SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2455-22

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.
MACARTHUR MASON,	:	
		Indictment No. 21-12-03234
Defendant-Appellant.	:	
		Sat Below:
	:	
		Hon. Kurt Kramer, J.S.C.,
	:	and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
Phone: 973-877-1200

RACHEL A. NECKES
Attorney Id. No. 381892021
Assistant Deputy Public Defender
Rachel.Neckes@opd.nj.gov

Of Counsel and
On the Brief

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

TABLE OF JUDGMENTS, RULINGS, & ORDERS BEING APPEALED

INDEX TO APPENDIX

TABLE OF AUTHORITIES

PAGE NOS.

Cases

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Cases (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Cases (Cont'd)

Statutes

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Rules

Rules of Evidence

Constitutional Provisions

Other Authorities

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Other Authorities (Cont'd)

PRELIMINARY STATEMENT

Law enforcement officers may not mislead a suspect about the seriousness of the offense that he faces to induce that suspect's waiver of his right to silence. Here, the trial court agreed that the interrogating detective affirmatively misled Mr. Mason to believe that he was waiving his rights to discuss a minor narcotics offense, even though the detective intended all along to discuss a much more serious first-degree armed robbery. Once the detective reinforced Mr. Mason's false impression, Mr. Mason identified himself in a still photo from an RT-TOIC security camera that was located a few blocks from where the robbery occurred. It was only then that the detective shifted his interrogation to the assault and robbery. The detective's deception gutted Mr. Mason's ability to provide a knowing and voluntary waiver. Because our courts do not tolerate such trickery in the waiver process, Mr. Mason's statement should have been suppressed.

Critically, Mr. Mason's statement is the only evidence tying him to the assault and robbery that occurred in the warehouse at 250 Mechanic Street. There is no forensic or physical evidence tying Mr. Mason to the scene, and the only surveillance footage facing 250 Mechanic—pulled from the church across the street—is far too blurry to identify the two figures that appear to enter the building. Indeed, no witness identified the individuals in the RT-

TOIC footage as the same individuals that appear in the church video. Consequently, without Mr. Mason's statement, there is no evidence against him.

But even if the court finds Mr. Mason's waiver voluntary and his statement admissible, it must find that the interrogation video as shown to the jury deprived Mr. Mason of a fair trial. After viewing the interrogation video during both the State's case-in-chief and deliberations, the jury twice heard the interrogating officer: (1) accuse Mr. Mason of lying fourteen times; (2) offer his opinion that the church video conclusively showed Mr. Mason entering 250 Mechanic; and (3) disclose that Mr. Mason had been arrested on unrelated charges. This impermissible lay opinion of Mr. Mason's credibility and guilt and inadmissible "other crimes" evidence created a danger that the jury would convict not based on admissible evidence, but based on the officer's belief that Mr. Mason was a liar and guilty and the perception that he had a propensity for criminal acts.

Finally, the prosecutor compounded the error in summation by denigrating the defense theory. Relying on an extended metaphor about magicians who employ "distractions" to create their "tricks" and "illusions," the prosecutor implicitly referred to defense counsel as a magician and warned the jury that "a lot of what the defense counsel wants you to believe are

distractions." The prosecutor concluded by noting that everything except central pieces of incriminating evidence were "a distraction," dismissing the entire defense argument and impugning defense counsel's motives.

Because these errors individually and cumulatively denied Mr. Mason his constitutional rights to due process and a fair trial, and invaded the jury's independent responsibility as factfinder, Mr. Mason's convictions must be reversed.

PROCEDURAL HISTORY

In November 2021, a Camden County grand jury issued Indictment No. 21-12-03234 against defendant-appellant MacArthur Mason and co-defendant Edward Williams, charging them with: first-degree armed robbery, contrary to N.J.S.A. 2C:15-1a(1) (Count One); second-degree conspiracy to commit robbery, contrary to N.J.S.A. 2C:5-2/N.J.S.A. 2C:15-1a(1) (Count Two); second-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(1) (Count Three); third-degree possession of a weapon for unlawful purpose, contrary to N.J.S.A. 2C:39-4d (Count Four); and fourth degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5d (Count Five). (Da 1-6)[1]

Prior to trial, Mr. Mason filed a motion to suppress statements he made to the police following his arrest. (1T 3-12 to 14) The Honorable Kurt Kramer,

---

[1] Da: Defendant-appellant's appendix
1T: June 21, 2022 (Miranda hearing)
2T: Aug. 2, 2022 (Miranda decision)
3T: Sept. 12, 2022 (scheduling conference)
4T: Sept. 19, 2022 (scheduling conference)
5T: Sept. 27, 2022 (scheduling conference)
6T: Oct. 17, 2022 (pretrial conference)
7T: Nov. 14, 2022 vol. 1 (trial)
8T: Nov. 14, 2022 vol. 2 (trial)
9T: Nov. 16, 2022 vol. 1 (trial)
10T: Nov. 16, 2022 vol. 2 (trial)
11T: Nov. 17, 2022 (trial)
12T: Nov. 18, 2022 (trial)
13T: Mar. 17, 2023 (sentencing)
PSR: Presentence report

J.S.C., presided over a testimonial hearing on June 21, 2022. (1T) The court denied the motion on the record on August 2, 2022. (2T 16-5 to 7; Da 8)

Trial in front of Judge Kramer and a jury commenced on November 14, 2022. (7T) During trial, the jury watched Mr. Mason's statement—once during the State's case-in-chief and once during deliberations. (7T 171-15 to 191-3; 11T 59-10 to 77-12) On November 18, the jury acquitted Mr. Mason of aggravated assault (Count Three) and found him guilty of the four remaining counts. (Da 14-17)

The court sentenced Mr. Mason on March 17, 2023 and imposed: a ten-year sentence for armed robbery, subject to the No Early Release Act (NERA); a concurrent five-year sentence for conspiracy, subject to NERA; and a concurrent sentence of eighteen months flat for unlawful possession of a weapon. (13T 18-2 to 20) The court merged Mr. Mason's conviction for possession of a weapon for unlawful purpose (Count Four) with his conspiracy conviction (Count Two). (13T 11-15 to 18, 18-14 to 16) Mr. Mason filed a timely notice of appeal on April 20, 2023. (Da 22)

STATEMENT OF FACTS

A. Suppression Hearing

Detective Kenneth Egan was assigned to investigate the assault and robbery of William Yocco by two individuals on August 22, 2021, at Yocco's business on 250 Mechanic Street in Camden. (1T 6-13 to 15, 7-14). Egan obtained surveillance footage from a church across the street and from a camera belonging to the Real Time Tactical Operations Intelligence Center (RT-TOIC). (1T 7-15 to 8-7) The church video—too blurry to show any individual's face—depicted two individuals appearing to enter and then exit 250 Mechanic Street, while the RT-TOIC video depicted two individuals walking on Sycamore Street. (1T 8-10 to 15, 49-4 to 50-9) Egan believed the two people in each video were the same two individuals based on their clothing. (1T 48-24 to 49-23)

Egan made two "attempt to identify" flyers from stills of the RT-TOIC video. (1T 9-23 to 10-12, 50-2 to 9) He then located a witness who identified one of the individuals as Edward Williams, whom the witness knew by the nickname Bojack. (1T 13-17 to 14-3) The witness, however, was unable to identify the second individual in the surveillance still. (1T 52-15 to 19) Bojack was charged that day and soon arrested. (1T 55-10 to 12, 60-17)

On September 30, Mr. Mason was arrested for an unrelated drug charge. (1T 17-13 to 14, 18-23 to 19-1) When the arresting officer notified Egan that Mr. Mason resembled the other individual from Egan's attempt to identify flyer, Egan went to the Detective Bureau to conduct an interview. (1T 17-15 to 16) Egan testified that, when he went to speak to Mr. Mason, he had no intention of speaking to him about any pending drug charges. (1T 20-3 to 5)

The State then played a video recording of the interrogation for the court. (1T 23-25) During the interrogation, before reading Mr. Mason his rights, Egan told Mr. Mason that he was "under arrest obviously today for whatever happened earlier." (1T 24-23 to 24) When Mr. Mason tried to confirm why he was under arrest, Egan again replied, "whatever you did today is what you're under arrest for, but I can't speak to you, because you're under arrest for that. . . . [s]o I have to read you your rights at this point." (1T 25-11 to 17) Egan then read Mr. Mason his Miranda rights, and Mr. Mason signed a standard waiver form. (1T 26-19 to 28-12)

After Mr. Mason waived his rights, Egan began asking Mr. Mason about the arrest that brought him into custody:

> DET. EGAN: So what's up Mr. Mason? What happened today? Buddy, what you just need money or something? Like what was going on? What --
>
> MR. MASON: Yeah. I bought some drugs. I get high, you know?

> DET. EGAN: All right.
>
> MR. MASON: I bought some dope, coke, and you know, got to go get high. I seen some people [I] knew and they talked to me and then they pulled up.
>
> DET. EGAN: The cops pulled up?
>
> MR. MASON: Uh-huh.
>
> DET. EGAN: You down on your luck lately or something?
>
> [(1T 28-13 to 25)]

Still without mentioning the robbery, Egan asked, "you know we have cameras all over the city, right? And we . . . check out the drug sets, and we check out all the high crime areas and stuff like that."[2] (1T 29-21 to 30-1; Da 7 at 4:44 to 4:52) Mr. Mason said he understood and then Egan, while showing Mr. Mason the still from the RT-TOIC video, instructed, "[t]ell me if you know who this person is." (1T 30-5 to 7) Mr. Mason confirmed that the person in the photo was him. (1T 30-8 to 11; Da 10) Egan next showed Mr. Mason the second still photo from the RT-TOIC video, and Mr. Mason identified the person in that photograph as Bojack. (1T 30-19 to 24; Da 11)

Immediately after, Egan pivoted away from discussing the drug charges, asking Mr. Mason to tell him about the last time he was with Bojack. (1T 31-4

[2] Although the transcript from the Miranda hearing reads, "You know, we have kind of an older city," it is clear from the video itself that Egan said "cameras all over the city." (1T 29-21 to 30-1; Da 7 at 4:44 to 4:52) This is also confirmed by the trial transcript. (7T 176-2 to 3)

to 7) Mr. Mason explained that he gave Bojack drugs, and that he followed Bojack so that Bojack would pay him. (1T 32-2 to 33-6) Mr. Mason elaborated that Bojack was in front of a church, that he had to run to catch up with him, and that he then ran to follow Bojack to Sycamore Street. (1T 33-3 to 10)

At that point, Egan stopped Mr. Mason and stated, "I don't want another lie coming out of a 52-year-old grown man's mouth. . . . I saw you go in the building. I saw you come out of the building. Do you want to explain to me what happened?" (1T 34-1 to 6) Egan told Mr. Mason that if he could not explain his presence in the building, he would think Mr. Mason was "just a cold-blooded individual, who just went into a business and beat the shit out of somebody." (1T 34-10 to 13) Mr. Mason continued to deny entering a building with Bojack, and Egan continued to accuse Mr. Mason of lying, citing that he had "everything on video." (1T 35-13) Although Mr. Mason stated at one point that he "came out of there" and that he was "the first one out," (1T 35-6 to 9) it is not clear exactly to what he is referring, and he otherwise adamantly denied being in the building.

After both parties presented their arguments, the court opined that Egan interviewed Mr. Mason "solely for purposes of the robbery charges." (1T 90-4 to 8) The court elaborated that Mr. Mason "would not have know[n] that he was the target of a robbery charge until [at] the earliest maybe page seven of

the transcript. . . . But up until that point, the questioning and the statements would have led [Mr. Mason] to believe it was issues involving the drugs." (1T 90-10 to 15) The court added that "no reasonable person would have known that they were being interviewed for purposes of the robbery," and that "the Defendant was mislead [sic]" into believing that the interview was about drugs. (1T 90-24 to 91-2) Finally, the court reaffirmed for a second time that Mr. Mason "was misled." (1T 92-7)

Nonetheless, the court denied Mr. Mason's motion. (2T 16-5 to 7; Da 8) The court stated in its findings that on September 30, arresting officers planned to release Mr. Mason on his own recognizance after a drug arrest but, prior to his release, transferred him for an interview with Egan. (2T 5-23 to 6-1) The court confirmed that Egan's interrogation was never about resolving the drug charges, and that "a reasonable person would not have known with any certainty [that] the interrogation was anything about the [robbery] charges until . . . the detective said, 'I saw you go in the building, I saw you come out of the building.'" (2T 6-7 to 10, 8-10 to 17) However, the court found that the totality of circumstances favored a voluntary waiver because: the bright line rule in State v. A.G.D., 718 N.J. 56 (2003), did not apply; the State did not intentionally defer filing charges to avoid disclosing them to Mr. Mason; and the remaining circumstances of the interrogation were not coercive. (2T 10-17

to 11-24, 12-9 to 12, 13-17 to 14-11) The Court thus ruled that the statement was admissible.

B. Trial

The State's proofs at trial were consistent with those from the Miranda hearing. Mr. Yocco testified that, on August 22, 2021, he was seated in a chair in the warehouse of his metal casings business at 250 Mechanic Street when two men entered the front door of his business, ran through the foyer and office space into his warehouse, and struck him with baseball bats. (9T 85-8 to 11, 87-24 to 88-1) Yocco said one of the two men, wearing a white and green track suit, reached into his front pant pocket and took his cash, which amounted to $1,800. (9T 91-16 to 19) Yocco acknowledged, however, that he initially told officers that he had "answer[ed] the door and got jumped." (9T 138-7 to 139-16) Yocco also testified that the second individual had "a dark clothing hoodie sweatshirt on" but admitted he had never given a description of the second suspect to the police. (9T 89-21 to 23, 115-10 to 13)

Law enforcement did not recover any stolen items nor any forensic or physical evidence tying Mr. Mason to the scene. Police recovered only a single bat that had no identifiable fingerprints. (7T 107-13 to 17, 108-9 to 19) Yocco testified that he could have identified the individuals involved, but officers never presented him with a photo array and no identification was made. (9T

38-21 to 39-4, 107-13 to 20) Additionally, the State conceded that two of Yocco's statements from the day of the incident—his initial 911 call and a statement made at the hospital that afternoon—were not preserved for the defense's review. (7T 8-10 to 12; 9T 171-13 to 19)

Egan was assigned to lead the investigation. Egan failed to review Yocco's hospital statement and his 911 call, but he did speak with Yocco the day after the crime. (7T 198-9 to 19, 199-12 to 14) Egan obtained surveillance footage from the neighborhood of 250 Mechanic, including a low-quality video from the church across the street and a video from a RT-TOIC camera on Third and Sycamore Street. (7T 147-12 to 14, 157-10 to 18, 159-23; Da 12-13) Both videos were played for the jury. (7T 150-24 to 25, 163-8 to 9) The church video appears to show two individuals enter and then exit 250 Mechanic Street. (Da 12) The RT-TOIC video simply shows two individuals walking along Sycamore Street. (Da 13) No witness testified that the two individuals in the RT-TOIC video were the same two individuals depicted in the church video.

