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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2023-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EUGENE RICHARDSON,

Defendant-Appellant.

Submitted May 16, 2017 – Decided October 4, 2017

Before Judges Fisher, Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 14-07-0587.

Joseph E. Krakora, Public Defender, attorney for appellant (Daniel V. Gautieri, Assistant Deputy Public Defender, of counsel and on the brief).

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Danielle R. Pennino, Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

Lacking a valid driver's license, defendant was caught giving a false name during a traffic stop for a motor vehicle violation. The officer arrested defendant for hindering

apprehension and took him down to the station. While in the booking room, the arresting officer searched defendant more thoroughly. The officer testified that once defendant removed his shoes he noticed a bulge in defendant's sock. He felt it. Drugs, he thought, and asked defendant to remove his sock, which revealed multiple packets of heroin.

The booking room's two motion-sensitive video cameras likely recorded the search. Yet, at defendant's jury trial on the drug possession charge — the hindering charge was not pursued — the State's case rested only on the officer's word. That is because the State allowed the booking room tape to be destroyed, despite defense counsel's prior written request that the State preserve and produce it.

The trial court denied his timely request to instruct the jury that it could draw an adverse inference from the tape's destruction. The trial court also denied defendant's pre-trial request to bar evidence that defendant hindered apprehension. The jury ultimately found defendant guilty of possessing heroin, and the court sentenced defendant, a repetitive offender, to a five-year term of imprisonment, with a two-year period of parole ineligibility.

Defendant presents two significant issues on appeal. First, was defendant entitled to an adverse inference charge to

remedy the police's routine destruction of the video where the defense expressly requested it be preserved? We conclude he was. In particular, we hold that when the State refuses a defendant's diligent pre-indictment request to preserve and produce recordings, which the State or its law enforcement agencies created and are directly relevant to adjudicating an existing charge, the defendant is entitled to an adverse inference charge. Second, did the court err in how it handled the evidence of hindering apprehension? We conclude it did. The evidence was inadmissible under N.J.R.E. 404(b) for its proffered purpose and, in any event, the court's instruction was inadequate. As these errors were not harmless, we reverse the conviction, and do not reach defendant's challenge to his sentence.

Before addressing each issue presented on appeal, we briefly review its procedural background.

I.

A.

We begin with the destruction of evidence. Five days after defendant's arrest, his attorney sent the prosecutor a discovery demand, which asked the State to preserve and produce "all video tapes, audio tapes or photographs, including but not limited to police vehicle video tapes, 911 tapes, police and emergency

personal [sic] dispatch tapes, [and] booking room tapes . . . ." (Emphasis added). The letter also "request[ed] that all evidence be preserved, protected and produced," and that "the State inform defense counsel in a timely fashion should the State learn that any evidence . . . relevant to this case . . . is about to destroyed . . . ."[1] The State did not respond, nor did it notify the police to preserve the booking room tapes.

At trial, the defense did not elicit evidence regarding its letter. Rather, it focused on the arresting officer's independent decision not to preserve the recording. A sergeant confirmed at trial that the cameras would have recorded a suspect held in the bench area where defendant was searched. However, the recordings were routinely overwritten after thirty days.

The arresting officer testified that he took no steps to preserve the recording. He claimed he only requested preservation of tapes to record incidents he did not see; therefore, there was no reason for him to request the tape's preservation. Yet, the sergeant testified officers could request the preservation of tapes "for almost any reason," and

[1] Although neither party included the letter in the record on appeal, we requested its production. In argument before the trial court, the State did not dispute that defense counsel had requested both the preservation and production of booking room recordings.

often did. He added that officers typically requested videos of incidents they did observe, noting that officers preserved tapes to refresh their recollection at trial. As the arresting officer did not request the video, it was erased thirty days after defendant's arrest.

The grand jury indicted defendant less than a month after the erasure.[2] By that point, there was no recording for the State to produce. In justifying its inaction, the prosecutor later contended her office had no responsibility to produce any discovery pre-indictment, although she essentially conceded the case had been referred to her office by the time defense counsel served the letter requesting preservation of the booking room recording.[3] She said that defense counsel could have submitted the discovery request directly to the police department. The prosecutor also noted that the request was a "form letter," and suggested that whether the recordings possessed evidence material to the defense was speculative.

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[2] Although the indictment charged possession with intent to distribute, N.J.S.A. 2C:35-5(b)(3), as well as simple possession, N.J.S.A. 2C:35-10(a)(1), the State dismissed the former charge before trial.

[3] She stated in oral argument opposing defendant's pre-trial motion to dismiss that when her office received the discovery request, "The State d[id]n't know if it[] [was] going to keep the case, or if it[] [was] going to dismiss the case."

