SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3984-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Atlantic County.
JOMO K. LYLESBELTON, a/k/a/ JOMO LYLES-BELTON	:	Indictment No. 20-01-00092-I
Defendant-Appellant.	:	Sat Below: Hon. Dorothy M. Incarvito-Garrabrant, J.S.C., and a jury
	:	

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

JENNIFER N. SELLITTI
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
(973) 877-1200

ETHAN KISCH
Assistant Deputy Public Defender
Attorney ID: 349152020
Of Counsel and On the Brief
Ethan.Kisch@opd.nj.gov
July 26, 2024

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF JUDGMENTS, ORDERS, & RULINGS BEING APPEALED

INDEX TO APPENDIX

TABLE OF RECORD CITATIONS

Da – Appendix to Defendant-Appellant's Brief

1T – May 1, 2023, Hearing Transcript

2T – May 3, 2023, Trial Transcript

3T – May 3, 2023, Complete Voir Dire Transcript

4T – May 4, 2023, Trial Transcript

5T – May 5, 2023, Trial Transcript

6T – May 8, 2023, Trial Transcript

7T – July 28, 2023, Sentencing Transcript

TABLE OF AUTHORITIES

PAGE NOS.

Cases

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Cases (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Cases (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Cases (Cont'd)

New Jersey Statutes

Other Statutes

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Other Statutes (Cont'd)

Rules

Other Authorities

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Other Authorities (Cont'd)

PRELIMINARY STATEMENT

Police found 17 grams of cocaine, scales, baggies, and a legal handgun in Jomo Lyles-Belton's bedroom. A jury convicted him of three offenses: possession of cocaine, possession of cocaine with intent to distribute, and constructive possession of a firearm during a drug distribution offense. All three must be reversed.

First, the State called the wrong eyewitness at trial. Detective Marc DiValerio did not find the cocaine, scales, or baggies. He only found Mr. Lyles-Belton's legal handgun across the room from the contraband. The unidentified officers who found the contraband never testified. So Detective DiValerio told the jury what the other officers told him about the search—including where the contraband was supposedly found. Even worse, the State then used his testimony to admit the contraband into evidence. These actions violated N.J.R.E. 602's personal knowledge requirement; the Confrontation Clause's cross-examination right, and N.J.R.E. 802's hearsay bar.

Second, the State introduced prohibited "other crimes" evidence. When packaging the cocaine for trial, the State mistakenly included two additional bags of cocaine from uncharged controlled buys in the exhibit package. Despite this error, Detective DiValerio told the jury that the exhibit's contents came from Mr. Lyles-Belton's bedroom. He also said the bags found

in the bedroom were "packaged for distribution." Then, at the State's direction, the detective counted the bags of cocaine in front of the jury—including the uncharged bags. The trial court provided curative instructions. But it should have ordered a mistrial.

Third, the trial court provided jury instructions contrary to binding precedent. Count Three charged Mr. Lyles-Belton with constructive possession of a firearm during a drug distribution offense, contrary to N.J.S.A. 2C:39-4.1(a) ("Section 4.1(a)"). As written, the statute imposes strict liability. So the court instructed the jury that mere constructive possession of a gun at the same time as a drug distribution offense is enough to convict. That is, the instruction required that he be convicted even if the items were in different locations. Yet two decades ago, the State Supreme Court held that Section 4.1(a) requires at least "a temporal and spatial link between the possession of the firearm and the drugs that defendant intended to distribute." State v. Spivey, 179 N.J. 229, 239-40 (2004). In other words, the jury needed to conclude that the gun and drugs were "related to a common purpose." Ibid. The court's jury instruction omitted this essential element, even though Mr. Lyles-Belton's handgun was legal and recovered in a closed dresser across the room from the contraband.

Finally, the trial court's misapplication of Section 4.1(a) violated the Second Amendment. Under the United States Supreme Court's new analytical

framework, the State must prove that Section 4.1(a), as applied by the court to Mr. Lyles-Belton, is consistent with our Nation's historical tradition of firearm regulation. The State cannot meet this heavy burden. Our Nation has no tradition of criminalizing mere constructive possession of a legal handgun. At most, historical laws proscribed the intentional use of a firearm, carried on one's person, in furtherance of a violent crime like assault or burglary.

For each of these reasons, this Court should reverse.

PROCEDURAL HISTORY

On January 15, 2020, Atlantic County Indictment 21-02-00092-I charged Mr. Lyles-Belton with three counts: third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (Count One); second-degree possession of between one-half ounce and five ounces of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(2) (Count Two); and second-degree possession of a firearm during a drug offense, N.J.S.A. 2C:39-4.1(a) (Count Three). (Da1-3)

In May 2023, the State tried Mr. Lyles-Belton in a jury trial before the Honorable Dorothy M. Incarvito-Garrabrant, J.S.C. (2T, 4T, 5T, 6T) During trial, the court denied Mr. Lyles-Belton's motion for a mistrial. (4T18-11 to 23-10) At the close of the State's case, the court also denied Mr. Lyles-Belton's motion for a directed verdict. (5T81-19 to 84-4) The jury later convicted him on each count. (6T94-10 to 97-24; Da4-6)

On July 28, 2023, Judge Incarvito-Garrabrant denied Mr. Lyles-Belton's motion for a new trial. (7T12-7 to 34-13; Da 11-22) That same day, the court imposed sentence. On Count Three, the court ordered a five-year prison sentence with a 42-month parole disqualifier under the Graves Act. After merging Count One into Count Two, the court levied a consecutive three-year prison sentence. (7T39-10 to 46-25; Da 7-10)

On August 29, 2024, Lyles-Belton filed a notice of appeal. (Da23-25)

STATEMENT OF FACTS

The State presented three witnesses at trial: Marc DiValerio, a detective employed by the State Police and a former member of the Atlantic City Metro Task Force (2T92-19 to 167-16; 4T39-7 to 44-10); Briana Senger, a forensic scientist at the State Police Lab (4T47-13 to 60-25); and Michael Gonzalez, a sergeant in the New Jersey Division of Criminal Justice's Human Trafficking Bureau, qualified as an expert in narcotics investigations (5T40-20 to 73-10).

1. Detective Marc DiValerio's Testimony

Detective DiValerio was the sole eyewitness called by the State. (2T92-19 to 167-16; 4T39-7 to 44-10) He was the lead detective in the investigation. (2T94-8 to 11) On August 10, 2017, DiValerio and other officers searched Mr. Lyles-Belton's Atlantic City home. (2T94-19 to 96-2) Mr. Lyles-Belton was taken into custody outside his home prior to the search; he was not present

during the search. (2T96-15 to 21) In Mr. Lyles-Belton's bedroom, the detective testified, officers found "bags of cocaine, digital scales, packaging material, specifically plastic baggies, and a handgun." (2T99-12 to 17)

According to Detective DiValerio, each officer on scene "was responsible for different duties. Some searched the residence. Some took pictures. Some watched over Mr. Belton to make sure he was safe. Others might have made sure nobody came and went from the residence during that time." (2T96-5 to 14) Throughout his testimony, DiValerio testified about actions taken by other police officers during the search. (See infra Point I) He testified that, although he was present during the search of the bedroom, "I was not the one who actually located the cocaine." (2T105-13 to 16, 130-12 to 20) Instead, he told the jury that one of the members of his unit found the cocaine inside a Nature's Way plastic bottle on a bookshelf near the foot of the bed. (2T130-12 to 131-25; see 2T99-18 to 23, 101-1 to 11, 108-21 to 109-8) Inside the bottle, the cocaine was divided among "separate plastic bags" (2T101-12 to 103-25; see 2T156-15 to 157-16) and "packaged for distribution" (2T147-2 to 6). He later clarified, "I didn't touch the bottle," and didn't directly observe anyone seize the bottle and open it. (2T130-16 to 131-25) That is, "[i]t would have been brought to my attention that narcotics were found" (2T131-9 to 11) and "somebody would have showed it to me, whoever located [it.]" (2T130-22

to 131-1) DiValerio detailed that "[o]nce we identified [cocaine] in the bottle, it was removed from the bottle. Again, it was placed in the New Jersey State Police evidence bags. They were sealed properly, and they were labeled with the case number, the date, my badge number, and then, they were taken back to the station for processing." (2T104-5 to 10)

The detective also told the jury that other officers found "pink plastic baggies that are consistent with packaging for distribution of narcotics." Those baggies were also inside the plastic bottle. (2T111-22 to 113-1, 138-23 to 139-7) These types of baggies, he testified, are "used to package the narcotics for distribution." (2T113-12 to 19) Nearby on the bookshelf, another officer found three digital scales. (2T113-20 to 115-18) Police did not locate cash, extra cell phones, cutting agents, or razor blades. (2T130-2 to 4, 147-7 to 148-7)

In a closed dresser on the other side of the 12-foot by 12-foot room, Detective DiValerio himself found a handgun that was lawfully registered to Mr. Lyles-Belton. (2T121-2 to 129-20, 151-15 to 155-24) According to DiValerio, the dresser was about six feet from the contraband found on the bookshelf. (2T126-6 to 20)

During the detective's testimony, the State directed his attention to State's Exhibit 2 (S-2). That exhibit, he told the jury, contained the packaged drugs recovered from Mr. Lyles-Belton's bedroom. (2T103-12 to 25) S-2,

DiValerio testified, contained "bags of cocaine that were located within that plastic bottle[.] These are also additional bags of cocaine that were located in the same bottle." (2T103-12 to 25) Defense counsel repeatedly objected to the detective's second-hand testimony and the admission of S-2, as well as the scales and baggies, arguing that the State should be required to call the officer(s) who actually found the contraband. (2T104-19 to 105-10, 105-21 to 108-17, 109-12 to 111-19, 132-2 to 138-17) The court ultimately overruled those objections and permitted the detective's testimony and the admission of S-2 and the other contraband. (2T134-12 to 138-17)

Once admitted, DiValerio testified that S-2 included "two clear plastic baggies" that "have white powder rock substance, cocaine." (2T156-15 to 23) The State then queried DiValerio about additional bags packaged in the exhibit and asked him to count them. (2T156-15 to 157-13) DiValerio—in front of the jury—began counting the bags of cocaine. (2T157-8 to 14) Defense counsel quickly objected. At sidebar, it was revealed that the State had placed two additional bags of cocaine from uncharged controlled buys within S-2. (2T157-15 to 161-3)[1] The court instructed the jury that it was striking the detective's

[1] The trial court observed that "it was discovered at sidebar that the State inadvertently included CDS in S-2 which were from uncharged controlled buys, not from the search of the Defendant's home." (Da18) The controlled buys were not charged in the indictment. (4T19-5 to 13) Indeed, the court explained, "the intent of all parties, was that the controlled buys and the

testimony "relative to those—relative to the counting of those bags, of—that the officer—that the Detective just testified to, as well as any testimony related to those items that were distributed from S-2 and given to the officer"; the jury was then dismissed for the day. (2T161-5 to 16)

The next morning, Mr. Lyles-Belton moved for a mistrial, arguing that DiValerio "informed the jury that there were multiple small bags of CDS that were prepackaged for distribution that were located in the Defendant's bedroom," "testified to the jury that all the items in S-2 were located within the Defendant's bedroom," "then counted the small Ziploc bags in front of the jury." (4T4-16 to 5-3) Yet, counsel noted, some of those bags were from uncharged controlled buys. (4T3-22 to 18-10) Moreover, this mistake only confirmed the fact that the detective "had no idea where the CDS was located," and even worse, "had no idea what CDS was actually located." (4T6-5 to 11)

The court denied the motion but ruled that a curative instruction was necessary. (4T18-11 to 23-10) The court delivered the curative to the jury (4T37-5 to 38-21) and the State brought the detective back for additional testimony. (4T39-7 to 44-10) The State again showed the detective S-2, this

---

evidence from the controlled buys or any alleged CDS from the controlled buys were not going to be submitted to the jury. And where we find ourselves is that . . . , they were in fact, and there was a counting out of the bags." (4T19-5 to 20)

time without the uncharged bags, and he again testified that it contained the cocaine police found on Mr. Lyles-Belton's bookshelf. (4T39-18 to 40-1)

2. Forensic Scientist Briana Senger's Testimony

The State next called Briana Senger, a forensic scientist at the State Police Laboratory. (4T47-13 to 60-25) After she was qualified as an expert in forensic science (4T51-16 to 52-2), Senger testified that S-2 included "two individual bags containing a white rock like substance." (4T56-20 to 25) The substance tested positive for cocaine; the drugs weighed 17.578 grams. (4T59-12 to 25)

3. Sergeant Michael Gonzalez's Expert Testimony

The State's third and final witness was Michael Gonzalez. (5T40-20 to 73-10) Gonzalez is employed by the New Jersey Division of Criminal Justice as a sergeant in the Human Trafficking Bureau. He previously worked in the Division's Gangs and Organized Crime and the Motor Vehicle Commission Bureaus. (5T7-15 to 8-6, 41-18 to 42-15)

Before Gonzalez testified, the court denied Mr. Lyles-Belton's motion under Rule 104 to preclude Gonzalez's expert testimony that possession of over 10 grams of cocaine would generally not be for personal use. (5T34-3 to 37-8; see generally 1T). After the court qualified Gonzalez as an expert in narcotics investigations (5T51-7 to 22), he told the jury that possession of a

half-ounce of cocaine (approximately 14 grams) is generally indicative of drug distribution, not personal use (5T57-7 to 59-7). Gonzalez explained "that amount of cocaine . . . is very expensive" and that users typically buy no more than 3.5 grams of cocaine at a time. (5T58-1 to 60-5) Baggies and scales, Gonzalez testified, are also indicative of drug distribution. (5T60-20 to 61-3)

LEGAL ARGUMENT

POINT I

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT PERMITTED THE STATE'S KEY WITNESS TO TESTIFY BASED ALMOST ENTIRELY ON HEARSAY AND ADMITTED PHYSICAL EVIDENCE WITHOUT A PROPER FOUNDATION. U.S. CONST. AMENDS. V, VI, & XIV; N.J. CONST. ART. 1, ¶¶ 1 & 10. (2T134-12 to 138-6; 4T18-11 to 23-10; Da17-22)

The State called Detective DiValerio as its only eyewitness. But he was not the officer who found the cocaine. Nor did he find the scales or baggies. (2T105-13 to 16, 108-21 to 109-8, 130-12 to 131-25) He only found Mr. Lyles-Belton's legal handgun across the room. (2T121-2 to 7, 152-15 to 155-24) The officers who found the drugs and paraphernalia never testified. So Detective DiValerio repeated what the other officers told him about the search—including where they purportedly found the drugs and paraphernalia. Even worse, the State then used Detective DiValerio, despite his lack of first-hand

knowledge, to move the drugs, scales, and baggies found by other officers into evidence. Because Detective DiValerio's testimony lacked a proper foundation and was impermissible hearsay that violated the Confrontation Clause, it should have been excluded. Instead, the trial court overruled Mr. Lyles-Belton's objections and the detective's testimony formed the basis for his conviction. So reversal is required.

Detective DiValerio's unusual testimony in this case implicates three concomitant legal principles: (1) N.J.R.E. 602's requirement of personal knowledge; (2) the Confrontation Clause's right to cross-examine any adverse witnesses, and (3) N.J.R.E. 802's bar on hearsay.

First, N.J.R.E. 602 requires that a fact "witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The Rule mandates "firsthand knowledge—that which comes to the witness through his own senses, mostly sight and hearing." State v. Watson, 254 N.J. 558, 592 (2023) (quoting Mueller & Kirkpatrick, Federal Evidence, § 6.5 (4th ed., July 2022 update)); id. ("'[P]ersonal knowledge means seeing directly the acts, events, or conditions in question'; 'hearing them'; or getting sensory input from 'the other senses of touch, smell, or taste.'" (quoting Mueller & Kirkpatrick, § 6.6)). A witness "who has no knowledge of a fact except what another has told him or her does

not, of course, satisfy the present requirement of knowledge from observation." Neno v. Clinton, 167 N.J. 573, 585 (2001) (quotation omitted) (cleaned up). In other words, "[w]hen the underlying statement is hearsay, there can be no 'personal knowledge' of the substance of the statement, but only knowledge of the fact that the statement was made." Ibid.

Second, the Sixth Amendment to the United States Constitution and Article 1, Paragraph 10 of the State Constitution both provide, in nearly identical language, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI; accord N.J. Const. art. 1, ¶ 10. "The right of confrontation is an essential attribute of the right to a fair trial, requiring that a defendant have a fair opportunity to defend against the State's accusations." State v. Branch, 182 N.J. 338, 348 (2005) (quotations omitted). "The government bears the burden of proving the constitutional admissibility of a statement in response to a Confrontation Clause challenge." State v. Basil, 202 N.J. 570, 596 (2010). Importantly, "the satisfaction of defendant's confrontation rights is a question of law, which [appellate courts] review de novo." State v. Wilson, 227 N.J. 534, 544 (2017).

Third, N.J.R.E. 802 provides that "[h]earsay is not admissible except as provided by [the] rules or other law." "Hearsay" is "a statement that: (1) the

declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." N.J.R.E. 801(c). The proponent of hearsay testimony must show it falls within a defined exception. State v. Stubbs, 433 N.J. Super. 273, 285-86 (App. Div. 2013).

