SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3500-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TYSHAWN M. DOWNEY,

Defendant-Appellant.

---

Submitted November 2, 2022 – Decided January 13, 2023

Before Judges Vernoia, Firko, and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 19-07-1116.

Joseph E. Krakora, Public Defender, attorney for appellant (Simon Wiener, Assistant Deputy Public Defender, of counsel and on the briefs).

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Cheryl L. Hammel, Assistant Prosecutor, on the brief).

PER CURIAM

After the trial court denied his motions to suppress, a jury convicted defendant Tyshawn M. Downey of controlled dangerous substance (CDS) offenses. Following the jury verdict, the same trial court found defendant guilty of driving with a suspended driver's license and possession of marijuana. The trial court sentenced defendant to five years' imprisonment on the CDS charges and to time served on the other charges.[1] We affirm.

I.

On October 12, 2017, defendant was charged with third-degree possession of CDS, (cocaine, heroin, and oxycodone), N.J.S.A. 2C:35-10(a)(1) (counts one, three, and six); second-degree possession of CDS (cocaine) with intent to distribute, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(2) (count two); and third-degree possession of CDS (heroin and oxycodone) with intent to distribute, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(3), N.J.S.A. 2C:35-5(b)(5) (counts four and seven).[2]

---

[1] On August 1, 2021, defendant was released from custody after reaching his mandatory release date.

[2] The counts in the indictment were renumbered following the superseding indictment. On July 23, 2019, the superseding indictment charged defendant with the same crimes as in the original indictment (17-10-1611), plus an

A. Defendant's Motion to Suppress Physical Evidence

Before trial, defendant moved to suppress physical evidence—the CDS and wax folds. On June 1, 2018, the trial court conducted a suppression hearing, where Detective Duncan MacRae and Drug Enforcement Agency (DEA) Special Agent Michael Goldfinger testified on behalf of the State and defendant testified on his own behalf. The following facts in this subsection are derived from that hearing.

In February 2017, a confidential informant (CI) notified MacRae of the DEA Monmouth Task Force that defendant was distributing narcotics in Ocean and Monmouth counties. Specifically, the CI stated defendant was dealing drugs out of a gray Ford Explorer near Adams Avenue in Toms River. MacRae shared this information with Goldfinger and Task Force Officer Kaan Williams of the Neptune Township Police Department (NTPD), who were both assigned to the DEA Monmouth Task Force. They ascertained defendant's driver's license had been suspended after setting up surveillance and reviewing the Division of Motor Vehicles database.

---

additional charge of third-degree possession with intent to distribute an imitation CDS (noscapine), a non-addictive opiod, N.J.S.A. 2C:35-11(a)(1) (count five).

The same day, after being notified by the Toms River Police Department (TRPD) that defendant was driving on Adams Avenue, MacRae was in the area and followed defendant "the entire way down Route 37." Since he was in an unmarked car and wearing plain clothes, MacRae requested a marked car conduct a motor vehicle stop of defendant. Sergeant Mooney[3] of the TRPD responded wearing a uniform in a marked car and directed defendant to stop at a McDonald's restaurant. MacRae, Goldfinger, and Williams also pulled into the parking lot. Goldfinger and Williams were traveling together in a separate, unmarked car. All four officers approached defendant's vehicle.

According to MacRae, he spoke with defendant and noticed an "immediately apparent" odor of raw marijuana coming from the vehicle. MacRae asked defendant to step out of the car. Williams also detected the odor. As a result of MacRae detecting a "strong" odor of marijuana emanating from the vehicle, MacRae read defendant his Miranda[4] rights "out of an abundance of caution" and notified defendant of the ongoing narcotics investigation. After being advised of his Miranda rights, defendant replied, "Okay."

---

[3] Sergeant Mooney's first name is not contained in the record.

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

Goldfinger and Williams then asked defendant if he had any CDS "on him," and, in response, defendant "indicated he had marijuana on him." Defendant then retrieved a bag of marijuana from his pants and gave it to Williams.

Officer Williams asked defendant if he had "anything else inside the vehicle," and defendant "admitted that there was some cocaine behind the radio inside the car." Defendant was willing to retrieve the plastic bag from the car and was permitted to do so. Defendant retrieved a plastic bag from the vehicle. The bag had "multiple items" that later tested positive for heroin, marijuana, cocaine, oxycodone, and noscapine. After defendant handed the bag over to the officers, he was arrested and also issued a motor vehicle summons.

