales by drug dealers at large; no testimony interpreting the contents of the notebook;[6] and no testimony about the relationship between a drug distribution scheme and the amount of cash or quantity of drugs found. No packaging materials were found. And the State presented no evidence of transactions other than those involving Seaver: the improperly admitted testimony that Rines sold her drugs for months before the incident, see Point II, supra, and the evidence that he gave her drugs during their road trip.

[6] Although Seaver testified that Rines would write in the notebook after giving her drugs, she was unable to explain what any of the entries meant or identify those that allegedly corresponded to her. (4T 144-20 to 23; 145-3 to 4; 146-4 to 7) Czepiel testified only that the notebook contained names and numbers. (4T 53-12 to 16)

Thus, just as in Lopez, jurors in this case could have embraced two legally incompatible propositions: that Rines and Seaver jointly possessed the drugs in the car, and that Rines intended to distribute them to her. But to find Rines guilty of intent to distribute based on the road-trip transactions, jurors had to rule out the possibility that Seaver was a joint possessor. They were never so instructed. "Such a prospect renders the verdict unreliable as a matter of law," and requires reversal. Lopez, 359 N.J. Super. at 236.

POINT IV

THE PROSECUTOR'S ATTEMPT TO ENLIST JURORS IN THE WAR ON DRUGS AND THE REPEATED INFLAMMATORY CLAIM THAT RINES WAS RESPONSIBLE FOR HIS CO-DEFENDANT'S DRUG ADDICTION DENIED RINES A FAIR TRIAL. (Not Raised Below)

The prosecutor's opening and summation included claims about Rines that were designed to outrage jurors. The State told the jury that Rines was responsible for keeping Seaver addicted to drugs, tricked her into using fentanyl in place of heroin, and was "a threat to everyone suffering with addiction in this country battling the opioid pandemic." (4T 28-25 to 29-7; 5T 49-10 to 25) These remarks could have led jurors to convict Rines not based on his actual conduct on April 10, 2021, but because they were told they could hold him accountable for the harms of the national opioid crisis and for keeping a young woman addicted to drugs. That unfair commentary denied Rines a fair trial. U.S. Const.

amends. VI & XIV; N.J. Const. art. I, ¶¶ 1, 9, & 10. Rines's convictions must be reversed.

Although prosecutors are given "considerable leeway" in their presentations to jurors, their discretion is not unlimited. State v. Frost, 158 N.J. 76, 82 (1999). For instance, "prosecutors should confine their summations to a review of, and an argument on, the evidence, and not indulge in . . . collateral improprieties of any type, lest they imperil otherwise sound convictions." Id. at 88 (quoting State v. Thornton, 38 N.J. 380, 400 (1962)).

Prosecutors may not employ language in their remarks to jurors that constitutes a "call to arms" against some broader societal issue. State v. Neal, 361 N.J. Super. 522, 537-38 (App. Div. 2003). To do so "improperly divert[s] jurors' attention from the facts of the case . . . and intend[s] to promote a sense of partisanship with the jury that is incompatible with the jury's function." Id. at 537. A jury's duty is limited to deciding, based on the evidence, whether the State has met its burden. It is improper for a prosecutor to suggest jurors have a further obligation "by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." State v. Rose, 112 N.J. 454, 521 (1988) (quoting ABA Standards for Criminal Justice §3-5.8(d) (2d ed. 1980)).

In State v. Holmes, this Court reversed the defendant's convictions after the prosecutor invoked the war on drugs in opening and closing, saying, "You all understand the particular drug problem that we have in this country, particularly Newark, and I submit to you, that the police officers don't have to make up facts," and "[w]ith the war on drugs, [the police witness] didn't have to come before you and fabricate these type of cases." 255 N.J. Super. 248, 249-50 (App. Div. 1992). This Court concluded these comments were "so inflammatory as to constitute plain error" and "were nothing less than a call to arms which could only have been intended to promote a sense of partisanship incompatible with [the jury's] duties." Id. at 251. "It was the jury's function, not to enlist in the war on drugs, but to listen to the evidence and decide in a dispassionate way the question of defendant's guilt." Ibid.

The assistant prosecutor at Rines's trial invoked the national opioid crisis both to "enlist [the jurors] in the war on drugs," ibid., and to unfairly assert that the State had a special interest in prosecuting Rines:

> Is [Seaver] getting a really good deal to testify? Absolutely, she is. But that's because the State of New Jersey has a lot more interest in prosecuting drug dealers than they do those addicted to drugs and battling with addiction.
>
> Seaver, while she's a threat to herself based on her addiction, Rines happens to be a threat to everyone suffering with addiction in this country battling the

> opioid pandemic. That's why he's sitting there and Seaver will be sitting up there later today.
>
> [4T 28-14 to 24.]

This was designed "to inflame the jurors by identifying defendant with matters of public notoriety as to which no evidence was or could have been ever introduced," Holmes, 255 N.J. Super. at 251, and blatantly appealed to public sensitivities about the opioid addiction crisis by labeling Rines a "threat." Moreover, telling jurors the State had a superior interest in holding Rines accountable, compared to his co-defendant, conveyed the prosecutor's personal belief in his culpability and implied that there was, in turn, a special state interest in convicting him.

The prosecutor furthermore tied this unfair commentary to the most provocative theme of the case: that Rines, a 68-year-old man, deceived Seaver, a 19-year-old girl, into using fentanyl instead of heroin in order to keep her hooked on drugs. The assistant prosecutor suggested Rines had done so to keep her in his company: "[W]hat's a 19 year old girl doing hanging out with a 65 year old man? He's her meal ticket." (4T 27-22 to 28-1) In opening and closing, the prosecutor urged jurors to convict "the guy who helped feed his codefendant's addiction" and told them "he was feeding the 19-year-old Jasmine Seaver what she believed to be heroin, which is a schedule two narcotic, pure fentanyl. . . . Jasmine was smoking this thinking she was smoking heroin." (4T

29-3 to 4; 5T 49-17 to 19; 49-24 to 25) By encouraging the jury to view Rines as a bad person, the State encouraged conviction based on outrage rather than on the facts. This denied Rines a fair trial and requires reversal of his convictions.

POINT V

THE CUMULATIVE IMPACT OF THESE ERRORS DENIED RINES A FAIR TRIAL. (Not Raised Below)

Error that may be harmless in itself, when combined with another error, may have a "cumulative effect [that] can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008). Each of the trial errors in Points II, III, and IV are independently sufficient for reversal. If, however, this Court disagrees, the cumulative effect of these errors nonetheless requires reversal. See, e.g., State v. Orecchio, 16 N.J. 125, 129 (1954); State v. Jones, 425 N.J. Super. 258, 276 (App. Div. 2012) (reversing based on the unlawful admission of other-crimes evidence and the State's improper use of expert witness testimony); State v. Blakney, 189 N.J. 88, 96-97 (2006) (reversing based on cumulative error due to prosecutorial misconduct and a failure to give adequate limiting instructions on other-crimes evidence).

The introduction of Seaver's testimony that Rines dealt drugs to her on prior unrelated occasions was not only highly prejudicial propensity evidence,

but it also promoted the offensive and unfair picture painted by the prosecutor of Rines as a devious older man preying on the young Seaver, setting her back in her battle with addiction, and tricking her into taking stronger drugs. The State relied on improperly admitted evidence and inflammatory arguments to prove intent to distribute because there was no evidence of other drug deals, no packaging materials, and no expert testimony on drug distribution. Accordingly, whether considered separately or in the aggregate, the myriad trial errors in this case tainted the jury's verdict and call for reversal of Rines's convictions.

POINT VI

RINES'S EXCESSIVE 12-YEAR SENTENCE WITH 4 YEARS OF PAROLE INELIGIBILITY WAS BASED ON A MISUNDERSTANDING OF THE ATTORNEY GENERAL'S DIRECTIVE 2021-4 AND WAS OTHERWISE IMPROPERLY IMPOSED. (6T 12-16 to 14-11)

Should Rines's convictions be allowed to stand, the matter must be remanded for resentencing. The imposition of the 12-year sentence with 4 years of parole ineligibility for non-violent drug offenses was both excessive and fundamentally flawed because (1) the prosecutor did not abide by the requirements of the Attorney General's Directive 2021-4, and as a result the court proceeded as though the 4-year parole disqualifier was mandatory when it was actually discretionary; (2) the court did not discuss any basis for the aggravating factors, the weights accorded to them, or its decision to reject all

mitigating factors; and (3) each of the simple possession charges should have merged with the charges for possession with intent to distribute.

1. Because Attorney General Directive No. 2021-4 required prosecutors to waive mandatory minimum terms for non-violent drug offenses, the 4-year period of parole ineligibility imposed on Rines's aggregate 12-year sentence was discretionary, not mandatory. Resentencing is required because the court treated the parole bar as though it were mandatory and did not engage in the required analysis to impose a discretionary parole bar.

On April 19, 2021, the New Jersey Attorney General issued Attorney General Law Enforcement Directive No. 2021-4, Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12 (Apr. 19, 2021) (hereinafter "Directive 2021-4"). The Directive required prosecutors to waive mandatory minimum terms for non-violent drug offenses. Accordingly, the 4-year period of parole ineligibility imposed on Rines's aggregate 12-year sentence was discretionary, not mandatory. The sentencing court failed to engage in the requisite analysis of sentencing factors to justify the imposition of a discretionary parole disqualifier, and failed to consider whether a shorter parole disqualifier – or no parole disqualifier – would be more just and more appropriate for Rines, a 68-year-old man. This requires a remand for resentencing.

