SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0729-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Camden County.
HARVEY CUTTS,	:	
Defendant-Appellant.	:	Indictment No. 23-02-00326-I
	:	Sat Below:
	:	Hon. Yolanda C. Rodriguez, J.S.C.

BRIEF AND APPENDIX
ON BEHALF OF DEFENDANT-APPELLANT

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Dated: February 26, 2024

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

Camden County Indictment No. 23-02-00326 charged the defendant, Harvey Cutts, with third-degree possession of a controlled dangerous substance (CDS), contrary to N.J.S.A. 2C:35-10a(1) (count one); third-degree possession of CDS with intent to distribute, contrary to N.J.S.A. 2C:35-5a(1) and -5b(3) (count two); second-degree weapons possession during a CDS offense, contrary to N.J.S.A. 2C:39-4.1a (count three); second-degree unlawful possession of a firearm, contrary to N.J.S.A. 2C:39-5b(1) (count four); and second-degree possession of a firearm by certain persons not to have weapons, contrary to N.J.S.A. 2C:39-7b(1) (count five). (Da 1-6)

Cutts filed a motion to suppress evidence, which was heard and denied by the Honorable Yolanda C. Rodriguez, J.S.C., on July 25, 2023. (Da 7; 1T 52-23 to 69-6)

On September 1, 2023, Cutts appeared before Judge Rodriguez and entered a guilty plea to unlawful possession of a firearm, as charged in count four.[1] (Da 8-15; 2T 3-18 to 3-24; 2T 5-9 to 9-24) On October 6, 2023, Judge Rodriguez sentenced Cutts to five years in prison with 42 months of parole

[1] Cutts also pled guilty to possession of CDS with intent to distribute under Indictment No. 21-11-00390, and third-degree aggravated assault, which is not part of this appeal. (2T 3-18 to 3-24)

ineligibility, pursuant to the Graves Act, N.J.S.A. 2C:43-6c. (Da 16-19; 4T 6-23 to 7-18)

Cutts filed a notice of appeal on November 8, 2023. (Da 20-23)

STATEMENT OF FACTS

On November 22, 2022, Camden police officers stopped and frisked two groups of men who were standing on Leonard Avenue, between Federal Street and Westfield Avenue. The men, six in total, were also checked for outstanding warrants. (Da 26-28; 1T 22-1 to 23-12) One group, which consisted of Joshua Arce and Carlos Garcia-Vargas, was on "the southern side of the street closer to Westfield Avenue" when detained. (Da 27; 1T 22-12 to 22-17) According to the supplemental police report,[2] the two men were stopped because "Detective Sergeant Widman had reasonable suspicion that these males were engaged in criminal activity due to the area and time of night." (Da 27) The report did not specify why Arce and Garcia-Vargas were frisked; it stated only that the men were "detained and terry frisked for weapons with negative results." (Da 27-28) Leonard Avenue between Federal Street and Westfield Avenue is a residential block with row houses, and the stop occurred at eight o'clock in the evening, two days before Thanksgiving. (Da 24; 1T 58-13 to 58-17)

[2] The supplemental report was supplied to the judge, and in her factual findings, made reference to facts contained in the report. (See, e.g. 1T 64-9 to 64-10)

Bodycam footage,[3] which captured part of Arce and Garcia-Vargas's encounter with police, shows two men in handcuffs. One of the men is in front of a row house with the number "33" on the front door, which was open at the time. The handcuffed man can be heard telling police that he lives at that address,[4] and a distraught woman can be heard excitedly speaking to the officers, mostly in Spanish. (Ex C 7:30 to 13:15) At one point, the woman can be heard saying "my house," while gesturing toward number 33; she can then be heard referring to the man in handcuffs as "mi hijo."[5] (Ex C 10:15 to 10:47)

When a records check confirmed that neither Arce nor Garcia-Vargas had outstanding warrants, the two men were finally released. (Da 28)

The other group of men, which consisted of Harvey Cutts, Dashon Gaines, Demetrius Smith and Khalif Simmons, were standing on the other side of

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[3] At the suppression hearing, the Defense introduced footage from body cameras worn by Detective Alexander Wizbicki and Officer Devine. (1T 27-2 to 27-4; 1T 32-14 to 32-19) A DVD with a copy of the footage is appended to this brief as "Da 24." The footage from each bodycam is in a separate file: the file named "Ex B" contains the footage from Devine's bodycam; and the file named "Ex C" contains the footage from Wizbicki's bodycam. The citations used in this brief refer to the bodycam video by their file name, and include the start and end times indicated by the timestamp on the recordings.

[4] According to USPhonebook.com, a person with the name "Joshua Arce" lives at 33 Leonard Avenue in Camden. See https://www.usphonebook.com/address/33-leonard-ave_camden-nj (last visited 1/15/2024).

[5] According to SpanishDictionary.com "mi hijo" means "my son." See https://www.spanishdict.com/translate/mi%20hijo

Leonard Avenue, closer to Federal Street, when they were stopped and frisked. (1T 10-18 to 10-19) Bodycam footage shows the men standing on the sidewalk in front of a row house with an elevated porch when uniform officers approach. (Ex B 0:30 to 1:00) Cutts, who is on the far left of the screen, is holding a bag of chips in one hand and feeding himself with the other. (Ex B 0:30 to 1:00) A plastic grocery bag can be seen hanging on the wrought iron railing of the porch, near where Cutts is standing, and what appears to be an unopened bottle of liquor can be seen on the floor of the porch, near the grocery bag. (Ex B 0:30 to 1:00; 3:40 to 3:50) Within seconds of approaching, the officers can be seen signaling the men to turn around and face the porch. Cutts and the other men turn, place their hands on the railing, and the officers proceed to frisk them. (Ex B 0:30 to 1:00)

The frisk of Cutts' person revealed that Cutts was in possession of a gun; no weapons were found on the other men. (Da 27; 1T 16-17 to 16-23) Cutts was taken into custody and a search incident to arrest revealed that Cutts was also in possession of drugs. (1T 17-4 to 17-12) The other three men were handcuffed and detained while a records check was conducted. (Ex B 1:30 to 3:44; 1T 17-1 to 17-13) While the men were waiting, one of them can be heard telling the officers that his aunt lives "right there"; they had just come from the liquor store: and they were "just chillin." (Ex B 12:30 to 12:45, 13:40 to 14:20) Gaines and

Smith were ultimately released; Simmons was arrested on an outstanding warrant. (Da 27)

Cutts moved to suppress the gun and drugs as the product of both an illegal stop and an illegal frisk. (1T 43-10 to 50-22)

A. The Suppression Hearing Testimony

At the suppression hearing, the State called one witness: Alexander Wizbicki, a plain clothes detective with the Camden Police Department's Narcotics Gang Unit (NGU). (1T 6-19 to 7-9) Wizbicki, however, was not involved in the stop or frisk of Cutts. (1T 22-1 to 22-7) As the bodycam footage established, by the time Wizbicki arrived, uniform officers had already made contact with the four men, other NGU detectives were already on the scene, and the frisk of Cutts was already under way.[6] (1T 26-19 to 34-10)

With respect to the events that led to the stop and frisk, Wizbicki testified that he and other NGU detectives were "conducting an operation" around

[6] While the other officers were dealing with the four men, Wizbicki was involved in searching a blue Hyundai parked nearby. Wizbicki found a gun on the car's front tire, which he removed and secured, while another officer found drugs on the back tire. (1T 15-2 to 16-10; 1T 21-3 to 34-10). When asked about his search of Hyubdai, Wizbicki testified: "So, in reference to particularly open air drug markets, within the area of our observations, it is common to stash items and narcotics and such in various locations so it is common for -- very common for us to check the immediate area." (1T 41-11 to 41-17) Cutts was not charged in connection with the gun or drugs found on the Hyundai. (1T 40-2 to 40-5)

Leonard Avenue, which Wizbicki described as an "open air market that distributes crack cocaine, powder cocaine, marijuana, things that are illegal narcotics." (1T 8-1 to 8-20) Wizbicki also said that there had been recent shootings in that area. (1T 10-11 to 10-12)

When asked what if anything the NGU detectives observed that night, Wizbicki responded: "So during that operation they observed four males that were on the northern side of the street on Leonard Street[,] . . . closer to Federal Street." The men, who were later identified as Cutts, Gaines, Simmons and Smith, were wearing "heavy dark clothing" and "ski masks." (1T 10-14 to 10-22; 1T 11-18; 1T 15-21 to 15-22) Wizbicki testified that the fact the men were "wearing heavy dark clothing in the reported area" contributed to his suspicion that the men were involved in criminal activity. (1T 15-18 to 15-23)