Our courts have often applied the hearsay prohibition and Confrontation Clause together "to protect criminal defendants 'from the incriminating statements of a faceless accuser who remains in the shadows and avoids the light of court.'" State v. Medina, 242 N.J. 397, 413 (2020) (quoting Branch, 182 N.J. at 348). In particular, "[w]hen [a police] officer conveys information from someone who does not testify, either 'directly or by inference,' and the information incriminates the defendant, both the Confrontation Clause and the hearsay rule are implicated." Watson, 254 N.J. at 609-10 (quoting Branch, 182 N.J. at 350).

In State v. Bankston, 63 N.J. 263 (1973), a detective testified that he approached the defendant because an informant said a person wearing certain clothes had drugs. Id. at 266-67. Although the detective "never specifically repeated what the informer had told them," the Court observed that "the inescapable inference from [his] testimony was that the informer had given information that defendant would have narcotics in his possession." Id. at 271.

Thus, "the jury was led to believe that an unidentified informer, who was not present in court and not subjected to cross-examination, had told the officers that defendant was committing a crime." Ibid. The Court reversed and held that "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." Ibid.

The same was true in Branch, 182 N.J. 338. At trial, the State asked the lead detective in a burglary, "based on information received did you develop a suspect in this case?" Id. at 347. The detective testified that he had received such information, that the defendant was the suspect, and that he had created a photo array. Ibid. The Court reversed and held that "the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant[.]" Id. at 350 (citing Bankston, 63 N.J. at 268-69). In short, the Court held, "the hearsay rule is violated if the officer states or suggests that some other person provided information that linked the defendant to the crime." Id. at 351 (citing Bankston, 63 N.J. at 268-69); see also State In the Interest of J.A., 195 N.J. 324, 351 (2008) (reversing because officer testified about description of robber given to him by eyewitness).

In sum, our Supreme Court has summarized that "[t]he common thread that runs through [the Confrontation Clause and hearsay case law] is that a police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant" because this "hearsay testimony permit[s] the jury to draw the inescapable inference that a non-testifying declarant provided information that implicated the defendant in the crime." Branch, 182 N.J. at 351 (citing cases).

Detective DiValerio's testimony violated each of these legal doctrines. First, he began his testimony by repeatedly using "we" or the passive voice to discuss actions taken by other police officers:

- Q: "What else did you locate in the room that you identified to be Defendant's?" A: "Also located in the bedroom were bags of cocaine digital scales, packaging material, specifically plastic baggies, and a handgun." Q: "So, let's talk about the drugs. Where did you find the drugs?" A: "The drugs were located at the foot of the bed. There was a small little bookshelf, I would call it. The drugs were located inside a plastic bottle on that shelf, or on that bookshelf." (2T99-12 to 23 (emphases added))

- Q: "I'm showing the Detective what's been pre-marked as S-18 for identification purposes. Do you recognize what that is? A: "Yes." Q: "And what is it?" A: "This is the bag that contained the bags of cocaine." Q: "Is that the bag, or is it a—" A: "This is the bottle that the bags of cocaine were contained with." Q: "And how do you know that it's the same bottle?" A: "I know it's the same bottle because it's in a State Police evidence bag. Once we retrieve the evidence, it was put in this bag, it was sealed, and then it was labeled with my—with the date, the case number, and the initials itemizing this piece of evidence, and it's—later had my name and badge number on it as well." (2T101-20 to 102-14 (emphases added))

- Q: "I'm showing the Detective what's been pre-marked as S-2 for identification purposes. Do you recognize that? (Indiscernible) as well." A: "Yes, I do." Q: "And what is it?" A: "These are bags of cocaine that were located within that plastic bottle that was up on the screen. These are also additional bags of cocaine that were located in the same bottle." (2T103-12 to 21 (emphases added))

- Q: "And how do you know that this is the same suspected cocaine that was recovered from the search?" A: "Once we identified it in the bottle, it was removed from the bottle. Again, it was placed in the New Jersey State Police evidence bags. They were sealed properly, and they were labeled with the case number, the date, my badge number, and then, they were taken back to the station for processing." (2T104-3 to 10 (emphases added))

It was at this point that defense counsel objected to any further testimony from the detective. Counsel also objected to the admission of State's Exhibit 2 (S-2), which purportedly contained the cocaine found in Mr. Lyles-Belton's bedroom. At sidebar, defense counsel challenged: "Is he the actual one that located the cocaine? Because he keeps saying the cocaine was located. So, my objection is foundation. And then, I (indiscernible) objection to follow-up questions, the State asking, you know, was he the one that located the cocaine?" (2T104-19 to 105-3 (emphasis added)) The State then indicated that "I believe so. Yeah." (2T105-4) Based on the State's representation, the court permitted the State to proceed with its direct examination. (2T105-5 to 10)

The State then asked: "Detective, were you the one who actually found the cocaine?" DiValerio responded, "I was not the one who actually located the

cocaine." (2T105-13 to 16 (emphasis added)) Defense counsel immediately asked for another sidebar and lodged an "objection to anything that he would say at this point on, because he was not the one that actually took custody of the cocaine inside the residence." (2T105-21 to 24) The court sustained the objection to S-2's admission, but again permitted the State to "ask follow-up questions, and we can see where we go from there." (2T106-6 to 108-14)

Back on the stand, Detective DiValerio repeated that, although he was present in the room during the search, he was not the person who unscrewed the plastic bottle to find the cocaine; instead, one of his "squad-mates" did. (2T108-21 to 109-8) Another sidebar quickly ensued, and defense counsel objected for a third time to the second-hand testimony and the admission of the cocaine. (2T109-12 to 110-18) The court then told the parties that it would wait to rule on admission of S-2 until after cross-examination. (2T110-19 to 111-3) The court did the same for S-4 (additional empty baggies) (2T113-3 to 9), and for S-5, S-6, and S-7 (scales) (2T114-19 to 22). Detective DiValerio then finished his direct testimony, telling the jury that the only item he personally found was Mr. Lyles-Belton's legal handgun in a closed dresser drawer across the room from the contraband. (2T121-2 to 129-20)

On cross-examination, Detective DiValerio admitted that he did not handle the contraband when the other officers found it. (2T130-12 to 131-25)

("I didn't grab it [i.e., the bottle with the cocaine in it] personally, no."); ("[S]omebody would have showed it to me, whoever located [it.]"); ("I did not touch the bottle. No."); ("It would have been brought to my attention that narcotics were found, because they were packaged as—and for evidence purposes.")) Worse still, when asked whether he "directly observe[d] somebody directly grabbing and opening that bottle," he responded "I did not." (2T131-15 to 25 ("I was in the room during the search, so I would have been made aware right then and there . . . if somebody had touched [it.]"))

At that point, defense counsel renewed his objection for the fourth time, arguing at sidebar that the detective "didn't observe who found that bottle, who opened that bottle. . . . I need somebody that says I was the one that found those drugs." (2T132-2 to 138-2) The best the State could offer was that, "if someone found it, presumably, they would go show people." (2T133-11 to 13)

The court ultimately denied defense counsel's objection and permitted the detective's testimony and the State's introduction of the cocaine, scales, and baggies. (2T134-12 to 138-6) The court explained that "[w]hat I have is the officer who was responsible for securing them, and I have testimony that that's what he did. That he took it from the people who were searching. I think there is sufficient validation at this point in time for those to be admitted. . . . I don't think it makes it hearsay at this point." (2T134-12 to 135-6, 136-3 to 15)

Mr. Lyles-Belton later moved for a judgment of acquittal (5T78-24 to 80-8), and for a new trial (Da17-19), arguing that his Confrontation Clause rights were violated by DiValerio's hearsay testimony and the admission of S-2. The court denied both motions. (5T81-19 to 84-4; Da20-22)

The trial court erred in permitting Detective DiValerio's testimony and admitting the contraband into evidence. The testimony (1) lacked a proper foundation of personal knowledge, N.J.R.E. 602; (2) constituted impermissible hearsay, N.J.R.E. 801(c), 802; and (3) violated Mr. Lyles-Belton's confrontation rights, U.S. Const. amends. V, VI, & XIV; N.J. Const. art. 1, ¶¶ 1 & 10.

Mr. Lyles-Belton had the right to confront the actual witnesses against him. Branch, 182 N.J. at 350-51; Bankston, 63 N.J. at 268-71. Instead, he was left to cross-examine a witness who knew almost nothing. The detective testified that he did not find the contraband; did not observe anyone else find it; did not know who found it; and did not know who immediately took possession of the items. And when pressed, the detective either recounted what other officers told him, speculated on what other officers "would have" done, or said he could not recall what happened. The Confrontation Clause and our Rules of Evidence demand better. Compare State v. Luna, 193 N.J. 202, 217 (2007) (holding that police officers "cannot repeat specific details about a

crime relayed to them by [a non-testifying witness] without running afoul of the hearsay rule" (citing Bankston, 63 N.J. at 268-69)), with State v. Kemp, 195 N.J. 136, 155 (2008) ("[A]ll of the sources who led [the detective] to focus on defendant testified and were cross-examined at defendant's trial, thereby obviating defendant's Confrontation Clause claim.").

Far from harmless, Detective DiValerio's hearsay testimony placed the cocaine, scales, and baggies in Mr. Lyles-Belton's bedroom. On top of that, the State used his testimony as the basis to introduce the contraband at trial. See State v. Weaver, 219 N.J. 131, 154 (2014) (requiring the State to show that a confrontation violation "was harmless beyond a reasonable doubt"). It would not have been difficult for the State to identify the specific officer(s) who found the contraband. (Although the State certainly could not have asked Detective DiValerio for help; the officers' identities were among the many things he did not know.) Indeed, Detective DiValerio himself testified that each officer on scene "was responsible for different duties. Some searched the residence. Some took pictures. Some watched over Mr. Belton to make sure he was safe. Others might have made sure nobody came and went from the residence during that time." (2T96-5 to 14)

The State Supreme Court rejected similar second-hand officer testimony in two recent cases considering police searches of digital firearm registries.

State v. Hedgespeth, 249 N.J. 234, 245 (2021) (holding that the Confrontation Clause requires the officer who conducted the search, or a suitable substitute witness "who personally witnessed or re-conducted the same search, is presented" for cross-examination); State v. Carrion, 249 N.J. 253, 272 (2021) (same). In doing so, the Court made clear that "[t]he applicable standard . . . is not whether it is burdensome to call a police officer to testify about his or her findings." Carrion, 249 N.J. at 273. It is axiomatic that "[t]he Confrontation Clause may make the prosecution of criminals more burdensome[.]" Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009). That is the point. The Clause "is binding, and we may not disregard it at our convenience[.]" Ibid.

For these reasons, Detective DiValerio's testimony violated N.J.R.E. 602, N.J.R.E. 802, and Mr. Lyles-Belton's confrontation rights, U.S. Const. amends. V, VI, & XIV; N.J. Const. art. 1, ¶¶ 1 & 10. Reversal is required.

POINT II

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT DID NOT ORDER A MISTRIAL AFTER THE STATE AND ITS KEY WITNESS DISPLAYED TO THE JURY PREJUDICIAL PHYSICAL EVIDENCE RELATED TO UNCHARGED CONDUCT. U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. ART. 1, ¶¶ 1, 9, 10. (4T18-11 to 23-10)

The ultimate issue at trial was whether the cocaine purportedly found in Mr. Lyles-Belton's bedroom was for personal use or for distribution. Detective DiValerio testified that the cocaine was found inside a plastic bottle, divided among "separate plastic bags" (2T101-12 to 103-25; 2T156-15 to 157-16), and "packaged for distribution" (2T147-2 to 6). When the State introduced the bags of cocaine into evidence, however, it mistakenly included two extra bags of cocaine in the exhibit package. Those bags were from uncharged controlled buys—that is, unrelated "other crimes" evidence. Detective DiValerio nevertheless testified that the State's Exhibit 2 (S-2) contained the items recovered from the bedroom. (2T103-12 to 25) The detective then opened the exhibit package and counted the bags of cocaine in front of the jury—including the uncharged bags. (2T156-15 to 157-14) After the jury saw them, the court struck the testimony with no explanation. (2T161-5 to 163-5) The court denied Mr. Lyles-Belton's motion for a mistrial (4T18-11 to 23-10), and instead provided curative instructions (4T37-5 to 38-21; 5T132-22 to 133-19).

In any criminal case, references to other crimes are prejudicial. And under the circumstances here, the State's mistake deprived Mr. Lyles-Belton of his rights to due process and a fair trial. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10. Though the court struck the testimony and provided curative instructions, they failed to remedy the harm. So reversal is required.

Our courts have long recognized that "evidence of a defendant's other crimes has a unique tendency to prejudice the jury[.]" State v. Green, 236 N.J. 71, 81 (2018) (quotation omitted). For that reason, N.J.R.E. 404(b) prohibits, with limited exceptions, "evidence of other crimes, wrongs, or acts." Before the State reveals such evidence, it "must pass" the "rigorous test" articulated in State v. Cofield, 127 N.J. 328, 338 (1992). Green, 236 N.J. at 81 (quotations omitted). In the end, "N.J.R.E. 404(b) is a rule of exclusion and . . . the trial judge bears the burden of scrutinizing the proffered evidence to determine if it satisfies the Cofield rule." State v. J.M., 225 N.J. 146, 164 (2016).

During Detective DiValerio's direct examination, the State asked him to identify the contents of S-2. DiValerio made clear that S-2's evidence package contained all the cocaine recovered from the plastic bottle in Mr. Lyles-Belton's bedroom:

> STATE: I'm showing the Detective what's been pre-marked as S-2 for identification purposes. Do you recognize that? (Indiscernible) as well. (Exhibit S-2 marked for identification)

> DET. DiVALERIO: Yes, I do.
>
> STATE: And what is it?
>
> DET. DiVALERIO: These are bags of cocaine that were located within that plastic bottle that was up on the screen. These are also additional bags of cocaine that were located in the same bottle.
>
> THE COURT: Is that also S-2?
>
> STATE: S-2, yes.
>
> THE COURT: Okay.
>
> STATE: They all are in the same.
>
> THE COURT: Thank you.
>
> [2T103-12 to 104-1]

Later, the State again asked Detective DiValerio about S-2. This time, however, the State instructed him to remove the bags of cocaine from the exhibit package and count them for the jury:

> STATE: I'm going to show you what's been admitted into evidence as S-2. So, are those the drugs that were recovered from (indiscernible), correct?
>
> DET. DiVALERIO: That is correct. Yes.
>
> STATE: And so, there is this bag, correct? And can you describe it, please?
>
> DET. DiVALERIO: This is a clear plastic bag—it's clear—two clear plastic baggies. They have a white powder rock substance, cocaine.

> STATE: And what about—I'm showing you what's also been admitted as S-2. Are those—were those items also recovered from the same location?
>
> DET. DiVALERIO: Yes, this was also found within the plastic bottle. Same location.
>
> STATE: And what about this? It's another S-2 as well.
>
> DET. DiVALERIO: This was also found with all the rest of the cocaine in a plastic bottle.
>
> STATE: And how many little bags are here. Can you tell?
>
> DET. DiVALERIO: It looks like two.
>
> STATE: And what about here?
>
> DET. DiVALERIO: It looks like one in this one, and I can't tell if that's one or two in there.
>
> STATE: And—
>
> DEFENSE COUNSEL: Judge, if we can—if we could approach?
>
> THE COURT: Please.
>
> [2T156-15 to 157-18]

The trial court later made four key factual findings about the incident. (4T18-11 to 21-20) First, the parties had agreed before trial to redact all references to the uncharged controlled buys "so that the jury would not be aware of those." (4T19-5 to 18) Second, the State nevertheless included two

bags of cocaine from controlled buys in the S-2 exhibit package. (4T19-18 to 20) Those drugs were not found in the search of Mr. Lyles-Belton's residence. (Da18) Third, Detective DiValerio counted the unrelated bags in front of the jury. (4T19-18 to 20) Fourth, the State alone was responsible for the errant testimony about and display of the unrelated bags. (4T18-13 to 24)

Given all that, there is no dispute that the State introduced "other crimes" evidence. Nor is there any debate that the State did not surmount Cofield's stringent test before doing so. The trial court nevertheless denied Mr. Lyles-Belton's motion for a mistrial. That was error.

"To address a motion for a mistrial, trial courts must consider the unique circumstances of the case." State v. Smith, 224 N.J. 36, 47 (2016) (citations omitted). The court must determine whether "there is an appropriate alternative course of action[.]" Id. (quotation omitted). If there is, "a mistrial is not a proper exercise of discretion." Ibid. "For example, a curative instruction, a short adjournment or continuance, or some other remedy, may provide a viable alternative to a mistrial, depending on the facts of the case." Ibid.

In State v. Herbert, 457 N.J. Super. 490 (App. Div. 2019), this Court explained that "[t]he decision to opt for a curative or limiting instruction, instead of a mistrial or new trial, depends on at least three factors." Id. at 505.

First, "a court should consider the nature of the inadmissible evidence the jury heard, and its prejudicial effect." Ibid. "The adequacy of a curative instruction necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached." Ibid. (quotation omitted). Importantly, "[e]vidence that bears directly on the ultimate issue before the jury may be less suitable to curative or limiting instructions[.]" Ibid.

Second, the court must consider "an instruction's timing and substance affect its likelihood of success." Ibid. On timing, "a swift and firm instruction is better than a delayed one" because "[d]elay may allow prejudicial evidence to become cemented into a storyline the jurors create in their minds during the course of the trial." Id. at 506 (citations omitted). "As for substance," Herbert explained, "a specific and explanatory instruction is often more effective than a general, conclusory one." Ibid.