Rines was subject to a mandatory extended term under N.J.S.A. 2C:43-6(f) on the charges of possession with intent to distribute (counts 3 and 4). N.J.S.A. 2C:43-6(f) requires the imposition of an extended term for defendants who have previously been convicted of certain enumerated drug crimes. It also includes a mandatory minimum term that "shall be fixed at, or between, one-third and one-half of the sentence imposed by the court." N.J.S.A. 2C:43-6(f). The "qualifying Chapter 35 offenses" to which the Directive applies include "any violation subject to a mandatory extended term pursuant to 2C:43-6(f)." Directive 2021-4 at 6. Thus, the prosecutor was required to abide by the Directive for Rines's possession with intent to distribute convictions.

The Directive "require[s] prosecutors to seek the waiver of mandatory parole disqualifiers for non-violent drug crimes . . . after conviction at trial." Id. at 5. To accomplish this after a conviction at trial, prosecutors are required to offer defendants a "post-trial agreement." Id. at 7. These post-trial agreements require prosecutors to seek "a period of parole ineligibility . . . equal to one-third of the sentence, less commutation, minimum custody, and work credits earned while in custody, consistent with N.J.S.A. 30:4-123.51(a), as if the individual had not been subject to a mandatory minimum term," id. at 7 – or, in more common terms, a "flat" sentence. Under N.J.S.A. 30:4-123.51(a), individuals serving a flat sentence – one that does not include a mandatory

minimum term – become parole eligible after serving one-third of the sentence, "less commutation time for good behavior . . . and credits for diligent application or work and other institutional assignments."

Accordingly, the prosecutor was required to seek a flat sentence at Rines's sentencing proceeding. Instead, the prosecutor told the court that one-third of Rines's sentence was to be treated as a mandatory minimum, saying, "a one-third stip where the defendant would not be eligible for parole" was a "mandated number." (6T 4-22 to 25) The court's pronouncement of the sentence and the judgment of conviction treat it that way: both reflect a 12-year sentence with a 4-year period of parole ineligibility on counts 3 and 4, in contrast to the 5-year flat terms imposed on the third-degree offenses.[7] (6T 13-2 to 14-7; Da 45)

While the court was permitted under the Directive to impose a discretionary period of parole ineligibility, see Directive 2021-4 at 7 (Section I.B.2), it could not do so without conducting the requisite analysis:

> As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors . . . , the court may fix a minimum term . . . during which the defendant shall not be eligible for parole.
>
> [N.J.S.A. 2C:43-6(b).]

[7] Directive 2021-4 does not apply to these offenses because they do not carry any mandatory minimum terms in the first place, see N.J.S.A. 2C:35-10(a)(1), and they are not among the enumerated crimes to which N.J.S.A. 2C:43-6(f) applies.

In addition to balancing the aggravating and mitigating factors, a court must also "appl[y] a stricter standard that reflects the serious impact that a parole disqualifier will have on the 'real time' served by the defendant." State v. Kiriakakis, 235 N.J. 420, 441 (2018) (quoting State v. Abdullah, 184 N.J. 497, 509 (2005) (internal quotation marks omitted)).

No analysis was conducted here. The parties and the court mistakenly treated the 4-year parole disqualifier as though it were mandatory, and as discussed more fully in the next subpoint, the court did not discuss its reasons for finding the aggravating factors or the weight it accorded them. The court also failed to address the real-time consequences of a 4-year parole disqualifier on the then-68-year-old Rines. The prosecutor's failure to adhere to the requirements of the Directive and the court's failure to justify the imposition of a 4-year parole disqualifier require a remand for resentencing.

2. Resentencing is required because the trial court did not discuss the aggravating factors, the weights assigned to them, or its refusal to find any mitigating factors.

The court engaged in no analysis or discussion whatsoever when it pronounced sentence, aside from the following declaration:

> As to any aggravating or mitigating factors, I do find the following aggravating factors, number 3, risk that the defendant will commit another offense, number 6, extent of the defendant's prior criminal record and seriousness of the offenses of which he has been convicted, and number 9, the need to deter the

> defendant and others from violating the law. I don't find that there are any mitigating factors here.
>
> [6T 12-16 to 23.]

This was the extent of the court's sentencing analysis. The justification for finding these factors cannot be gleaned from the prosecutor's presentation either, which was similarly limited to: "I think aggravating factors 3, 6, and 9 are present." (6T 7-1 to 2)

The law is clear that it is improper for a court to fail to explain the factual bases for the aggravating factors it finds. State v. Case, 220 N.J. 49, 65 (2014) (noting that "trial judges must explain how they arrived at a particular sentence") (emphasis added). Court Rule 3:21-4(h) provides that "[a]t the time sentence is imposed the judge shall state reasons for imposing such sentence including. . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence." (emphases added). Merely listing aggravating factors and declining to find mitigating factors, with no elaboration or individualized assessment whatsoever, is inadequate.

The absence of an individualized discussion denies Rines the opportunity for meaningful appellate review of his sentence. State v. Bienek, 200 N.J. 601, 608 (2010) (explaining that the sentencing court's explanation of "the reasoning behind its findings . . . is important for meaningful appellate review of any criminal sentence challenged for excessiveness"). That is because a "reviewing

court is expected to assess the aggravating and mitigating factors to determine whether they 'were based upon competent credible evidence in the record.'" Ibid.

Rines was convicted of non-violent drug offenses as a 68-year-old man with health problems. (6T 9-1 to 7) His 12-year sentence with 4 years of parole ineligibility is excessive and was improperly imposed. A remand for resentencing is required if Rines's convictions are upheld.

3. The possession charges for each drug type should have merged with the respective charges for possession with intent to distribute.

Rines was charged with and convicted of possession of fentanyl (count 1) and possession with intent to distribute that same fentanyl (count 3); and possession of methamphetamine (count 2) and possession with intent to distribute the same methamphetamine (count 4). Count 1 should have merged into count 3, and count 2 should have merged into count 4. Because the court failed to merge these offenses, Rines was assessed a total of $6,730 in fines, which was $2,350 in excess of what was statutorily and constitutionally permissible under principles of merger. (Da 46) His financial obligation must be reduced to $4,380. In addition, the judgment of conviction should be amended to reflect the merger of these convictions and the elimination of the concurrent 5-year flat terms of imprisonment on counts 1 and 2.

"The doctrine of merger is based on the concept that an accused [who] committed only one offense . . . cannot be punished as if for two." State v. Tate, 216 N.J. 300, 302 (2013) (quoting State v. Davis, 68 N.J. 69, 77 (1975)) (alterations in original). Therefore "[m]erger implicates a defendant's substantive constitutional rights." Ibid. (citing State v. Miller, 108 N.J. 112, 116 (1987)). Besides its effect on sentencing in many cases, merger "also has a measurable impact on the criminal stigma that attaches to a convicted defendant." State v. Rodriguez, 97 N.J. 263, 271 (1984).

The statutory standard for merger, N.J.S.A. 2C:1-8(a), "provid[es] that offenses are different when each requires proof of facts not required to establish the other." Tate, 216 N.J. at 307 (quoting State v. Hill, 182 N.J. 532, 542 (2005)). That approach "has been characterized as 'mechanical.'" Ibid. Thus, New Jersey instead follows "a 'flexible approach' in merger issues." Hill, 182 N.J. at 542 (quoting State v. Brown, 138 N.J. 481, 561 (1994)).

The more flexible approach requires courts "to focus on the elements of the crimes and the Legislature's intent in creating them, and on the specific facts of each case." Ibid. Courts should consider

> the time and place of each . . . violation; whether the proof submitted as to one count . . . would be . . . necessary . . . to a conviction under [the other] count; whether one act was . . . part of a larger scheme . . . ; the intent of the accused; and the consequences of the criminal standards transgressed.

> [Tate, 216 N.J. at 311 (quoting Davis, 68 N.J. at 81) (alterations in original).]

Under any merger analysis, the convictions for simple possession must merge with the convictions for possession with intent to distribute of each respective drug type. Our courts have long found that a conviction for possession must merge with a conviction for possession with intent to distribute that same substance when the counts refer to the same quantity of the same drug. See, e.g., State v. Gibson, 318 N.J. Super. 1, 11-12 (App. Div. 1999) ("We agree with defendant that his conviction on count two for possession of a controlled dangerous substance . . . should have merged with his conviction on count three for possession of a controlled dangerous substance with intent to distribute . . ."); State v. Selvaggio, 206 N.J. Super. 328, 330 (App. Div. 1985) ("The convictions for possession merge into the convictions for the simultaneous possession with intent to distribute the same substance."); State v. Sherwood, 139 N.J. Super. 201, 206 (App. Div. 1976) (agreeing with the defendant, and noting that the State conceded, that "conviction for possession of LSD merged with the conviction for possession with intent to distribute the same"); State v. Rechtschaffer, 70 N.J. 395, 412 (1976) (noting that "possession was an indispensable element of the possession with intent to distribute in this case"). Rines's conviction for possession of fentanyl must merge with the conviction

for possession with intent to distribute that same fentanyl (counts 1 and 3); the same is true for the convictions for methamphetamine (counts 2 and 4).

After merging these convictions, Rines's financial penalties must be reduced accordingly. Rines was assessed a total of $6,730. Of that total, $2,350 was assessed on the possession-only charges: $2,000 in Drug Enforcement and Demand Reduction fines; $100 in Forensic Laboratory fees; $100 in Victims of Crime Compensation Board fees; and $150 in Safe Neighborhoods Services Funds fees. (Da 46) These fines should be eliminated, resulting in a new total financial obligation of $4,380. The judgment of conviction should, at minimum, be amended to indicate mergers and reflect the correct fees.

CONCLUSION

For the reasons outlined in Point I, the police lacked reasonable suspicion to prolong the traffic stop for a canine sniff, and the evidence in this case should have been suppressed. In the alternative, Rines's convictions should be reversed for the reasons stated in Points II, III, IV, and V.

