SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0937-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC S. SMITH, JR., a/k/a
ERIC STUART SMITH, JR.,
and ERIC S. SMITH,

Defendant-Appellant.

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Submitted March 8, 2023 – Decided July 7, 2023

Before Judges Vernoia, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Indictment No. 16-11-0181.

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Daniel Finkelstein, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Eric S. Smith, Jr. of first-degree possession with intent to distribute a controlled dangerous substance. The court imposed an extended term twenty-five year with a twelve-year period of parole ineligibility. Defendant appeals from an order denying his motion to suppress evidence, as well as his judgment of conviction and sentence. Based on our review of the record, the parties' arguments, and the applicable legal principles, we affirm the court's order denying defendant's suppression motion, reverse defendant's conviction, and remand for a new trial.

I.

The criminal charges in this matter arose from a 2016 investigation of defendant for possession of narcotics. In November 2016, a grand jury returned an indictment charging defendant in seven counts, consisting of: three counts of second-degree unlawful possession of a weapon; one count of first-degree possession with intent to distribute a controlled dangerous substance; one count of third-degree possession with intent to distribute a controlled dangerous substance; one count of second-degree possession of a firearm during the commission of certain crimes; and one count of second-degree certain persons not to possess weapons.

Defendant moved to suppress evidence — cocaine — seized from his person without a warrant on April 11, 2016. A judge conducted a hearing on the motion, found the police officers properly seized the cocaine after observing it in plain view, and denied the suppression motion. After obtaining new counsel, defendant filed a new suppression motion arguing that, during the hearing on the initial motion, prior counsel did not adequately challenge the corroboration of information attributed to a confidential informant.

A different judge denied defendant's request for a new suppression hearing, but later ordered a rehearing on the suppression motion after it was discovered the judge who initially heard and denied the motion had represented defendant many years earlier. The court also granted the State's request that the court decide the motion by reviewing the audio and video recording of the testimony from the initial hearing and consider further arguments from counsel.

Without objection, a third judge conducted a hearing during which the recording of the testimony from the initial hearing was played and heard argument from counsel. The judge rendered an oral decision finding that while investigating reports from two confidential informants that defendant was involved in drug trafficking while armed with a weapon, New Jersey State Police Detective Juan Jeffrey Mazzoni and New Jersey State Trooper Andrew Silipino

approached defendant outside his former girlfriend's apartment. The court further found the officers observed something "weighted" in defendant's pocket that appeared as a "swinging bulge" as defendant walked from his vehicle toward the apartment.

The court also found that after the officers approached defendant and asked to talk with him "for a minute," he placed his hand in his pocket. Detective Mazzoni instructed defendant to remove his hand from the pocket, but defendant did not comply. The court further found the detective, fearful defendant had a weapon in his pocket, then grabbed defendant's arm near its elbow to pull defendant's hand out of the pocket. As defendant pulled his hand out of his pocket, the officers observed a velvet bag with a drawstring in his hand. They also observed the drawstring was not pulled tight, the bag was "wide open," and the bag contained what they recognized as cocaine.

The court concluded the officers first properly conducted a field inquiry by approaching defendant and speaking with him. The court further determined the totality of the circumstances included the officers' knowledge defendant had a prior conviction for "a gun offense" and for distribution of a controlled dangerous substance, information from two confidential informants that defendant was dealing drugs, and that the apartments were located in a high

crime area where "known distribution and weapons offenses" took place. The court also noted the officers could not see defendant's hand while it was in his pocket, and defendant failed to "accede to what would have been a simple request to remove his hand." Thus, the court concluded a "lawful field inquiry turned into" a valid protective pat-down for weapons and the officers properly seized the cocaine when defendant pulled from his pocket the open bag containing what the officers immediately recognized as cocaine.

The court denied defendant's motion and the matter proceeded to trial. During the trial, the court assured the jurors their service would not extend beyond April 18, 2019. On April 11, 2019, the jury deliberated for about two hours before being dismissed until the following week.

When the trial next continued on April 16, 2019, the jury foreperson advised his wife had a medical emergency and needed imminent surgical care. The court and the parties therefore understood the foreperson would be unavailable to continue to serve beyond the conclusion of the proceedings that day. Jury deliberations resumed at around 9:30 a.m. that morning.

About three hours later, the jury submitted a note to the court stating, "We are unanimous on one charge. We will not be unanimous on the others." The

court read the note to the parties before dismissing the jury for lunch. Outside the jury's presence, the court then proposed:

> [THE COURT:] [Let us] give it the afternoon and see if they come back with another note or a verdict one way or the other. If [they are] still deadlocked, you guys can decide whether you want a partial verdict?
>
> [DEFENSE COUNSEL]: We know how the [a]ppellate [c]ourts look at that.
>
> THE COURT: Well, they [do not] like them. And you know, the trial courts [do not] like them either.

Neither party indicated a willingness to accept a partial verdict. Following lunch, the court instructed the jurors to continue deliberating. They did so from approximately 1:45 p.m. to 3:25 p.m., at which point they submitted a second note to the court, reiterating, "Unanimous on one charge. Not unanimous on other charges."

