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Date: March 18, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2755-22T1

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior
v.	:	Court of New Jersey, Law
	:	Division, Monmouth County
MARC W. DENNIS,	:	Ind. No. 18-12-0202-S
	:	
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Lourdes Lucas, J.S.C.,
	:	and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

The State Grand Jury returned Indictment S-18-12-0202 charging defendant, Marc W. Dennis, with: two counts of second-degree official misconduct, contrary to N.J.S.A. 2C:30-2 (Counts One and Two); second-degree pattern of official misconduct, contrary to N.J.S.A. 2C:30-7 (Count Three); third-degree tampering with public records, contrary to N.J.S.A. 2C:28-7a (Count Four); third-degree theft by unlawful taking, contrary to N.J.S.A. 2C:20-3 and N.J.S.A. 2C:20-2b(2)(g) (Count Five); and fourth-degree falsifying public records, contrary to N.J.S.A. 2C:21-4a (Count Six). (Da 1 to 12)

After trial before the Honorable Lourdes Lucas, J.S.C. and a jury in April and May 2022, defendant was acquitted of Counts One, Four, and Six, and convicted of Counts Two, Three, and Five.[2] (Da 7 to 12) On March 15, 2023 2023, after merger, Judge Lucas sentenced defendant to serve an aggregate five-year prison term, all five years without parole, to forfeit his pension, and to pay the usual fees and penalties. (Da 16 to 19)

On May 12, 2023, defendant filed his notice of appeal. (Da 20 to 23)

STATEMENT OF FACTS

Defendant Marc Dennis was a New Jersey State Trooper who was tried in

[2] Although, as argued in Point II, infra, there was not a complete verdict taken on Count Two.

a single trial for offenses relating to two distinct sets of charges. The first set of charges (Da 1 to 3; Da 8 to 9; Da 11 to 12) related to defendant's alleged official misconduct in failing to properly recalibrate Alcotest devices. He was acquitted of all those counts, and, thus, they are not at issue in this appeal, and no testimony related to those allegations is recounted here. The second set of charges (Da 4 to 7; Da 10) alleged that defendant committed three offenses (official misconduct, a pattern of official misconduct, and theft) when -- while suspended for the Alcotest allegations, but still a member of the New Jersey State Police (hereinafter "NJSP") -- he either: (1) retained, or otherwise failed to surrender, an NJSP "wallet identification" (hereinafter "wallet ID") with the intent to benefit himself, or (2) displayed that wallet ID in any of four traffic stops in 2017 and 2018 with the intent to avoid a traffic ticket, when he should not have been in possession of that ID while suspended. As will be seen in the legal argument, numerous legal errors tainted the eventual guilty verdicts for all three of those offenses. The State presented the following evidence at trial with regard to the wallet-ID offenses.

Frances Scozzafava, an NJSP forensic photographer, testified that there are two principal kinds of NJSP official ID: a larger "leather billfold" that contains two separate identification cards -- one on each of the two panels of the billfold -- and the wallet ID, which is more the size of a credit card. (11T 89-1 to 14; 11T 92-1 to 6; 11T 96-21 to 97-16) Both types of IDs say, "Property of

New Jersey State Police" on them. (11T 93-7 to 17; 11T 95-3 to 7; 11T 97-11 to 100-25) The wallet ID states the date on which the holder was most recently promoted, not when the card was issued; thus, even a replaced card would have the same date on it as the most recent original, according to Scozzafava. (11T 99-7 to 22) Scozzafava testified that defendant was issued his billfold and wallet IDs in 2014, but that he filed a form in which he claimed he lost his personal wallet on January 4, 2016 -- including his wallet ID -- and he was issued a new wallet ID card that Scozzafava printed on January 15, 2016. (11T 104-7 to 107-25) Scozzafava admitted that there is no restriction on a member's possession of privately-printed NJSP business cards, and that those cards are not NJSP property. (11T 109-5 to 21)

Thomas Snyder was the first of many State witnesses to read[3] from the NJSP rules and regulations regarding the legal obligations of a trooper to surrender NJSP equipment when suspended. He told the jury that a suspended trooper is obligated to turn in all "badges, identification cards, and other [NJSP]-owned property and equipment." (10T 79-9 to 15) Sergeant William Cross told the jury the same thing. (11T 38-14 to 22) Cross also testified that defendant filed a report with the NJSP dated January 6, 2016, in which he claimed he lost

[3] Point III, infra, addresses the propriety of the judge's eventual decision to fail to instruct the jury on those legal obligations, leaving the recitations of Snyder and others to be the only time the jury heard about those requirements.

his wallet, including the wallet ID, on January 4, 2016, and that, suspecting he left it at a physical-therapy office in Brick, he contacted that office to see if anyone had found it, but the wallet was not recovered. (11T 32-13 to 34-5) On cross-examination, Cross admitted that there are "courtesy cards" that some troopers lawfully give out to whomever they please and that some officers or troopers will refrain from issuing a traffic ticket if presented with one of those cards. (11T 62-4 to 63-19) Cross also agreed that defendant followed proper procedure in reporting the wallet ID missing in the manner that he did. (11T 70-21 to 24)

Major Joseph Fraulo testified that defendant was suspended for the pending Alcotest charges on September 19, 2016 -- in other words, many months after defendant had already reported the original wallet ID missing. (122-18 to 20) At the time of the suspension, defendant was ordered to turn in all badges, ID cards, and NJSP-owned property. (11T 144-6 to 16) The prosecution had Fraulo testify to the jury about the requirements of turning in such items, as they had with other witnesses. (11T 136-7 to 17) Fraulo admitted, however, that there is nothing wrong with a trooper's possessing business cards that identify him as a trooper, because those are private and not the property of the NJSP, even though they are often made in the NJSP print shop. (11T 152-17 to 23)

Glen Ross, a former NJSP lieutenant, testified that he was defendant's supervisor in the Firearms Investigation Unit in September 2016, and on the day

of the suspension he retrieved defendant's badge, wallet ID, both sections of defendant's billfold ID, and much of defendant's other NJSP property from defendant, even giving him a ride home after he did so. (11T 156-16 to 23; 11T 158-17 to 165-18; 11T 169-23 to 24) Three days later, via a prearrangement with defendant, Ross and others retrieved the remainder of defendant's NJSP property, like uniforms, from his residence. (11T 165-19 to 174-22)

The State then called as witnesses the four local police officers who stopped defendant for minor traffic offenses in 2017 and 2018, while he was suspended and after his current IDs had been confiscated, and, each time, quickly let him proceed on with only a warning, not a ticket. In each instance, video footage of those very brief stops was played and some still photographs from some of those videos were also admitted into evidence; those items have been supplied to this Court on a flash drive. (Da 24 to 26) But, defendant submits that in none of those videos or photographs is it clear what, if anything, defendant displayed to the officers who stopped him. (Da 24 to 26)