Should this Court uphold Rines's convictions, the matter should be remanded for resentencing for the reasons given in Point VI.

Respectfully submitted,

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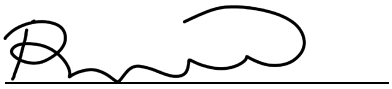
BY: 
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Dated: August 16, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-3926-22

STATE OF NEW JERSEY, :

PLAINTIFF-RESPONDENT, :

V. :

CHESTER O. RINES, :

DEFENDANT-APPELLANT. :

CRIMINAL ACTION

On Appeal From a Final Judgment of Conviction in the Superior Court of New Jersey, Law Division, Burlington County.

Sat Below:
Hon. Christopher J. Garrenger, J.S.C., Hon. Aimee R. Belgard, J.S.C., and a Jury

---

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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PROCEDURAL HISTORY

On July 20, 2021, the Burlington County Grand Jury returned a five-count indictment, Indictment 21-07-0717-I, against defendant, Chester O. Rines, and a co-defendant, Jasmine M. Seaver. Counts One and Two of the Indictment charged defendant with third-degree Possession of a Controlled Dangerous Substance, in violation of N.J.S.A. 2C:35-10a(1). Count Three of the Indictment charged defendant with first-degree Possession of a Controlled Dangerous Substance with Intent to Distribute, in violation of N.J.S.A. 2C:35-5a(1) and 2C:35-5b(1). Count Four charged defendant with second-degree Possession of a Controlled Dangerous Substance with Intent to Distribute, in violation of N.J.S.A. 2C:35-5a(1) and 2C:35-5b(9)(a). Count Five charged defendant with fourth-degree Possession with Intent to Distribute Drug Paraphernalia, in violation of N.J.S.A. 2C:36-3. [Da1-5].

Defendant appeared before the Honorable Christopher J. Garrenger, J.S.C., on October 7, 2022, on a motion to suppress the warrantless search of defendant's car pursuant to a motor vehicle stop. [1T].[1] The State presented the

[1] 1T refers to the transcript dated October 27, 2022.
2T refers to the pre-trial transcript dated May 30, 2023.
3T refers to the trial transcript dated June 7, 2023.
4T refers to the trial transcript dated June 8, 2023.
5T refers to the trial transcript dated June 9, 2023.
6T refers to the sentencing transcript dated July 28, 2023.

testimony of Florence Township Police Detective Ryan Miller and Florence Township Police Patrolman Zachary Czepiel. [1T5; 1T23]. After hearing the testimony of the officers, Judge Garrenger reserved his decision to issue a written opinion. [1T51-21 to 52-9].

On October 27, 2022, Judge Garrenger denied defendant's motion to suppress the search and seizure of his vehicle. [Da6-15]. Judge Garrenger found the officers had a reasonable and articulable suspicion to stop the vehicle based on the observed motor vehicle violation. [Da11]. Turning to the canine sniff of the vehicle, Judge Garrenger found that the sniff prolonged the stop of the car but that the officer had a reasonable and articulable suspicion to prolong the motor vehicle stop. [Da12-14]. He pointed to the co-defendant's repeated interruptions while the officer was speaking to defendant, defendant's nervousness and confusion, and defendant's evasive answers to the officer's questions. [Da13].

Judge Garrenger held that Officer Czepiel had probable cause to conduct a warrantless search of the vehicle once the canine indicated that drugs were present in the vehicle. [Da14]. Therefore, he upheld the search of the vehicle and denied the motion to suppress the stop and subsequent search and seizure of defendant's vehicle. [Da15].

Defendant appeared before the Honorable Aimee R. Belgard, J.S.C., on May 30, 2023, for pre-trial motions. [2T]. She granted the State's motion to dismiss Count Five of the Indictment, Distribution of Drug Paraphernalia. [2T8-1 to -25]. The State moved to amend the language in Count Four of the Indictment, which originally charged defendant with Distribution of a Controlled Dangerous Substance. [2T8-13 to -18; 2T9-4 to -19]. The State moved to amend the language to Possession with Intent to Distribute. [2T9-4 to -19].

The State sought to introduce evidence that the defense characterized as N.J.R.E. 404(b) material. [2T24-11 to 27-6]. The State argued that evidence of a prior CDS distribution transaction captured on CCTV footage corroborated the State's theory of the case and evidence of phone calls made by defendant while he was in the Burlington County Jail asking someone to find witnesses to testify on his behalf served to negate defendant's theory of the case. [2T24-11 to 27-6]. Judge Belgard held that the material was too prejudicial in its current form to be admitted at trial. She held it was probative but needed to be sanitized before it could be published to the jury. [2T32-22 to 34-21].

Defendant appeared before Judge Belgard and a jury for trial on June 7, 8, and 9, 2023. [3T; 4T; 5T]. The State presented the testimony of Florence Township Police Detectives Ryan Miller and Christopher Powell, Florence

Township Police Patrolman Zachary Czepiel, co-defendant Jasmine Seaver, and Burlington County Forensic Scientist Jason Roland. [4T33; 4T47; 4T96; 4T126; 4T151]. At the conclusion of the State's case-in-chief, defendant moved for a judgment of acquittal pursuant to State v. Reyes, 50 N.J. 454 (1967). [4T186-12 to 188-8]. Judge Belgard denied defendant's motion after giving all reasonable inferences to the State. [4T190-6 to 191-14].

Judge Belgard charged the jury on June 9, 2023, and the jury returned the verdict on the same day. [5T]. The jury found defendant guilty on all counts. Judge Belgard polled the jury as the verdict was being read and the verdict was unanimous. [5T95-22 to 103-23].

Defendant appeared before Judge Belgard for sentencing on July 28, 2023. [6T]. The State asked defendant to be sentenced to a 12-year New Jersey State Prison sentence with a four-year period of parole ineligibility on the Distribution charges and five-year sentences for the Possession convictions. [6T4-4 to 7-4]. All of the sentences would run concurrently to each other making defendant's aggregate sentence a 12-year sentence with a four-year period of parole ineligibility. [6T6-12 to 7-1]. The State argued for the application of aggravating factors (3), (6), and (9). [6T7-1 to -4].

Defendant asked the court to sentence him to the 12-year term proposed by the State. He asked the court to consider his age and significant health issues when sentencing defendant. [6T7-16 to 9-15].

Judge Belgard found aggravating factors (3), (6), and (9) applied based on defendant's criminal history. She did not find that any mitigating factors applied. [6T12-16 to -23]. Judge Belgard sentenced defendant as follows: On Counts Three and Four of the Indictment, she sentenced defendant to 12 years in New Jersey State Prison with a four-year period of parole ineligibility. [6T13-2 to -16]. On Counts One and Two of the Indictment, she sentenced defendant to five years in New Jersey State Prison. [6T13-19 to 14-4]. Judge Belgard ran all of the sentences concurrently to each other. [6T14-8 to -10]. She imposed the following financial penalties and fines: On each count, she imposed $50 VCCB, $75 Safe Neighborhoods, and a $50 lab fee. [6T13-8 to -9; 6T13-16 to -17; 6T13-23 to -24; 6T14-5 to -6]. On Counts Three and Four, she imposed the additional penalties of $2000 DEDR penalty. [6T13-9; 6T13-16]. On Counts One and Two she imposed $1000 DEDR penalty. [6T13-24; 6T14-6]. Additionally, on Count Four, she imposed a $30 LEOTEF penalty. [6T13-8 to -9].

This appeal follows defendant's conviction.

STATEMENT OF FACTS

On April 10, 2021, Florence Township Police Detective Ryan Miller[2] was on patrol in Florence Township when he saw a vehicle, a white Ford F-150 pick-up truck driven by defendant, Chester Rines, turn right on a red light at the intersection of Route 130 and Florence-Columbus Road. [4T34-5 to -22]. Turning right on a red light is illegal at the intersection. [4T34-19 to -20]. Detective Miller effectuated a stop of defendant's vehicle. [4T34-23 to -25].

Detective Miller approached the vehicle on the passenger's side of the car. [4T35-21 to -22]. Defendant and co-defendant, Jasmine Seaver, were in the vehicle. [4T35-1 to -2]. Defendant appeared nervous to the detective. [4T35-23 to -24]. Co-defendant Seavers interrupted the officer and stopped defendant from answering the officer's questions. [4T36-7 to -11].

Defendant would not make eye contact with the officer when the officer was speaking to him. [4T36-9 to -10]. Because of defendant's behavior, Detective Miller believed that "something [was] wrong" and asked defendant to step out of the car. [4T40-14 to -16]. Defendant gave the detective answers that were contradictory to each other. [4T36-16 to -20]. When asked where he was

[2] At the time of the stop, Detective Miller was a patrolman in the Florence Township Police Department.

coming from, he answered, "New Jersey." When asked where he was going, he answered, "New Jersey." [Da16; 4T41-12 to -18].

Co-defendant Seavers remained in the vehicle while the officers spoke to defendant. [Da16]. Corporal Tompkins, who had arrived on the scene to assist Detective Miller, told Seavers to stop touching bags that were in the car. [4T41-22 to 42-2]. Defendant was more concerned with co-defendant's actions than speaking to the officer. [4T42-12 to -13; 4T44-2 to -5].

Detective Miller asked for a K-9 officer to respond to the scene. [Da16]. Florence Township Police Sergeant Zachary Czepiel and his K-9, Bolo, responded to the scene of the motor vehicle stop. [4T49-15 to 50-4]. Bolo was trained in the detection of certain narcotics, including methamphetamines, heroin, crack, cocaine, PCP, and ecstasy. [4T49-11 to -12]. He was not trained in the detection of the fentanyl. [4T88-13 to -15].