The court again discussed with counsel the possibility of accepting a partial verdict or, alternatively, providing the jury a Czachor charge.[1] In part,

[1] See State v. Czachor, 82 N.J. 392, 404-08 (1980) (providing "guidance to trial judges on the proper procedures to follow in the event of a jury deadlock in a criminal trial."). An appropriate Czachor charge should advise the jury the court is not attempting to coerce a verdict by providing the instruction; inform the individual jurors they should attempt to reach a unanimous verdict; and inform the jurors that while they should listen respectfully to each other's views, no juror should surrender their honest convictions to side with the majority. Id. at

the court noted the factors pertinent to whether it could properly accept a partial verdict, including whether the "State indicates that it will dismiss the unresolved . . . counts," and confirmed the State was unwilling to do so. The court also generally discussed what it viewed as the advantages and disadvantages to defendant if a partial verdict was taken and stated it did not know if taking a partial verdict would be favorable to defendant. The court then stated it "would be hesitant to ask for a partial verdict."

Defense counsel explained he was not convinced a partial verdict was in defendant's interest, in part because the State would not agree to dismiss the remaining counts if a partial verdict was accepted. The court acknowledged acceptance of a partial verdict "cannot be to the detriment of the defendant's rights," stated it "[did not] think [it is] to the detriment" of defendant, but noted its view was based on speculation "on both sides of the fence."

The trial judge then explained he was going to give the jury the Czachor charge and "see what happens." Defense counsel requested the court ask the foreperson if he could both tend to his wife and return to deliberate on the

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405 n.4; see also Model Jury Charges (Criminal), "Judge's Instructions on Further Jury Deliberations" (approved Jan. 14, 2013).

afternoon of the following day, April 17, 2019, and thereafter so that the court did not "lose him." The court stated it was "not prepared to do that" because it wanted to provide the jury an entire day to deliberate on April 17, 2019.

The court provided the jury with a Czachor charge. Following the modified charge, the court held a sidebar conference with the foreperson and counsel.[2] During the sidebar conference, the court confirmed the foreperson could not continue to serve beyond that day.

The jury, with the foreperson included, continued its deliberations, and later sent the court a note requesting a replay of Detective Mazzoni's and defendant's trial testimony. The court advised counsel it was going to release the foreperson from further service and "probably reconstitute a different jury" the following day.

Defense counsel objected to reconstituting the jury and, again, proposed the court discuss with the foreperson a schedule that would allow him to both take care of his wife and continue deliberating. The court found defense counsel's request was "not pragmatic[,]" particularly because it had otherwise advised the jury the trial would end on April 18, 2019. Nonetheless, the court

[2] The transcript notes "the sidebar conference [was] completely inaudible."

agreed to conduct another conference with the foreperson. The court dismissed the other jurors for the day and engaged in colloquy with the foreperson. The foreperson explained he was no longer able to serve on the jury due to personal reasons that were unrelated to the case, his interactions with the other jurors, or the deliberations. The court dismissed the foreperson from further jury service.[3]

On the following day, April 17, 2019, defendant moved for a mistrial based on the court's dismissal of the foreperson and its plan to replace the foreperson with an alternate juror and allow the reconstituted jury to continue deliberations anew following the initial jury's repeated statements it had reached a unanimous decision on one of the charges. The court denied defendant's motion, finding defendant had not opposed releasing the foreperson and replacing the foreperson was otherwise proper.

The court provided instructions to the reconstituted jury, and deliberations began anew at 9:32 a.m. At the reconstituted jury's request, the court replayed the testimony of defendant and Detective Mazzoni, and the jurors ate lunch, between 10:42 a.m. and 2:14 p.m. The jury continued deliberations from around 2:14 p.m. to about 2:44 p.m., at which time the jury submitted a third note to the

[3] The transcript notes this "sidebar conference [was] completely inaudible" as well.

court stating, "Unanimous on one charge; not making progress on other charges."

The court accepted the reconstituted jury's partial verdict of guilty on first-degree possession with intent to distribute a controlled dangerous substance, N.J.S.A. 2C:35-5(b)(1), under count one of the indictment. As discussed, the court imposed an extended term twenty-five-year sentence, subject to a twelve-year period of parole ineligibility. This appeal followed.

On appeal, defendant presents the following arguments for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO REVEAL INFORMATION REGARDING THE CONFIDENTIAL INFORMANTS, WHICH WAS ESSENTIAL TO A FAIR DETERMINATION OF HIS DEFENSE[.]
>
> POINT II
>
> DEFENDANT'S MOTION TO SUPPRESS THE COCAINE SEIZED ON APRIL 11, 2016 WAS IMPROPERLY DENIED[.]
>
> POINT III
>
> THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION DUE TO THE

STATE'S FAILURE TO CALL AMBER PIERCE AS A WITNESS[.]

POINT IV

THE PROSECUTOR'S COMMENTS DURING SUMMATION CONSTITUTED MISCONDUCT WHICH DENIED DEFENDANT A FAIR TRIAL[.]