There is no dispute that November 22, 2022, was a cold day. (1T 58-7 to 58-9) With the exception of one uniform officer, every patrol officer and plain clothes detective seen on the bodycam footage was wearing some kind of head and/or face covering. For example, one uniform officer can be seen wearing a dark, fur-lined, leather, trapper-style hat that covered the back of his neck and ears (Ex B 23:05 to 24:14), while another was wearing a black knit cap (Ex B 2:35 to 2:45); Wizbicki can be seen wearing a black, hooded sweatshirt with the hood pulled over his head and a black knit cap underneath the hood (Ex B 22:15

to 22:45), while another plain clothes detective is wearing a hood with a baseball cap underneath (Ex B 7:25 to 7:35); a female officer can be seen wearing a dark knit cap on her head and what appears to be a neck gaiter over her nose and mouth. (Ex C 7:25 to 7:42)

The four men who were detained were similarly dressed for the cold: they were all wearing winter jackets and long pants (three of the men were wearing what are clearly light- to medium-wash blue jeans); they had hoods on their heads and were wearing black balaclavas[7] underneath their hoods. (Ex 00:40 to 00:55; Ex B 20:00 to 22:00)

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[7] A balaclava is "a closely fitting covering for the head and neck, usually made from wool." "balaclava," Cambridge Dictionary. https://dictionary.cambridge.org/us/dictionary/english/balaclava (retrieved January 29, 2024).

Balaclavas, which can "serve[] as multi-purpose facemasks" became a fashion "phenomenom" during the pandemic. André-Naquian Wheeler, "All the Cool Kids Are Wearing Balaclavas," Vogue, February 14, 2023. https://www.vogue.com/article/all-the-cool-kids-are-wearing-balaclavas

Between 2021 and 2023, the balaclava became a staple of street fashion:

- In 2021, it "infiltrated rap culture seemingly overnight," ibid, and was regarded as a top contender "in the race to claim 2021's hottest fashion trend." Leah Dolan, "Behold the balaclava: Why a 19th-century army accessory has taken over social media," CNN, December 28, 2021. https://www.cnn.com/style/article/balaclava-gen-z-internet-culture/index.htm
- As of December 28, 2021, there were "102.6 million videos attached to the hashtag '#balaclava'" on TikTok, and, on Google, "the question 'how to knit a balaclava' [had] gr[own] more than 5000% in the [previous] 12 months." Ibid.
- By 2022, the balaclava had worked its way into the fashion lines of top designers, like Stella McCartney and Louis Vuiton, and popular

Wizbicki claimed that the detectives also observed "a heavy amount of foot traffic" "leading to those four males," and "then after that, one of those four males was observed concealing themselves in between two cars and immediately breaking contact." (1T 10-25 to 11-6) When asked "with whom they were immediately breaking contact," Wizbicki responded: "I don't know." (1T 11-7 to 11-12) When asked again, he responded: "The pedestrians that would come onto the set." (1T 11-19 to 11-20) The detectives then directed marked patrol units to go into the area and "conduct stops." (1T 11-24 to 11-25)

In addition to their "heavy" clothing, Wizbicki testified, the decision to stop the men was based on "several factors": "recent violence in the area"; "that area in particular is very -- poorly lit"; and "the observation of the foot traffic coming in, one of them males breaking off, leading pedestrians [and] concealing themselves in between cars." (1T 17-19 to 17-24) According to Wizbicki, "concealing themselves in between cars is very common as well. It hides the narcotics dealers from law enforcement when they're riding by." (1T 17-25 to

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fashion brands, like Urban Outfitters and Zara, showing up on the runways of Paris and dominating New York Fashion Week. Ibid. See also Lourdes Avila Uribe, "Balaclavas: Shop The Biggest Trend At New York Fashion Week 2022." HuffPost, February 18, 2022. https://www.huffpost.com/entry/balaclavas-trend_l_620d537 ce4b05706db716e69; Zak Maoui, "The balaclava is 2022's must-have item, but why? And…why?" GQ, February 3, 2022. https://www.gq-magazine.co.uk /fashion/article/balaclava-fashion-trend.

18-3) Wizbicki did not say how many pedestrians were allegedly seen approaching the men, which of the men was allegedly seen "breaking off" from the group, or which of the cars the man was allegedly seen "concealing" himself between. Nor did Wizbicki say that any of the men were seen handing anything to the pedestrians or engaging in what appeared to be hand-to-hand transactions; that he knew any of the men from prior drug distribution arrests; or that any of the pedestrians who allegedly approached the men were known drug users. Nevertheless, when asked by the prosecutor if the men could "have been charged for loitering to commit a CDS set," Wizbicki responded: "Yeah. They would have been charged for loitering based on our observation." (1T 18-4 to 18-7)

After Wizbicki testified as to why the four men were stopped, the prosecutor asked Wizbicki why the men were "detained in handcuffs." Wizbicki responded: "Due to officer safety and . . . the detectives observed them blading their bodies." (1T 16-1 to 16-4) According to Wizbicki, when the marked units arrived on the scene, the men "immediately started blading their bodies," which, Wizbicki testified, is "typically . . . [a] sign[] that they could potentially be on the dangerous -- they're trying to shift their body away from officers." (1T 12-4 to 12-17) Wizbicki did not personally observe this so-called "blading." (1T 21-3 to 22-4)

While Wizbicki provided reasons as to why the men were stopped and detained in handcuffs, he did not provide a reason as to why the men were frisked. Rather, his testimony established that it is the practice of the Camden police to frisk anyone they detain:

> [PROSECUTOR]: Backing up, is -- is it commonplace practice when somebody is detained, is it common police practice for a Terry frisk to be performed?
>
> [WIZBICKI]: Yes.

(1T 16-13 to 16-16)

B. The Judge's Ruling

The Defense argued the police had no basis to stop and frisk the six men who were standing on Leornard Avenue that night because "there was no testimony at all that any of those individuals were armed and dangerous." (1T 46-23 to 47-2) The Defense also asserted there was no basis to stop Cutts because Wizbicki's testimony established only that Cutts and the other three men had been seen "greeting other people," and there "was no testimony at all of criminal activity." (1T 46-5 to 46-7) The Defense argued: "It's not illegal to talk to people on the street; nor is it illegal to stand on the street, nor is it illegal to be outside in a high crime area at night." (1T 46-11 to 46-14)

The State argued there was "reasonable articulable suspicion" to stop and frisk Cutts, because "The group of males were dressed in all black, located in a

poorly lit area wearing black ski masks and engaging in suspicious conduct[,] . . . and when law enforcement arrived, they further bladed their bodies," raising "concern[s] . . . that they were armed and dangerous."[8] (1T 51-21 to 52-2; 1T 52-7 to 52-10) The State further argued that police had probable cause to arrest Cutts, because he was "loitering in a high crime area known for narcotics trafficking[,] . . . and . . . was observed loitering as part of a group of individuals observed engaging in suspected narcotics trafficking." (1T 51-5 to 51-12)

After finding Wizbicki was a credible witness (1T 53-15 to 54-5), the judge identified aspects of Wizbicki's testimony that she found "very important." (1T 57-4 to 57-5) While acknowledging that six men in total were stopped and frisked that night, the judge focused on the observations made about the four men standing closer to Federal Street, "because the defendant was one of those four." (1T 55-15 to 55-17; 1T 57-22 to 47-25; 1T 63-25 to 64-5) The judge stated:

> [Wizbicki] was aware of law enforcement observations which are significant and they include that there are four males on

[8] The prosecutor also argued that Wizbicki's discovery of a gun on the tire of a nearby car provided reasonable suspicion to stop and frisk the men. (1T 51-13 to 52-15) However, Wizbicki's testimony and the BWC footage clearly established that the stop and frisk was well under way before Wizbicki saw the gun on the tire. Moreover, there is no evidence that police suspected the men had a connection to the gun on the tire, e.g., the men were not questioned about the gun on the tire and none of the men were charged in connection with the gun on the tire. See supra, n.6.

> the sidewalk of Leonard [Avenue] with ski masks, and darkly dressed.
>
> [T]here was heavy pedestrian traffic in the sense that those -- those unknown pedestrians would approach in particular one of the four males and then one would go in and lea[d] the pedestrian [] in between the two vehicles.
>
> * * *
>
> [T]his is suspicious behavior on this street known for, as he called it the open air market sale of narcotics. The detectives observed the males, those four, concealing themselves in between the two vehicles at times and as explained, the law enforcement who were conducting surveillance noticed one of the four males in the all dark, all black clothing being approached by unknown pedestrians in the area and then going in between those two vehicles.
>
> The [NGU] then coordinates with other officers to do and conduct a pedestrian stop. Detective Wizbicki explained that as marked patrol units arrived on Leonard [Avenue], . . . the group of four males began to blade their bodies away from the marked patrol units[.]

