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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0675-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TYRELL W. TAYLOR, a/k/a
DEWALT TYRRELL,
TYRELL WILLIAM TAYLOR,
TAYLOR TYRELL and
TERRELL W. TAYLOR,

Defendant-Appellant.

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Argued April 27, 2022 – Decided May 27, 2022

Before Judges Hoffman, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 18-05-0283 and 19-04-0219.

Ashley Brooks, Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ashley Brooks, of counsel and on the briefs).

Valeria Dominguez, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Acting Attorney General, attorney; Valeria Dominguez, of counsel and on the briefs).

PER CURIAM

Defendant appeals from his jury trial conviction for third-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(2). Following the guilty verdict, defendant pled guilty to possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1). At trial, defendant agreed to stipulate that he had a prior disorderly persons conviction involving domestic violence, thus making him a "certain persons" for purposes of N.J.S.A. 2C:39-7(b)(2). He now contends for the first time on appeal that the stipulation was invalid because the court did not personally address him in a colloquy akin to a guilty plea hearing. Defendant asks us, in essence, to announce a new rule of procedure that would require a trial court to question a defendant personally to establish that he or she knowingly and voluntarily waived the right to require the State to prove the prior-conviction element of the certain persons offense. Defendant also contends for the first time on appeal that the judge erred by failing to issue curative instructions sua sponte when two witnesses mentioned that defendant had been taken into custody for "another matter." He also contends the five-year prison sentence he received is excessive and that we must remand for

resentencing because the new youth mitigating factor, N.J.S.A. 2C:44-1(b)(14), applies retroactively. After carefully reviewing the record in light of the arguments of the parties and the applicable principles of law, we affirm the convictions and sentence.

I.

In May 2018, a grand jury returned an indictment charging defendant with third-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(2). In April 2019, a grand jury returned a separate indictment charging defendant with third-degree possession of CDS (cocaine), N.J.S.A. 35-10(a)(1).

Between March 10 and 12, 2020, defendant was tried before a jury on the weapons charge. On March 12, 2020, the jury found defendant guilty of third-degree certain persons not to have a weapon. Thereafter on June 25, 2020, defendant pled guilty to third-degree possession of CDS.

On September 3, 2020, the trial court sentenced defendant on the certain persons conviction to a five-year term of imprisonment—the maximum sentence that can be imposed on conviction of a third-degree crime. N.J.S.A. 2C:43-6(a)(3). As required by the Graves Act, N.J.S.A. 2C:43-6(c),[1] the court imposed

[1] The Graves Act is named for Senator Francis X. Graves, Jr., who sponsored legislation in the 1980s mandating imprisonment and parole ineligibility terms

a forty-two month term of parole ineligibility. On the cocaine conviction, the trial court sentenced defendant in accordance with the plea agreement to a term of five years to run concurrently to the certain-persons sentence.

The following facts were elicited at the trial. On January 25, 2018, officers from the Elizabeth Police Department Narcotics Unit executed a search warrant[2] for an apartment located in a building on Third Street in Elizabeth. When the officers arrived to execute the warrant, they observed a man, later identified as defendant, exit the front door of the Third Street building. Officers followed defendant to a Bond Street address approximately a block and a half from the Third Street building. The police observed defendant meet with "a male that [the officers] kn[e]w from the community." The two men went into the house on Bond Street. Shortly after exiting the house, defendant "was taken into custody for another matter."

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for persons who committed certain offenses while armed with a firearm. The term now refers to all gun crimes that carry a mandatory minimum term of imprisonment.

[2] The record shows that police obtained a search warrant because they believed defendant was involved in drug activity. The parties stipulated that the search was lawful and that the jury would not be told that a search warrant had been issued.

The officers then returned to the building on Third Street and proceeded to defendant's apartment. Officers knocked and announced their presence. Michelle Ameris, defendant's sister, answered the door. The officer disclosed "the nature of the investigation" to Ameris and then entered the apartment. Four children were also present in the apartment. The record indicates that defendant resided in the apartment with his three sisters, his mother, and his brother.

The apartment contained three bedrooms. Ameris informed police that defendant resided alone in the first bedroom on the left. Prior to conducting a search of the apartment, Elizabeth Police Department Detective Athanasios Mikros took photographs of the apartment.

Detective Mikros searched the first bedroom to the left, defendant's bedroom, and recovered a Nike bag on top of a dresser. The detective found a handgun in the bag. Upon finding the handgun, Detective Mikros called for Officer Joseph Anthony Pevonis, a firearm instructor for the Elizabeth Police Department. Officer Pevonis "put gloves on . . .[,] removed the handgun from the bag[,] . . . [and] made the gun safe." The handgun was loaded with one bullet and the accompanying magazine contained nine bullets. The handgun was operable.

While searching the bedroom in which the handgun was discovered, Detective Mikros also found mail addressed to defendant. The mail was located on the same dresser where the Nike bag containing the handgun was found. Detective Mikros also noticed that the bedroom contained only men's clothing, not women's or children's clothing.

