SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4012-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK WILLIAMS,

Defendant-Appellant.

Submitted January 31, 2017 – Decided June 21, 2017

Before Judges Ostrer, Leone and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 14-01-0052.

Joseph E. Krakora, Public Defender, attorney for appellant (Kevin G. Byrnes, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Tom Dominic Osadnik, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from a judgment of conviction entered after a jury trial for various controlled dangerous substance (CDS) offenses and hindering apprehension, and claims the sentence

imposed was excessive. He also challenges a court order denying his motion to suppress evidence. Based on our review of the record in light of the applicable law, we affirm the court's denial of the suppression motion, reverse defendant's conviction and sentence for hindering apprehension, and affirm his remaining convictions and sentence.

I.

On September 13, 2013, Juan Clavijo, a Passaic police detective, conducted a drug surveillance operation in a high drug trafficking area. Clavijo set up surveillance on the top floor of a multi-family home and used binoculars to observe street-level activity. Other officers were assigned to work as Clavijo's "arrest team," meaning he would direct them to detain or arrest individuals based upon his observations of any suspected drug activity.

At about 11:50 a.m., Clavijo observed a man, later identified as defendant, enter the driver's seat of a vehicle parked on the street below his vantage point. Clavijo observed a white male approach the passenger side of defendant's vehicle and engage in a brief conversation with a black male standing on the sidewalk. Clavijo knew the black male from previous investigations.

The black male spoke to defendant, who then lifted his buttocks off of the vehicle seat, reached toward his lower back,

and pulled out a clear plastic bag containing a white item. Defendant removed a white item from the bag and handed it to the black male, who passed it to the white male. The white male then handed the black male paper currency, and the black male handed it to defendant. Clavijo observed defendant then return the plastic bag to its original location. The white male left the location, and Clavijo directed his arrest team to detain him. They were unable to do so because they could not locate him.

A few minutes later, Clavijo observed a man, later identified as Calvin Pagan, approach the passenger side of defendant's vehicle. Pagan spoke with another black male, who then spoke directly to defendant. Clavijo saw defendant lift his buttocks off of the driver's seat of the vehicle, reach into his buttocks area, and retrieve a plastic bag containing a white item. Defendant opened the bag, pulled out a white item and gave it to the black male standing next to the vehicle. The black male handed the white item to Pagan, who then gave the black male money. The black male handed the money to defendant. Defendant then leaned back on the driver's seat, lifted his buttocks off the seat, and reached into his buttocks area. After defendant extracted his hands from his buttocks area, he no longer held the plastic bag.

Pagan left the area, and Clavijo directed his arrest team to detain Pagan. Pursuant to Clavijo's instructions, detective Jason

Cancel followed Pagan in his unmarked police vehicle and observed Pagan smoking from a glass cylinder, commonly referred to as a crack pipe. As Cancel exited his vehicle, Pagan threw down the crack pipe, and it shattered on the ground. Cancel detained Pagan and discovered a metal rod, which Cancel described as a "push rod," meaning a piece of drug paraphernalia used to push crack cocaine into a crack pipe. Cancel arrested Pagan and arranged for a marked patrol vehicle to bring Pagan to police headquarters.

After Pagan left the street where Clavijo first observed him, Clavijo saw a male later identified as Tomasz Cichon riding a bike. At the same time, defendant performed a U-turn with his vehicle and parked it on the opposite side of the street. Cichon approached the driver's side of defendant's vehicle. After a brief conversation between defendant and Cichon, defendant raised his buttocks off the driver's seat, reached into his buttocks area, and retrieved a plastic bag containing a white item. He took a white item out of the bag, and gave it Cichon, who then handed defendant money. Cichon placed the white item in a blue box that he put in his pants pocket. Clavijo saw defendant raise his buttocks off the seat, and reach into his buttocks area with the plastic bag in his hand. After removing his hand from his buttocks area, defendant no longer held the plastic bag.

Cichon departed the area on his bicycle and Clavijo directed

the arrest team to detain him. Cancel stopped Cichon, who became very nervous and said, "It's right there. It's right there." Cancel searched Cichon and found a blue container containing .13 grams of crack cocaine in Cichon's right pocket, as well as cash and a crack pipe.

Meanwhile, moments after Cichon left defendant's vehicle, defendant drove off. Clavijo directed his arrest team to stop defendant. Officer Marco Clavijo stopped defendant's vehicle, ordered defendant to exit the vehicle, and immediately placed defendant under arrest. Defendant was handcuffed and searched by Marco Clavijo, who recovered $502 from defendant's pocket. Detectives arrived and Marco Clavijo had no further involvement in the matter.

Defendant was transported to police headquarters, where detective Clavijo performed a strip search of defendant that did not result in the recovery of any evidence. Clavijo applied for and obtained a warrant for a search of defendant's anal cavity, after which defendant was transported to a hospital.

At the hospital, Clavijo presented a doctor with the warrant, and Clavijo and five other detectives observed the search of defendant's anal cavity. As the doctor put gloves on, defendant stated he had to use the bathroom, and he wanted the detectives removed from the area while the search was performed.

The doctor instructed defendant to lay on his side, and after he pulled down defendant's pants detectives observed a plastic bag protruding from defendant's buttocks. The doctor then spread defendant's buttocks and removed the bag. The bag contained a white item, later determined to be cocaine. After the search, defendant told the detectives that he thought they were "lazy," and would not get a search warrant for his anal cavity.