(1T 55-9 to 56-19) The Judge found the alleged "blading" "very significant," because "[Wizbicki] explained that that is something that gives the officers and in his experience reason to believe that these individuals might be armed." (1T 56-21 to 57-3)

The judge also found it "important that this is a residential area. . . . This isn't an isolated parking lot off of a warehouse or anything like that. It is a residential area with row houses." (1T 58-13 to 58-17) The judge noted that it was cold that night (1T 58-7 to 58-9), and the street was "not well lit." (1T 55-

13) The judge found that it was "not reasonable to assume that this is just people hanging out on a cold evening in November to greet pedestrians and others" (1T 66-11 to 66-13), and that the officers' alleged observations furnished them with reasonable suspicion to stop and frisk Cutts and the three men he was with:

> So, there is reasonable articulable suspicion to have an investigative detention when those officers in their patrol cars come onto Leonard Avenue. And there is observation by law enforcement of the blading coupled with knowing this is the high crime area and their experience of narcotic sales and shootings in this area, this is suspicious activity that these individuals could be armed and dangerous to these officers who have reasonable articulable suspicion of criminal activity and the officers can conduct, the Court finds an investigative detention.
>
> Observing their blading and knowing the reputation of Leonard Street -- and it's a residential area, the officers also not only have to protect their own safety, but the community's safety.

(1T 64-23 to 65-12)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING SUPPRESSION WHERE DEFENDANT WAS ONE OF SIX MEN THAT POLICED STOPPED AND FRISKED WITHOUT A VALID BASIS TO DO SO. (Da 7; 1T 52-23 to 69-6)

The officers did not have a valid basis to stop Cutts. Nor did they have a valid basis to frisk Cutts. Therefore, the gun and drugs recovered from Cutts' person were the product of an illegal stop and frisk and must be suppressed. U.S. Const. amends. IV and XIV; N.J. Const. art. I, par. 7.

Under both the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, "searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." State v. Elders, 192 N.J. 224, 246 (2007). "People, generally, are free to go on their way without interference from the government. That is, after all, the essence of the Fourth Amendment[.]" State v. Shaw, 213 N.J. 398, 409-10 (2012) (citing Terry v. Ohio, 392 U.S. 1, 9, 27 (1968)). Consequently, "the State bears the burden of proving by a preponderance of the evidence that [the] warrantless search or seizure '[fell] within one of the few well-delineated exceptions to the warrant requirement.'" Ibid. (quoting State v. Pineiro, 181 N.J. 13, 19-20 (2004)).

The investigatory stop and protective frisk for weapons are two such exceptions. Under state and federal law, a brief investigatory stop of an individual is permissible if the officer has “reasonable and particularized suspicion" that such individual has just engaged in or is about to engage in criminal wrongdoing. State v. Stovall, 170 N.J. 346, 356 (2002)(citing Terry, 392 U.S. at 21); State v. Caldwell, 158 N.J. 452 (1999). In other words, “police may not randomly stop and detain persons" based on a whim or hunch. Shaw, 213 N.J. at 400. Police must "be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch'" in order to stop and detain individual, even temporarily. United States v. Sokolow, 490 U.S. 1, 7 (1989)(quoting Terry, 392 U.S. at 27).

During the course of an investigatory stop, an officer is permitted "'to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.'" State v. Roach, 172 N.J. 19, 27 (2002) (quoting Terry, 392 U.S. at 23). That is, an officer may "conduct 'a carefully limited search of the outer clothing'" to determine whether weapons are present. Id. (quoting Terry, 392 U.S. at 30). However, police may not subject everyone they stop to a protective frisk for weapons. “[W]hether there is good cause for an officer to make a protective search incident to an investigatory stop is a question separate from whether it was permissible to stop the suspect in the

first place." State v. Thomas, 110 N.J. 673, 678-79 (1988). "[I]n order to conduct a protective search, an officer must have a 'specific and particularized basis for an objectively reasonable suspicion that defendant was armed and dangerous.'" Roach, 172 N.J. at 27 (quoting Thomas, 110 N.J. at 683 (emphasis in original).

In this case, Wizbicki's vague description of pedestrians approaching Cutts and the group of men he was with did not establish reasonable suspicion for the stop. Wizbicki's testimony also failed to establish reasonable suspicion to subject the men to a protective search for weapons. In fact, Wizbicki did not testify that the men were frisked because there was reason to believe they were armed. Rather, Wizbicki testified that the men were frisked because it is common practice for police to frisk anyone they have stopped, at least in a "high crime" area. Because the State failed to establish that police had a reasonable and articulable basis to stop and frisk Cutts, the gun and drugs recovered from his person should have been suppressed as the fruits of an illegal search and seizure. Wong Sun v. United States, 371 U.S. 471 (1963). Therefore, the trial judge's order denying suppression must be reversed.

A. The Police Did Not Have A Reasonable And Articulable Belief That Defendant And His Three Friends Were Involved In Criminal Activity. It Is Clear From The Evidence That The Four Men Were Stopped For The Same Reason The Other Two Men Were Stopped: "Due To The Area."

Wizbicki's vague testimony about pedestrians approaching the four men and one of them "breaking off" and going in between cars (1T 17-19 to 17-24) did not establish reasonable suspicion to stop the men, let alone probable cause to arrest the men for "loitering" for the purpose of committing a drug offense, as the State suggested. (1T 18-4 to 18-7; 1T 51-5 to 51-12) Wizbicki did not specify how many pedestrians allegedly approached the four men or observe any type of exchange between the men and the pedestrians. Nor did he say any of the pedestrians were known drug users or any of the four men were known drug dealers. While the motion judge found it "unreasonable to assume" that Cutts and his friends were simply "hanging out on a cold evening in November," talking to passersby (1T 66-11 to 66-13), that is precisely what the evidence established: that Cutts and three friends were standing on a sidewalk socializing.

The fact that it was a cold evening did not signify that the men, who were dressed appropriately for the cold, were involved in criminal activity. It is not unreasonable that a group of men would be "hanging out" and socializing at eight o'clock in the evening on a residential block in an urban neighborhood two days before Thanksgiving. This is especially true during a global pandemic when outdoor socializing, even in winter, was commonplace, particularly on

weeks when coronavirus infections were surging.[9] Moreover, the BWC footage demonstrates that the men appear to be doing just that: socializing. Cutts was eating from an open bag of chips and a grocery bag and bottled beverage can be seen on the raised porch in front of which the men were standing. (Ex B 0:30 to 1:00; 3:40 to 3:50)

The judge also misapprehended the significance of the fact that the men were on a residential block with row houses, as opposed to in "an isolated parking lot off of a warehouse." (1T 58-7 to 58-17; 1T 64-23 to 65-12) It is a perplexing suggestion that four men on a sidewalk in front of row houses, one of whom was snacking on what appeared to corn chips, should raise more suspicion in the mind of a police officer than four men in an isolated parking lot in a commercial area after business hours. There is nothing criminal about people standing and snacking on a residential city block, even in a so-called "high-crime area." As the Defense argued below: "It's not illegal to talk to people on the street; nor is it illegal to stand on the street, nor is it illegal to be outside in a high crime area at night." (1T 46-11 to 46-14)

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[9] According to CDC data, there was a sharp rise in covid and influenza hospitalizations during November 2022. See https://www.cdc.gov/respiratory-viruses/data-research/dashboard/illness-severity.html

The officer's invocation of the label "high-crime area" does not transform what would otherwise be described as socializing – standing in front of a porch with refreshments – into "loitering" for the purpose of "engaging in narcotics transactions," as the State argued. (1T 51-5 to 51-12) In State v. Gibson, 218 N.J. 277 (2014), our Supreme Court rejected the notion that defendant's otherwise innocent conduct — leaning against a porch on the property of a closed community center at three o'clock in the morning — could reasonably be viewed as "loitering," simply because the community center, which had a "no loitering" sign posted in the window, was in an area with a "history for violent crime and drug activity" and the center's director asked police for assistance in keeping people off the property due to recent incidents of criminal activity outside the center. Id. at 282-83, 297. As the Court in Gibson stated:

> The constitutional right to be free from arbitrary arrest is not suspended in high-crime neighborhoods where ordinary citizens live and walk at all hours of the day and night. Momentarily leaning against a building, or an upraised porch, on a city block, would not be considered loitering to an objectively reasonable citizen.
>
> [Id. at 297; see also State v. Shaw, 213 N.J. 398, 420 (2012)("That [the place where defendant was stopped] is located in a high-crime area does not mean that residents in that area have lesser constitutional protection from random stops.").]