Defendant moved before trial to dismiss the indictment on the ground that destruction of the videorecording violated his right to due process. The court denied the motion, finding the police did not act in bad faith.[4] That decision is not before us.

The court reserved decision on defense counsel's alternative request for an adverse inference jury instruction. However, when counsel renewed the request at trial, a different judge denied it.

The court held there was no binding authority that required the State to preserve the recordings in response to a letter to the prosecutor's office. Noting the prior finding of no bad faith, the judge stated he would have viewed the matter differently had defense counsel sent the request directly to the police. The judge stated that an adverse inference charge would "tell[] the jury the police did something wrong," which the court declined to do. When defense counsel renewed the request before summations, the court added that defense counsel had

[4] A defendant must prove bad faith to establish a due process violation based on destruction of potentially useful, as opposed to exculpatory, evidence. See State v. Marshall, 123 N.J. 1, 109 (1991) (applying Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988)), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993); State v. Mustaro, 411 N.J. Super. 91, 102-03 (App. Div. 2009).

thoroughly examined the issue at trial and could address it in closing.

The defense did. The absence of video was a major theme of the short trial. The defense's sole witness was the sergeant in charge of preserving booking room recordings. The defense highlighted the absence of the surveillance footage, and focused on the arresting officer's decision not to preserve the video, despite the sergeant's testimony that officers often did. In summation, the defense referred to cases in the news of police misconduct and misrepresentations ultimately belied by bystanders' recordings. The prosecutor responded that the officer was not required to preserve the recording and that there was no evidence of "foul play." The prosecutor contended that reference to the lost recording was a "smoke screen" and that the officer's observation of drugs met the State's burden.

As his first point on appeal, defendant contends:

> THE TRIAL JUDGE ERRED IN FAILING TO PROVIDE JURORS WITH AN ADVERSE-INFERENCE OR CURATIVE INSTRUCTION AFTER THE STATE FAILED TO PRESERVE THE VIDEOTAPE OF THE ALLEGED CRIME, THEREBY ALLOWING CRITICAL EVIDENCE TO BE DESTROYED.

B.

The issue presented involves the State's pre-indictment failure, despite defendant's request, to preserve obviously relevant evidence that would have been discoverable post-

indictment. We conclude that the State's failure to do so violated its implied obligations under the criminal discovery rules and our caselaw, and warranted an adverse inference instruction. Notably, our courts' power to order discovery is not limited to the express terms of the automatic discovery provisions of Rule 3:13-3(b). See State ex rel. A.B., 219 N.J. 542, 555 (2014). The courts have "the inherent power to order discovery when justice so requires." Ibid. (internal quotation marks and citation omitted). We draw support for our conclusion from our Supreme Court's decisions requiring police officers to preserve their interview notes before and after indictment. We also look to persuasive authority of other state courts.

1.

Without doubt, defendant, post-indictment, would have been entitled to discovery of the videorecording — had it been preserved. According to our Rules, the State's obligation to produce discovery in criminal cases arises after indictment, unless a pre-indictment plea offer is made. See R. 3:13-3(a) (pre-indictment discovery); R. 3:13-3(b)(1) (post-indictment discovery by defendant). The disclosure obligation pertains to "relevant material," R. 3:13-3(b)(1), and includes videorecordings in the State's possession, R. 3:13-3(b)(1)(B). To qualify as "relevant material," the evidence must have "'a

tendency in reason to prove or disprove [a] fact of consequence to the determination of the action.'" State v. Gilchrist, 381 N.J. Super. 138, 146 (App. Div. 2005) (quoting N.J.R.E. 401). A court must "focus upon 'the logical connection between the . . . evidence and a fact in issue.'" Ibid. (quoting State v. Darby, 174 N.J. 509, 519 (2002)). The videotape certainly met that standard. It recorded the alleged offense and would have tended to prove or disprove the officer's testimony that defendant possessed heroin in his sock.

We read Rule 3:13-3(b)(1) to imply a duty to preserve evidence pre-indictment, at least where the item is clearly destined for post-indictment disclosure and a defendant timely requests its preservation. To conclude otherwise would give the State, as well as the police, free rein to destroy evidence that may help a defendant, before indictment triggers automatic disclosure. That would frustrate the broad pre-trial discovery our Rules authorize and undermine the Rules' goals of "promoting the search for truth," and "providing fair and just trials." State v. Scoles, 214 N.J. 236, 251-52 (2013).