Defendant was charged in an indictment with fifteen offenses, but prior to trial the State dismissed seven of the charges.[1] The matter proceeded to trial on the following eight counts: third-degree possession of CDS (cocaine), N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of CDS (cocaine), with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3) (count two); second-degree possession of CDS (cocaine), with intent to distribute within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1 and 2C:35-5(a) (count four); third-degree distribution of CDS (cocaine), N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3), to Pagan (count five) and Cichon (count eight); second-degree distribution of CDS (cocaine) within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1 and 2C:35-5(a), to Pagan (count seven) and Cichon (count ten); and third-degree hindering

[1] At the State's request, the court dismissed counts three, six, nine, eleven, twelve, thirteen, and fourteen.

apprehension, prosecution, conviction or punishment, through the concealment or destruction of evidence, N.J.S.A. 2C:29-3(b)(1) (count fifteen).

Prior to trial, defendant filed a motion to suppress the evidence seized during the arrests of Pagan and Cichon, and the cocaine recovered from defendant's anal cavity. The court conducted an evidentiary hearing and denied defendant's motion.

Following trial, the jury found defendant not guilty of the charges in counts five and seven, which concerned the alleged distribution of cocaine to Pagan, but found him guilty of the remaining charges. At sentencing, the court granted the State's motion for a mandatory extended term under N.J.S.A. 2C:43-6(f). The court merged defendant's convictions for possession (count one) and possession with intent to distribute (count two) with his conviction for possession with intent to distribute within 500 feet of a public housing facility (count four), and imposed a ten year sentence on count four with a five-year period of parole ineligibility.

The court further merged defendant's conviction for distribution to Cichon (count eight) with his conviction for distribution to Cichon within 500 feet of a public housing facility (count ten), and sentenced defendant to a concurrent ten-year term with five years of parole ineligibility on count ten. The court

also sentenced defendant to a consecutive four-year term for hindering apprehension (count fifteen).

This appeal followed. On appeal, defendant makes the following arguments:

> POINT I
>
> [] DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE CHARGE OF HINDERING APPREHENSION SHOULD HAVE BEEN GRANTED[.]
>
> POINT II
>
> [] DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. I OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE ADMISSION OF AN EXPERT OPINION BASED ON A HYPOTHETICAL THAT ASSUMED A FACT — THE DRUG POSSESSOR IS A DRUG DEALER — THAT WAS THE ULTIMATE DISPUTED ISSUE IN THE CASE[.]
>
> POINT III
>
> [] DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. I OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S FAILURE TO DEFINE ALL THE ELEMENTS OF THE HOUSING FACILITY DRUG-ZONE CRIME[.] (Not Raised Below)[.]
>
> POINT IV
>
> [] DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. I OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURORS ON ALL THE ESSENTIAL ELEMENTS OF DISTRIBUTION AND INTENT TO DISTRIBUTE CDS[.] (Not Raised Below)[.]

POINT V

[] DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AS GUARANTEEED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 7 OF THE NEW JERSEY CONSTITUION WAS VIOLATED BY THE UNLAWFUL SEARCH AND SEIZURE[.]

A. THE STATE FAILED TO PROVE THAT THE SEARCH OF [] DEFENDANT AND CO-DEFENDANTS WERE INCIDENT TO A LAWFUL ARREST[.]

B. THE TRIAL COURT'S CONCLUSION THAT THE STATE MET ITS BURDEN OF PROVING THE LEGALITY OF THE SEARCH AND SEIZURE IS A MIXED QUESTION OF LAW AND FACT SUBJECT TO PLENARY REVIEW ON APPEAL[.]

POINT VI

THE SENTENCE IS EXCESSIVE: THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING AND MITIGATING FACTORS[.]

II.

We first turn our attention to defendant's argument that the court erred by denying his motion for acquittal on the hindering apprehension charge. In count fifteen of the indictment, defendant was charged with hindering his own apprehension, prosecution, conviction, or punishment, in violation of N.J.S.A. 2C:29-3(b)(1), "by placing an amount of cocaine in his buttocks." Defendant argues he was entitled to a judgment of acquittal on the charge because

his conviction for concealing the cocaine in a body cavity violates his constitutional rights against self-incrimination and warrantless searches.

At the close of the State's evidence, the court denied defendant's motion for acquittal on all charges. The court found the hindering charge was supported by defendant's concealment of the cocaine in his anal cavity, and his statement at the hospital about the presumed laziness of the detectives. Following the jury's verdict, the court again denied defendant's motion for a judgment of acquittal on the hindering charge, finding the evidence was "ample in terms of concluding that [defendant] had concealed the crack cocaine in his buttocks" in order "to hinder his detention or his apprehension, the investigation of the crimes that occurred as well as the prosecution of those crimes."

"On a motion for judgment of acquittal, the governing test is: whether the evidence viewed in its entirety, and giving the State the benefit of all of its favorable testimony and all of the favorable inferences which can reasonably be drawn therefrom, is such that a jury could properly find beyond a reasonable doubt that the defendant was guilty of the crime charged." State v. D.A., 191 N.J. 158, 163 (2007); accord State v. Dekowski, 218 N.J. 596, 608 (2014); State v. Reyes, 50 N.J. 454, 458-59 (1967). No distinction is made between direct and circumstantial evidence.