POINT V

THE REPLACEMENT OF TWO DELIBERATING JURORS AFTER THE DELIBERATIONS HAD PROGRESSED TO THE POINT AT WHICH THE NEW JURORS WERE UNABLE TO PLAY A MEANINGFUL ROLE DENIED DEFENDANT A FAIR TRIAL[.]

POINT VI

THE TRIAL COURT'S ACCEPTANCE OF A PARTIAL VERDICT ON THE POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE COUNT WAS ERROR WHICH DENIED DEFENDANT A FAIR TRIAL[.]

POINT VII

THE TRIAL COURT WRONGFULLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL[.]

POINT VIII

THE SENTENCE OF TWENTY-FIVE YEARS WITH A PAROLE DISQUALIFIER OF TWELVE YEARS IS EXCESSIVE[.]

II.

We first consider defendant's argument he is entitled to a reversal of his conviction because the court erred by substituting an alternate juror for the foreperson after the jury twice indicated it had reached a unanimous verdict on one of the counts of the indictment. Defendant contends a juror may not be properly replaced after deliberations have progressed to a point that it is "strongly inferable the jury has made actual fact-findings or reached determinations of guilt or innocence."

Under circumstances identical to those present here, our Supreme Court in State v. Horton considered a challenge to a conviction where jurors announced they reached a partial verdict prior to the trial court's decision to excuse a juror who could no longer serve due to a pre-planned vacation. 242 N.J. 428, 430 (2020). The trial court replaced the excused juror with an alternate juror and allowed the reconstituted jury to continue deliberations anew with the replacement juror. Ibid. The defendant moved for a mistrial, which the trial court denied, and the reconstituted jury later returned a unanimous guilty verdict. Ibid. The defendant appealed from his conviction, making the same argument defendant makes here — "the juror substitution after the jury had reached a partial verdict denied him a fair trial." Ibid.

The Court agreed, explaining "[w]e have rich and fulsome jurisprudence on the issue of juror substitution in the face of a jury having reached a partial verdict. Quite simply, substitution is impermissible. The proper course is for the trial court to take the partial verdict and declare a mistrial on the open counts." Ibid. The Court explained that "[i]f a partial verdict has been rendered, or the circumstances otherwise suggest that jurors have decided one or more issues in the case, including guilt or innocence, the trial court should not authorize a juror substitution, but should declare a mistrial." Id. at 431 (emphasis added) (quoting State v. Ross, 218 N.J. 130, 151 (2014)). The Court held "substitution of a juror after the return of partial verdicts for the purpose of continuing deliberations in order to reach final verdicts . . . [constitutes] plain error." Ibid. (alteration in original) (citing State v. Corsaro, 107 N.J. 339, 354 (1987)).

The bright line standard described in Horton serves to protect the "mutuality of deliberations — the 'joint or collective exchange of views among individual jurors'" essential to the "constitutional guaranty of trial by jury." Ross, 218 N.J. at 146-47 (first quoting State v. Williams, 171 N.J. 151, 162-63 (2002); and then quoting State v. Miller, 76 N.J. 392, 406 (1978)); see also State v. Jenkins, 182 N.J. 112, 126 (2004) (quoting Williams, 171 N.J. at 163)

("Inasmuch as the essence of jury deliberations is a collective sharing of views, reconstituting a jury in the midst of deliberations 'can destroy the mutuality of those deliberations.'"). Although Horton was decided after defendant's trial, it summarized and described the well-settled "rich and fulsome jurisprudence" extant at the time of defendant's trial, 242 N.J. at 430-31 (first citing Ross, 218 N.J. 130; then citing Corsaro, 107 N.J. 339; and then citing Jenkins, 182 N.J. 112), that required a court to "declare a mistrial if a substitution would imperil the integrity of the jury's process," Ross, 218 N.J. at 147 (citing State v. Hightower, 146 N.J. 239, 253-54 (1996)). In Ross, decided years before defendant's trial, the Court held that "when the circumstances suggest a strong inference that the jury has affirmatively reached a determination on one or more factual or legal issues, the trial court should not substitute an alternate for an excused juror." Id. at 151.

The Court's reasoning and holdings in Ross and Horton apply with syllogistic precision here. Prior to the dismissal of the jury foreperson, the jury twice advised the trial court it reached a unanimous determination on one of the charges against defendant. Therefore, it was plain error to "substitute an alternate" juror after excusing the foreperson and to allow the reconstituted jury

to continue deliberations anew.[4] Horton, 242 N.J. at 431. The trial court should have taken a "partial verdict, declare[d] a mistrial, and constitute[d] a new jury to hear the remaining counts." Ibid. The trial court's decision not to do so requires a reversal of defendant's conviction and a remand for a new trial on the charge for which defendant was convicted. Id. at 431-32.

We are not persuaded by the State's argument defendant invited the court's error by failing to agree to take a partial verdict prior to the dismissal of the foreperson, and only then seeking a mistrial after the foreperson was dismissed. The State claims defendant invited the error — the court's substitution of the jury foreperson with an alternate juror instead of taking a partial verdict in response to the jury's statements it reached a unanimous determination on one of the charges — and, for that reason, defendant waived his right to argue on appeal the court erred by not taking a partial verdict and declaring a mistrial on whatever counts of the indictment remained.