Third, "a court must ultimately consider its tolerance for the risk of imperfect compliance." Id. at 507. For errors that raise constitutional issues, a mistrial is appropriate if an error "raise[s] a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." Ibid. (quotation omitted). For non-constitutional errors, a mistrial is warranted if the mistake "is of a nature as to have been clearly capable of producing an unjust result." Ibid. (quotation omitted).

Here, the trial court's instructions were inadequate. Minutes after Detective DiValerio counted the bags for the jury, the court provided the following general instruction to the jury:

> The objection is sustained. To the jury. Jury, I'm striking all of the testimony relative to those—relative to the counting of those bags, of—that the officer—the Detective just testified to, as well as any testimony related to those items that were distributed from S-2 and given to the officer. You are to disregard that. You may not consider that in any of your deliberations.
>
> [2T161-5 to 12.]

But the court did not make clear what exactly it was striking. Nor did the court explain why this was happening, leaving the jurors to puzzle overnight about the incident and the origin of the bags. See Green, 236 N.J. at 84 ("To further minimize the inherent prejudice in the admission of other-crimes evidence, a carefully crafted limiting instruction "must be provided . . . when the evidence is first presented[.]" (quotation omitted)).

The next morning, the court told the jury that it needed to disregard Detective DiValerio's testimony about the contents of S-2:

> So, you may recall when we broke yesterday that Detective DiValerio was testifying, and what I did was I asked you to disregard certain testimony at the end of the day. I'm going to read you an instruction. Members of the jury, it came to the Court's attention yesterday that while the State's witness, Detective DiValerio, was testifying, that he misidentified several items which had been packaged inside of State's Exhibit 2. When he—

> what he misidentified were bags of suspected cocaine that were packaged. They are not relevant to this case, and it was testified to in error. In this regard, the State mishandled the items which this witness stated were packages containing cocaine, and stated that same were seized pursuant to a search of the Defendant's bedroom. They were not.
>
> I am instructing you in the strongest way possible that each of you shall disregard any testimony you heard on—about those exhibits you observed in Court yesterday. You are not to consider whether—what the State produced to be relevant to this matter, and not to consider what the State produced as packaged cocaine. You shall disregard it. It was the State who made a mistake of placing them in the same bag with other evidence in S-2, which other evidence in S-2 is relevant to this matter.
>
> [4T37-5 to 38-15.]

The court repeated a similar curative during its final jury instructions. (5T132-22 to 133-19)

Although the court used strong language, these instructions were also inadequate. Indeed, no instruction could have sufficiently cured the prejudice from the jury's seeing the additional bags of cocaine. To begin with, our courts have repeatedly held that "[o]ther-crimes evidence is considered highly prejudicial." State v. Vallejo, 198 N.J. 122, 133 (2009). Such "evidence has a unique tendency to turn a jury against the defendant, and poses a distinct risk of distracting the jury from an independent consideration of the evidence that bears directly on guilt itself." State v. Reddish, 181 N.J. 553, 608 (2004)

(quotations omitted). It also "has the capacity to 'blind the jury from a careful consideration of the elements of the charged offense' and so tarnish a defendant that he may be convicted on the basis of what he once was rather than what he has recently done." State v. Lykes, 192 N.J. 519, 540 (2007) (Albin, J., dissenting) (quoting State v. Blakney, 189 N.J. 88, 93 (2006)).

Moreover, the extra bags went to the ultimate question in the case: whether the cocaine was for distribution or personal use. Herbert, 457 N.J. Super. at 505 (explaining that ultimate-issue evidence is "less suitable to curative or limiting instructions"). The prejudice was later compounded by Sergeant Gonzalez's testimony that the more cocaine and bags police find, the more likely the cocaine is intended for distribution. (5T58-1 to 61-3); State v. Skinner, 218 N.J. 496, 521 (2014) (noting that other crimes evidence can be uniquely prejudicial "because of its apparent similarity" to the charged crime).

That the State made an honest mistake is irrelevant. See State v. Greene, 242 N.J. 530, 547 (2020) ("If errors committed during the course of a trial 'mortally' cut into a defendant's substantive rights—errors that have the clear capacity to prejudice the jury against the defendant—then the fact that the errors were made in good faith or through no fault of the State or court, or even defense counsel, is of no consequence."). Further, a new trial would not

have required substantial resources. The State called only three witnesses testifying over a few hours.

Justice Robert Jackson put it succinctly when he warned that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citations omitted). Our courts have repeatedly joined that warning. See, e.g., Green, 236 N.J. at 84 ("[T]he inherently prejudicial nature of other-crimes evidence casts doubt on a jury's ability to follow even the most precise limiting instruction." (quotation omitted)); Greene, 242 N.J. at 552 ("[N]o curative instruction is likely to have the desired effect of removing the taint of the forbidden information from the jurors' minds."); Herbert, 457 N.J. Super. at 504 ("There are undoubtedly situations in which notwithstanding the most exemplary charge, a juror will find it impossible to disregard such a prejudicial statement." (quoting State v. Boone, 66 N.J. 38, 48 (1974)).

In the end, this rare occurrence—a detective cataloguing, in front of the jury, other crimes physical evidence touching on the ultimate issue in the case—demands more medicine than the trial court's curatives. Because this combination of prejudicial information had the capacity "to lead to a verdict

that could not otherwise be justly reached," Herbert, 457 N.J. Super. at 505 (quotation omitted), reversal is required.

POINT III

MR. LYLES-BELTON'S CONVICTION UNDER N.J.S.A. 2C:39-4.1(A) MUST BE REVERSED BECAUSE THE TRIAL COURT PROVIDED JURY INSTRUCTIONS INCONSISTENT WITH BINDING PRECEDENT. N.J. CONST. ART. 1, ¶¶ 1, 9, 10. (Not Raised Below)

When police searched Mr. Lyles-Belton's bedroom, unnamed officers found drugs, scales, and baggies on a small bookshelf near the foot of the bed. On the opposite side of the room, Detective DiValerio located a nine-millimeter Smith and Wesson handgun in a closed dresser drawer. (2T121-2 to 129-20, 126-6 to 20, 151-15 to 155-24) The parties stipulated that the handgun "was lawfully registered to Defendant Jomo Lyles-Belton." (2T121-23 to 122-12) After the search, the State charged Mr. Lyles-Belton with two drug crimes: third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (Count One); and second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2) (Count Two). (Da1-2)

But the State also charged Mr. Lyles-Belton with a third count: second-degree possession of a firearm during a drug offense, under N.J.S.A. 2C:39-4.1(a) ("Section 4.1(a)") (Count Three). (Da3) Section 4.1(a) provides that:

> Any person who has in his possession any firearm while in the course of committing, attempting to commit, or conspiring to commit a violation of [certain criminal statutes, including possession of CDS with intent to distribute, N.J.S.A 2C:35-5] is guilty of a crime of the second degree.
>
> [N.J.S.A. 2C:39-4.1(a).]

As written, Section 4.1(a) imposes strict liability. That is, "the mere presence of guns at the scene where the drug offense is committed suffices." State v. Harris, 384 N.J. Super. 29, 52-53 (App. Div. 2006) (quotation omitted) (explaining that liability "is not dependent on how the firearm is used or intended to be used").

In State v. Spivey, 179 N.J. 229 (2004), however, the State Supreme Court held that Section 4.1(a)'s phrase "while in the course of committing" requires at least "a temporal and spatial link between the possession of the firearm and the drugs that defendant intended to distribute." Id. at 239. The Court explained:

> The evidence must permit the jury to infer that the firearm was accessible for use in the commission of the crime. The inference to be drawn—that the gun was possessed in the course of committing the drug offense—becomes more tenuous the further removed the gun is from the drugs. . . . The closer in proximity a firearm is to drugs, the stronger and more natural the inference that the two are related to a common purpose.
>
> [Id. at 239-40.]

That "common purpose," as alleged by the State here, was to distribute drugs. So ultimately, the jury must be able to "infer that defendant possessed the drugs with the intent to distribute" and "that he possessed the gun with the intent to further that criminal scheme." Id. at 239.

The court's jury instructions here were plainly inconsistent with Spivey. "Appropriate and proper charges to a jury are essential for a fair trial[.]" State v. Carrero, 229 N.J. 118, 127 (2017) (quotation omitted). "[B]ecause correct jury charges are especially critical in guiding deliberations in criminal matters, improper instructions on material issues are presumed to constitute reversible error." State v. Jenkins, 178 N.J. 347, 361 (2004) (citation omitted). Plain error requires that a flawed jury charge "possessed a clear capacity to bring about an unjust result." State v. Chapland, 187 N.J. 275, 289 (2006) (quotation omitted).

Spivey has been on the books for two decades. Yet the trial court failed to inform the jury that Section 4.1(a) requires at least "a temporal and spatial link between the possession of the firearm and the drugs that defendant intended to distribute." Spivey, 179 N.J. at 239-40. Indeed, the jury needed to conclude that the gun and drugs were "related to a common purpose." Id. at 240. Instead, the court told the jury nothing about the required nexus. After instructing that possession need only be constructive (5T155-3 to 157-11), the court told the jury Section 4.1(a) imposes strict liability:

> The third element the State must prove beyond a reasonable doubt is that Jomo Lyles-Belton possessed the firearm while he was in the course of committing, attempting to commit, or conspiring to commit the crime of possession with the intent to distribute cocaine. The term in the course of committing means that, at the time the defendant possessed the weapon, he was also committing a drug crime, namely possession with the intent to distribute cocaine.
>
> [5T157-12 to 158-8; see generally 5T153-25 to 158-14.]

The failure to include Spivey's "common purpose" requirement was plain error, so reversal is required. R. 2:10-2; State v. Koskovich, 168 N.J. 448, 508 (2001) ("Because of the importance of jury instructions, we have consistently held that incorrect charges on substantive elements of a crime constitute reversible error." (quotation omitted) (cleaned up)).

Of course, "[w]hen a jury instruction follows the model jury charge, although not determinative, it is a persuasive argument in favor of the charge as delivered." State v. Whitaker, 402 N.J. Super. 495, 513-14 (App. Div. 2008) (quotation omitted), aff'd, 200 N.J. 444 (2009). That said, "the model charges are not binding statements of law." State v. O'Donnell, 255 N.J. 60, 79 (2023). "An erroneous jury charge when the subject matter is fundamental and essential or is substantially material is almost always considered prejudicial." State v. Maloney, 216 N.J. 91, 104-05 (2013) (quotation omitted). Thus, "[s]uch errors are poor candidates for rehabilitation under the harmless error

philosophy." Ibid. Here, the model charge was approved a week before the Supreme Court decided Spivey. Compare Model Jury Charges (Criminal), "Possession of Firearm While Committing Certain Drug Crimes (N.J.S.A. 2C:39-4.1a)" (rev. Mar. 22, 2004), with Spivey, 179 N.J. 229 (decided Apr. 1, 2004); see O'Donnell, 255 N.J. at 79 ("[T]his Court does not evaluate model jury charges other than when they are reviewed as part of an appeal."). So the trial court's providing an outdated model charge, without accounting for Spivey, was plainly erroneous.

The instruction made a real difference here. If Mr. Lyles-Belton possessed his legal handgun and the drugs at the same time—including constructive possession in two different locations—the jury charge required conviction. But Spivey requires the State prove that the possession of the gun was with the intent to further the drug crime—the "common purpose." 179 N.J. at 239-40. And the State presented no evidence that Mr. Lyles-Belton ever used his legal handgun for anything but self-defense in his home. (See Point IV below) The handgun "was lawfully registered to" Mr. Lyles-Belton. (2T121-23 to 122-12) The handgun was in a closed dresser drawer across the room from the drugs and paraphernalia. (2T121-2 to 129-20, 126-6 to 20, 151-15 to 155-24) Further, there was no evidence that linked the handgun to the contraband. Nor was there proof that Mr. Lyles-Belton had ever used his handgun to deal

drugs. The trial court's errant instruction stopped the jury from considering all these important questions. In fact, the instruction compelled the jury to convict.[2]

Because the jury instructions deprived Mr. Lyles-Belton of a fair trial, his conviction on Count Three must be reversed.

POINT IV

THE TRIAL COURT'S SWEEPING INTERPRETATION OF N.J.S.A. 2C:39-4.1(A), AS APPLIED TO MR. LYLES-BELTON, VIOLATED HIS SECOND AMENDMENT RIGHTS. U.S. CONST. AMENDS. II, XIV; N.J. CONST. ART. 1, ¶¶ 1, 9, 10. (Not Raised Below)

Much has changed for our Nation's gun laws over the last 15 years. And that puts it gently. The Supreme Court has announced new interpretations of the Second Amendment to the United States Constitution that amount to nothing less than a legal revolution. The amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

[2] This Court should also recommend that the Model Jury Charge Committee consider whether to amend Section 4.1(a)'s model jury charge, last updated over two decades ago, to incorporate Spivey's requirements. See State v. Bryant, 419 N.J. Super. 15, 28 (App. Div. 2011) ("[T]he Model Jury Charge . . . [is] subject to revision and correction whenever the language of the jury charge is contrary to an appellate interpretation of the statute in question.").

In District of Columbia v. Heller, 554 U.S. 570, 595, 636 (2008), the Court held, for the first time, that the Second Amendment protects the individual right to possess a handgun at home for self-defense. Two years later, in McDonald v. City of Chicago, 561 U.S. 742, 791 (2010), the Court held that the amendment is incorporated against the states. And most recently, the Court expanded the Heller right to apply "outside the home" in New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 10 (2022). The right to possess a handgun for self-defense, Bruen announced, is no longer "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." Id. at 70 (quoting McDonald, 561 U.S. at 780).

Bruen also minted a new legal framework to determine whether a law's application infringes on Second Amendment rights. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." Id. at 24. Then, the government bears the burden to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." Ibid. That means "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." Id. at 19. Otherwise, the law is unconstitutional. Id. at 33-34.

Under this framework, the trial court's errant application of Section 4.1(a) violated Mr. Lyles-Belton's Second Amendment rights. The Second Amendment presumptively protects Mr. Lyles-Belton's right to possess a legal handgun at home for self-defense. So the State must prove that Section 4.1(a), as applied by the trial court to Mr. Lyles-Belton here, is consistent with the Nation's historical tradition of firearm regulation. It cannot. There is no historical tradition of "mere possession"—i.e., strict liability—gun laws. At most, laws prohibited the intentional use of a firearm, carried on one's person, in furtherance of a violent offense. Section 4.1(a), as applied by the trial court in this case, has no historical comparator. So Mr. Lyles-Belton's conviction on Count Three must be vacated.

A. The Second Amendment presumptively protects the right to possess a handgun.

The threshold inquiry under Bruen is whether the "Amendment's plain text covers [Mr. Lyles-Belton's] conduct[.]" 597 U.S. at 24. "[W]hen the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to 'justify its regulation.'" United States v. Rahimi, 144 S. Ct. 1889, 1897 (2024) (quoting Bruen, 597 U.S. at 24).

The Second Amendment guarantees the right "to possess a handgun in the home for self-defense." Bruen, 597 U.S. at 8-9; McDonald, 561 at 767-68;

Heller, 554 U.S. at 628-29. That right "is exercised individually and belongs to all Americans"—not "an unspecified subset." Heller, 554 U.S. at 580-81; see Rahimi, 144 S. Ct. at 1903 ("[W]e reject the Government's contention that [an individual] may be disarmed simply because he [or she] is not 'responsible.'"). Accordingly, the Second Amendment "presumptively protects" Mr. Lyles-Belton's storage and possession of his legal handgun in his home. Bruen, 597 U.S. at 24; accord State v. Montalvo, 229 N.J. 300, 319-320 (2017). So we must turn to the second step under Bruen: whether the State can prove that history and tradition support the trial court's application of Section 4.1(a) to Mr. Lyles-Belton.

B. The State cannot meet its heavy burden to prove that the trial court's sweeping interpretation of Section 4.1(a), as applied to Mr. Lyles-Belton in this case, is consistent with the Nation's historical tradition of firearm regulation.

The State "must demonstrate" that Section 4.1(a), as applied by the trial court to Mr. Lyles-Belton here, "is consistent with this Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 17, 19, 24. In this case, as with all cases addressing a longstanding "general societal problem that has persisted since the 18th century" like the possession of firearms during crimes, "that inquiry will be fairly straightforward." Id. at 26. That is, the State should be able to uncover a "distinctly similar historical regulation" to Section 4.1(a) "addressing that problem." Ibid. Though, of course, an historical analogue

"need not be a 'dead ringer' or a 'historical twin.'" Rahimi, 144 S. Ct. at 1898 (quoting Bruen, 597 U.S. at 30). In the end, this Court "must ascertain whether" Section 4.1(a), as applied here, "is 'relevantly similar' to laws that our tradition is understood to permit, 'applying faithfully the balance struck by the founding generation to modern circumstances.'" Id. (quoting Bruen, 597 U.S. at 29 & n.7).

Because the State cannot meet this demanding historical standard, Mr. Lyles-Belton's conviction under Section 4.1(a) must be reversed. Bruen, 597 U.S. at 33-34. As discussed above, the trial court told the jury that Section 4.1(a) criminalized Mr. Lyles-Belton's mere constructive possession of his legal handgun during a drug distribution offense; if he constructively possessed a gun while he constructively possessed drugs, he is guilty. No linkage required. (5T157-12 to 20) But our Nation has no historical tradition of "mere possession"—i.e., strict liability—gun laws. At most, laws prohibited the intentional use of a firearm, carried on one's person, in furtherance of a violent offense. Section 4.1(a), as applied by the trial court in this case, has no historical counterpart.