Amanda Margolis of the Union County Prosecutor's Office's Forensic Laboratory testified as to DNA test results from the handgun. Margolis opined that the results from the DNA found on the grip, side, and frame of the gun indicated that three individuals had contributed to that DNA mixture. She testified that the test result provided very strong support for the conclusion that defendant was a major contributor. Margolis also testified that defendant was excluded as a possible contributor to the DNA profile of the sample taken from the trigger on the handgun. Regarding the magazine, Margolis was unable to reach any conclusions on the profile because the "results were too limited."

Sheryl Dewalt, defendant's mother, testified as a defense witness. She stated that Guy Ameris, her other son, sometimes stayed in defendant's room on weekends. Dewalt also testified that "everybody" had access to defendant's room and that "[f]rom time to time[,] [defendant] would have company."

The State recalled Margolis as a rebuttal witness. She opined that it was significantly more likely that defendant was the contributor of the DNA sample obtained from the handgun than his siblings or parents.

Defendant raises the following contentions for our consideration:

> POINT I
>
> A DEFENDANT WHO STIPULATES THAT HE HAS BEEN PREVIOUSLY CONVICTED OF A PREDICATE OFFENSE AS DEFINED BY N.J.S.A. 2C:39-7(b)(2) WAIVES THE CONSITUTIONAL RIGHT TO HAVE EVERY ELEMENT OF EVERY CHARGE AGAINST HIM PROVEN BEYOND A REASONABLE DOUBT AND THE RIGHT NOT TO INCRIMINATE HIMSELF. BECAUSE SUCH A WAIVER MUST BE KNOWING AND VOLUNTARY AND THERE IS NO INDICATION THAT IT WAS, [DEFENDANT] WAS DEPRIVED OF DUE PROCESS, NECESSITATING REVERSAL OF THE CERTAIN-PERSONS CHARGE. (Not Raised Below)
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> POINT II
>
> THE ADMISSION OF EVIDENCE THAT [DEFENDANT] HAD BEEN ARRESTED FOR A SEPARATE MATTER PRIOR TO THE SEARCH OF THE APARTMENT AND THE COURT'S FAILURE TO ISSUE A CURATIVE INSTRUCTION REQUIRES REVERSAL. (Not Raised Below)
>
> POINT III
>
> RESENTENCING IS REQUIRED BECAUSE THE COURT MISTAKENLY BELIEVED IT HAD TO IMPOSE A FIVE-YEAR TERM ON THE CERTAIN-

PERSONS OFFENSE, WHICH WAS THE MAXIMUM SENTENCE AND EXCESSIVE.

POINT IV

[DEFENDANT] SHOULD BE RESENTENCED BECAUSE MITIGATING FACTOR FOURTEEN SHOULD BE ACCORDED PIPELINE RETROACTIVITY. U.S. CONST. AMENDS. VIII, XIV; N.J. CONST. ART. I, PARAS. 1, 12. (Not Raised Below)

A. THE PLAIN LANGUAGE OF THE STATUTE—THAT IT "SHALL TAKE EFFECT IMMEDIATELY"—HAS SOME AMBIGUITY AND DOES NOT FORBID RETROACTIVE APPLICATION.

B. THE LEGISLATIVE HISTORY—WHICH SHOWS A PURPOSE TO REQUIRE BROAD CONSIDERATION OF YOUTH IN SENTENCING—MILITATES IN FAVOR OF APPLYING THE MITIGATING FACTOR TO CASES ON DIRECT APPEAL.

C. THE AMELIORATIVE PURPOSE OF THE MITIGATING FACTOR CREATES A STRONG PRESUMPTION THAT THE LEGISLATURE WOULD HAVE INTENDED FOR APPLICATION TO CASES ON DIRECT APPEAL.

D. NO MANIFEST INJUSTICE WOULD RESULT FROM APPLYING THE MITIGATING FACTOR TO CASES PENDING ON DIRECT APPEAL.

II.

We first address defendant's contention, raised for the first time on appeal, that his due process rights were violated because the trial court did not personally engage him in a colloquy to determine whether he knowingly and voluntarily agreed to the stipulation that he had previously been convicted of a predicate offense.[3] In practical effect, defendant asks us to adopt a new rule of procedure that would require a waiver colloquy similar in many respects to a guilty plea colloquy. We reject that argument and conclude that the process for accepting a stipulation described in State v. Bailey, 231 N.J. 474 (2018), is adequate to safeguard a defendant's due process rights.