[4] We also observe the reconstituted jury deliberated for a relatively short time when compared to the deliberations of the initially constituted jury. See Jenkins, 182 N.J. at 133 (noting, when the reconstituted jury's return of a verdict in twenty-three minutes signaled "minds were closed when the alternate joined the deliberations," then "judicial economy had to bow to defendant's fair trial rights and a mistrial should have been declared").

Under the invited-error doctrine, "trial errors that '"were induced, encouraged or acquiesced in[,] or consented to by defense counsel ordinarily are not a basis for reversal on appeal."'" State v. A.R., 213 N.J. 542, 561 (2013) (quoting Corsaro, 107 N.J. at 345). "The doctrine is implicated 'when a defendant in some way has led the court into error[,]'" "and is meant to prevent defendants from manipulating the system[.]" Id. at 561-62 (first alteration in original) (quoting State v. Jenkins, 178 N.J. 347, 359 (2004)). In sum, "a defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought . . . claiming it to be error and prejudicial." Jenkins, 178 N.J. at 358 (quoting State v. Pontery, 19 N.J. 457, 471 (1955)).

Because the invited-error doctrine is designed to prevent manipulation, it "is implicated only when a defendant in some way has led the court into error." Id. at 359. "[W]hen 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." Ibid.

The record does not support a finding defendant manipulated the court into excusing the foreperson without taking a partial verdict. To the contrary, the record shows the court broadly addressed the issue of whether it should take a partial verdict prior to dismissing the foreperson, reviewed the possible advantages and disadvantages to defendant in doing so, observed that it could only speculate as to whether acceptance of a partial verdict was in defendant's interest, and noted the State's decision not to agree to dismiss the remaining charges if a partial verdict was taken counseled against taking a partial verdict.

To be sure, defense counsel expressed an unwillingness to accept a partial verdict because it was not in defendant's interest, but the record shows the court decided on its own, and without any reliance on defendant's position, that it was not appropriate to accept a partial verdict. Further, as later expressed by the court in its decision on defendant's mistrial motion, the court decision to dismiss the foreperson and allow the reconstituted to deliberate was based on its view that it was entirely proper to do so without taking a partial verdict from the originally constituted jury.[5]

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[5] We also observe the State's reliance on the invited-error doctrine is undermined by the position it took at trial following the dismissal of the foreperson. The State asserted the court could not properly take a partial verdict until the court provided the jury with the Czachor charge, allowed the jury to continue to deliberate, and was subsequently advised the jury could not reach a

There is no evidence defendant manipulated the court into deciding not to accept a partial verdict prior to its dismissal of the foreperson and, to the contrary, defendant repeatedly requested the court address the foreperson's scheduling issues to allow the initially constituted jury to complete its deliberations. Prior to the dismissal of the foreperson, defendant never took a position or asserted an argument inconsistent with his subsequent claim dismissal of the foreperson foreclosed further deliberations by a reconstituted jury. Indeed, that issue was never addressed by the court during its colloquy with counsel about whether it was appropriate to accept a partial verdict. In the absence of any evidence defendant manipulated the court or that the court relied

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verdict on all the charges. As such, according to the State, it would have been improper for the court to have taken a partial verdict prior to the dismissal of the foreperson because following the court's reading of the Czachor charge to the originally constituted jury on April 16, 2019, the jury continued to deliberate — and sought a lengthy readback of two witnesses' testimony — up until the court's dismissal of the remaining jurors for the day and its dismissal of the jury foreperson from further deliberations. That is, the jury never took the steps prior to the dismissal of the foreperson that the State later argued were required for the court to properly accept a partial verdict because the jury was actively involved in ongoing deliberations pursuant to the Czachor charge up until the moment the court dismissed the foreperson. As such, and contrary to the State's arguments on appeal, defendant did not invite an error or manipulate the court into its decision not to accept a partial verdict prior to dismissing the foreperson because, according to the State's position before the trial court, the court could not properly accept a partial verdict while the originally constituted jury was engaged in ongoing deliberations, and that jury was in the middle of those deliberations when the court dismissed the foreperson.

on any purported manipulative actions of defendant, the invited-error doctrine is inapplicable here. A.R., 213 N.J. at 561.

However, even if the invited-error doctrine applies, it does not foreclose defendant's argument the court erred by dismissing and replacing the foreperson and allowing the reconstituted jury to deliberate. "Even if a party has 'invited' an error, . . . courts will not bar defendants from raising an issue on appeal if 'the particular error . . . cut mortally into the substantive rights of the defendant.'" Id. at 562 (quoting Corsaro, 107 N.J. at 345). The doctrine will not be applied where it would "cause a fundamental miscarriage of justice." Ibid. (quoting N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 342 (2010)).