In contrast, defendant testified he was "snatched out of the car" and searched without his consent after "forcefully" and profanely being told to stand still. He also stated, "eight to ten vehicles" had been surveilling him, he did not recall being read his Miranda rights, and officers did not ask for consent to search the vehicle. According to defendant, after the officers patted him down, they found a bag containing marijuana. Then, defendant gave the officers another bag from his pants, also containing marijuana. Defendant further alleges he witnessed officers breaking objects in the vehicle and removing items without

his permission. He acknowledged he was cooperative because he did not "want to be beat up."

Defendant also testified he smoked "more than a half-ounce of marijuana," drank alcohol, and used "other drugs" before driving that day. He stated the car and his person smelled like marijuana, and he admitted to not having a valid driver's license at the time of the stop. Defendant acknowledged there were drugs inside the vehicle, and he knew where they were located—behind the dashboard.

After considering testimony from MacRae and defendant, the trial court denied defendant's motion to suppress physical evidence. Because defendant testified he smoked "half an ounce of pot" before the vehicle stop, a "staggering amount" in the trial court's view, along with ingesting other drugs and drinking, the trial court found it could not make "a credibility finding that [defendant] recalled these events with clarity." But, the trial court found MacRae's testimony credible especially with regard to detecting the strong odor of marijuana. The trial court also found the initial stop was "clearly appropriate" because defendant was driving with a suspended license in violation of N.J.S.A. 39:3-40.

In addition, the trial court found defendant answered in the affirmative when Goldfinger asked him if there was anything in the vehicle. The trial court also notably determined "in the immediate aftermath of the stop," MacRae "Mirandize[d]" defendant. The trial court found the strong odor of marijuana emanating from defendant's vehicle—which permeated his clothing and vehicle—justified the officers examining the interior of the vehicle under State v. Mandel, 455 N.J. Super. 109, 114-15 (App. Div. 2018).[5] In its decision, the trial court noted "a strong odor is not required," and the "[d]etection of the characteristic smell of burned marijuana by a trained and experienced State trooper emanating from the passenger compartment of a legally stopped motor vehicle created probable cause to believe that a violation of law had been or was being committed," relying upon State v. Walker, 213 N.J. 281, 290 (2013); Mandel, 455 N.J. Super. at 114-15.

The trial court noted it was "inconvenient" that the State was unable to produce any consent-to-search forms, but it did not draw any "negative

[5] We note the matter under review predates the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, N.J.S.A. 24:6I-31 to -56 (the Act), which became effective on February 22, 2021. Under the Act, an odor of marijuana cannot create a reasonable suspicion or probable cause to conduct a warrantless search. N.J.S.A. 2C:35-10c(a). In a recent decision, we held the Act should be applied prospectively. State v. Gomes, 472 N.J. Super. 515, 535-36 (App. Div. 2022).

inference" from that omission. The trial court explained that based on the smell coming from the inside of the car, the State would "have been able to have gained access" to the interior of the vehicle, regardless of whether defendant suggested there was contraband in the interior. In denying defendant's motion to suppress physical evidence, the trial court elaborated:

> So I am going to find that the State's version of events ultimately more persuasive. I do not have to find that . . . [d]efendant consented to the search. Although I do find that when he was asked by . . . Goldfinger if there was anything in the vehicle, that he answered in the affirmative. I do not make a finding whatsoever with respect to whether there were fifteen cops rolling around the interior of [the vehicle] or whether . . . defendant went back into the vehicle and removed the radio itself in order to get the plastic bag.
>
> I [find] . . . Mandel to be persuasive and by virtue of the fact that it was an Appellate Division opinion to be ultimately . . . controlling.

On June 25, 2018, the trial court entered a memorializing order denying defendant's motion to suppress physical evidence.

B. Defendant's Motion to Suppress His Statements –The Miranda Hearing

A few months later, defendant moved to suppress his statements made to police during the stop. Defendant argued the State failed to meet its burden of

proving beyond a reasonable doubt that he waived his Miranda rights knowingly and voluntarily.

MacRae and Goldfinger testified on behalf of the State at the hearing. MacRae reiterated much of the testimony he gave at the prior suppression hearing. Goldfinger testified about the circumstances of the traffic stop. Defendant did not testify at the Miranda hearing.

MacRae testified as to what he said to defendant:

> I said, . . . I'm going to read you Miranda—I'm going to advise you of your Miranda rights. You have the right to remain silent. Anything you say could be used against you in a court of law. You have the right to have an attorney present during questioning. If you cannot afford an attorney, one will be appointed to you by the [c]ourt at no costs. If you wish to answer questions now without an attorney present, you can stop answering questions at any time. Do you understand your rights?