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[3] In this appeal, we limit the focus of our analysis to the procedure applicable to accepting a stipulation that the defendant was previously convicted of a predicate offense for the purposes of the certain persons offense, N.J.S.A. 2C:39-7. We do not address its application to any other crime. We note that, in other constitutional contexts, the United States and New Jersey Supreme Courts have recognized that proof of a defendant's prior criminal history is different from other facts that must be proved to a jury beyond a reasonable doubt under the Sixth Amendment. Cf. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); State v. Thomas, 188 N.J. 137, 142 (2006) (alteration in original) (quoting Apprendi, 530 U.S. at 490) (recognizing that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

In this instance, the parties agreed to two stipulations:

> [T]he parties agree that on January 25th, 2018, members of the Elizabeth Police Department were lawfully present in and lawfully searched 230 3rd Street, . . . in the City of Elizabeth.
>
> Ladies and gentlemen, the parties also agree that on June 26th, 2013, [defendant] was convicted of an offense that bars him from legally possessing a firearm.

Neither party at any time objected to the language of the stipulations. We emphasize that to the contrary, the parties jointly presented these stipulations to the court. The only request made to the trial judge was to switch the order of the two stipulations so that the judge would first instruct the jury that defendant was previously convicted of an offense that legally barred him from possessing a firearm.

The trial judge provided the following preliminary instruction to the jury:

> So let me tell you, ladies and gentlemen, a few things. The parties in this case . . . agree that on June 26, 2013, [defendant] was convicted of an offense that bars him from legally possessing a firearm.
>
> The parties in this case also agree that on January 25th, 2018, members of the Elizabeth Police Department were lawfully present in and lawfully searched [an apartment on] 3rd Street, . . . in the City of Elizabeth.
>
> Now, these agreed upon facts they're also known as stipulations. The parties have agreed to these facts. The jury should treat these facts as undisputed. That is,

> the parties agree that these facts are true. As with all evidence, undisputed facts can be accepted or rejected by the jury in reaching a verdict.

Defendant did not object to the judge's preliminary instructions.

After summations, the trial judge provided final instructions to the jury. The judge instructed the jury on the three elements of the certain persons offense:

> The first element the State must prove beyond a reasonable doubt is that Exhibit [sixty-nine] in evidence is a firearm.
>
> . . . .
>
> The second element the State must prove beyond a reasonable doubt is that the defendant knowingly purchased, owned, possessed or controlled the firearm.
>
> . . . .
>
> Now, the third element the State must prove beyond a reasonable doubt is that the defendant is a person who previously has been convicted of an offense barring him from possessing a weapon.

The trial judge then reiterated his prior instruction regarding the stipulations:

> In this matter the parties have stipulated or agreed that the defendant has previously been convicted of an offense barring him from possessing a weapon. With regard to the stipulation[,] you should treat these facts as being undisputed. That is, the parties agree that these

> facts are true. As with all evidence, undisputed facts can be accepted or rejected by the jury in reaching a verdict.
>
> Normally evidence of a defendant's prior conviction is not permitted under our Rules of Evidence. This is because our Rules specifically exclude evidence that a defendant has committed a prior offense when it is offered only to show that he has a disposition or a tendency to do wrong and, therefore, must be guilty of the present offense. However, our Rules do permit evidence of a prior crime when the evidence is used for some other purpose. In this case the evidence has been introduced for the specific purpose of establishing an element of the present offense. You may not use this evidence to decide that defendant has a tendency to commit crimes or that he is a bad person. That is, you may not decide that just because the defendant has committed an offense previously[,] he must be guilty of the present crime. The evidence produced by the State concerning a prior conviction is to be considered in determining whether the State has established its burden of proof beyond a reasonable doubt.
>
> Now, if you find that the State has proven every element of the offense beyond a reasonable doubt then you must find the defendant guilty. On the other hand, if you find that the State has failed to prove any of these elements beyond a reasonable doubt then you must find the defendant not guilty.

Defendant did not object to the court's final instructions.

We begin our analysis by acknowledging the legal principles that govern this appeal. The Supreme Court of the United States has recognized that "no person shall be made to suffer the onus of a criminal conviction except upon

sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979) (summarizing the protections outlined in In re Winship, 397 U.S. 358 (1970)); see State v. Lodzinski, 246 N.J. 331, 359 (2021) (Patterson, J., concurring) (recognizing the protections afforded to criminal defendants under Winship); see also State v. Anderson, 127 N.J. 191, 208–09 (1992) (noting that "in a criminal prosecution [where] the accused has a constitutional right to a trial by jury, each element of the crime must be decided by the jury and none of those elements may be withheld from the jury and decided by the judge as a matter of law"). A defendant can nonetheless waive the requirement that the State prove each element beyond a reasonable doubt through a valid stipulation. See Bailey, 231 N.J. at 477.