From the RT-TOIC video, Egan obtained still photos of the two individuals who he believed entered and exited the building at 250 Mechanic. (7T 166-4 to 21) Egan learned from his investigation that one of those two individuals was Edward Williams, also known as Bojack. (8T 209-11 to 21)

Egan filed charges against Bojack on September 7, and Camden police arrested him on September 8. (8T 210-14 to 18) The person who identified Bojack was also shown pictures of Mr. Mason but did not make any identification. (8T 212-3 to 13)

The State played a redacted version of the September 30 interrogation of Mr. Mason for the jury. (7T 171-15) Before and after playing the video, the court warned the jury that "[n]othing Detective Egan says during the statement is evidence," and that the jury remains "sole decider of the facts, including the credibility of any statements made by Mr. Mason." (7T 168-6 to 9, 191-10 to 13) Egan confirmed that, while Mr. Mason was coherent during the interrogation, his eyes were closed and he was slumped over. (8T 215-4 to 11, 216-3)

Although the redacted recording excluded explicit references to Mr. Mason's pending drug charges, the jury still heard that Mr. Mason was "under arrest obviously today for whatever—whatever happened earlier" that day (7T 172-10 to 12); they heard Egan state conclusively that he saw Mr. Mason enter and exit 250 Mechanic on video (7T 180-4 to 5); they heard Egan accuse Mr. Mason of lying fourteen different times, (7T 180-1 to 2, 180-16 to 17, 180-20, 181-19, 181-21 to 23, 183-13 to 15, 183-22 to 24, 184-7, 184-17 to 19, 185-7 to 9, 186-4 to 5, 186-5 to 6, 190-6 to 7, 190-11 to 18); and they heard Egan tell Mr.

Mason that he would have to "explain to everybody" at his trial "why [he] lied." (7T 190-10 to 18)

Defense counsel argued in closing that law enforcement made several errors in its investigation, including that officers failed to preserve two of Yocco's statements from the day of the crime and that neither Egan nor the State asked Yocco to identify his alleged assailants. (9T 175-13 to 16, 176-13 to 17, 183-8 to 19, 184-8 to 11) Defense counsel further argued that evidence showed that things did not happen the way Yocco said that they did. (9T 184-16 to 22)

The prosecutor responded in closing by reflecting that, as a child he "loved magic tricks" and was impressed by "something disappearing" and "something reappearing." (9T 197-3 to 4, 197-9 to 10) But, he noted, as people get older, they realize that magic is all "tricks" and "illusions." (9T 197-10 to 13) And "as a grown man with kids of [his] own," the prosecutor said that he finds magic "fascinating [] because the best tricks are the ones that you can look at . . . and [say] I know they're going to try to trick me. . . . And they still get you. They still trick you. You still don't know how they did it." (9T 197-14 to 22) Finally, the prosecutor observed that magicians "use distraction" to trick their audiences. (9T 197-23) And, like magicians, the State told the jury that "a lot of what the defense wants you to believe are distractions." (9T 198-5 to 6)

The prosecutor then analyzed the evidence from trial and characterized many of defense counsel's arguments as "distractions." (9T 200-9 to 18; 10T 203-10 to 15, 209-17, 218-2 to 11, 220-10)

During deliberations, the jury requested to review Mr. Mason's interrogation video, the church video, and the RT-TOIC video, which were each played for the jury. (11T 58-10 to 13, 58-20, 59-10, 77-23)

LEGAL ARGUMENT

POINT I

MR. MASON'S WAIVER OF HIS MIRANDA RIGHTS WAS NOT KNOWING AND VOLUNTARY BECAUSE THE INTERROGATING DETECTIVE MISLED HIM TO BELIEVE THE INTERVIEW WAS ABOUT A MINOR, UNRELATED DRUG CHARGE. (2T 16-5 to 7; Da 8)

Mr. Mason could not intelligently and voluntarily waive his rights against self-incrimination because Detective Egan affirmatively misled him to believe that their conversation would concern a minor narcotics charge and not a much more serious allegation of first-degree armed robbery. Judge Kramer confirmed Egan's deceptive strategy twice on the record, stating that Egan "misled" Mr. Mason to believe he faced significantly less severe charges until after Mr. Mason waived his rights and incriminated himself. (1T 91-1 to 2, 92-7) Nonetheless, noting that no charges had yet been filed against Mr. Mason and observing that the remaining circumstances were not inherently coercive, the trial court rejected Mr. Mason's motion to suppress. (2T 10-17 to 11-24, 12-9 to 12, 13-17 to 14-11) But such deception in the waiver process is not tolerated by our courts. See State v. Diaz, 470 N.J. Super. 495, 525 (App. Div. 2022). Consequently, the order admitting Mr. Mason's statement and his

ensuing conviction must be reversed. U.S. Const. amends. V, XIV; N.J.S.A. 2A:84A-19; N.J.R.E. 503.

The right against self-incrimination is one of the most important protections guaranteed by our state law and federal constitution. State v. O'Neill, 193 N.J. 148, 167 (2007). As a result, incriminating statements made during custodial interrogation are inadmissible if the interrogating officers fail to properly read the suspect the Miranda rights. See Miranda v. Arizona, 384 U.S. 436, 469 (1966). New Jersey's privilege against self-incrimination offers even broader protection than the Fifth Amendment, such that our Supreme Court has built upon the original warnings to require that officers warn interrogees of any criminal complaints or warrants filed against them, as well as the nature and seriousness of those charges, before interrogation. State v. A.G.D., 178 N.J. 56 (2003); O'Neill, 193 N.J. at 176-77.

After receiving these warnings, a suspect may waive his rights, but the State must prove beyond a reasonable doubt that the waiver was knowing, intelligent, and voluntary. State v. L.H., 239 N.J. 22, 42 (2019); see Moran v. Burbine, 475 U.S. 412, 421 (1986) (requiring a suspect's waiver be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"). Courts evaluate the totality of circumstances to determine if the State has proven a valid waiver, including

the "characteristics of the defendant and the nature of the interrogation." State v. Galloway, 133 N.J. 631, 654 (1993). If circumstances "cast doubt on the knowing and intelligent quality" of the waiver, the issue must be resolved in the suspect's favor. State v. McCloskey, 90 N.J. 18, 28-30 (1982).

In addition, the State must prove beyond a reasonable doubt that a confession is voluntary and comports with due process. State v. O.D.A.-C., 250 N.J. 408, 421 (2022). A defendant's confession is involuntary if it was made because his "will was overborne." Ibid. (citing L.H., 239 N.J. at 42). To evaluate voluntariness under the due process clause, courts likewise scrutinize the totality of the circumstances, looking to the same factors as those relevant to the waiver analysis. Ibid. (citations omitted).

If police mislead a suspect to reasonably believe that a custodial interrogation will be about a far less serious charge, then the suspect's waiver cannot be voluntary. Diaz, 470 N.J. Super at 518-19; see State v. Nyhammer, 197 N.J. 383, 407 (2009) (stating that evidence a person was "threatened, tricked, or cajoled into a waiver of his privilege will render the waiver involuntary") (citations omitted). In Diaz, officers detained defendant, who they believed to be involved in a drug-induced death, outside of his apartment and warned him of his Miranda rights. 470 N.J. Super. at 505-06. When defendant asked about the basis of the arrest, a detective responded that they

were conducting a narcotics investigation. Id. at 506. Defendant was then transported to the stationhouse, where he waived his rights and provided incriminating information. Id. at 506-07. It was only then that the officers changed the "tenor and substance" of the interrogation to focus on the significantly more serious drug-induced-death charge. Id. at 507-08. Upon review, the court found defendant's statement involuntary, holding that detectives affirmatively misled him as to his status "by providing a deliberately vague and incomplete answer to his question as to why he was taken into custody." Id. at 518-19. The court further noted that any reasonable person in defendant's position would have been similarly misled. Id. at 519.

Similarly, here, Mr. Mason was misled as to his status when Egan "reinforce[d] a false impression as to the seriousness of the sentence" that Mr. Mason faced. Id. at 518-19. Mr. Mason asked Egan before he waived his rights why he had been arrested. (1T 25-11) Like the officer in Diaz, Egan told Mr. Mason that he was under arrest for the drug offense from that day, intentionally misleading Mr. Mason to believe he was in custody only for a minor narcotics charge to induce his waiver. (1T 25-12 to 14) In fact, the trial court found that the only reason the police kept Mr. Mason in custody at the time of his interview was solely so that Egan could interrogate him about the armed robbery; the officers who arrested Mr. Mason for the minor narcotics

charge had planned to release him on his own recognizance before Egan intervened. (2T 5-23 to 6-1) And, similarly to Diaz, Egan only shifted the conversation to the armed robbery after Mr. Mason had waived his rights and identified himself and Bojack in the still photographs from the RT-TOIC video. (1T 30-5 to 22) The trickery in this interrogation was so obvious that the court affirmatively stated twice on the record that Egan misled Mr. Mason into believing that he was waiving his rights to discuss a more minor charge. (1T 91-1 to 2, 92-7) Additionally, the court confirmed that no reasonable person in Mr. Mason's position would have known that he was the target of a robbery investigation. (1T 90-8 to 25)

Because Mr. Mason was misled about his status at the beginning of the interrogation, his waiver was involuntary. See Diaz, 470 N.J. Super. at 525 ("Affirmatively misleading an interrogee about the seriousness of the offense for which he or she was taken into custody strikes at the heart of the waiver decision."). As the Appellate Division held in Diaz, officer statements that are "reasonably likely to convey to defendant that he was facing a significantly less serious sentence than he actually faced," even if unintended, undermine an otherwise knowing and voluntary waiver. Id. at 518-19, 527. Moreover, Egan's testimony that he never planned to question Mr. Mason about his pending drug charges only reinforces that he purposefully subdued Mr. Mason into believing

that the interrogation was about the narcotics charge to elicit his waiver and self-identification. (1T 20-3 to 7) Deception utilized to induce an individual's waiver of rights—whether it is intentional or not—is not tolerated by our courts and requires reversal. See also O.D.A.-C., 250 N.J. at 422 (condemning interrogator statements that "mislead suspects about the consequences of speaking").

Importantly, the proper analysis of Mr. Mason's waiver relies on neither A.G.D. nor Sims, as this is not a case in which officers merely withheld information from an interrogee but a case where an officer actively misled someone. In State v. Sims, for example, the Court ultimately found a confession voluntary under the totality of circumstances where officers refused to "get into the details" of a defendant's arrest, but where there was also no allegation that officers misled defendant to believe that his interrogation had to do with some lesser crime.[3] 250 N.J. 189, 199, 217 (2022). As the Appellate Division explained in Diaz, "[i]t is one thing for police to withhold information. It is another thing entirely for them to provide an explanation that creates or reinforces a false impression as to the seriousness of the sentence

[3] The Sims Court also declined to extend the bright-line rule in A.G.D., which requires officers to warn interrogees of the nature and seriousness of any charges or arrests warrants that have been formally filed against them. 250 N.J. at 214. Like Diaz, Mr. Mason's argument does not rely on an extension of the bright-line rule from A.G.D. See Diaz, 470 N.J. Super. at 518.

that defendant is facing." 470 N.J. Super. at 519. Because here, as the trial court observed, the officer reinforced Mr. Mason's false impression that he remained in custody because of his minor narcotics offense, Mr. Mason's waiver cannot be voluntary, and his statement should have been suppressed, regardless of our Supreme Court's ruling in Sims.

Moreover, although the trial court found otherwise, additional factors compound with Egan's misrepresentations to further compel finding an involuntary waiver and statement. For example, the trial court failed to consider that Mr. Mason told Egan at the beginning of the interrogation that he had gotten high on "dope" and "coke" that day. (1T 28-13 to 21) Even if Mr. Mason was not so intoxicated such that he was incapable of communicating, State v. Warmbrun, 277 N.J. Super. 51, 64 (App. Div. 1994), the impact of drugs on his mental state is still one of several circumstances weighing in favor of finding Mr. Mason's waiver involuntary.

Additionally, Egan used particularly coercive tactics to compel Mr. Mason to further incriminate himself, including stating that Egan would think Mr. Mason to be "just a cold-blooded individual who just went into a business and beat the shit of somebody" if he failed to satisfactorily explain his presence in 250 Mechanic. (7T 180-10 to 13) This interrogation tactic comes

straight from step seven[4] of the "Reid technique"—an interrogation method that many scholars argue is so coercive that it may elicit false confessions. See, e.g., Timothy E. Moore & C. Lindsay Fitzsimmons, Justice Imperiled: False Confessions and the Reid Technique, 57 Crim. L. Q. 509 (2011); Kiera Janzen, Coerced Fate: How Negotiation Models Lead to False Confessions, 109 J. Crim. L. & Criminology 71, 90-91 (2019) ("[T]he Reid Technique may lead to coerced and false confessions."); Gisli H. Gudjonsson, The Psychology of Interrogations and Confessions: A Handbook 36-37 (2003) (describing the Reid technique as "inherently coercive" and stating that there is "ample evidence" it can lead to false confessions). Under the totality of circumstances, Mr. Mason's statements must be suppressed.

Finally, the failure to suppress this statement was not harmless. As our Supreme Court has noted, "it is rare that an unconstitutionally secured confession is deemed harmless beyond a reasonable doubt . . . [because] 'inculpatory remarks by a defendant have a tendency to resolve jurors' doubts about a defendant's guilt to his detriment.'" State v. Carrion, 249 N.J. 253, 284 (2021) (citations omitted); see McCloskey, 90 N.J. at 31 (holding that courts

[4] In the seventh step of the "Reid technique," officers are encouraged to present an "alternative" in which the interrogee is given two incriminating choices concerning some aspect of the crime, one which is more socially unacceptable than the other. See Joseph P. Buckley, The Reid Technique of Interviewing and Interrogation 22-23 (2014).

should apply the "harmless error doctrine sparingly" in cases where "the State has violated defendant's privilege against self-incrimination"); see also State v. Tillery, 238 N.J. 293, 334 n.3 (2019) (Albin, J., dissenting) (collecting cases rejecting harmless error claims).

Here, the only piece of evidence tying Mr. Mason to this crime is an identification he made of himself in the RT-TOIC video during this interrogation. Law enforcement recovered no forensic or physical evidence tying Mr. Mason to the scene, neither Yocco nor Bojack identified Mr. Mason as a person involved, and Egan had made no progress in identifying any second individual until Mr. Mason identified himself in his statement. Without the interrogation, there is no case against Mr. Mason. Because the admission of his confession was so harmful, and because even the trial court agreed that Egan misled Mr. Mason into believing the interrogation was about a minor drug charge, Mr. Mason's statement should have been suppressed. The order denying Mr. Mason's motion and his conviction must therefore be reversed.

POINT II

MR. MASON WAS DEPRIVED OF A FAIR TRIAL WHEN THE JURY HEARD DETECTIVE EGAN ACCUSE MR. MASON OF LYING FOURTEEN TIMES, EXPRESS HIS LAY OPINION ON THE VIDEO FOOTAGE, AND AFFIRM THAT MR. MASON HAD BEEN ARRESTED ON UNRELATED CHARGES. (Not raised below)

Even if the court finds that Mr. Mason's waiver and subsequent statements were knowing and voluntary, reversal is still required because the interrogation video, twice played for the jury, included two types of inadmissible evidence that should have been redacted. First, the video featured Egan's extensive commentary on Mr. Mason's veracity and guilt, including at least fourteen accusations of dishonesty, thereby usurping the jury's role as fact finder. Second, the video included Egan's reference to Mr. Mason's unrelated arrest which, without any analysis or limiting instruction from the court, created the impermissible risk that the jury believed Mr. Mason had a propensity to commit crimes. The erroneous admission of these statements was clearly capable of causing an unjust result and requires reversal. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10; R. 2:10-2.