According to MacRae, defendant indicated he understood his rights and wanted to be cooperative with the investigation. MacRae additionally stated that defendant was "very cooperative" throughout the interaction as he was neither handcuffed nor under arrest, and after being read his Miranda warnings, replied "Okay."

Goldfinger testified about his training in identifying signs of intoxication. He saw "no indicia" of defendant being intoxicated at the time of the stop.

Goldfinger "clearly" heard MacRae provide defendant his Miranda rights since he was "within earshot" five feet away. Defendant appeared to understand questions asked of him, and he spoke clearly. Goldfinger also testified he and Williams had their guns drawn.

In denying defendant's motion to suppress his statements, the trial court found there was an ongoing narcotics investigation in progress, and the "situation was custodial." Despite again criticizing the State's failure to provide Miranda rights waiver forms, the trial court found MacRae's and Goldfinger's testimony to be "truthful" and "credible." The trial court credited Goldfinger's testimony that he heard MacRae give defendant his Miranda warnings. The trial court concluded MacRae advised defendant of his Miranda rights, and defendant knowingly and intelligently waived those rights. In addition, the trial court accepted Goldfinger's testimony that defendant showed no signs of intoxication when the Miranda warnings were given. A memorializing order was entered.

C. The Trial

At trial, MacRae, Goldfinger, Williams, Detective Anthony Sgro, Justin Victoria, and Barbara Volk testified for the State. Defendant did not testify and did not present any witnesses. Notably, Williams testified he "heard the tail

end" of MacRae providing defendant his Miranda rights, and Williams could not decipher exactly what was said.

Goldfinger pointed out that defendant had a "rapport" with Williams. According to Williams, the radio "had been tampered with" because when defendant removed the radio to retrieve the drugs in the car, the upholstery behind the radio was "very loose." Detective Sgro of the Ocean County Prosecutor's Office testified as an expert witness about the packaging of narcotics for distribution as opposed to personal use. Victoria, a senior forensic chemist employed by the Ocean County Sheriff's Department, testified as an expert witness as to the evidence seized testing positive for CDS. Volk testified about chain of evidence procedures at the Ocean County Sheriff's Department. The jury found defendant guilty of three counts of possession of CDS (counts one, three, and six), and acquitted him on the remaining counts.

On January 31, 2020, the trial court sentenced defendant to concurrent five-year prison terms on each of the three counts. At the sentencing hearing, the trial court also found defendant guilty of driving while suspended and sentenced him to loss of driving privileges for one year, plus fines and costs. In addition, the trial court found defendant guilty of disorderly persons possession of marijuana and sentenced him to time served on that charge.

Defendant raises the following issues on appeal:

> POINT I
>
> BECAUSE THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT [DEFENDANT'S] OSTENSIBLE WAIVER OF HIS MIRANDA RIGHTS WAS KNOWING, INTELLIGENT, AND VOLUNTARY, OR IN TURN THAT HE KNEW HE COULD REFUSE CONSENT TO SEARCH, THE TRIAL COURT ERRED BY DENYING HIS MOTIONS TO SUPPRESS STATEMENTS AND EVIDENCE. U.S. CONST. AMENDS. IV-V; N.J. CONST. ART. 1, ¶ 7.
>
> A. [Defendant's] "[O]kay" Is Insufficient To Prove Beyond A Reasonable Doubt That He Knowingly And Voluntarily Waived His Miranda Rights.
>
> B. [Defendant's] Subsequent Actions Were Made In Reaction To Continued Police Questioning After His Ambiguous Response to Miranda Warnings And So Should Have Been Suppressed.
>
> C. Without [Defendant's] Un-Mirandized Statements And Actions, The Officers' Subsequent Search Was Unsupported By Probable Cause, Requiring Suppression.
>
> D. Even If [Defendant's] Statement And Actions Had Been Properly Mirandized, The State Did Not Show That [Defendant's] Consent To Search The Car Was Voluntary Because It Did Not Establish That [Defendant] Knew He Could Refuse Consent.

POINT II

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY BY DETECTIVE WILLIAMS AND AGENT GOLDFINGER THAT IMPROPERLY AND PREJUDICIALLY IMPLIED [DEFENDANT'S] INVOLVEMENT IN OTHER CRIMES. N.J.R.E. 404(b). (NOT RAISED BELOW).