As the Court in Bailey noted, this commonly occurs in prosecutions for "certain persons" offenses pursuant to N.J.S.A. 2C:39-7. Ibid. The Court explained that "[t]he 'certain persons' subject to prosecution under N.J.S.A. 2C:39-7 are those who previously have been convicted of a particular offense identified within that statute. Proof of a prior conviction for an enumerated offense is a necessary predicate to prove a certain persons charge." Ibid. Importantly, for purposes of this appeal, the Court added that "[i]n the majority

of [certain persons] cases, . . . evidence is proffered through stipulation." Ibid. This is so because when "a defendant chooses to stipulate, evidence of the predicate offense [at trial] is extremely limited." Id. at 488. When the defendant agrees to stipulate, "[t]he most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that . . . bar a convict from possessing a gun[.]" Id. at 488 (alterations in original) (quoting Old Chief v. United States, 519 U.S. 172, 190–91 (1997)).

The Court further explained that "[w]hen a defendant refuses to stipulate to a predicate offense under the certain persons statute, the State shall produce evidence of the predicate offense: the judgment of conviction with the unredacted nature of the offense, the degree of offense, and the date of conviction." Id. at 490–91. It is understandable, therefore, why many defendants choose to stipulate to a predicate offense to avoid "a risk of unfair prejudice." See Old Chief, 519 U.S. at 185–86. In this instance, in the absence of the stipulation, the State would have been permitted—indeed, required—to introduce evidence to establish that defendant has previously been convicted of an offense involving domestic violence.

Our evidence rules establish the framework for stipulations. Specifically, N.J.R.E. 101(a)(5) provides, "[i]f there is no bona fide dispute between the

parties as to a relevant fact, the court may permit that fact to be established by stipulation or binding admission." The Court Rules further provide, a "court may accept a written stipulation of facts . . . that the defendant admits to be true, provided the stipulation is signed by the defendant, defense counsel and the prosecutor."[4] R. 3:9-2. The Supreme Court in Bailey further explained that a stipulation is valid, in the context of a certain persons offense, if it "is a knowing and voluntary waiver of rights, [and] placed on the record in defendant's presence." 231 N.J. at 488.

We are satisfied that even absent proof in the record before us that defendant signed the stipulation, see supra note 4, the record shows that the parties agreed to the stipulation and that defendant knowingly and voluntarily

[4] We cannot confirm if the stipulation was signed by defendant because it was not included in the record on appeal. Defendant argues for the first time in his reply brief that there is no evidence that the defendant signed any stipulation as required by Rule 3:9-2. However, defendant has not provided a copy of the stipulation in his appendix to show that he did not sign it. As we note in our discussion of the invited error doctrine and the plain error rule, "[a] defendant who does not raise an issue before a trial court bears the burden of establishing that the trial court's actions constituted plain error." State v. Ross, 229 N.J. 389, 407 (2017). Had defendant challenged the validity of the stipulation at trial, any questions concerning whether defendant had signed the stipulation would have been easily addressed and any oversight quickly remedied. In these circumstances, and especially considering that defendant was present when the stipulations were discussed and twice explained to the jury, we decline to presume that the trial court, defense attorney, and prosecutor, failed to comply with Rule 3:9-2.

waived his right to require the State to prove the third element of the certain persons offense. Importantly, defendant cites no published decision for the proposition that the trial court was obligated to conduct a colloquy with defendant on the record to ensure the waiver was knowing and voluntary.

The language in Bailey does not support any such categorical requirement. In explaining the required procedure, the Court noted, "[p]rovided that the stipulation is a knowing and voluntary waiver of rights, placed on the record in defendant's presence, the prosecution is limited to announcing to the jury that the defendant has committed an offense that satisfies the statutory predicate-offense element." 231 N.J. at 488 (emphasis added). The underscored language referring to a defendant's "presence" would be superfluous if the trial court were required to question the defendant personally to establish that the stipulation was made knowingly and voluntarily. The clear implication in Bailey is that if the defense strategy has changed so that the defendant no longer accepts the stipulation that had been presented to the court as an agreement between the parties, it is incumbent on counsel to alert the trial court so that alternate arrangements can be made for the State to prove the third element by introducing trial evidence of a predicate conviction.

We add that, while the procedures for accepting a guilty plea and for accepting a stipulation at trial are both codified in Rule 3:9-2, there is a significant difference between a guilty plea and a stipulation. While both involve a waiver of trial rights, a guilty plea is dispositive, literally, so that it removes the case from a jury's consideration. A stipulation, in contrast, does not terminate the fact-finding role of the jury. As happened in this case, when there is a stipulation, the jury is expressly told, "[a]s with all evidence, undisputed facts can be accepted or rejected by the jury in reaching a verdict."