In State v. Goldsmith, 251 N.J. 384 (2022), the Court again stressed that the State cannot rely on an officer's characterization of an area as "high-crime" to justify an otherwise illegal detention. Like Cutts, Goldsmith was outside on a

winter evening on a residential block in Camden when police approached him. As in the instant case, the State called one witness at the suppression hearing, an officer with the Camden County Sheriff's Office. The officer testified that he and his partner were patrolling the block where Goldsmith was stopped because it is a "'high-crime area' known for shootings and open-air drug transactions" – language remarkably similar to that used by Wizbicki. Id. at 390-91. According to the officer, when they first arrived on the block, they saw two men in front of a "vacant house, where they believed drugs were sold and weapons stored." Id. at 391. As soon as the officers got out of their car, the men "took off," just as Goldsmith emerged from a walkway on the side of the house, "which is known for the sale of [drugs] and weapons." Id. 391-93, 405. Although he did not witness a hand-to-hand transaction between Goldsmith and the two men, the officer testified that he "was suspicious of defendant based on his training and experience that drugs and guns are often stored in walkways, because of general 'reports [he had] been having in the area,' and because of his belief that criminal activity was taking place at the vacant house." Id. at 405. Goldsmith was stopped and frisked; a gun and drugs were found on Goldsmith's person; drugs were also found in the alleyway. Id. at 393-94.

In finding the police did not have reasonable suspicion to stop Goldsmith, the Court stressed "[t]he State must do more than simply invoke the buzz words

'high-crime area' in a conclusory manner to justify investigative stops" and found the officer's "vague testimony fell short of providing factual support for his conclusory statement that the area was high crime." Id. at 404; see also State v. Pineiro, 181 N.J. 13, 31 (2004) (Albin, J., concurring) ("The words 'high crime area' should not be invoked talismanically by police officers to justify a Terry stop that would not pass constitutional muster in any other location."). As the Court in Goldsmith explained,

> [The officer's] testimony provided nothing more than a general description of a high-crime neighborhood, noting it is well known for weapons, shootings, and drug sales. He noted that he had seen five to ten drug sales on that block, presumably over the course of his 20 years as an officer, but that testimony is unclear because the officer did not provide a timeline or context for the drug sales he had witnessed. Furthermore, [the officer] stated that he previously arrested fugitives in that neighborhood, but did not indicate the approximate number of fugitives or a timeline during which those arrests occurred. Again, as our caselaw has held, the character and prevalence of crime in an area – although insufficient on its own to support particularized suspicion – can be one factor in determining whether reasonable suspicion existed. The State, however, must provide at least some evidence to support the assertion that a neighborhood should be considered as "high-crime."
>
> [Id. at 404-405.]

The Court further found that "even if [the officer] had provided more information regarding the prevalence of crime in the area, that would have been insufficient to justify the stop because the other factors on which the officers relied were also insufficient -- even when taken together -- to form a reasonable

and articulable suspicion that defendant was engaged in criminal activity." Id. at 405. The Court reasoned,

> [The officer] supported his suspicion of defendant by claiming that defendant was "coming out of a walkway between a vacant property which is known for the sales of [drugs] and weapons" after the two unidentified individuals walked away. [The officer] testified that he was suspicious of defendant based on his training and experience that drugs and guns are often stored in walkways, because of general "reports [he had] been having in the area," and because of his belief that criminal activity was taking place at the vacant house. None of those non-specific, non-individualized factors, however, "meet the constitutional threshold of individualized reasonable suspicion" that this particular defendant was engaged in criminal activity.
>
> [Id. at 405-406 (citing State v. Nyema, 249 N.J. 509, 532 (2022)).]

In the instant case, Wizbicki's testimony about the area was far less detailed than the officer's in Goldsmith. When asked by the prosecutor about recent arrests in the area, Wizbick simply said that he was aware from the police department's "records management system" that, prior to November 21, 2022, there had been "several arrests for narcotics related offenses, distribution of narcotics and possession of narcotics in that area"; he himself had made narcotics arrests in that area; and on November 21, 2022, "we were in that area for the open air drug market as well as recent shootings within that area." (1T 8-21 to 10-12) Wizbicki's vague testimony did not "support the assertion that [the] neighborhood should be considered as 'high-crime.'" Id. at 405.

Even if the State had presented more detailed evidence about the high-crime nature of the area, Wizbicki's vague testimony about one of the four men "breaking off" and going in between cars with an unspecified number of unknown pedestrians did not provide reasonable suspicion of criminal activity. Like the officer's testimony in Goldsmith that he knew from his training and experience drugs and guns are stored in walkways, Wizbicki testified that "concealing themselves in between cars is very common" because "it hides the narcotics dealers from law enforcement when they're riding by." (1T 17-25 to 18-3) "None of those non-specific, non-individualized factors, however, meet the constitutional threshold of individualized reasonable suspicion that th[ose] particular [four men] w[ere] engaged in criminal activity." Id. at 405-406 (internal quotation marks and citation omitted).

Wizbicki's vague testimony about the officers' observations prior to the stop – four men socializing with each other and talking to unidentified passersby, and one of the men walking between two cars an unspecified number of times – "could be used to justify the stop of virtually anyone" socializing on Leonard Avenue, between Federal Street and Westfield Avenue, "on any day, and at any time, based simply on their presence on that street." Id. at 406. Indeed, it appears that that is exactly was happening that night: two other men – Arce and Garcia-Vargas – were stopped at the other end of the street on "suspicion

that [they] were engaged in criminal activity due to the area and time of night." (Da 27)

B. The Trial Judge Erred In Finding That The Alleged "Blading" Provided A Valid Basis To Frisk The Four Men When Detective Wizbicki Did Not Offer "Blading" As A Basis For The Frisk And Specifically Testified That It Is Police Practice To Conduct A Frisk For Weapons Whenever An Individual Is Stopped.

In the instant case, the motion judge erroneously found that the police had a valid basis to search Cutts and the three men he was with after "[o]bserving their blading and knowing the reputation of Leonard Street." (1T 64-23 to 65-12) First, Wizbicki did not testify that the men's alleged blading was a basis to believe that the men were armed, or that the alleged blading was the reason the men were frisked. Rather, Wizbicki testified blading is "typically . . . [a] sign[] that they could potentially be on the dangerous – they're trying to shift their body away from officers" (1T 12-4 to 12-17), and, according to Wizbicku, that was the reason the men were handcuffed. (1T 16-1 to 16-4) As for the frisk, it was clear from Wizbicki's testimony that the men were not frisked because the officers believed they were armed, but rather, because it is police policy to frisk anyone who is stopped. (1T 16-13 to 16-16) Indeed, Arce and Garcia-Vargas were not frisked because they were observed "blading" or for any other particularized reason; they were frisked simply because they were stopped. (Da 27-28)

A policy of frisking every person who is stopped is patently improper. "[W]hether there is good cause for an officer to make a protective search incident to an investigatory stop is a question separate from whether it was permissible to stop the suspect in the first place." Thomas, 110 N.J. at 678-79. An officer may not conduct a search for weapons unless he has "an objectively reasonable suspicion that a suspect was armed and dangerous." Id. at 683. That is, a protective frisk is permitted when a reasonably prudent officer would be justified in the belief, based on "specific and articulable facts[,]" and not "his inchoate and unparticularized suspicion or 'hunch,'" that an individual is armed and dangerous. State v. Privott, 203 N.J. 16, 29 (2010) (quoting Terry, 392 U.S. at 21, 27). As discussed in Subsection C, that standard was not met in this case.

C. The Alleged "Blading" Did Not Provide Reasonable Suspicion To Believe That Any Of The Four Men Were Armed And Dangerous.

In this case, the officers had no particularized reason to believe that Cutts or the men he was with were armed and dangerous: the officers were not investigating a report of a violent crime and had no information that any of the four men were armed; the officers did not see a bulge in Cutt's clothing or the clothing of the other men; and the officers did not know Cutts or the other men from prior encounters, let alone prior encounters involving weapons. See e.g., Roach, 172 N.J. at 27-29 (upholding weapons search where officers observed an unusual bulge in the groin area of defendant's pants); State v. Valentine, 134

N.J. 536, 547-49 (1994)(upholding weapons search where officer had personal knowledge that suspect carried weapons on previous occasions); Thomas, 110 N.J. at 680 ("in situations where the suspect is not thought to be involved in violent criminal conduct and the officers have no prior indication that the suspect is armed, more is required to justify a protective search").

