SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0530-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JERMAINE McCAIN, a/k/a
JERMAINE McCAINE,

Defendant-Appellant.

———————————————

Argued September 11, 2023 – Decided October 11, 2023

Before Judges Sabatino, Mawla and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 16-12-1848.

Laura B. Lasota, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Michele E. Friedman, Assistant Deputy Public Defender, of counsel and on the brief).

Nancy A. Hulett, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County

Prosecutor, attorney; Nancy A. Hulett, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant Jermaine McCain was convicted of third-degree possession of a controlled dangerous substance ("CDS") in South Brunswick, N.J.S.A. 2C:35-10(a)(1); fourth-degree possession with intent to distribute drug paraphernalia in Edison, N.J.S.A. 2C:36-3; fourth-degree possession with intent to distribute drug paraphernalia in South Brunswick, N.J.S.A. 2C:36-3; first-degree maintaining a CDS production facility in Edison "and/or" South Brunswick at a premises on Route 1 "and/or" a Chrysler 200, N.J.S.A. 2C:35-4; and third-degree distribution of substance represented to be CDS in Edison, N.J.S.A. 2C:35-11(a)(1).

McCain was found not guilty on the remaining charges, which included firearms-related counts in South Brunswick and possession with intent to distribute heroin in Edison. On August 17, 2020, McCain was sentenced to an aggregate term of ten years of imprisonment with a forty-month period of parole ineligibility.

On appeal, McCain raises the following points for our consideration:

POINT I
BECAUSE A SERIOUS UNANIMITY PROBLEM LIES AT THE CORE OF . . . MCCAIN'S

CONVICTION FOR MAINTAINING A DRUG PACKAGING FACILITY, THAT CONVICTION MUST BE REVERSED. (Not Raised Below)

POINT II

TESTIMONY AND ARGUMENT ABOUT THE DANGEROUSNESS OF CUTTING AGENTS AND DRUGS WAS IRRELEVANT AND HIGHLY PREJUDICIAL, REQUIRING REVERSAL. (Not Raised Below)

POINT III

THE STATE'S INTRODUCTION OF HIGHLY PREJUDICIAL PRIOR BAD ACT EVIDENCE DEPRIVED . . . MCCAIN OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

POINT IV

THE COURT COMMITTED REVERSIBLE ERROR WHEN PERMITTING THE LEAD DETECTIVE, WHO WAS NOT QUALIFIED AS AN EXPERT, TO TESTIFY THAT THE WAX FOLDS ARE TYPICALLY USED FOR NARCOTICS. (Not Raised Below)

POINT V

THE IMPOSITION OF THE [TEN]-YEAR TERM OF IMPRISONMENT WITH A [FORTY]-MONTH PERIOD OF PAROLE INELIGIBILITY WAS MANIFSTLY EXCESSIVE AND UNDULY PUNITIVE.

A. The Court Improperly Penalized . . . McCain for His Drug Addiction, Resulting in an Undue Emphasis on Aggravating Factor Three.

> B. Under a Proper Analysis of the Aggravating and Mitigating Factors, and Consideration of the Circumstances of the Governing Offense, the Court Should Have Sentenced . . . McCain for the First-Degree Offense as a Second-Degree Offender.

We have considered the arguments in view of the record and applicable legal principles. Based on our review, we affirm the convictions and sentence for the reasons stated in this opinion.

I.

Pre-trial the court conducted a Franks[1] hearing and heard motions to: reveal a confidential informant; compel production of internal affairs records; dismiss the indictment; and introduce evidence pursuant to N.J.R.E. 404(b). A seven-day jury trial was conducted in March 2020, during which both parties produced witnesses. We summarize the facts developed in the record herein.

On January 7, 2016, Detective Joseph Tuccillo and other officers from the Mercer County Sheriff's Office went to the Office Depot store on Route 1 in Edison Township to apprehend McCain on an outstanding warrant for his arrest. The officers found McCain inside the store and arrested him. Inside his pocket

[1] Franks v. Delaware, 438 U.S. 154 (1978).

were keys to a Chrysler 200 and a wallet with approximately $390. Detective Tuccillo believed that McCain's behavior was highly suspicious, so he called for a canine to assist. When the unit arrived, the dog positively alerted for CDS on the Chrysler's driver's side door seam.