In sum, we decline to interpret Rule 3:9-2 to prohibit a trial court from accepting a stipulation as to the predicate offense in a certain persons prosecution "without first questioning the defendant personally, under oath or affirmation," as is required for accepting a plea of guilty. Id. Accordingly, we reject defendant's contention that the trial court committed structural error in this case by not personally addressing defendant to confirm that he had knowingly and voluntarily agreed to the stipulation.[5]

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[5] The New Jersey Supreme Court has noted that structural errors only occur "in a very limited class of cases." State v. Camacho, 218 N.J. 533, 549 (2014) (quoting Johnson v. United States, 520 U.S. 461, 468 (1997)). This is so because "[a] structural error . . . is a 'structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by harmless-error standards.'" Ibid. (alteration in original) (quoting Arizona v. Fulminante, 499 U.S. 279, 309–10

But, even were we to assume for the sake of argument that an error was committed in accepting the stipulation, see supra note 4, we see no reason to reverse defendant's trial conviction since any such error was essentially invited.[6] Under the invited-error doctrine,

> a "defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his [or her] chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he [or she] sought and urged, claiming it to be error and prejudicial."
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> [State v. Jenkins, 178 N.J. 347, 358 (2004) (quoting State v. Pontery, 19 N.J. 457, 471 (1955)).]

The Court in Jenkins added,

> when a defendant asks the court to take his [or her] proffered approach and the court does so, we have held that relief will not be forthcoming on a claim of error by that defendant. On another occasion, we characterized invited error as error that defense counsel has "induced." State v. Corsaro, 107 N.J. 339, 346 (1987). However, we have not decided whether actual reliance by the court is necessary to trigger the doctrine.
>
> [Ibid.]

(1991)). Structural errors affect "the framework within which the trial proceeds, rather than simply . . . the trial process itself." Ibid. Typically, reviewing courts look to see if the procedure utilized at the trial court "undermine[d] the trial process." See State v. A.R., 213 N.J. 542, 558 (2013).

[6] We need not consider whether a trial court would be required to personally address a defendant if defense counsel asked the court to do so.

The Court further explained that the doctrine of invited error, as applied in criminal cases, "is designed to prevent defendants from manipulating the system." Id. at 359. As a result,

> the invited-error doctrine . . . is implicated only when a defendant in some way has led the court into error. Conversely, when there is no evidence that the court in any way relied on a defendant's position, it cannot be said that a defendant has manipulated the system. Some measure of reliance by the court is necessary for the invited-error doctrine to come into play.
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> [Ibid.]

In this instance, we believe the invited error doctrine applies because the trial court relied on the representations made by both parties that the State did not need to prove the predicate offense element. We reiterate and emphasize that defendant benefited from the stipulation because it kept the jury from hearing that he had been convicted of a domestic violence offense. We note that while the State benefited as well in that it was not required to introduce evidence of defendant's conviction, we presume that the State would have had little difficulty meeting its burden of proof at trial. We further stress that defendant only decided to challenge the stipulation on appeal after being found guilty by the jury. See id. at 358 (noting that a defendant cannot beseech the trial court

to take a certain course of action and then, on appeal, condemn that same procedure as prejudicial error).

The present matter is distinguishable from our recent decision in State v. Canfield, where we deemed the invited error doctrine to be inapplicable. 470 N.J. Super. 234, 284 (App. Div. 2022). In Canfield, we considered whether the trial court was obligated to charge the jury on passion/provocation manslaughter, in conjunction with self-defense, sua sponte. Id. at 257. In deciding that the invited error doctrine did not apply, we determined that the defendant had not explicitly requested the trial court not to charge the jury on passion/provocation manslaughter, and we therefore "decline[d] to assume that [the] defendant's generic argument not to charge on [other] lesser-included offenses . . . somehow influenced the trial court's decision whether to charge on passion-provocation manslaughter." Id. at 286. We emphasized that the defendant "did not expressly argue against a passion/provocation instruction" and that "[h]is silence with respect to any such instruction [was] at best a tacit objection that must be extrapolated inferentially from his objection to other lesser-included charges." Id. at 287. Accordingly, we declined to invoke the invited-error doctrine and, as in Jenkins, instead applied the plain-error standard of review to the defendant's newly-minted contention on appeal. Id. at 288–87.

Unlike Canfield, here, both parties specifically agreed to the stipulation, the trial court relied on the stipulation in instructing the jury, and defendant benefited from the stipulation by keeping the jury from learning specifically that defendant had previously been convicted of domestic violence.

We add that even if the invited-error doctrine did not apply, we would still reject defendant's newly-minted contention applying the plain error standard of review. The law is well-settled that when, as in this case, a defendant "does not object or otherwise preserve an issue for appeal at the trial court level, we review the issue for plain error. We must disregard any unchallenged errors or omissions unless they are 'clearly capable of producing an unjust result.'" State v. Santamaria, 236 N.J. 390, 404 (2019) (quoting R. 2:10-2); see also State v. Galicia, 210 N.J. 364, 383 (2012) ("[A]n appellate court will not consider issues, even constitutional ones, which were not raised below.").