Contrary to the judge's ruling, Wizbicki's testimony that the men were observed "blading their bodies," without more, did not provide the officers with an objectively reasonable basis to believe the men were armed and dangerous. Cf. State v. Nimmer, 975 N.W.2d 598, 600-605 (Wis. 2022)(finding reasonable suspicion for protective frisk where defendant was only person "at nearly the exact location" that ShotSpotter reported gunfire less than a minute earlier, and as police approached, defendant "began digging around his left side with his left hand" and "blading his body," which the officer defined as "moving his left side away from me where I could only see his right side" in an apparent effort to conceal something on his left side). Wizbicki did not explain why "blading" is "a sign" of potential dangerousness or demonstrate any correlation between "blading" and weapons possession. Moreover, Wizbicki, who did not witness the alleged blading, defined "blading" as "shift[ing] their bodies away from away from officers" when the patrol car approached. (1T 12-14 to 12-17) At best, Wizbicki's vague description of the men's alleged conduct established

nothing more than the men turned away from the police car as it approached, which they had every right to do.

Similarly, in State v. Pugh, 826 N.W. 418 (Wis. Ct. App. 2012), defendant Pugh exercised his right to walk away from police by "blading," i.e., "turning his body," "as he backed away from them." Id. at 424. Despite the officers' claims that "blading" is one of the "characteristics of armed individuals," id. at 421, the Wisconsin Court of Appeals found that Pugh's act of "blading" did not furnish the officers with reasonable suspicion to believe that Pugh was armed. As the Court reasoned, "But how does a person walk away from another (as Pugh had the right to do) without turning his or her body to some degree? Calling a movement that would accompany any walking away 'blading' adds nothing to the calculus except a false patina of objectivity." Ibid.

As the defendant in Pugh, Cutts and his friends had every right to turn their bodies away from police, particularly as young Black men, a demographic on whom

> the burden of aggressive and intrusive police action falls disproportionately[.] . . . [A]s a practical matter neither society nor our enforcement of the laws is yet color-blind. There is little doubt that uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement.
>
> [United States v. Brown, 925 F.3d 1150, 1156 (9th Cir. 2019)(internal quotation marks, alterations and citations omitted).]

Thus, the men's act of turning away when the police car approached cannot reasonably be interpreted as anything more than four Black men expressing their desire to avoid an unnecessary interaction with police. Therefore, the judge below erroneously relied on the alleged "blading" as a valid basis to believe the four men were armed and dangerous.

D. Conclusion: Encouraging Judges To Give Uncritical Deference To An Officer's Suspicions of Criminal Activity and Dangerousness Creates The Potential For Racially Discriminatory Stops and Frisks.

In finding that the officers had reasonable suspicion to stop and frisk Cutts and his friends, the judge gave uncritical deference to the officers' belief that the four men were armed and up to no good – based on the men's presence in a "high-crime area"; the officers' vague description of contact the men allegedly had with an unspecified number of unknown passersby; the fact that the men were dressed in "heavy" clothing on a cold night; and the men's alleged "blading." "Such uncritical deference provides the space into which seeps the damaging influence of racial bias." Commonwealth v. Sweeting-Bailey, 178 N.E.3d 356, 381 (Mass. 2021)(Budd, C.J., dissenting).

As this Court recognized in State v. Scott, 474 N.J. Super. 388 (App. Div. 2023), "The problem of implicit bias in the context of policing is both real and intolerable." Id. at 399. When judges are permitted to rely on subjective and unreliable indicators of criminal activity – buzz words like "high-crime area,"

"blading," and "furtive gestures," and vague descriptions of behavior that an officer, based on his "training and experience," interprets as "suspicious" – the risk that people of color will be disproportionately stopped is unavoidable. See Nyema, 249 N.J. at 533-34 ("given the wide range of behavior exhibited by many different people for varying reasons while in the presence of police[,] . . . whatever individuals may do – whether they do nothing, something, or anything in between – the behavior can be argued to be suspicious"); State v. Price-Williams, 973 N.W.2d 556, 582 (Iowa 2022) (recognizing that unconscious racial biases "'could provide a further source of unreliability in officers' rapid, intuitive impressions of whether an individual's movements are furtive and indicate criminality'") (quoting Floyd v. City of New York, 959 F. Supp. 2d 540, 580-81 (S.D.N.Y. 2013)).

Thus, when judges give uncritical deference to subjective and unreliable indicators of criminal activity, as the judge below did in this case, they

> [c]reat[e] greater space for officers to act on their ungrounded intuitions that people are dangerous [and up to no good, and] increase[] the risk that people of color will be subjected disproportionately to unjustified [stops and] patfrisks. If we have any hope of mitigating racial disparities in our criminal justice system, it is imperative that we pay close attention to the effect that our law of search and seizure has on people of color."
>
> [Sweeting-Bailey, 178 N.E.3d at 381 (Budd, C.J., dissenting).]

Therefore, this Court must reverse the trial judge's ruling and find that the stop and frisk of the men on Leonard Avenue was unconstitutional. To find otherwise would "invite[] officers to pat frisk first and invent explanations later, for it assures that as long as officers can articulate a reason – any reason – for which a person's behavior indicated that a weapon was on the scene, that reason will be accepted and the patfrisk condoned." Ibid.

In this case, the police articulated reasons for the stop and frisk of Cutts and his three friends, during which a gun was recovered. In contrast, the police did not articulate any reasons for the stop and frisk of Arce and Garcia-Vargas, during which nothing was recovered. In assessing the objective reasonableness of the officers' explanation for stopping and frisking Cutts and his friends, the Court should heavily weigh the officers' failure to offer any explanation for simultaneously stopping and frisking two other men, beyond the men's presence in a high-crime area. (Da 27)

CONCLUSION

For the reasons set forth above, the trial court's order denying defendant's motion to suppress evidence must be reversed.

Respectfully submitted,

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August 9, 2024

LETTER-BRIEF IN LIEU OF FORMAL BRIEF
ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent)
v.
Harvey Cutts (Defendant-Appellant)

Docket No. A-000729-23T2

Criminal Action: On Appeal from a judgement of conviction of the Superior Court of New Jersey, Law Division, Camden County.
Indictment No.: 23-02-00326-I

Sat Below: Hon. Yolanda C. Rodriguez, J.S.C

Honorable Judges:

Pursuant to R. 2:6-2(b) and R. 2:6-4(a) this letter-brief is submitted on behalf of the State of New Jersey.

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COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

The State respectfully relies on defendant's Statement of Procedural History. (Db1).

COUNTERSTATEMENT OF FACTS

This appeal emanates from the denial of defendant's motion to suppress a firearm found in defendant's waistband and CDS on his person. On July 25, 2023, a motion to suppress hearing was held before the Hon. Yolanda C. Rodriguez, J.S.C. where Detective Alexander Wizbicki of the Camden County Police Department was the sole witness. The court denied the motion. The following is a summary of the pertinent evidence and the court's decision.

Detective Wizbicki is a six-year veteran of the Camden County Police Department assigned to the Narcotics Gang Unit responsible for conducting surveillance operations in known open air drug markets in Camden City. (1T5-1 to 12). Before that assignment, he was a patrol officer with duties such as traffic stops and calls for service. (1T5-16 to 25). He has received numerous specialized trainings including patrol concepts and drug recognition. (1T6-7 to 18).

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[1]The State relies on defendant's Table of Citations (Dbii), with the following addition:

"Db" refers to defendant's appellate brief.
"Da" refers to defendant's appendix.

On the evening November 1, 2022, around 8:18 p.m., Detective Wizbicki was assigned to the Narcotics Gang Unit conducting surveillance around Leonard Street between Federal and Westfield. (1T6-19 to 8-2). Det. Wizbicki testified that this is a known open air drug market that distributes crack cocaine, power cocaine, and marijuana. (1T8-8 to 20). He was particularly aware of several recent arrests for drug distribution in that very area. (1T8-21 to 9-2). In addition to arrests he made himself in that area, he testified that the department's record management system indicated numerous other arrests by other officers in that area. (1T9-3 to 10). Finally, Det. Wizbicki testified that there were recent shootings in the area. (1T10-9 to 12).

While conducting their surveillance, officers observed four males on the north side of Leonard Street with heavy foot traffic leading to the males. (1T10-16 to 11-4). The males were wearing dark clothing and ski masks, and the area was poorly lit. (1T11-15 to 18). Officers observed pedestrians walk up to the males and then quickly "break contact." One of the four males would conceal himself between two cars. (1T11-3 to 20). Based on these observations, Det. Wizbicki testified that they would have been charged with loitering to commit a CDS offense. (1T18-4 to 7).