Sergeant Czepiel told Bolo to "sniff it out," the command used to tell the dog to sniff around the perimeter of the vehicle. [4T50-7 to -16]. Bolo indicated the officers to the presence of narcotics in the vehicle by tensing his body and sitting at the spot where he detected the odor of narcotics. [4T50-17 to -24]. Because of voids in the vehicle, spaces from where the odor of narcotics could escape, Bolo could not indicate exactly where the odor emanated from, only that narcotics were present. [4T87-24 to 88-12].

The officers conducted a search of the vehicle. In a locked backpack that was found on the floor by the passenger's seat, the officers found a notebook that appeared to be a ledger containing names and numbers and a tightly rolled dollar bill and tinfoil with burnt residue on it. [4T52-16 to -25; 4T53-8 to -16; 4T58-5 to -10]. The zippered portion of the backpack was secured with a luggage lock. [4T59-18]. Defendant provided the key to the lock from his pants pocket. [4T60-6; 4T67-16 to -18].

Inside the bag, there was a cigar box, a digital scale, razor blades, a plastic spoon and a large amount of US currency, $19,489.00. [4T69-5 to -20; 4T76-3; 4T99-11]. The backpack contained large amounts of compressed controlled dangerous substances that appeared to be heroin and methamphetamines. [4T71-16 to -20; 4T72-15 to -17; 4T73-22 to -25; 4T74-12 to -16]. The substances were seized and taken to the Burlington County Forensic Laboratory for testing. [4T77-17 to -19]. The substance the officers believed to be heroin tested positive for fentanyl, 304.98 grams or 10.78 ounces. [4T174-21 to -24]. The methamphetamines weighed 92.56 grams or 3.26 ounces. [4T177-12 to -18].

Florence Township Police Detective Christopher Powell was not on duty on April 10, 2021, but responded to the police station to interview defendant and co-defendant. [4T97-5 to -12]. Defendant told the detective that he was traveling from New Hampshire to Virginia Beach, Virginia, to see his daughter. [4T103-

13 to -16; 4T105-8 to -18]. He was in Virginia but traveled north to New Jersey to meet someone from New Hampshire. [4T106-1 to -5; 4T110-21 to 113-6]. Defendant bought and transported cars. [4T113-25 to 114-3]. Defendant told the detective that he transported narcotics for someone who lived in New Hampshire who was either Indian or Mexican. [4T115-6 to 117-7]. He had some concerns for his safety. [4T116-11 to -16].

At trial, co-defendant testified for the State as a condition of her plea agreement to provide truthful testimony. [4T126; 4T137-1 to -10]. Seavers began abusing heroin when she was 18 years old. [4T127-10 to -14]. She met defendant approximately three to four months before the car stop and arrest in Florence Township in a trailer park in Rochester, New Hampshire. [4T129-16 to -25]. Seavers bought heroin from defendant. Sometimes defendant would just give her heroin. [4T130-1 to -10].

In the days leading up to the motor vehicle stop, defendant asked Seavers if she wanted to drive to Virginia Beach, Virginia, with him to look at a Corvette that defendant wanted to buy. [4T130-13 to 131-1]. While in Virginia, defendant bought spare parts to make the car operable. [4T143-23 to 144-2]. Defendant and Seavers stayed in an Econo Lodge Motel. [4T133-13 to -15]. In the room, Seavers saw the contents of the backpack and knew it contained drugs. [4T131-22 to 132-14]. The bag was locked. She did not have a key. [4T131-20 to -21;

4T132-15 to -17]. Defendant would give her drugs from backpack. [4T132-10 to -14]. He would weigh and measure the drugs on the scale and then write the transaction down in the notebook he was using as ledger. [4T132-24 to 133-4].

While in Virginia, defendant asked Seavers if she wanted to go to New Jersey with him. Because there was nothing else to do in the hotel room and because she had never been to New Jersey, Seavers agreed to accompany defendant. [4T133-17 to 134-2]. Defendant grabbed the backpack with the narcotics in it before leaving the motel room. [4T134-3 to -6]. He placed the backpack on the floor on the passenger's side of the truck because he did not want to be separated from it. [4T135-23 to -24; 4T136-5 to -7]. The dollar bill and tinfoil that Seavers used to ingest heroin that day were in the pocket of the backpack. [4T134-11 to -21]. The key to luggage lock on the backpack was on defendant's beltloop. [4T136-10 to -12].

Defendant and Seavers stopped at a country club in New Jersey before they were stopped by the Florence Township Police. [4T135-6 to -9]. Defendant was very nervous and jittery during the stop. [4T135-13 to -14]. Seavers was also concerned because she knew there was a large quantity of drugs in the car. [4T135-18 to -24].

Seavers gave a full statement to the police because she did not believe she had anything to hide. [4T136-15 to -24]. The drugs in the car were not hers.

[4T136-22 to -24]. She had never possessed such a large quantity of drugs or US currency. [4T138-21 to -25].

On cross-examination, Seavers stated that was already a heroin user when she met defendant. [4T139-15 to -17]. She did not know how much drugs defendant had in his possession but knew they were illegal when she agreed to accompany him. [4T142-8 to 143-8]. She could not read his ledger and did not know what the entries meant. [4T144-14 to 145-7]. She agreed that the bag was at her feet at the time of the motor vehicle stop. [4T148-4 to -7].

LEGAL ARGUMENT

POINT I

JUDGE GARRENGER PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE SEARCH OF HIS MOTOR VEHICLE.

Violations of motor vehicle law justify an officer's stop of vehicles. In the seminal case, Delaware v. Prouse, the United States Supreme Court held that an officer can stop a vehicle when he has at least an articulable and reasonable suspicion that either the vehicle or an occupant is subject to seizure for violation of law. Prouse, 440 U.S. 648, 664, 99 S. Ct. 1391, 1401 (1979). The Court further stated that "the foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations." Id. at 659, 99 S. Ct. at 1399. Subsequent to the Court's decision in Prouse, the violation of motor vehicle law

has consistently been held to provide an officer with the requisite articulable and reasonable suspicion to effectuate a motor vehicle stop. State v. Murphy, 238 N.J. Super. 546, 554 (App. Div. 1990).

The State must prove that articulable and reasonable suspicion existed by only a preponderance of the evidence, not some higher standard such as proof beyond a reasonable doubt. State v. Sugar, 100 N.J. 214, 238-39 (1985); State v. Slockbower, 79 N.J. 1, 16 n.1 (1979). Moreover, the fact that a defendant is subsequently found not guilty beyond a reasonable doubt of a motor vehicle violation does not impugn the propriety of the initial stop. Murphy, 238 N.J. Super. at 553-54. And, the subjective intentions of the officer involved "play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774 (1996). "[T]he proper inquiry for determining the constitutionality of a search and seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent." State v. Bruzzese, 94 N.J. 210, 219 (1983).

> Moreover, on a motion to suppress, "the State need prove only that the police lawfully stopped the car, not that it could convict the driver of the motor-vehicle offense." State v. Williamson, supra, 138 N.J. at 304; see also State v. Jones, 326 N.J.Super. 234, 239 (App. Div. 1999). Thus, it is inconsequential that the defendant was ultimately acquitted of the motor vehicle violation. The issue is whether the officer had a reasonable and articulable suspicion of a violation before the stop.

State v. Heisler, 422 N.J. Super. 399, 413 (App. Div. 2011).

Both the Fourth Amendment to the United States Constitution and the New Jersey Constitution guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. The New Jersey Constitution affords a greater level of protection against unreasonable searches and seizures than under the United States Constitution. See State v. Johnson, 193 N.J. 528, 541 (2008); State v. Eckel, 185 N.J. 523, 537-38 (2006); State v. Carty, 170 N.J. 632, 639, 648-51 (2002).

"The touchstone of the Fourth Amendment is reasonableness." State v. Craft, 425 N.J. Super. 546, 553 (App. Div. 2012); citing Florida v. Jimeno, 500 U.S. 248, 250 (1991). "The reasonableness of a warrantless search or seizure is determined 'by assessing, on the one hand, the degree to which it intrudes on an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests.'" Id.; citing State v. Davilla, 203 N.J. 97, 111 (2010). "[T]he basic test under both the Fourth Amendment to the United States Constitution and Article I, Paragraph 7, of the New Jersey Constitution is the same: was the conduct objectively reasonable in light of the facts known to the law enforcement officer at the time of the search." State v. Handy, 206 N.J. 39, 46-47 (2011). "That standard affords the police necessary

latitude to respond to criminality while deterring unreasonable conduct and protecting the citizens from government overreaching." Id. at 47.

"When determining the validity of a warrantless search or seizure, 'the question is not whether the police could have done something different, but whether their actions, when viewed as a whole, were objectively reasonable.'" State v. Craft, 425 N.J. Super. at 553, citing State v. Bogan, 200 N.J. 61, 81 (2009). "The State bears the burden of proving by a preponderance of the evidence the validity of a search executed without a warrant." State v. Reininger, 430 N.J. Super. 517, 533 (App. Div. 2012), citing State v. Edmonds, 211 N.J. 117, 128 (2012). In analyzing search and seizure cases, the focus is not on the officer's subjective intent, but the "objective reasonableness" of their actions. State v. Bacome, 228 N.J. 94, 103 (2017).

Warrantless searches and seizures are presumptively unreasonable and are therefore prohibited unless falling within a recognized exception to the search warrant requirement. State v Johnson, 193 N.J. 528, 552 (2008). "The exceptions to the warrant requirement take into account that in certain circumstances, 'a search without a warrant is both reasonable and necessary.'" State v. Craft, 425 N.J. Super. 546 (2012). "For example, our case law permits a warrantless search when incident to a lawful arrest, when consent is given, when government

officials act in a community-caretaking function, and when exigent circumstances compel action." Id. at 553.