First, the State will find no "mere constructive possession" laws from the Founding and Reconstruction eras—the most relevant periods for the historical analysis. See Bruen, 597 U.S. at 34, 37-38; Rahimi, 144 S. Ct. at

1898 n.1. Of course, it is the State's burden to uncover historical analogues. Bruen, 597 U.S. at 24-25; Rahimi, 144 S. Ct. at 1898. But to give the State a head start on its research, a study cited in Heller found that "at no time between 1607 and 1815 did the colonial or state Governments of what would become the first fourteen states exercise a police power to restrict the ownership of guns by members of the body politic." Robert H. Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment, 25 L. & Hist. Rev. 139, 143 (2007). As one court recently observed, "if anything, regulations were not about what kind of firearm one was not allowed to keep, but about the kind of firearm one was required to buy and have ready for militia duties." Miller v. Bonta, 2023 WL 6929336, at *14 (S.D. Cal. Oct. 19, 2023), appeal held in abeyance, 2024 WL 1929016 (9th Cir. Jan. 26, 2024). So as a baseline, mere possession—both inside and outside the home—was lawful and commonplace.

More specifically, there are no Founding- and Reconstruction-era laws criminalizing mere constructive possession of a firearm during a drug offense. Drug abuse is undoubtedly a "general societal problem that has persisted since the 18th century." Bruen, 597 U.S. at 26; e.g., Gerald F. Uelmen & Victor G. Haddox, Drug Abuse and the Law Sourcebook § 3:2 (rev. Apr. 2024) ("The United States of America during the 19th century could quite properly be

described as a 'dope fiend's paradise.'"). So the State needs to point to a "distinctly similar historical regulation" to Section 4.1(a). Bruen, 597 U.S. at 26. And yet, there was no 18th or 19th century practice of criminalizing drug distribution at all. "During the [19th] century there was virtually no effective regulation of narcotics in the United States." David T. Courtwright, A Century of American Narcotic Policy (1992), ncbi.nlm.nih.gov/books/NBK234755/. "[U]ntil the early 20th century, . . . what we now think of as 'illicit drugs,' such as opium and cocaine, were legal in the United States[.]" United States v. Duarte, 101 F.4th 657, 691 n.16 (9th Cir. 2024) (quotation omitted), reh'g en banc granted, opinion vacated, 2024 WL 3443151 (9th Cir. July 17, 2024). In fact, Congress waited until 1970 to pass the first comprehensive law targeting drug trafficking. See Gonzales v. Raich, 545 U.S. 1, 10-11 (2005).

Legislatures had no trouble establishing other trafficking crimes, like smuggling goods contrary to customs laws. E.g., United States v. Brockius, 24 F. Cas. 1242, 1242 (C.C.D. Pa. 1811) (discussing indictment for smuggling); United States v. Claflin, 25 F. Cas. 433, 435 (C.C.S.D. N.Y. 1875) (discussing offenses of "knowingly buying" and "dealing in smuggled goods"); Rex v. Eser, 3 Haw. 607, 607 (Haw. Kingdom 1875) (discussing person "charged with having smuggled opium"); Dunbar v. United States, 156 U.S. 185, 189-90 (1895) (discussing opium smuggling, contrary to the 1890 McKinely Act).

That said, no laws proscribed mere constructive gun possession—or, for that matter, any type of possession—during a smuggling offense. "[T]he lack of a distinctly similar historical regulation addressing th[e] problem" of gun possession during drug distribution "is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." Bruen, 597 U.S. at 26.

Even if the State substantially broadens the level of generality at which the historical inquiry takes place, it will likewise find no support for Section 4.1(a) as applied here. A handful of Founding-era laws addressed firearm possession during non-drug crimes. But again, mere constructive possession was never enough. Laws instead required the government to prove that an individual possessed a gun on one's person and used it in furtherance of a violent crime.[3] E.g., 1783 Conn. Pub. Acts 633, An Act For The Punishment of Burglary And Robbery (enhancing penalty for burglary or robbery while "so armed with any dangerous Armor or Weapon, as clearly to indicate their violent intentions" (emphasis added) (available via Duke Repository); 1788-1801 Ohio Laws 20, A Law Respecting Crimes and Punishments, ch. 6 (same for burglary) (available via Duke Repository); An Act to Describe, Apprehend

[3] See generally Repository of Historical Gun Laws, Duke Center For Firearms Law (collecting gun laws from the colonial era through the middle of the 20th century), firearmslaw.duke.edu/repository/ ("Duke Repository"); Mark Frassetto, Firearms and Weapons Legislation up to the Early 20th Century 99-101 (rev. July 26, 2023) (same), ssrn.com/abstract=2200991.

and Punish Disorderly Persons § 2 (N.J. 1799) (enhancing penalty if burglar "shall have upon him or her any pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent to assault any person" (emphasis added)) (available via Duke Repository); Act of Mar. 2, 1799, ch. 43, § 15, 1 Stat. 733, 736 (enhancing penalty for federal robbery of mail carrier "if in effecting such robbery . . . the offender shall much wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons" or "shall attempt to rob the mail of the United States, by . . . shooting at him or his horses, or threatening him with dangerous weapons" (emphases added)) (available via maint.loc.gov/law/help/statutes-at-large/5th-congress/session-3/c5s3ch43.pdf (PDF at 4)).

The same is true for laws enacted around the 1868 adoption of the Fourteenth Amendment. E.g., Of Offences Against the Person, § 4628 (Tenn. 1852) (enhancing penalty for assault "[i]f any person assaults and beats another with a cowhide, stick, or whip, having at the time in his possession a pistol or other deadly weapon, with intent to intimidate the person assaulted, and prevent him from defending himself" (emphasis added)) (available via Duke Repository); Act of June 8, 1872, ch. 335, §§ 285, 287, 17 Stat. 283, 320 (enhancing penalty for federal robbery of mail carrier "if, in effecting such robbery . . . the robber shall wound the person having custody of the mail, or

put his life in jeopardy by the use of dangerous weapons" or "shall attempt to rob the mail by . . . shooting at him or his horse, or threatening him with dangerous weapons" (emphases added)) (available via govinfo.gov/content/pkg/statute-17/pdf/statute-17-Pg283.pdf (PDF at 38)).

In sum, Founding- and Reconstruction-era laws never criminalized mere possession of a firearm during another crime—and certainly not mere constructive possession during drug distribution. At most, laws enhanced punishment for the intentional use of a firearm, carried on one's person, in furtherance of a violent offense. See Bruen, 597 U.S. at 70 (concluding that historical regulations "limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials").

The State likewise will find no refuge in 20th century laws. For starters, modern laws are largely irrelevant to the historical inquiry. Bruen, 597 U.S. at 34, 36-37, 66; see id. at 83 (Barrett, J., concurring); Heller, 554 U.S. at 605-26. Congress enacted 18 U.S.C. § 924(c)(1)(A) ("Section 924(c)")—the closest federal comparator to Section 4.1(a)—in 1968. So it likely means little to the Bruen historical analysis. But even if Section 924(c) is offered as an historical analogue, it is significantly narrower—both in text and in practice—than the

trial court's application of Section 4.1(a) here. In fact, Section 924(c) demonstrates that Section 4.1(a), as applied here, was unconstitutional.

§ 924(c) forbids "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm[.]"[4] Thus, consistent with the historical laws cited above, "[u]nder § 924(c), the 'mere presence' of a gun is not enough." United States v. Sparrow, 371 F.3d 851, 853 (3d Cir. 2004). "What is instead required is evidence more specific to the particular defendant, showing that his or her possession actually furthered the drug trafficking offense." Ibid. (quotation omitted).

Indeed, Section 924(c)'s explicit "in furtherance" requirement is what keeps the provision constitutional. United States v. Cash, 2023 WL 6532644, at *2-*3 (3d Cir. Oct. 6, 2023) (unpublished) (observing that "courts have repeatedly rejected Second Amendment challenges to § 924(c)" because the

[4] § 924(c) "has two separate prongs, the violation of either standing alone is sufficient to support a conviction under the statute: (1) 'us[ing] or carry[ing]' a firearm 'during and in relation to' the underlying offense; or (2) 'possess[ing] a firearm' 'in furtherance' of the underlying offense." United States v. Burnett, 773 F.3d 122, 134 (3d Cir. 2014). In Mr. Lyles-Belton's case, the State did not allege that he "use[d] or carrie[d]" his legal handgun. The State instead pursued a constructive possession theory of liability under Section 4.1(a). (E.g., 2T83-12 to 15 (State's opening: "the State's theory is that the Defendant constructively possessed the firearm, in addition to the cocaine."); 5T122-9 to 124-15 (State's summation))

"Amendment does not protect the right to possess a firearm for unlawful purposes" (emphasis added)); United States v. Potter, 630 F.3d 1260, 1261 (9th Cir. 2011) ("[I]t cannot seriously be contended that the Second Amendment guarantees a right to use a firearm in furtherance of drug trafficking." (emphasis added)). Under the trial court's application, however, Section 4.1(a) had no such purpose requirement.

The federal model charge for Section 924(c) likewise provides that "[p]ossession 'in furtherance of' means for the purpose of assisting in, promoting, accomplishing, advancing, or achieving the goal or objective of" drug trafficking. Mod. Crim. Jury Instr. 3d Cir. 6.18.924A-1 (2023). Indeed, the federal instruction specifically warns jurors that "[m]ere presence of a firearm at the scene is not enough to find possession in furtherance of a" drug trafficking crime because "[t]he firearm's presence may be coincidental or entirely unrelated to the underlying crime." Ibid. It then provides the jury with eight factors "that may help you determine whether possession of a firearm furthers" the drug trafficking offense. Ibid.[5]

[5] These factors are: (1) "the type of criminal activity that is being conducted;" (2) "accessibility of the firearm;" (3) "the type of firearm;" (4) "whether the firearm is stolen;" (5) "whether the defendant possesses the firearm legally or illegally;" (6) "whether the firearm is loaded;" (7) "the time and circumstances under which the firearm is found;" and (8) "proximity to drugs or drug profits." Mod. Crim. Jury Instr. 3d Cir. 6.18.924A-1 (2023). Of course, these factors were not included in the trial court's Section 4.1(a) instruction.

To be clear: the State can prohibit the possession of a firearm in furtherance of an unlawful purpose—including drug dealing. But permitting the jury to convict based on mere constructive possession violates the Second Amendment. See Rahimi, 144 S. Ct. at 1898 ("Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding.").

The Legislature can hardly be faulted for failing to predict the "Heller revolution." It first enacted N.J.S.A. 2C:39-4.1 in 1998, L. 1998, c. 26 (eff. June 24, 1998), and last tweaked the statute's text years before Heller, McDonald, and Bruen, L. 2001, c. 443 (eff. Jan. 11, 2002). Nevertheless, those subsequent decisions now bind the Legislature, the State, and this Court. Mr. Lyles-Belton brings only a narrow, as-applied challenge—not a broad facial challenge seeking to strike down Section 4.1(a) in its entirety.[6] And under the

[6] In the post-Bruen revolution, some courts have struck down parts of several federal and state statutes in toto—including New Jersey laws. E.g., Siegel v. Platkin, 653 F. Supp. 3d 136, 161-62 (D.N.J. 2023) (temporarily restraining enforcement of several New Jersey "sensitive place" laws), appeal pending, 3d. Cir. No. 23-2043; Koons v. Reynolds, 649 F. Supp. 3d 14, 45 (D.N.J. 2023) (same), appeal pending, 3d. Cir. No. 23-2043; Hardaway v. Nigrelli, 636 F. Supp. 3d 329, 332 (W.D.N.Y. 2022) (temporarily restraining New York law barring gun possession in "any place of worship or religious observation").

No such drastic remedy is required here. This Court can narrowly hold that the trial court's failure to instruct the jury on Spivey's "common purpose" requirement rendered Section 4.1(a) unconstitutional as applied to Mr. Lyles-Belton. Courts have often taken this cautious "as applied" approach when considering long-standing criminal laws. E.g., Lara v. Comm'r Pennsylvania

circumstances of this case, the State cannot "demonstrate that" Section 4.1(a), as interpreted by the trial court and applied to Mr. Lyles-Belton here, "is consistent with the Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 17, 24. So his conviction on Count Three must be vacated.

CONCLUSION

For the reasons stated above, this Court should reverse Mr. Lyles-Belton's convictions.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: */s/ Ethan Kisch*
ETHAN KISCH
Assistant Deputy Public Defender
Of Counsel and on the Brief
Attorney ID: 349152020

Dated: July 26, 2024

State Police, 91 F.4th 122, 140 (3d Cir. 2024) (enjoining state laws preventing 18- to 20-year olds from carrying firearms outside home during a state of emergency), rehr'g and rehr'g en banc denied, 97 F.4th 156 (3d Cir. 2024); Worth v. Jacobson, 2024 WL 3419668, at *14 (8th Cir. July 16, 2024) (similar); Duarte, 101 F.4th at 691 (holding federal "felon-in-possession" prohibition, 18 U.S.C. § 922(g)(1), unconstitutional as applied to non-violent felon), reh'g en banc granted, opinion vacated, 2024 WL 3443151; United States v. Ayala, 2024 WL 132624, at *1 (M.D. Fla. Jan. 12, 2024) (holding federal bar on firearm possession in federal facilities, 18 U.S.C. § 930(a), unconstitutional as applied to postal worker carrying legal handgun in post office), appeal pending, 11th Cir. No. 24-10462.

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3984-22T2

STATE OF NEW JERSEY, Plaintiff-Respondent, v. JOMO K. LYLESBELTON, a/k/a/ JOMO LYLES-BELTON, Defendant-Appellant.	CRIMINAL ACTION On Appeal from Final Judgment of Conviction in the Superior Court of New Jersey, Law Division, Atlantic County Sat Below: Hon. Dorothy M. Incarvito-Garrabrant, J.S.C., and a jury

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

AMANDA G. SCHWARTZ – ATTORNEY NO. 240412017
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE UNIT
P.O. BOX 086
TRENTON, NEW JERSEY 08625
(609) 376-2400
schwartza@njdcj.org

OF COUNSEL AND ON THE BRIEF December 9, 2024

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER AUTHORITIES

RULES

TABLE OF CITATIONS

Db – Defendant's brief
Da – Defendant's appendix
1T – May 1, 2023, Hearing Transcript
2T – May 3, 2023, Trial Transcript
3T – May 3, 2023, Jury Voir Dire Transcript
4T – May 4, 2023, Trial Transcript
5T – May 5, 2023, Trial Transcript
6T – May 8, 2023, Trial Transcript

PRELIMINARY STATEMENT

Defendant Jomo Lylesbelton was charged and convicted of various drug offenses after cocaine was found in his bedroom pursuant to a judicially-authorized search. The charged offenses included possession of a firearm while committing a drug offense—specifically, possession with intent to distribute—due to the discovery of a gun close in proximity to the location where the cocaine was found.

The trial court properly admitted the physical evidence based on the foundation established by the lead detective's testimony, i.e., based on his personal knowledge of supervising the search and securing the evidence. Any discrepancies in the detective's testimony were appropriately left for the jury to consider when deciding witness credibility and the weight of evidence. The State was also not required to call each law enforcement officer who participated in the search or handled the evidence to testify to satisfy the Confrontation Clause, as established legal precedent holds that gaps in the chain of custody impact the weight of evidence rather than its admissibility.

When alerted to the inadvertent admission of cocaine evidence from uncharged controlled buys, the trial judge took immediate action by striking the testimony and issuing comprehensive curative instructions to the jury. She explicitly directed them to disregard this evidence and repeated the instruction

multiple times. Given the strength and promptness of these instructions in protecting defendant from undue prejudice, the trial judge properly denied defendant's motion for a mistrial. Additionally, the judge's delivery of the model jury instruction for N.J.S.A. 2C:39-4.1 adequately explained the prosecution's burden to establish a clear spatial and temporal connection between the gun and the drugs.

Finally, N.J.S.A. 2C:39-4.1 was constitutionally applied to defendant because his specific conduct—the possession of a firearm while committing a drug offense—fell outside the scope of the Second Amendment. Courts have consistently ruled that the Second Amendment does not protect possessing weapons during the commission of drug-related offenses or other criminal activities. Accordingly, defendant's convictions should be affirmed.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On January 15, 2020, an Atlantic County Grand Jury returned Indictment 20-01-00092-I, charging defendant with third-degree possession of a Controlled and Dangerous Substance (CDS), N.J.S.A. 2C:35-10(a)(1) (count one); second-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(2) (count two); and second-degree possession of a firearm during a CDS offense, N.J.S.A. 2C:39-4.1(a) (count three). (Da1-3).

The trial was held before the Honorable Dorothy M. Incarvito-Garrabrant, J.S.C., and a jury between May 3, 2023, and May 8, 2023. (2T-6T). After the State presented its evidence, defendant moved for a mistrial. (4T5-20 to 6-4). The judge denied the motion. (4T20-6 to 21). Following the State's case, defendant moved for a directed verdict, which was also denied. (5T79-2 to 84-4). On May 8, 2023, the jury convicted defendant on all counts. (Da4-6; 6T94-19 to 96-6).

On July 28, 2023, before sentencing, defendant moved for a new trial, but the judge denied it. (7T3-15 to 7-19; 7T24-6 to 13). Defendant was sentenced that same day. The judge merged count one (possession of a CDS) with count two (possession of a CDS with the intent to distribute), and

sentenced defendant to a three-year term of imprisonment.[1] (7T44-16 to 22). For count three (possession of a firearm during a CDS offense), the judge sentenced defendant to a consecutive five-year prison term with a forty-two-month parole disqualifier under the Graves Act, N.J.S.A. 2C:43-6(c). (Da7-10; 7T144-16 to 145-14).