Officer Robert Schroeck of the Lakehurst Police Department testified that he stopped defendant on March 27, 2017, and did not issue a citation. (14T 7-24 to 11-8) Schroeck testified, "I really don't write a lot of tickets, period," and that he exercises discretion in that regard whether or not the driver is a police officer showing police identification. (14T 13-9 to 21) Schroeck, however, believed he was shown an NJSP billfold (or "bifold") ID, not some other form

of NJSP ID, during that stop, but agreed that he was not sure. (14T 29-11 to 30-21; 14T 19-7 to 24-23) He also admitted that he could not say that he had ever seen an NJSP ID prior to this stop. (14T 26-13 to 27-2)

Officer Thomas Eichen testified that his November 18, 2017 stop of defendant in Berkeley lasted only 14 seconds, because, he believes, he was shown "some form of ID or badge that showed [defendant] was law enforcement,"[4] but he was not familiar with NJSP ID at the time and he could not say what he was shown. (14T 48-21; 14T 50-12 to 17; 14T 53-5 to 54-20) Eichen testified that he would not normally process a civilian stop so quickly and would not accept a business card as valid proof of law-enforcement status, but would normally "send them on their way" if he was shown some type of law-enforcement ID. (14T 47-4 to 12; 14T 44-16 to 45-6)

Office Pawel Wcislo stopped defendant on January 20, 2018 in Marlboro, and, he testified that defendant showed what Wcislo believed to be an NJSP ID, leading Wcislo to say out loud that defendant was "on the job" -- which Wcislo testified was shorthand for the fact "[t]hat you're a police officer," which was accurate.[5] (14T 58-13 to 59-16; 14T 63-12 to 16) Wcislo agreed that defendant never asserted to him that he was "on the job" or whether he was active duty or

[4] At the risk of stating the obvious, defendant was "law enforcement" at the time, just not on active duty; he was still a trooper, albeit a suspended one.
[5] See footnote 4, supra.

suspended. (14T 63-20 to 25) The encounter was very brief and Wcislo told defendant, "Have a good one," and ended the stop without issuing a ticket. (14T 63-9 to 11) Wcislo reiterated that he thought he saw "a police ID from the state police." (14T 97-24 to 25) But he admitted that he saw the alleged ID for just "[a] second," and also admitted that even if defendant had just shown a "PBA card" or courtesy "gold card," he also would have let him go without a ticket. (14T 83-11 to 85-19) Cross-examination also focused on a comparison between defendant's actual wallet ID, which he had turned in, and the card he seemed to be showing to Wcislo in the video and photos of the Marlboro stop, highlighting what seemed to be differences in color and details. (14T 91-17 to 97-12)

Toms River Police Officer Robert Westfall testified that he stopped defendant for a minor traffic offense on March 27, 2018, and that defendant displayed what Westfall called a "New Jersey State Police ID" at "chest level," after which Westfall released him without a ticket. (13T 84-9 to 88-12) The entire stop lasted "just shy of a minute," according to Westfall. (13T 160-22) He testified that what he saw was a "bifold wallet" with a card that said, "New Jersey State Police," and "had a golden triangle on it." (13T 86-16 to 87-18) Westfall "believed [defendant] was a New Jersey state trooper."[6] (13T 91-8; 13T 91-19 to 21) Westfall said that defendant possessed "something that was carried

[6] That belief was accurate. See footnote 4, supra.

by members of the New Jersey State Police. So, basically, I put two and two together and figured he was a trooper." (13T 91-13 to 21) Westfall admitted that his discretion to let any driver go without a ticket, even for DWI, is significant, "regardless of a card," and that people use all types of NJSP-adjacent cards, including "PBA cards" and "union cards" to "get out of a traffic stop." (13T 131-10 to 24; 13T 163-16 to 164-7) When Westfall later reported the incident to the NJSP -- which was after he recalled defendant's name as a suspended trooper (13T 104-24 to 106-1) -- he told Lieutenant Wesley Garland that what he saw was a "wallet bifold" containing an ID, and when he was shown the different types of official NJSP ID on cross-examination, he could not say which one he was shown except to say that it said, "New Jersey State Police" and "had a triangle on it." (13T 154-15 to 24; 13T 157-2 to 9) He agreed that defendant did not say anything about his status as a trooper, but that Westfall assumed it from whatever he was shown. (13T 157-12 to 21) Westfall found defendant to be "cocky and condescending" during the stop, which, he admitted, "had a lot to do with" why he pursued the matter by reporting it to the NJSP. (13T 178-2 to 24)

Laura Kushner, an NJSP forensic photographer, testified that she was entrusted with collecting video footage from two of the stops -- Lakehurst and Marlboro -- and enhancing it to create still photographs. (13T 43-19 to 47-11) But she admitted on cross-examination that while she initially told a supervisor

that one of the photos seemed to depict the official NJSP wallet ID, she cannot say "positively" that that is the case. (13T 70-3 to 13)

Lt. Garland testified that Westfall's report to the NJSP prompted an investigation, and he also, like a number of witnesses before him -- but not the judge -- told the jury that a suspended trooper has certain duties regarding turning in official IDs. (11T 180-6 to 11; 11T 192-23 to 193-18) Garland testified that on June 21, 2018, he contacted defendant's then-attorney and requested that defendant surrender any NJSP ID that he might still have in his possession, and that, when defendant did not surrender any additional ID as a result, a search of defendant's person, entire home, and car was undertaken pursuant to a warrant on August 22, 2018, but that search revealed no retained ID cards. (11T 199-22 to 207-5; 12T 91-1 to 9)

Garland admitted that he "mistaken[ly]" told the grand jury, and incorrectly wrote in a report, that the two wallet IDs that were issued to the defendant would have different dates on them. (11T 215-1 to 11; 11T 219-24 to 220-4) He also agreed that NJSP troopers are allowed to carry business cards and need not turn those in when they are suspended because those cards are not NJSP property. (11T 216-18 to 218-4)

Eric Barlow, Bureau Chief of the NJSP Investigation Bureau, who supervised the investigation into the wallet-ID allegations (12T 95-16 to 96-4), testified similarly to Garland regarding the letter to defendant's attorney and the

subsequent failed search of defendant's person, home, and car, but he also offered an improper lay opinion on direct examination that is the subject of Point V infra: "What we came to realize was that once [defendant] turned over the credit card ID or the wallet ID, he now had a second one, which was inevitably the first one which he [had] reported stolen or missing. So we knew he was in possession of one." (12T 97-4 to 9) (emphasis added)

The defense case was as follows. Defendant testified that he graduated the NJSP academy in May 2001. (15T 139-8 to 9) He testified that he had "hundreds" of NJSP business cards, in order to be able to leave them with anyone in a court or agency who might need to contact him. (16T 59-13 to 60-24) He also had a union card and courtesy cards, which he would hand out to family or friends in case they were to "get stopped in a motor vehicle" for "some type of traffic violation." (16T 59-18 to 60-8) The business card stated that he was with the NJSP, and listed his rank, name, phone number, email address, and the name of the unit he was assigned to. (16T 66-7 to 10) That was the card he would display if he were stopped for a motor-vehicle violation. (16T 67-4 to 7) He kept it in his wallet "right in front of my license," he testified. (16T 67-10 to 12) He denied displaying a wallet ID in any of these stops because he no longer had one in his possession once he was suspended. (16T 72-9 to 22) He also testified that the business card that he had "looks similar to the wallet ID." (16T 64-6)