POINT III

THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY THAT THE OPINION TESTIMONY OF AGENT GOLDFINGER, WHO WAS NOT TESTIFYING AS AN EXPERT WITNESS, SHOULD NOT HAVE BEEN RECEIVED AS EVIDENCE. N.J.R.E. 701, 702, 704. (NOT RAISED BELOW).

II.

In our review of defendant's suppression motions, we defer to the trial judge's findings so long as they are "supported by sufficient credible evidence." State v. S.S., 229 N.J. 360, 374 (2017) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). Appellate courts defer to the trial judge's credibility and factual findings because of the trial court's ability to see and hear the witnesses, and thereby obtain the intangible but crucial "feel" of the case. State v. Maltese, 222 N.J. 525, 543 (2015) (quoting State v. Hreha, 217 N.J. 368, 382 (2014)). We will not reverse a trial court's findings of fact unless the findings are clearly erroneous or mistaken. See S.S., 229 N.J. at 381. We review the trial court's

legal conclusions de novo. State v. Dorff, 468 N.J. Super. 633, 644 (App. Div. 2021) (citing S.S., 229 N.J. at 380).

We "engage in a 'searching and critical' review of the record to ensure protection of a defendant's constitutional rights" when assessing the propriety of a trial court's decision to admit a police-obtained statement. Hreha, 217 N.J. at 381-82 (quoting State v. Pickles, 46 N.J. 542, 577 (1966)). "A suspect's waiver of [their] Fifth Amendment right to silence is valid only if made 'voluntarily, knowingly and intelligently.'" State v. Adams, 127 N.J. 438, 447 (1992) (quoting Miranda, 384 U.S. at 444). The State bears the burden of establishing beyond a reasonable doubt that a confession is knowing and voluntary. N.J.R.E. 104(c); State v. Nyhammer, 197 N.J. 383, 401 n.9 (2009).

First, defendant contends the trial court erred in denying his motion to suppress his statements to the investigating officers. Defendant asserts the trial court incorrectly concluded "that the totality of the circumstances indicated [he] truly waived his Miranda rights." He contends the State failed to present evidence establishing he expressly indicated he understood the Miranda warnings, considering that his "okay" response was "so ambiguous," and he did not receive a written notice of the warnings.

The determination of the voluntariness of a custodial statement requires an assessment of the "totality of all the surrounding circumstances" related to the giving of the statement. State v. Roach, 146 N.J. 208, 227 (1996) (citations omitted). In reviewing the totality of circumstances, the trial court considers the following factors: a suspect's age, education, intelligence, prior contacts with the criminal justice system, length of detention, advisement of constitutional rights, the nature of the questioning, and whether physical punishment or mental exhaustion were involved in the interrogation process. State ex rel. A.S., 203 N.J. 131, 146 (2010) (quoting State v. Presha, 163 N.J. 304, 313 (2000)); see also State v. Tillery, 238 N.J. 293, 317 (2019) (reaffirming factors).

"The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and [the State of New Jersey]'s common law, now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, [Rule] 503." S.S., 229 N.J. at 381 (quoting Nyhammer, 197 N.J. at 399). In Miranda, the United States Supreme Court "determined that a custodial interrogation by law enforcement officers is inherently coercive, [and] automatically trigger[s] the Fifth Amendment privilege against self-incrimination." State v. P.Z., 152 N.J. 86, 102 (1997). As a result, when defendants are being custodially interrogated, they must be told:

> (1) 'that [they have] the right to remain silent;' (2) 'that anything [they say] can be used against [them] in a court of law;' (3) 'that [they have] the right to the presence of an attorney;' and (4) 'that if [they] cannot afford an attorney[,] one will be appointed for [them] prior to any questioning if [they] so desire[].' Miranda imposes a fifth requirement: 'that a person must be told that [they] can exercise [their] rights at any time during the interrogation.'
>
> [Tillery, 238 N.J. at 315 (quoting Miranda, 384 U.S. at 479) (internal citations omitted).]

A defendant may waive their Miranda rights. A party's waiver will not be valid, however, unless it was "'knowing, intelligent, and voluntary' based upon an evaluation of the totality of the circumstances," State v. Yohnnson, 204 N.J. 43, 59 (2010) (citations omitted), and was not "the product of police coercion," Presha, 163 N.J. at 313. An assessment of the totality of the circumstances requires a trial court to determine whether the party "understood that [they] did not have to speak, the consequences of speaking, and that [they] had the right to counsel before doing so if [they] wished." State v. A.M., 237 N.J. 384, 397 (2019) (quoting Nyhammer, 197 N.J. at 402).