In a series of decisions culminating in State v. W.B., 205 N.J. 588 (2011), the Supreme Court established that the State must preserve, for later disclosure, the pre-indictment writings and notes of a police officer under the prosecutor's

supervision. Id. at 608; see also State v. Branch, 182 N.J. 338, 367 n.10 (2005) (criticizing police officers' "seemingly routine practice of destroying their contemporaneous notes of witness interviews"); State v. Cook, 179 N.J. 533, 542 n.3 (2004). Once "a case is referred to the prosecutor following arrest by a police officer as the initial process, or on a complaint by a police officer, local law enforcement [becomes] part of the prosecutor's office for discovery purposes." W.B., supra, 205 N.J. at 608 (citing R. 3:3-1; R. 3:4-1). The obligation established in W.B. "cover[s] the gap between the investigation and a defendant's indictment." State v. Dabas, 215 N.J. 114, 119 (2013) (citing W.B., supra, 205 N.J. at 608). Upon indictment, the notes are disclosable as reports "in the possession, custody and control of the prosecutor." W.B., supra, 205 N.J. at 608 (citing R. 3:13-3(c)(6), (7), and (8) (2011), now found at R. 3:13-3(b)(1)(F), (G), and (H)).

The Court's decision in W.B. responded to the widespread police practice of destroying notes once an officer prepared a formal report. See Dabas, supra, 215 N.J. at 118-19. The officer in W.B. destroyed notes of interviews of the alleged victim and the defendant in a sexual assault case. W.B., supra, 205 N.J. at 607. The Court explained that preserving writings would guard against "the possibility of a misrecording" in the

subsequent report. Ibid. The Court grounded the requirement in both the discovery rules and the right to confront witnesses:

> Yet the possibility of a misrecording is precisely why the notes must be maintained — a defendant, protected by the Confrontation Clause and our rules of discovery, is entitled to test whether the contemporaneous recording is accurate or the final report is inaccurate because of some inconsistency with a contemporaneous recordation. It is for the jury to decide the credibility of the contemporaneous or other recordation made while an investigation is on-going prior to preparation of a formal report.
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> [Id. at 607-08.]

Just as the State may not routinely destroy officers' notes before they must be disclosed under Rule 3:13-3(b)(1), we conclude the State may not destroy law enforcement's videorecording of an offense, particularly when a defendant has made a timely request to preserve it. The same confrontation right at play in W.B. applies to the destruction of a videorecording of an officer searching a defendant. The recording enables a defendant to test the officer's version of what transpired.

The evidential value of the recordings may be substantial, and even more reliable than an officer's notes. As the Court stated, in reference to the recording of an alleged child abuse victim's statement:

> [T]he videotape "convey[s] not only the exact words spoken by the child, but their finer shades of meaning through facial expressions, body movements and inflections of voice." In addition, a video recording creates an objective, reviewable record, enhances the reliability of confessions, protects police officers from false allegations, improves the overall quality of police work, and may well "preserve judicial resources" by discouraging defendants from raising frivolous pre-trial challenges to the admission of the child's statement.
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> [State v. P.S., 202 N.J. 232, 253 (2010) (citations omitted).]

As for remedy, the W.B. Court held, prospectively, that "if notes of a law enforcement officer are lost or destroyed before trial, a defendant, upon request, may be entitled to an adverse inference charge molded, after conference with counsel, to the facts of the case." 205 N.J. at 608-09. As the defendant in W.B. neither requested an adverse inference charge at trial, nor timely raised the issue before his new trial motion, the Court declined to hold on appeal that the defendant was entitled to the charge. Id. at 609. The Court added that an adverse inference charge as a sanction for destruction of interview notes may be "unnecessary where enough evidence is presented to make [the] out-of-court statement trustworthy" without the notes. Id. at 609 n.10 (citing P.S., supra, 202 N.J. at 254).

However, the Court mandated an adverse inference charge under the circumstances presented in Dabas, supra. The officer

in Dabas destroyed his lengthy pre-interview notes involving a murder investigation. 215 N.J. at 123-24. The pre-interview was followed by a brief recorded inculpatory interview consisting of short answers to leading questions. Ibid. Upon preparing his written report, the officer destroyed his pre-interview notes a year after indictment. Id. at 123. The notes were unquestionably subject to discovery by that time. The Court held it was an abuse of discretion for the trial court to refuse to give an adverse inference charge as requested by the defendant. Id. at 141.

The Court highlighted the impact of the officer's destruction of notes on the truth-seeking process:

> The potential for unconscious, innocent self-editing in transferring words, sentence fragments, or full sentences into a final report is a real possibility. So is the potential for human error in the transposition of words from notes into a report. The meaning and context of [the defendant's] words as recorded in the notes may have been subject to differing interpretations where [the investigator] saw only one. Language nuances may have been lost as [the investigator] translated them into the final report. The slightest variation of a word or a phrase can either illuminate or obscure the meaning of a communication.
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> [Id. at 138-39.]