State v. Mayberry, 52 N.J. 413, 437 (1968), cert. denied, 393 U.S. 1043, 89 S. Ct. 673, 21 L. Ed. 2d 593 (1969); Reyes, supra, 50 N.J. at 458-59. Applying the same legal standard, we conduct a de novo review of a trial court's ruling on a motion for acquittal. Dekowski, supra, 218 N.J. at 608; State v. Williams, 218 N.J. 576, 593-94 (2014); State v. Moffa, 42 N.J. 258, 263 (1964).

Under N.J.S.A. 2C:29-3(b)(1):

> b. A person commits an offense if, with purpose to hinder his own detention, apprehension, investigation, prosecution, conviction or punishment for an offense or violation . . . he:
>
> (1) Suppresses, by way of concealment or destruction, any evidence of the crime . . . which might aid in his discovery or apprehension or in the lodging of a charge against him . . . .

To convict defendant of the offense, the State was required to prove:

> (1) that defendant knew he[] could/might be charged with [an offense];
>
> (2) that [] defendant suppressed, by way of concealment or destruction, any evidence of the crime . . . which might aid in his discovery or apprehension or in the lodging of a charge against him; and
>
> (3) that [] defendant acted with purpose to hinder his[] own detention, apprehension, investigation, prosecution, conviction, or punishment.

> [Model Jury Charge (Criminal), "Hindering One's Own Apprehension or Prosecution" (May 12, 2014).]

In State v. Fuqua, 303 N.J. Super. 40 (App. Div. 1997), we considered a defendant's constitutional challenge to the application of N.J.S.A. 2C:29-3(b)(1). As the defendant sat in a parked car, he was approached by the police. Id. at 42. The defendant drove his car away and a police chase followed. Id. at 44. Following the defendant's apprehension, he was searched and cocaine was found in his sock. Id. at 43. The defendant was charged and convicted of eluding, possession of CDS, and hindering apprehension by concealing the cocaine in his sock. Id. at 42. The defendant challenged his conviction for hindering, arguing that application of the hindering statute, N.J.S.A. 2C:39-3(b)(1), violated his right against self-incrimination. Id. at 45.

We did not decide the defendant's constitutional challenge to the statute's application and instead "treat[ed] the issue as one of statutory construction." Id. at 45-46. We determined that the statute was applicable where it

> relates to the concealment or destruction of evidence of a person's completed crime, such as tampering with a crime scene, disposing of a murder weapon or the like . . . . Where, however, the crime is an ongoing possessory offense, such as defendant's possession of the cocaine in this case, we question the application of this statute.

[Id. at 46.]

We reasoned that to hold otherwise would result in a requirement that illegal substances, weapons, and materials "be carried in plain view or else the possessor could be convicted" of hindering. Ibid. Finding that such an interpretation was "difficult to fathom" and would "implicate the constitutional prohibition against self-incrimination," we determined

> the language of the statute [applies] to evidence of crimes other than ongoing possessory crimes where the possession of the items or substance at that time is chargeable as a separate offense. The statute, where it speaks of concealment of "evidence of the crime" with the purpose of hindering the actor's apprehension, N.J.S.A. 2C:29-3b(1), is sensibly construed to refer to evidence of a completed criminal act, not a current possessory crime.
>
> [Id. at 46-47.]

In State v. Sharpless, 314 N.J. Super. 440, 459-60 (App. Div. 1998), certif. denied, 157 N.J. 542 (1998), we reversed a defendant's conviction for tampering with evidence in violation of N.J.S.A. 2C:28-6. The evidence supporting the conviction showed the defendant discarded twenty-three decks of heroin as he was approached by the police prior to his arrest for possessory drug offenses. Id. at 446-47.

We construed the application of N.J.S.A. 2C:28-6 with the same rationale underlying our decision in Fuqua. Id. at 459. We

recognized it was common for individuals possessing criminal contraband to attempt to hide it from law enforcement and discard it upon the approach of law enforcement. Ibid. We reasoned that N.J.S.A. 2C:28-6 did not constitute a sufficiently clear statement of legislative intent to permit convictions for a possessory offense and tampering with evidence each time a defendant took an action to hide or discard evidence of the possessory offense. Ibid. We held:

> Instead, consistent with the court's interpretation of N.J.S.A. 2C:29-3b(1) in Fuqua, we construe the phrase "conceal[ment]" of "any article . . . with the purpose to impair its availability in [an investigation]" in N.J.S.A. 2C:28-6 to refer only to "evidence of a completed criminal act, not a current possessory crime." Under this analysis, defendant's abandonment of his drug supply occurred during the course of his ongoing possession of heroin with the intent to distribute and consequently did not constitute tampering with evidence.
>
> [Ibid. (citation omitted).]

In State v. Mendez, 175 N.J. 201, 204-07 (2002), the defendant was convicted of tampering with evidence where he discarded and destroyed cocaine during a police pursuit. The Court approved of the reasoning in Fuqua and Sharpless, but found they were factually distinguishable because they did not involve the destruction of evidence. Id. at 211. The Court held that "when a defendant allegedly possesses and then destroys all or part of the specimen

of CDS, the Code [of Criminal Justice] permits the State to charge that defendant with both drug possession and tampering with physical evidence." Id. at 203. In other words, the Court "interpret[ed] Sharpless as holding that the crime of tampering with evidence of a possessory crime includes as a necessary element the permanent alteration, loss, or destruction of the evidence itself." Id. at 211-12. The Court explained that once the CDS was destroyed, the possessory offense was "completed," and the defendant had "taken a new step in completing a separate offense involving destruction of physical evidence." Id. at 212.