Here, the trial court found the officers' testimony to be credible. The trial court accepted MacRae's testimony that defendant was fully informed of this Miranda rights. As our Supreme Court explained in Tillery, the factors that govern whether a Miranda waiver is valid are analogous to the factors that a court analyzes

to determine the voluntariness of a confession. These include "the suspect's intelligence and education, age, familiarity with the criminal justice system, physical and mental condition, and drug and alcohol problems." 238 N.J. at 317. At the motion hearing to suppress physical evidence, defendant testified he had a lengthy history of criminal convictions for robbery and eluding, for which he was sentenced to imprisonment. Defendant also admitted he was convicted of possession and distribution of CDS and resisting arrest. He acknowledged he has a "very bad drug problem."

Here, the Miranda forms were unavailable, but the trial court found the State met its burden of proving defendant's waiver was intelligent, knowing, and voluntary. In denying defendant's motion to suppress his statements, the trial court highlighted:

> the Mirandization by . . . Mac[R]ae had in fact taken place. The question that I was most concerned about was . . . [d]efendant's intoxication, if any, and that is why I asked . . . Goldfinger the question that I did. He indicated that he had substantial training. His testimony was that he's been a special agent for [eighteen] years, that he's done international investigations, domestic investigations, cartel investigations. So it's a fairly sophisticated background. He confirmed that he heard . . . Mac[R]ae give these. And then in response to my questions his ultimate testimony was that he observed no indicia of intoxication even though he received training with respect to intoxication indicators for a variety of drugs.

> So for that reason[,] I am finding that the waiver was both knowing and voluntary. . . . I think the State has established its burden of proof simply because I found the officers to be credible. I thought their testimony was truthful.

The record demonstrates by sufficient credible evidence that defendant was properly advised of his Miranda rights and his waiver of those rights was made knowingly and intelligently under the totality of the circumstances. We find no reason to overturn the trial court's finding that MacRae's and Goldfinger's testimony was credible. Goldfinger "clearly" heard MacRae provide defendant his Miranda rights since he was "within earshot" five feet away. MacRae testified defendant indicated he understood his rights. Defendant wanted to be cooperative with the investigation and replied "Okay" after MacRae provided his Miranda warnings. In Tillery, the Court pronounced that our law "does not require that a defendant's Miranda waiver be expertly stated in order to be effective," and "[a] waiver may 'be established even absent formal or express statements.'" Id. at 316 (quoting A.M., 237 N.J. at 397).

Further, Goldfinger saw "no indicia" of defendant being intoxicated at the time of the stop. In a footnote in his brief, defendant argues there is tension in the trial court's reasoning that his purported intoxication affected his memory while testifying at the motion to suppress physical evidence hearing, but not his

understanding of his Miranda rights at the time of stop. We reject that argument because defendant did not testify at the Miranda hearing. Rather, he only testified at the motion to suppress physical evidence hearing. Thus, the trial court correctly did not rely on defendant's testimony elicited at the earlier motion to suppress physical evidence hearing in deciding the waiver issue raised at the subsequent Miranda hearing. See State v. Bivins, 226 N.J. 1, 14 (2016) (holding that the Court's decision focuses "on the evidence presented at the suppression hearing").

In sum, the trial court properly found the State proved defendant's statements were made freely and voluntarily in the totality of the circumstances. See State v. Cook, 179 N.J. 533, 563 (2004); State v. Galloway, 133 N.J. 631, 654 (1993). We see no reason to disturb the determination to admit defendant's statements.

III.

Next, defendant contends the officers' search behind the vehicle dashboard was unlawful because his statements were not Mirandized. He concedes there was probable cause for the officers to suspect there was marijuana inside the vehicle based on its smell and that, based on the marijuana smell, the passenger compartment and trunk could be searched. However,

defendant argues that because his statements concerning the presence of other CDS in the vehicle were obtained in the absence of both the administration of Miranda warnings and any waiver of his Miranda rights, his statements could not support the search behind the vehicle's dashboard that yielded the plastic bag containing the CDS.

Our Supreme Court has announced, "searches [by police officers] on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible." State v. Witt, 223 N.J. 409, 450 (2015). With regard to the relevant law at the time of the stop here, prior to the effective date of the Act, "[t]he smell of marijuana itself constitute[d] probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'" Walker, 213 N.J. at 290 (quoting State v. Nishina, 175 N.J. 502, 516-17 (2003)); see also Mandel, 455 N.J. Super. at 115.