Our Supreme Court has made clear that "[p]lain error is a high bar and constitutes 'error not properly preserved for appeal but of a magnitude dictating appellate consideration.'" Santamaria, 236 N.J. at 404 (quoting State v. Bueso, 225 N.J. 193, 202 (2016)). "Moreover, that high standard provides a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error." Bueso, 225 N.J. at 203. That principle is

especially important in this case, because had defendant raised his present contention to the trial court, the court could easily have addressed the issue by personally questioning defendant as to his understanding of the stipulation and his agreement to it. So too, the State could have elected to forego the stipulation and instead introduce readily-available evidence of defendant's predicate conviction. See Ross, 229 N.J. at 407 (quoting State v. Weston, 222 N.J. 277, 294–95 (2015)) (A defendant must assume the burden of establishing that the trial court's actions constituted plain error "because 'to rerun a trial when the error could easily have been cured on request, would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal.'").

We conclude by noting that "[t]o determine whether an alleged error rises to the level of plain error, it must be evaluated in light of the overall strength of the State's case." State v. Singh, 245 N.J. 1, 14–15 (2021). In this instance, proof that defendant possessed the firearm is overwhelming, and the fact of his prior domestic violence conviction is undisputed.

III.

We turn next to defendant's contention that the trial court erred by failing to provide curative instructions sua sponte when two different witnesses at trial made fleeting comments that suggested a prior arrest. During direct

examination, Detective Mikros detailed the events leading up to the search of the apartment on Third Street. The Detective stated that he and other officers "followed [defendant] to [an address on] Bond Street . . . . He was observed meeting with a male that we know from the community . . . . A short time later he went into [a] house. A short time later they came out and then, . . . he was taken into custody for another matter." Defendant did not object to the comment about being taken into custody for another matter.

Later during direct examination, Detective Mikros testified that he recognized the handgun marked as exhibit S-69. The prosecutor then asked Detective Mikros when he had previously seen the handgun. Detective Mikros responded, "[o]ne [sic] of the day of, of the search warrant—I mean of the investigation." Defendant did not object to the comment about the search warrant. After completing the direct examination, the prosecutors asked for a sidebar. The prosecutor alerted the judge as to the detective's brief reference to a search warrant. The prosecutor asked if a curative instruction was necessary. Defense counsel stated that a curative instruction was not needed.

Sergeant David Turner[7] of the Elizabeth Police Department testified that he and other officers were conducting an investigation that brought them to an apartment building on Third Street. He further testified that he witnessed defendant exit that building. Toward the end of the direct examination, the prosecutor asked Sergeant Turner if he was "aware of whether . . . defendant was detained by any of [his] colleagues on that day[.]" Sergeant Turner responded, "[y]es, yes, he was." Defendant did not object to the question or answer.

Evidentiary rulings are generally reviewed under the abuse of discretion standard. State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383–84 (2001)). However, when a party fails to object to an evidentiary ruling, appellate court's conduct a review under the plain error standard. State v. Medina, 242 N.J. 397, 411–12 (2020).

As we have already noted, reviewing courts "must disregard any unchallenged errors or omissions unless they are 'clearly capable of producing an unjust result.'" Santamaria, 236 N.J. at 404 (quoting R. 2:10-2). Plain error is a "high bar" to meet on appeal, id. at 404 (quoting Bueso, 225 N.J. at 202),

[7] Defendant mistakenly refers to Lieutenant Turner as Lieutenant Valdinoto, in his brief. However, Frank Valdinoto was one of the prosecutors trying the case.

and that rigorous standard places "a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error." Bueso, 225 N.J. at 203; see also State v. Nelson, 173 N.J. 417, 471 (2002) (holding that a failure to object to testimony permits an inference that any error in admitting the testimony was not prejudicial).

Pursuant to N.J.R.E. 404(b)(1), "evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." We recently recognized that there is an "apprehension in admitting evidence of other crimes [because] 'the jury may convict the defendant [for being] a bad person in general.'" State v. Howard-French, 468 N.J. Super. 448, 461 (App. Div. 2021) (quoting State v. Cofield, 127 N.J. 328, 336 (1992)).

Our Supreme Court has recognized that "N.J.R.E. 404(b) '[is] a rule of exclusion rather than a rule of inclusion.'" State v. Willis, 225 N.J. 85, 100 (2016) (quoting State v. Marrero, 148 N.J. 469, 483 (1997)). Accordingly, "evidence of uncharged misconduct would be inadmissible if offered solely to prove the defendant's criminal disposition, but if that misconduct evidence is material to a non-propensity purpose . . ., it may be admissible if its probative

value is not outweighed by the risk of prejudice." State v. Rose, 206 N.J. 141, 159 (2001).

In Cofield, our Supreme Court established a four-part test for the admission of other crimes evidence under N.J.R.E. 404(b):

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

In this instance, we need not conduct an analysis under Cofield because the State did not attempt to elicit "other crimes" evidence and does not argue that the detective's remarks were admissible under any theory authorized by N.J.R.E. 404(b). Rather, the comments from Detective Mikros and Sergeant Turner were made inadvertently in response to basic questions about the events on the day of defendant's arrest. We deem their comments pertaining to "another matter" to be inadmissible.