On August 29, 2023, defendant filed a notice of appeal in this Court. (Da23-25).

[1] The State notes that defendant received an illegal sentence that requires correction. A sentence may be corrected at any time if it is illegal, even if this requires increasing the term of imprisonment. See State v. Baker, 270 N.J. Super. 55 (App. Div.), aff'd o.b. 138 N.J. 89 (1994). Here, defendant's third-degree offense in count one merged into count two, a second-degree offense. But, defendant received only a three-year sentence, despite N.J.S.A. 2C:43-6(a)(2) requiring that imprisonment terms for second-degree crimes "be fixed by the court . . . between five years and 10 years." When offenses merge, the court must impose "the more severe aspects of the sentence for each offense." State v. Robinson, 439 N.J. Super. 196, 200 (App. Div. 2014). Thus, defendant's sentence of three years for a second-degree crime is an illegal sentence that must be corrected.

COUNTERSTATEMENT OF FACTS

The following facts were established at defendant's trial.

A. Detective DiValerio supervised the search of defendant's residence as the lead detective.

In August 2017, Detective Sergeant Marc DiValerio of the New Jersey State Police began investigating defendant and was assigned as the lead detective. (2T94-8 to 18). On August 10, 2017, DiValerio executed a search warrant at defendant's residence in Atlantic City, accompanied by "multiple members from [his] unit." (2T94-19 to 23). Upon arriving at the house, the police secured the location where only defendant was present. (2T96-5 to 9). "[E]very detective was responsible for different duties. Some search[ed] the residence. Some took pictures. Some watched over [defendant] to make sure he was safe." (2T96-9 to 14).

Police identified defendant's bedroom by finding clothing that matched what he had worn during previous surveillance, along with a checkbook belonging to him. (2T97-5 to 13). In the bedroom, police located "bags of cocaine, digital scales, packaging material, specifically plastic baggies, and a handgun." (2T99-15 to 17). Detective DiValerio testified that at the foot of the bed, there was a small bookshelf, and "drugs were located inside a plastic bottle on . . . that bookshelf." (2T99-18 to 23). DiValerio testified that after discovering and identifying the cocaine in the bottle, it was removed and placed

into New Jersey State Police evidence bags. The bags were sealed and marked with DiValerio's badge number before being transported to the police station for processing and subsequent testing at the State Police Lab. (2T104-3 to 15; 2T129-21 to 130-1). The State moved to admit Exhibit S-2, consisting of "the bags of cocaine that were located within that plastic bottle," into evidence. (2T103-18 to 21).

Defense counsel objected, challenging the foundation of Exhibit S-2. Counsel questioned whether Detective DiValerio was the one who found the cocaine, noting his repeated use of the passive phrase "was located" during his testimony. (2T104-16 to 105-3). In response, the judge directed the prosecutor to ask DiValerio follow-up questions. (2T105-5 to 10). When the prosecutor directly asked DiValerio if he was "the one who actually found the cocaine," he answered that he was not. (2T105-13 to 16). Counsel objected again to DiValerio's testimony, arguing that without personally finding the cocaine, DiValerio could not verify whether "somebody pulled it out of a pocket and said, look what I found." (2T106-14 to 19). The judge sustained the objection, allowing the State to again "ask follow-up questions to determine" how DiValerio knew about the cocaine. (2T106-6 to 10; 2T108-11 to 24).

The prosecutor resumed questioning, asking Detective DiValerio if he was present in the room during the search and if he observed one of his fellow

officers find the bottle of cocaine. DiValerio responded yes to both questions. (2T108-21 to 109-8). Again, the State moved to admit Exhibit S-2 into evidence, and again, defendant objected. (2T109-12 to 16). Defendant maintained that DiValerio had not specified what he observed—specifically, who opened the bottle and what actions he saw that officer take with it. (2T110-1 to 8). Counsel asked the judge to reserve her decision until after cross-examination, and she agreed. (2T110-19 to 24).

The prosecutor then continued direct examination, asking Detective DiValerio questions about the rest of the search. He testified that police also found pink plastic baggies that were "consistent with packaging for distribution of narcotics." (2T111-22 to 112-1; 2T113-12 to 19). DiValerio identified those baggies as Exhibit S-4, testifying that they were the same ones found during the search because they were sealed in a State Police evidence bag labeled with his name and badge number. (2T112-9 to 113-2). He also testified that he found "three digital scales" on the bookshelf. (2T113-24 to 114-1). DiValerio also identified the scales admitted into evidence as Exhibits S-5 through S-7 by the sealed State Police evidence bags bearing his name and badge number. (2T114-6 to 18). DiValerio explained that based on his training and experience, he knew that these scales "are typically used to weigh a specific quantity of narcotics for distribution" because they are small and often found with the drugs. And here

they were found on the "same shelving unit as the bottle . . . . Pretty much right next to them." (2T114-25 to 115-14).

Detective DiValerio found a 9-millimeter handgun in the top drawer of defendant's dresser. (2T121-2 to 7). He said the gun was within arm's reach of the bed and approximately six feet from the bookshelf containing the drugs. (2T123-14 to 124-2). DiValerio noted that the room was very small, measuring no larger than twelve-feet-by-twelve-feet. He said that upon entering, one could see the entire room with the bed positioned between the dresser and the bookshelf. (2T126-10 to 20, 2T128-7 to 15). The parties stipulated that the Smith & Wesson 9-millimeter handgun bearing Serial Number #HES0127, seized from defendant's room, was lawfully registered to defendant and that ballistics testing confirmed the weapon was operable. (2T122-4 to 12).

On cross-examination, Detective DiValerio confirmed that he was not the officer who personally handled the bottle or examined the contents. (2T130-12 to 20). DiValerio explained that, although he did not directly observe the grabbing and opening of the bottle, "somebody would have shown it to" him and made him "aware right then and there" to secure the evidence. (2T130-22 to 131-25). Based on this testimony, defense counsel objected to admitting the bottle containing cocaine into evidence, arguing that the State failed to establish "drug custody." (2T132-5 to 9; 2T133-5 to 7). The judge overruled the

objection. She explained that there was a sufficient foundation to admit the evidence because DiValerio was the officer responsible for securing the evidence, and he testified that he had secured the evidence from the searching officers. (2T135-1 to 5). The judge noted that the discrepancies between DiValerio's direct and cross-examination testimony concerning his observation of the bottle's discovery was a "fact question for the jury" that defense counsel could further explore during cross-examination. (2T136-3 to 15). Because no testimony "nullifie[d] the foundation," Exhibit S-2 (the bags of cocaine located inside the plastic bottle) was admitted into evidence. (2T138-4 to 17).

After the judge admitted the evidence, cross-examination continued. Detective DiValerio testified that another officer showed him the bottle "[w]ithin moments" of finding it, indicating, "hey, this is what we have[.]" (2T139-2 to 12). DiValerio said that after thoroughly searching the bedroom, the police seized items they believed "had evidentiary value for proving the crime of possession with intent to distribute." (2T146-3 to 12). But the police found no money, cutting agents, or multiple cell phones. (2T147-7 to 23). Although there were smoking pipes in the room, the police did not seize any drug paraphernalia used to ingest CDS. (2T151-19 to 152-5).

B. The State's mistake in admitting physical evidence of uncharged conduct was immediately stricken, and multiple curative instructions were given.

On redirect examination, the prosecutor asked Detective DiValerio to describe Exhibit S-2 to the jury. (2T156-15 to 20). DiValerio stated that in the bottle, there were "two clear plastic baggies" with "a white powder rock substance, cocaine." (2T156-21 to 23). The prosecutor then asked DiValerio to count additional bags packaged in the exhibit. As DiValerio began counting the bags of cocaine, defense counsel immediately objected, and the parties went to a sidebar with the judge. (2T156-24 to 157-16). Counsel informed the judge that Exhibit S-2 should not have included the two prepackaged bags from the controlled buys. (2T159-14 to 160-5). The prosecutor agreed and asked for the evidence of the additional baggies to be stricken from the record. (2T160-6 to 7). The judge agreed to strike the testimony, (2T160-8 to 13), and issued the following instruction to the jury before excusing it for the day:

> The objection is sustained . . . . I'm striking all of the testimony relative to those -- relative to the counting of those bags, of -- that the officer -- the Detective just testified to, as well as any testimony related to those items that were distributed from S-2 and given to the officer. You are to disregard that. You may not consider that in any of your deliberations.
>
> [(2T161-5 to 12).]

When the trial resumed the next day and before the jury was brought in,

defendant moved for a mistrial with prejudice. Counsel argued that defendant was prejudiced because "the jury heard DiValerio testify before them that there were multiple small bags of CDS packaged for distribution located in the Defendant's bedroom" and watched DiValerio counting the small bags in front of them. (4T5-4 to 9). The prosecutor acknowledged the error that led to the jury witnessing Detective DiValerio count evidence from the uncharged controlled buys. (4T10-12 to 15; 2T11-21 to 23). But the prosecutor maintained that "strong curative instruction[s]" could remedy any prejudice. (2T12-14 to 19). The State further suggested that adding an instruction to the final jury charges was appropriate to "really cure the prejudice." (4T12-22 to 13-5).

After reviewing Detective DiValerio's testimony and considering the arguments of counsel, the judge ruled that, based on the totality of the circumstances, "the trial [was] not irretrievably broken or lost" and did not rise to "the level of manifest injustice." (4T19-21 to 25; 4T20-6 to 8). Instead, the judge concluded that "with a strong curative instruction, the jury can be advised, instructed, and directed not to consider that evidence, and . . . they can follow that instruction to understand that they cannot consider any of that." (4T20-89 to 21). The judge explained she would permit additional direct and cross-examination regarding the remaining contents of Exhibit S-2, which could be separated from the inadmissible evidence. (4T22-6 to 12). The parties then

collaborated with the judge to draft a jury instruction, which defendant approved after suggesting several revisions that the court adopted. (4T25-12 to 16; 4T36-4 to 9). When the jury was brought in, the judge immediately instructed:

> Okay. So, you may recall when we broke yesterday that Detective DiValerio was testifying, and what I did was I asked you to disregard certain testimony at the end of the day. I'm going to read you an instruction. Members of the jury, it came to the Court's attention yesterday that while the State's witness, Detective DiValerio, was testifying, that he misidentified several items which had been packaged inside of State's Exhibit 2. When he -- what he misidentified were bags of suspected cocaine that were packaged. They are not relevant to this case, and it was testified to in error. In this regard, the State mishandled the items which this witness stated were packages containing cocaine, and stated that same were seized pursuant to a search of the Defendant's bedroom. They were not. I am instructing you in the strongest way possible that each of you shall disregard any testimony you heard on -- about those exhibits you observed in Court yesterday. You are not to consider whether -- what the State produced to be relevant to this matter and not to consider what the State produced as packaged cocaine. You shall disregard it. It was the State who made a mistake of placing them in the same bag with other evidence in S-2, which other evidence in S-2 is relevant to this matter. You are the judges of the facts. As with all witnesses, you may accept their testimony, reject their testimony, or accept or reject part of their testimony. As with all witnesses, you may evaluate their credibility, taking into account the factors I provided to you in my preliminary instructions.
>
> [(4T37-5 to 38-11).]

The judge then asked if each juror would be "able to scrupulously follow" the

instruction. All fourteen jurors nodded affirmatively, indicating they could comply with the court's instructions. (4T38-11 to 16). Then, before Detective DiValerio was recalled to the stand, the judge explained to the jury that the evidence that was part of the stricken testimony was also vacated from being admitted as part of Exhibit S-2. (4T38-22 to 39-2).

During redirect examination, Detective DiValerio reintroduced Exhibit S-2 as the evidence seized from defendant's bedroom. He identified it as "the cocaine . . .seized from Defendant's bedroom" and noted that it was found in "white rock form." (4T39-25 to 40-1). DiValerio also identified a photograph of the shelf where the drugs were found, which contained "pink baggies used to package narcotics and digital scales." (4T40-7 to 9). On recross-examination, defense counsel had DiValerio review photographs of the crime scene. DiValerio agreed that there was "not a single photograph of the alleged cocaine that was allegedly found," even though procedures for residence searches included taking photographs to document the items found. (4T44-1 to 4).

C. Expert testimony established that police recovered over half an ounce of cocaine from defendant's bedroom, indicating distribution.

Briana Senger, a forensic scientist with the New Jersey State Police who conducted the chemical analysis of the CDS in this case, testified as an expert in forensic science. (4T49-4 to 7; 4T50-16 to 18; 4T51-24 to 53-2; 4T55-3 to 8). She identified Exhibit S-2 as "two individual bags containing a white rock

like substance." (4T56-20 to 25). Senger explained that her analysis involved three steps. First, she weighed the evidence and determined that the total weight of the two bags combined was 17.578 grams—over half an ounce.[2] (3T59-16 to 60-1). Next, she performed a preliminary color test that indicated the presence of cocaine. (4T58-2 to 14). Finally, she conducted a confirmatory test called gas chromatography/mass spectrometry, which showed both bags contained cocaine. (4T58-17 to 59-1). Based on these tests, Senger concluded that the substance in the two bags was cocaine. (4T59-12 to 15).

Sergeant Michael Gonzalez from the New Jersey Division of Criminal Justice testified as an expert in narcotics based on his training and experience. (5T51-18 to 22). He explained that cocaine distribution occurs in various quantities ranging from kilograms down to ounces and grams, depending on the seller's level of operation. (5T56-3 to 6). Gonzalez further explained that cocaine dealers commonly add additives to increase profit while maintaining potency, noting that ten grams is the minimum amount allowable for this practice. (5T57-18 to 20). Gonzalez testified that during his undercover work, he never purchased less than ten grams when buying for distribution purposes. (5T58-17 to 59-7). For personal use purchases, however, he would buy no more

---

[2] One half-ounce is approximately fourteen grams. (5T57-18 to 20).

than an "eight ball," which is equivalent to 3.5 grams. (5T59-8 to 60-5). Based on his training and experience, Gonzalez concluded that possession of one half-ounce is "generally indicative" of distribution. (5T57-21 to 58-7).

D. Defendant renewed his objections to the admission of Exhibit S-2 and the prejudicial impact of the inadvertently presented evidence by moving for a directed verdict and a new trial.

After the State rested, defendant filed a motion for a directed verdict. Defendant argued that his right to confrontation was violated because the State never identified the officer who discovered the CDS, thus failing to establish initial custody of the evidence. (5T79-2 to 8-08). The judge denied the motion, concluding that the State had offered "sufficient evidence, considered in a light most favorable to the State, that would allow a reasonable jury to find the defendant guilty as charged, beyond a reasonable doubt." (5T82-10 to 14; 5T84-3 to 5). Addressing defendant's concerns about Detective DiValerio's testimony, the judge found that the "conflicting testimony between his testimony on direct, his testimony on cross . . . [a]s to whether or not he saw the CDS being . . . found by another officer or not" was an "issue of fact and credibility for the jury." (5T83-18 to 84-2).

After a charge conference was held off the record in chambers, both parties confirmed their consent to the charging document on the record. (5T92-18 to 22; 5T92-25 to 93-4). Following jury deliberation, defendant was found

guilty on all counts. (6T94-19 to 96-6).

Before sentencing, defendant moved for a new trial on interests-of-justice grounds. Counsel reiterated his arguments regarding the alleged Confrontation Clause violation and the erroneous admission of the controlled buy evidence before the jury. (7T3-15 to 7-9). The judge denied the motion, finding that "Detective DiValerio provided an adequate foundation to admit S-2 into evidence" because he was the lead detective on the case, was present when the cocaine was found, and secured it in the evidence bag. (7T30-16 to 24). She noted that "the State's choice not to call the law enforcement official who actually unscrewed the cap to the plastic bottle and first observed the cocaine did not violate the defendant's Sixth Amendment right to confrontation" because questions about foundation or chain of custody were credibility issues for the jury to decide. (7T30-25 to 31-10).

Addressing the admission of the two additional bags of cocaine, Judge Incarvito-Garrabrant emphasized that she "did not understate the severity of the State's mistake and provided multiple curative instructions." (7T32-20 to 33-4). She concluded that "[t]hese curative instructions along with the entirety of the instructions provided to the jury, including but not limited to false in one, and false in all, and credibility of the witnesses, adequately addressed and overcame any prejudice to the defendant from the inadvertent publication of the

additional bags of cocaine." (7T33-5 to 13). This appeal follows.

LEGAL ARGUMENT

POINT I

THE PHYSICAL EVIDENCE WAS PROPERLY ADMITTED AT TRIAL.

The trial court properly admitted the physical evidence from defendant's bedroom based on Detective DiValerio's testimony because he provided an adequate foundation as the supervising lead detective who was present during the search and responsible for securing the evidence. The alleged flaws in Detective DiValerio's testimony affected only how much weight the jury should give the evidence, not whether it should have been admitted. The discrepancies about whether he personally witnessed another officer find the cocaine or learned of its discovery shortly after did not invalidate the foundation for admitting the evidence. Instead, the discrepancies presented credibility issues for the jury to evaluate and weigh. Moreover, any hearsay statements about the evidence's discovery were harmless because the physical evidence of the drugs—not statements about their discovery—proved defendant's guilt. Additionally, gaps in the chain of custody did not constitute a Confrontation Clause violation, as well-established precedent holds that such gaps affect the weight of the evidence rather than its admissibility.