For the reasons we have explained, application of the doctrine to defendant would cause a fundamental miscarriage of justice because it would bar him from obtaining relief from the court's erroneous determination and plain error. Horton, 242 N.J. at 431. Application of the doctrine would deprive defendant of relief from the trial's court decision permitting the reconstituted jury to incorrectly determine his guilt or innocence on the serious charges against him and the reconstituted jury's determination he is guilty of the first-degree offense for which he was convicted. See generally Corsaro, 107 N.J. at

346 (quoting State v. Harper, 128 N.J. Super. 270, 277-78 (App. Div. 1974)) (explaining improper juror substitution may "trench directly upon the proper discharge of the judicial function" and "errors of this dimension may be cognizable on appeal as plain error notwithstanding their having been precipitated by a defendant at the trial level."). Thus, even if there is a basis to apply the invited-error doctrine to defendant's arguments on appeal concerning the deliberations and verdict of the reconstituted jury, we reject application of the doctrine because it would deprive defendant of his right to a verdict founded on meaningful deliberations by the jury. See Ross, 218 N.J. at 151 (noting improper substitution of a juror after deliberations have begun implicates issues "as to whether a reconstituted jury will meaningfully deliberate").

III.

Defendant also argues the court erred by denying his motion to compel the disclosure of the identity of the two confidential informants Detective Mazzoni testified had reported defendant was involved in the distribution of controlled dangerous substances. More particularly, defendant argues his former girlfriend, and the mother of his child, Amber Pierce was one of the confidential informants, she provided false information to the officers that resulted in the State Police investigation of him, and she orchestrated his arrest

by luring him to the apartment and by asking him to pick up and bring the bag containing the cocaine to her at the apartment on the day of his arrest. Defendant contended he picked up the bag and transported it to the apartment at the time of his arrest, but he did not have any knowledge of its contents. On appeal, he argues the trial court abused its discretion by denying his request that the State disclose the identities of the confidential informants.

The informer's privilege against disclosure of their identity is well-established and "considered essential to effective enforcement of the criminal code," particularly narcotics laws. State v. Milligan, 71 N.J. 373, 381, 381 n.3 (1976). "Without a strong showing of need, courts will generally deny a request for disclosure." State v. McDuffie, 450 N.J. Super. 554, 568 (App. Div. 2017) (quoting State v. Florez, 134 N.J. 570, 578 (1994)). N.J.R.E. 516 "provides that a witness need not provide the identity of an informant unless the identity of that person has already been otherwise disclosed or 'disclosure of his identity is essential to assure a fair determination of the issues.'" Florez, 134 N.J. at 578.

The purpose of the privilege is twofold: "to protect the safety of the informant and to encourage the process of informing." State v. Sessoms, 413 N.J. Super. 338, 343 (App. Div. 2010) (citing Roviaro v. United States, 353 U.S. 53, 60 (1957)). The privilege "protect[s] the public interest in a continuous flow

of information to law enforcement officials." Ibid. (quoting Grodjesk v. Faghani, 104 N.J. 89, 97 (1986)). In narcotics cases, it is particularly vital to maintain this "indispensable[] part of the arsenal that law-enforcement forces bring to bear against drug crimes." Florez, 134 N.J. at 582; see also Milligan, 71 N.J. at 381 n.3.

Our courts have long recognized even an in camera hearing regarding an informant's identity "will effectively reduce cooperation with the police and defeat the purposes which underlie the informer's privilege." Milligan, 71 N.J. at 393 n.12. Thus, when deciding whether to grant a request for an in camera hearing, the court must balance "the public interest in protecting the flow of information against the individual's right to prepare his defense[,] . . . taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id. at 384 (quoting Roviaro, 353 U.S. at 62). Thus, "[s]omething more than speculation should be required of a defendant before the court overrules an informer's privilege of nondisclosure." McDuffie, 450 N.J. Super. at 567 (alteration in original) (quoting Milligan, 71 N.J. at 393).

We review a court's denial of a request for disclosure of the identity of a confidential informant for an abuse of discretion. Id. at 565. A court abuses its

discretion when its "decision [is] made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." U.S. ex rel. U.S. Dep't of Agric. v. Scurry, 193 N.J. 492, 504 (2008) (citing Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Defendant's arguments on appeal are not supported by the record. Defendant claims he moved prior to trial for disclosure of the two confidential informants "the State claimed provided the information that caused them to launch an investigation of [him]." He also claims he argued before the trial court that two prior encounters — motor vehicle stops — he had with the police during the months preceding the April 11, 2016 incident that resulted in his arrest and conviction were orchestrated by the confidential informants and that he needed to know the informants' identities to defend himself.

The record, however, establishes that before the trial court defendant sought only to ascertain whether a confidential informant gave the police information prior to a February 22, 2016 stop and search of his motor vehicle. More particularly, defense counsel requested only "what type of information [the police] were acting on" when they stopped defendant on February 22, 2016. Contrary to defendant's claim on appeal, defense counsel did not request the

identity of any confidential informant. In fact, counsel expressly stated, "[I am] not asking that the identity of the confidential informant be revealed."