Defendant testified that he lost his wallet on the afternoon of New Year's Eve 2015, and believes he did so when it fell out of a pocket in "baggy sweatpants" that he was wearing at a physical-therapy appointment at Brielle Orthopedics in Brick. (16T 79-2 to 80-19) He noticed that the wallet was missing a few hours later when he was at the home of his girlfriend, Christine Ogle, in Toms River. (16T 81-9 to 16) Inside the wallet were his NJSP wallet ID, along with credit cards, cash, and other cards. (16T 85-13 to 23) His immediate reaction was to search his car and around Ogle's home, and then to drive back to Brielle Orthopedics, but they were closed by that point. (16T 81-18 to 82-4) He even searched garbage cans and the parking lot outside that orthopedic office, but to no avail. (16T 82-2 to 4) Thereafter, Ogle contacted that office and there was some "correspondence" between Ogle and that office, but again to no avail, eventually leading to defendant filing an official report with the NJSP regarding the missing wallet ID. (16T 82-14 to 84-7) Defendant testified that he referenced January 4, 2016, in that report as the date he lost the ID because he had waited a few days to see if the wallet would turn up. (16T 83-16 to 84-18) That report was dated January 6, 2016. (16T 89-3 to 11; 16T 181-19 to 182-8)

Defendant testified that he believes he received his replacement wallet ID on January 16, 2016. (16T 90-15 to 91-3) He also filed a missing-property report on January 19, 2016, with the Brick Police Department because his supervisor at NJSP ordered him to do so. (16T 89-18 to 25; 16T 183-9 to 184-2) Defendant

never found the missing wallet ID. (16T 91-19 to 21)

Defendant testified that he never learned that there was a criminal investigation going on until August 2016 when investigators came to his house to interview him regarding the Alcotest allegations. (16T 91-10 to 18) Eventually he was charged and suspended on September 19, 2016, when he surrendered all his equipment, including his now-replaced wallet ID and his bifold/billfold ID. (16T 96-5 to 97-6; 16T 101-6 to 102-6)

Defendant testified that at the Toms River stop, he did not show Officer Westfall any sort of license or ID, not even a business card, because Westfall seemed to recognize that defendant was a trooper, after which Westfall let him go without a ticket. (16T 114-19 to 116-3) It would not have been unusual for Westfall to recognize defendant as a trooper, because when defendant was in the Alcohol and Drug Testing Unit, he was a sergeant and the field coordinator for multiple counties, responsible for training "about a hundred" law-enforcement agencies in New Jersey. (15T 153-13 to 155-21)

Defendant testified that he did not specifically recall the stop in Lakehurst conducted by Officer Schroeck, but that, if he displayed something to Schroeck, it would have been his business card, not an official NJSP ID that he no longer had at the time. (16T 116-7 to 15) When the Schroeck/Lakehurst video was played in court, defendant testified that the video is not clear but that it appears to be his business card that he showed. (16T 139-7 to 140-17) He testified

similarly with respect to the Berkeley stop by Officer Eichen, which he also did not specifically remember, but he again noted that the business card is "the only thing I had" by that point. (16T 116-19 to 117-6; 16T 141-4 to 7)

Defendant testified that Officer Wcislo, who conducted the Marlboro stop, "looked familiar," possibly from an Alcotest training session that defendant had conducted, and defendant testified that he showed Wcislo his business card. (16T 117-7 to 20) He agreed that the phrase "on the job" used by Wcislo in that stop was "common jargon" used simply to indicate that one is a police officer. (16T 141-20 to 22) When he viewed the video from that stop, he testified that he clearly "showed something," but it was blurry and had to be the business card, not an NJSP ID, because the business card was "the only thing" he had. (16T 142-4 to 9)

On cross-examination, defendant denied that police officers are the only people who get the courtesy of officer discretion in a traffic stop. (16T 169-1 to 23) As discussed further in Point V, infra, the prosecutor also grilled defendant on whether his business card violated an NJSP SOP (Standard Operating Procedure) by its appearance -- an utterly irrelevant, but highly prejudicial, topic because defendant was not charged with using an improper business card to avoid a traffic ticket. (16T 173-14 to 175-18)

Christine Ogle testified that she was a passenger in the car with defendant for the Toms River and Marlboro stops, and that, in the Toms River stop,

defendant did not show any ID; rather, Officer Westfall appeared to simply recognize defendant as a trooper. (15T 37-6 to 23) With regard to the Wcislo stop, Ogle first testified, "That stop was so quick; it was like he knew Marc, is how I would interpret that stop." (15T 51-21 to 52-2) But on cross-examination, she admitted that the video appeared to show that defendant displayed something to Wcislo. (15T 77-2 to 17) Ogle also testified that she spent a considerable amount of time for a few days -- starting on New Year's Eve 2015 when defendant lost his wallet – trying to help him locate that wallet, including sending over 11 pages of emails back and forth to Brielle Orthopedics regarding the wallet. (15T 39-13 to 40-8; 15T 46-3 to 51-8; 15T 77-24 to 78-21) Ogle recalled that the NJSP reissued defendant a new wallet ID, but, once he turned that one in upon being suspended, she never saw him in possession of a wallet ID again, only a business card that she would see in his wallet whenever she would go into it -- which she would do "numerous times" to retrieve her own ID after she and defendant would go out together, when she would have him hold her ID for the evening. (15T 51-18 to 20; 15T 52-13 to 53-21) Ogle testified further that defendant's business card resembles the official NJSP wallet ID in appearance. (15T 52-3 to 8)

Lieutenant Christopher Dudzek of the Toms River Police Department testified that he worked with defendant as a seminar instructor "a number of times" in "a number of different locations." (15T 99-12 to 100-21; 15T 106-20

to 22) He explained how Westfall's decision to report the matter directly to the NJSP was an example of a "definitely more than frowned upon" instance of not following the proper chain of command in the Toms River Police Department, and that the proper method would have been to report the matter to a sergeant in-house, who then would have reported to Dudzek himself. (15T 108-21 to 109-22; 15T 125-5 to 25; 15T 131-17 to 132-2)

Defendant also presented two law-enforcement witnesses to vouch for his reputation for truth and veracity, which one even called "[i]mpeccable." (14T 217-5 to 10; 14T 201-2 to 15)

LEGAL ARGUMENT

POINT I

IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO SEND THE JURY BACK FOR MORE DELIBERATION -- AFTER THE JURY'S SECOND ANNOUNCEMENT THAT IT HAD A PARTIAL VERDICT ON SOME COUNTS, BUT WAS DEADLOCKED ON OTHERS -- AT 4:45 PM, WHEN THE JUDGE ALREADY HAD KNOWN FOR OVER A WEEK THAT MORE THAN ONE OF 13 JURORS WERE ON VACATION AS OF THE NEXT MORNING. THAT ERROR WAS EXACERBATED BY BOTH: (1) THE JUDGE'S FAILURE TO FOLLOW THE MODEL SUPPLEMENTAL INSTRUCTION WHICH INQUIRES OF THE JURY WHETHER FURTHER DELIBERATION MIGHT BE BENEFICIAL OR FUTILE, AND (2) THE JUDGE'S STATEMENT TO THE JURY AT 4:45 PM THAT SHE WOULD "DETERMINE HOW LONG WE CAN HAVE YOU HERE TODAY." (RULINGS AT 21T 41-13 TO 43-1; 21T 45-11 TO 46-15)

The verdict in this case was returned at 5:08 p.m. on May 10, 2022, after the jury twice reported deadlocks that day. (21T 46-17 to 22) As will be demonstrated in this point, the manner in which that verdict was reached was via an unconstitutional trampling of defendant's Sixth Amendment and state-constitutional rights to full and fair jury deliberation and his Fourteenth Amendment and state-constitutional rights to due process, and, consequently, the convictions should be reversed and the matter remanded for retrial.