However, even if an officer has "probable cause to believe that the vehicle is carrying contraband[,] . . . the search must be reasonable in scope." State v. Patino, 83 N.J. 1, 10 (1980). Although a search may first be "validly initiated, [it] may become unreasonable because of its intolerable intensity and scope." Id. at 10-11 (citing Terry v. Ohio, 392 U.S. 1, 18-19 (1968)). "The scope of a warrantless search of an automobile is defined by the object of the search and

the places where there is probable cause to believe that it may be found." State v. Esteves, 93 N.J. 498, 508 (1983) (citations omitted).

Here, the trial court found "the State's version of events ultimately more persuasive," especially that MacRae detected a strong odor of marijuana emanating from defendant and the vehicle's interior. The trial court held the strong odor of marijuana was sufficient for the officers to examine the interior of the vehicle. In denying defendant's motion to suppress physical evidence, the trial court also found there was a dialogue between Goldfinger and defendant—with defendant answering in the affirmative—when Goldfinger asked "if there was anything in the vehicle."

The trial court's findings are supported by sufficient credible evidence in the record. The parties agree the motor vehicle stop was valid because defendant "was a suspended driver," in violation of N.J.S.A. 39:3-40. The smell of marijuana was so pervasive that it permeated defendant's clothing, as well as the interior of the car. Additionally, MacRae testified defendant stated to Goldfinger that "he had cocaine behind the radio in the car." Hence, since we previously found defendant's statements were properly Mirandized, the scope of the search, regardless of who conducted it, was valid. The strong smell of marijuana, coupled with defendant's statement to Goldfinger, permitted the search of CDS behind the dashboard pursuant to the automobile exception to the

warrant requirement. See, e.g., Witt, 223 N.J. at 447. Therefore, we see no reason to disturb the determination to deny defendant's motion to suppress physical evidence.

Defendant further argues even if his statements were properly Mirandized, the State failed to show his consent to search the car was voluntary. He explains the search of the car was unlawful because "the State did not prove that [he] knew he could refuse consent to search in the first place." We refrain from addressing defendant's arguments regarding whether he was aware he was able to refuse consent to search the vehicle, as any search was valid under the automobile exception, as discussed above.

MacRae and defendant gave conflicting narratives regarding who searched the car. According to MacRae, defendant volunteered to retrieve the evidence from the car, and the officers permitted him to do so. On the other hand, defendant claims the officers entered his car and searched each part, without his permission, removing and breaking objects. Notably, the trial court highlighted it "do[es] not make any finding whatsoever with respect to whether there were fifteen cops rolling around the interior of [the vehicle] or whether . . . [d]efendant went back into the vehicle and removed the radio itself in order to get the plastic bag." As noted, we refrain from deciding on defendant's lack-of-

consent claim because the search was valid pursuant to the automobile exception, as explained in our analysis above.

IV.

We next address defendant's argument, raised for the first time on appeal, that Goldfinger's and Williams's testimony Williams was "familiar with" defendant constituted inadmissible evident under Rule 404(b). According to defendant, the testimony prejudicially suggested his involvement in other illegal activities and led to the inference that defendant had a bad character because Williams handled drug-related matters. We review this issue under the plain error standard as defendant did not object to the testimony at trial. R. 2:10-2.

Generally, when reviewing the admission or exclusion of evidence, appellate courts afford "[c]onsiderable latitude" to a trial court's determination, examining "the decision for abuse of discretion." State v. Kuropchak, 221 N.J. 368, 385 (2015) (alteration in original) (first quoting State v. Feaster, 156 N.J. 1, 82 (1998); and then quoting Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008)). We accord great deference to a trial court's evidentiary rulings under Rule 404(b). State v. Barden, 195 N.J. 375, 390 (2008) (citing State v. Lykes, 192 N.J. 519, 534 (2007)). The decision whether to admit or exclude Rule 404(b) evidence is left to the trial court's discretion and will be reversed "[o]nly where there is a

clear error of judgment." State v. Green, 236 N.J. 71, 80-81 (2018) (alteration in original) (quoting State v. Rose, 206 N.J. 141, 157-58 (2011)).