Det. Wizbicki radioed to patrolling officers in the area to conduct a pedestrian stop. (1T11-24 to 12-2). Upon seeing marked patrol vehicles, but before being stopped, the males immediately began to "blade" their bodies away from police

presence, which based on his training and experience was consistent with firearm possession. (1T12-6 to 17).

Based on these observations, officers detained defendant and the three other males and frisked them for weapons for officer safety. (1T15-18 to 16-4). The frisk revealed a Glock firearm on defendant's person. (1T16-22 to 23). A subsequent search incident to arrest revealed narcotics and cash.

Simultaneous to the stop and frisk, Det. Wizbicki approached the vehicles where the males had been concealing themselves during the suspected CDS activity and discovered a firearm in plain view on top of the driver-side front tire of a blue Hyundai. (1T15-4 to 7, 23-15 to 18). He made this observation from about seven to ten feet away while standing on the sidewalk. (1T15-11 to 17). Narcotics were also found on the driver-side rear tire. (1T16-9 to 10). Defendant was not charged with possession of these items.

The court found Detective Wizbicki's testimony to be credible. (1T53-16 to 54-7). Noting his years of experience, the court credited his particular familiarity the area where this event occurred as an open air drug market, having participated in arrests there, as well as his general knowledge through the department's Records Management System. (1T55-2 to 8). The court also noted the his testimony regarding recent shootings in that area and found it to be appropriately considered a high crime area. (1T64-6 to 11).

The court further concluded officer had reasonable articulable suspicion to conduct a stop. The court relied on Det. Wizbicki's observations of these four males in dark clothing and ski masks on a poorly lit high crime street, having brief contact with numerous pedestrians and then quickly breaking contact while attempting to conceal themselves between vehicles. (1T57-4 to 14). The court concluded "it is not reasonable to assume this is just people hanging out on a cold evening in November to greet pedestrians and others." (1T66-7 to 13).

The court further relied on Det. Wizbicki's testimony that upon noticing police presence, the males "bladed" their bodies which, based on training and experience, led officers to believe the males were armed and dangerous. (1T66-21 to 25). After all, the court reasoned, "[t]hey know that this is a high crime area, [with] recent shootings." (1T66-14 to 20). "It's not just a narcotics area but it's known for violence, it's poorly lit . . . . [and] you have four individuals now blading[.]" (1T66-21 to 23). The court opined that the officers not only have to protect their own safety, but the community's safety as well. (1T65-11 to 12). After all, "[t]his isn't a an isolated parking lot off a warehouse or anything like that. It is a residential area with row houses." (1T58-13 to 17). The court found this fact weighed "very significantly." (1T56-21 to 57-3).

This appeal follows.

LEGAL ARGUMENT

POINT I: THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE DEFENDANT'S DETENTION AND FRISK WAS LAWFUL UNDER THE TOTALITY OF THE CIRCUMSTANCES. (Da7; 1T52-23 to 69-6)

The State respectfully urges this Court to affirm the trial court's decision to deny defendant's motion to suppress because officers had mere articulable and reasonable suspicion to stop and then frisk defendant under the totality of the circumstances. Defendant alleges that the trial court improperly denied his motion to suppress evidence, arguing that the police observations here were nothing more than unsubstantiated hunches. However, the trial court properly found and the record reflects that law enforcement had reasonable, articulable facts that the defendant committing an offense and potentially armed and dangerous. In any event, the evidence would have been inevitably discovered after Det. Wizbicki discovered the gun and drugs on top of the vehicle tires. Accordingly, the State urges this Court to affirm.

A. Standard of review.

The "standard of review on a motion to suppress is deferential." State v. Nyema, 249 N.J. 509, 526 (2022). "[A]n appellate court reviewing 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. Ahmad, 246 N.J. 592, 609 (2021) (alteration in original) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). Reviewing courts will "defer[ ] to those findings in recognition of the trial court's 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.' " Nyema, 249 N.J. at 526 (quoting Elders, 192 N.J. at 244). Furthermore, higher courts review "[a] trial court's legal conclusions ... and its view of 'the consequences that flow from established facts,' ... de novo." Id. at 526-27 (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

The general rule as to the admission or exclusion of evidence is that "[c]onsiderable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion." State v. Feaster, 156 N.J. 1, 82 (1998), cert. denied, 532 U.S. 932 (2001). Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless "the trial court's ruling 'was so wide of the mark that a manifest denial of justice resulted.'" State v. Marrero, 148 N.J. 469, 484 (1997) (quoting State v. Kelly, 97 N.J. 178, 216 (1984)).

B. The requisite reasonable suspicion was established under the totality of the circumstances to briefly detain defendant.

A police officer may conduct an investigatory stop if, based on the totality of the circumstances, there is a reasonable and particularized suspicion to believe that

an individual has just engaged in, or is about to engage in, criminal activity. State v. Maryland, 167 N.J. 471, 487 (2001) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)). Using the totality of the circumstances test, our Supreme Court emphasized the factors to be considered, including a police officer's "common and specialized experience," and evidence concerning the area's reputation for crime. State v. Moore, 181 N.J. 40, 45-46 (2004).

Importantly, reasonable suspicion "'does not deal with hard certainties, but with probabilities ... [and] common-sense conclusions about human behavior.'" State v. Valentine, 134 N.J. 536, 543 (1994) (quoting United States v. Cortez, 449 U.S. 411, 418 101 (1981)). "Although a mere hunch does not create reasonable suspicion, the level of suspicion required is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." State v. Gamble, 218 N.J. 412, 428 (2014) (internal citations omitted). Accordingly, the New Jersey Supreme Court has repeatedly affirmed that "[t]he same circumstances which justify an investigatory stop may also present the officer with 'a specific and particularized reason to believe that the suspect is armed'" for purposes of an investigatory frisk. Gamble, 218 N.J. at 432; State v. Arthur, 149 N.J. 1, 7-8 (1997).

Importantly, an officer's experience and knowledge are also factors courts should consider in applying the totality of the circumstances test. State v. Pineiro,

181 N.J. 13, 22 (2004); State v. Davis, 104 N.J. 490, 504 (1986). In short, the evidence available to the officer should be "'seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" State v. Ramos, 282 N.J. Super. 19, 22 (App. Div. 1995) (quoting Cortez, 449 U.S. at 418). In particular, as the Supreme Court has observed, when a judge evaluates the totality of the circumstances, the judge must recognize the police officer's experience and training and consider how that experience and training bears upon the officer's determination. State v. Sheffield, 62 N.J. 441, 445, cert. denied, 414 U.S. 876 (1973).

In particular, as the New Jersey Supreme Court has reaffirmed, "the fact that a suspect's behavior may be consistent with innocent behavior does not control the analysis....'[S]imply because a defendant's actions might have some speculative innocent explanation does not mean that they cannot support articulable suspicions if a reasonable person would find the actions are consistent with guilt.'" State v. Mann, 203 N.J. 328, 339 (2010) (quoting Arthur, 149 N.J. at 11-12); see also State v. Nishina, 175 N.J. 502, 511 (2003) ("Facts that might seem innocent when viewed in isolation may sustain a finding of reasonable suspicion when considered in the aggregate...."); State v. Citarella, 154 N.J. 272, 280-81 (1998)(although conduct may have an innocent explanation, it may also support suspicion of criminal activity).

[T]he character and prevalence of crime in an area – although insufficient on its own to support particularized suspicion – can be one factor in determining whether reasonable suspicion existed." State v. Goldsmith, 251 N.J. 384, 405 (2022). However, "[t]he State must do more than simply invoke the buzz words "high crime area" in a conclusory manner to justify investigative stops." Id. at 404. Such specifics may include "a timeline or context for the drug sales [and officer] had witnessed" in an area, or how many "fugitives or a timeline during which those arrests occurred." Id. at 404-05.

Furthermore, while nervousness is not in itself sufficient to establish reasonable suspicion, "nervousness and furtive movements may be considered in conjunction with other factors to establish reasonable and articulable suspicion" to conduct a protective search. State v. Dunbar, 434 N.J. Super. 522, 527-28 (App. Div. 2014); see also Valentine, 134 N.J. at 553–54; State v. Todd, 355 N.J. Super. 132, 138 (App. Div. 2002). For that reason, while actions may appear to a layperson to constitute merely innocuous behavior, particularly in drug distribution schemes, a trial court should credit the articulated beliefs of an experienced officer. State v. Alvarez, 238 N.J. Super. 560, 565-66 (App. Div. 1990).