A. Detective DiValerio had personal knowledge of the discovery of the disputed evidence.

A trial court's determinations on the admissibility of evidence are reviewed for abuse of discretion. State v. R.Y., 242 N.J. 48, 64 (2020). Under that standard, a reviewing court reviews "a trial court's evidentiary ruling only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). A reviewing court will not substitute its "judgment for the trial court's unless" the trial court's determination "was so wide of the mark that a manifest denial of justice resulted." Ibid. (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

N.J.R.E 602's personal knowledge requirement mandates "firsthand knowledge -- that which comes to the witness through his own senses, mostly sight and hearing." State v. Watson, 254 N.J. 558, 592 (2023) (quoting Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 6.5 (4th ed., July 2022 update)). But the threshold "is low, requiring only enough 'to support a finding' by some rational juror of personal knowledge." Ibid. (quoting Paul F. Rothstein, Federal Rules of Evidence, Rule 602 (2023)). "A person who has no knowledge of a fact except what another has told him [or her] does not, of course, satisfy the present requirement of knowledge from observation." Neno v. Clinton, 167 N.J. 573, 585-86 (2001) (citation omitted). A party may choose not to call a witness if their testimony is unnecessary, potentially due to its

cumulative nature. See State v. Hill, 199 N.J. 545, 562 (2009).

Here, Detective DiValerio's testimony met N.J.R.E. 602's personal knowledge requirement through his role as lead detective supervising the search. He directly oversaw evidence collection and documentation, demonstrating his firsthand involvement by securing and labeling evidence bags with his name and badge number. As the officer who authored the investigation report and signed the criminal complaints, DiValerio had comprehensive knowledge of the search and its findings. Calling every officer who physically handled individual pieces of evidence would have been unnecessarily cumulative when the supervising detective could competently testify about the search and evidence collection process that occurred under his direct oversight. Thus, it was not an abuse of discretion for the trial judge to admit the physical evidence based on DiValerio's first-hand knowledge.

The discrepancies in Detective DiValerio's testimony—between his direct and cross-examination accounts of how he learned about the cocaine's discovery—arose during his discussion of Exhibit S-2. As detailed in Point II, infra, the jury received specific instructions regarding his erroneous testimony about Exhibit S-2, including that it was mishandled. In his closing argument, defense counsel emphasized that the judge needed to provide a jury instruction to correct DiValerio's erroneous identification of cocaine found in defendant's

bedroom. He also highlighted the curative instruction about the State's mishandling of evidence twice and previewed how the "False in one, False in all" jury charge could apply to DiValerio. (5T108-9 to 109-9; 5T113-1 to 12). The jury was properly tasked with assessing DiValerio's credibility regarding the discovery of the drugs. During the opening jury instructions, the judge informed the jury that they were "the sole judges of the facts" required "to pass upon all questions of fact, including the credibility and believability of the witnesses." (2T62-11 to 13; 2T68-21 to 23). The judge also instructed the jurors on credibility factors, including "whether the witness made any inconsistent or contradictory statements." (2T73-7 to 73-3). These instructions were reinforced multiple times during the final jury charge. (5T131-2 to 15; 5T133-20 to 134-6; 5T136-2 to 137-2). Thus, the jury could properly evaluate DiValerio's credibility and determine how much weight to give his testimony.

Moreover, any hearsay statements about the discovery of evidence were harmless because it was the physical evidence itself—the cocaine, digital scales, and packaging materials—that proved defendant's guilt, not statements about how these items were found. Here, the physical evidence and expert testimony provided proof of possession with intent to distribute and not hearsay statements from non-testifying witnesses. Unlike in Bankston, where inadmissible hearsay connected the defendant to the crime, resulting in the "logical implication" that

"a non-testifying witness ha[d] given police evidence of the accused's fault" in violation of hearsay rules and the Confrontation Clause. State v. Bankston, 63 N.J. 263, 268 (1973).

B. The admission of the evidence through Detective DiValerio did not violate the Confrontation Clause.

Both the Sixth Amendment of the Constitution and Article Ten of the State Constitution provide that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]'" State v. Buda, 195 N.J. 278, 299 (2008) (quoting U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). But the Confrontation Clause only "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" Crawford v. Washington, 541 U.S. 36, 51 (2004). The United States Supreme Court said in Melendez-Diaz v. Massachusetts that "it is not the case that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." 557 U.S. 305, 311 n.1, (2009). The Court recognized that while "[i]t is the obligation of the prosecution to establish the chain of custody," that does not mean that "everyone who laid hands on the evidence must be called." Ibid. (alteration in original) (citation omitted). Rather, "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." Ibid. (quoting United States v. Lott, 854 F.2d 244, 250 (7th

Cir. 1988)). Numerous courts have reinforced that Melendez-Diaz does not require testimony from every individual involved in the chain of custody. See Milligan v. State, 116 A.3d 1232, 1239 n.40 (Del. 2015) (collecting cases).

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." N.J.R.E. 901. "A party introducing tangible evidence has the burden of laying a proper foundation for its admission." State v. Brunson, 132 N.J. 377, 393 (1993). This foundation should include a showing of an uninterrupted chain of custody. Ibid. Nonetheless, "the State is not obligated to negate every possibility of substitution or change in condition of the evidence." Ibid. "Whether the requisite chain of possession has been sufficiently established to justify admission of the exhibit is a matter committed to the discretion of the trial judge, and his determination will not be overturned in the absence of a clearly mistaken exercise thereo." State v. Brown, 99 N.J. Super. 22, 27 (App. Div. 1968).

Detective DiValerio's testimony about the evidence found in defendant's bedroom did not violate the Confrontation Clause. The other officers announcing their discoveries to DiValerio—their supervising officer who was present and responsible for securing evidence—did not constitute "testimonial" statements bearing witness against defendant. As the Supreme Court explained

in Melendez-Diaz, while testimony from other officers may help establish chain of custody, the State need not call every officer who searched defendant's bedroom for each piece of evidence discovered. Instead, gaps in the chain of custody affect the weight of the physical evidence—a determination properly left to the jury. The judge, therefore, correctly admitted Exhibit S-2 and other physical evidence because DiValerio provided an adequate foundation—he was present during the search, observed the process, secured the evidence, and underwent cross-examination about his investigative procedures, including his observations and actions. This evidence was properly admitted at trial, and the ruling below should be affirmed.

POINT II

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL.

The State's error of showing the jury two bags of cocaine from the uncharged controlled buys did not require a mistrial, as the judge issued strong, immediate, and repeated curative instructions that adequately addressed any potential prejudice. The thoroughness and forcefulness of these curative measures, coupled with substantial evidence supporting the conviction, meant that the inadvertent admission of the controlled buys evidence could not have produced an unjust result.

A. The judge's strong and repeated curative instructions adequately addressed potential prejudice.

"A motion for a mistrial should be granted only in those situations where to deny it would result in manifest injustice." State v. Ribalta, 277 N.J. Super. 277, 291 (App. Div. 1994). When "the court has an appropriate alternative course of action," it should deny a request for a mistrial. See State v. Allah, 170 N.J. 269, 281 (2002). Thus, a mistrial is warranted only when an instruction to the jury or other curative action cannot remedy an error. See State v. Winter, 96 N.J. 640, 646-47 (1984). Determining whether inadmissible evidence can be effectively addressed through a cautionary or limiting instruction, or if it necessitates the more drastic measure of declaring

a mistrial, "is one that is peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting." Id. at 648. On appeal reviewing courts should only consider evidentiary errors that led to an unsuccessful mistrial motion if they were "'clearly capable of producing an unjust result.'" Ibid. (quoting State v. La Porte, 62 N.J. 312, 318-19 (1973)). Thus, appellate courts "will not disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice." State v. Jackson, 211 N.J. 394, 407 (2012).

"Trials are not perfectly orchestrated productions." State v. Yough, 208 N.J. 385, 388 (2011). To be sure, "inadmissible evidence frequently, often unavoidably, comes to the attention of the jury, and the record cannot be purged of all extraneous influence." Winter, 96 N.J. at 646. When inadmissible evidence is admitted in error, "a curative instruction may sometimes be a sufficient remedy." State v. Prall, 231 N.J. 567, 586 (2018). If the trial judge decides that a curative instruction is sufficient to address an error instead of a mistrial, the instruction "must be firm, clear, and accomplished without delay." State v. Vallejo, 198 N.J. 122, 134 (2009). "The same deferential standard that applies to the mistrial-or-no-mistrial decision applies to review of the curative instruction itself" because it is "in the best position to assess the impact of an

evidentiary ruling." State v. Herbert, 457 N.J. Super. 490, 503 (App. Div. 2019).

Reviewing courts assess the adequacy of the instruction using the three factors established by this Court in Herbert. "First, a court should consider the nature of the inadmissible evidence the jury heard, and its prejudicial effect." Herbert, 457 N.J. Super. at 505. "The adequacy of a curative instruction necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached." Winter, 96 N.J. at 647. Detailed instructions are more effective than general ones in addressing prejudicial evidence. Vallejo, 198 N.J. at 136.

Second, "an instruction's timing and substance affect its likelihood of success." Herbert, 457 N.J. Super. at 505. "[S]wift and firm instruction[s]" are preferred over one that is delayed because "delay may allow prejudicial evidence to become cemented into a storyline the jurors create in their minds during the course of the trial." Id. at 505-06. It is best practice "to give limiting instructions at the time the evidence is presented and again in the final jury charge." Id. at 506. Regarding content, detailed and explanatory instruction typically proves more effective than a broad, general one. The Supreme Court has repeatedly emphasized the necessity of "specificity when trial judges provide curative instructions to alleviate potential prejudice to a defendant from inadmissible evidence that has seeped into a trial." Vallejo, 198 N.J. at 135.

"Third, a court must ultimately consider its tolerance for the risk of imperfect compliance." Herbert, 457 N.J. Super. at 507. But, even in criminal cases where constitutional errors occur, not every possibility of an unjust outcome warrants a new trial. The possibility must be substantial enough to create reasonable doubt about whether the error influenced the jury's decision. See Ibid.; Winter, 96 N.J. at 647.

Instructions that fully address the prejudicial aspects of the testimony can effectively cure the taint of inadmissible evidence and minimize the risk of substantial prejudice. Here, the judge acted swiftly, striking the erroneous testimony and directing the jury to disregard it. Before any additional testimony was elicited, the judge issued the curative instruction—agreed to by the parties—the following day. Following best practices, the judge reinforced this instruction during final jury instructions—resulting in three distinct admonitions about disregarding this evidence, with the first two delivered immediately after the testimony. Furthermore, when the jury requested to review Detective DiValerio's testimony during deliberations, the judge took extra care to remind them of the struck testimony despite this evidence not being included in the playback. These thorough and repeated instructions effectively eliminated any risk of an unjust verdict.

The instructions here met all three Herbert factors. The detailed

instructions identified the State's mishandling of evidence as the source of error, clearly specified which evidence the jury was prohibited from considering, and were given immediately and repeatedly. In addition to the curative instruction given immediately, Judge Incarvito-Garrabrant instructed the jury generally on the term "evidence," explaining that it included testimony, stipulations, and exhibits. But then she emphasized that "any testimony that [she] may have had occasion to strike is not evidence and shall not enter in . . . final deliberations." She stressed that it must "be disregarded," meaning that "even though [the jury] may remember the testimony," it cannot be used in "discussion or deliberations." (5T132-12 to 21). Then specifically, the judge pointed to Detective DiValerio's testimony, stating that he misidentified the bags of suspected cocaine, reminding the jury that they "are not relevant to this case and was testified to in error." (5T132-22 to 133-3). She again explicitly stated that the State "mis-handled the items" and instructed the jury "in the strongest way possible" to "disregard any testimony you heard and those exhibits you observed in Court." (5T133-7 to 19).

The "False in one, false in all" instruction, was also charged to the jury:

> If you believe that any witness or party willfully or knowingly testified falsely to any material facts in the case with the intent to deceive you, you may give such weight to his or her testimony as you may deem it is entitled. You may believe some of it, or you may, in your discretion, disregard all of it.

[(5T137-3 to 9).]

The trial judge properly exercised her discretion by issuing a curative instruction to address the inclusion of erroneous evidence. The drastic remedy of a mistrial was unwarranted, given that the repeated instructions were sufficient to cure any potential prejudice.

B. The jury was capable of following the court's instructions.

"[I]n administering the criminal law the courts must rely upon the jurors' ability and willingness to follow the limiting instruction without cavil or question." State v. Manley, 54 N.J. 259, 270 (1969). Our Supreme Court already addressed the skepticism highlighted by defendant about jury instructions' ability to overcome prejudicial effects. The Court acknowledged that "[t]here are undoubtedly situations in which notwithstanding the most exemplary charge, a juror will find it impossible to disregard such a prejudicial statement." State v. Boone, 66 N.J. 38, 48, (1974) (citing Krulewitch v. United States, 336 U.S. 440, 453 (1949)). But the Court found those situations limited to contexts "in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Id. at 504 (quoting Bruton v. United States, 391 U.S. 123, 135 (1968)). Instead, the

Court noted that typically "evidentiary instructions probably do work, but imperfectly, and better under some conditions than others." Ibid. (citation omitted). Thus, a jury instruction's effectiveness depends on whether the jurors will be able to follow it. "For example, the Court found that a limiting instruction could never cure the prejudicial effect from the admission of a defendant's prior but withdrawn guilty plea." Herbert, 457 N.J. Super. at 504 (quoting State v. Boone, 66 N.J. 38, 48 (1974)).

The admission of evidence here did not rise to such an incurable level, and the jury could have followed the strongly worded curative instruction cautioning against using the evidence to infer defendant's guilt of the charged crimes. The cocaine from the controlled buys was not necessary to meet the weight requirement for the charged offense, and the weight of the drugs had not been discussed when the error occurred. Thus, defendant's guilt was proven beyond a reasonable doubt through the properly admitted two bags. After the curative instruction had been given, the forensic expert testified that Exhibit S-2 contained two individual bags—the correct amount—and specifically identified it as the evidence she tested. (4T56-20 to 57-13). This testimony reinforced that the inadmissible evidence was separate from and unnecessary, to prove the charged offense.

Additionally, "[a]lthough drug amounts are used to determine the

gradation of a violation of the offense of distribution/possession with intent to distribute CDS, see N.J.S.A. 2C:35-5(c), our law does not prescribe a minimum amount to prove an intent to distribute." State v. Rodriguez, 466 N.J. Super. 71, 119 (App. Div. 2021). "Rather, that determination depends on the totality of the relevant circumstances." Ibid. (citing Model Jury Charges (Criminal), "Possession of a Controlled Dangerous Substance with Intent to Distribute (N.J.S.A. 2C:35-5)" (rev. June 8, 2015). Here, the jury heard Detective DiValerio's testimony about other evidence found in defendant's room, including the baggies and scales, as well as Sergeant Gonzalez's expert opinion about how these items indicated an intent to distribute. Thus, the error of the jury seeing the two extra baggies that they were repeatedly instructed to disregard could not have led to an unjust result.

Lastly, this case is distinguishable from instances where other-crimes evidence is erroneously admitted, requiring analysis under N.J.R.E. 404(b).[3] Here, the evidence was inadvertently introduced through testimony, immediately recognized as an error, and promptly addressed by the trial court.

[3] N.J.R.E. 404(b) evidence is evidence of "other crimes, wrongs or act" that are "not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith." State v. Skinner, 218 N.J. 496, 514 (2014) (quoting State v. Cofield, 127 N.J. 328, 336 (1992)).

The jury was explicitly instructed that this evidence was admitted in error and to be disregarded rather than the jury being left to weigh prohibited propensity evidence. It is presumed that the jury followed this charge, and thus, there is no basis to reverse defendant's convictions.

POINT III

THE JURY WAS PROPERLY INSTRUCTED IN FINDING DEFENDANT GUILTY OF VIOLATING N.J.S.A. 2C:39-4.1, THAT HE POSSESSED A FIREARM WHILE IN THE COURSE OF COMMITTING A DRUG OFFENSE.

The statutory phrase "while in the course of committing" in N.J.S.A. 2C:39-4.1(a) establishes a requirement of a temporal and spatial nexus between the possession of a fireaem and the intended drug distribution. But this connection is an evidentiary standard rather than mandatory language required for jury instructions.

"[A] party may generally not 'urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict.'" State v. Macchia, 253 N.J. 232, 251 (2023) (quoting R. 1:7-2). In the absence of such objections, appellate courts review challenges to jury instructions for plain error. Under that standard "[a]ny 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." R. 2:10-2.

"In the context of a jury charge, plain error requires demonstration of '[l]egal impropriety in the charge prejudicially affecting the substantial rights

of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Burns, 192 N.J. 312, 341 (2007) (alteration in original) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). But the failure to "interpose a timely objection constitutes strong evidence that the error belatedly raised . . . was actually of no moment," State v. White, 326 N.J. Super. 304, 315 (App. Div. 1999), and creates a "presum[ption]" that the instructions were adequate." State v. Morais, 259 N.J. Super. 123, 134-35 (App. Div. 2003) (alteration in original).

Juries should receive instructions on all "essential and fundamental issues and those dealing with substantially material points." State v. Green, 86 N.J. 281, 287 (1981). But a defendant is "not entitled to have the jury instructed in his [or her] own words." State v. Whitaker, 402 N.J. Super. 495, 513 (App. Div. 2008) (alteration in original) (quoting State v. Pleasant, 313 N.J. Super. 325, 333 (App. Div. 1998)). "When a jury instruction follows the model jury charge, although not determinative, 'it is a persuasive argument in favor of the charge as delivered.'" Id. at 513-14 (quoting State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000)). The Supreme Court has acknowledged that "[i]t is difficult to find that a charge that follows the Model Charge so closely constitutes plain error." Mogull v. CB Com. Real Est. Grp., 162 N.J. 449, 466 (2000) (alteration

in original); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 8.1 on R. 1:8-7 (2023) ("Use by the court of model jury charges is recommended as a method, albeit not perfect, for avoiding error.").