Counsel explained he sought only information as to whether a confidential informant had provided information concerning defendant prior to the February 22, 2016 motor vehicle stop to support a putative claim the reason provided for the stop — tinted windows — was pretextual. Indeed, counsel reiterated, "I [do not] need to know the identity of the confidential informant" and "I could care less who it is."

The record is devoid of evidence the police received information concerning defendant prior to the February 22, 2016 motor vehicle stop.[6] Moreover, as the court correctly determined, the information defendant specifically sought was irrelevant to the April 11, 2016 incident which resulted in defendant's arrest and conviction. The court found the genesis of law

[6] At a suppression hearing that occurred prior to defendant's request for information concerning whether the February 22, 2016 motor vehicle stop was based on information provided by a confidential informant, Trooper Silipino, who effectuated the motor vehicle stop, testified he never spoke to a confidential informant about defendant. Detective Mazzoni testified he did not receive any information concerning defendant from a confidential informant prior to the stop. Detective Mazzoni also testified he first received information from a confidential informant concerning defendant within a week after the February 22, 2016 motor vehicle stop and then, approximately one week later, received information from a second confidential informant about defendant's alleged activities as a narcotics dealer who had been seen in possession of a handgun.

enforcement's interest and investigation of defendant was irrelevant to whether he unlawfully possessed the cocaine and weapons for which he was criminally charged.[7]

We find no abuse of discretion in the court's determination, and defendant offers no basis to conclude otherwise. Instead, defendant's arguments on appeal focus solely on a claim he did not make before the trial court. For the first time on appeal, defendant asserts the court erred by denying a request for the identity of the confidential informants that he never made in the first instance.

Defendant argues the court erred by denying a request for the identity of confidential informants who provided Detective Mazzoni with information about defendant. Because he never made the request to the trial court, we consider his argument as one raised for the first time on appeal. We choose not to address the claim because it does not "go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

[7] The officers found weapons during a search of Pierce's apartment on the day of defendant's arrest for possession of the cocaine in the bag he had held in his pocket. Defendant was charged with offenses related to the weapons found in the apartment. We do not address the circumstances concerning the seizure of the weapons or the weapons charges because they are not pertinent to the issues presented on appeal.

Moreover, based on defendant's failure to raise the issue before the trial court, the record is not fully developed such that it is appropriate to determine the merits of the claim on appeal. See id. at 19 ("[T]he points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review").

On remand, however, defendant is not precluded from requesting from the trial court an order directing that the State provide the identity of the confidential informants based on the record presented and obtaining a ruling from the court on the request. Nothing in this opinion should be considered as expressing an opinion on the merits of any such request if made on remand.

IV.

Defendant further contends the court erred by denying his motion to suppress the cocaine seized from his person on April 11, 2016. He argues the evidence was seized as the result of an unconstitutional search and the evidence should have been suppressed as fruit of the poisonous tree. More particularly, he argues the seizure was unlawful "because the police coordinated their operation so that they could evade the reasonable articulable suspicion requirement of State v. Carty, 170 N.J. 632 (2002)." He also argues the seizure was not justified under the plain view exception to the warrant requirement

because the police went to the apartment complex in which Amber Pierce's apartment was located because they were suspicious defendant was dealing drugs from that apartment and, therefore, discovery of the cocaine was not inadvertent.

At the hearing on the suppression motion, the State presented evidence that on February 22, 2016, Trooper Silipino stopped defendant's vehicle, a gray Nissan Ultima, because its windows had an illegal tint. During the stop, Trooper Silipino learned defendant's "vehicle was registered to a different person with a different address." That information prompted the officer to order defendant out of the vehicle.

Once outside the vehicle, defendant "placed his hands in his pockets" and Trooper Silipino ordered him to remove his hands from his pockets "for safety." Defendant at first complied, but then returned his hands to his pockets. Trooper Silipino then conducted a protective search of defendant, which revealed no weapons. Trooper Silipino also asked defendant for consent to search the vehicle, which defendant refused.

Silipino requested a canine unit to inspect the vehicle. The canine alerted to the presence of drugs, but a search of the vehicle revealed none. Silipino

issued defendant "a motor vehicle summons for tinted windows" and "released him from the scene."

Following that incident, Trooper Silipino requested Detective Mazzoni investigate defendant for the possible transportation of narcotics. Detective Mazzoni contacted two confidential informants who had provided reliable information to him in the past, and both informants identified defendant as a narcotics dealer. One of the informants also identified defendant's vehicle as a gray Nissan Ultima; the other informant stated they had recently seen defendant possess a "black, .40-caliber handgun."

As his investigation of defendant proceeded, Detective Mazzoni also learned defendant had prior convictions for weapons and narcotics offenses. He then conducted surveillance of defendant on three separate dates, but his efforts uncovered nothing incriminating.

On April 11, 2016, Detective Mazzoni, Trooper Silipino, and two other officers traveled to Pierce's apartment and waited about two hours for defendant to arrive. Defendant arrived at the apartment in the gray Nissan Ultima and, when he exited his vehicle, Detective Mazzoni noticed "the left pocket of his windbreaker[] was weighted[] substantially on the left side . . . ."