Here, defendant argues that his conviction for hindering apprehension is inconsistent with the holding in Fuqua and the reasoning in Sharpless. The State argues Fuqua and Sharpless provide no refuge for defendant because they apply only when a defendant's concealment of evidence is attendant to an ongoing possessory offense, and that here defendant concealed the cocaine to hinder his apprehension for the completed offense of drug distribution to Cichon. Defendant asserts the evidence concealed in his buttocks was not evidence of the distribution offense but instead provided the basis for his conviction for possession and possession with intent to distribute.

Although the State now argues defendant's conviction was proper if limited to hindering his completed distribution offense,

no such limit was imposed at trial. The indictment, which was read to the jury, charged that defendant, with the purpose of hindering apprehension "for an offense," suppressed by concealment or destruction evidence which might aid in "a charge against him." The trial court's charge instructed that the jury had to find "that [d]efendant knew that he could or might be charged with the offense of possession, possession with the intent to distribute, or distribution of a controlled dangerous substance, namely cocaine," that he suppressed by concealment or destruction evidence "of the crime" which might aid in "a charge against him," and that he acted with the purpose of hindering his apprehension "for the offense of possession, possession with intent to distribute, or distribution of a controlled dangerous substance, namely cocaine." Thus, the indictment and the jury instructions permitted defendant to be convicted of hindering his apprehension for his ongoing possessory offenses. The indictment and jury instructions also permitted conviction of hindering even if the jury found that defendant acted and intended only to conceal and not destroy the cocaine, and that he concealed the evidence before he completed the distribution offense or became aware of the police presence.[2]

[2] The indictment and jury instructions also did not charge attempt

We are mindful that our reasoning in Fuqua is limited to evidence concealed as attendant to a possessory offense, Fuqua, supra, 303 N.J. Super. at 46-47, and that defendant was found guilty of the completed crime of distribution.[3] Nevertheless, we cannot ignore defendant was charged with and convicted of three separate possessory offenses for the cocaine he concealed in his buttocks following his distribution to Cichon, and there was no showing defendant destroyed, or attempted to destroy, any of the evidence. Thus, the indictment and the jury instructions permitted the jury to convict defendant of hindering apprehension for those "ongoing possessory offense[s]" by concealing the cocaine that was the basis for those offenses.[4] Under our interpretation of the statute in Fuqua, that could not properly constitute a violation of N.J.S.A. 2C:29-3(b)(1). Ibid.; Sharpless, supra, 314 N.J.

---

under N.J.S.A. 2C:5-1.

[3] There may be circumstances where the concealment of CDS following the completion of a distribution offense would violate N.J.S.A. 2C:29-3(b)(1) but we need not speculate about them here.

[4] Indeed, in response to a hypothetical posed to the State's expert witness on direct examination, the State's expert on narcotics and distribution testified the cocaine concealed in defendant's buttocks was "possessed" for distribution, and not for concealment of any prior completed distribution. Moreover, the evidence showed defendant placed the cocaine in his buttocks before he became aware of any police presence, and there was no evidence he took further action to conceal the cocaine at any time after he became aware of the police presence at the scene.

Super. at 459. We therefore reverse defendant's conviction for hindering apprehension in count fifteen, vacate the sentence imposed and remand for entry of an amended judgment of conviction on that charge.

III.

We next address defendant's argument that the court erred by permitting Danyal Bachok, the State's expert witness in narcotics and narcotics distribution,[5] to offer opinions concerning defendant's guilt on the distribution and possession with intent to distribute charges. Prior to trial, defendant moved to bar Bachok's testimony on the issue of whether defendant possessed the cocaine for distribution. The court denied the motion and indicated defendant could object on a question-by-question basis during Bachok's trial testimony.

At trial, the State posed a hypothetical question to Bachok that included a detailed rendition of the facts related to defendant's interactions with the three individuals as he sat in his vehicle, the officer's observations of Pagan and Cichon following their departure from the location of defendant's car, and the arrest and search of defendant. The hypothetical referred

[5] Bachok was qualified as an expert in narcotics, narcotics possession, distribution, packaging, and street value.

to defendant as the dealer, and the three individuals as buyers one, two, and three.

The hypothetical was posed without objection until the following colloquy occurred:

> [PROSECUTOR]: [Bachok], assuming all those hypothetical facts, do you have an opinion as to why the crack cocaine recovered from between dealer's buttocks would be possessed?
>
> [BACHOK]: For distribution.
>
> [PROSECUTOR]: And what is the basis for your opinion?
>
> [BACHOK]: Based on the three transactions that were witnessed and also the denomination breakdown of the money and the absence —

Defense counsel objected, arguing the prosecutor's use of the terms dealer and buyer, and Bachok's testimony that there were three transactions, constituted an impermissible expert opinion on the ultimate issue that defendant engaged in three drug transactions. The court overruled the objection, finding the testimony was permissible under State v. Odom, 116 N.J. 65 (1989), because Bachok did not directly comment on defendant's guilt but instead "simply characterize[d] defendant's conduct based on the facts in evidence in light of a specialized knowledge." See State v. Nesbitt, 185 N.J. 504, 507 (2006) (noting Odom permitted the State to pose a hypothetical question to a drug expert that mirrored the facts of the case even if "expressed in terms of

ultimate issues of fact"); accord State v. Sowell, 213 N.J. 89, 99-103, 107 (2013); State v. McLean, 205 N.J. 438, 454-55 (2011); State v. Reeds, 197 N.J. 280, 290-93 (2009).