Eight days before the verdict, on May 2, the post-testimonial portion --

i.e., summations, jury instructions and deliberations -- of the trial was delayed for one week (until May 9) because of a positive COVID test from someone who had been present in court on April 28. (17T 47-15 to 50-8; 17T 60-3 to 11) At that time, on May 2, the judge was made aware that three of the 13 jurors were going to be unavailable after May 10 because those three were going on vacation as of May 11. (17T 47-15 to 59-13) At the time, on May 2, the prosecutor asked whether, in light of that tight schedule, it would be possible to restart the trial on May 5, instead, since "that would be five days past the point of [COVID] contact."[7] (17 T 59-4 to 24) The judge denied that request, and also dismissed defense objections that if the trial were not restarted until May 9, the "jury may rush through the jury-deliberation process because they don't want to miss those particular trips [on May 11]," by noting that she would "reassess as we move forward in the week." (17T 59-17 to 61-19)

On May 9, the attorneys gave their summations and the judge read the jury instruction, after which the jury was dismissed at 4:30 p.m. for the day, without having begun deliberations. (20T 210-3 to 7) Obviously, at that point, that meant that the jury had one day at most for deliberation: May 10.

That next day, May 10, defense counsel asked the judge early on, before deliberations had begun, to check with the jurors to see if their vacation plans

[7] May 5 is actually seven days after April 28, not five. The prosecutor actually undersold what was a good idea.

had changed, but the judge refused, ruling that she was "not going to preemptively anticipate that for some reason they are going to be rushed." (21T 11-22 to 17) The jury then retired to deliberate at 9:28 a.m. (21T 18-18) The jurors returned to the courtroom at 12:27 p.m. and took a lunch break until 1:42 p.m., when they returned to the courtroom again and deliberated until 2:22 p.m., when they announced their first deadlock: "Judge Lucas, we're in a deadlock and not sure what to do. Can you advise?" (21T 21-15 to 23-23)

At 2:26 p.m., the judge read the standard State v. Czachor, 82 N.J. 392, 406 (1980), instruction to tell the jurors to return to deliberations, but not to surrender one's honest convictions while still remaining open-minded to the views of others. (21T 25-18 to 26-9) At that point, the jury returned to its deliberations, and defense counsel again raised the prospect that time was getting tight before three jurors' vacations, but the judge said she was "not going to engage in speculation" about the duration of the deliberations to come. (21T 26-21 to 29-19)

At 3:56 p.m., while the jury was still deliberating after the first deadlock, defense counsel indicated to the court that he had learned from the judge's "assistant" that two jurors (of 13) still had a planned vacation the next day and that he was concerned that the jurors "are going to rush to get a verdict to get on their plane," but the judge again refused "to speculate"; however she said she would "check in with the jurors" at "around 4:30" p.m. "and we will go from

there." (21T 33-12 to 34-23) Specifically, the judge promised to "ask them [at 4:30] to confer as to whether they want to continue deliberations or whether they would like to come back tomorrow, and then we will see where we are at that juncture." (21T 34-22 to 35-2) (emphasis added).

But, at 4:35 p.m., the parties reassembled in court and learned that the jurors had just announced another deadlock, and this time the jury was more specific. The note not only announced the continuing deadlock, but specifically referenced the imminent vacation of two of the members, as well as the fact that the jury had reached a verdict on some counts: "Judge Lucas, we are still deadlocked and two of the jurors are leaving town on vacation tomorrow. What should we do? We made a decision on some of the counts, but not on all."[8] (21T 35-25 to 36-10). The State raised the prospect of recessing the trial, mid-deliberations, and resuming the matter when the vacationing jurors returned, and the judge said she would consider that and "would certainly hear from the defense" on that topic, after which she brought the jury back into court, allegedly

[8] Notably, because the jury announced that it had a partial verdict, even if more than 13 jurors had been left on the panel at the time, the judge would not have had the option of sending the jury home, excusing the two jurors whose vacations were looming, and bringing back the jury with two alternates to "deliberate anew" on the case. Both State v. Horton, 242 N.J. 428, 430-431 (2020), and State v. Corsaro, 107 N.J. 339, 354 (1987), hold that it is reversible error to substitute a juror (or jurors) once a jury has announced that it has reached a partial verdict. This was, thus, the last day of deliberation no matter what.

to "continue those discussions on those options." (21T 38-5 to 40-12)

But then, inexplicably, there was no "discussion." Instead the judge gave another Czachor instruction, told the jurors that she was going to "determine how long we can have you here today," and she sent them back to deliberate more at 4:45 p.m., telling them additionally only that they could "notify the court again" and that "there are options," but she never asked the jurors -- as the model instruction indicates she should have done upon a second deadlock (Da 27) -- whether further deliberations would likely be fruitful or whether she should just take a partial verdict. (21T 41-13 to 43-1) (emphasis added)

When the jury left the courtroom, defense counsel objected that sending the jury back into deliberation at that point -- with vacations looming and two deadlocks already announced – was causing the jurors to be unduly "pushed to try and make a decision." (21T 44-25 to 45-5) The judge overruled the objection, claiming that no one on the jury indicated an objection to deliberating further, but obviously ignoring the fact that she never posed such a question to them -- meaning that a juror with an "objection" would have had to boldly assert that objection in open court, an unlikely scenario when the note had referenced the looming vacation issues but the judge had seemingly ignored that concern. (21T 45-11 to 46-15) Unsurprisingly, having announced two deadlocks, having had its vacation concerns ignored, and having been told that the judge was looking into how late she could keep then there, the jury announced its unanimous

verdict on all counts, just moments later, at 5:08 p.m. (21T 46-17 to 22)

Defendant urges on appeal that the judge's handling of the reported jury deadlocks inappropriately coerced a verdict in violation of the defendant's Sixth Amendment right to a jury trial, his Fourteenth Amendment right to due process and his corresponding state-constitutional rights. Consequently, defendant's convictions should be reversed and the matter remanded for retrial.