Here, there is sufficient credible evidence in the record to affirm the trial court's considerable discretion in finding reasonable suspicion to stop defendant. Those reasons are (1) defendant's conduct consistent with drug distribution in (2) a

high crime area (3) at nighttime in the cold on a poorly lit street, and (4) defendant's "blading" which the officers' training and experience signified gun possession. Based on all these factors together, in their totality and not in isolation, the officers lawfully conducted an investigative stop.

First, Detective Wizbicki framed his observation by describing the area as high crime. At the time, he had been in the Narcotics Gang Unit for over a year and spent time conducting investigations in that area. (1T5-4 to 8, 10-2 to 5). He knew this area to be an open air drug market based on several recent arrests for narcotics, both possession and distribution. (1T8-18 to 9-2). Personally, Det. Wizbicki had made numerous arrests in that area in the short time he belonged to this unit. (1T9-9 to 10). Indeed, this was a common location of surveillance operations for that very reason. (1T10-2 to 8). Det. Wizbicki also testified that there was been recent shootings in the area, a residential neighborhood. What is more, Det. Wizbicki further testified that in addition to his personal knowledge, the Department's Record Management System contained records of arrests in this area. Based on all this knowledge of the area and to protect the residential community trying to live peacefully there, this area was chosen for surveillance. (1T9-4 to 6).

This testimony is much more than "buzz words" or "conclusory" statements about the area. Det. Wizbicki knew this area, and in his short time as a Narcotics officer had personally conducted numerous arrests. Unlike the officer in Goldsmith

who had made five to ten arrests in that area during his 20-year career, Det. Wizbicki had made numerous arrests in just a year or two. While this factor alone certainly could never justify stopping individuals in this area, its character and prevalence for crime must be part of the totality-of-the-circumstances analysis.

Within the context of this high crime area, Det. Wizbicki's articulated observations, based on his training and experience, reasonably added to his suspicions of criminal activity. As the court noted, it was not reasonable to assume these individuals were just hanging out on a cold winter night on the street while meeting up with pedestrians and then quickly breaking contact, all while concealing themselves between two vehicles. (1T66-7 to 13). After all, suspicion "does not deal with hard certainties, but with probabilities ... [and] common-sense conclusions about human behavior." (citations omitted). Sure, one explanation could be that they were there merely to hangout and greeting one another, but "the fact that a suspect's behavior may be consistent with innocent behavior does not control the analysis....'[S]imply because a defendant's actions might have some speculative innocent explanation does not mean that they cannot support articulable suspicions if a reasonable person would find the actions are consistent with guilt.'" (citations omitted). This Court must consider this fact, as well, withing the framework of the officer's training and experience, and "weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'"

(citations omitted). Det. Wizbicki reasonably found these actions to be consistent with drug distribution.

But that is not all. In addition to these observations, officers observed that when their presence was detected, defendant "bladed" his body. Det. Wizbicki explained that when "someone blades their body is [sic] signs that they could potentially be . . . dangerous – they're trying to shift their body away from officers." (1T12-14 to 17). Again, while this could be innocent behavior, in the real life, high stakes world of policing in high crime, poorly lit areas at nighttime, it is a common sense conclusion that the individual could be armed and dangerous, and further evidence that they were involved in criminal activity.

Importantly, it was not just defendant. There were four males, adding to the dangerousness of the situation and the reasonableness of the suspicion that these males were engaged in illicit criminal activity and not just greeting people on the street.

Based on all these observations, the officers had articulable suspicion that defendant was engaged in criminal activity. Indeed, reasonable suspicion is "considerably less than proof of wrongdoing by a preponderance of the evidence" and "obviously less" than a well-grounded suspicion required for probable cause. Gamble, 218 N.J. at 428 (emphasis added). Thus, this suspicion does not have to be even well-grounded. It only needs to be more than a hunch. Det. Wizbicki's

observations, within the context of the high crime location, time, and poor lighting, and based on his training and experience as an officer conducting surveillance in this specific place over time, created the requisite suspicion to conduct a brief stop, even if it was considerably less than well-grounded suspicion. Therefore, this Court must affirm.

C. The Terry Frisk for weapons was lawful.

A "pat-down," commonly referred to as a "Terry frisk," is generally permitted only when an officer has "an objectively reasonable suspicion that a suspect is armed and dangerous." State v. Nishina, 175 N.J. 502, 515 (2003). Terry directs that courts measure the reasonableness of a pat-down incident to a lawful investigatory stop with an objective standard, judging the reasonableness of the pat-down within the context of the circumstances confronting the police officer. State v. Thomas, 110 N.J. 673, 679 (1988). The pat-down is reasonable only if "a reasonably prudent man in the circumstances would be warranted in his belief that his safety or that of others was in danger." State v. Valentine, 134 N.J. 536, 543 (1994) (quoting Terry, 392 U.S. at 27).

In making the determination, however, "the officer need not be absolutely certain that the individual is armed." Terry, 392 U.S. at 27. Even in situations in which an officer does not believe a suspect is engaged or about to become engaged in violent criminal activity, the right to frisk for weapons during a permissible

investigatory stop is frequently automatic where a police officer has a specific and objectively-credible reason to believe that the suspect is armed. See Adams v. Williams, 407 U.S. 143, 146–47 (1972) (upholding protective search based on informant's tip that suspect was carrying "a gun at his waist"). Indeed, there are many instances where the right to conduct a protective search of an individual flows directly from the same justification for the investigatory stop. See State v. Privott, 203 N.J. 16, 30 (2010); State v. Ascencio, 257 N.J. Super. 144, 147-149 (Law Div. 1992), aff'd 'o.b. 227 N.J. Super. 334 (App. Div. 1994), certif. den. 140 N.J. 278 (1995)

Here, the officers right to conduct a protective search emanated from their observation of defendant and the three other males "blading." Combined with their observations consistent with drug activity, the time of night and poor lighting, officers must be permitted to protect themselves and others under such circumstances by quickly and minimally frisking for weapons. Therefore, the State respectfully requests that this Court affirm the well-reasoned findings of the trial court and hold the seizure of the firearm was lawful.

D. Even if the stop and frisk was premature, the gun and drugs on defendant's person would have been inevitably discovered.

While it does not appear Det. Wizbicki discovered the gun and drugs on the car tires before defendant was stopped and frisked, it is certain this fact would have

only solidified the lawfulness of the stop and frisk. In that sense, the gun on defendant would have been inevitably discovered.

"[T]he inevitable discovery doctrine allows for the admission of evidence obtained through law enforcement's unconstitutional conduct if that evidence would have been discovered in the absence of that unlawful conduct." State v. Carmy, 239 N.J. 282, 301 (2019) (internal citations omitted). "Inevitable discovery tempers the 'social costs associated with the exclusionary rule' by placing 'police in the same position that they would have been in had no police misconduct occurred.'" Id. at 301-02 (quoting State v. Sugar, 100 N.J. 214, 237 (1985)).

Plainly, had defendant not been stopped and frisked before Det. Wizbicki discovered the gun and drugs in plain view on top of the car tires parked on a public street – indeed, the same vehicle defendant and his cohorts were seen hiding near -- they would have been stopped and frisked afterward. Under these circumstances, the social cost of the exclusionary rule would not be justified because the evidence would have been discovered even if the initial stop and frisk had not yet occurred. The gun and drugs on the tire was entirely consistent with the Det. Wizbicki's observations. Their discovery confirmed his reasonable suspicions, based on his training and experience, and would have cemented the right to stop and frisk defendant for weapons. Accordingly, even if the initial stop and frisk was premature,

the discovery of the gun and drugs on the car tire would have inevitably led to a lawful stop and frisk of defendant and discovery of his gun and drugs.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the trial court properly denied the defendant's motion to suppress evidence and urges this Court to affirm.

Respectfully submitted,

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LETTER REPLY ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0729-23T2
INDICTMENT NO. 23-02-00326

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Camden County
HARVEY CUTTS,	:	
		Sat Below:
Defendant-Appellant	:	Hon. Yolanda C. Rodriguez, J.S.C.

DEFENDANT IS CONFINED

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b) on behalf of Harvey Cutts.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Harvey Cutts relies on the procedural history and statement of facts from his opening brief.

LEGAL ARGUMENT

Cutts relies on the legal arguments in his previously filed brief and adds the following:

POINT I

THE STATE OFFERED NO COMPELLING REASON TO BELIEVE THAT CUTTS AND HIS FRIENDS WERE NOT STOPPED AND FRISKED FOR THE SAME UNCONSTITUTIONAL REASON THE OTHER TWO MEN WERE STOPPED AND FRISKED: "DUE TO THE AREA."