We next must consider whether those comments were "clearly capable of producing an unjust result." Santamaria, 236 N.J. at 404 (quoting R. 2:10-2). We hold they were not. Both comments were brief and vague. Furthermore, we must assess the impact of these remarks in the context of the State's overall proofs. The record before us shows the State introduced overwhelming evidence of defendant's guilt: (1) defendant's mother and sister testified that the room where the gun was found was defendant's bedroom; (2) mail addressed to defendant was found on top of the same dresser where the gun was discovered; (3) the testimony of Margolis provided evidence that defendant was a major contributor to the DNA found on the handgun; and (4) the testimony of Margolis provided evidence that it was more likely defendant's DNA on the handgun as opposed to a related family member's DNA.

And as we have already noted, the absence of an objection suggests that defense counsel did not view those remarks to be prejudicial. Nelson, 173 N.J. at 471. For the same reasons, we conclude that the trial court did not commit plain error by failing to instruct the jury sua sponte to disregard the detective's fleeting remarks. In these circumstances, and considering the overwhelming admissible evidence that defendant at least constructively possessed a firearm

as a certain person, we conclude the failure to issue a curative instruction does not constitute plain error requiring a reversal of the jury verdict. See R. 2:10-2.

IV.

Defendant next argues that his sentence was excessive. Defendant does not challenge the imposition of the 42-month period of parole ineligibility, acknowledging that the parole disqualification term he received is mandated by the Graves Act, N.J.S.A. 2C:43-6(c). Rather, defendant challenges the five-year State Prison sentence. Specifically, defendant asserts that the trial court did not exercise its discretion because it was under the misimpression that it had no choice but to sentence him to a five-year term. We disagree and affirm the sentence.

As a general matter, sentencing decisions are reviewed under a highly deferential standard. See State v. Roth, 95 N.J. 334, 364–65 (1984) (holding that an appellate court may not overturn a sentence unless "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience"). Our review is therefore limited to considering:

> (1) whether guidelines for sentencing established by the Legislature or by the courts were violated; (2) whether the aggravating and mitigating factors found by the sentencing court were based on competent credible

> evidence in the record; and (3) whether the sentence was nevertheless "clearly unreasonable so as to shock the judicial conscience."
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> [State v. Liepe, 239 N.J. 359, 371 (2019) (quoting State v. McGuire, 419 N.J. Super. 88, 158 (App. Div. 2011)).]

"[A]ppellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). Relatedly, a trial court's exercise of discretion that is in line with sentencing principles "should be immune from second-guessing." State v. Bieniek, 200 N.J. 601, 612 (2010).

In State v. Natale, our Supreme Court eliminated the "presumptive term" that had been fixed at or near the mid-point of the sentencing range for each degree of crime. 184 N.J. 458, 488 (2005). The Court explained that

> [a]lthough judges will continue to balance the aggravating and mitigating factors, they will no longer be required to do so from the fixed point of a statutory presumptive [term]. We suspect that many, if not most, judges will pick the middle of the sentencing range as a logical starting point for the balancing process and decide that if the aggravating and mitigating factors are in equipoise, the midpoint will be an appropriate sentence. That would be one reasonable approach, but it is not compelled. Although no inflexible rule applies, reason suggests that when the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors

> preponderate, sentences will tend toward the higher end of the range.
>
> [Ibid.]

In State v. Kruse, the Court explained that "the [sentencing] court must describe the balancing process leading to the sentence." 105 N.J. 354, 360 (1987). The Court added, "[t]o provide an intelligible record for review, the trial court should identify the aggravating and mitigating factors, describe the balance of those factors, and explain how it determined defendant's sentence." Ibid. "Merely enumerating those factors does not provide any insight into the sentencing decision, which follows not from a quantitative, but from a qualitative, analysis." Id. at 363 (citing State v. Morgan, 196 N.J. Super. 1, 5 (App. Div. 1984)).

In the matter before us, at the outset of the sentencing hearing, the trial court noted:

> Pursuant to 2C:43-6(c) the term of imprisonment for this conviction must include the imposition of a minimum term. The minimum term shall be fixed at one-half of the sentence imposed by the Court or [forty-two] months, whichever is greater. On this third degree conviction [forty-two] months is the greater. This is a Graves Act offense. The legislature has spoken.

Later in the sentencing proceeding, the trial court reiterated:

> Now, again, this is a Graves Act offense. The legislature has spoken. The defendant is sentenced to five years in New Jersey State Prison with a [forty-two]-month period of parole ineligibility. This sentence is imposed pursuant to 2C:43-6(c). This sentence is imposed for a violation of 2C:39-7(b)(2).