A. The interrogation video included Detective Egan's impermissible opinion evidence regarding Mr. Mason's credibility and guilt.

At trial, the State played a redacted recording of Egan's interrogation of Mr. Mason for the jury, and the jury requested to view the video again during

its deliberations. On both occasions, the jury heard Egan both accuse Mr. Mason of lying no fewer than fourteen times and assert his opinion that surveillance footage showed Mr. Mason step inside of 250 Mechanic. Because lay witnesses are prohibited from opining on a defendant's credibility and "invad[ing] the fact-finding province of the jury," Mr. Mason's conviction must be reversed. State v. McLean, 205 N.J. 438, 443 (2011).

Although lay witnesses may provide testimony in the form of "opinions or inference" under New Jersey Rule of Evidence 701, lay witnesses may not testify "on a matter 'not within [the witness's] direct ken . . . and as to which the jury is as competent as he to form a conclusion." Id. at 459 (citations omitted); State v. C.W.H., 465 N.J. Super 574, 593 (App. Div. 2021). Assessing credibility is one such issue that falls "peculiarly within the jury's ken," and for which jurors require no expert assistance. State v. J.Q., 252 N.J. Super. 11, 39 (App. Div. 1991). Consequently, witnesses are prohibited from opining on the credibility of other witnesses. State v. R.K., 220 N.J. 444, 458 (2015); see State v. Frisby, 174 N.J. 583, 594 (2002) ("[T]he mere assessment of another witness's credibility is prohibited.").

Specifically, "a witness should never 'offer an opinion that a defendant's statement is a lie.'" C.W.H., 465 N.J. Super. at 593 (citing State v. Tung, 460 N.J. Super. 75, 102 (App. Div. 2019)). A police officer's opinion concerning a

defendant's veracity is especially damaging because "a jury may be inclined to accord special respect to such a witness." Ibid.; see also Tung, 460 N.J. Super. at 103-04.

For example, in C.W.H., the jury watched an interrogation video containing a detective's numerous accusations that defendant was being dishonest. 465 N.J. Super. at 590. The same officer also testified at trial, opining that defendant's behavior during the interrogation represented a "textbook interview of someone being deceptive." Id. at 592. Because the officer's testimony "clearly conveyed the impression to the jury that defendant was being deceptive," the court held that the jury's ability to assess defendant's credibility was impermissibly tainted. Id. at 595. Similarly, in Tung, an interrogation video showed officers "expressly stat[ing that] they knew defendant was lying," and accompanying in-court testimony included an officer's "personal belief that defendant was a liar." 460 N.J. Super. at 102-03. The court found the opinion evidence inadmissible, explaining that the officer's testimony on defendant's veracity and guilt undermined the jury's ability to make its own credibility determination. Ibid. Further, the court held that the trial court's instruction warning jurors to "disregard the officers' 'comments' during defendant's interrogation[] was inadequate to address the

multiplicity of times during the playback" when the officers opined that defendant was lying. Id. at 102-03.

Here, Egan's repeated accusations that Mr. Mason was lying likewise gutted the jury's ability to independently evaluate Mr. Mason's credibility. When Mr. Mason described his last interaction with Bojack, Egan responded, "I don't want another lie coming out of a 52-year-old grown man's mouth." (7T 180-1 to 2) From there, citing the surveillance footage of 250 Mechanic, Egan proceeded to accuse Mr. Mason of lying or dishonesty another thirteen times:

- "So, explain it to me, Mr. Mason. Because you already came at me with one lie." (7T 180-16 to 17)
- "I'm not going to listen to lies." (7T 180-20)
- "You're lying about things. . ." (7T 181-19)
- "You're lying about things that could be explained. And you're going to go to prison." (7T 181-21 to 23)
- "I don't want you to swear on everything you love, because you're lying." (7T 183-13 to 15)
- "Then why did you come up with two different stories before telling me the truth? Why did you lie to me twice?" (7T 183-22 to 24)
- "That's a lie." (7T 184-7)
- "See here's the thing. The problem is when this goes to court and they see that you're lying . . ." (7T 184-17 to 19)

- "[Y]ou're saying that you didn't enter the building [which] is false." (7T 185-7 to 9)
- "Well you lied to me twice already." (7T 186-4 to 5)
- "Mr. Mason, -- you're still lying to me now." (7T 186-5 to 6)
- "I'm not going to listen to you because I don't want to hear lies." (7T 190-6 to 7)
- "So if you want to tell me the truth -- so when this goes to court and it looks like you're sorry, and it looks like that you actually didn't do this, then I'll listen to you. If you don't and you want stick to this story then I'll just hit play while we're in court and then you can explain to everybody why you lied." (7T 190-11 to 18)

And, adding further commentary on Mr. Mason's guilt, Egan surmised that Mr. Mason was "going to go to prison for a very long time," and that if Mr. Mason did not explain why he was in the building, Egan would have to believe that Mr. Mason was "a cold-blooded individual who just went into a business and beat the shit out of somebody." (7T 180-11 to 13, 182-1 to 2) Just like the detectives in C.W.H. and Tung, Egan's extensive commentary on Mr. Mason's veracity and character impermissibly invaded the jury's ken.

The introduction of these opinions through a recorded interview rather than live testimony does not alter the analysis. Egan's lay opinions would not have been permitted live at trial, as "[t]he State may not attack one witness's credibility through another witness's assessment of that credibility." R.K., 220 N.J. at 458. Permitting the admission of portions of an interrogation in which

detectives opine on credibility and guilt in a manner not permitted at trial would place directly before the jury the exact type of evidence the court otherwise prohibits. Statements that are inadmissible if made by a detective at trial should not become admissible simply because they were made by the same detective during an interrogation. See also Tung, 460 N.J. Super at 102 (finding that an officer's commentary on defendant's credibility, some of which was introduced through an interrogation video, was improper).

In fact, several other states prohibit such prejudicial testimony, including when it is admitted through a recorded interrogation. The Kansas Supreme Court, for example, has held that portions of an interrogation in which an officer told the defendant that he was "a liar" and was "bullshitting" should not have been admitted because "[a] jury is clearly prohibited from hearing such statements from the witness stand . . . and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics." State v. Elnicki, 105 P.3d 1222, 1229 (Kan. 2005). Similarly, the Wyoming Supreme Court has held that a detective's comments in a recorded interview that "express opinions about the accused's mendacity and guilt and about the alleged victim's truthfulness and credibility" should not have been admitted because they improperly "invade[] the exclusive province of the jury to determine the credibility of the witnesses."

Sweet v. State, 234 P.3d 1193, 1204 (Wyo. 2010); see also Commonwealth v. Kitchen, 730 A.2d 513, 522 (Pa. Super. Ct. 1999) (holding that officers' "accusations of lying and untruthfulness must be redacted from the [interrogation] videotapes prior to their submission to a jury").

Additionally, like Egan's commentary on Mr. Mason's credibility, portions of the interrogation in which Egan insisted that he saw Mr. Mason enter and exit 250 Mechanic on video should not have been played for the jury. See McLean, 205 N.J. at 462 (stating that officer testimony is "not a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself or an opportunity to express a view on guilt or innocence"). (7T 180-4 to 5, 182-20 to 21) Egan did not witness these acts firsthand and had no prior familiarity with Mr. Mason; thus, he would not have been permitted at trial to identify either of the figures in the church video as Mr. Mason. See State v. Singh, 245 N.J. 1, 17 (2021). Indeed, determining whether Mr. Mason can be seen in the church video was the exclusive responsibility of the jury. And, as noted above, the fact that Egan's assertion that the video depicted Mr. Mason was introduced through the interrogation video rather than direct testimony at trial does not change the analysis.

Egan's lay opinion commentary on Mr. Mason's veracity and guilt should not be allowed solely because it was offered through an interrogation

video instead of through live testimony. Accordingly, the trial court erred by allowing the jury to hear Egan characterize Mr. Mason as a liar fourteen times in just over thirteen minutes and proclaim that he saw Mr. Mason enter 250 Mechanic on video, usurping the jury's role as fact finder and assessor of credibility.

B. The interrogation video included Detective Egan's reference to Mr. Mason's unrelated arrest, constituting impermissible 404(b) evidence.

The interrogation video also included Detective Egan's inadmissible remarks on Mr. Mason's custodial status, revealing to the jury that Mr. Mason was under arrest for an unrelated charge at the time of the interrogation. Not only was this evidence of a prior bad act entirely irrelevant, but also no instruction warned the jury against relying on the information to conclude that Mr. Mason had a propensity for committing crimes. The trial court's failure to analyze the admissibility of Mr. Mason's prior arrest or to provide an accompanying limiting instruction violated Mr. Mason's rights to due process and a fair trial, requiring reversal. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, and 10.

To prevent a jury from convicting a defendant due to its perception that he is "a 'bad' person in general" rather than because of the evidence presented at trial, N.J.R.E. 404(b) restricts the admission of evidence of a defendant's

other crimes or past wrongs. State v. Cofield, 127 N.J. 328, 336 (1992). Evidence of a prior wrong "'has a unique tendency' to prejudice a jury," and thus "must be admitted with caution." State v. Willis, 225 N.J. 85, 97 (2016) (citations omitted). Prior-bad-act evidence has the distinctive effect of "suggesting to a jury that a defendant has a propensity to commit crimes, and, therefore, that it is more probable that he committed the crime for which he is on trial." Ibid. (internal quotation marks omitted).

To ensure that such evidence will be used only for appropriate, limited purposes and not to demonstrate a defendant's propensity to commit crime, Cofield set out a four-pronged test for admissibility under N.J.R.E. 404(b):

> (1) the evidence of the other crime must be relevant to a material issue in dispute;
>
> (2) it must be similar in kind and reasonably close in time to the offense charged;
>
> (3) the evidence must be clear and convincing; and,
>
> (4) the evidence's probative value must not be outweighed by its apparent prejudice.

127 N.J. at 338. As the Cofield Court emphasized, admitting evidence of other bad acts is the exception, not the rule, making N.J.R.E. 404(b) a rule of exclusion. Id. at 337; see Willis, 225 N.J. at 100. If a trial court fails to analyze other-crime evidence under the test set out in Cofield, a reviewing court must

conduct a plenary review of the admissibility of the prior bad act that was allowed into evidence. State v. Reddish, 181 N.J. 553, 609 (2004).

Under the first prong of Cofield, the prior wrong must be relevant. Evidence is relevant if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Our Supreme Court has noted that the "primary focus in determining the relevance of evidence is whether there is a 'logical connection between the proffered evidence and a fact in issue.'" Willis, 225 N.J. at 98 (quoting State v. Covell, 157 N.J. 554, 565 (1999)). As stated above, even relevant evidence of other crimes is excluded if its probative value is outweighed by its prejudicial value.

In Reddish, the trial court allowed the jury to learn that defendant confessed to the crime for which he was on trial while in police custody for an unrelated charge. 181 N.J. at 606-07. Applying Cofield for the first time, our Supreme Court reasoned that the custodial nature of the confession had "little relevance," and that admission of this evidence carried a significant risk that the jury would conclude that defendant had a propensity to commit bad acts. Id. at 610. Consequently, the Court held that the trial court erred by allowing the jury to learn that defendant made incriminating statements while under arrest for an unrelated offense. Id. at 610-12.

Similarly, evidence that Mr. Mason gave his confession while in custody for an unrelated arrest was irrelevant to any issue before the jury. The jury learned of the custodial nature of Mr. Mason's interrogation while watching the interrogation video, during which Egan stated, "[y]ou're under arrest obviously today for whatever . . . happened earlier." (7T 172-10 to 12) The unrelated arrest was confirmed again when Mr. Mason tried to clarify the basis of his arrest and Egan responded, "whatever you did today is what you're under arrest for." (7T 172-24 to 25) Because the jury was informed that the alleged robbery occurred on August 22 and that Mr. Mason was arrested and interrogated on September 30, it was obvious to the jury that Egan's reference during the interrogation to "whatever [Mr. Mason] did today" was unrelated to the robbery. (7T 55-10 to 11, 175-24 to 25)

It is impossible to conceive of any non-propensity purpose for the jury to learn of Mr. Mason's custodial status. See Reddish, 181 N.J. at 610. There is simply no "logical connection" between Mr. Mason's arrest and any fact in issue. Willis, 225 N.J. at 98. And, had there been even some relevance for the arrest, the significant risk that the jury would assume Mr. Mason was guilty because of his prior record far outweighed any probative value that one could conjure. Reddish, 181 N.J. at 610.

Moreover, should the court find that Mr. Mason's custodial status had some relevance or probative value, the trial court's failure to explain the proper use of this evidence to the jury would still constitute reversible error. Our Supreme Court has held that a clear instruction on the appropriate use of other-bad-act evidence is necessary in every case, even where it is not requested by defense counsel. See State v. Clausell, 121 N.J. 298, 323 (1990); State v. Oliver, 133 N.J. 141, 157-59 (1993). The instruction must "explicitly caution the [jury] against inferring from a single instance of bad conduct"—i.e., a prior arrest on unrelated charges—"a propensity on behalf of defendant to commit crimes." Reddish, 181 N.J. at 611. The fact that the jury received no guidance for interpreting the other-bad-act evidence presented at Mr. Mason's trial through the interrogation video further compounds the error.

With no relevance and no limiting instruction, admission of evidence of Mr. Mason's custodial status was clearly capable of suggesting to the jury that Mr. Mason had a propensity to commit crimes and, thus, likely committed this crime. Therefore, as will be discussed further below, the failure to properly redact Mr. Mason's interrogation video constituted reversible error.

C. The erroneous admission of Detective Egan's lay opinion and evidence of Mr. Mason's prior arrest was plain error.

The erroneous admission of the minimally redacted interrogation video was highly prejudicial and clearly capable of causing an unjust result. R. 2:10-

2. The State's entire case against Mr. Mason relied on his self-identification in the RT-TOIC video and his statement admitting that he was with Bojack that day. Mr. Mason's statement was admitted alongside Egan's numerous accusations of dishonesty, opinions as to what the surveillance footage shows, and acknowledgments that Mr. Mason had been arrested on unrelated charges, sullying Mr. Mason's credibility with the jury.

With no DNA, fingerprint, or other identification evidence tying Mr. Mason to the scene, the credibility of Mr. Mason's vehement denials was especially critical. The church video—the only recording of 250 Mechanic's front door—is far too blurry to identify who is going in and out of the building, and whether they are going far past the door frame and foyer, and into the warehouse. While Mr. Mason identified himself in the RT-TOIC video, it is not at all clear that the person he identified himself to be in that video is present in the church video. And, although Mr. Mason acknowledged once during the interrogation that he "came out of there," (7T 181-3) Mr. Mason's descriptions throughout the interrogation of where he was and what he did on that day are confused and difficult to follow.

This case therefore came down to Mr. Mason's contention that he was not in the building, against the State's contention that Mr. Mason was one of the two individuals whom Yocco said assaulted him with bats and robbed him.