On appeal, defendant contends the court erred by overruling his objection to Bachok's testimony, and renews his pretrial argument that Bachok's testimony defendant possessed the cocaine for distribution was inadmissible. We agree the court erred in permitting the testimony but are convinced that under the circumstances presented, it was not clearly capable of producing an unjust result. R. 2:10-2.

"A trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Nantambu, 221 N.J. 390, 402 (2015) (quoting State v. Harris, 209 N.J. 431, 439 (2012)). We assess whether there was a clear error in judgment in light of the applicable law. State v. Rinker, 446 N.J. Super. 347, 358 (2016).

Expert testimony is permissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." N.J.R.E. 702. Expert testimony "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.J.R.E. 704. Nevertheless, expert testimony is not

admissible unless it "concerns a subject matter beyond the ken of an average juror." Reeds, supra, 197 N.J. at 290.

In State v. Cain, 224 N.J. 410, 420-26 (2016), the Court summarized and clarified the legal standards governing the admissibility of expert testimony and the use of hypothetical questions in drug cases. It explained that expert testimony is permissible in drug cases because "the average juror is not knowledgeable about the arcana of drug-distribution schemes." Id. at 426. Thus, experts may testify concerning the indicia of a drug distribution operation, including the manner in which drugs are packaged and processed for distribution. Ibid. They are also permitted to explain the significance of quantities and values of drugs, the use of logos in drug packaging, the functions of drug related paraphernalia, the roles played by individuals in drug transactions, and "the various machinations used by drug dealers to thwart detection." Ibid.

However, the Court also held that expert testimony in drug cases is subject to limitations. Id. at 426-27; State v. Simms, 224 N.J. 393, 403 (2016). An expert "should not express an opinion on matters that fall within the ken of the average juror or offer an opinion about the defendant's guilt," Cain, supra, 224 N.J. at 426 (citing Nesbitt, supra, 185 N.J. at 512-14), or "be used to bolster a fact witnesses's 'testimony about straightforward but

disputed facts,'" id. at 426-27 (quoting McLean, supra, 205 N.J. at 455). The Court reaffirmed what it declared many times in the past: that expert testimony is unnecessary to explain to jurors the obvious. Id. at 427; see also Sowell, supra, 213 N.J. at 100-02; McClean, supra, 205 N.J. at 462-63.

The Court also addressed the confusion caused by its conflicting statements in Odom, supra, 116 N.J. 65, concerning whether an expert in a drug case could properly offer an opinion that "embraces ultimate issues that the jury must decide," such as the defendant's state of mind. Id. at 421 (quoting Odom, supra, 116 N.J. at 79). The Court explained that experts are "no better qualified than a juror to determine the defendant's state of mind after the expert has given testimony of the peculiar characteristics of drug distribution that are beyond the juror's common understanding." Id. at 427. Such testimony "may be viewed as an expert's quasi-pronouncement of guilt that intrudes on the exclusive domain of the jury as factfinder, and may result in impermissible bolstering of fact witnesses." Ibid. Thus, "[t]he prejudice and potential confusion caused by such testimony substantially outweighs any probative value it may possess." Id. at 427-28. Accordingly, the Court concluded that "[g]oing forward, in drug cases, an expert witness may not opine on the defendant's state of mind. Whether a defendant possessed a controlled dangerous

substance with the intent to distribute is an ultimate issue of fact to be decided by the jury." Id. at 429.

The Cain Court also restricted the use of hypothetical questions in drug cases. Hypothetical questions "should only be used when necessary" and should not be used "[w]hen the evidence is straightforward and the facts are not in dispute." Ibid. "To the extent possible, questions posed to an expert witness in a drug case should be compact and easy to understand and should not take the form of a summation." Id. at 430.

Measured against this standard,[6] Bachok's challenged testimony was clearly inadmissible insofar as it exceed Cain's limitations. That testimony was unnecessary because the occurrence of the transactions and defendant's purpose in possessing the cocaine was not beyond the ken of the jurors. Bachok directly expressed an opinion that defendant possessed the cocaine for the purpose of distribution. Moreover, it was improper to employ the monikers dealer and buyer in the hypothetical question because it assumed a fact — that defendant was a drug dealer — that was disputed and required resolution by the jury. See Simms, supra, 224 N.J. at 405. The use of the terms also permitted Bachok's reference to the transactions to inferentially constitute an

[6] We have held that Cain has pipeline retroactivity. State v. Green, 447 N.J. Super. 317, 328 (App. Div. 2016).

expression of opinion that defendant was engaged in drug distribution, another issue within the exclusive province of the jury.