New Jersey case law does not require officers to have a separate reasonable suspicion to conduct a canine sniff during a traffic stop. State v. Dunbar, 229 N.J. 521 (2017). The sniff may not prolong a "traffic stop beyond the time required to complete the stop's mission, unless he possesses reasonable and articulable suspicion to do so." Id. at 540. To transform a stop into a brief investigatory stop "[t]here must be some objective manifestation that the person [detained] is, or is about to be engaged in criminal activity." State v. Pineiro, 181 N.J. 13, 22 (2004). Here, Judge Garrenger held that the sniff delayed the stop beyond the time it would take to issue a summons or inquire about the stop, so he proceeded to whether the officer had a reasonable and articulable suspicion to conduct the canine sniff.

In State v. Nelson, 237 N.J. 540 (2019), the Supreme Court examined a traffic stop that was prolonged by a canine sniff by approximately one half-hour. Id. at 548. In the context of that stop, the officer received a tip from ATF that a silver Infiniti would be traveling on the Turnpike carrying a large amount of marijuana. Id. at 546-47. The tip included the license plate, a general description of the driver, and the direction in which the car was headed. Id. at 547. The

detective who initiated the stop stopped the car after observed motor vehicle violations. Ibid.

Upon stopping the vehicle, the officer noted that car was full of Febreze air fresheners. Ibid. The defendant was very nervous: he was sweating and trembling as he spoke to the officer. Ibid. He gave contradictory answers to the detective's questions. Ibid.

The stop was extended to have a canine sniff the outside of the car. Id. at 548. In upholding the stop, the Supreme Court stated that the courts must examine the totality of the circumstances in determining whether a reasonable and articulable suspicion exists. Id. at 554. The Nelson Court held that, based upon the information available to the officer, including the tip from the ATF, the defendant's nervous behavior, and the officer's examination of the car through the windows of the car, there was reasonable and articulable suspicion to ask for the canine sniff of the vehicle and prolong the stop. Id. at 554-555.

> In determining whether reasonable suspicion exists, a court must consider 'the totality of the circumstances -- the whole picture.'" State v. Stovall, 170 N.J. 346, 361 (2002) (quoting United States v. Cortez, 449 U.S. 411, 417, 101 S. Ct. 690 (1981)). To appropriately view the "whole picture," he Court must not engage in a "divide-and-conquer" analysis by looking at each fact in isolation. District of Columbia v. Wesby, 583 U.S. __, 138 S. Ct. 577, 588 (2018). The reasonable suspicion inquiry also considers the officers' background and training, and permits them "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" United States v.

> Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744 (2002) (quoting Cortez, 449 U.S. at 418).

State v. Nelson, 237 N.J. 540, 554-555 (2019).

The Court held that the detective had a reasonable and articulable suspicion to believe that defendant was committing a crime beyond the observed motor vehicle violations and upheld the stop and the use of the canine to sniff the vehicle's perimeter. Id. at 555.

Here, Judge Garrenger properly looked at the totality of the circumstances to determine that the prolonged stop of the vehicle was justified by the officer's reasonable and articulable suspicion that there was "a crime afoot." Nelson, supra, 237 N.J. at 554. Judge Garrenger pointed to defendant's nervous behavior and the contradictory stories between defendant and co-defendant and defendant's own contradictory statements. [Da13-14]. When asked where he was coming from, defendant told the officer he was coming from New Jersey. [Da13]. When asked where he was going, he was unable to give a clear answer. He answered he was going to New Jersey at one point. [Da13].

Defendant argues that nervousness alone does not establish a basis for probable cause, but the officer clearly did not rely on nervous behavior alone to form his reasonable and articulable suspicion. The officer pointed to defendant's answer that he was coming from a country club but was not dressed for a country club and did not have any golf paraphernalia in his truck, like clubs. [1T7-18 to

-24]. Defendant told the officer he was going to Virginia, too. [1T17-1 to -2]. Defendant and co-defendant talked over each other. [Da13].

It was not merely nervous behavior that escalated the stop from a motor vehicle stop to a search of defendant's car. The officer had a well-grounded reasonable and articulable suspicion that there was criminal wrongdoing. Defendant's nervous behavior went beyond the behavior discussed in defendant's brief. His answers were self-contradictory and his breathing patterns shifted. [Da13]. Defendant points to State v. Nyema, 249 N.J. 509, 535 (2022), to support his contention that nervous behavior alone does not form the basis for a reasonable and articulable suspicion. Here, however, unlike the officer in Nyema, who investigated based upon a hunch, Detective Miller looked to the totality of the circumstances, which included defendant's nervousness, but also defendant's non-responsive, self-contradictory answers to his questions and co-defendant's behavior. When viewed in whole, Detective Miller's observations formed a reasonable and articulable suspicion that there was criminal wrongdoing. Judge Garrenger properly denied defendant's motion to suppress the evidence and stop of the vehicle. Defendant cannot succeed on this argument.

POINT II

DEFENDANT CONSENTED TO THE ADMISSION OF PAST ACTS OF DRUG DEALING SO THIS ARGUMENT MUST BE REVIEWED FOR INVITED ERROR OR PLAIN ERROR. (NOT RAISED BELOW.)

Preliminarily, this argument should be barred, as defendant did not raise it at the trial court level. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229 (1973). New Jersey Court Rule 2:10-2 states:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

Assuming, arguendo, this Court reaches the merits of defendant's argument, it must be reviewed for plain error.

Defendant argues that the evidence was improperly introduced as N.J.R.E. 404(b) evidence that prejudiced defendant. Under N.J.R.E. 404(b), evidence of a defendant's prior wrongdoings is not admissible against him unless it meets certain exceptions. See State v. Burris, 357 N.J.Super. 326, 335 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003). The purpose of this rule is to prevent the State from introducing evidence against a defendant to suggest that he had a propensity to commit the crime for which is on trial because he committed the prior bad act. State v. Weeks, 107 N.J. 396, 406 (1987).

The State is permitted to introduce "other crimes" evidence however, to show "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b). The New Jersey Supreme Court has formulated a four-prong test governing the admissibility of other crimes evidence. State v. Cofield, 127 N.J. 328, 338 (1992). To be admissible, the evidence must 1) be relevant to a material issue which is genuinely disputed, 2) be similar in kind and reasonably close in time to the offense charged, 3) be proven by clear and convincing evidence, and 4) have probative value that is not outweighed by prejudice. Id.

The first factor of this Cofield analysis borrows language directly from N.J.R.E. 401. "Evidence is relevant if it tends 'to prove or disprove any fact of consequence to the determination of the action.'" State v. Covell, 157 N.J. 554, 564-65 (1999). Relevance is based on the logical connection between the evidence offered as a prior bad act and a fact that was put at issue. State v. Hutchins, 241 N.J. Super. 353, 358 (App.Div.1990). "If the evidence offered makes the inference to be drawn more logical, then the evidence should be admitted unless otherwise excludable by a rule of law." State v. Darby, 174 N.J. 509, 519 (2002).

Other crimes evidence, to be admissible, must be "relevant to a material issue in dispute." Cofield, supra, 127 N.J. at 338. Moreover, there must be no other substantial proof that would sufficiently establish the issue at hand. State v. Brown, 138 N.J. 481 (1994). As the courts have noted all evidence against a defendant is prejudicial, the question is whether the evidence is so prejudicial that it deprives defendant of a fair trial. State v. Outland, 458 N.J. Super. 357, 371 (App. Div. 2019).

In State v. Rose, 206 N.J. 141, 180 (2011), the Supreme Court of New Jersey adopted the Third Circuit's test in United States v. Green, 617 F.3d 233 (3d Cir. 2010), for determining whether evidence of uncharged acts is intrinsic to the charged crime. Under this test, evidence is intrinsic if it (1) directly proves the charged offense or (2) if the uncharged acts are performed contemporaneously with the charged crime and facilitate the commission of the charged crime. Rose, 206 N.J. at 180, quoting Green, 617 F.3d at 248-48.

"Mistakes at trial are subject to the invited-error doctrine. Under that settled principle of law, trial errors that "'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal....'" State v. Corsaro, 107 N.J. 339, 345 (1987) (alteration in original) (quoting State v. Harper, 128 N.J. Super. 270, 277 (App. Div.), certif. denied, 65 N.J. 574 (1974)). In other words, if a party has "invited" the error, he

is barred from raising an objection for the first time on appeal. See N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342 (2010)." State v. A.R., 213 N.J. 542, 561 (2013). "[A] 'defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought and urged, claiming it to be error and prejudicial.' State v. Pontery, 19 N.J. 457, 471 (1955). Thus, when a defendant asks the court to take his proffered approach and the court does so, we have held that relief will not be forthcoming on a claim of error by that defendant." State v. Jenkins, 178 N.J. 347, 358 (2004).

First, defendant's argument falls squarely within the invited error doctrine. During the trial, out of the presence of the jurors, the State informed the court that it intended to introduce evidence of defendant's selling and giving drugs to Seaver on more than one occasion. Anticipating an objection from defense counsel, the State argued that the drugs transactions were intrinsic evidence and not N.J.R.E. 404(b) evidence. [4T92-18 to 93-25]. Defense counsel, in response, stated:

> With respect to the distribution issue that had come up over the last week or so, that was specifically in reference to issues involving his possession with intent to distribute and distribute drugs to parties unknown to him, people he would meet up with, people perhaps that he might meet at Deerwood Country Club let's just say hypothetically. But with respect to these drugs, I think -- it's

> interesting that Mr. Harris is characterizing my client's alleged giving of drugs to Jasmine Seaver as distribution of CDS, where actually facts support constructive possession by both of them to these drugs, of these drugs.
>
> So I'm not going to object to him describing -- having her describe instances where my client may have shared or given drugs to her. And I would leave it in the record and let us argue to the jury what all that really is.
>
> [4T94-4 to -21].