In other words, destruction of notes deprives a defendant of potentially useful evidence.

"The adverse-inference charge is a remedy to balance the scales of justice . . . ." Id. at 140. The Court drew parallels to the adverse inference charge authorized in State v. Clawans, 38 N.J. 162, 170-75 (1962), which involved a missing witness, rather than missing evidence. Ibid. "[A] defendant may be entitled to such a charge if the State fails to present a witness who is within its control, unavailable to the defense, and likely to give favorable testimony to the defendant." Ibid.

The Court concluded that "[b]alancing the scales" required an adverse inference charge consisting of instructions that (1) "the State had a duty to produce the pre-interview notes to the defense following the return of the indictment"; (2) "[b]ecause the State made the notes unavailable, . . . the jury . . . was permitted to draw an inference that the contents of the notes were unfavorable to the State"; and (3) "[w]hether to draw such an inference falls within the jury's discretion, after it gives full consideration to the nature of the discovery violation, the explanation given by the State for the violation, and any other relevant factors that would bear on the issue." Id. at 141.[5]

[5] In response to the Court's decision in W.B., the Committee on Model Criminal Jury Charges adopted the following instruction:

> You have heard testimony that ___ failed to preserve (his/her/their) original notes in this case. Law enforcement

(continued)

Here, the case for such an adverse inference charge is just as strong. Although this case involves the pre-indictment destruction of evidence, defense counsel's timely request to

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(continued)

> officers are required to preserve contemporaneous notes of their interviews and observations at the scene of a crime, even after producing their final reports. A defendant is entitled to test whether the officer has accurately recorded statements and observations that were made contemporaneously and also to test whether the final report and the officer's trial testimony are inaccurate because of some inconsistency with what the officer recorded at the scene. When the contemporaneous notes are not preserved, the defendant is deprived of this opportunity to test the accuracy of the contemporaneous notes, the final report, and the trial testimony.
>
> [Insert Parties Contentions, If Any]
>
> It is for you the jury to decide the credibility of the evidence presented. In evaluating the officer's credibility, you may infer that notes lost or destroyed by an officer before trial contained information unfavorable or inconsistent with that officer's trial testimony or final report. In deciding whether to draw this inference, you may consider all the evidence in the case, including any explanation given as to the circumstances under which the contemporaneous notes were lost or destroyed. In the end, however, the weight to be given to the testimony, and to the loss or destruction of the notes, is for you, and you alone, to decide.
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> [Model Jury Charge (Criminal), "Failure of Police to Preserve Notes" (2011).]

preserve the evidence places this case in a category more like Dabas than W.B. Just as the State in Dabas failed to preserve and produce evidence, despite an explicit requirement, the State here failed to preserve and produce the videorecording, despite an explicit request. Also, as in Dabas, defendant timely requested an adverse inference charge. In fact, the evidential impact of the recording in this case is as great, if not greater than in Dabas. Here, the recording memorialized the offense itself and there is no corroborating evidence of the officer's version of events.

We recognize that trial courts are vested with the discretion to fashion an appropriate sanction for a violation of discovery obligations. Dabas, supra, 215 N.J. at 141; see also R. 3:13-3(f). Trial courts also exercise broad discretion in determining whether to comment on evidence during a jury instruction, State v. Brims, 168 N.J. 297, 307 (2001), or to grant a defendant's request for a particular jury charge. State v. Green, 86 N.J. 281, 290 (1981).

However, we are not obliged to defer to the exercise of discretion that rests on an "impermissible basis." See Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (internal quotation marks and citation omitted). We will also reverse a conviction where the court, which is obliged "to ensure that the

jurors receive accurate instructions on the law," delivers "erroneous instructions on material issues," State v. Reddish, 181 N.J. 553, 613 (2004) (internal quotation marks and citations omitted), or omits an instruction that is prejudicial to the defendant "in light of the totality of the circumstances," see State v. Marshall, 123 N.J. 1, 145 (1991) (internal quotation marks and citations omitted), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993).

The trial court here not only refused defendant's request for an adverse inference charge, but denied any other remedy to "balance the scales" that the State tilted by permitting the recording's destruction. In finding no discovery violation, the court presumed the State was not obliged to preserve the recording; and the defense should have directed its request to the police. Yet, as noted above, since the case was referred to the prosecutor, the police and the prosecutor's office acted as one. See W.B., supra, 205 N.J. at 608. In sum, the implied obligation of Rule 3:13-3(b)(1); the Court's decisions in Dabas and W.B.; and the defense's explicit request for preservation all compelled the State, including the police, to preserve the recording. As it failed to do so, an adverse inference charge was warranted, so the jury could itself weigh "the explanation

given by the State for the violation." Dabas, supra, 215 N.J. at 141.