Pursuant to a search warrant, detectives searched the car finding: four boxes of wax folds with a stamp of a red skull and a red hat with "Breaking Bad" written underneath; a bag with a brown substance; $4,004 in the trunk; two silver keys; a stamp kit; and a December 2, 2015 receipt bearing McCain's name for a public storage unit located in South Brunswick Township. Assorted mail was also found throughout the car with McCain's name and address.

Police also searched the storage unit pursuant to a search warrant. The unit was filled with boxes, bags, furniture, and clothing. Police seized a blue and black bag containing an AR-15 style rifle. The gun had an unloaded magazine. Police also found a bag containing small black rubber bands, surgical masks, several clear Ziploc bags, and an envelope from a credit union with McCain's name and the address. Inside a bag that was marked "Halo Farms," police found a black bag containing a box. Inside this box police seized a straw and two wax paper folds stamped "Sin City."

At trial, the prosecutor presented evidence, under N.J.R.E. 404(b), of a September 2015 search of McCain's Lexus by Trenton Detective Otis Wood. Instead of testimony, the parties agreed that a stipulation would be read to the jury that Detective Wood arrested McCain after a motor vehicle stop near the Neshaminy Mall in Langhorne, Pennsylvania. Items seized from the Lexus included seven boxes containing glycine bags with various stamps; numerous loose glycine bags with different stamps, including two that read "Sin City"; eight bags of small black rubber bands; numerous bundles of glycine folds rubber banded together; a box of rubber gloves; a digital scale; a clear bag containing a brown substance, which was submitted to NMS Laboratory; a grinder; a spoon; and several straws.

At trial, Detective Tuccillo, who was not tendered as an expert witness, testified to many of the factual assertions above. Additionally, he stated that "[u]nderneath the front seat, [he] recovered . . . a cutting agent." Immediately after, the prosecutor asked Detective Tuccillo to opine about the brown substance – a question which was objected to and sustained. With respect to the wax folds in the car, Detective Tuccillo testified without objection that wax folds were "typically used for narcotics," and that these wax folds were stamped with a red skull and hat and bore the words "Breaking Bad." When defense counsel

cross-examined Detective Tuccillo on a potential legal purpose for possessing the wax folds – namely, stamp collecting – the officer indicated that people do "[n]ot [put stamps in] the wax folds that you would put heroin into."

M. V. of Rent-A-Car testified that McCain rented the car in question. She stated it is very common for individuals who are not listed on the rental agreement to drive their rental cars, and rental companies often do not find out that unlisted drivers drive the cars unless there is a car accident.

Mandelle Hunter of the New Jersey State Police was qualified as an expert in forensic analysis of CDS. Hunter testified that two samples were submitted to her for testing. The first sample, a plastic baggie with a brown powdery substance weighing thirty-five grams, was tested, and determined to not constitute CDS. She found it was caffeine and quinine, which are commonly used as fillers or cutting agents. The second sample contained glassine folds with powder, as well as a set of sifters, a straw, and black rubber bands. The glassine folds were stamped "Sin City." One of the glassine folds tested positive for trace amounts of heroin, meaning that it had less than .001 grams of heroin, and was thus, unweighable. T. D. of NMS Labs, who was also qualified as an expert in the field of CDS analysis and identification, testified that she received and tested a separate sample in this matter, detecting caffeine and quinine.

Retired Detective Daniel Muntone of the Middlesex County Prosecutor's Office, who was qualified as an expert in CDS possession, distribution, packaging, and repackaging, testified for the State, that a cutting agent is an additive that bulks a drug up to make it seem like a larger quantity than it is. He further explained that common cutting agents for cocaine are inositol[2] or mannitol; while cutting agents for heroin include corn starch, sugar, quinine, caffeine, and fentanyl. Detective Muntone explained the drugs are purchased at a "hub" and brought back to Middlesex County for repackaging and distribution. He testified that cocaine is usually sold in the cut corners of sandwich baggies and heroin is packaged in glycine or wax folds. Detective Muntone explained that the heroin folds sometimes have a stamp or brand name on them.