Defense counsel very clearly wanted the testimony to come into evidence. Defendant cannot credibly make the argument that the court should not have let the evidence in when defendant clearly consented to the testimony. Defense counsel's theory of the case centered on Seaver's knowledge of the contents of the bag and her proximity to it at the time of the stop. Furthermore, defendant did not request a limiting instruction or raise an objection during the course of the trial. Defendant's argument must be reviewed for invited error.

Defendant argues that Seaver's testimony is violative of State v. Hernandez, 170 N.J. 106 (2001). However, defendant's matter is easily distinguished from Hernandez. Seaver did not testify as to past drug sales to prove that defendant was known for selling drugs; nor was her testimony used to support the proposition that defendant was a bad person. The purpose of Seaver's testimony was to show that defendant had knowledge of what was in the backpack and that the backpack belonged to defendant. [4T132-4 to -21].

Defendant's theory of the case was that the backpack was in the possession of Seaver and that she was the person with the heroin addiction and who possessed the large quantities of drugs. [4T142-11 to -21; 4T146-14 to -19; 4T148-4 to -12; 4T148-20 to -22]. The State had to demonstrate that there was an absence of mistake and that the bag did not belong to Seaver.

The test as to whether the evidence is admissible is whether the testimony's probative value outweighs its prejudicial value. As noted above, all evidence is prejudicial to an extent. The question is whether the evidence is too prejudicial.

Clearly, here, the evidence does not fall within the category of too prejudicial to withstand judicial scrutiny. The testimony was intrinsic evidence that was relevant to demonstrate that defendant was the possessor and distributor of the drugs. Seaver's testimony explained the significance of the paraphernalia found within the bag. She explained the purpose of the scale and the notebook and how the key to luggage lock was always in defendant's possession. [4T132-10 to -14; 4T132-24 to 133-4]. If evidence of past drug sales was prejudicial, the prejudicial impact of the testimony was minimal compared to the overwhelming evidence against defendant.

Defendant was found in possession of a large quantity of fentanyl and methamphetamines and US currency. [4T73-17 to 76-3]. The only way to open

the bag came from a key that was found in defendant's possession. [4T60-6 to -13; 4T67-16 to -21]. Seaver testified that the bag remained in defendant's close proximity and sight throughout the trip. [4T136-3 to -7]. The overwhelming evidence of defendant's guilt supports the verdict and negates the small portion of Seaver's testimony.

Defendant argues that Seaver's testimony was suspect because of the existence of her plea bargain. This testimony was explored thoroughly by defense counsel as part of her theory of the case that Seaver's testimony was incentivized. [4T147-7 to 148-3]. Seaver's testimony fell squarely within the boundaries of Cofield and did not deprive defendant of a fair trial.

As noted above, defendant cannot claim that he was prejudiced by the lack of a limiting instruction. Defendant did not request one or raise an objection to the testimony. Thus, even if this Honorable Court concludes that defendant did not invite or acquiesce to the alleged error, his claims also fails under the plain error analysis, as Seaver's testimony was not clearly capable of producing an unjust result. Defendant cannot succeed on this argument.

POINT III

JUDGE BELGARD'S JURY INSTRUCTIONS WERE PROPER AND IN LANGUAGE APPROVED OF BY DEFENDANT DURING THE CHARGING CONFERENCE. (NOT RAISED BELOW)

Preliminarily, as in **POINT II**, supra, this argument should be barred, as defendant did not raise it at the trial court level. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229 (1973). New Jersey Court Rule 2:10-2 states:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

Assuming, arguendo, this Court reaches the merits of defendant's argument, it must be reviewed for plain error.

At the end of a case, it is important that "[a]ppropriate and proper charges to a jury" are given by the trial judge. State v. Green, 86 N.J. 281, 287 (1981). At this time, the trial judge should explain to the jury its function by detailing "a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Id. at 287-88. The instructions should be given in non-legal language that those uneducated in the law can understand. Id. at 288. The charge should explain all of the essential elements with a "plain and clear exposition of the issues." Id.

The standard of review for a jury charge is whether the charge adequately conveys the law and does not confuse the jury. State v. Brown, 80 N.J. 587, 600 (1979), (quoting Latta v. Caulfield, 79 N.J. 128, 135 (1979)). To determine whether a charge was correct, the court must examine the charge as a whole. State v. Jordan, 147 N.J. 409, 422 (1977), (citing State v. Wilbely, 63 N.J. 420, 422 (1973)). "No party is entitled to have the jury charged in his or her own words; all that is necessary is that the charge as a whole be accurate." Jordan, 147 N.J. at 422, (citing Large v. Rothman, 110 N.J. 201 (1988); State v. Thompson, 59 N.J. 396 (1971)).

"Our courts have consistently placed an extraordinarily high value on the importance of appropriate and proper jury charges to the right to trial by jury." State v. Allen, 308 N.J. Super. 421, 431 (App. Div. 1998). "Erroneous instructions on matters material to the juror's deliberations are presumed to be reversible error." Id.; citing State v. Grunow, 102 N.J. 133, 148 (1986). See also State v. Brown, 138 N.J. 481, 522 (1984), overruled on other grounds by State v. Cooper, 151 N.J. 326 (1996)(clear and correct jury instructions are essential for a fair trial.)

A trial court has an "absolute duty" to properly instruct the jury regarding its fact-finding responsibilities, State v. Concepcion, 111 N.J. 373, 379 (1988), which may include special cautionary instructions relating to the jury's

consideration of particular kinds of evidence. State v. Baldwin, 296 N.J. Super. 391, 396 (App. Div. 1997).

Defendant argues that the evidence presented at trial created an ambiguity that allowed the jury to believe that both defendants could have possessed the drugs with the intent to distribute to each other. "[W]here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse simple joint possession, without any intent to distribute the drug further. Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution." State v. Lopez, 359 N.J. Super. 222, 234 (2003).

In Lopez, this Honorable Court held that the evidence presented at trial was equivocal and could establish that both defendants possessed the contraband with intent to keep it for personal use. Id. at 230-231. Here, in contrast, the evidence was not equivocal. Seaver testified that the drugs were not hers, but she received them from defendant during the course of the trip. [4T132-10 to -17; 4T135-20 to 136-12]. Although defendant tried to establish that the drugs were possessed jointly, or only by Seaver, the evidence established that the drugs were possessed solely by defendant. [4T148-2 to -22]. Defendant had the key to the luggage lock on the backpack on his belt loop and in his pocket. [4T67-16

to -17; 4T136-8 to -12]. Defendant disclaimed any drug use in his statement to the police post-arrest.

Contrary to defendant's argument, the State was not required to prove that defendant possessed the drugs with the intent to distribute them to Seaver. The instructions correctly stated that the jury had to find that defendant possessed the drugs with the intent to distribute them. Unlike in Lopez, the jury was not asked to find that defendant possessed the drugs with the intent to distribute them to Seaver. The jury was asked to determine whether defendant possessed a large quantity of drugs with the intent to distribute them. Separate and distinct from State v. Morrison, 188 N.J. 2 (2006), defendant and co-defendant were not acting with a common purpose. Seaver was a drug user but not a distributor. Her testimony was clear that defendant gave or sold her drugs but she did not have a possessory interest in the backpack. Seaver firmly stated that the paraphernalia found in the unlocked side pocket of the backpack was hers and used to ingest drugs she received from defendant. [4T134-13 to -16; 4T146-14 to -24].

Defendant contends that absent an expert opinion on the distribution of controlled dangerous substances the jury was left without any evidence to consider that defendant possessed the drugs with intent to distribute other than the distribution of the drugs to Seaver. An expert opinion is not necessary to explain to a jury "that which was obvious." State v. Nesbitt, 185 N.J. 504, 514

(2006). Moreover, Sergeant Czepiel was qualified as an expert in narcotics investigations and testified that scales are often used to weigh and apportion controlled dangerous substances. The jury heard evidence that defendant's locked backpack contained plastic-wrapped individually packaged cylinders of fentanyl and methamphetamines. [4T73-17 to 74-16]. Defendant had a large quantities of US currency and a notebook that co-defendant stated was used to record drug transactions. [4T74-17 to -20; 4T80-4 to -10; 4T133-3 to -4].

There is no evidence that defendant and co-defendant possessed the drugs with a common purpose to distribute them. The jury instructions adequately conveyed the state of the law and did not confuse the jurors. The instructions were proper and defendant cannot succeed on this argument.

POINT IV

THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT IN ITS OPENING STATEMENT TO THE JURORS. (NOT RAISED BELOW)

As noted in the previous points, this argument should be barred, as defendant did not raise it at the trial court level. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229 (1973). New Jersey Court Rule 2:10-2 states:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

Assuming, arguendo, this Court reaches the merits of defendant's argument, it must be reviewed for plain error.

While a defendant must receive a fair trial, he is not entitled to a perfect trial. State v. Loftin, 287 N.J. Super. 76, 111 (App. Div. 1996). Not every suspected deviation from perfection on the part of the prosecutor warrants reversal of a conviction. State v. Williams, 113 N.J. 393, 452 (1988); State v. Hipplewith, 33 N.J. 300, 314 (1960); State v. Bucanis, 26 N.J. 45, 46 (1958). Furthermore, a prosecutor "is accorded considerable latitude in summing up the State's case forcefully and graphically and to pursue the prosecutorial duty with earnestness and vigor." State v. Tilghman, 345 N.J. Super. 571, 575 (App. Div. 2001). Prosecutors, however, "also have the overriding obligation to see that prejudice is fairly done." Id. See also, State v. Daniels, 364 N.J. Super. 357, 373 (App. Div. 2003).