Defense counsel objected to Bachok's testimony concerning defendant's purpose in possessing the cocaine, and the transactions, and we therefore consider whether the court's error in allowing the testimony was harmless. "An evidentiary error will not be found 'harmless' if there is a reasonable doubt as to whether the error contributed to the verdict." State v. J.R., 227 N.J. 393, 417 (2017). "The prospect that the error gave rise to an unjust result 'must be real [and] sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'" Ibid. (quoting State v. Lazo, 209 N.J. 9, 26 (2012) (alterations in original)).

Based on our review of the record, we are not convinced the court's error creates reasonable doubt that the error contributed to the verdict. The evidence concerning defendant's purpose in possessing the cocaine was overwhelming. He was observed on three occasions extracting a plastic bag from his buttocks area, taking a white substance from it, and transferring the white substance to third parties in exchange for money. Two of the third parties, Pagan and Cichon, were immediately confronted by the police following the exchanges with defendant, and in Pagan's case he was

observed using a crack pipe, and Cichon was found in possession of cocaine in the same container he used to store the white item he obtained from defendant. Defendant was arrested immediately following the observed exchanges and a plastic bag containing cocaine was found in defendant's buttocks, the precise location where he had been seen placing a bag after each of the observed transactions. Last, defendant was in possession of a large amount of currency in denominations typically used in street level drug transactions. In sum, Bachok's testimony added little to the avalanche of evidence demonstrating defendant possessed the cocaine with the intent to distribute it.

We also discern no basis to conclude that Bachok's testimony that defendant engaged in transactions creates a reasonable doubt that admission of the testimony led the jury to a verdict it might not have otherwise reached. In the first instance, defendant was charged separately with distribution of cocaine to Pagan and Cichon, but was found guilty only of distribution to Cichon. Thus, the jury was not swayed by Bachok's testimony concerning purported drug transactions and determined defendant's guilt on the distribution charges based on other admissible evidence.

The evidence supporting defendant's conviction for distribution of cocaine to Cichon was overwhelming, independent of Bachok's testimony that the exchange at the vehicle constituted

a drug transaction. In contrast, although Pagan was observed engaging in an exchange of a white item for money with defendant through an intermediary, when Pagan was stopped by law enforcement he was not in possession of cocaine. As such, there was less evidence Pagan actually purchased cocaine from defendant, and the jury, apparently unpersuaded by Bachok's testimony concerning purported transactions, found reasonable doubt that defendant distributed cocaine to Pagan.

We are therefore satisfied the court's error in permitting Bachok's testimony concerning the transactions does not raise a reasonable doubt that the jury would have reached a different verdict. The evidence concerning the drug distribution to Cichon was overwhelming, and the jury rejected Bachok's testimony as it related to the charge of distribution to Pagan. Bachok also offered other admissible testimony supporting the State's claim defendant engaged in drug transactions, including the absence of drug paraphernalia in the possession of street level drug dealers, the amounts of drugs held for street level drug distribution, crack cocaine pricing, and the denominations of currency typically used in street level crack cocaine transactions.

We therefore reject defendant's contention that his convictions should be reversed based on the court's error in permitting Bachok's testimony concerning defendant's purpose in

possessing the cocaine, and the transactions. See Sowell, supra, 213 N.J. at 107 (finding error in admission of drug expert's testimony did not require reversal where there was otherwise overwhelming evidence of the defendant's guilt).

IV.

Defendant next argues the court committed plain error in its charge to the jury on the offense of distribution of CDS within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1.[7] Defendant contends a determination of guilt under N.J.S.A. 2C:35-7.1 requires a finding there was distribution of CDS within 500 feet of a public housing facility owned or leased by a local housing authority in accordance with the local redevelopment and housing law, and that the court erred by failing to define for the jurors the requirements of the local redevelopment and housing law. Defendant asserts the failure rendered the jury unable to determine if the State proved all of the elements of the offense beyond a reasonable doubt.

Defendant's argument is without merit sufficient to warrant discussion in a written opinion, R. 2:11-3(e)(2), beyond the

[7] Defendant does not argue the court erred in failing to give a proper instruction on the charge of possession with intent to distribute within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1, as alleged in count four, but our analysis of the merits of defendant's assertion applies to that charge as well.

following brief comments. "Appropriate and proper charges to a jury are essential for a fair trial." State v. Green, 86 N.J. 281, 287 (1981); State v. Baum, 224 N.J. 147, 158-59 (2016). "Entailed is a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Green, supra, 86 N.J. at 287-88.

"This requirement of a charge on a fundamental matter is more critical in a criminal case when a person's liberty is at stake." Id. at 289. "Because of the importance of proper instructions to the right of trial by jury, erroneous instructions on matters or issues material to the jury's deliberations are presumed to be reversible error." State v. Collier, 90 N.J. 117, 122-23 (1982); accord State v. McKinney, 223 N.J. 475, 495-96 (2015); State v. Afanador, 151 N.J. 41, 54 (1997).

When reviewing an alleged error in the jury charge, "portions of a charge alleged to be erroneous cannot be dealt with in isolation but the charge should be examined as a whole to determine its overall effect." State v. Wilbely, 63 N.J. 420, 422 (1973). Thus, in "assessing the soundness of a jury instruction," we consider how ordinary jurors would understand the instructions as a whole, based upon the evidence before them. State v. Savage, 172 N.J. 374, 387 (2002).