Detective Muntone opined that the cost of a gram of cocaine in Middlesex County was around sixty dollars; a dose of heroin cost five to seven dollars; a dose of heroin is about one or two wax folds; a single fold of heroin is called a "deck"; ten decks is called a "bundle"; fifty folds is a "brick", and the folds are bundled together using rubber bands. He also described the paraphernalia used to ingest cocaine and heroin: cocaine can be smoked or inhaled through the nose through pen holders, straws, or rolled dollar bills; heroin can be injected with a

[2] The trial court transcript reflects the inaccurate phonetic spelling "an Osital."

needle but is more often inhaled, commonly through cut straws. Detective Muntone explained that repackaging illegal drugs involves using scales, packaging materials (including wax folds), cutting agents, and sifters to blend the cutting agents with the heroin.

An employee from Public Storage testified that McCain opened an account at the Route 1 facility in June 2015, using the aforementioned address. She identified the keys found in the Chrysler as keys to the locks that Public Storage places stickers on, whether the lock is sold by them or provided by the renter of the storage unit.

McCain's sister testified that she went to the storage unit following his arrest, and found belongings in the unit that she was not sure to whom they belonged. She further stated one of McCain's roommates had reached out to her for access to the locker and she has never known McCain to own a firearm.

Finally, McCain testified on his own behalf, and admitted that he rented the storage unit at the Public Storage facility on Route 1. McCain claimed that the belongings placed in the storage unit came from a residence he and two roommates shared in Somerset. He stated that the $4,000 found in the Chrysler was from an insurance payment he received following a September 2015 car accident coinciding with his arrest in Pennsylvania. He claimed that after the

accident, he rented vehicles. McCain also asserted the officer who arrested him in Pennsylvania had known him since childhood, and they had a physical confrontation over dating the same woman. McCain claimed he never owned a gun and had never seen the gun found in the storage unit, and that the sifters and glycine bags in the storage unit were not his.

II.

In Point I, McCain, for the first time on appeal, contends the trial court's use of "and/or" in the jury charge may have led the jury to a non-unanimous verdict on the offense of maintaining a CDS facility. He posits that the jury was improperly directed to convict him of the offense based on different acts and at least two different theories of evidence. McCain further argues that this was compounded by the court failing to provide a specific unanimity instruction.

"[P]roper jury instructions are essential to a fair trial," and "'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). However, a party may generally not "urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict[.]" R. 1:7-2. In the absence of such objections, appellate courts review

challenged jury instructions for plain error. State v. Adams, 194 N.J. 186, 206 (2008). An error is plain if it is "clearly capable of producing an unjust result," Rule 2:10-2, in that there is "a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached . . .." State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)).

However, even in a criminal prosecution, an error in a jury charge does not compel reversal of the conviction. State v. Docaj, 407 N.J. Super. 352, 362 (App. Div. 2009). Rather, the error must contain "'legal impropriety. . . prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed the clear capacity to bring about an unjust result.'" Ibid. (quoting State v. Hock, 54 N.J. 526, 538 (1969)). "[T]he test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997) (quoting State v. Sette, 259 N.J. Super. 156, 190-91 (App. Div. 1992)); see also State v. Baum, 224 N.J. 147, 159 (2016). "To 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. Clark, 251 N.J. 266,

287 (2022) (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (internal quotation marks omitted)).

The requirement of a unanimous jury verdict, manifested in New Jersey's Rules of Court and presupposed by its Constitution, demands that the trier of fact reach a "subjective state of certitude on the facts in issue." State v. Frisby, 174 N.J. 583, 596 (2002) (citation omitted); N.J. Const. art. I, ¶ 9; R. 1:8-9. Unanimity generally "requires 'jurors to be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence." Frisby, 174 N.J. at 596 (quoting United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)). Furthermore, criminal convictions must "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." State v. Bailey, 231 N.J. 474, 483 (2018) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

That a defendant could have been convicted based on anything less than a unanimous verdict implicates the defendant's substantive rights. State v. Shomo, 129 N.J. 248, 260 (1992) (citing R. 1:8-9); State v. Cordasco, 2 N.J. 189, 202 (1949). However, the jury need not unanimously agree on "which of several possible sets of underlying brute facts make up a particular element," or "which of several possible means the defendant used to commit an element of the

crime." Richardson v. United States, 526 U.S. 813, 817 (1999). In other words, "when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." Schad v. Arizona, 501 U.S. 624, 649-50 (1991) (Scalia, J., concurring).