In reviewing prosecutorial misconduct claims, the Appellate Division has noted that the following factors should be considered: (1) whether defense counsel timely and properly objected to the remarks; (2) whether the remark was withdrawn promptly; (3) whether the court gave curative instructions. State v. Allen, 337 N.J. Super. 259, 267 (App. Div. 2001), certif. denied, 171 N.J. 43 (2003) (quoting State v. Frost, 158 N.J. 76, 83 (1999)); see also, State v. Setzer, 268 N.J. Super. 553, 566 (App. Div. 1993). If defense counsel fails to object,

offending remarks usually will not be deemed prejudicial. State v. G.S., 145 N.J. 460 (1996). Other considerations include the severity of the misconduct, the context in which it occurred, the likely effect of any curative instructions, and the strength of evidence against defendant. United States v. Manning, 23 F.3d 570, 574 (1st Cir. 1994).

"The asserted error must be evaluated by the plain-error standard, namely whether the misconduct was so egregious in the context of the summation as a whole as to deprive defendant of a fair trial." Tilghman, supra., 345 N.J. Super. at 575. To warrant reversal on grounds of prosecutorial misconduct, the reviewing court must determine that: (1) the prosecutor's conduct was clearly and unmistakably improper, and (2) that the improper conduct resulted in substantial prejudice to defendant's fundamental right to have a jury fairly evaluate the merits of his defense. State v. Engel, 249 N.J. Super. 336, 382 (App. Div. 1991); Williams, supra, 113 N.J. at 452 (citing Bucanis, supra, 26 N.J. at 56). As the New Jersey Supreme Court has stated, the alleged prosecutorial conduct must be "so egregious that it deprived the defendant of a fair trial." State v. Ramseur, 106 N.J. 123, 322 (1987). See also State v. Bauman, 298 N.J. Super. 176, 207 (App. Div. 1997); State v. Ortisi, 308 N.J. Super. 573, 595 (App. Div. 1998); Allen, supra, 337 N.J. Super. 259.

A prosecutor cannot make a call to arms appeal to jurors or ask them to send a message to the community with their verdict. Even if the courts had determined that the AP "crossed the line" of permissible advocacy, his remarks do not invariably justify reversal. The Supreme Court of New Jersey in Frost, supra, 158 N.J. at 76, expressly refused "to adopt a *per se* rule that requires reversal of every conviction whenever there is evidence of egregious prosecutorial misconduct during trial." See also State v. Kounelis, 258 N.J. Super. 420, 429 (App. Div. 1999) (improper but not reversible error for prosecutor to suggest "that defense counsel's task was to confound and confuse the jury"). In criminal cases where reversal was ordered, a prosecutor's remark disparaging the defense was but one instance of a wider and persistent pattern of misconduct which included inherently more egregious and prejudicial elements. See Frost, supra, 158 N.J. at 88-89; State v. Goode, 278 N.J. Super. 85, 92 (App. Div. 1994); State v. Acker, 265 N.J. Super. 351, 356-57 (App. Div.), certif. denied, 134 N.J. 485 (1993); State v. Pindale, 249 N.J. Super. 266, 286-87 (App. Div. 1991); State v. Sherman, 230 N.J. Super. 10, 17-18 (App. Div. 1988). There is no pattern of prosecutorial misconduct in this matter.

Defendant objects to one isolated comment in the State's opening statement. The jury was cautioned in the opening and final jury instructions that the opening and closing statements made by the attorneys were not considered

evidence and cannot be treated as evidence. [4T7-15 to -21; 5T57-16 to -21]. The now objected-to portion of the State's opening was one comment in the State's argument. It was not repeated. It was not a theme of the State's opening argument.

Defendant contends that the State's closing statement also encouraged the jury to convict defendant for being a bad person by contributing to Seaver's drug addiction but that statement is inaccurate. The State fairly commented on the evidence before the jury: defendant had distributed drugs to Seaver during the course of their trip to Virginia. Defendant did not possess heroin but fentanyl. During defendant's closing, defendant made much of the fact that the investigating officers initially believed defendant possessed heroin, not fentanyl. [5T39-24 to 40-22]. Defendant argued that the drugs could have been switched somewhere between being removed from defendant's truck and being submitted to the Forensic Laboratory for testing. [5T38-23 to 40-12]. Defendant said, "You will recall that the substances Jasmine Seaver said she used, and actually, Mr. Rines mentioned in his statement to the police, was believed to be heroin." [5T40-1 to -4]. The State's summation rebutted the allegations that the drugs were switched or altered by some unseen actors.

The State's closing did not exceed the boundaries of the testimony heard by the jurors nor did it ask the jurors to convict defendant for being a bad person. Defendant cannot succeed on this argument.

POINT V

DEFENDANT WAS NOT DEPRIVED OF A FAIR TRIAL. THE EVIDENCE OF DEFENDANT'S GUILT WAS OVERWHELMING AND ANY OF THE COMPLAINED OF ERRORS ARE WITHOUT MERIT SUFFICIENT TO WARRANT OVERTURNING DEFENDANT'S VALID CONVICTION. (NOT RAISED BELOW)

As fully addressed in respondent's corresponding points, the trial errors raised on appeal are wholly without merit. Defendant is not entitled to a perfect trial; any incidental legal errors which may have crept into defendant's trial did not prejudice defendant nor rendered the proceedings unfair, and cannot be invoked to upset his valid convictions. See State v. Orecchio, 16 N.J. 125, 129 (1954); State v. Scher, 278 N.J. Super. 249, 267-68 (App. Div. 1994), certif. denied, 140 N.J. 276 (1995); cf. State v. Bey, 129 N.J. 557, 625 (1992) (errors committed during penalty phase of capital murder trial, considered both individually and cumulatively, were clearly not capable of affecting the sentence of death). A review of the entire trial proceedings shows that no other type of error is present on this record and reversal on this ground is unwarranted.

As detailed in POINTS I through IV of the State's brief, defendant has not raised arguments that require reversal. The evidence that defendant possessed

large quantities of controlled dangerous substances with the intent to distribute them was overwhelming. Defendant was found in a vehicle with a locked backpack. The only key to the backpack was found on defendant's person. Inside the backpack were large, wrapped-in-plastic quantities of fentanyl and methamphetamines. The backpack also contained a scale and a large quantity of U.S. currency. The evidence at trial clearly established defendant possessed controlled dangerous substances with the intent to distribute them. There is no evidence that the jury's verdict was infected by error.

POINT VI

DEFENDANT'S SENTENCE IS PROPER AND DOES NOT SHOCK THE JUDICIAL CONSCIENCE.

Defendant's sentence is appropriate. In State v. Roth, 95 N.J. 334 (1984), the New Jersey Supreme Court established a three-part analysis for appellate review of a sentencing decision. The court must determine: 1) whether the correct statutory sentencing guidelines and presumptions have been followed; 2) whether there is substantial evidence in the record to support the court's application of those guidelines; and 3) whether in applying those guidelines to the relevant facts, "the trial court clearly erred by reaching a conclusion that could not have reasonably been made upon a weighing of the relevant factors." Id. at 365-66.

On review, an appellate court should not substitute its judgment for that of the trial court. State v. Burton, 309 N.J. Super. 280, 290 (App. Div. 1998), certif. denied, 156 N.J. 407 (1998) (citing Roth, 95 N.J. at 365). The test is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is rather whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review. Id. The appellate court shall review the aggravating and mitigating factors and "modify defendant's sentence upon his application where such findings are not fairly supported on the record, see N.J.S.A. 2C:44-7, but only where the sentencing court has made a clear error in judgment that would shock the judicial conscience of the reviewing court." Roth, 95 N.J. at 364.

The trial court must examine the aggravating factors, but the consideration of the mitigating factors remains discretionary. State v. Setzer, 268 N.J. Super. 553, 567-68 (App. Div. 1993); certif. denied 135 N.J. 468 (1993). If there is a preponderance of aggravating factors, the court may impose sentence up to the maximum degree of the offense. If there is a preponderance of the mitigating factors, the court may sentence down to the statutory minimum. Roth, 95 N.J. at 359. The balancing, however, is not simply a quantitative analysis of the number of factors, but, rather, the "proper weight to be given each is a function of its gravity in relation to the severity of the offense." Id. at 368.

To provide for adequate review, "the trial court should identify the aggravating and mitigating factors, describe the balance of those factors, and explain how it determined defendant's sentence." State v. Kruse, 105 N.J. 354, 360 (1987). N.J.S.A. 2C:44-1 provides an enumerated list of thirteen criteria for withholding or imposing a sentence of imprisonment.

In the New Jersey Supreme Court case of State v. Natale, 184 N.J. 458 (2005), the Court excised presumptive sentences from the criminal code. The Court determined that the proper way to conform New Jersey's sentencing scheme to the United States Supreme Court's opinion in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), was to excise the presumptive terms from the sentencing statutes. Id. The Court held that even though the presumptive terms were no longer a mandatory starting point, it suspected many judges would still use the mid-points in the sentencing ranges to being their analyses of the defendant's sentences. Natale, 184 N.J. at 488.

1. The Court Properly Imposed A Period Of Parole Ineligibility And Weighed The Aggravating And Mitigating Factors Appropriately. (This Refers To Subpoints 1 And 2 Of Defendant's Brief.)