Here, the court's instructions tracked the relevant model jury charges. See Model Jury Charge (Criminal), "Possession of a Controlled Dangerous Substance with Intent to Distribute in Proximity to Public Housing Facilities, Parks or Buildings" (March 26, 2001); Model Jury Charge (Criminal), "Distributing a Controlled Substance: Proximity to Public Housing Facilities, Parks or Buildings" (March 26, 2001). These instructions included for each offense the requirement that the State establish that the public housing facility be owned or leased to a local housing authority in accordance with the local development and housing law.

Defendant does not contend that any of the charges failed to identify an essential element of the offenses. Instead, he contends the jurors were not instructed concerning whether the public housing facility was owned or leased in accordance with the local development and housing law. Such a charge was unnecessary here, however, because defendant entered into a stipulation, which was read to the jury, that the public housing facility at issue was owned or leased by a public housing authority in accordance with the local redevelopment law.

Defendant did not object to the court's jury instructions at trial. We therefore review the instructions for plain error, an error clearly capable of producing an unjust result, and discern

none present here. R. 1:7-2; R. 2:10-2; McKinney, supra, 223 N.J. at 494; Afanador, supra, 151 N.J. at 54.

V.

Defendant also argues the court's jury instruction on distribution of CDS, N.J.S.A. 2C:35—5(a)(1) and N.J.S.A. 2C:35-5(b)(3), was erroneous because it defined "distribution" to include "the transfer, actual, constructive, or attempted, from one person to another, of a controlled dangerous substance," but failed to instruct the jury on the elements of attempt under N.J.S.A. 2C:5-1 (emphasis added).[8] The State argues the court utilized the model jury instructions, the instructions as whole were correct, and that any error in failing to define attempt was harmless because defendant was not charged with attempted distribution, the evidence showed only completed transactions, and there was no argument made that defendant should be convicted based on any alleged attempt to distribute CDS.

Defendant did not object to the jury charge at trial and we therefore review for plain error. R. 1:7-2; R. 2:10-2. The court utilized the pertinent model jury charges, which define distribution to include an attempt without elaborating on the

[8] The same definition was included in the court's charge on possession of CDS with intent to distribute. Although defendant does not expressly challenge the court's instruction on that charge, our analysis of the issue is the same.

statutory elements of attempt. See, e.g., Model Jury Charge (Criminal), "Possession of a Controlled Dangerous Substance With Intent to Distribute" (June 8, 2015); Model Jury Charge (Criminal), "Distribution of a Controlled Dangerous Substance" (Jan. 14, 2008). The charges derive their definition of "distribute" from the definitions of "distribute" and "deliver," set forth in N.J.S.A. 2C:35-2.

The lack of a definition of attempt in these charges under certain circumstances might constitute an error clearly capable of producing an unjust result, but no such circumstances are present here. There was nothing in the evidence or the arguments to suggest this was a case of attempted distribution. Clavijo testified only about completed exchanges and the State argued defendant was guilty of distribution by making those exchanges. Thus, even assuming "the judge's failure to charge the jury [on] attempt was in error, this error was not sufficient to lead the jury to a result it would not have otherwise reached." State v. Belliard, 415 N.J. Super. 51, 74 (App. Div. 2010), certif. denied, 205 N.J. 81 (2011).

VI.

Defendant next argues the court erred by denying his pretrial motion to suppress the evidence seized from Pagan, Cichon, and himself. We disagree.

Following an evidentiary hearing on defendant's motion the court determined that the credible evidence established that based on Juan Clavijo's observations of the exchanges and Cancel's observations of Pagan smoking crack, there was probable cause for the arrest and search of Pagan. The court found that based on Clavijo's observations of Cichon there was probable cause to suspect he had committed an offense thereby justifying his arrest and search. The court last determined that based on the observations of defendant and the results of the arrests of Pagan and Clavijo there was probable cause for the arrest and search of defendant by Marco Clavijo and subsequent search of defendant's anal cavity following the issuance of the search warrant.

"Appellate courts reviewing a grant or denial of a motion to suppress must defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015). We "disregard those findings only when a trial court's findings of fact are clearly mistaken." Ibid. We owe no deference to the trial court's legal conclusions, which we review de novo. Id. at 263.

"The Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protect citizens against unreasonable searches and seizures, and require

a showing of probable cause prior to the issuance of a warrant." State v. Moore, 181 N.J. 40, 44 (2004). A warrantless search is presumed invalid unless it fits within a recognized exception to the warrant requirement. Ibid. The State bears the burden of proof as to the legality of the arrest and subsequent search. State v. O'Neal, 190 N.J. 601, 611 (2007); Moore, supra, 181 N.J. at 44-45.

Here, the court sustained the searches of Pagan and Cichon, and the warrantless search of defendant based on the exception to the warrant requirement for searches incident to a lawful arrest. See Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969); Moore, supra, 181 N.J. at 45. The court determined that the officers had probable cause to arrest Pagan, Cichon, and defendant when the searches were conducted, thus justifying the warrantless searches as incident to those arrests.

The standard for determining probable cause to arrest and to search are the same. State v. Smith, 155 N.J. 83, 92 (1998). Probable cause requires a well-grounded suspicion that a crime has been or is being committed. Moore, supra, 181 N.J. at 45; State v. Nishina, 175 N.J. 502, 515 (2003). In considering whether there is probable cause, the court should consider the totality of the circumstances and "make a practical, common sense

determination whether, given all of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Moore, supra, 181 N.J. at 46 (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 544 (1983)). The circumstances to be considered include the officers' experience, and whether the area where the arrest occurred is a high-crime area. Id. at 46.