The use of the phrase "and/or" has been criticized by this court as injecting potential confusion and ambiguity into jury instructions. State v. Gonzalez, 444 N.J. Super. 62, 77 (App. Div. 2016). In Gonzalez, the trial court used "and/or" on several occasions while charging the jury on robbery and aggravated assault, including as to accomplice liability. In reversing, the court stated:

> The repeated use of the offending phrase rendered these instructions ambiguous. Even if we could somehow assume that, in navigating these instructions, the jury accurately guessed when "and/or" should have been "and" and when "and/or" should have been "or" or, even, when "and/or" meant both . . . we are further struck by the spectre of a verdict that may have lacked unanimity or may have lacked a finding on one or more elements of the offenses for which defendant was convicted.
>
> [Id. at 75.]

The court concluded that utilizing the problematic phrase

> conveyed to the jury that it could find defendant guilty of either substantive offense – which is accurate – but left open the possibility that some jurors could have found defendant conspired in or was an accomplice in the robbery but not the assault, while other jurors could

> have found he conspired in or was an accomplice in the assault but not the robbery.
>
> [Id. at 76.]

Thus, the court held that the "repeated use of 'and/or' wrung from the charge any clarity it might have otherwise possessed." Id. at 77. See also State v. Gentry, 183 N.J. 30, 33 (2005) (jurors were required to agree on which acts were committed against which victim).

In denying certification in Gonzalez, our Supreme Court stated: "The Court agrees with the Appellate Division's conclusion that the use of 'and/or' in the jury instruction in this case injected ambiguity into the charge. . .. The criticism of the use of 'and/or' is limited to the circumstances in which it was used in this case." Gonzalez, 226 N.J. at 209.

The Supreme Court recently reemphasized that "unanimity is not required when a statute embodies a single offense that may be committed in a number of cognate ways." State v. Macchia, 253 N.J. 232 (2023)[3] (quoting Frisby, 174 N.J. at 597). The Court in Macchia affirmed our holding that "[t]he State presented only one theory to support the charge of reckless manslaughter – defendant and [the victim] engaged in a fist fight, which ended in defendant shooting and

[3] At our request, the parties filed supplemental briefs to address Macchia, which was decided after the initial briefing concluded.

killing [them]." Macchia, 253 N.J. at 255. Also, "that to disprove self-defense, the State need not prove that defendant's belief was not honest and reasonable, and that defendant provoked the encounter, and that defendant could have retreated. Instead, if the State proves any of the disqualifiers beyond a reasonable doubt, it has disproven self-defense." Ibid. Further, the Court reasoned in Macchia that "[a]fter the trial court answered the jury's questions and accurately explained the law, there was no 'tangible indication' that the jury was confused about what facts it needed to decide to determine guilt." Id. at 260.

Here, the jury instruction stated:

> McCain on or about January 7, 2016 to January 8, 2016 in the Township of Edison and/or in the Township of South Brunswick, in the County of Middlesex and within the jurisdiction of this [c]ourt did knowingly operate a premises at 3825 U.S. 1 and/or a Chrysler 200 bearing Pennsylvania registration [XXXXXXX] used for the manufacturing or packaging or repackaging of heroin.
>
> [(emphasis added).]

McCain contends the jury instruction containing "and/or" was confusing and lacked a specific unanimity instruction, since the trial judge advised the jurors that they could convict based on evidence found at the storage facility "and/or" in the rental car. McCain argues that Gonzalez is similar to this case,

as there is no way to ascertain how the jury interpreted the phrase "and/or" within the jury instructions, possibly resulting in different jurors returning a verdict upon different evidence at different locations. The State urges us to reject this interpretation of Gonzalez.

The parties argue over whether the facility location and location of evidence is a "brute fact" that does not require unanimity or is "exceptionally complex" and the plaintiff's multiple theories are "contradictory," "conceptually distinct," and not even "marginally related," to each other. See Macchia 253 N.J. at 258. However, the elements of the crime of maintaining a CDS production facility were proven unanimously, and unanimous agreement on the "brute facts" or which of the "several possible means McCain used to commit an element of the crime," is not required. Id. at 253. The rented car and the storage facility are instrumentalities of the same charge of operating a CDS distribution facility. Based on the testimony, the jury was presented multiple pieces of evidence used to satisfy each element of the crime, as evidenced by findings of guilt on charges for possession and possession with intent to distribute drug paraphernalia, for actions that occurred at the storage locker in South Brunswick, and in the car in Edison.