In this credibility battle, the minimally redacted interrogation video in which Egan called Mr. Mason a liar, provided his own opinion on what the church video showed, and revealed Mr. Mason's unrelated arrest impermissibly tipped the scales, usurping the jury's ability to form its own conclusion as to Mr. Mason's veracity and guilt.

Moreover, the kinds of evidence introduced through the interrogation video are those largely considered to be uniquely prejudicial. First, Egan's lay opinions on Mr. Mason's veracity and guilt were especially damaging because of his role as a lead investigator and interrogator—individuals to whom juries ascribe "almost determinative significance." Frisby, 174 N.J. at 596 (quoting Neno v. Clinton, 167 N.J. 573, 586-87 (2001)); C.W.H., 465 N.J. Super. at 593. The error remains highly prejudicial even if independent video footage substantiated Egan's accusations of dishonesty and had clearly showed Mr. Mason entering and exiting 250 Mechanic, as his lay opinion commentary would still have impermissibly biased the jury's deliberations. See Tung, 460 N.J. Super. at 103-04 (finding cumulative error even though independent video footage verified the officer's statements that defendant was lying about where he was on the evening of the crime).

Second, allowing the jury to learn of Mr. Mason's custodial status without any curative or limiting instruction is the kind of other-crime evidence

courts agree "has a unique tendency to turn a jury against the defendant," allowing them to conclude that a defendant committed a crime not because of the evidence, but because of a propensity to commit bad acts. State v. Stevens, 115 N.J. 289, 302 (1989); see State v. G.S., 145 N.J. 460, 468 (1996) (discussing the "distinct risk" that other crime evidence will "distract a jury from an independent consideration of the evidence").

Because of the particularly harmful types of evidence introduced through the interrogation recording, and the lack of any physical evidence or eyewitness testimony tying Mr. Mason to Yocco's injuries, the error was clearly capable of producing an unjust result, and Mr. Mason's convictions must be reversed.

POINT III

THE PROSECUTOR'S STATEMENTS DURING SUMMATION, IN WHICH HE USED AN EXTENDED METAPHOR ABOUT MAGIC TO CHARACTERIZE DEFENSE COUNSEL'S ARGUMENTS AS A "DISTRACTION" AKIN TO A MAGIC TRICK, DEPRIVED MR. MASON OF A FAIR TRIAL. (Not raised below)

In summation, the prosecutor denigrated defense counsel's argument as mere "distractions," comparing them to distractions that magicians employ in their "tricks" and "illusions." (9T 197-12, 197-23 to 198-6) Implicitly referring to defense counsel as one such magician, the prosecutor told the jury that "a lot of what the defense wants you to believe are distractions." (9T 198-5 to 6) He maintained this theme throughout his argument, concluding that everything other than the central pieces of incriminating evidence were just "a distraction." (10T 220-6 to 10) The prosecutor's dismissal of defense counsel's case and denigration of his motives deprived Mr. Mason of a fair trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9 and 10.

Although prosecutors have "considerable leeway" in delivering their summations, they are generally limited to commenting upon the evidence and the reasonable inferences that may be drawn therefrom. State v. Munoz, 340 N.J. Super. 204, 217-18 (App. Div. 2001); State v. Pindale, 249 N.J. Super. 266, 285 (App. Div. 1991). Accordingly, a prosecutor may not denigrate defense

counsel, cast "unjustified aspersions on defense counsel's motives," or "impugn the integrity of a particular lawyer . . . as a means of imputing guilt to the defendant." Pindale, 249 N.J. Super. at 286; State v. Lockett, 249 N.J. Super. 428, 434 (App. Div. 1991).

For example, a prosecutor may not accuse defense counsel of deceiving or confusing the jury. Lockett, 249 N.J. Super. at 434. In Lockett, the prosecutor told the jury that defense counsel wanted jurors to "look at some smoke in the corner of the room" so that they would not "look at the defendant's conduct." Ibid. The court held that these statements impermissibly impugned defense counsel's motives. Ibid. Likewise, in Pindale, a prosecutor told the jury during summation that defense counsel's role "is to try to confuse you" and that defense counsel was "hoping that by some stroke of luck somehow you guys might drop the ball and get so confused that you misread the evidence." 249 N.J. Super. at 286. Just like Lockett, the Pindale Court held that the prosecutor's statements improperly demeaned the role of the defense attorney. Ibid.; see State v. Sherman, 230 N.J. Super. 10, 16 (App. Div. 1988) (finding improper the prosecutor's statements that defense would "use certain courtroom maneuvers" and that "the first defense is a defense of confusion").

Here, the prosecutor's statements in summation similarly implied that defense counsel's goal was to confuse the jury with distractions and hide the

simple facts in front of them. To begin his summation, the prosecutor relied on an extended metaphor about magic, explaining that magic is all "tricks," "illusions," and "things like that." (9T 197-12 to 13) The prosecutor said that "the best tricks are ones that you can look at . . . and [say], I know they're going to try to trick me. . . . [a]nd they still get you." (9T 197-16 to 21) He explained to the jury that magicians "use distraction" or "slight of hand" to do this, and that many magicians rely on "distractions that distract you from those things" that are right in front of you. (9T 197-23 to 198-4) Concluding the introduction to his summation, the prosecutor asserted, "a lot of what the defense wants you to believe are distractions." (9T 198-5 to 6)

The prosecutor did not stop there, continuing the theme of "distraction" throughout his summation to discredit defense counsel's arguments. For example, after defense counsel argued that law enforcement failed to ask Yocco to identify Bojack, the prosecutor responded that the failure to present photo arrays was "another distraction." (10T 203-10 to 12) After defense counsel argued that the incident may not have happened in the way Mr. Yocco described, the prosecutor asserted to the jury that the "[d]efense with their distractions wanted you to think well maybe something else [happened]." (10T 209-17 to 21) And, in his conclusion, the prosecutor brushed aside defense counsel's argument that the investigation was unreliable, stating, "[d]istractions

aside, problems with the case, and investigation aside, the facts are simple. The video showed two people going in. Mr. Yocco tells you two people came in. Mr. Mason tells you he's one of those people. Everything else is a distraction." (10T 220-6 to 10)

Like Pindale and Lockett, the prosecutor's statements during summation improperly accused defense counsel of using distractions to cause confusion. Statements advising jurors that defense counsel wants them to "look at some smoke in the corner of the room," Lockett, 249 N.J. Super. at 434, become "so confused that you misread the evidence," Pindale, 249 N.J. Super. at 286, or to not be fooled by defense counsel's "distractions" all similarly demean the role of the defense attorney, impugn defense counsel's motives, and encourage the jury to dismiss or ignore defense counsel's arguments. As the courts found in Pindale and Lockett, these types of statements are improper. See State v. Frost, 158 N.J. 76, 86 (1999) (emphasizing that the prosecutor's comments "suggesting that defense counsel's closing arguments were 'lawyer talk'" were improperly disparaging).

Moreover, the prosecutor's statements were clearly capable of causing an unjust result. R. 2:10-2. Following Egan's commentary on Mr. Mason's veracity and disclosure of unrelated prior bad acts, which irreversibly tainted Mr. Mason's credibility, the prosecuting attorney likewise used his summation to

taint defense counsel's credibility. The last thing the jury heard before it began deliberating was the prosecutor's commentary encouraging the jury to dismiss defense counsel's argument as a "distraction," interfering with their ability to independently weigh the evidence. When a prosecutor urges a jury to cast aside defense counsel's argument as nothing more than a "distraction," the error can clearly cause an unjust result. Mr. Mason's conviction therefore must be reversed.

POINT IV

THE CUMULATIVE EFFECT OF THE ERRORS DISCUSSED DENIED MR. MASON A FAIR TRIAL AND REQUIRE REVERSAL. (Not raised below)

Each error raised above is of sufficient magnitude to require reversal. But if the Court does not find that any one error warrants a new trial, it must find that their total effect casts doubt on the verdict such that reversal is required. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10; see State v. Orecchio, 16 N.J. 125, 134 (1954) (citations omitted) ("[W]here any one of several errors assigned would not in itself be sufficient to warrant a reversal, yet if all of them taken together justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of this court to reverse."); State v. Jenewicz, 193 N.J. 440, 474 (2008) (holding that cumulative error required reversal, notwithstanding the State's "powerful" evidence at trial).

The State's case against Mr. Mason is entirely circumstantial. No DNA, fingerprint, or eyewitness evidence linked Mr. Mason to the crime. Only Mr. Mason's admission that he was with Bojack and his self-identification from footage recorded by a nearby camera tied Mr. Mason to this robbery. But Mr. Mason's statement was erroneously placed in front of the jury alongside numerous accusations that he was lying, the officer's opinion as to what the church video showed, and evidence that Mr. Mason had been arrested on an

unrelated charge. Effectively sullying Mr. Mason's reputation, this inadmissible evidence and lay opinion testimony tainted the jury's ability to evaluate Mr. Mason's credibility and the evidence independently.

To make matters worse, the prosecutor compounded the error by denigrating defense counsel in summation, comparing him to a magician and dismissing his arguments as "distractions." Both during its case-in-chief and summation, the State thus managed to improperly undermine the credibility of Mr. Mason and his counsel, interfering with the jury's ability to independently evaluate whether the State introduced sufficient evidence to prove its case beyond a reasonable doubt. See also Pindale, 249 N.J. Super. at 286-87 (concluding that cumulative error warranted reversal when prosecutorial misconduct—to which defense counsel did not object at trial—was coupled with the erroneous admission of evidence of defendant's conduct after the crime).

Accordingly, the collective impact of these errors was clearly capable of producing an unjust result. R. 2:10-2. Mr. Mason's convictions must therefore be reversed.

POINT V

THE SENTENCING COURT FAILED TO MERGE MR. MASON'S CONVICTION FOR CONSPIRACY WITH HIS CONVICTION FOR ARMED ROBBERY. (Not raised below)

The court must order a remand because the sentencing court erroneously failed to merge Mr. Mason's convictions for armed robbery (Count One) and conspiracy (Count Two). Because the State presented no evidence that the objectives of the conspiracy went beyond the robbery itself, the trial court should have merged Mr. Mason's convictions on Counts One and Two.

A defendant cannot be punished for two offenses when he has only committed one. State v. Cole, 120 N.J. 321, 325-26 (1990). The issue of merger "implicates a defendant's substantive constitutional rights." Id. at 326 (citing State v. Miller, 108 N.J. 112, 116 (1987)). Although our Supreme Court has not pinpointed whether the prohibition against dual punishment "rests on principles of double jeopardy, due process or some other legal tenet," the issue of merger indisputably triggers constitutional protections. State v. Herrera, 469 N.J. Super. 559, 565 (App. Div. 2022) (citations omitted). To determine whether convictions merge, the court reviews the case "de novo to 'discern and effectuate the legislative intent underlying the statutory provision[s] at issue.'" Ibid. (citations omitted).

A conspiracy conviction merges with a completed offense if "the completed offense was the sole criminal objective of the conspiracy." State v. Hardison, 99 N.J. 379, 386 (1985); see State v. Jurcsek, 247 N.J. Super. 102, 109-10 (App. Div. 1991). In this way, the New Jersey Criminal Code views conspiracy like attempt, conceiving of conspiracy as a lesser-included offense of the completed offense. Hardison, 99 N.J. at 386. Thus, only where the prosecution shows that the "objective of the conspiracy was the commission of additional offenses" or involved "a distinct danger in addition to that involved in the actual commission of any specific offense" will the convictions not merge at sentencing. Id. at 386-87 (emphasis added); compare State v. Hyman, 451 N.J. Super. 429, 459 (App. Div. 2017) (declining to merge convictions when the conspiracy involved an agreement to possess and distribute 200 grams of cocaine and the substantive offense involved possession with intent to distribute fifty grams of cocaine); with Jurcsek, 247 N.J. Super. at 109-10 (merging a conviction for conspiracy to commit forgery, falsify records, and theft with a substantive theft conviction when all overt acts were "an integral part" of the substantive offense).

Applying these principles, Mr. Mason's robbery and conspiracy convictions should have been merged at sentencing. The State has not shown any objective of the conspiracy beyond the commission of the robbery at 250

Mechanic. Further, as the trial court observed, the proofs for conspiracy at trial involved only the "coordination of acts," as there was "no evidence of a verbal agreement" between Mr. Mason and his co-defendant. (9T 153-6 to 11) Without any evidence of conspiracy other than the coordinated conduct between Mr. Mason and Bojack during the robbery for which they were convicted, the State cannot point to "a distinct danger in addition" to the commission of the substantive crime. See Hardison, 99 N.J. at 386, 391 (finding that convictions for robbery and conspiracy should have merged when the conduct proven demonstrated no "further criminal objectives" other than the completed robbery). Accordingly, Mr. Mason's case must be remanded for a resentencing.

CONCLUSION

For the reasons set forth in Point I, the order admitting Mr. Mason's statement and his ensuing convictions must be reversed. For the reasons set forth in Points II through IV, Mr. Mason's convictions must be reversed and the matter remanded for a new trial. Alternatively, for the reasons set forth in Point V, the matter must be remanded for a resentencing.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender

BY: /s/ Rachel A. Neckes_____
RACHEL A. NECKES
Assistant Deputy Public Defender
Attorney ID No. 381892021

Dated: November 9, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002455-22T4

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	On Appeal from a Judgment Of Conviction of the Superior
	:	Court of New Jersey, Law Division, Camden County.
v.	:	Indictment No. 21-12-0324
MACARTHUR MASON,	:	Sat Below
Defendant-Appellant.	:	Hon. Kurt Kramer, J.S.C and a jury

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

GRACE C. MACAULAY
CAMDEN COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT

KEVIN J. HEIN [ID: 910402012]
ASSISTANT PROSECUTOR
MOTIONS AND APPEALS UNIT
CAMDEN COUNTY PROSECUTOR'S OFFICE
200 FEDERAL STREET
CAMDEN, NEW JERSEY 08103
(856) 225-8617

OF COUNSEL AND ON THE BRIEF.

email: heink@ccprosecutor.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

The State respectfully relies on defendant's Statement of Procedural History. (Db4-5).

COUNTERSTATEMENT OF FACTS

TRIAL

On August 22, 2022, around 11 a.m., William Yocco sat alone in his business warehouse in Camden organizing tools when two men, including defendant, entered unannounced and beat him with baseball bats. Defendant's co-assailant then rifled through Mr. Yocco's pockets and took $1,800 cash while defendant continued to beat him with a bat. A jury of his peers found defendant guilty of armed robbery after trial, among other charges. (Da14-17).

A little before 11 a.m. that morning, Mr. Yocco went to David's Tire Repair to swap out his tires. (9T93-10 to 15). When the tire job was finished, he paid for the repair with cash kept in his pants pocket. (9T94-1 to 4). He then drove three or four blocks down the road to his business, Peerless Castings at 250 Mechanic Street, where he parked his truck on the street in front of his shop, visible to anyone walking by. (9T94-10 to 95-1).

---

[1] The State relies on defendant's Table of Citations (Db4), with the following addition:

"Db" refers to defendant's appellate brief.