We reject the State's contention that defendant was obliged to show the State acted in bad faith and the evidence was exculpatory. Bad faith is an essential element of a due process violation where the evidence is potentially useful. See Marshall, supra, 123 N.J. at 109; State v. Knight, 145 N.J. 233, 245 (1996). On the other hand, "[s]uppression of requested exculpatory evidence violates due process, regardless of the prosecution's good faith." State v. Robertson, 438 N.J. Super. 47, 67 (App. Div. 2014), rev'd on other grounds, 228 N.J. 138 (2017). However, as the Court held in W.B. and Dabas, neither proof of bad faith, nor a showing that evidence is exculpatory, is essential to demonstrate a discovery violation or to justify an adverse inference charge.[6]

2.

Our conclusion also finds support in the persuasive decisions of other jurisdictions. They have found an adverse inference charge was warranted by the State's destruction of potentially useful evidence, even where bad faith was not shown.

[6] Bad faith is not a prerequisite for an adverse inference charge in the civil context, as a sanction for spoliation of evidence. See Jerista v. Murray, 185 N.J. 175, 202 (2005). We can conceive of no reason to impose a more demanding standard when a person's liberty is at stake in a criminal case.

See State v. Glissendorf, 329 P.3d 1049, 1051-53 (Ariz. 2014) (adverse inference charge required where State destroys evidence that has a "tendency to exonerate" or is "potentially useful"); Hammond v. State, 569 A.2d 81, 90 (Del. 1988) (defendant entitled to adverse inference charge where State destroyed a crashed automobile in a vehicular homicide case); Cost v. State, 10 A.3d 184, 196 (Md. 2010) (requiring adverse inference charge where State destroyed "highly relevant" tangible evidence); People v. Handy, 988 N.E.2d 879, 879 (N.Y. 2013) (stating, "when a defendant in a criminal case, acting with due diligence, demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the State, the defendant is entitled to an adverse inference charge"); People v. Butler, 33 N.Y.S.3d 602, 605 (App. Div. 2016) (mandating adverse inference charge where police surveillance video of crime was erased before a defense request).

In Handy, supra, the defendant was charged with assaulting sheriffs officers in a jail. 988 N.E.2d at 879. A jailhouse recording system recorded at least part of the incident. Id. at 880. One of the officers viewed the video, reportedly decided it recorded only a "very small part" of the incident, and allowed the images to be routinely overwritten after thirty days. Ibid. The tape was erased, despite the defendant's

demand for the evidence shortly after he was charged with a felony complaint, but before indictment.[7]

Adhering to Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), as does our Supreme Court, the New York Court of Appeals declined to find a due process violation. Yet, it held that the trial court was required to grant defendant's request for an adverse inference charge. Id. at 883. The New York court rejected the Appellate Division's conclusion that the defendant could not establish the recording's value, noting that the State's destruction "created the need to speculate about its contents." Id. at 882. Furthermore, requiring an adverse inference would "give[] the

[7] The timing of the defendant's request was elucidated in a subsequent case, People v. Durant, 44 N.E.3d 173, 179 (N.Y. 2015) (stating, with reference to Handy, "[d]espite the defendant's demand for such evidence, the police destroyed the surveillance images sometime between the defendant's arraignment on the complaint and the filing of the indictment"). However, the New York Appellate Division rejected the notion that the duty to preserve evidence is only triggered upon the defendant's request, and instead required authorities to take whatever steps necessary to preserve the relevant evidence "'when something will . . . foreseeably lead to criminal prosecution.'" Butler, supra, 33 N.Y.S.3d at 605 (quoting Handy, supra, 988 N.E.2d at 882-83). "To conclude that the duty to preserve is not triggered until a request is made by the defendant would only give an incentive to State agents to destroy the evidence before the defendant has a chance to request the tapes." Ibid. On the other hand, the New York model jury instruction, drafted after Handy, addresses cases where government agents destroyed evidence after the defense requested it. See id. at 607 (Curran, J., concurring).