First and foremost, under these circumstances -- knowing full well that vacations were imminent, that a partial verdict had been reached, and that it was nearly 5 p.m. on what was necessarily the last day of deliberation -- the judge should have taken a partial verdict and granted a mistrial on the deadlocked counts after the second deadlock announcement. "A judge has discretion to require further deliberations after a jury has announced its inability to agree, [State v.] Figueroa, 190 N.J. [219,] 235 [(2007)], 'but exercise of that discretion is not appropriate "if the jury has reported a definite deadlock after a reasonable period of deliberations."'" State v. Johnson, 436 N.J. Super. 406, 422 (App. Div. 2014), quoting State v. Adim, 410 N.J. Super. 410, 423-424 (App. Div. 2009), quoting Czachor, 82 N.J. at 407 (emphasis added). Here, it is hard to understand, with the looming issue of the next-day vacations, how the court could deem the second expression of this jury's deadlocked status not to have declared a "definite deadlock," to use the words of Czachor and Adim, that simply should not have been broken by an instruction that made it seem as if the jury would be

stuck deliberating into that evening. This was a "definite deadlock," to quote Czachor, under these circumstances – i.e., in which one day of deliberation was all that was possibly going to occur and everyone knew the time was very late on that day -- and the answer to that deadlock was to declare a mistrial.

Alternatively, however, at a minimum, even if the second "redeliberate" order could somehow have been justified at 4:45 p.m., the way it was given here was simply too coercive to pass constitutional muster. By the second deadlock announcement, after two prior Czachor instructions, the case cried out for the model supplemental charge (Da 27) to be followed. That model charge is, according to the footnote that accompanies it, designed to be given after a jury has already once been given a Czachor instruction and returned as deadlocked. (Da 27) The instruction, which is more of a question, reads:

> You have indicated that your deliberations have reached an impasse. Do you feel that further deliberations would be beneficial or do you feel that you have reached a point at which further deliberations would be futile? Please return to the jury room to confer, and advise me of your decision in another note.

(Da 27)

While it was fine hours earlier for the judge to give the first Czachor instruction, at 4:45 p.m. on what was necessarily the last day of deliberation, there simply was no excuse for not giving that supplemental instruction and making such an inquiry here. It is almost like the judge knew what the obvious

answer was and wished to avoid that answer. This was a jury note that was very clearly stating that the jury was "deadlocked" on some counts, that it was very concerned about the looming vacations of two jurors the next day, and that it had reached verdicts on some other counts. And yet the second "continue to deliberate"/Czachor instruction not only ignored two of those three concerns in that note in favor of simply telling the jurors to keep trying, but it also hinted to the jurors that they were in for a long haul when the judge said that she was going to "determine how long we can have you here today." (21T 42-13 to 14)

Defendant urges that the judge's refusal at 4:45 p.m. on the last day of deliberations to follow the model supplemental instruction and inquire whether further deliberations would be fruitful after the second deadlock, in concert with her comment that she would see how late she could keep the jury and her failure to acknowledge both the jury's concerns about the vacation issue and the fact that the taking of a partial verdict was an option combined -- under these specific circumstances[9] -- to create an atmosphere that was unduly coercive of a verdict.

[9] It is the combination of all of these circumstances in this case that distinguishes the matter from the contrary decision in State v. Harris, 457 N.J. Super. 34l 48-51 (App. Div. 2018). Harris involved the failure of the trial court to make the supplemental model-charge inquiry of the jury before delivering a third Czachor instruction -- an issue this Court deemed "a close question" when affirming the trial judge's decision to fail to make the supplemental inquiry -- but Harris did not have any of the additional concerns of this case. There was not a jury in Harris that had was about to lose two of its 13 members to a vacation; there was

The whole point of a Czachor instruction is to avoid coercion of a verdict. The instruction emphasizes that jurors should not surrender honest beliefs simply to reach a verdict. 82 N.J. at 406. Czachor represents a state-law departure from the federal rule. That federal rule approves of a so-called "dynamite" instruction, first sanctioned in Allen v. United States, 164 U.S. 492 (1896), which focuses on the need to return a verdict and further directs its attention to the weak links in the chain -- the holdout juror(s) in the minority -- and questions whether the holdout(s) ought not to knuckle under, in effect, and accept the view of the majority. Despite prior New Jersey case law to the contrary, Czachor deemed the Allen instruction to be too coercive to be used in New Jersey and mandated that a new instruction be used in future cases. 82 N.J. at 402-407. An instruction which appears to emphasize pressure to return a verdict is "inconsistent with jury freedom and responsibility" and "does not permit jurors to deliberate objectively, freely, and with an untrammeled mind." Id. at 402.

Here, the judge's failure to inquire after the second deadlock whether

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not a situation that involved a 4:45 p.m. second deadlock on what was necessarily the last day of deliberations; and there was not a judge applying subtle pressure by telling the jury that she would see how late she could keep the jury there that night. Additionally, the Harris jury had not reached a partial verdict that could have been taken. This is a very different situation than Harris, and not remotely a "close question" regarding the need to inquire whether further deliberation would be futile.

further deliberations would be futile was, in light of all the circumstances of this case, itself a coercive act. This was a jury that was trying hard to do its job, and had reached a partial verdict, but was also up against a serious deadline caused by the vacations of two of its members the next day. But the court ignored those specifically-expressed concerns, at 4:45 in the afternoon, and instead told the jury that she was looking into how late she could keep them. The case law has made it clear that reading the Czachor instruction is not a talisman that necessarily protects the resulting verdict from claims of error. In Figueroa, 190 N.J. at 227, telling the jury at the conclusion of the Czachor instruction, "I got to be here tomorrow, I got to be here Friday. I got nothing going on Saturday, and Giants are playing away on Sunday, so we will be here as long as it takes you to go through this process," was seen as a "fundamental" violation of the spirit of Czachor which unduly coerced a verdict. The Figueroa Court made clear that the proper focus in analyzing the giving of such an instruction is whether, in the end, the jurors may well have felt that the judge was telling them, in a subtle or not-so-subtle fashion, that they must return a verdict: "Based on our review of this record, we cannot agree that the jurors were not in fact under the impression that they would be required to continue to deliberate for as long as it might take to reach unanimity." Id. at 242. In such an instance, a trial judge effectively converts a benign Czachor instruction into a command as coercive as the one given in Allen.

Likewise, in Adim, 410 N.J. Super. at 427-428, the Appellate Division reversed convictions which resulted when the trial court gave almost all of the approved Czachor language in the instruction to the deadlocked jury, but also included language that appeared to emphasize the rendering of a verdict, and gave a summary of the evidence which appeared to underscore how uncomplicated the case was from an evidential standpoint. The Adim court interpreted Czachor to reject the notion that it is sufficient merely to read the language of the Czachor instruction, which dulls the coercive effect of an Allen charge, when the manner in which that instruction is given, on the whole, could nevertheless be interpreted by a reasonable juror to push the jury towards unanimous agreement: "In Czachor the Court concluded that it would no longer rely on the assumption that a jury charge tending to coerce agreement could be 'overcome' or 'balanced' by language to the effect that no juror 'should surrender his conscientious scruples or personal convictions.'" Id. at 429 (internal citations omitted). Where the instruction, as given in a flawed manner, leaves the reviewing court with a doubt that the jury would have returned a verdict if the matter had been handled properly, reversal is required. Id. at 430.