Mr. Yocco described his shop, with a front entry door that led to a small foyer. The foyer had a door in the back to an office, and a door on the left that led to his warehouse. (9T87-1 to 17). That morning, Mr. Yocco was in his warehouse alone, sitting in a chair sorting tools. (9T87-18 to 22). Suddenly, he saw two men enter the front door and then warehouse area with baseball bats. (9T87-24 to 25). One man wore a green and white track suit, and the other wore a dark colored hoodie sweatshirt. (9T89-21 to 23). Both men began immediately to beat him with the bats, hitting him seven or eight times in the head, face, side, and leg, as he tried to get up and away. (9T90-9 to 22). He bled profusely. (9T91-8 to 11). The men did not hesitate in any way, and they said nothing during the attack. (9T88-19 to 22). Mr. Yocco was coherent the entire time, never losing consciousness, as he watched them hit him. (9T89-9 to 11, 91-2 to 3). He told the jury he was "100 percent" sure that both men beat him with bats. "I watched him do it[,]" he insisted. (9T95-25 to 96-2).

During the attack, the man in the track suit went into Mr. Yocco's pocket and retrieved a wad of cash totaling $1,800 in U.S. currency, while the other man continued to hit him with his bat. (9T91-15 to 92-8). The money was in denominations of 5's and 20's. (9T91-23 to 24). After they took the money, the two men left the same way they entered, through the front door of 250 Mechanic Street.

(9T92-9 to 17). Mr. Yocco called the police, who after arriving immediately took him to the hospital. (9T95-2 to 9).

Officer Giovanni Portobanco, a six-year veteran of the Camden County Police Department, received the 9-1-1 dispatch call that morning. (7T52-16 to 53-23). After announcing his presence outside the front door, Mr. Yocco opened the door and appeared "shaken up, pretty scared." (7T58-6 to 10). Officer Portobanco noted he was bleeding heavily from the head. (7T58-10 to 11). Officer Portobanco stayed with him and did not go inside the business. (7T59-1 to 7). Another unit arrived and then transported him to Cooper Hospital. (7T59-8 to 14).

He was in the hospital for over a week. (9T95-10 to 11). Dr. Cary Lubkin of Cooper Hospital testified that a CAT scan revealed three types of inside head bleeding consistent with blunt force trauma that could have been fatal if left untreated. (7T76-1 to 2, 79-17 to 23). Mr. Yocco also had injuries to his ankle, elbow, and arm, including contusions and bruises. (7T79-11 to 16). He was given anti-seizure medication and required staples to close the wound on his head. (7T81-4 to 18).

Sergeant Pascual Irizarry of the Camden County Police Department arrived at the hospital to photograph Mr. Yocco's injuries, and then proceeded to 250 Mechanic Street to photograph the crime scene. (7T93-1 to 20, 99-9 to 11). Sergeant Irizarry observed what appeared to be blood throughout the foyer and a bat. (7T100-

22 to 25, 107-8 to 9). The bat was recovered and tested for fingerprints, but none were obtainable, which was common in his experience. (7T108-7 to 22).

Detective Kenneth Egan, at the time employed by the Camden County Police Department,[2] oversaw the investigation. (7T145-15 to 25). He began by pulling surveillance video from the area, which yielded video from a church across the street from 250 Mechanic Street. (7T147-10 to 14). He also obtained Real Time Tactical Operations and Intelligence Center (RT-TOIC) footage from 3rd and Sycamore Streets, a few blocks away from 250 Mechanic Street. (7T161-17 to 20). The church surveillance captured Mr. Yocco's truck outside his business front door and then two individuals entering his business front door, one wearing green and another in a blue shirt.[3] (Da12; S-19 in evidence). After a few minutes go by, the same two individuals are seen running out of Mr. Yocco's business. (Da12). A few minutes later, two individuals matching those in the church surveillance are seen walking away on RT-TOIC video, a few blocks away from 250 Mechanic Street and in the same direction the individuals ran off. (Da12-13, S-19 and S-23 in evidence). They had removed their green and blue colored tops and had a wad of cash in hand. (Da13).

[2] At the time of trial, Detective Egan was employed by the Jackson Township, NJ Police Department. (7T144-19 to 20).

[3] Detective Egan determined that the church surveillance video time was off by reviewing it with the RT-Toic video. (7T157-10 to 22).

About a month later, Detective Egan had an opportunity to interview defendant about the attack. A redacted version of the audio/video of the interview was played for the jury. (Da7, S-6 in evidence); (7T171-15; 9T82-6 to 8). Detective Egan explained to defendant that he wanted to talk to him about something apart from whatever he was arrested for and brought him to the police station that day. (7T172-10 to 16). He then read defendant his Miranda[4] rights. (7T173-22 to 175-23). Defendant indicated his understanding both verbally and by signing the Miranda form. (7T173-22 to 176-4). Detective Egan immediately showed defendant a photograph of the assailant that entered Mr. Yocco's building in a blue shirt. (Da10; S-28 in evidence); (7T176-5 to 7). "That's me," defendant instantly responded and sign the photo. (Da10; S-28 in evidence); (7T176-8 to 12). Detective Egan next showed defendant a photograph of the assailant who held the green jacket on Sycamore, to which defendant immediately stated, "Bojack" and signed the photograph. (Da11; S-29 in evidence). Defendant said he ran up to Bojack in front of the church on Mechanic Street and yelled, "Yo, what's up with my dough?" (7T179-1 to 4). He told Detective Egan that Bojack kept running behind him and then went to Sycamore Street and fought with someone. (7T179-6 to 8).

Detective Egan confronted defendant with his lies and the video of him going in and then, a few minutes later, out of 250 Mechanic Street. (7T180-1 to 6).

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

Defendant continued to deny that he ever went into the building, but said that Bojack told him he "went in there and fought that man. . . . and robbed him" (7T182-3 to 183-4). Detective Egan continued to press defendant about the video showing him he went into the building, and defendant continued to deny – "Man, I'm telling you I wasn't in the building." (7T184-3 to 16). Detective Egan emphasized that he was not saying he knew defendant "assaulted the man. . . [or] robbed the man. . . . [or] hurt the man." (7T186-10 to 12). But after admitting he was in the photo, that he was with Bojack, and on Mechanic Street, defendant still continued to deny going into the building despite video of him doing just so. Again, Detective Egan clarified that he was only asking whether he went into the building, and not whether he assaulted or robbed the victim, yet defendant remained steadfast that he did not. (7T189-5 to 11). Recognizing that defendant's statements were in direct contradiction to the video surveillance, Detective Egan continued to insist that defendant was lying to him. (7T190-6 to 18).

Miranda Hearing

Testimony at the pretrial Miranda hearing mirrored that which was later elicited at trial, minus the agreed-upon redactions in defendant's recorded statement.[5]

[5] At a pretrial hearing on October 6, 2022, defendant's counsel asked for time to consider redactions "for trial purposes." (5T9-12 to 15).

Detective Egan was the State's sole witness as the Miranda hearing. (1T et seq.). He testified that he learned about the robbery on the day it occurred and began collecting video from the area. (1T6-6 to 8-7). As a result, he recovered video from RT-TOIC and the church across the street. (1T7-15 to 22). The RT-TOIC video "showed two individuals, one dressed in black, one dressed in blue, come up to the building, to the door, go into the building." (1T8-10 to 12). After a couple minutes, "they come running out of the building[a]nd they run down past the church, down towards . . . Sycamore Street." (1T8-12 to 15). The church video showed them going into and then out of the building at 250 Mechanic Street. (1T8-21 to 9-1).

Detective Egan developed two still images from the video to make an "attempt to identify flyer." (1T9-20 to 24). The purpose of the flyer was to provide the image throughout the police department to see if any officers recognized the suspects from prior experience or in their travels. (1T10-1 to 7). Detective Egan received a tip from another officer regarding the male in black, leading them to a home the potential suspect shared with a witness who positively identified him in the photograph as "Bojack." (1T12-17 to 15-25). Bojack was later identified as Edward Williams, upon whom Detective Egan filed charges. (1T16-11 to 23). At that time, no one was able to identify the second suspect. (1T16-24 to 17-5). Between the incident date of August 22, 2021 and the end of September, officers on the street came across other

individuals believed to look like the second suspect in the disseminated flyer, but none of those leads resulted in a positive identification. (1T19-7 to 13).

On September 30, 2021, defendant was arrested for unrelated distribution of narcotics. (1T17-13 to 14). Officers believed defendant looked like the still-unidentified suspect in the flyer and contacted Detective Egan, who went to speak with him. (1T17-14 to 18). At that time, Detective Egan knew defendant was under arrest for drug charges but was not sure whether charges had yet been filed. (1T19-24 to 2). Charges related to the robbery were not filed on defendant, which Detective admitted at that moment in time could not have been because there was no evidence to charge him. (1T20-8 to 16, 4510 to 46-1).

Detective Egan then conducted a recorded interview with defendant. (2T8-18). After obtaining defendant's identifiers, Detective Egan told defendant, "You're under arrest obviously today for whatever happened earlier. I don't really know too much about it. . . . I don't want to get into that right this second. . . . We can if you like, but I have to go through paperwork." (1T24-23 to 25-5). When asked if he had ever had his rights read to him, defendant responded affirmatively, "uh-huh." (1T25-6 to 9). After removing defendant's handcuffs, and before Detective Egan could begin reading defendant his rights, defendant stated, "Just sign it. Let me just sign it[,]" referring to the Miranda form. (1T26-6 to 7). Defendant then replied "uh-huh,"

"yes, sir," and "yeah" to each statement of rights and signed the form without hesitation. (1T26-19 to 28-12).

Detective Egan then began to ask defendant a little bit about what had happened that day regarding the drugs. (1T28-13 to 29-12). After a moment of that, he asked defendant, "Have you done anything in the past, you know, that you wish you didn't do because of drugs?" (1T29-13 to 15). Defendant admitted to sometimes selling drugs. (1T29-16 to 30-4). Detective Egan then showed defendant the photograph of the second suspect in the robbery and asked, "So I just want to show you a picture real quick. Okay? Tell me if you know who this person is. Okay?" (1T30-5 to 7). Defendant responded, "Uh-huh. That's me" and signed the photograph. (1T30-8 to 11). Defendant denied knowing what the photograph was from. (1T30-12 to 18). Detective Egan also showed defendant a photograph of the first suspect, who they already knew to be Edward Williams, a.k.a. "Bojack." (1T30-19 to 20). Defendant responded, "Yeah, I know [him]. That's . . . Bojack," and then signed that photograph. (1T30-21 to 24).

Defendant denied hanging out with Bojack a lot, but that he would supply him with drugs when he needed them. (1T31-4 to 25). Recently, he had sold Bojack a couple bags with promise of payment later on. (1T32-2 to 10). When defendant saw him near the church on Mechanic Street, he ran to him and asked "Yo, what's up with my dough?" (1T33-3 to 5). Defendant told the detective that Bojack then ran

toward Sycamore Street to talk to somebody. He did not know why they were running, he was just behind Bojack. (1T33-8 to 13).

At that point, Detective Egan stopped defendant and said, "I don't want another lie coming out of a 52 year old grown man's mouth." (1T34-1 to 2). He continued, "I saw you go in the building. I saw you come out of the building. Do you want to explain to me what happened? Because did you hit the guy with the bat? Did he hit the guy with the bat?" (1T34-4 to 8). At first, defendant said he was "the first one out[,]" (1T35-6 to 14), and then denied going in the building at all. (1T36-13 to 25). Defendant stated Bojack told him he "went in there and fought the man. . . [a]nd robbed him." (1T37-8 to 15). But he continued to tell the detective that he was not in the building with Bojack. (1T37-16 to 18).

Detective insistence that defendant was lying about not being in the building, given the video showing both suspects going in, and defendant's denials continued for a moment. (1T37-19 to 40-13). Detective Egan emphasized that he was not saying he knew defendant "assaulted the man. . . [or] robbed the man. . . . [or] hurt the man." (7T186-10 to 12). But after admitting he was in the photo, that he was with Bojack, and on Mechanic Street, defendant still continued to deny going into the building despite video of him doing just so. Again, Detective Egan clarified that he was only asking whether he went into the building, and not whether he assaulted or robbed the victim, yet defendant remained steadfast that he did not. (7T189-5 to

11). Recognizing that defendant's statements were in direct contradiction to the video surveillance, Detective Egan continued to insist that defendant was lying to him. (7T190-6 to 18). The recording ended with defendant responding, "That's a damn lie. I ain't go in no fucking building." (7T190-24 to 25).

After hearing testimony, watching the video recorded interview, and considering counsel's arguments, the trial court denied the motion to suppress the statement. The trial court found that the intent of the interview "at all times was the robbery and not the drug charges[,]" and that "[n]o charges related to the robbery had been filed at the time of the interview" because Detective Egan "did not have the necessary facts to charge the defendant with robbery before the interview." (2T7-24 to 8-4). The court agreed that "there was not probable cause to charge the defendant with robbery prior to the interview." (2T9-1 to 2). The court further found that no notice was given to defendant that the focus of the interrogation would be the robbery. (2T8-5 to 9).

The trial court ruled that since no charges were filed, nor could have been filed, the "bright line rule [of A.G.D.] does not apply to this case." (2T9-16 to 23). Moreover, the court held that "the State did not intentionally defer filing charges to avoid an A.G.D. violation . . . to avoid disclosing the charges he faced." (2T10-24 to 12-12). The court found Detective Egan's testimony to be credible. (2T12-16 to 20). Therefore, the court went on to consider the totality of the circumstances.

The court found defendant to be 53 years' old with seven prior indictable convictions. (2T13-17 to 18). The court found defendant was read his rights, and signed the rights form indicating his understanding. (2T13-18 to 20). The court found the interview lasted roughly seventeen minutes, inclusive of the Miranda rights. (2T13-22 to 24). The court further found that there was "no physical punishment or mental exhaustion exhibited" and that the "questioning was neither improperly repeated nor prolonged in nature." (2T13-24 to 14-1). Finally, the court found that despite not knowing that the questions would revolve around the robbery, "waiver of Miranda rights is . . . not [offense] specific. . . . If defendant wished for the questioning to end[] as to one or all of the alleged crimes he is being asked about he merely needs to invoke his rights. . . ." which he "knowingly and intelligently waived . .. under Miranda and participated willingly in the interrogation . . . ." (2T14-6 to 16-4).

LEGAL ARGUMENT

POINT I: DEFENDANT'S STATEMENT TO DETECTIVE EGAN WAS KNOWING, INTELLIGENT, AND VOLUNTARY BEYOND A REASONABLE DOUBT. (2T16-5 to 7; Da8).

In Point I of his appellate brief, defendant contends that the trial court abused its discretion by admitting defendant's recorded statement to police because Detective Egan "affirmatively misled him to believe that their conversation would concern a minor narcotics charge and not a much more serious allegation of first-degree robbery." (Db16). Yet the record plainly shows that defendant was a mere suspect at the time he waived his rights, the police lacking probable cause to arrest or charge him for the robbery until the moment he identified himself as the assailant in the surveillance video. Given the totality of the circumstances, defendant's statement was made knowingly, intelligently, and voluntarily beyond a reasonable doubt. This Court should affirm.