N.J.S.A. 2C:43-6(f) states:

> A person convicted of manufacturing, distributing, dispensing or possessing with intent to distribute any dangerous substance or controlled substance analog under N.J.S.2C:35-5, of maintaining or operating a controlled dangerous substance production facility under N.J.S. 2C:35-4, of employing a juvenile in a drug distribution

> scheme under N.J.S. 2C:35-6, leader of a narcotics trafficking network under N.J.S. 2C:35-3, or of distributing, dispensing or possessing with intent to distribute on or near school property or buses under section 1 of P.L.1987, c.101 (C.2C:35-7), who has been previously convicted of manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog, shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by subsection c. of N.J.S. 2C:43-7, notwithstanding that extended terms are ordinarily discretionary with the court. The term of imprisonment shall, except as may be provided in N.J.S.2C:35-12, include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, not less than seven years if the person is convicted of a violation of N.J.S. 2C:35-6, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

In 2021, the New Jersey Attorney General handed down guidelines for the imposition parole disqualifiers for certain enumerated non-violent offenses. Defendant argues that because his offense falls within the purview of the Directive, the trial court was required to, and failed to, determine if the parole ineligibility period was appropriate. Defendant's argument is inapt as the Directive states:

> B. ***Post-trial agreements.*** Whenever a defendant is convicted after trial of a qualifying Chapter 35 offense, the prosecuting attorney shall offer the defendant the opportunity to enter into an agreement prior to sentencing that contains the following terms:
>
> 1. Pursuant to Section 12, the court at sentencing shall impose a period of parole ineligibility for any qualifying Chapter 35 offense equal to one-third of the sentence, less commutation, minimum custody, and work credits earned while in custody, consistent with

> N.J.S.A. 30:4-123.51(a), as if the individual had not been subject to a mandatory minimum term; and
>
> 2. The court at sentencing shall retain discretion to impose any other sentencing terms it deems just and appropriate, including, where appropriate, the imposition of an additional, discretionary period of parole ineligibility, pursuant to N.J.S.A. 2C:43-6(b), if the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors. Any such period of discretionary parole ineligibility would be served in addition to the period equal to one-third of the sentence, less prison credits, described in Section I.B.1 above.

Here, the State and defendant entered into a post-conviction agreement as to the sentence as expressly permitted by the Directive. The State noted that the verdict discussions were held pursuant to the Directive's guidelines. In response to the State's proposed sentence, defense counsel stated:

> I did agree to Mr. Harris' proposal about sentencing him to a term which was not the maximum that my client faced with the mandatory extended term which would have been 20 years. Certainly, because he possessed -- he was convicted of possessing these two drugs at the same time, I would certainly argue that anything be concurrent, his possession of the methamphetamine, his possession of the fentanyl, that those should have been concurrent terms.
>
> So, although perhaps esoterically he faced 40 years, actually, he probably only faced 20 years but I believe that the sentence of 12 years, serve a minimum of four years before eligibility for parole is a reasonable sentence under the terms of this case.
>
> [6T7-7 to 8-4].

Defendant's sentence is in conformity with the Directive and its objectives. Contrary to defendant's arguments, the trial court did weigh aggravating and mitigating factors when it sentenced defendant. The court found aggravating factors (3), (6), and (9) applied to defendant's conviction. She did not find any mitigating factors applied. [6T12-16 to -23].

Defendant's sentence is well-within the guidelines. It does not shock the judicial conscience. Defendant had convictions out of New Hampshire for distribution or possession with intent to distribute controlled dangerous substances. He also had a conviction for sexual assault. [PSR].

When fashioning the statement with defense counsel, the State and defendant took defendant's age and circumstances into consideration. The 12-year, four years without parole, aggregate sentence considered defendant's health, age, and also the weighty nature of the charges for which he was found guilty. Defendant's sentence is appropriate and does not shock the judicial conscience, nor does it violate the tenets of the Attorney General's guidelines. Defendant cannot succeed on this argument.

2. The Court Did Not Merge Defendant's Convictions For Sentencing Purposes But The Concurrent Nature Of The Sentences Renders It Moot. (This Refers to Subpoint 3 of Defendant's Brief.)

"The overall principle guiding merger analysis is that a defendant who has committed one offense cannot be punished as if for two. Convictions for lesser-included offenses, offenses that are a *necessary* component of the commission of another offense, or offenses that merely offer an alternative basis for punishing the same criminal conduct will merge." State v. Brown, 138 N.J. 481, 561 (1994), overruled on different grounds by State v. Cooper, 151 N.J. 326 (1997)(internal citations and quotations omitted.)

Here, the court could have merged the possession of controlled dangerous substance charges with the possession with intent to distribute charges for sentencing purposes. It did not do that. However, defendant was sentenced to concurrent sentences on all counts of the indictment which resulted in an aggregated sentence of 12 years, four without parole, in New Jersey State Prison. The net effect is the same as if the court had merged the counts.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Honorable Court to affirm defendant's conviction and sentence.

Respectfully submitted,

LACHIA L. BRADSHAW
BURLINGTON COUNTY PROSECUTOR

/S/ Alexis R. Agre_____
By: Alexis R. Agre (Id No. 026692002)
Assistant Prosecutor

Dated: January 3, 2025

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3926-22
INDICTMENT NO. 21-07-00717-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Burlington County.
CHESTER O. RINES,	:	Sat Below:
Defendant-Appellant.	:	Hon. Christopher J. Garrenger, J.S.C., Hon. Aimee R. Belgard, J.S.C.,
	:	and a Jury.

Your Honors:

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

DEFENDANT IS CONFINED

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REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Chester O. Rines relies on the procedural history and statement of facts from his initial brief, filed on August 19, 2024. (Db) [1] The State filed its responding brief on January 3, 2025. (Sb)

[1] Sb – State's response brief
Db – Defendant's opening brief
Da – Defendant's appendix to his opening brief

LEGAL ARGUMENT[2]

Mr. Rines relies on the legal argument from his initial brief and adds the following.

REPLY POINT I

THE STATE IDENTIFIES THE WRONG TESTIMONY AS THE SUBJECT OF ITS ARGUMENT IN POINT II, AND IN ANY CASE, THE FAILURE TO GIVE A LIMITING INSTRUCTION REQUIRES REVERSAL.

In Point II of Rines's opening brief, he challenges the erroneous admission of past acts of drug dealing, in violation of N.J.R.E. 404(b), with no limiting instruction whatsoever. (Db 18-25) The State's response is directed at Seaver's testimony that during the road trip, Rines provided her with drugs. (Sb 19-25) But Rines is not challenging that testimony. As made clear in Point II of his opening brief, Rines explicitly challenges Seaver's testimony that "three or four months" before the trip when the two had just met, Rines sold or gave her drugs on multiple occasions:

> Q: Can you characterize the relationship that developed between yourself and Rines?
>
> A: I would just buy drugs from him. A lot of the time he just gave me drugs, I didn't have to buy them.
>
> Q: What kind of drugs?

[2] Reply Point I responds to the State's Point II. (Sb 19-25) Reply Point II responds to Point III of the State's brief. (Sb 26-30)

> A: Heroin.
>
> Q: Did he ever say why he wouldn't take your money sometimes?
>
> A: No, he just was very nice about it and just gave me drugs.
>
> [4T 130-1 to 10.]

Thus, the State's claim that "[t]he purpose of Seaver's testimony was to show that defendant had knowledge of what was in the backpack and that the backpack belonged to defendant" is simply wrong, because the challenged testimony was not about receiving drugs from the backpack during the road trip at all. The backpack is entirely irrelevant to Seaver's prejudicial, inadmissible testimony that Rines gave her heroin on other unrelated occasions several months before the road trip.

The same mistake infects the State's invited-error argument. Defense counsel stated that she was "not going to object" to Seaver describing Rines giving her drugs in response to the State's request to admit the road trip transactions. As the prosecutor stated:

> What I am seeking to come in, Judge, is the trip down to Virginia Beach that they were all on, Mr. Rines, Ms. Seaver and two others. During that time period before they make their journey up to New Jersey there is one or more circumstances in which Mr. Rines, at Ms. Seaver's request, goes into the bag, gets drugs out of the bag, weighs them on the scale, marks same in the

> ledger and gives her some drugs. This took place prior to the journey to New Jersey. But obviously it's extremely relevant as it goes to Ms. Seaver's knowledge as to what is in the bag.
>
> [4T 93-4 to 19 (emphasis added).]

The State never sought the court's permission or defense counsel's consent to admit Seaver's testimony about other unrelated instances of drug dealing. The admission of this testimony with no limiting instruction whatsoever is reversible error.

REPLY POINT II

SERGEANT CZEPIEL WAS NEVER QUALIFIED AS AN EXPERT IN NARCOTICS INVESTIGATIONS OR ANY OTHER FIELD.

Rines respectfully wishes to correct the State's assertion that "Sergeant Czepiel was qualified as an expert in narcotics investigations and testified that scales are often used to weigh and apportion controlled dangerous substances." (Sb 30) The State did not attempt to qualify Sergeant Czepiel as an expert in narcotics investigations or any other field or subject. The sergeant's testimony about the tendency of drug dealers to use scales was therefore inappropriately admitted.

The State presented no expert testimony on drug distribution or narcotics

investigations -- no expert testimony about digital scales, no testimony about the razor blade whatsoever, no testimony about the relationship between drug deals and the amount of cash or the quantity of drugs found, and no evidence of packaging materials. And the State's only evidence of drug transactions fell into two categories, both involving Seaver: (1) the inadmissible testimony that Rines sold her drugs for months before the incident, which could not be considered as evidence of the charged crimes (see Db 18-25 and Reply Point I, supra), and (2) the evidence that he gave her drugs during their road trip. Accordingly, jurors in this case may have improperly convicted Rines of intending to distribute drugs based on the road-trip transactions, without ruling out the possibility that Seaver jointly possessed the drugs. For the reasons laid out in Point III of Rines's opening brief, that error renders the verdict unreliable and requires reversal. (Db 18-25)

CONCLUSION

For the reasons in this reply and in Rines's initial brief, the evidence in this case should have been suppressed and his convictions require reversal. In the alternative, the matter must be remanded for resentencing.

Respectfully submitted,

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Public Defender
Attorney for the Defendant-Appellant

BY: 

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Attorney ID No. 404382022

Dated: January 17, 2025