State an incentive to avoid the destruction of evidence." Ibid. The court emphasized that the jury was permitted, but not required, to draw an inference in defendant's favor. Id. at 883; see also People v. Viruet, ___ N.E.2d ____ (N.Y. 2017) (slip op. at 7-8) (extending the rule to a third party recording, in the State's possession, of the murder the defendant was charged with committing).[8]

The court in Handy, supra, 988 N.E.2d at 882, relied on the Maryland Court of Appeals' decision in Cost, supra. Cost involved the destruction of tangible items of evidence in the prison cell where the defendant allegedly stabbed a fellow inmate through a slot between their two cells. 10 A.3d at 187-88, 196. The items included the victim's allegedly blood-stained linens and clothing. Id. at 196. The Maryland court held that a "missing evidence" charge was mandated because "[t]he evidence destroyed while in State custody was highly

[8] Much like the instruction outlined in Dabas, supra, 215 N.J. at 141, the New York model jury charge, adopted after Handy, informs the jury of the State's obligation to preserve evidence, but leaves it to the jury to determine whether to draw an adverse inference. See CJI2d [NY] Destroyed Evidence. By contrast, the Arizona model charge, referenced in Glissendorf, supra, 329 P.3d at 1051, does not inform the jury that the State is obliged to preserve the evidence, but it informs the jurors that they may draw an adverse inference if they are not satisfied with the State's explanation for its destruction. See Rev. Ariz. Jury Inst. Stand Crim. 10 ("Lost, Destroyed, or Unpreserved Evidence").

relevant to [the defendant's] case," and "could not be considered cumulative, or tangential -- it goes to the heart of the case." Ibid. Furthermore, the defendant's own argument to the jury was no substitute for an instruction from the court, which would have "more force and effect." Id. at 196-97 (internal quotation marks and citation omitted).

The court held that fairness dictated a "missing evidence" instruction favoring defendant, particularly since Maryland law permits a "missing evidence" instruction against a defendant, to allow a jury to infer consciousness of guilt. Id. at 191, 197. The court recognized, "[f]or the judicial system to function fairly, one party in a case cannot be permitted to gain an unfair advantage through the destruction of evidence." Id. at 197.

The court declined to require the instruction "as a matter of course, whenever the defendant alleges non-production evidence." Ibid. Instead, the court left it to the trial court's discretion to refuse such a charge "where the destroyed evidence was not so highly relevant, not the type of evidence usually collected by the state, or not already in the state's custody." Ibid. However, a trial court "abuses its discretion when it denies a missing evidence instruction and the jury instructions, taken as a whole, [do not] sufficiently protect

the defendant's rights and cover adequately the issues raised by the evidence." Ibid. (internal quotation marks and citation omitted).

Consistent with this persuasive authority, we conclude the trial court erred in rejecting defendant's request for an adverse inference charge. The recordings were unquestionably relevant, as they pertained to the very heart of the case. Defendant exercised due diligence in requesting the preservation and production of the recordings. Yet, the State and police, acting as one, allowed the routine destruction of the recording.

3.

We conclude that the court's error denied defendant a fair trial. This prosecution for simple drug possession rested solely on the arresting officer's word. The State asked the jury to believe that an on-the-scene search did not uncover the drugs; a booking room search did. But, no one else in the booking room could confirm that is what happened. While officers often preserved recordings, the arresting officer chose not to. The recording may have conclusively established defendant's guilt if the officer was truthful, but it may have conclusively exonerated defendant if the officer was not. A jury instruction would likely have added weight to the defense argument, by expressly permitting the jury to draw an adverse

inference from the destruction of the booking room recording. See Marshall, supra, 123 N.J. at 145 (noting that a defense counsel's arguments "can by no means serve as a substitute for [proper] instructions by the court").

It is possible, of course, that the jury may have found defendant guilty, even if the court had delivered the requested adverse inference charge. However, "mere possibilities . . . do not render an error harmless." State v. Scott, 229 N.J. 469, 484 (2017). "[I]f there is a reasonable doubt as to whether the error contributed to the verdict" — and we conclude there is here — we shall not deem it harmless. See State v. J.R., 227 N.J. 393, 417 (2017). Therefore, the omission of the jury instruction warrants reversal.

II.

A.

Defendant's right to a fair trial was also undermined by allowing evidence that he gave a false name to the officer during the traffic stop. After a brief N.J.R.E. 104 hearing, the court denied defendant's motion under N.J.R.E. 404(b) to bar evidence of hindering apprehension.

At the pre-trial hearing, the officer recounted how he discovered that defendant gave a false name, Tamorah Richardson, and arrested him on the disorderly persons offense. The officer

explained that defendant later admitted his true name, but was still taken to the station-house pursuant to department policy. The State contended that evidence of hindering went to "motive, as well as identity," and it "frame[d] the context of the arrest." Also, without the evidence, the jury would speculate that the police did "something improper" in arresting defendant.