In arguing that there was reasonable suspicion to stop Cutts and his friends, the prosecutor simply reiterates the trial judge's findings – "it was not reasonable to assume these individuals were just hanging out on a cold winter night on the street" and Wizbicki observed "conduct consistent with drug distribution" (Sb 9, 11)[1] – without addressing any of the challenges to those findings that Cutts raised in his brief: (1) the BWC footage demonstrated that it was reasonable to assume that Cutts and his friends were "just hanging out"; and (2) Wizbicki's testimony about an unspecified number of unknown pedestrians

[1] "Sb" State's brief

approaching and one of the men "breaking away" and "concealing" himself between parked cars was too vague and conclusory to establish reasonable suspicion of narcotics activity.

As discussed at length in his opening brief, the BWC footage shows Cutts and his friends standing in front of the porch of a row house, with a grocery bag and a bottled beverage, eating chips. The prosecutor did not explain why it was "not reasonable" to assume the men were just socializing when the BWC footage shows the men doing just that. Nor did the prosecutor address the lack of specificity as to the conduct that Wizbicki said he witnessed before activating his BWC. Wizbicki testified that he saw pedestrians approach the men but he did not say how many. Nor did he say that any of the alleged pedestrians were know drug users. He testified that one of the men "would break away" from the group and walk with the pedestrians between two parked cars in order to "conceal themselves" but he did not say how many times this occurred or what he meant by "conceal." He never said he saw the individuals bend or crouch down, out of view; thus, the only reasonable inference to draw is that they simply walked between two parked cars as they were talking. Nor did he identify the man who broke away as the one who was eating corn chips; thus, the only reasonable inference to draw is that the man who "broke away" was not Cutts.

Wizbicki's testimony as to what he observed before activating his BWC

– which established, at best, that while Cutts was eating corn chips and standing with his friends, one of his friends walked with another person between two parked cars a couple of times – did not establish reasonable suspicion to believe any of the men, let alone Cutts, was involved in narcotics activity. And it certainly did not provide probable cause to arrest the men for loitering for the purpose of committing a drug offense, as Wizbicki also asserted. (Sb 2) "Hailing a cab or a friend, chatting on a public street, and simply strolling aimlessly are time-honored pastimes in our society and are clearly protected under [state] as well as federal law." Wyche v. State, 619 So.2d 231, 235 (Fla. 1993) (citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)). Indeed, none of the men were arrested for that loitering offense and the prosecutor does not argue that they could have been.

Notably, the Camden County Police Department's (CCPD) BWC policy requires officers to activate their BWC the moment they observe conduct that provides the basis for a stop or frisk. The Directive states: "The decision to electronically record an encounter is not discretionary. Officers shall activate their BWC without unnecessary delay upon being dispatched, and in the case of self-initiated events—prior to citizen engagement, and/or immediately upon observing circumstances supporting constitutional justification; when feasible. CCPD, Written Directive on Body Worn Cameras, "Standard Operating

Procedure" (May 28, 2021), §3.1 (first emphasis in original; second emphasis supplied). The Directive also states: "When a BWC is activated, officers shall state the time and shall provide narration where practical and appropriate in an effort to augment the value of the recording and to provide clarity for the viewer." Id. at §3.2. Again, in in this case, none of the BWC footage captured the conduct alleged to have been "consistent with narcotics distribution" or Wizbicki's narration of that alleged conduct.

The prosecutor argues that the "high crime" nature of Leonard Avenue must be considered because it provides "context" for Wizbicki's "articulated observations." (Sb 11) The prosecutor recognizes, however, that it would be constitutionally impermissible for police to stop an individual based solely on his presence in a so called "high crime" area: "While this factor alone certainly could never justify stopping individuals in this area, its character and prevalence for crime must be part of the totality-of-the-circumstances analysis." (Sb 10-11) (emphasis in original) Except, in this case, that is exactly what happened. As part of the same operation, two other men, Arce and Garcia-Vargas, were simultaneously stopped on Leonard Street, based on the area alone. The prosecutor does not address the fact that NGU detectives believed they had "reasonable suspicion that [Arce and Garcia-Vargas] were engaged in criminal activity due to the area and time of night." (Da 27) (emphasis added) This is not

something that can be ignored, because it underscores why officers give more than a vague and conclusory description of the conduct on which an investigatory stop is based: so the reviewing court can ensure that the officer's interpretation of the conduct he observed was reasonable and not based on implicit bias or stereotype.

Cutts reiterates the unfortunate truth that this Court recognized in State v. Scott, 474 N.J. Super. 388 (App. Div. 2023): "The problem of implicit bias in the context of policing is both real and intolerable." Id. at 399. In the context of investigative stops, researchers have found

> consistent evidence of disparities in police responses to Black, Latinx, and Black Latinx civilians, and significant differences by race in the use of specific indicia of reasonable suspicion that motivate stops. The higher error rates for specific indicia of suspicion suggest that rather than individualized bases of suspicion, officers may be activating stereotypes and archetypes to articulate suspicion and justify street seizures.
>
> [Jeffrey Fagan, No Runs, Few Hits, and Many Errors: Street Stops, Bias, and Proactive Policing, 68 UCLA L. Rev. 1584, 1663 (2022).]

Just as there was no articulable basis to believe Cutts and his friends were involved in narcotics activity, there was no articulable basis to believe Cutts and his friends were armed. Wizbicki's testimony the men "bladed" their bodies when police arrived, something Wizbicki did not actually witness himself, did not establish that the officers had a constitutionally sufficient basis for placing Cutts and his friends against a porch, handcuffing them and subjecting them to

a pat-down search for weapons, when: (1) the BWC footage, which captures the moment when police approached the men, does not show the men doing anything that would indicate they are armed; and (2) Arce and Garcia-Vargas were immediately placed against the porch, handcuffed and frisked, in precisely the same manner as Cutts and his friends were frisked, simply for being on Leonard Avenue.

In defending the stop and frisk, the prosecutor argues: "Importantly, it was not just defendant. There were four males, adding to the dangerousness of the situation and the reasonableness of the suspicion that these males were engaged in illicit criminal activity and not just greeting people on the street." (Sb 3) The fact that Cutts was with a group of three friends was not a basis to view his behavior more suspiciously. Racial disparities in police decisions to frisk and the disparate treatment that Black people experience when interacting with police are amplified for Black people, especially young Black males, when they are stopped in a group. Erin Cooley et al., Racial Biases in Officers' Decisions to Frisk are Amplified for Black People Stopped Among Groups Leading to Similar Biases in Searches, Arrests, and Use of Force, 11 Soc. Psychol. & Personality Sci. 761, 769 (2020).[2]

Effective policing does not explain the disproportionate escalation of

[2] Available at: https://www.researchgate.net/publication/337218956

stops of Black people when they are in a group, because data shows that officers are not more likely to find illegal contraband on Black people stopped in groups. Id. at 766–67. Researchers theorize that these disparities are attributable to widely held racial biases, such as stereotypes that associate Black people with threat and aggression. Ibid. Indeed, in this case, no contraband was found on Arce and Garcia-Vargas, who were stopped simply because they were on Leonard Avenue, or on any of the Cutts' friends.

The prosecutor also defends the police action as a service to the residents of the community: "Based on all this knowledge of the area and to protect the residential community trying to live peacefully there, this area was chosen for surveillance." (Sb 10) These six young men were members of the community. One of Cutts' friends can be heard telling the officers that his aunt lives "right there" and they were "just chillin." (Ex B 12:30 to 12:45, 13:40 to 14:20) Arce was detained in front of his home while his distraught mother tried to reason with police. (Ex C 7:30 to 13:15) There was no justification for the stop and frisk of Cutts' and his friends, just as there was no justification for stop and frisk of Arce and his friend.

The State's alternative argument – that the Cutts would have inevitably been frisked and the gun inevitably discovered (Sb 14) – was not raised by the prosecutor below and should be deemed waived. "'[W]ith few exceptions ...

appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'" State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)).

In the alternative, the matter should be remanded so the issue can be fully litigated, and because the judge has already expressed an opinion on the validity of the stop and frisk and the reasonableness of the police action, the Court should direct the matter should to be assigned to a different judge. See e.g., State v. Henderson, 397 N.J. Super. 398, 416 (App. Div.) (remanding for a new Wade hearing before a different judge in recognition of the "difficult and uncomfortable task for [judge] to now revisit and re-evaluate the evidence in light of the opinion he has already expressed about that evidence").

CONCLUSION

For the foregoing reasons, and the reasons stated in his opening brief, defendant respectfully requests that this Court reverse the trial court's order denying his motion to suppress.

Respectfully submitted,

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