N.J.S.A. 2C:39–4.1(a) provides in pertinent part:

> Any person who has in his possession any firearm while in the course of committing, attempting to commit, or conspiring to commit a violation of [a drug offense involving distribution or intent to distribute] is guilty of a crime of the second degree.

Under the statute, "the simple possession of [a firearm] in the course of committing a CDS crime is sufficient to qualify for criminal culpability." State v. Harris, 384 N.J. Super. 29, 52 (App. Div. 2006). "The character of the offense, therefore, is not dependent on how the firearm is used or intended to be used." Ibid. Instead, this Court has noted that N.J.S.A 2C:39-4.1 "seeks to end[] the 'mere presence of guns' at the scene where the drug offense is committed and the threat of violence posed when guns are available to a drug dealer.'" State v. Harrison, 358 N.J. Super. 578, 584, (App. Div. 2003), aff'd sub nom. State v. Spivey, 179 N.J. 229 (2004).

The question in Spivey was "whether defendant simultaneously possessed the firearm and drugs and, if so, whether the firearm was possessed 'while in the course of committing' a statutorily specified crime." 179 N.J. at 236. The issue came before the Supreme Court following this Court's decision

upholding Spivey's conviction, finding "the State satisfied its burden of proof under N.J.S.A. 2C:39–4.1a by showing that defendant jointly and constructively possessed both the drugs and the firearm, which were in close proximity to each other." Id. at 235; see Harrison, 358 N.J. Super. at 587. Spivey contended that to be convicted of "possession of a firearm while in the course of committing a drug offense" the State must prove either actual or constructive possession of the weapon in close physical proximity to his person at the time of the predicate drug offense. He claimed the State failed to meet this burden of proof, and therefore, the trial court erred in denying his motion for a judgment of acquittal. Ibid.

In addressing defendant's possession of the gun and drugs, the Supreme Court noted that "[a] person does not abandon legal possession of the items in his home every time he exits the front door." Id. at 237. Although Spivey was across the street when officers executed the search warrant on his apartment, the Court found that under the principle of constructive possession, "the evidence here permitted the jury to draw the reasonable inference that defendant had the intention and capacity to exercise dominion over the" gun and drugs found in the kitchen cabinet. Id. at 232–33, 37.

Next, the Court "determine[d] whether the evidence support[ed] the jury finding that defendant possessed the firearm 'while in the course of committing'

the drug offense." Id. at 237. Spivey argued that because he was outside the apartment building when officers found the drugs and gun inside the apartment, he could not commit an offense under N.J.S.A. 2C:39-4.1(a). Ibid. The Court rejected this argument by comparing N.J.S.A. 2C:39-4.1 with armed robbery, explaining that "[t]he scene of a robbery and many other violent crimes is wherever the defendant accosts his victim." Id. at 238. Thus, an "unarmed defendant who perpetrates a robbery in an alleyway has not committed an armed robbery if he leaves his gun at home, even though he is in constructive possession of the weapon" because there is no nexus between the gun and the crime. Id. at 238–39. But in Spivey, the "loaded .22 caliber handgun and the drugs were located at the scene of the crime, his home, where he could access both simultaneously." Id. at 239. The Court emphasized that because "[t]he gun and drugs were in close proximity to each other . . . a jury could infer that both were within defendant's control." Ibid. Thus, "the jury could infer that he possessed the gun with the intent to further" his intent to distribute the drugs. Ibid.

The Supreme Court noted that the language "while in the course of committing" suggests "a temporal and spatial link between the possession of the firearm and the drugs that defendant intended to distribute." Ibid. Justice Albin explained that this requirement meant "[t]he evidence must permit the jury to

infer that the firearm was accessible for use in the commission of the crime" because "[t]he inference . . .that the gun was possessed in the course of committing the drug offense—becomes more tenuous the further removed the gun is from the drugs." Ibid. Thus, "[t]he closer in proximity a firearm is to drugs, the stronger and more natural the inference that the two are related to a common purpose." Id. at 240. Applying that evidentiary standard, the Court ultimately found that "the jury could reasonably infer that defendant possessed the loaded firearm stored in his kitchen cabinet with the purpose of protecting himself and the drugs found throughout his apartment" based on "[t]he physical and temporal proximity of the weapon and the drugs[.]" Ibid.

During jury instructions, Judge Incarvito-Garrabrant delivered the model jury charge for "possession of a firearm while committing certain drug crimes." She instructed on the three elements the State must prove beyond a reasonable doubt for the jury to find defendant guilty of this charge. She explained that the third element was that "at the time alleged in the indictment, [defendant] was in the course of committing, attempting to commit, or conspiring to commit possession with the intent to distribute cocaine." (5T153-25 to 154-17). The model instruction for the third element states:

> The third element the State must prove beyond a reasonable doubt is that [defendant] possessed the firearm while he was in the course of committing, attempting to commit, or conspiring to commit the

> crime of possession with the intent to distribute cocaine. The term in the course of committing means that, at the time the defendant possessed the weapon, he was also committing a drug crime, namely possession with the intent to distribute cocaine. The term attempting to commit means that, at the time the defendant possessed the weapon, he was also purposely engaged in conduct which would constitute possession with the intent to distribute cocaine. If the attended circumstances were as a reasonable person would believe them to be or doing anything with the purpose of causing the result, which is a specific element of possession with the intent to distribute cocaine or purposely doing anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting the substantial step in the -- in a course of conduct planned to calumniate in his commission of that crime.
>
> [(5T157-12 to 158-8).]

Contrary to defendant's assertion, Spivey established an evidentiary standard that the State must meet to convict a defendant of this offense rather than a mandatory jury instruction requirement. Because the Court in Spivey addressed a challenge to the sufficiency of evidence —not jury instructions—it did not create a requirement for trial courts to sua sponte modify the model jury instructions for N.J.S.A. 2C:39-4.1 beyond the model charge, particularly since defendant made no such request below. This is especially significant given that the model jury charge has been used successfully for the last twenty-four years following the Spivey decision. The judge's use of the model jury instruction was, therefore, not plain error. The instruction properly required the State to

prove beyond a reasonable doubt that the gun was possessed "while in the course of committing" a drug offense, explaining this phrase to mean "at the time the defendant possessed the weapon, he was also committing a drug crime." This adequately conveyed Spivey's temporal and spatial link requirement between the gun and drugs. The State met this burden through testimony about the small size of defendant's bedroom and that someone in the bed could simultaneously reach for both drugs and the gun, which supported the rational inference that the firearm was accessible for use in the commission of a drug offense, creating the required nexus. Defendant's conviction under N.J.S.A. 2C:39-4.1(a) should, therefore, be affirmed by this Court.

POINT IV

N.J.S.A. 2C:39-4.1 WAS CONSTITUTIONALLY APPLIED TO DEFENDANT.

N.J.S.A. 2C:39-4.1(a) was constitutionally applied to defendant because the Second Amendment's plain text does not protect firearm possession during the commission of criminal activity. Instead, the scope of the Second Amendment, as confirmed by the United States Supreme Court and scores of other courts, reaches only the right to possess firearms for lawful purposes. Moreover, even if the Second Amendment presumptively protects the conduct prohibited by N.J.S.A 2C:39-4.1, the statute would still be constitutionally applied as it aligns with the historical principles underlying our nation's tradition of firearm regulation. As a result, it was properly left to the jury to decide whether defendant engaged in the specific conduct that N.J.S.A. 2C:39-4.1(a) prohibits—possessing a firearm while committing a drug offense.

As defendant acknowledges, he never challenged the constitutionality of N.J.S.A. 2C:39-4.1(a) as applied to him below. (Db37). "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). "Appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available." State v.

Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 19 (2009)). Even when considered, arguments not raised before the trial court are only reviewed for plain error. R. 2:10-2. Under the plain error standard, reversal is warranted only if an error was "clearly capable of producing an unjust result." Ibid. Thus, defendant waived his ability to challenge the statute's applicability and any review must proceed under the plain error standard.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. "Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense." United States v. Rahimi, 602 U.S. ___,144 S. Ct. 1889, 1897 (2024). The United States Supreme Court has emphasized that "individual self-defense is 'the central component' of the Second Amendment right[.]" New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 3 (2022) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)). But the Court has repeatedly made clear that "the right secured by the Second Amendment is not unlimited," as it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

Courts assessing Second Amendment claims conduct a two-step inquiry. First, a challenger must show that the Amendment's "plain text covers an individual's conduct," focusing on the "normal and ordinary meaning of the text." Bruen, 597 U.S. at 17, 20 (citation omitted). If it does, then "the Constitution presumptively protects that conduct," id. at 17, and the State must then show that "the challenged regulation is consistent with the principles that underpin our regulatory tradition." Rahimi, 144 S. Ct. at 1897-98. This inquiry is "not meant to suggest a law trapped in amber"; while the "law must comport with the principles underlying the Second Amendment, … it need not be a 'dead ringer' or a 'historical twin.'" Id. at 1898 (quoting Bruen, 597 U.S. at 30). Defendant's challenge fails at either step.

The Second Amendment does not protect defendant's possession of a firearm while committing a drug offense. Rather, "the right protected by the Second Amendment" is to keep and bear arms "for a lawful purpose." Heller, 554 U.S. at 620 (citation omitted); see also id. at 612 ("No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose." (citation omitted)). But the entire point of such a criminal charge is that defendants possess their weapons for unlawful purposes. Unlike the petitioners in Bruen, "ordinary, law-abiding adult citizens" who sought to carry a gun for self-defense publicly, defendant's conduct involved possessing

a semiautomatic handgun while possessing cocaine with intent to distribute. See Bruen, 597 U.S. at 31-32.

Unsurprisingly, courts both before and after Bruen have deemed such conduct unprotected. Pre-Bruen, the Third Circuit explained that "while the Second Amendment secures 'the right of law-abiding, responsible citizens to use arms . . . it does not entitle a drug trafficker to carry a firearm in furtherance of his criminal exploits[.]" United States v. Napolitan, 762 F.3d 297, 311 (3d Cir. 2014) (quoting Heller, 554 U.S. at 570) (internal citation omitted); see also United States v. Potter, 630 F.3d 1260, 1261 (9th Cir. 2011) ("[I]t cannot seriously be contended that the Second Amendment guarantees a right to use a firearm in furtherance of drug trafficking"). And following Bruen, courts "have held that the Second Amendment does not protect the possession of a gun in furtherance of criminal activity, such as drug trafficking." United States v. Harris, No. 2:20-cr-00679-BRM, 2024 U.S. Dist. LEXIS 89159, at *12-13 (D.N.J. May 17, 2024) (collecting cases). As Justice Alito underscored, Bruen did not "disturb[] anything that [the Supreme Court] said in Heller or McDonald about restrictions that may be imposed on the possession or carrying of guns," including that possession be for lawful purposes only. 597 U.S. at 72 (Alito, J., concurring). Defendant's unlawful conduct remains unprotected.

But even if the Second Amendment's plain text presumptively protected the conduct regulated by N.J.S.A. 2C:39-4.1, though it does not, the statute would still be constitutional as applied to defendant because it aligns with historical principles. Indeed, Bruen recognized that "[t]hroughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms[.]" 597 U.S. at 21. Its historical analysis reveals a clear principle of prohibiting firearm possession for unlawful purposes.

Before, during, and after the Founding, American jurisdictions systematically penalized the use of firearms during criminal activities, creating a principle for modern laws restricting firearm use during the commission of unlawful acts. As Bruen detailed, "the act of 'go[ing] armed to terrify the King's subjects' was 'a great offence at the common law'" if it was done "with evil intent or malice." Bruen, 597 U.S. at 44 (quoting Sir John Knight's Case, 3 Mod. 117, 118 Eng. Rep. 75, 76 (K. B. 1686)). Similar restrictions carried over to the colonies, where legislatures like those in Massachusetts and New Hampshire "codified the existing common-law offense of bearing arms to terrorize the people" by "proscrib[ing] 'go[ing] armed Offensively ... in Fear or Affray." Id. at 47. By the time of the Founding, "at least four States—Massachusetts, New Hampshire, North Carolina, and Virginia—expressly

codified prohibitions on going armed." Rahimi, 144 S. Ct. at 1901.

"As during the colonial and founding periods, the common-law offenses of 'affray' or going armed 'to the terror of the people' continued to impose some limits on firearm carry in the antebellum period." Bruen, 597 U.S. at 50. Through antebellum, "carrying for a 'wicked purpose' with a 'mischievous result . . . constitute[d a] crime.'" Bruen, 597 U.S. at 51-52 & n.15 (quoting State v. Huntly, 25 N.C. 418, 423 (1843) (per curium)); see also O'Neil v. State, 16 Ala. 65, 67 (1849) (prohibiting carrying deadly weapons "for the purpose of an affray, and in such manner as to strike terror to the people."). So while "those who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so," those who sought to carry for unlawful purposes were not. Bruen, 597 U.S. at 52 (emphasis added).

These early American laws establish a historical principle comfortably covering modern laws that prohibit firearm possession during the commission of a crime or for unlawful purposes, which would include CDS distribution. See Rahimi, 144 S. Ct. at 1897-98. Thus, N.J.S.A. 2C: 39-4.1(a), which prohibits those engaged in drug crimes from possessing firearms, is consistent with the historical tradition of firearms regulation in America. Defendant recognizes as much, conceding that it is "clear[] the State can prohibit the possession of a firearm in furtherance of an unlawful purpose—including drug

dealing." (Db49).

Defendant's "as-applied" argument that "permitting the jury to convict based on mere constructive possession violates the Second Amendment" also fails. Contra (Db49 & n.6). By claiming that "Founding- and Reconstruction-era laws never criminalized mere possession of a firearm during another crime—and certainly not mere constructive possession during drug distribution," (Db46), Defendant is patently seeking the State produce a "dead ringer" or a "historical twin," which the Supreme Court has expressly warned courts not to require, Rahimi, 144 S. Ct. at 1897-98. That is, even assuming a criminal charge based on constructive possession were "by no means identical to these founding era regimes, . . . it does not need to be." Id. at 1901.

Indeed, defendant's as-applied Second Amendment challenge is little more than a rehash of his substantive attack on his conviction. Compare (Db32-37) ("[T]he State presented no evidence that [defendant] ever used his legal handgun for anything but self-defense in his home."), with (Db37-50) ("There is no historical tradition of 'mere possession'—i.e., strict liability—gun laws."). This Court should reject that effort. See supra at 34-40. As this Court has already acknowledged, "[d]rug dealers are especially vulnerable to robbery, burglary, and other crimes because would-be attackers know drug dealers are not likely to report offenses and solicit aid from police." State v.

Rodriguez, 466 N.J. Super. 71, 120-21 (App. Div. 2021) (quoting Spivey, 179 N.J. at 240). And while "a drug dealer, like anyone else, may attempt to claim self-defense under N.J.S.A. 2C:3-4 (use of force in self-protection) to justify the use of a weapon," this "does not mean the firearm was not possessed while in the course of committing, attempting to commit, or conspiring to commit a" CDS offense. Id. at 121. Although defendant may have legally owned his gun, keeping it where it was easily accessible from the drugs that he was distributing still amounted to committing the criminal offense of possession of a firearm while intending to distribute cocaine. Since the evidence presented was sufficient for a reasonable jury to find that defendant possessed both the drugs and gun within the spatial and temporal proximity required by Spivey to establish a violation of N.J.S.A. 2C:39-4.1(a), the law survives a constitutional as-applied challenge. Nor can defendant satisfy the plain-error standard. Thus, his conviction should be affirmed.

CONCLUSION

This Court should affirm defendant's convictions.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: s/ *Amanda G. Schwartz*
Amanda G. Schwartz
Deputy Attorney General
schwartza@njdcj.org

AMANDA G. SCHWARTZ
DEPUTY ATTORNEY GENERAL
ATTORNEY NO. 240412017
DIVISION OF CRIMINAL JUSTICE
APPELLATE UNIT

OF COUNSEL AND ON THE BRIEF

DATED: December 9, 2024

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
ALISON PERRONE
Deputy Public Defender
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973-877-1200 · Fax 973-877-1239

JENNIFER N. SELLITTI
Public Defender

December 17, 2024

ETHAN KISCH
Assistant Deputy Public Defender
Attorney ID: 349152020
Of Counsel and on the Brief

LETTER-BRIEF IN REPLY ON BEHALF OF DEFENDANT-APPELLANT JOMO LYLES-BELTON

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3984-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Atlantic County.
JOMO K. LYLESBELTON, a/k/a JOMO LYLES-BELTON	:	Indictment No. 20-01-00092-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. Dorothy M. Incarvito-Garrabrant, J.S.C., and a jury
	:	DEFENDANT IS CONFINED

Your Honors:

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

TABLE OF CONTENTS

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-Appellant Jomo Lyles-Belton relies on the procedural history and statement of facts from his July 26, 2024, plenary brief. (Db3-10)[1]

LEGAL ARGUMENT

In response to the State's December 9, 2024, response brief (Sb), Mr. Lyles-Belton relies on the legal arguments detailed in his plenary brief (Db10-50) and adds the following arguments in reply.