Despite criticism of the "and/or" phrase, its use in this case did not create "confusion or ambiguity." The general unanimity instruction, which reinforced to this jury that it must unanimously agree on the specific predicates of a guilty verdict, was sufficient. Model Jury Charges (Criminal), "Criminal Final Charge" (rev. Sept. 1, 2022). Under the plain error standard, the trial judge's instructions on first-degree maintaining a CDS production facility, including "and/or," was not capable of producing an unjust result or prejudice substantial rights warranting reversal.

Macchia's holding that unanimity is not required for the several possible means of satisfying an element of a crime distinguishes this case from Gonzalez. The State was required to prove that McCain knowingly operated a CDS production facility, which was proved by the facility being in his car in Edison or in the storage facility in South Brunswick or in both locations. There were no alternate theories of guilt presented by the State, but rather evidence of a continuous, unbroken course of criminal conduct. Maintaining a CDS production facility is what the jury was required to find unanimously. This was not a case requiring a determination of the objective of a conspiracy or the scope of McCain's liability as an accomplice. The jury instructions were in accord with the Court's decision in Macchia and other precedent.

III.

In Point II, McCain urges us to overturn his conviction because he claims the Detective Muntone's testimony "regarding the dangers of cutting agents, as well as stamps referring to death, was irrelevant and highly prejudicial, and was inadmissible under N.J.R.E. 403." Since there was no objection to this testimony at trial, our review is under the plain error standard. R. 2:10-2.

Detective Muntone testified regarding various other cutting agents including mannitol, sugar, and corn starch – and went on to advise the jury that rat poison is often used as a cutting agent to increase drug profit margins. He also told the jury that fentanyl is often used as a cutting agent and is a leading cause of deaths. McCain asserts that "the only reason for the prosecution to expose the jury to expert testimony regarding poisoning and deaths, as it pertained to cutting agents, was to inflame their passions and confuse the issues at hand." He argues the "testimony about cutting agents unrelated to caffeine and quinine had no probative value whatsoever."

A trial judge's decision to admit or exclude evidence is "entitled to deference absent a showing of an abuse of discretion, i.e., [that] there has been a clear error of judgment." Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016) (internal quotation omitted). When a trial court weighs the probative

value of evidence against its prejudicial effect pursuant to N.J.R.E. 403, its ruling should be overturned only if it constitutes "a clear error of judgment." State v. Koedatich, 112 N.J. 225, 313 (1988). The decision of a trial judge "must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide [off] the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

The inquiry under N.J.R.E. 403 extends to whether the probative value of the evidence "is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the [issues]." State v. Thompson, 59 N.J. 396, 421 (1971). It is not enough for the opposing party to show that the evidence could be prejudicial; "[d]amaging evidence usually is very prejudicial but the question here is whether the risk of undue prejudice was too high." State v. Morton, 155 N.J. 383, 453-54 (1998) (quoting State v. Bowens, 219 N.J. Super. 290, 296-97 (App. 1987)). "The mere possibility that evidence could be prejudicial does not justify its exclusion." State v. Swint, 328 N.J. Super. 236, 253 (App. Div. 2003).

McCain argues that the "inflammatory" statements regarding cutting agents in addition to Detective Muntone's testimony about various stamps

referring to death, including "rest in peace" or "dead on arrival," conveyed to the jury that individuals like McCain are responsible for causing drug overdoses. McCain argues the judge did not issue a curative instruction and the cumulative effect could have produced an unjust result warranting reversal of his convictions.

"Admission of expert testimony on drug possession and distribution techniques is permissible when reasonably required to assist jurors in understanding subjects that are beyond the ken of an average layperson." State v. Nesbitt, 185 N.J. 504, 507 (2006); see State v. Odom, 116 N.J. 65 (1989). Similar, to Nesbitt, where the court found a detective's testimony could have been perceived as helpful to the jury in understanding the nature of the drug transaction, Detective Muntone's testimony could have been helpful to the jury in understanding drug possession and distribution. Nesbitt, 185 N.J. at 516.

Allowing Detective Muntone to identify and explain the drug terms and explanations did not amount to plain error. The terms used by the expert were for the purpose of explaining drug distribution and possession. Using drug terms that include death and the dangers of cutting agents do not clearly cause an unjust result. In this case, where there were stamps with skulls, writing, and different cutting agents, they helped the jury understand what was found.