Thus, Figueroa and Adim both rest on the commonsense notion that the positive aspects of a Czachor instruction can be undercut by other actions of the trial judge to a degree that the resulting verdict must be reversed as potentially coerced.

In the instant case, under these specific circumstances, once the jury declared a second deadlock at 4:45 p.m., stated that the jurors were concerned because two of them had a vacation the next day, and told the judge they had reached a partial verdict, the proper course of action could not possibly have been simply to steamroll over the jury's deadlock declaration and order the jury to keep deliberating at that late hour, without addressing the vacation issue and without inquiring: (1) whether further deliberations would be futile and (2) whether she should instead take a partial verdict. Moreover, adding to the jurors' worries by musing out loud in front of them about seeing how late she could keep them there made the situation even more coercive, as in Figueroa and Adim. In light of the clear command from the case law, the judge's handling of the second deadlock, under these circumstances, ran the extreme risk of coercing the verdict that resulted only minutes later, and, thus, the convictions must be reversed and the matter remanded for retrial.

POINT II

THE JURY NEVER RETURNED A VERDICT FOR ALL OF THE ELEMENTS OF OFFICIAL MISCONDUCT; THEREFORE, THE VERDICTS FOR OFFICIAL MISCONDUCT AND A PATTERN OF OFFICIAL MISCONDUCT MUST BE REVERSED. (NOT RAISED BELOW)

Official misconduct is committed when a public servant, with a purpose to obtain a benefit, either commits an unauthorized act as part of his official

function, or refrains from committing an act that he is required to do as part of his official function. N.J.S.A. 2C:30-2. With respect to Count Two charging official-misconduct related to the retention or misuse of the NJSP wallet ID, for reasons that are impossible to understand, the judge decided to sever the returning of the official-misconduct verdict into two questions: first whether defendant was "guilty" or "not guilty" of all the other non-benefit elements of official misconduct -- i.e., whether defendant committed an unauthorized act or refrained from committing an act that he was duty-bound to commit -- and then a "Yes/No" question about the "benefit" element: "Did the defendant obtain or seek to obtain, for himself or another, a non-pecuniary benefit, or did he seek to injure another or deprive another of a benefit?" (Da 13 to 14)

The jury returned a verdict of "guilty" when they were asked about all of the other elements of official misconduct. (Da 13; 21T 49-19 to 51-14) But neither the verdict sheet (Da 14) nor the transcript of the verdict shows a verdict for the "benefit" element. (21T 49-19 to 51-14) In other words, the jury never found defendant guilty of all of the elements of official misconduct.

This legal point is simple: there never was a valid verdict for official misconduct, and defendant was denied his right to a valid jury verdict under the Sixth Amendment, to due process and a fair trial under the Fourteenth Amendment, and to all of those right as set forth in the state constitution. The law could not be more clear that, as a constitutional matter, "there is simply no

substitute for a jury verdict." State v. Vick, 117 N.J. 288, 291 (1989) Without a jury verdict for official misconduct, there obviously could also be no valid jury verdict for a pattern of official misconduct. Consequently, both of those convictions should be reversed and those counts remanded for retrial.

POINT III

THE PARAMETERS OF THE LEGAL DUTIES OF A PUBLIC SERVANT ARE A LEGAL MATTER THAT SHOULD BE INSTRUCTED TO THE JURY BY THE JUDGE. NOT ONLY WERE THEY NOT INSTRUCTED HERE -- REVERSIBLE ERROR UNTO ITSELF -- BUT THEY WERE INSTEAD ONLY THE SUBJECT OF TESTIMONY FROM MULTIPLE FACT WITNESSES, THEREBY ALLOWING THE JURY TO PICK AND CHOOSE WHAT OF THAT FACTUAL TESTIMONY IT DECIDED TO CREDIT. (PARTIALLY RAISED BELOW; RULINGS AT 14T 138-10 TO 11; 14T 140-10 TO 14; 16T 215-13 TO 23; 17T 82-16; 20T 168-23 TO 184-20)

Official misconduct, as indicted in this case, is committed when a public servant, with a purpose to obtain a benefit, either: (1) commits an act relating to his office, but "constituting an unauthorized exercise of his official functions," knowing that it is unauthorized, N.J.S.A. 2C:30-2a, or (2) "refrains from performing a duty which is imposed upon him by law." N.J.S.A. 2C:30-2b. It is black-letter law that it "is the court's function," not the role of witnesses, "to ascertain the law" governing an allegation of official misconduct, "and explain it to the jury." State v. Grimes, 235 N.J. Super. 75, 80 (App. Div. 1979).

"Whether a statutory duty is imposed upon a public officer is a legal issue," State v. Deegan, 126 N.J. Super. 475, 482 (App. Div.), certif. den. 654 N.J. 283 (1974) (emphasis added), and, thus, part of the law that must be explained to the jury by the judge under Grimes. See also State v. Brady, 452 N.J. Super. 143, 165-166 (App. Div. 2017) (dismissing an official-misconduct indictment when the prosecutor presenting the matter to the grand jury did not explain the legal duties of the public official in question to the grand jury), citing Grimes, 235 N.J. Super. at 79. Because here the jury instruction contained absolutely no explanation of the legal duties of a suspended trooper regarding turning in ID or displaying ID, and, instead, those duties were only the subject of testimony from fact witnesses, which allowed the jury to believe, or disbelieve, any aspect of that testimony -- as with any factual testimony -- the jury was inappropriately left without a proper and full legal definition of all of the elements of official misconduct. Consequently, defendant's rights to a proper jury verdict under the Sixth Amendment, to due process under the Fourteenth Amendment, and to the corresponding rights under the state constitution were violated, and his convictions must be reversed and the matter remanded for retrial.

The jury instructions plainly were lacking any legal explanation of the duties of a suspended trooper to turn in NJSP ID or to refrain from using NJSP ID. (20T 168-23 to 184-20) All those instructions said about the scope of a suspended trooper's duties was to repeat the State's allegations from the

indictment (20T 168-23 to 170-19), and to note that the State must also prove that the defendant was on notice of his legal duties of a trooper, because one must know a duty exists in order to commit official misconduct, under Grimes, 235 N.J. Super. at 89. (20T 173-24 to 174-22)

Put simply, under Grimes, Deegan, and Brady, the scope of the legal duties of a suspended trooper are a matter of law, to be explained by the judge in the jury instructions, not a matter of fact for the State to prove to the jury. Yet the jury instructions in this case never explained those legal duties, and instead the sole source of any explanation of the law governing those duties came from the State's factual witnesses, who, as noted in the Statement of Facts, were asked a number of times to tell the jury about the parameters of a suspended trooper's duties. Why does that matter? Because, unlike the jury instructions, which the jury is obligated to follow, factual testimony can be believed in whole, in part, or not at all by a jury. State v. Ernst, 32 N.J. 567, 583 (1960). The scope of a trooper's duties was simply not a matter of fact for the State to prove; it was a matter of law for the judge to instruct, and she did not do so.