"The privilege against self-incrimination, as set forth in the Fifth Amendment to the United States Constitution, is one of the most important protections of the criminal law." State v. Presha, 163 N.J. 304, 312 (2000) (citing U.S. Const. amend. V; State v. Hartley, 103 N.J. 252, 262 (1986)). Likewise, New Jersey ""common law has granted individuals the 'right against self-incrimination since colonial times.' " State v. Vincenty, 237 N.J. 122, 132 (2019) (quoting State v. A.G.D., 178 N.J. 56, 66 (2003)). In New Jersey, "[a] confession obtained during a custodial interrogation

may not be admitted in evidence unless law enforcement officers first informed the defendant of his or her constitutional rights." State v. Hreha, 217 N.J. 368, 382 (2014) (citing Miranda, 384 U.S. at 444). The State bears the burden of proving beyond a reasonable doubt that a waiver "was knowing, intelligent, and voluntary in light of all the circumstances," in other words, the totality of the circumstances. Presha, 163 N.J. at 313; State v. Nyhammer, 197 N.J. 383, 402-03 (2009).

In the totality of the circumstances analysis, courts look to factors such as the defendant's "age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved." Nyhammer, 197 N.J. at 403 (quoting Presha, 163 N.J. at 313). A defendant's previous encounters with law enforcement has been mentioned as an additional relevant factor. State v. Miller, 76 N.J. 392, 402 (1978). Only under very limited circumstances do courts apply a per se rule, such as the requirement to advise a defendant when the police have issued a criminal complaint or arrest warrant. See A.G.D., 178 N.J. at 68. However, in State v. Sims, our high Court distinguished the bright-line rule in A.D.G., and rejected a rule that would have required police to disclose their prediction, based on information known to them at the time of the interrogation, of what charges may be filed. 250 N.J. 189, 215 (2022). Instead, the Court emphasized

trial courts consider these factors in its totality of the circumstances analysis. Id. at 216.

After all, "[t]he essential purpose of Miranda is to empower a person—subject to custodial interrogation within a police-dominated atmosphere—with knowledge of his basic constitutional rights so that he can exercise, according to his free will, the right against self-incrimination or waive that right and answer questions." Nyhammer, 197 N.J. at 406 (citing Miranda, 384 U.S. at 456-57). "The defining event triggering the need to give Miranda warnings is custody, not police suspicions concerning an individual's possible role in a crime." Id. at 406 (internal citations omitted). That is why "failure to be told of one's suspect status [is] only one of many factors to be considered in the totality of circumstances." Id. at 407. Indeed, "Miranda does not require that 'the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights' because 'the additional information could affect only the wisdom of Miranda waiver, not its essentially voluntary and knowing nature." Ibid. (quoting Colorado v. Spring, 479 U.S. 564, 576-77 (1987)).

"It is one thing for police to withhold information. It is another thing entirely for them to provide an explanation that creates or reinforces a false impression as to the seriousness of the sentence that a defendant is facing." State v. Diaz, 470 N.J. Super. 495, 519 (App. Div. 2022). In Diaz, the defendant was a suspect in a strict

liability drug induced death case. When the defendant first asked the police "what [this] is all about[,]" police replied, "we [are] conducting an investigation involving narcotics." Ibid. They made no mention that the victim had died of a drug overdose, even though at that point in the investigation police already had reliable information that

> (1) defendant communicated with Ludeman[, the victim's roommate,] regarding a drug deal on May 7, 2019, via Facebook Messenger; (2) defendant went to Ludeman's apartment to complete the transaction; (3) Ludeman gave four out of the eight bags of heroin she purchased from defendant to her roommate, Baita; (4) Ludeman was rendered unconscious for several hours after injecting the heroin that had been supplied by defendant, suggesting the potency of that product; (5) Ludeman found Baita dead when Ludeman woke up after ingesting the heroin defendant supplied; (6) Ludeman told police she believed Baita's death was a drug overdose; (7) Ludeman handed over to police two bags of heroin marked "American made" in red ink that she had given to Baita and that were found among Baita's possessions; (8) Ludeman agreed to a consensual intercept of a telephone conversation between her and defendant during which, as per police instruction, Ludeman invited defendant to return to her apartment to sell additional heroin; (9) the detectives overheard that defendant agreed to come immediately to Ludeman's apartment to sell more heroin to her and a fictitious person; (10) immediately after the consensually-intercepted telephone call concluded, defendant left his residence and was apprehended; (11) defendant was carrying eight bags of heroin on his person; and (12) additional folds of heroin marked "American made" in red ink were found in defendant's apartment, further corroborating Ludeman's information and credibility.
>
> [Id. at 530-31.]

Relying on this information, this Court held that "at the time defendant was taken into custody," police had sufficient facts to believe defendant was "criminal responsible for the victim's death" Id. at 528. This Court considered is "highly relevant" that the detectives had so much information from a cooperating witness. Id. at 529. This Court held that the defendant's waiver was not made knowingly because police advised defendant of the reason for his arrest "in a manner that was vague and misleading" based on what they knew. Id. at 533.

Here, under the totality of the circumstances, the motion hearing record shows sufficient credible evidence establishing beyond a reasonable doubt defendant's waiver was made knowingly, intelligently, and voluntarily. Rather than being "affirmatively misled," defendant was simply shown a photograph of himself without any misinformation, and when he was nothing more than a possible suspect for whom no evidence existed to justify charges. This Court should affirm.

At the outset, there is no dispute that charges were not filed at the time Detective Egan interviewed defendant. Nor was there any evidence to support charging defendant before the interview, such that Detective Egan intentionally delayed filing charges to avoid having to disclose them. Accordingly, neither the bright-line ruled in A.G.D. nor the danger referenced in Sims is at issue in this case. (Db21).

Rather, defendant's claim is that Detective Egan had to tell defendant that he was there to investigate a crime for which he was a possible suspect while under arrest for a separate offense for his waiver to be a knowing one. In support, defendant relies on Diaz, arguing that Detective Egan reinforced a false impression as to the seriousness of the sentence defendant faced, and misled defendant into believing he was in custody only for a minor narcotics charge to induce waiver. (Db19).

Yet, there are striking differences here that demonstrate, under the totality of the circumstances, that defendant waived his rights knowingly. First, unlike in Diaz, there is nothing in the record to suggest Detective Egan was pursuing some type of strategy to mislead defendant. Defendant was lawfully arrested apart from this case, and Detective Egan only showed up to the station to question defendant when another officer thought that defendant might be the person in the attempt to identify flyer. Rather than "provid[ing] an explanation that creates or reinforces a false impression as to the seriousness of the sentence that [] defendant was facing," at worst all Detective Egan did was withhold information from a possible suspect he had limited reason to believe was the robber he pursued. Diaz, 470 N.J. Super. at 519. There was no trickery and no deception as to the true reason he was in custody.

Second, unlike in Diaz, at the time he sat down with defendant, Detective Egan had no information that "viewed collectively, would lead an objectively reasonable police officer to believe that defendant was criminally responsible for"

the robbery. Id. at 528. Officer Egan had been searching for the second suspect in the robbery, even pursuing various leads from other officers that had not panned out. He had no more information to suggest this time would be different than he had with all those other leads. As the trial court found, there was no probable cause to support charging or arresting defendant at that time for robbery. All Detective Egan knew at that moment was that there was an individual at the station who another officer believed resembled the second suspect in the flyer -- nothing more. This further demonstrates that Detective Egan owed defendant no explanation as to why he was showing him the photograph. To require such under these circumstances would run contrary to the Nyhammer Court's declaration that "Miranda does not require that 'the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.'" Nyhammer, 197 N.J. at 407 (internal citations omitted).

What is more, all the other circumstances surrounding the interview supported a finding that defendant knowingly, intelligently, and voluntarily waived his rights. Indeed, defendant was eager to waive them. Before Detective Egan could even get them out of his mouth, defendant stated "Just sign it. Let me just sign it." (1T26-6 to 7). Of course, however, Detective Egan provided them anyway, and at their conclusion defendant initialed and signed the rights form. (2T13-18 to 21).

The court further found that defendant was 53 years' old and had significant prior contact with the justice system, with seven prior indictable convictions. (2T13-17 to 18). Defendant acknowledged his familiarity with his rights when Detective Egan asked him, "You ever have your rights read to you? Because you're under arrest, I have to read you your right. You understand that, right?" (1T25-6 to 8). Defendant replied affirmatively, "uh huh." (1T25-9). The interview lasted a mere seventeen minutes including the reading of his rights, and the court found that defendant suffered "no physical punishment" and no "mental exhaustion was exhibited." (2T13-22 to 25). Contrary to defendant's assertion that he was too intoxicated to give a free waiver, the court noted no issues with defendant's demeanor or responses throughout the interview. In fact, defendant was quite animated in his denials. Moreover, the court emphasized that the questioning of was not improperly repeated nor prolonged. (2T13-25 to 14-1).

As a result of all the circumstances, in their totality, the court correctly found that defendant's waiver was knowing, intelligent, and voluntary beyond a reasonable doubt. This Court should now affirm.

POINT II: IT WAS NOT PLAIN ERROR FOR THE COURT TO ALLOW THE JURY TO HEAR THE AGREED UPON PORTIONS OF DEFENDANT'S REDACTED RECORDED INTERVIEW, INDEED IT WAS INVITED. [Not Raised Below]

Defendant asserts, for the first time on appeal, that he was denied a fair trial because the jury heard during the seventeen minutes recorded interview that Detective Egan called him a liar after defendant identified himself but denied going into 250 Mechanic Street, and by referring to his unrelated arrest. For the reasons that follow, the court properly admitted the redacted portion of defendant's recorded statement, twice accompanied by the appropriate jury instruction that nothing the detective says is evidence and they the jury is the sole arbiter of credibility and the facts. Moreover, defendant invited those comments into the trial after expressly advising the court he was reviewing the transcript redactions proposed by the State "for trial purposes" and then, during trial, confirmed the statement was acceptably redacted before it was played for the jury. In any event, these errors, given defendant's self-identification, were harmless. Accordingly, the State respectfully urges this Court to affirm.

Since defendant raised none of the issues addressed in this Point at trial, this Court reviews for plain error. State v. Macon, 57 N.J. 325, 333 (1971). Thus, "unless it is of such a nature as to have been clearly capable of producing an unjust result[,]" any error or omission should be disregarded. R. 2:10-2. Put another way, the error

must be "sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." State v. Williams, 168 N.J. 323, 336 (2001). The plain error standard is a "high bar," to "provide[] a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error." State v. Santamaria, 236 N.J. 390, 404 (2019) (internal citations omitted).

A. Defendant's redacted interview played for the jury did not include any impermissible opinions concerning defendant's credibility or guilt.

It is axiomatic that witnesses 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 guilty or innocence." State v. McLean, 205 N.J. 438, 461 (2011) (internal citations omitted).

For example, in State v. Tung, this Court held that an "[officer's] opinions as to defendant's truthfulness and guilt . . .[are] not admissible as either demeanor evidence or lay opinion." 460 N.J. Super. 75, 101 (App. Div. 2019). There, this Court found "most troubling" the police officer's testimony "on the manner in which defendant gave responses" during an interrogation that "suggest[ed] that [the officer's] own experience and specialized training enabled him to determine that defendant was lying." Id. at 103. That officer "stressed to the jury" that "defendant's responses were 'vague' but 'not denials,' while an honest person would have

answered 'no, absolutely not.'" Ibid. This Court "concluded that '[t]he testimony . . . was improper' because '[t]he overall message,' which was 'exacerbated' by '[t]he absence of a video recording of the interrogation' was that the officer 'could tell that defendant was laying.'" State v. C.H.W., 465 N.J. Super. 574, 594 (App. Div. 2021) (quoting Tung, 460 N.J. Super. at 103-04).

Similarly. In C.H.W., the detective of a child sex assault investigation testified to the jury that he had received "specialized training on 'tactical interviewing' and 'statement analysis.'" Id. at 588-89. During "prolonged" and "repeated questioning" over a "two-and-one-half-hour[]" long recorded interview played for the jury, the detective described defendant's denials as "extremely week" and "some of the weakest denials [he'd] seen in an interview." Id. at 590-92. "[T]his is actually a textbook interview of somebody being deceptive throughout the whole, entire interview[,]" he added for the jury. Id. at 592. The detective further added that, based on his training and experience, "certain cues that indicated deceptiveness included '[w]eak denials, lack of eye contact, belching, sweating, [and] crying.'" Id. at 593.

The Court concluded that "the jury's evaluation of whether defendant's denial of guilt was credible was tainted by [the detective's] 'clearly and repeatedly stated opinion' that defendant was being deceptive in his denials." Id. at 596. The error was "exacerbated" by the trial court's failure to "'include[] a general

instruction to disregard the officer's 'comments' during defendant's interrogation,' in order 'to address the multiplicity of times' during the interrogation when the officers accused defendant of not being honest or truthful in his denials." Id. at 598 (quoting Tung, 460 N.J. Super. at 102).

Here, Detective Egan's assertions to the defendant that he was lying during the recorded interrogation are distinguishable from both Tung and C.W.H. in a few important ways. First, Detective Egan's courtroom testimony contained no opinion at all. While the State does not submit that officer opinions solely emanating from a recorded interrogation played at trial can never amount to improper opinion testimony, both Tung and C.H.W. courts emphasized the degree to which the officers supplemented their opinions on the witness stand. Here, Detective Egan never offered his opinion on the witness stand.

Moreover, in those cases, the officers not only emphasized their opinions in both the recording and on the witness stand, but based them on their perceptions and alleged specialized ability to determine whether a person was telling the truth. Here, on the other hand, Detective Egan accused defendant of lying about clear, plain, and even undisputed evidence. It was undisputed at trial that two men went into and then out of the victim's place of business that day—defendant agreed as much during his closing argument to the jury. (9T179-2 to 17, 181-5 to 6). So, unlike an opinion about "vague" answers or "weak denials," defendant's contention that he did not

going inside the building after he positively identified himself as the person on the video was patently false.

In that way, Detective Egan's statements were not opinions at all. Detective Egan was not offering a subject belief about defendant's truthfulness, but rather pointing out an objective fact that was uncontroverted by both the evidence and defendant himself at trial. Perhaps had Detective Egan accused defendant of lying about what happened inside the building, he may have stepped into improper opinion testimony. But that did not occur. In fact, Detective Egan emphasized on the recording that he was only asking whether he went into the building, and not whether he assaulted or robbed the victim. (7T189-5 to 11). Which is most notable, since the entirety of defendant's defense at trial was not whether he went into the building, but whether the State establish poof beyond a reasonable doubt regarding what happened inside.

Furthermore, to the extent it was an opinion in the literal sense, the trial court provided an appropriate jury instruction both directly before and after the statement was played:

> Detective Egan is going to make reference to his opinions of the facts in this case. Nothing Detective Egan says during the statement is evidence. You as the jury are the sole decider of the facts, including the credibility of any statements made by Mr. Mason. As such you are to disregard any opinions or descriptions of the facts presented during the interrogation by Detective Egan and make your own determinations as to the facts.

[(7T168-4 to 12, 191-8 to 17).]