Defendant interprets the court's comment that "the legislature has spoken" to suggest that the court believed that it had no discretion but to sentence defendant to a five-year prison term. We read the court's remarks instead to reflect the court's acknowledgment that the Graves Act required imposition of a 42-month period of parole ineligibility. Indeed, the trial court cited the statutory provision that circumscribed his sentencing discretion: N.J.S.A. 2C:43-6(c). That statute reads:

> A person who has been convicted under . . . paragraph (2) or (3) of subsection b. of section 6 of P.L.1979, c. 179 (C.2C:39-7) . . . who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm as defined in 2C:39-1f., shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at one-half of the sentence imposed by the court or 42 months, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

N.J.S.A. 2C:43-6(c) requires a term of imprisonment but does not specify the length of that term for a third-degree conviction. In contrast, that provision

does expressly require a 42-month term of parole ineligibility for a conviction other than for a fourth-degree crime. We decline to assume that the sentencing court misread the literal text of the statute it was citing.

Furthermore, the notion that the trial court somehow thought it had no discretion at all in fixing the sentence is belied by the fact that the court conducted a commendably thorough analysis of the relevant aggravating and mitigating factors.

The trial court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) ("[t]he risk that the defendant will commit another offense"); six, N.J.S.A. 2C:44-1(a)(6) ("[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted"); and nine, N.J.S.A. 2C:44-1(a)(9) ("[t]he need for deterring the defendant and others from violating the law").

As to factor three, the trial court noted that there was a risk of reoffending. In making this finding, the trial court recognized that defendant had been on probation before and reoffended after completing probation on more than one occasion. One of the times he reoffended was after a period of incarceration for 511 days.

Regarding factor six, the trial court relied on its justification for factor three. The trial court took note of defendant's prior juvenile adjudications, including: (1) a 2005 juvenile adjudication for an offense that, if committed by an adult, would have amounted to third-degree theft; (2) 2009 and 2010 juvenile adjudications for robbery by force, if committed by an adult; (3) a 2013 disorderly persons conviction for possession of CDS; (4) a 2013 disorderly persons conviction for a contempt of a domestic violence restraining order; and (5) a 2014 abuse and neglect conviction.

As to factor nine, the trial court noted that "there's the strong need, the very, very, very strong need, to deter this defendant in particular as well as others in general from violating the law."

The trial court also found mitigating factor one, N.J.S.A. 2C:44-1(b)(1) ("[t]he defendant's conduct neither caused nor threatened serious harm"). The trial court noted that defendant was not in actual possession of the handgun and that it was "more of a constructive possession type of situation." Consequently, the court concluded that defendant's conduct did not cause or threaten serious harm.

Importantly, the trial court determined that aggravating factors "[t]hree, six[,] and nine substantially, significantly outweigh [mitigating factor] one."

The trial court also gave "great weight to the deterrence factor when coming to this conclusion."

We are satisfied that the trial judge properly identified and balanced the applicable aggravating and mitigating factors and provided an intelligible record for our review. Kruse, 105 N.J. at 360. Importantly, the trial court's finding that the aggravating factors significantly outweighed the sole mitigating factor adequately explained why the court imposed a sentence above the midpoint of the third-degree range of ordinary terms. See N.J.S.A. 2C:43-6(a)(3) ("In the case of a crime of the third degree, for a specific term of years which shall be fixed by the court and shall be between three years and five years."). Accordingly, we conclude that the decision to impose a prison term at the top of the third-degree range does not shock the judicial conscience.[8] See Roth, 95 N.J. at 364–65.

[8] We add that had the court decided in its discretion to impose a shorter prison term within the third-degree range of ordinary terms, that decision would not reduce the mandatory minimum term of parole ineligibility required under N.J.S.A. 2C:43-6(c).

Finally, defendant argues that he is entitled to be resentenced because the new youth mitigating factor, N.J.S.A. 2C:44-1(b)(14),[9] is retroactive and he was twenty-five years old at the time of the offense. The question of whether the new mitigating factor applies retroactively is presently before the New Jersey Supreme Court in State v. Lane, Docket No. A-17-21. In that case, the question the Court will address is, "[d]oes mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), that the 'defendant was under 26 years of age at the time of the commission of the offense,' apply retroactively?" Id. The Court heard oral argument in February, 2022, and its decision is now pending.

At oral argument before us, defense counsel acknowledged that the issue defendant has raised has been preserved and that there is no reason for us in this case to render an opinion on the retroactive application of the new mitigating factor pending the Supreme Court's impending resolution of that issue.

To the extent we have not specifically addressed them, any additional contentions raised by defendant lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2).

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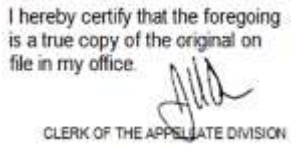
[9] The statute now provides, in pertinent part, "[i]n determining the appropriate sentence to be imposed on a person who has been convicted of an offense, the court may properly consider [as a mitigating circumstance that]. . . [t]he defendant was under 26 years of age at the time of the commission of the offense." N.J.S.A. 2C:44-1(b)(14).

Affirmed.


I hereby certify that the foregoing
is a true copy of the original on
file in my office.
CLERK OF THE APPELLATE DIVISION