The defense did not object to testimony to establish the fact of the motor vehicle stop and defendant's arrest, and was willing to stipulate to the legality of the arrest, but contended that evidence that defendant lied to the officer or hindered apprehension was highly prejudicial. Defense counsel initially argued there was no need to stipulate as to defendant's identity — an idea the court suggested.

The court denied defendant's motion on three grounds. First, the court held the evidence was admissible under N.J.R.E. 404(b) and the multipart test of State v. Cofield, 127 N.J. 328, 338 (1992) (stating that admissible evidence of other crimes or wrongs must be (1) "relevant to a material issue;" (2) "similar in kind and reasonably close in time to the offense charged;" (3) "clear and convincing;" and (4) its "probative value . . . must not be outweighed by its apparent prejudice"). The court found the hindering evidence was relevant to defendant's

identity; it was reasonably close in time;[9] the State clearly and convincingly proved defendant initially lied about who he was; and the evidence's probative value was not outweighed by its prejudice, which the court could address with an appropriate jury instruction. Second, the court held that the evidence was not "other crimes" evidence after all, but was "part of . . . one single criminal occasion," since defendant may have provided false information "to avoid apprehension for the drugs . . . ." Third, applying N.J.R.E. 403, the court held that the probative value was not substantially outweighed by the risk of undue prejudice.

After the court rendered its decision, defense counsel offered to stipulate to defendant's identity, although insisting it was not an issue that required evidence of defendant's hindering, since defendant admitted he was Eugene Richardson at the scene. The court responded that defense counsel's concession was too late.

Once the officer testified that he arrested defendant for hindering apprehension, the judge instructed the jury:

> The [d]efendant is not charged with that particular issue right now. That's not

[9] We recognize the Court has stated that "the second prong may be eliminated where it 'serves no beneficial purpose.'" State v. Barden, 195 N.J. 375, 389 (2008) (quoting State v. Williams, 190 N.J. 114, 131 (2007)).

> going to be for your consideration, any type of [h]indering claim, if you will.
>
> That testimony is admissible and for the limited purpose for you on the issue of identi[t]y of this particular [d]efendant and also, to place the situation in the appropriate context by the State, in terms of the entire case.

In the final instructions to the jury the judge amplified:

> [T]here was testimony that Officer Selby believed that the information provided to the officer in his apprehension, meaning the [d]efendant, I previously advised you that the [d]efendant is not charged with a criminal offense in connection with that statement.
>
> Furthermore, I previously advised and remind you once again that you are to consider the statement only with regard to the identification of the [d]efendant and the context of the entire case.
>
> Furthermore, you are also free to determine as with all evidence whether this statement allegedly made by the [d]efendant with regard to his identity to Officer Selby was, in fact, made. And if so, the weight to be attached to that evidence.

The judge did not expressly describe the uses of the evidence that were prohibited, nor did defense counsel expressly request such an instruction, or object to its omission.

During its deliberations, the jury asked the court: "Can we consider the fact that the [d]efendant lied about his name and date of birth and age?" Defense counsel urged the court to instruct the jury it could not. Alternatively, she urged the

court to instruct the jury that it could consider the evidence only for the purposes of identification and "not for anything else." She noted her concern that the jury would use the evidence "to ascribe some kind of character information or character assessment . . . ." The prosecutor agreed, and suggested, "I think the way to deal with it is the language that [defense counsel] used, it's not to ascribe any sort of character to the [d]efendant, just simply the officer needed to ID him." The judge rejected these suggestions and repeated its previous instructions.

As his second point on appeal, defend contends:

> THE COURT ERRED IN ADMITTING OTHER-CRIMES EVIDENCE ON THE SUBJECT OF IDENTITY, WHICH WAS NOT AN ISSUE IN THE CASE. THE COURT'S LIMITING INSTRUCTION FAILED TO ENSURE THAT JURORS WOULD NOT MISUSE THAT EVIDENCE TO CONVICT BASED ON THE NOTION THAT RICHARDSON HAD A PROPENSITY TO COMMIT CRIMES.

B.

The State essentially concedes that the evidence of defendant's hindering constituted other crimes and wrongs evidence under N.J.R.E. 404(b).[10] However, the State argues that it satisfied the four-prong test under Cofield. We disagree.