Detective Mazzoni approached defendant and asked: "Mr. Smith, can I talk to you?" Defendant was "free to leave" but upon hearing Detective Mazzoni's question, he turned around, saw the officers, put his left hand into the left pocket of his windbreaker, and "gripped" the object weighing down his pocket. Detective Mazzoni asked defendant to remove his hand from his pocket. In response, defendant stepped backwards but did not comply with Detective Mazzoni's request.

The officers were "concerned that" the "bulge in [defendant]'s clothing . . . [could] be used as a weapon against" them. Accordingly, Detective Mazzoni ordered defendant to remove his hand from his pocket and said: "I want to ask you a couple questions." Trooper Silipino also repeatedly ordered defendant to remove his hands from his pockets. Defendant did not comply.

Detective Mazzoni then grabbed defendant by the elbow and removed his hand from his pocket. Defendant's hand gripped a partially-open Crown Royal whiskey bag within which Detective Mazzoni recognized "a clear plastic bag with a large amount of cocaine." The officers seized the cocaine.

The court denied defendant's motion to suppress the cocaine and any subsequently seized items as fruit of the poisonous tree. The court found Trooper Silipino's and Detective Mazzoni's testimony credible. The court found

the officers were justified in approaching defendant and determined their initial encounter constituted a permissible field inquiry that escalated into a valid protective search. The court further concluded the plain view exception to the warrant requirement applied to the officer's discovery of the cocaine and, for that reason, the seizure was lawful.

"We review the trial court's determination of [a] defendant's motion to suppress under a deferential standard." State v. Miranda, 253 N.J. 461, 474 (2023). "Appellate courts reviewing a grant or denial of a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Lamb, 218 N.J. 300, 313 (2014). Thus, we accord deference to those factual findings because they "are substantially influenced by [an] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Ibid. (quoting State v. Elders, 192 N.J. 224, 244 (2007)).

We therefore may reverse only when the trial court's determination is "so clearly mistaken 'that the interests of justice demand intervention and correction.'" Ibid. (quoting Elders, 192 N.J. at 244). "We review de novo the trial court's legal conclusions and its determination of the consequences that flow from established facts." Miranda, 253 N.J. at 475 (first citing State v.

Nyema, 249 N.J. 509, 526-27 (2022); and then citing State v. Hubbard, 222 N.J. 249, 263 (2015)).

The Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution protect against "unreasonable searches and seizures" and generally require a warrant issued upon "probable cause." N.J. Const. art. I, ¶ 7; see also U.S. Const. amend. IV. "[A] warrantless search is presumptively invalid" unless the State establishes the search falls into "one of the 'few specifically established and well-delineated exceptions to the warrant requirement.'" State v. Gonzales, 227 N.J. 77, 90 (2016) (quoting State v. Edmonds, 211 N.J. 117, 130 (2012)).

Where a defendant moves to suppress evidence seized without a warrant, the State bears the "burden, by a preponderance of the evidence, to establish" one such exception to the warrant requirement applies and "the warrantless search or seizure of an individual was justified in light of the totality of the circumstances." State v. Bard, 445 N.J. Super. 145, 155-56 (App. Div. 2016) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)). "[T]he touchstone for evaluating whether police conduct has violated constitutional protections is reasonableness. The reasonableness of police conduct is assessed with regard

to circumstances facing the officers, who must make split second decisions in a fluid situation." Id. at 157 (internal citations and quotations omitted).

"The protective search exception to the warrant requirement was created to protect an officer's safety where there is reason to believe that a suspect is armed and dangerous." State v. Roach, 172 N.J. 19, 27 (2002); accord Terry v. Ohio, 392 U.S. 1, 27 (1968). A protective search must be "designed to discover . . . hidden instruments for the assault of the police officer[,]" State v. Carrillo, 469 N.J. Super. 318, 338 (App. Div. 2021) (quoting State v. Thomas, 110 N.J. 673, 683 (1988)), and thus must be "confined in scope to an intrusion reasonably designed to discover" such weapons, Roach, 172 N.J. at 27 (quoting Terry, 392 U.S. at 29). This may include "a carefully limited search of the outer clothing" to determine whether weapons are present. Ibid. (quoting Terry, 392 U.S. at 30).

A seizure of evidence may also properly occur in the absence of a search warrant under the plain view exception to the warrant requirement. Under the plain view exception, a warrantless seizure of evidence is proper where a police officer is "lawfully . . . in the area where [they] observed and seized the incriminating item or contraband, and it [is] . . . immediately apparent that the seized item is evidence of a crime." State v. Williams, 254 N.J. 8, 45 (2023)

(emphasis omitted) (quoting Gonzales, 227 N.J. at 82). Under the law extant at the time of the seizure of the cocaine from defendant, the plain view exception applied where: "(1) a police officer was 'lawfully in the viewing area'; (2) the officer 'discover[ed] the evidence "inadvertently"'; and (3) it was '"immediately apparent" to the police that the items in plain view were evidence of a crime, contraband, or otherwise subject to seizure.'"[8] Williams, 461 N.J. Super. at 11 (quoting State v. Mann, 203 N.J. 328, 341 (2010)). The inadvertence prong "is satisfied if the police did not 'know in advance the location of the evidence and intend to seize it . . . .'" Id. at 11 n.6 (quoting State v. Johnson, 171 N.J. 192, 211 (2002)); accord Coolidge v. New Hampshire, 403 U.S. 443, 469-71 (1971).