While defense counsel did not object at the time of the actual jury instruction, the matter arose a number of times during the trial (11T 4-17 to 9-17; 14T 112-10 to 113-7; 14T 134-24 to 140-14; 16T 215-13 to 23; 17T 82-12 to 15), and, siding with defense counsel's position, the judge consistently stated that she was "unquestionably" (14T 138-10 to 11) going to charge the jury on

the law regarding the duties of a suspended trooper because those duties "are a matter of law and not a factual question." (14T 140-10 to 14; 16T 215-13 to 23; 17T 82-16) Then she never did so.[10] (20T 168-23 to 184-20)

One of the most basic principles of New Jersey criminal law is that "[a]n essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. McKinney, 223 N.J. 475, 495 (2015), quoting State v. Afanador, 151 N.J. 41, 54 (1997); see also State v. Concepcion, 111 N.J. 373, 379 (1988) ("Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial"). "[T]he trial court has an absolute duty to instruct the jury on the law governing the facts of the case." State v. Butler, 27 N.J. 560, 595 (1958). The charge must provide a "'comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.' State v. Green, 86 N.J. 281, 287-288 (1981)." Concepcion, 111 N.J. at 379. "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations. Thus, the court must explain the controlling legal principles and the questions the jury is to decide." State v. Martin, 119 N.J. 2, 15 (1990). Therefore, instructional errors on essential

[10] Because the judge and counsel discussed this issue so many times, and the judge sustained the defense objections at those times, but then no objection was lodged at the actual time of the instruction, appellate defense counsel has labeled this error "partially raised below."

matters, even in cases where those errors are not raised at all below, are traditionally deemed prejudicial and reversible error because they interfere with the jury's proper assessment of the defendant's culpability. State v. Rhett, 127 N.J. 3, 5-7 (1992); Concepcion, 111 N.J. at 379.

More specifically, it will always be reversible error for a jury instruction to fail to explain all the correct elements of a crime, even where the jury would have almost certainly found those elements had it been properly instructed. State v. Vick, 117 N.J. 288, 292 (1989) (failing to properly charge the "absence of a gun permit" element of unlawful possession of a firearm without a permit is reversible plain error even in a case where the defendant could not possibly have had a permit because he did not own the weapon in question). That rule is so strict because an improperly deficient jury instruction on a critical element means that there can be no proper jury findings under that instruction. Id. at 291. "[T]here is simply no substitute for a jury verdict." Id.; see also State v. Bailey, 231 N.J. 474, 489 (2018) (conviction reversed when jury instruction failed to define an element properly and thus "the jury could not have made a finding on that issue"). The Sixth Amendment and the state constitution guarantee no less than a jury verdict on every element of the crime, even if an element is uncontested or conceded, and without a proper explanation of that element, the verdict is not valid. Vick, 117 N.J. at 291; Bailey, 231 N.J. at 489. Thus, even where there has been no objection lodged by trial counsel, an

erroneous instruction on such a fundamental matter will necessarily be deemed plain error worthy of reversal. State v. Jordan, 147 N.J. 409, 422-423 (1997), citing Vick, 117 N.J. at 291.

Here, as noted, despite repeatedly saying she would do so, the judge never explained the legal duties of a suspended state trooper to the jury. (20T 168-23 to 184-20) Instead, those duties were solely the subject of testimony from fact witnesses. While the jurors are told, as here, that they must follow the legal instructions in the jury charge (20T 154-3 to 4), and they are presumed to do so, State v. Savage, 172 N.J. 374, 394 (2002), they are also told that the jurors are the exclusive judges of the credibility of factual witnesses (20T 158-1 to 9), and they have full rein to believe or disbelieve those witnesses as they see fit. Ernst, 32 N.J. at 583. Thus, this jury made findings on an element -- whether defendant violated the legal duties of a trooper -- without ever having received a legal explanation of the scope of those duties from the judge. Those duties were not a factual matter, and factual witnesses could not explain their scope to the jury; only the judge could do that. Such a verdict cannot stand, under Grimes, Brady,[11]

[11] Brady dismissed an indictment for the grand-jury equivalent of nearly precisely what was done here. In that case, the prosecutor presenting the matter to the grand jury failed to explain the scope of the legal duties of the public official in the case and instead left the grand jury to conclude what the exact scope of those duties was. 452 N.J. Super. at 165-166. The only difference here is that it was the judge who failed in that regard with the petit jury. Just as the

Bailey, and Vick, and thus, defendant's convictions, all of which hinged on an explanation -- that was never given -- of his legal duties regarding turning in the ID once suspended, must be reversed and the matter remanded for retrial of those counts.

POINT IV

THE MANNER IN WHICH OFFICIAL MISCONDUCT AND A PATTERN OF OFFICIAL MISCONDUCT WERE PRESENTED TO THE JURY IMPROPERLY ALLOWED THE JURY TO BE NON-UNANIMOUS REGARDING THE THEORY OF GUILT. AS REQUESTED BY DEFENSE COUNSEL, THE VERDICT SHOULD HAVE BEEN TAKEN IN A MANNER THAT DEMANDED INDIVIDUAL UNANIMOUS FINDINGS ON THE UNDERLYING ALLEGATIONS OF THOSE COUNTS. (RULINGS AT 20T 110-16 TO 111-7; 20T 168-23 TO 184-20; DA 13 TO 14)

In State v. Gonzalez, 444 N.J. Super. 62, 70-78 (App. Div.), certif. den. 226 N.J. 209 (2016), this Court reversed verdicts for plain error when the jury was repeatedly told that jurors could reach unanimous verdicts as long as they were convinced that one "and/or" another version of events had occurred. The Court concluded that the instructions were plain error because they:

Brady Court ruled that "the prosecutor must clearly and accurately explain the law to the grand jurors and not leave purely legal issues open to speculation by lay people who are simply performing their civic duty," id., the judge must explain those same duties to a petit jury. The failure to do so is necessarily fatal to the convictions.

> left open the possibility that some jurors could have found defendant conspired in or was an accomplice in the robbery but not the assault, while other jurors could have found he conspired in or was an accomplice in the assault but not the robbery. In short, these instructions did not necessarily require that the jury unanimously conclude that defendant conspired to commit or was an accomplice in the same crime. Such a verdict cannot stand.

Id. at 76 (emphasis added). Unable to determine that the jury "actually found defendant guilty based on a shared vision of the evidence and through the application of clear and correct legal principles," this Court reversed in Gonzalez. Id. at 78 (emphasis added). The same result should occur here with respect to Counts Two and Three -- official misconduct and a pattern of misconduct. Defendant's Fourteenth Amendment rights to due process, his Sixth Amendment right to a jury trial, and his corresponding state-constitutional rights were all violated by instructions that left open the possibility of non-unanimous jury decisions on Counts Two and Three. Consequently, his convictions on those counts should be reversed and the matter remanded for retrial of those counts.

The allegations of official misconduct in Count Two were very broad. That count alleged that defendant violated one or both of two separate subsections of N.J.S.A. 2C:30-2: (1) that he refrained from performing a required duty, under N.J.S.A. 2C:30-2b, or (2) that he committed an act that was an unauthorized exercise of his official function. N.J.S.A. 2C:30-2a. The first of those referred to failing to surrender his NJSP wallet ID, whereas the second

referred to displaying that ID in any of four different motor-vehicle stops. In other words, there were five different ways alleged that defendant could have been guilty of official misconduct.