[10] The State does not try to defend the court's conclusion that the evidence was part of the same transaction as the drug offense such that N.J.R.E. 404(b) did not apply. See State v. Rose, 206 N.J. 141, 180 (2011) (rejecting the res gestae (continued)

Although the evidence may have clearly and convincingly established that defendant gave a false name (prong three), neither the defendant's identity nor the "context" of the case was a material issue (prong one). Defendant's identity was not genuinely disputed. In fact, the defense offered to stipulate to defendant's identity and that he was lawfully in custody. See State v. Darby, 174 N.J. 509, 519-20 (2002) (stating that an issue must actually be disputed in order for the evidence to be deemed relevant under N.J.R.E. 404(b)); State v. Stevens, 115 N.J. 289, 301 (1989) (concluding that "'when the accused concedes the issue to be proved, the proffered evidence has no probative value'" (citation omitted)).

In any event, defendant's false statement that he was Tamorah Richardson did not prove he was Eugene Richardson. The

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(continued)
doctrine for admitting other crimes or wrongs evidence, and holding that N.J.R.E. 404(b) generally applies unless evidence is "intrinsic" to the charged offense, that is, evidence of an act that "directly proves the charged offense" or an act "performed contemporaneously with the charged crime . . . [that] facilitate[s] the commission of the charged crime") (internal quotation marks and citation omitted). Consequently, we do not address the trial court's findings that the evidence of hindering was "part of one single . . . criminal occasion" and defendant may have wanted to "avoid apprehension." Nonetheless, we note that the court did not instruct the jury that it could use the evidence of hindering as evidence of consciousness of guilt, nor did the court deliver the mandated instruction on consciousness of guilt. See State v. Williams, 190 N.J. 114, 133-34 (2007); State v. Mann, 132 N.J. 410, 421 (1993).

officer testified at trial that defendant was "later identified as Eugene Richardson," but he did not say how. At the N.J.R.E. 104 hearing, the officer stated that defendant himself admitted he was Eugene Richardson at the traffic stop, once the officer told him that he knew he was not Tamorah Richardson. In other words, the false statement did not prove defendant's identity; his own admission did. Inasmuch as the evidence had no probative value pertaining to the issue of identity, the evidence was outweighed by prejudice to defendant (prong four). In sum, it should have been excluded.

Furthermore, the court failed to properly instruct the jury that it could not use the hindering evidence to prove defendant's propensity to commit crimes, or that he was a bad person who likely committed a crime. See State v. Gillispie, 208 N.J. 59, 92 (2011) (stating "the court's instruction should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence" (quoting Cofield, supra, 127 N.J. at 340-41) (emphasis added)). Our model charge includes the following critical instruction:

> However, you may not use this evidence to decide that the defendant has a tendency to commit crimes or that he/she is a bad person. That is, you may not decide that, just because the defendant has committed other crimes, wrongs, or acts, he/she must be guilty of the present crime[s]. I have admitted the evidence only to help you

> decide the specific question of [describe specific purpose]. You may not consider it for any other purpose and may not find the defendant guilty now simply because the State has offered evidence that he/she committed other crimes, wrongs, or acts.
>
> [Model Jury Charge (Criminal), "Proof of Other Crimes, Wrongs or Acts N.J.R.E. 404(b)" (2016).]

An appropriate limiting instruction must be given even if a defendant does not request it. See State v. Clausell, 121 N.J. 298, 323 (1990). Yet, even after the jury inquired whether it could consider the fact that defendant "lied about his name and date of birth and age," the court declined to instruct the jury about the prohibited uses of the evidence.

We are convinced the court's errors in admitting the evidence of hindering apprehension and delivering an incomplete jury charge, were clearly capable of producing an unjust result and warrant reversal, independent of the failure to deliver an adverse inference charge discussed above. R. 2:10-2. Our Supreme Court has emphasized the inherently prejudicial nature of other crimes or wrongs evidence. "Nothing could be more prejudicial than the erroneous admission of such testimony." State v. G.V., 162 N.J. 252, 261 (2000); see also State v. Atkins, 151 N.J. Super. 555, 570 (App. Div. 1977), rev'd on other grounds, 78 N.J. 454 (1979).

The Court has cautioned against the overuse of the "harmless error" doctrine, particularly as applied to the wrongful admission of other crimes or wrongs evidence, noting "[t]he likelihood of prejudice is acute when the proffered evidence is proof of a defendant's uncharged misconduct." G.V., supra, 162 N.J. at 262 (internal quotation marks and citation omitted). Even where the N.J.R.E. 404(b) evidence is admissible, harmful error is likely committed when the trial court fails to charge the jury appropriately as to the limited use of such evidence. Ibid. ("[E]ven if the evidence had been admissible on the subsidiary issues in the case, the charge in this case left the jury wholly unguided as to how to use the evidence for such limited purposes.").

III.

Given our disposition, we need not reach defendant's argument that his sentence was excessive.

Reversed. We do not retain jurisdiction.