REPLY POINT I

DETECTIVE DiVALERIO'S TESTIMONY VIOLATED N.J.R.E. 602, N.J.R.E. 802, AND THE CONFRONTATION CLAUSE. (Db10-21)

In Point I of his plenary brief, Mr. Lyles-Belton argues that Detective Marc DiValerio's trial testimony repeating what other police officers told him about the search of Lyles-Belton's bedroom violated N.J.R.E. 602's personal knowledge requirement, N.J.R.E. 802's hearsay bar, and the Confrontation Clause. (Db10-21) The law governing Detective DiValerio's testimony is clear: "both the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a

[1] The following abbreviations are used:
Db – Defendant-Appellant's July 26, 2024, Plenary Brief
Sb – The State's December 9, 2024, Response Brief
2T – May 3, 2023, Trial Transcript

non-testifying declarant to incriminate the defendant in the crime charged." State v. Branch, 182 N.J. 338, 350 (2005) (citing State v. Bankston, 63 N.J. 263, 268-69 (1973)); e.g., State v. Watson, 254 N.J. 558, 609-10 (2023); State v. Luna, 193 N.J. 202, 217 (2007). That is exactly what happened here.

The State does not dispute that Detective DiValerio's testimony was replete with hearsay. (See Sb 21-22) Nor could it, as DiValerio simply repeated what other officers told him about the search of Lyles-Belton's bedroom -- including where and how those other officers said they found drugs. (See Db15-18) Indeed, it is hard to pick out any non-hearsay testimony from DiValerio. (Ibid.)

According to the State, however, all that hearsay testimony was "harmless because the physical evidence of the drugs -- not statements about their discovery -- proved defendant's guilt." (Sb18, 21-22) But the location of the drugs was essential to the State's case. The State needed to prove that the drugs were for distribution -- not for personal use. The purported location of the drugs -- in a plastic bottle, near the scales and additional baggies -- was a key detail. (See Db19-20) Plus, as defense counsel argued below, Detective DiValerio could not even testify firsthand about the even more fundamental question of whether the drugs were located in Lyles-Belton's room at all. As defense counsel explained when arguing below that DiValerio's testimony was

impermissible, "he doesn't know where that cocaine came from. All he could testify to is this is what somebody told me. But honestly, he couldn't know if somebody pulled it out of a pocket and said, look what I found." (2T106-14 to 18) Defense counsel could not probe these crucial issues with DiValerio because he had no personal knowledge and provided only hearsay testimony.

The State also contends that Detective DiValerio's hearsay testimony did not violate the Confrontation Clause because "gaps in the chain of custody" go to "the weight of the evidence rather than its admissibility" (Sb18, 23-24), citing two sentences from a footnote in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009). But chain of custody is not the issue here. The real issue is that DiValerio provided hearsay testimony on the ultimate issue in the case, and that hearsay testimony violated Mr. Lyles-Belton's right to confront the actual witnesses against him. To that point, the State's argument omits the next crucial sentence in the Melendez-Diaz footnote: "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live." Ibid. (emphasis added). That is, all of Detective DiValerio's testimony recounting what other officers told DiValerio they did or DiValerio's speculating what other officers "would have" done should have been introduced by those other officers -- not through DiValerio's hearsay. But

those officers never testified, so DiValerio's testimony violated the hearsay bar and the Confrontation Clause. Branch, 182 N.J. at 350; Bankston, 63 N.J. at 268-69; Watson, 254 N.J. at 609-10; Luna, 193 N.J. at 217.

REPLY POINT II

THE CURATIVE INSTRUCTIONS DID NOT EFFECTIVELY REMEDY THE STATE'S DISPLAY OF OTHER CRIMES PHYSICAL EVIDENCE. (Db22-32)

In Point II of his plenary brief, Mr. Lyles-Belton argues that the trial court should have ordered a mistrial after the State showed the jury two additional bags of cocaine unrelated to the case, and Detective DiValerio told the jury that police recovered the bags from Lyles-Belton's bedroom. (Db22-32)

The State concedes that it wrongly displayed the additional bags and that its witness testified improperly. Nevertheless, the State contends that the "cocaine from the controlled buys was not necessary to meet the weight requirement for the charged offense," so "the error of the jury seeing the two extra baggies that they were repeatedly instructed to disregard could not have led to an unjust result." (Sb31-32) But the State misses the point of excluding prejudicial evidence of other crimes under N.J.R.E. 404(b). Such evidence has the capacity to "blind the jury from careful consideration of the elements of the charged offence," State v. Blakney, 189 N.J. 88, 93 (2006), "and poses a

distinct risk of distracting the jury from an independent consideration of the evidence that bears directly on guilt itself," State v. Reddish, 181 N.J. 553, 608 (2004) (quotation omitted). And because the court's initial curative instruction did not clearly explain what evidence it was striking or why the curative was necessary, jurors were left to ruminate on the additional bags of cocaine overnight. (Db28) At that point, as Mr. Lyles-Belton argues (Db28-31), no further instruction could have sufficiently cured the fact that the jury saw "other crimes" evidence touching on the ultimate issue in the case: whether the drugs were for personal use or distribution. The court's additional instructions were simply too late, and ultimately could not remedy the prejudice of the State's mistake.

Under the circumstances of this case, the trial court should have ordered a mistrial. Because it did not, reversal is required.

REPLY POINT III

THE JURY INSTRUCTION ON COUNT THREE WAS PLAINLY INCONSISTENT WITH SPIVEY. (Db32-37)

In Point III of his plenary brief, Mr. Lyles-Belton argues that the trial court failed to properly instruct the jury on Count Three, which charged second-degree constructive possession of a firearm contemporaneous to a drug offense under N.J.S.A. 2C:39-4.1(a) ("Section 4.1(a)"). (Db32-37)

Importantly, the State concedes that, per State v. Spivey, 179 N.J. 229, 239-40 (2004), the statutory phrase "while in the course of committing" in Section 4.1(a) "establishes a requirement of a temporal and spatial nexus between the possession of a firearm and the intended drug distribution." (Sb34 (paraphrasing Spivey))

The State makes three arguments. First, the State contends that Spivey only "established an evidentiary standard that the State must meet to convict a defendant rather than a mandatory jury instruction requirement." (Sb40, 34) The State does not explain what it means by "evidentiary standard," but it is clear that the State's use of "evidentiary standard" is just another way of saying "facts the State are required to prove." It is axiomatic that a jury must find "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970) (emphasis added). Those required facts constitute the essential elements of a crime. State v. Delibero, 149 N.J. 90, 99 (1997) ("The State in a criminal prosecution is bound to prove every element of the offense charged beyond a reasonable doubt." (citation omitted)); N.J.S.A. 2C:1-13(a) ("No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt."). Therefore, when the Spivey Court determined

that the State must prove a "temporal and spatial link" between a gun and drugs for distribution, it was defining a required element of the crime.

Ultimately, then, Spivey established the State's burden to prove the "temporal and spatial link between the possession of the firearm and the drugs that defendant intended to distribute." 179 N.J. at 239-40. That is, the jury must be able to "infer that defendant possessed the drugs with the intent to distribute" and "that he possessed the gun with the intent to further that criminal scheme." Ibid. The jury instructions in this case omitted all of this essential information. Indeed, under the sweeping strict liability instructions given below, a jury could have convicted a defendant who stores his legal gun at a Sussex County gun range if he also left illicit drugs in his Cape May County home 150 miles away.

The State's second argument fares no better. The State contends that because Spivey considered "a challenge to the sufficiency of evidence," it therefore "did not create a requirement for trial courts to sua sponte modify the model jury instructions for N.J.S.A. 2C:39-4.1 beyond the model charge, particularly since defendant made no such request below." (Sb 40) The State is right that Spivey was an appeal from a Reyes[2] motion challenging the

[2] State v. Reyes, 50 N.J. 454, 458-59 (1967) (establishing standard for motion for judgment of acquittal); see R. 3:18-1, -2.

sufficiency of the evidence. But that procedural posture only confirms that Spivey established the facts necessary to prove that Mr. Lyles-Belton was possessing a gun "while in the course of committing" a drug offense under Section 4.1(a). The Reyes standard "is whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Lodzinski, 249 N.J. 116, 144 (2021) (emphasis added); id. at 161 (Patterson, J., dissenting) (same). That is, the Spivey Court was tasked with defining the essential elements of Section 4.1(a). 170 N.J. at 239-40. Those essential elements must be included in the jury instructions. Indeed, the State later admits in its brief that it needed to prove Mr. Lyles-Belton "possessed both the drugs and gun within the spatial and temporal proximity required by Spivey to establish a violation of N.J.S.A. 2C:39-4.1(a)[.]" (Sb49) Without an instruction on this requirement, however, the jury did know enough to hold the State to its burden of proof.

Finally, the State rightly points out that defense counsel did not object to the trial court's use of the model instruction. But as explained in Mr. Lyles-Belton's plenary brief (Db35-36), even when counsel has not requested a specific instruction, "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) (quotation omitted) (cleaned up). In a case like this, where the Supreme Court in Spivey provided further guidance, it is not enough for a jury instruction to simply copy the statutory language. "A court's obligation properly to instruct and to guide a jury includes the duty to clarify statutory language that prescribes the elements of a crime when clarification is essential to ensure that the jury will fully understand and actually find those elements in determining the defendant's guilt." State v. Alexander, 136 N.J. 563, 571 (1994).

Here, Spivey provided that necessary clarification, but the trial court omitted it. Thus, this Court must reverse Mr. Lyles-Belton's conviction on Count Three -- even on plain error review with uncontroverted facts -- because the jury was not properly instructed on the essential elements necessary to convict. State v. Vick, 117 N.J. 288, 293 (1989) ("The requirement" that jury instructions obligate the State prove the essential elements of a crime "is so basic and so fundamental that it admits of no exception no matter how inconsequential the circumstances."); United States v. Haywood, 363 F.3d 200, 207 (3d Cir. 2004) ("The omission of an essential element of an offense in a jury instruction ordinarily constitutes plain error" because "due process requires proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant is charged." (quotation omitted) (cleaned

up)); State v. Whitted, 232 N.J. Super. 384, 391 (App. Div. 1989) ("Appellate resolution of a challenge to a jury charge in a criminal case cannot turn on the absence of defense counsel's objection to the charge, where an essential element of the offense charged was omitted in the jury instructions." (cleaned up)); see, e.g., State v. Grate, 220 N.J. 317, 333 (2015) (reversing on plain error because the trial court failed to instruct the jury that "knowingly" modified all material elements of the offense); State v. Afanador, 151 N.J. 41, 56 (1997) (reversing on plain error because the trial court failed to instruct the jury on an essential element of the drug kingpin statute); State v. Weeks, 107 N.J. 396, 410 (1987) (reversing on plain error be cause the trial court failed to instruct the jury on an essential element of accomplice liability).

In any event, this was not a trial in which the evidence of the requisite "temporal and spatial link" was uncontroverted. A jury properly instructed on the elements of Section 4.1(a) may well have reached a different result in this case given that Mr. Lyles-Belton's handgun was legal and stored in a closed dresser drawer across the room from the contraband. Thus, a reasonable jury could have found that it was not sufficiently "link[ed]" to the contraband in question to prove beyond a reasonable doubt that "he possessed the gun with the intent to further that criminal scheme" of drug distribution. Spivey, 179 N.J. at 239-40. Indeed, the State provided no evidence that Mr. Lyles-Belton

used his handgun for anything other than self-defense. (Db36-37) Whether these barriers severed the necessary spatial and temporal nexus is a factual question on which a reasonable jury, properly instructed on all elements of the offense, could have reached a different result.

Because the trial court failed to provide jury instructions that clearly articulated the essential elements of Section 4.1(a) as defined by Spivey, this Court must reverse Mr. Lyles-Belton's conviction on Count Three.

REPLY POINT IV

THE STATE FAILS TO MEET ITS BURDEN TO SHOW THAT N.J.S.A. 2C:39-4.1(A) -- AS APPLIED TO MR. LYLES-BELTON BY THE TRIAL COURT'S JURY INSTRUCTION ON COUNT THREE -- IS CONSISTENT WITH THE SECOND AMENDMENT. (Db37-50)

As explained in Point IV of Mr. Lyles-Belton's plenary brief, because the trial court failed to properly instruct the jury on Count Three consistent with Spivey, the instruction also violated the Second Amendment. (Db37-50) The trial court told the jury that Section 4.1(a) criminalized Mr. Lyles-Belton's mere constructive possession of his legal handgun even if totally unrelated to a contemporaneous drug offense. So, to withstand Second Amendment scrutiny, the State now has the burden on appeal to prove that our Nation has a historical tradition of criminalizing similar conduct. That is, the State must point to similar historical laws that criminalized mere constructive possession

of a legal gun contemporaneous to a drug offense, without Spivey's "in furtherance" requirement. (Db40-41) Otherwise, Section 4.1(a) violated the Second Amendment as applied to Mr. Lyles-Belton in this case.

In Rahimi and Bruen, the Supreme Court made clear that the State must do its homework to defend any application of a criminal law that touches on the right to possess a firearm. That is, "when the Government regulates arms-bearing conduct . . . it bears the burden to justify its regulation" by proving "the new law is relevantly similar to laws that our tradition is understood to permit." United States v. Rahimi, 602 U.S. 680, 691-92 (2024) (quotations omitted) (cleaned up). The State must make that showing by "identify[ing] a well-established and representative historical analogue[.]" New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 28-30 (2022); Rahimi, 602 U.S. at 692. In turn, this Court is required to hold the State to that burden. See Matter of M.U.'s Application for a Handgun Purchase Permit, 475 N.J. Super. 148, 162 (App. Div. 2023) (recognizing that this Court must "consider whether relevant historical analogues demonstrate that [the statute] is consistent with this Nation's historical tradition of firearm regulation" (quotation omitted)).

The State does not meet its heavy burden here, as it fails to raise a single historical law that criminalized mere constructive possession of a firearm contemporaneous to a drug offense without requiring that the possessor carried

the firearm in furtherance of that underlying drug offense. To be sure, the State points to a historical tradition of criminalizing the intentional use of a firearm, carried on one's person, in furtherance of a violent offense. (See Sb44-47) Mr. Lyles-Belton does not dispute that historical tradition -- indeed, the State relies on cases that Lyles-Belton already cited in his plenary brief's own historical review. (See Db42-49) But that is not the historical burden the State must shoulder here. The jury was instructed that Section 4.1(a) was a strict liability crime: if Lyles-Belton constructively possessed a gun contemporaneous to constructively possessing drugs for distribution, it was required to find him guilty. It did not matter where the gun and drugs were found. Nor did it matter whether or not the gun was possessed to further the drug offense because, under the court's jury instruction, no Spivey nexus was required.

Yet, the State brings forth no historical laws demonstrating that our Nation's tradition of firearm regulation sweeps that broadly.[3] In fact, the few

[3] Despite its failure to do so here, the State has had no difficulty offering dozens of potential historical analogues to support other gun statutes. E.g., Koons v. Platkin, 673 F. Supp. 3d 515, 586-591, 615-623, 628-657 (D.N.J. 2023) (examining dozens of historical laws raised by the State in a challenge to parts of N.J.S.A. 2C:58-4.6(a)), appeal filed 3d Cir. Dkt. 23-2043; Ass'n of New Jersey Rifle & Pistol Clubs v. Platkin, __ F.Supp.3d __, 2024 WL 3585580, at *23-24 (D.N.J. July 30, 2024) (same in a challenge to N.J.S.A. 2C:39-1(w), 2C:39-5(f), 2C:39-9(g), 2C:58-5), appeal filed 3d Cir. Dkt. 24-2415; Matter of M.U.'s Application for a Handgun Purchase Permit, 475 N.J. Super. at 185-89 (same in a challenge to N.J.S.A. 2C:58-3(c)(5)).

sources the State does cite further prove Mr. Lyles-Belton's point: historical gun laws required the government to prove that the firearm be carried on one's person in furtherance of an unlawful violent activity. (See Sb45-47; Db42-48) That is not what the strict liability instruction below required.

A proper jury instruction that informed the jury of Spivey's essential requirements to convict under Section 4.1(a) -- a "temporal and spatial link between the possession of the firearm and the drugs that defendant intended to distribute" demonstrating "that defendant possessed the drugs with the intent to distribute" and "that he possessed the gun with the intent to further that criminal scheme," 179 N.J. at 239 -- would not necessarily raise a Second Amendment issue. But the trial court included none of that necessary information. Thus, in addition to violating Spivey, Section 4.1(a) as applied to Mr. Lyles-Belton through the trial court's errant jury instructions plainly violated the Second Amendment. See State v. Montalvo, 229 N.J. 300, 321-24 (2017) (reversing, on plain error, when model jury instruction for N.J.S.A. 2C:39-5(d) was inconsistent with the Second Amendment and directing Committee on Model Jury Instructions "to review and revise" model charge accordingly).

Ultimately, the State wants to defend the trial court's sweeping interpretation of Section 4.1(a), as applied to Mr. Lyles-Belton, but does not

unearth any similar historical analogues to support it. Because the State has not made the showing required under Bruen and Rahimi, this Court must reverse Mr. Lyles-Belton's conviction on Count Three.

CONCLUSION

For the reasons set forth here and in Mr. Lyles-Belton's July 26, 2024, plenary brief (Db), this Court should reverse his convictions.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender

BY: */s/ Ethan Kisch*
ETHAN KISCH
Assistant Deputy Public Defender
Attorney No. 349152020

Dated: December 17, 2024