Measured against these well-established principles, we discern no error in the court's denial of defendant's suppression motion. Prior to their encounter with defendant on April 11, 2016, the officers knew defendant had a prior conviction for a weapons offense and that one confidential informant identified defendant as possessing a "black, .40-caliber handgun." As explained by Trooper Silipino, defendant caused the officers to fear he was armed through his

[8] "The New Jersey Supreme Court eliminated the inadvertence prong in November 2016," but made clear that its ruling was prospective in nature. State v. Williams, 461 N.J. Super. 1, 11 n.6 (App. Div. 2019) (citing Gonzales, 227 at 82).

failure to comply with the officers' directives to remove his hand from his pocket, which the officers observed contained a weighted object. Detective Mazzoni limited his action to the removal of defendant's hand from the left pocket of defendant's windbreaker. The officers' concern for their safety was based on defendant's prior movement of his hand and grasping of the weighted item in his pocket after the officers asked to speak with him, and his subsequent refusal to remove the item from his grasp when requested to do so. We are satisfied the court correctly determined Detective Mazzoni engaged in a valid protective search by removing defendant's hand from the pocket in which he held the object. See Roach, 172 N.J. at 29 (upholding protective search where the defendant "refused to obey [the police officers'] lawful orders and continued to move his hands toward the unidentified bulge" in his pocket); Bard, 445 N.J. Super. at 160-61 (upholding protective search where the defendant refused to remove his hand from his pocket "despite requests for him to expose it to the troopers' view.").

The court also correctly determined the officers observed the open bag exposing the cocaine in plain view after defendant's hand was removed from his pocket during the protective search. Williams, 461 N.J. Super. at 11. The officers' discovery of the cocaine was inadvertent because the record is bereft of

evidence the officers knew defendant possessed cocaine at that time or that there was a bag of cocaine in the pocket into which he inserted his hand immediately upon being addressed by the officers. The officers removed defendant's hand from his pocket in response to his actions and did not make the protective search "intend[ing] to seize" narcotics. Id. at 11 n.6 (quoting Johnson, 171 N.J. at 211). We also find no basis supporting a rejection of the court's finding, which is supported by substantial credible evidence, it was "immediately apparent" to the officers the white powder they observed in the bag was cocaine. See id. at 11; Lamb, 218 N.J. at 313.

Defendant argues the officers required a reasonable articulable suspicion of criminal activity before they could approach defendant on April 11, 2016, in accordance with the holding in Carty, 170 N.J. 632, because Trooper Silipino — the officer who conducted the traffic stop on February 22, 2016 — was present at the April 11, 2016 encounter. We are not persuaded. Carty requires a police officer conducting a traffic stop to have a reasonable articulable suspicion of criminal activity, beyond the initial traffic stop, before the officer may request consent to search a vehicle. 170 N.J. at 635. This rule "is limited in that it pertains to consent searches pursuant to a stop for a traffic infraction." Id. at 654. We decline to extend Carty to an encounter on a sidewalk, from

which defendant was free to leave, nearly two months following an initial traffic stop. See ibid.; see also State v. Rodriguez, 172 N.J. 117, 126 (2002) (second alteration in original) (quoting State v. Davis, 104 N.J. 490, 497 (1986)) ("[A] police officer properly initiates a field inquiry by approaching an individual on the street . . . and 'by asking him if he is willing to answer some questions[.]'"); State v. Maryland, 167 N.J. 471, 484 (2001) ("[A] field inquiry may be conducted in the absence of grounds for suspicion without violating the Fourth Amendment or Article I, paragraph 7 of the New Jersey Constitution"). Moreover, the officers never sought defendant's consent to search his pocket — they asked only that he remove his hand from his pocket while they spoke to him. We therefore affirm the court's order denying defendant's motion to suppress the cocaine seized from defendant's person on April 11, 2016.

Because we reverse defendant's conviction and remand for a new trial, it is unnecessary to address defendant's claim the court erred by denying his motion for a new trial and by imposing an excessive sentence. We also do not address the merits of any of his remaining arguments, each of which is founded on alleged errors by the court based on the record and circumstances extant

during the proceeding.[9] We express no view of the merits of any of the arguments and defendant is permitted to make the same or similar arguments during the proceedings on remand if appropriate based on the circumstances presented at that time.

Reversed, vacated, and remanded for proceedings in accordance with this opinion. We do not retain jurisdiction.

[9] Those arguments include defendant's claims the court erred by denying his motion for an adverse inference charge pursuant to State v. Clawans, 36 N.J. 162 (1962) based on the State's decision not to call Pierce as a witness, and that he was denied a fair trial based on the comments made by the State during its closing arguments.