Here, we conclude there was no abuse of discretion under Rule 404(b). The Rule states bad act evidence, or evidence of "other crimes, wrongs, or acts," is inadmissible as evidence of a person's bad character or criminal predisposition; however, such evidence is admissible to prove "motive, opportunity, intent, . . . or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b). Williams testified he was "familiar with" defendant. Williams, an eleven-year veteran of the NTPD, also testified defendant lived in Neptune Township. Further, Goldfinger testified it appeared Williams was familiar with defendant.

Saliently, neither of the officers' testimony suggested defendant had a criminal history. First, Goldfinger's testimony was used to explain how Williams and defendant maintained a "rapport" during the motor vehicle stop, which led to defendant allegedly indicating that he had marijuana on his person. The testimony explained defendant's cooperation with Williams. Second, Williams's testimony set the stage for the motor vehicle stop, considering that he later stated he was not familiar with the Toms River area and usually worked

in Neptune. Simply because Williams was purportedly familiar with defendant from Neptune does not imply defendant committed other crimes.

We reject defendant's argument that the jury impermissibly concluded that because Williams knows individuals who traffic drugs in Ocean County, and was familiar with defendant, Williams surmised defendant was selling drugs. Nothing stated by Williams in our view had the capacity to prejudice defendant by insinuating he had a prior criminal history "or was otherwise disposed towards criminal behavior." See State v. Ramos, 217 N.J. Super. 530, 538 (App. Div. 1987).

Moreover, there is overwhelming evidence in the record to support the jury's determination defendant committed the three charges for which he was convicted. Even if the officers' testimony constituted Rule 404(b) evidence, the fleeting reference to Williams's familiarity with defendant was not outweighed by its prejudicial effect, and we find no plain error. Consequently, Williams's testimony did not explicitly include or imply defendant was a criminal or had a criminal history, and we are therefore satisfied that his testimony did not constitute prohibited Rule 404(b) evidence.

V.

Finally, and for the first time on appeal, defendant contends Goldfinger's testimony violated Rule 701 when he relied on his experience to opine as to the packaging of heroin for distribution, hidden compartments in cars, and the nature of the items found behind defendant's car's dashboard. Since defendant has raised this issue for the first time on appeal, we again review it under the plain error standard. R. 2:10-2.

Rule 701, which governs lay witness opinion testimony, states: "If a witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness'[s] perception; and (b) will assist in understanding the witness'[s] testimony or determining a fact in issue." "The purpose of [Rule] 701 is to ensure that lay opinion is based on an adequate foundation." Neno v. Clinton, 167 N.J. 573, 585 (2001); see also State v. Singh, 245 N.J. 1, 14 (2021). Lay opinion testimony can be admitted "[only] if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function." State v. McLean, 205 N.J. 438, 456 (2011).

Opinion testimony may not "intrude on the province of the jury by offering, in the guise of opinions, views on the meaning of facts that the jury is

fully able to sort out . . . [or] express a view on the ultimate question of guilt or innocence." Id. at 461. "[L]ay opinion testimony is limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay." Id. at 460. To be admissible, lay opinion testimony must be founded on a witness's perception which must "rest[] on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." Id. at 457.

Our Supreme Court has "permitted police officers to testify as lay witnesses, based on their personal observations and their long experience in areas where expert testimony might otherwise be deemed necessary." State v. LaBrutto, 114 N.J. 187, 198 (1989). Nonetheless, admissibility "must be[] firmly rooted in the personal observations and perceptions of the lay witness in the traditional meaning of . . . Rule 701." McLean, 205 N.J. at 459 (alteration in original).

Here, at trial, after the State asked Goldfinger to explain what is commonly behind the dashboard and hidden compartments in a car suspected of containing illicit drugs, he answered:

> [GOLDFINGER:] They call them—most people call them traps. They're hidden compartments found in—in numerous things, in homes, but in this case specific to vehicles. A lot of times we find them behind radios. We find them secreted into where an airbag would typically be or glove box would be. It could be really

anywhere in a car depending on how extravagant the individual wants to get with this trap and how much money he wants to spend on installation. This was a very basic, in my opinion, homemade compartment.

. . . .

[STATE:] Now . . . at the time you retrieved . . . the various wax folds, how were they packaged in regards to the rubber bands?

[GOLDFINGER:] They were packaged in what's known as on the street as bundles.

[STATE:] Okay. And what do you mean by bundles, if you could briefly explain that to the jury?