Many of the comments that McCain now objects to were fleeting, and part of Detective Muntone's relevant expertise to educate the jury on the distribution and repackaging of illegal drugs. There was no improper inference made with the brief reference to fentanyl as another cutting agent. Therefore, allowing this part of the expert testimony did not constitute plain error and does not warrant reversal.

IV.

In Point III, McCain argues that he was deprived of a fair trial when the trial judge admitted the evidence found in the September 2015 search of his Lexus under N.J.R.E. 404(b). This argument lacks merit.

In State v. Cofield, 127 N.J. 328, 338 (1992), the Supreme Court established a four-part test for the admission of evidence of other crimes, wrongs, or acts pursuant to N.J.R.E. 404(b): (1) the evidence must be admissible as relevant to a material issue; (2) it must be similar-in kind and reasonably close in time to the offense charged; (3) the evidence of the other crime, wrong, or act must be clear and convincing; and (4) pursuant to N.J.R.E. 403, the probative value of the evidence must not be outweighed by its apparent prejudice. As we noted, a trial judge's decision to admit or exclude evidence is "entitled to deference absent a showing of an abuse of discretion, i.e., [that] there has been

a clear error of judgment." Griffin, 225 N.J. 413. Admissibility rulings regarding other-crimes evidence made pursuant to N.J.R.E. 404(b) are reversed "[o]nly where there is a clear error of judgment . . .." State v. Rose, 206 N.J. 141, 157-58 (2011) (quoting State v. Barden, 195 N.J. 375, 391 (2008)).

The trial judge appropriately conducted a Cofield analysis related to the evidence seized from the search of the Lexus. The judge found the first prong of Cofield was satisfied based upon the similarity of the evidence seized in the September 2015 and January 2016 searches. She stated:

> The Public Storage invoices for Unit FS 11 were the same in both searches; the cutting agents which were quinine and caffeine were the same in both searches; black rubber bands were the same; the style of boxes containing unused folds were the same; and most notably, there were unused folds stamped "Sin City" found in both vehicles. Of the hundreds or thousands of different stamp types that exist in the world, the same stamp in both places creates a distinct link between the events; connecting [McCain] to the items found in January 2016. To the extent that [McCain] disputes ownership or knowledge of the contents of the storage locker or rental car, the similar evidence from Pennsylvania does go to show knowledge. To the extent that the intent to distribute is at issue, the evidence from the September 2015 search is relevant, together with showing a common plan, and preparation.

The judge found that the "close in time" requirement of the second Cofield prong was satisfied. She noted "[t]iming is a qualitative consideration, not

simply quantitative." The search of McCain's first car occurred in September 2015 while the search of the rental vehicle and storage unit at issue here occurred in January 2016, less than four months later.

The third Cofield prong was met because McCain's admission and conviction "establish clear and convincing evidence of the prior bad act."

Finally, under the fourth Cofield prong, the trial judge found that the probative value of the evidence, namely, providing proof of McCain's motive, intent, knowledge, preparation, and plan, outweigh the prejudicial effect the evidence may have. The State proposed to remove the heroin and cocaine evidence from the presentation to diminish prejudice, and McCain agreed. Based on this stipulation, the State was not permitted to indicate to the jury that there was any cocaine or heroin in the Pennsylvania case.

On appeal, McCain argues that even if the first three prongs of Cofield were satisfied, the minimal probative value of the glassine bags stamped "Sin City," a brown powdery substance, black rubber bands, and spoon from the prior 2015 car search was not outweighed by "the extreme prejudice flowing from such evidence." He argues the sanitization of not telling the jury that there was any cocaine or heroin found did not cure the prejudice given the context, namely, the evidence of the cutting agent and that the crux of the State's case centered

on the use of caffeine and quinine as mixing agents. McCain argues that the jury could have inferred that he had been using these substances to package drugs, even though unweighable amounts of drugs were found.

The trial judge's evidentiary ruling and Cofield analysis were sound. The circumstances of the previous arrest were clearly useful to show knowledge, intent, and common plan under N.J.R.E. 404(b)(2) because the same stamps and other matching packaging material were found in both the Lexus and storage facility. The judge also properly informed the jury about the limited proper use of the evidence and its limitations. The jury knew that it was not to use the evidence about the paraphernalia seized from the Lexus to infer a criminal disposition.

V.

In Point IV, McCain contends the trial judge committed reversible error by permitting Detective Tuccillo to testify that wax folds are typically used for narcotics. Because there was no objection at trial, our review is under the plain error standard. R. 2:10-2.