In any even, even if it was error to admit this portion of the interrogation, it was not clearly capable of producing an unjust result. While the case against defendant indeed relied in large part on his statement, it was his self-identification that damned him. While the State did not have a lot of physical evidence to connect defendant to the robbery, once he identified himself in the photograph the evidence instantly became overwhelming. Two men go in to the building, two men come out. Mr. Yocco has severe injuries and is missing a wad of cash. Video surveillance captures two men going in, running out, the taking off their tops with a wad of cash in their hands. The missing piece was not what happened, but rather who did it. The second defendant identified himself in the photograph, the combined evidence of his guilt was overwhelming. Accordingly, even if the jury should not have heard Detective Egan call defendant a liar, there is no reasonable probability that it produced an unjust result. There was no plain error here.

In short, defendant cannot hide from his objective, undisputed, plain lies during an interrogation by accusing his interrogator of an improper opinion. Defendant knew his statement could be used against him, and when he chose to lie about something so plainly obvious, and something he did not dispute at trial, it is fair evidence for the jury to consider when judging his overall credibility. But even

if not, this was not plain error because the evidence of his guilt, with his self-identification, was overwhelming. Accordingly, the State respectfully asks this Court to affirm.

B. The mentions in the redacted statement that defendant was under arrest on unrelated charges were invited by defendant, and not otherwise plain error.

At a pretrial hearing on October 6, 2022, more than a month before trial began, the court asked defendant about the proposed redactions. (6T9-5 to 9). Defense counsel indicated to the judge that he was still going through them "for trial purposes." (6T9-12 to 15). The portion played for the jury was the agreed upon statement after defendant had ample time to review and consider redactions in preparation for trial. Indeed, just before the statement was played for the jury, defense counsel again confirmed he was satisfied with the redactions. (7T167-7 to 8). Thus, to the extent it was error, defendant invited it. And even if not invited, considering the overwhelming evidence of the video surveillance, victim testimony, and defendant's self-identification, the fleeting mentions that defendant was under arrest on an unrelated offense was not clearly capable of producing an unjust result. The State respectfully urges this Court to affirm.

At the outset, the State concedes the fleeting portions at the very beginning of the recorded statement related to defendant's custody on an unrelated offense, without defendant's invitation, should have been redacted. However, the record

plainly shows that defendant not only acquiesced to the redactions, but did so "for trial purposes."

Trial errors that "'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal....'" State v. Corsaro, 107 N.J. 339, 345 (1987) (quoting State v. Harper, 128 N.J. Super. 270, 277 (App.Div.), certif. denied, 65 N.J. 574 (1974)). Designed to "prevent defendants from manipulating the system[,]" State v. Jenkins, 178 N.J. 347, 359 (2004), the doctrine "is implicated 'when a defendant in some way has led the court into error[,]' and it has been applied 'in a wide variety of situations,' State v. A.R., 213 N.J. 542, 562-63 (2013) (quoting N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340-41 (2010)).

Redactions to the statement were discussed in a pretrial conference on October 6, 2022, and with the State's proposed redactions in hand, defense counsel told the trial court he needed more time to consider which redactions he wanted "for trial purposes." (5T9-12 to 15). The State was willing to redact any other portions the defense wanted out (6T9-16 to 20), defense counsel just needed time to "deci[de] on what [he was] doing for trial purposes[.]" (6T9-12 to 15). Moreover, just before the statement was played for the jury, defense counsel confirmed he was "good with the editing," which is consistent with his failure to object at any time to the mentions of his unrelated arrest left in. (7T167-7 to 8).

Indeed, his closing at the end of trial illuminated his strategy– attack the investigator for homing in on defendant and failing to do a proper investigation: Detective Egan never went to the crime scene. (9T182-24 to 25); never reviewed the photos of the crime scene (9T183-1 to 2); never listened to the 911 call (9T183-3 to 4); and never listened to the audio of the statement from the victim (9T183-4 to 7). Defense counsel framed all these omissions as "a choice" Detective Egan made to ignore a proper investigation and get the guy who was at the station under arrest. Defendant acquiesced to the mentions of his unrelated arrest and took advantage of them for "trial purposes." He must not now be permitted to use what he once considered to be a shield from conviction as a sword on appeal. Such manipulation of the system is why invited errors do not merit reversal.

But even if this error was not invited, it was still not plain error. The facts of this case were simple and damning for defendant. Surveillance video showed two people walking into Mr. Yocco's business and two people running out. (Da12). RT-TOIC video showed the same individual walking down the street with their shirts removed and a wad of cash in one's hand. (Da10-13). Mr. Yocco testified that two people came in, was 100% sure both beat him and took his cash from his pocket. The jury saw photos of the victim's bloodied injuries. And finally, defendant unwittingly confirmed he was one of assailants when he identified himself in the photograph. This is overwhelming evidence of guilt that a fleeting statement about

an unrelated arrest does not pollute. This error is not sufficient to raise a reasonable doubt as to whether it led the jury to a result it otherwise might not have reached. Therefore, it is not plain error, and this Court should affirm.

POINT III: THE PROSECUTOR'S COMMENTS DURING SUMMATION WERE WITHIN THE SCOPE OF PERMISSIBLE ARGUMENTATION AND, IN ANY EVENT, NOT PLAIN ERROR. (Not Raised Below).

Defendant asserts for the first time on appeal that the prosecutor made improper comments during his summation that deprived him of a fair trial. Yet the record shows that the prosecutor's comments were within the scope of vigorous argument permitted at the conclusion of trial. This Court should find no error, let alone plain error in the State's summation, and affirm.

"Prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries[and are] afford[ed] . . . considerable leeway in closing arguments so long as their comments are reasonably related to the scope of the evidence presented." State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 122 S. Ct. 136 (2001) (citing State v. Harris, 141 N.J. 525, 559 (1995)). Certianly, "the primary duty of a prosecutor is not to obtain convictions but to see that justice is done." Ibid. But "trials do not occur in a vacuum and a courtroom is not a classroom." State v. Goode, 278 N.J. Super. 85, 92 (App Div. 1994). "Thus, prosecutors are afforded considerable leeway in their remarks to the jury. Ibid. (citing State v. Purnell, 126 N.J. 518, 540 (1992)).

The determination whether prosecutorial misconduct warrants reversal of a criminal conviction requires an evaluation of the misconduct and its prejudicial effect on the defendant's right to a fair trial. Timmendequas, 161 N.J. at 575. "To

justify reversal, the prosecutor's conduct must have been 'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." Ibid. (citations omitted). When determining whether alleged instances of prosecutorial misconduct are sufficiently egregious as to deprive defendant of his right to a fair trial, the reviewing court "must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to the improprieties" when they occurred. State v. Purnell, 126 N.J. 518, 540 (1992). Generally, when trial counsel makes no objection to the improper remarks, the remarks will not be deemed prejudicial as trial counsel's failure to object indicates that he or she did not believe the remarks were prejudicial at the time they were made. Timmendequas, 161 N.J. at 576. Moreover, trial counsel's failure to object similarly deprives the trial court of taking any curative action. Ibid. "In the absence of objections by defense counsel to the assistant prosecutor's summation, we may not reverse unless his excesses 'so grievously affect the substantial rights of the defendant as to convince [the court] that they possessed a clear capacity to bring about an unjust result.'" State v. Sherman, 230 N.J. Super. 10, 18-19 (App. Div. 1988) (quoting State v. Hipplewith, 33 N.J. 300, 309 (1960)).

On assessing a challenge based on prosecutorial misconduct in summation, a reviewing court must look at the prosecutor's comments in the context of the entire trial record as well as against the remarks of defense counsel. State v. Morton, 155

N.J. 383, 419-420 (1998); State v. Ortisi, 308 N.J. Super. 573, 595 (App. Div.), certif. denied, 156 N.J. 383 (1998); State v. Engel, 249 N.J. Super. 336, 379 (App. Div.), certif. denied, 130 N.J. 393 (1991). Even in those instances where the prosecutor's statements amount to misconduct, that misconduct will not be ground for reversal unless it was so egregious as to deprive the defendant as of his right to a fair trial. Timmendequas, 161 N.J. at 575.

Of course, "[i]t is improper to demean the role of the defense attorney." State v. Pindale, 249 N.J. Super. 266, 286 (App. Div. 1991) (citing Sherman, 230 N.J. Super. at 16). In Sherman, for example, "a prosecutor repeatedly argued that defense counsel knew their clients were guilty . . . and were 'not going to tell you what happened on that night, because, if they did, their clients would be convicted, so they're going to try to use certain courtroom maneuvers to work on you,' namely 'the defense of confusion, let's confuse the Jury.'" Sherman, 230 N.J. Super. at 15-18. This Court concluded that the prosecutor "improperly accuse[d] both defense attorneys of concealing their clients' guilt through deception[.]" Ibid.

Similarly, this Court found improper a prosecutor's remarks that the defendant's "mommy hired him a lawyer" so he could "buy his way out of it," and that "the defense's role in this case is to try to confuse you." Pindale, 249 N.J. Super. at 286. And, in State v. Lockett, the prosecutor argued:

> the best defense counsel, when the evidence is so overwhelming that it really makes your gut wrench, what

> do you do, you don't say look at the evidence, you say look over in the corner of the room, by God, look at some smoke in the corner of the room. . . . I don't want you to look at the defendant's conduct, I don't want you to look at the circumstances of the case, I don't want you to look at the facts because, if you look at the facts, I'm crushed. My defendant is guilty.
>
> [249 N.J. Super. 428, 434 (App. Div. 1991).]

Even with the improper comments in Pindale and Lockett, however, this Court reversed only due to the accumulation of errors. Id. at 431-36; Pindale, 249 N.J. Super. at 286-87.

The prosecutor's comments here were proper argumentation, and even if not, did not rise to the level of impropriety as that of Sherman and Pindale. The prosecutor's comments that many of the defense's arguments were distractions from the simple, straightforward facts that established defendant's guilt did not disparage the defense, but attacked the multitude of arguments that had just been made before the jury by counsel. It is not error for the State to point out that defense arguments distract from the most relevant facts, and to draw the jurors' attention to the most probative evidence. The prosecutor's analogy to magic simply highlighted that some arguments by the defense took attention away from the plainness of defendant's guilt right before their eyes, encouraging them to ignore much less important and less persuasive arguments. On their own, these comments were not "so egregious as to deprive the defendant as of his right to a fair trial." Timmendequas, 161 N.J. at 575.

Furthermore, the court instructed the jury that they were the "sole and exclusive judges of the evidence, of the credibility of the witnesses, and the testimony to be attached to the testimony of each witness." (11T8-19 to 9-1). It continued,

> Regardless of what counsel said or I may have said recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts. Argument, statements, remarks, openings and summations of counsel are not evidence and must not be reated as evidence. Although the attorneys may point out what they think is important in this case, you must rely solely upon your understanding and recollection of the evidence that was admitted during the trial.
>
> [(11T9-2 to 11).]

The jury, of course, is presumed to follow such instructions. State v. Loftin, 146 N.J. 295, 390 (1996).

What is more, the overwhelming evidence in this case militates against plain error. Again, the facts of this case were straight forward. Surveillance video showed two people walking into Mr. Yocco's business and two people running out. (Da12). RT-TOIC video showed the same individual walking down the street with their shirts removed and a wad of cash in one's hand. (Da10-13). Mr. Yocco testified that two people came in, was 100% sure both beat him and took his cash from his pocket. The jury saw photos of the victim's bloodied injuries. And finally, defendant unwittingly confirmed he was one of assailants when he identified himself in the

photograph. This is overwhelming evidence of guilt that the prosecutor's comments, even if they crossed the line, did not affect the outcome. This error is not sufficient to raise a reasonable doubt as to whether it led the jury to a result it otherwise might not have reached.

Furthermore, unlike Pindale and Lockett, where the accumulation of errors led to reversal rather than the improper summation comments alone, here defendant has failed to establish a cumulation of errors. To the extent the prosecutor's comments went out of bounds of proper argumentation, that alone did not have the clear capacity to produce an unjust result.

Therefore, it is not plain error, and this Court should affirm.

POINT IV: DEFENDANT CANNOT SHOW THE CUMULATION OF ALLEGED ERRORS LED TO AN UNJUST RESULT. (Not Raised Below)

Defendant asserts he was denied a fair trial by the cumulative effect of the alleged errors. (Db28-31). "Even if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018) (citing State v. Jenewicz, 193 N.J. 440, 473 (2008)). Contrary to defendant's argument, this case was not entirely circumstantial. Rather, by defendant's own admission he was one of the two people who went into the business to rob the victim. Moreover, the victim sat on the witness stand and told the jury he was 100% sure both assailants beat him when him money was taken. The jury heard that eyewitness testimony and saw the images of the victim's injuries. So long as defendant's statement does not offend Miranda, which the State adamantly argues it does not, no other alleged error individually or cumulatively overcomes the overwhelming evidence of defendant's guilt.

POINT V: THE STATE CONCEDES THAT DEFENDANT'S ROBBERY AND CONSPIRACY TO COMMIT ROBBERY CONVICTIONS SHOULD MERGE.

Defendant's second-degree conspiracy to commit robbery formed the preparation to commit the first-degree robbery only. The State concurs with defendant that, despite his consent at sentencing, these convictions should merge. See N.J.S.A. 2C:1-8a(2).

CONCLUSION

For all the reasons set forth herein, the State respectfully urges this Court to affirm defendant's convictions, outside a limited remand for merger.

Respectfully submitted,

GRACE C. MACAULAY
CAMDEN COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT

By: *s/ Kevin J. Hein*
KEVIN J. HEIN
ASSISTANT PROSECUTOR

KEVIN J. HEIN [ID:910402012]
MOTIONS AND APPEALS UNIT
CAMDEN COUNTY PROSECUTOR'S OFFICE
200 FEDERAL STREET
CAMDEN, NEW JERSEY 08103
(856) 225-8400
EMAIL: HEINK@CCPROSECUTOR.ORG

OF COUNSEL AND ON THE BRIEF

DATED: JULY 8, 2024

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
ALISON PERRONE
Deputy Public Defender
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973.877.1200 · Fax 973.877.1239
The.Defenders@opd.nj.gov

JENNIFER N. SELLITTI
Public Defender

July 17, 2024

RACHEL NECKES
ID. NO. 381892021
Assistant Deputy
Public Defender

Of Counsel and
On the Letter-Brief

LETTER BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2455-22
INDICTMENT NO. 21-12-03234

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Camden County,
v.	:	
MACARTHUR MASON,	:	Sat Below:
Defendant-Appellant.	:	Hon. Kurt Kramer, J.S.C., and a Jury

DEFENDANT IS CONFINED

Your Honors:

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

TABLE OF CONTENTS

PAGE NOS.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant MacArthur Mason respectfully refers this Court to the Procedural History and Statement of Facts set forth in his brief previously submitted in this matter. (Db 4-15)[1]

LEGAL ARGUMENT

Mr. Mason relies on the legal arguments from his initial brief and adds the following:

POINT I

MR. MASON'S MIRANDA WAIVER WAS NOT KNOWING AND VOLUNTARY.