[GOLDFINGER:] Bundles . . . are how heroin is sold on the street either what's called a bundle or a brick. Each bundle contains ten wax folds of a use or dosage of heroin, and then each brick contains five of these bundles for a total of [fifty] bags. So you'll see five bags rubber band, five more—I'm sorry. Ten bags rubber band, ten bags rubber band and then those five bundles with one more band around it and commonly wrapped in a newspaper or magazine wrapping or some kind of paper wrapping. It looks like a little, they call them bricks [because] it looks like a little brick.

[STATE:] And in regards to the various—are you familiar with the stamps and imprints and what the meaning of that is, commonly?

[GOLDFINGER:] Yes. Uh-huh.

[STATE:] Can you briefly explain that to the jury?

[GOLDFINGER:] Most drug distributors have stamps that their customers can identify as being theirs. You know, a stamp could be anything, any—any logo, any word, any color. And they stamp each bag, and it's common for heroin users to associate that stamp with that specific dealer.

So user A, if he has a good bag of heroin and it's got an apple on it, you could tell user B you're going to want an apple if you want a good high. They associate those stamps with—with the dealer and with the quality of the particular heroin.

[STATE:] And I notice you're referring to the quality of heroin. What do you mean by that?

[GOLDFINGER:] Well, quality of the heroin, you know, based on a user is whatever gets you more high. So a good quality heroin will make the user higher.

A lot of the heroin you see out there has what we—when we test often it goes off of purities and that kind of thing on the federal side, and the purities often based on how much heroin versus cut, because heroin dealers, when they—when they buy the heroin before they package it in these little bags, they take the heroin and they take other types of powder substances of all different kinds and they do what's called cutting it.

So some dealers are very generous in how much heroin they put in versus the cut, you know, and that's if you're a user you want from a dealer who's more generous, obviously. You want more product and less junk, so to speak.

[STATE:] And, basically, once in any investigation or even here, once these were retained or put into

> evidence, they would have been sent for analysis to get the actual analysis of what the substance is, correct?
>
> [GOLDFINGER:] Correct.
>
> [STATE:] But based on the various stamps that you observed on February 23rd of 2017, what did you believe [it] to be?
>
> [GOLDFINGER:] Heroin. There's no other narcotic I know of that's packaged that way.

Based on our review of the record, we find Goldfinger's testimony regarding hidden compartments in vehicles and the method in which drugs are packaged constituted improper lay witness opinion. Our Supreme Court has

> established the boundary line that separates factual testimony by police officers from permissible expert opinion testimony. On one side of that line is fact testimony, through which an officer is permitted to set forth what [they] perceived through one or more of the senses. . . .
>
> On the other side of the line, we have permitted experts, with appropriate qualifications, to explain the implications of observed behaviors that would otherwise fall outside the understanding of ordinary people on the jury. . . . [A]n expert may explain the significance of quantities of narcotics or its distinctive packaging, which are matters that would not otherwise be known by an average juror.
>
> [Id. at 460-61 (internal citations omitted) (emphases added).]

Goldfinger was introduced as a fact witness, not as an expert witness. However, he "was asked about his training and experience in an apparent effort to proffer expert testimony from a lay witness." See State v. Brockington, 439 N.J. Super. 311, 323 (App. Div. 2015) (finding that the officer's testimony was impermissible lay opinion testimony because he "not only described what he suspected, he stated his conclusions of the specific drugs being transferred, crossing the line from suspicion to fact, supported only by his interpretation of what he had observed"). Goldfinger testified generally about hiding places for drugs in vehicles and how drugs are packaged for distribution, which is outside the realm of what a reasonable juror would understand.

In any event, even though the trial court erred in admitting this portion of Goldfinger's testimony, defendant failed to establish that any such error was "clearly capable of producing an unjust result." R. 2:10-2. Indeed, although the testimony supported the State's claim defendant possessed the drugs with intent to distribute them, the jury found defendant not guilty of the possession-with-intent charges. The State presented overwhelming evidence establishing defendant's guilt on the remaining possessory drug charges based upon MacRae's, Goldfinger's, and Williams's factual testimony.

In addition, Goldfinger's improper lay opinion testimony is irrelevant to the drug possession charges for which defendant was convicted. In sum, we are not persuaded that any illegal error impacted the verdict. See State v. Weaver, 219 N.J. 131, 154 (2014); State v. Deny, 250 N.J. 611, 634 (2022) (concluding that a detective's testimony explaining the meaning of slang terms was erroneously admitted as lay, rather than expert opinion, but holding any error was harmless given the "overwhelming evidence against defendants").

To the extent that we have not addressed defendant's remaining arguments, we find they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.