On appeal, McCain argues that New Jersey courts require expert testimony "to explain complex matters that would fall beyond the ken of the ordinary juror." State v. Fortin, 189 N.J. 579, 597 (2007). He asserts Detective

Tuccillo was a fact witness who improperly testified beyond that scope when he told the jurors that wax folds were "typically used for narcotics." Furthermore, McCain argues that due to Detective Tuccillo's role as lead detective, allowing the testimony "was clearly capable of producing an unjust result."

The detective's testimony was beyond the scope of a lay witness because he was not qualified as an expert to opine on the drug trade. However, his testimony was brief and fleeting, and it was not plain error to have allowed it. Moreover, McCain was not prejudiced because McCain was permitted to rebut the testimony when he testified. Detective Tuccillo's testimony was also neutralized when McCain's counsel elicited testimony from another officer that wax folds are not inherently illegal. In short, the fleeting comment by Detective Tuccillo was not going to "tip the scale" against McCain when there was substantial other evidence to prove his guilt. Balancing these facts, the testimony did not amount to reversible error.

VI.

Lastly, in Point V, McCain argues that his sentence was excessive and unduly punitive.

The Supreme Court has stated we "must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of

aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984) (alteration in original)). Our standard of review is deferential to the sentencing court's determination of the appropriate sentence and we must not substitute our judgment for that of the sentencing court. See State v. Rivera, 249 N.J. 285, 297 (2021).

McCain argues that the court improperly penalized him for his drug addiction, resulting in an undue emphasis on aggravating factor three, risk of re-offense, N.J.S.A. 2C:44-1(a)(3). The trial judge found that:

> That is based upon the fact that there are two prior pending charges out of Mercer County for which you've pled guilty to, along with the conviction in Pennsylvania for a similar activity, along with the fact that there is an admitted addiction, which is -- can be a life long struggle. So, even though you may not be actually using now, and I hope that you never go back to it, all of these factors weigh in favor of finding aggravating factor three.

McCain cites State v. Baylass, 114 N.J. 169, 179 (1989), which ruled that a sentencing court "should not weigh a defendant's drug addiction as evidence of an aggravating factor." See State v. Henry, 418 N.J. Super. 481, 495 (Law

Div. 2010) (finding defendant's alcoholism to be a mitigator because, "[a]lthough this does not justify or excuse the defendant's conduct, it explains it"); but see State v. Bieniek, 200 N.J. 601, 610 (2010) (finding "no fault" in court's refusal to find this as a mitigator). Furthermore, McCain argues that "[b]ecause the court was precluded from using [his] drug addiction as an aggravator, its consideration of same when finding aggravating factor three was clearly erroneous."

The judge was not punishing McCain for his drug addiction, but was instead recounting his criminal record, which entailed his addiction to drugs. Further, the judge made this finding after considering mitigation letters submitted on McCain's behalf.

The trial judge performed a proper sentencing analysis, considering the aggravating and mitigating factors and the sentencing guidelines. She provided detailed reasons for her decision. The sentence does not shock the judicial conscience and was based on the appropriate standards and evidence.

McCain also argues on appeal that the trial judge should have sentenced McCain on the first-degree offense as a second-degree offender. He argues the circumstances of the first-degree maintaining a drug packaging facility conviction warrant a downward sentencing departure. He emphasizes that less

than .001 grams of heroin was found in the storage facility and "the Legislature could not have contemplated sending a man to prison for ten years with a mandatory period of parole ineligibility for a CDS offense where the only CDS discovered was an unweighable amount." He further claims the record establishes that his character and attitude show he is unlikely to reoffend. McCain points to the letters of support and petition signed by fifty community members attesting to his mentorship and community leadership.

The court may sentence a defendant to a lower degree if it is clearly convinced that the mitigating factors substantially outweigh the aggravating factors and where the interest of justice demands. N.J.S.A. 2C:44-1(f)(2). We decline to second guess the trial judge's sentencing decision because the record supports the conclusion that the mitigating factors did not substantially outweigh the aggravating factors to warrant a downgrade. McCain's conviction of CDS offenses and for maintaining a CDS production facility was a harm to the community he was serving. Lastly, he received the lowest possible sentence for a first-degree offense range, which was appropriate, in the interests of justice, and does not shock the judicial conscience.

Affirmed.