As discussed in Mason's opening brief, an officer may not "reinforce a false impression as to the seriousness of the sentence" that a defendant faces to induce that person's Miranda waiver. State v. Diaz, 470 N.J. Super. 495, 519 (App. Div. 2022). Here, the trial court stated several times on the record that Detective Egan misled Mason into believing that his interrogation would concern a minor drug charge instead of the significantly more serious allegation of armed robbery. (1T 90-22 to 91-2, 92-6 to 7, 93-1 to 14, 95-13 to 22, 98-7) Indeed, Egan intended to question Mason only about the robbery, Mason remained in custody only to be questioned about the robbery, and,

[1] Db: Defendant-appellant's appellate brief
Pb: Plaintiff-respondent's appellate brief

nonetheless, Egan gave a "deliberately vague and incomplete answer" when Mason asked about the basis of his arrest. Diaz, 470 N.J. Super. at 518. Because such deception renders a waiver involuntary, and because none of the State's arguments to the contrary are persuasive, the hearing court's order must be reversed.

The State argued in its brief that Egan's interrogation involved "no trickery and no deception as to the true reason" that Mason "was in custody." (Pb 18) This argument is belied by the record. Mason was arrested on September 30, 2021 for a minor drug offense. (1T 17-11 to 14, 18-23 to 19-1) The officer who arrested him notified Egan that Mason resembled the individual in a flyer that Egan created for his armed robbery investigation. (1T 17-15 to 16) Egan thus went to interrogate Mason about the armed robbery. Significantly, Egan testified that he did not intend to question Mason about the drug arrest from that day and the hearing court found that Mason only remained in custody so that Egan could question him about the robbery—the arresting officers had otherwise planned to release Mason on his own recognizance. (1T 20-3 to 7; 2T 5-23 to 6-1, 6-7 to 10)

Despite his intention to interrogate Mason about the robbery, Egan began the interrogation by telling Mason that he was "under arrest obviously today for whatever happened earlier." (1T 24-23 to 24) When Mason asked

Egan again about the basis of his arrest, Egan reinforced, "whatever you did today is what you're under arrest for, but I can't speak to you, because you're under arrest for that. . . . [s]o I have to read you your rights at this point."[2] (1T 25-11 to 17) Further, after reading the Miranda warnings and obtaining Mason's waiver, Egan continued questioning Mason about the drug arrest, asking "[w]hat happened today?" and if "[t]he cops pulled up?" (1T 28-13 to 22) It was not until after Egan secured Mason's self-identification that he shifted the conversation from the drug arrest that day to the armed robbery. Cf. State v. Cotto, 471 N.J. Super. 489, 520-21 (App. Div. 2022) (finding no evidence of strategic deception when the "the substance of the interrogation, from start to finish, focused" on the more serious crime of arson and not the traffic warrants for which defendant was arrested).

The record thus clearly demonstrates how Egan reinforced Mason's misunderstanding that their conversation concerned a minor drug offense, even though Egan intended all along to question Mason about the much more

[2] The State contended that Egan told Mason that he was going to speak with him about something "apart from what he was arrested for." (Pb 5) In support of its position, the State cites an exchange where Mason begins to explain what happened prior to the drug arrest, and Egan says, "That's all right. I don't want to get into that right this second. . . . I have to go through paperwork." (1T 25-2 to 5, 7T 172-10 to 16) This exchange clearly does not support the State's position and, moreover, the hearing court confirmed that no reasonable person in Mason's position would have known that he was being interviewed about a robbery and not a minor drug offense until after his waiver. (2T 8-5 to 17)

serious allegation of armed robbery. As this Court observed in Diaz, "[a]ffirmatively misleading an interrogee about the seriousness of the offense for which he or she was taken into custody strikes at the heart of the waiver decision." 470 N.J. Super. at 525; see also State v. Nyhammer, 197 N.J. 383, 407 (2009) (stating that evidence that an individual was tricked will render a waiver involuntary); State v. O.D.A.-C., 250 N.J. 408, 422 (2022) (stating that suspects should not be misled about the consequences of speaking in the Miranda process). Because Egan misled Mason, Mason's ensuing waiver cannot be knowing or voluntary.

Moreover, the hearing court itself stated on the record repeatedly that Egan misled Mason during his interrogation, further contradicting the State's claims. After reviewing the interrogation video and hearing all relevant testimony, the court emphasized that Mason was "misle[]d" to believe that the interrogation would be about a drug arrest. (1T 90-22 to 91-2) The court confirmed that certain circumstances of the interrogation were "pretty egregious," and stated five more times that Mason had been "misled." (1T 92-6 to 7, 93-1 to 14, 95-13 to 18, 98-7) Further, the court stated at the hearing and in its oral decision that "no reasonable person" in Mason's position "would have known that they were being interviewed for purposes of the robbery." (1T 90-24 to 25, 93-8 to 14, 95-15 to 22; 2T 4-5 to 17) These are factual findings

to which this Court must defer. Diaz, 470 N.J. Super. at 513. Consequently, the State's various assertions—including that Egan merely withheld information, did not give Mason any misinformation, and employed no trickery or deception (Pb 17-18)—contradict the record and the court's findings.

The State further attempted to distinguish State v. Diaz by arguing that, at the time of the interrogation, Egan did not have an objectively reasonable belief that Mason was responsible for the robbery. (Pb 18-19) But Diaz does not hinge on the presence of probable cause or even reasonable suspicion; instead, the Diaz Court pointed to the extent of probable cause in that case as an indication that the officers were strategically misleading the defendant to induce his confession.[3] 470 N.J. Super. at 524. Here, however, Egan's strategy

[3] The Diaz court also likely discussed probable cause in light of the status of State v. Sims, 466 N.J. Super. 346 (App. Div. 2021). At the time Diaz was published, the Appellate Division had recently held that an interrogee who is arrested and questioned prior to the filing of formal charges cannot voluntarily waive his rights if he is not informed of the crime for which he was arrested. Id. at 354. The Diaz Court thus addressed the issue of probable cause in response to the State's argument that the defendant's waiver was voluntary even under Sims because police did not have probable cause to charge him. 470 N.J. Super. at 527. Sims, however, was later overturned, 250 N.J. 189 (2022), and, here, Mason does not rely on its reasoning; Mason argues not that the police withheld information from him, but that they misled him as to the seriousness of the charges he faced. See Diaz, 470 N.J. Super. at 519 ("It is one thing for police to withhold information. It is another thing entirely for them to provide an explanation that creates or reinforces a false impression as to the seriousness of the sentence that defendant is facing."). That argument does not hinge on the presence of probable cause.

is clear from his own testimony because, while he stated that his purpose in interrogating Mason was only to investigate the robbery, he still spent the first several minutes of the interrogation asking Mason about the drug arrest and delivering deliberately vague answers about why Mason was in custody. Like Diaz, this approach was "designed or reasonably likely to convey" to Mason that he faced a far less serious sentence than he actually did. Id. at 527. And, similarly to Diaz, this deception rendered Mason's waiver involuntary. Ibid.

Lastly, the State argued that Mason's "significant prior contact with the justice system" leaned in favor of finding his waiver voluntary. (Pb 19-20) If anything, Mason's prior experience with law enforcement had the exact opposite effect; because Mason believed he was being held and questioned on a minor drug offense, he likely believed based on his prior experience that if he cooperated, he would be quickly released. This expectation would also be accurate, as the hearing court noted in its findings that Mason "was going to be released on his own recognizance for the drug offenses, but . . . was transported for a police interview with Detective Egan." (2T 5-23 to 6-1) Mason's prior experience thus weighs even further in favor of finding his waiver involuntary. Consequently, the hearing court's order must be reversed and Mason's convictions vacated.

POINT II

MR. MASON WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE INTERROGATION VIDEO ERRONEOUSLY INCLUDED DETECTIVE EGAN'S COMMENTARY ON MASON'S CREDIBILITY, GUILT, AND AN UNRELATED ARREST.

As Mason argued in his opening brief, the minimally redacted interrogation video included several types of inadmissible evidence that biased the jury's ability to reach a fair verdict. First, the video featured Egan's lengthy commentary on Mason's veracity and guilt. Second, the video contained Egan's references to Mason's unrelated arrest, the admission of which the State concedes was error. (Pb 27) The erroneous admission of this commentary created the danger that the jury's convictions were influenced by an officer's belief that Mason was guilty and a liar, and the perception that he had a propensity to commit crimes. Because this error is clearly capable of producing an unjust result, and because the State's arguments in opposition are unpersuasive, reversal is required.

A. Egan's lay commentary on Mason's credibility and guilt should have been redacted.

The interrogation video played for the jury included two types of improper lay commentary. First, Egan commented extensively on Mason's credibility—when Mason insistently denied entering the Peerless Casings

warehouse, Egan accused him of lying fourteen times. See State v. McLean, 205 N.J. 438, 453 (2011); State v. Frisby, 174 N.J. 583, 594 (2002) ("[T]he mere assessment of another witness's credibility is prohibited."); State v. C.W.H., 465 N.J. Super 574, 593 (App. Div. 2021) ("[A] witness should never offer an opinion that a defendant's statement is a lie.") (internal citations omitted). Second, Egan offered his view on Mason's guilt and on facts in evidence, repeatedly asserting that the church surveillance video clearly depicted Mason entering the warehouse. See McLean, 205 N.J. at 461-62 (confirming that officer testimony is "not a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself"); State v. Cain, 224 N.J. 410, 427 (2016) (holding that testimony regarding a defendant's guilt "intrudes on the exclusive domain of the jury as factfinder"). Egan's commentary thus invaded the jury's ken as an independent factfinder, biasing their ability to reach a fair verdict.

In response, the State argued that Egan's accusations of dishonesty did not constitute improper opinion testimony because Mason was "lying about clear, plain, and even undisputed evidence." (Pb 24) In particular, the State contended that the defense did not dispute that Mason was one of the two people who went into Peerless Casings. (Pb 24-25) This is incorrect. Defense counsel's summation was two-fold: first, he argued that Mason did not go

inside the warehouse, in part suggesting that whoever did must have known that Yocco had cash on hand; (9T 179-15 to 16, 180-23 to 182-10, 184-8 to 185-2) and, second, counsel argued that even if Mason was one of those people, the State still did not prove that Mason participated in the robbery. (9T 184-23 to 185-2) Mason thus contested throughout that he is not one of the blurry figures in the church video, leaving that issue and the veracity of Mason's denials squarely in dispute. It was thus the jury's exclusive task to evaluate Mason's credibility and a clear error for the court to allow Egan to bias the jury's assessment by repeatedly calling Mason a liar. See McLean, 205 N.J. at 459.

Further, not only did Egan impermissibly comment on facts and issues in dispute that the jury needed to resolve, but he also impermissibly commented on facts that were neither "clear," "plain," nor "objective," as the State suggested. (Pb 24-25) Egan's insistence that Mason was one of the individuals who entered the Peerless Casings warehouse was based on Egan's personal review of the church video footage. Notably, though, the church footage—which is the only recording of the Peerless Casings doorway—is far too blurry to identify who is at the building entrance. Egan thus concluded that Mason entered the warehouse based on a combination of (1) the church video and (2) Mason's self-identification in the RT-TOIC footage from a few blocks away.

But it was solely the jury's task to view that footage and determine whether the person that Mason identified on the RT-TOIC footage was the same blurry person from the church video, or whether the video was sufficiently unclear such that there was reasonable doubt as to the alleged assailant's identity. Egan's inadmissible commentary irreversibly tainted the jury's ability to make that assessment independently.

Accordingly, the interrogation video contained Egan's commentary on issues that were directly in dispute, neither "clear" nor "plain," and that should have been left to the jury to resolve. The State's claims that Egan's comments were not opinions but factual assertions (Pb 25) only cement the error, as our case law makes clear that lay-witness officers are not permitted to comment on factual questions they did not witness and that the jury "can evaluate for itself." See McLean, 205 N.J. at 462-63; State v. Singh, 245 N.J. 1, 17 (2021). The State's argument thus reaffirms that reversal is necessary.

B. Egan's reference to Mason's unrelated arrest should have been redacted.

In its response, the State concedes that Egan's statements in the interrogation video that reference Mason's unrelated arrest were improper. (Pb 27) The State contends, however, that reversal is not warranted because the error was either invited or harmless. (Pb 27) The State's arguments, however, are unconvincing, and reversal is necessary.

First, the court's failure to redact the mentions of arrest in the interrogation video—as well as its failure to issue an appropriate limiting instruction—were not invited by the defense. The invited error doctrine applies "when a defendant in some way has led the court into error." State v. Jenkins, 178 N.J. 347, 359 (2004). Consequently, "[s]ome measure of reliance by the court is necessary for the invited error doctrine to come into play." Ibid. Accordingly, defense counsel's mere failure to object to an error warrants plain error review but does not constitute invited error. See generally State v. Bailey, 231 N.J. 474, 490 (2018) (confirming that the invited error doctrine applies when a party "urged the lower court to adopt the proposition now alleged to be error") (emphasis added and citations omitted); State v. Corsaro, 107 N.J. 339, 345 (1987) (quoting State v. Pontery, 19 N.J. 457, 471 (1955)) ("The defendant cannot beseech and request the trial court to take a course of action, and . . . then condemn the very procedure he sought and urged.") (emphasis added).

In this case, defense counsel merely failed to object to the impermissible references in the interrogation video. Before trial, defense counsel noted to the court that he was still reviewing the interrogation video for redactions. (6T 9-5 to 15) Then, when the State introduced the video at trial, the court asked, "[w]e're good with the editing?" and both parties replied "[y]es." (7T 167-7 to

9) As the State observed, defense counsel's words were "consistent with his failure to object at any time to the mentions of [Mason's] unrelated arrests left in" the video. (Pb 28) (emphasis added) But, as stated above, the failure to object compels a plain error analysis, and does not constitute invited error. And, without a limiting instruction from the court, admission of this evidence created the distinct risk that the jury would believe that Mason had a propensity to commit crimes, unfairly influencing the jury's verdict. R. 2:10-2.

C. Admission of the minimally redacted video was plain error.

The erroneous admission of the partially redacted interrogation video was clearly capable of causing an unjust result. R. 2:10-2. The video included Egan's numerous accusations of dishonesty, impermissible opinions as to what the church surveillance footage depicts, and references to inadmissible propensity evidence. Each of these errors undermined Mason's credibility with the jury and unfairly biased the jurors' independent assessment of the evidence.

Additionally, the State's case was not overwhelming—no DNA, fingerprint, or eyewitness identification tied Mason to the robbery. It was thus the jury's task to determine whether the person in the RT-TOIC video was the same person as the individual on the church video, and whether that person entered Peerless Casings and committed the alleged crime. When Egan called

Mason a liar, espoused that he "saw [him] go in the building" and "saw [him] come out of the building," and disclosed Mason's unrelated arrest, he unduly influenced the jury's ability to conduct an independent evaluation. See Frisby, 174 N.J. at 596 (quoting Neno v. Clinton, 167 N.J. 573, 586-87 (2001)) (noting that juries ascribe "almost determinative significance" to a police officer's commentary). Because these errors could have influenced the verdict, Mason's convictions must be reversed.

CONCLUSION

For the reasons set forth in Point I, the order admitting Mr. Mason's statement and his ensuing convictions must be reversed. For the reasons set forth in Point II, Mr. Mason's convictions must be reversed and the matter remanded for a new trial. Additionally, the matter must be remanded for a resentencing to merge Mr. Mason's convictions, particularly given the State's consent on that issue. (Pb 38)

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender

BY: /s/ Rachel A. Neckes
RACHEL A. NECKES
Assistant Deputy Public Defender
Attorney ID No. 381892021

Dated: July 17, 2024