In Moore, the Court found there was sufficient probable cause to arrest the defendant where an experienced narcotics officer, conducting surveillance in a high drug trafficking area, observed the defendant exchange money for small unknown objects. Id. at 47; cf. State v. Pineiro, 181 N.J. 13, 25 (2004) (finding an exchange of a cigarette package in a high crime area established an articulable suspicion of criminal activity justifying an investigatory stop). Here, the court was presented with circumstances providing a greater basis for a well-grounded suspicion that defendant, Pagan, and Cichon had committed or were committing crimes than those the Court found sufficient in Moore.

Clavijo observed three suspected drug transactions, including those between defendant and Pagan and Cichon. In each transaction there was an exchange of currency for a white substance, which defendant kept consistently concealed. Immediately following Pagan's transaction, and prior to his arrest, he was observed

smoking from a crack pipe. The arrest of Cichon, and the recovery of the cocaine from the box in which he placed the white item he received from defendant, provided an additional circumstance supporting the arrest of defendant. In sum, we are satisfied the evidence amply supports the court's determination there was a reasonable basis to suspect Pagan, Cichon, and defendant had committed or were committing crimes, thereby justifying their arrests and the searches incident to them.

VII.

Defendant last argues his aggregate sentence of fourteen years with a five-year period of parole ineligibility is excessive. As we have voided defendant's hindering conviction and its consecutive four-year sentence, he is solely subject to the aggregate ten-year sentence with a five-year period of parole ineligibility on his drug convictions. We proceed to examine that sentence.

Defendant argues the court erred by finding aggravating factors three, the risk that defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3), and nine, the need to deter the defendant and others from violating the law, N.J.S.A. 2C:44-(a)(9). Defendant also claims the court erred by failing to find mitigating factors one, that defendant's conduct neither caused nor threatened to cause serious harm, N.J.S.A. 2C:44-1(b)(1), and two,

that defendant did not contemplate that his conduct would cause or threaten serious harm, N.J.S.A. 2C:44-1(b)(2). We review a "trial court's 'sentencing determination under a deferential standard of review.'" State v. Grate, 220 N.J. 317, 337 (2014) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)). We may "not substitute [our] judgment for the judgment of the sentencing court." Lawless, supra, 214 N.J. at 606. We must affirm a sentence if: (1) the trial court followed the sentencing guidelines; (2) its findings of fact and application of aggravating and mitigating factors were based on competent, credible evidence in the record; and (3) the application of the law to the facts does not "shock[] the judicial conscience." State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

A sentencing court must find mitigating factors that are supported by the record, and should accord them such weight as it deems appropriate. Grate, supra, 220 N.J. at 338; State v. Case, 220 N.J. 49, 64-65 (2014); State v. Dalziel, 182 N.J. 494, 504-05 (2005). Defendant contends the court erred by failing to find mitigating factors one and two, but did not request that the court find those factors at the time of sentencing. See State v. Blackmon, 202 N.J. 283, 297 (2010) ("Although there is more discretion involved in identifying mitigating factors than in addressing aggravating factors, those mitigating factors that are

suggested in the record, or are called to the court's attention, ordinarily should be considered and either embraced or rejected on the record.") (emphasis added); State v. Bieniek, 200 N.J. 601, 609 (2010) (encouraging trial courts to address each mitigating factor raised by defendants). Even if defendant requested a finding of mitigating factors one and two, "[d]istribution of cocaine can be readily perceived to constitute conduct which causes and threatens serious harm" and, thus, supported the court's decision not to find those mitigating factors here. State v. Tarver, 272 N.J. Super. 414, 435 (App. Div. 1994).

We are also satisfied the record supports the court's finding of aggravating factors three and nine. We reject defendant's contention the court erred in finding aggravating factor three based solely upon his current convictions and prior record, thereby double-counting aggravating factors. The court correctly considered defendant's criminal history in determining his risk of re-offending, Dalziel, supra, 182 N.J. at 502, and also based its finding on defendant's history of unemployment and reliance upon drug distribution for financial support.

Defendant's assertion that aggravating factor nine "has lost its value as a meaningful aggravating factor" lacks merit. Our Supreme Court has noted that the need for deterrence is one of the most important factors in sentencing. State v. Fuentes, 217 N.J.

57, 78-79 (2014). In Fuentes, the Court stated that in considering aggravating factor nine a sentencing court must make a qualitative assessment of the defendant's risk of recidivism in light of the defendant's history, including but not limited to the defendant's criminal history. Id. at 78. Here, the court fulfilled this mandate, considering defendant's personal and criminal history in determining the need for deterrence.

We also are not persuaded by defendant's argument that his sentences on his drug convictions are manifestly excessive. The court properly considered defendant's prior criminal record and the circumstances of the offenses for which he was convicted, found and weighed the aggravating and mitigating factors, and imposed a sentence in accordance with the applicable legal principles that does not shock our judicial conscience. Bolvito, supra, 217 N.J. at 228.

Defendant's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Defendant's conviction for hindering apprehension under count fifteen is reversed, and his sentence on that charge is vacated. His remaining convictions and sentences are affirmed. The matter is remanded for entry of an amended judgment of conviction consistent with this opinion. We do not retain jurisdiction.