Thus, when it came time for the charge conference, defense counsel brought up the issue of the potential for a non-unanimous verdict on the issue of official misconduct. Specifically, he asked that the jury be compelled, if it found defendant guilty, to indicate, via separate interrogatories on the verdict sheet, which of those scenarios all 12 of them had found. (20T 108-3 to 109-24) Indeed, counsel asked the judge how one otherwise would "know which one they found him guilty of?" (20T 110-3 to 4) But the judge was unmoved, holding that because the State crammed all of the allegations of misconduct into one count, the court could ask for a verdict on that count without asking the jury to agree on the underlying acts or omissions. (20T 110-16 to 111-7) As a result, the charge and verdict sheet on Counts Two and Three leave this Court with absolutely no idea what the jury actually agreed upon with regard to its guilty verdicts on those counts. (20T 168-23 to 184-20; Da 13 to 14)[12]

[12] This error only is exacerbated by the errors raised in Points I through III. The rushed/compelled verdict, discussed in Point I, and the failure to define the legal duties of a suspended trooper, discussed in Point III, loom even larger as errors when it is quite likely that the verdicts influenced by those errors were not even the result of unanimous agreement on the theory of guilt. Moreover, there was not even a finding at all of the "benefit" element of official misconduct. See Point II, supra.

"The unanimity principle is deeply ingrained in our jurisprudence." State v. Frisby, 174 N.J. 583, 596 (2002). The ultimate question is "whether 'the jury instruction [that is given in the case] requires jurors to be in substantial agreement as to just what defendant did' before determining his guilt or innocence." Id., quoting United States v. Gipson, 553 F. 2d 453, 457 (5th Cir. 1977). Thus, in Frisby, the instruction was ruled deficient because the general unanimity instruction was seen as not good enough to let the jury know that all twelve jurors deliberating on endangering the welfare of a child would have to agree on whether the defendant had inflicted injury on the child, or simply failed to supervise that child. Id. at 596-600. Or, as the Frisby Court put it, "a more specific instruction was required in order to avert the possibility of a fragmented verdict." Id. at 598.

Indeed, the Frisby Court distinguished the result in State v. Parker, 124 N.J. 628, 639 (1991), where the allegations of a "core of conceptually-similar acts relating to the students' educational relationship with the teacher and her abuse of that relationship" in an official-misconduct case were held not to warrant a unanimity charge which would require the jury to be unanimous on which specific ones of those "conceptually-similar acts" the teacher committed in front of her students. The Frisby Court noted that Parker specifically held that one of the types of cases which requires a more-specific unanimity instruction is one where "a single crime can be proven by different theories based on

different acts and at least two of these theories rely on different evidence, and [when] the circumstances demonstrate a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory." 174 N.J. at 597. In Parker, all of the allegations of inappropriate behavior, viewing of pornography with the students and inappropriate physical contact were all of a single type in front of the same students, whereas in Frisby, the theories of guilt were independent of one another; in one, the defendant was charged with physically assaulting the child, but the other was a charge of neglect, and the jury well could have been split on which was proven. Frisby, 174 N.J. at 596-600.

The case law follows that distinction, from Frisby, each time. Thus, convictions have been reversed in cases where the jury very well could have been split on the theories of guilt, and they have been affirmed in cases where such confusion in the verdict was not possible. See Gonzalez, 444 N.J. Super. at 71-78 (Court reversed convictions because it was "struck by the spectre of a verdict that may have lacked unanimity" because of generalized jury instructions allowing verdicts on one theory "and/or" another); State v. Gentry, 183 N.J. 30, 32-33 (2005) (robbery conviction reversed where jury could have disagreed which employee of a store was the victim of the defendant's use of force); State v. Tindell, 417 N.J. Super. 530, 552-557 (App. Div. 2011) (terroristic-threats conviction reversed when jury could have differed on which person was the

victim and the jury instruction did not require unanimity on that point); State v. Jackson, 326 N.J. Super. 276, 279 (App. Div. 1999) (drug convictions reversed when jury could have disagreed as to which cocaine the defendant possessed and the jury instruction did not require unanimity on that issue); State v. Bzura, 261 N.J. Super. 602, 612-615 (App. Div. 1993) (false-swearing conviction reversed when jury could have disagreed whether defendant was guilty because he gave (1) two inconsistent statements or (2) a single false statement -- involving, like here, two different subsections of a single criminal statute -- and the jury instruction allowed for such a non-unanimous verdict); State v. Gandhi, 201 N.J. 161, 191 (2010) (conviction for stalking upheld because there was no realistic chance that the jury was split as to which no-contact order the defendant violated when those orders were overlapping); State v. T.C., 347 N.J. Super. 219 (App. Div. 2002)(as in Parker, a conviction for a more generalized charge -- in this case endangering the welfare of a child -- was upheld because the individual acts of abuse were all conceptually similar and advanced a single theory of ongoing physical and emotional abuse of one victim, so no more-specific unanimity instruction was needed).

Here, the strong possibility -- from the jury instructions -- that the jury simply did not agree on the fundamentals of what defendant actually did wrong with respect to Counts Two and Three is too much to ignore. As is evident in the Statement of Facts, supra, the State's proofs were shaky to say the least and

had a rather extreme chance of splitting the jury on the theory of guilt. Did all 12 jurors really agree that defendant violated subsection (b) of N.J.S.A. 2C:30-2 by refusing to turn in his original wallet ID in September 2016, which would mean that they believed he hadn't really lost it back in January 2016, but instead had squirrelled it away for future use back when there was nothing to indicate that he was even being investigated, let alone that he would be suspended? Similarly, with the dearth of any clear video or photographic evidence of exactly what was displayed in any of the four traffic stops, did all 12 jurors ever agree that there was a particular incident where they were convinced beyond a reasonable doubt that defendant violated subsection (a) of N.J.S.A. 2C:30-2 by displaying an official ID while suspended to get out of a ticket? Maybe they all agreed on the fundamentals of what defendant did. But the likelihood is far greater that this was a hodgepodge verdict with various jurors believing various things, but all of them merely vaguely believing that defendant did one of the five things he was accused of doing without actually reaching unanimous agreement on what that thing was.

This Court is then left with a verdict on Counts Two and Three that is so generic that no one could possibly determine what it is that the jury thought defendant did wrong, or, even more importantly, whether the jury unanimously agreed on whatever that thing was. As in Gonzalez, the "instructions were inherently ambiguous because the judge failed to explain in clear English what

the jurors were required to decide and, as a result, generated numerous ways in which the jury could have convicted without a shared vision of what defendant did." 444 N.J. Super. at 77. Defendant's convictions for Counts Two and Three should be reversed and the matter remanded for retrial of those counts.

POINT V

THE PROSECUTOR'S DECISION TO CROSS-EXAMINE DEFENDANT -- AND THEN ARGUE TO THE JURY IN SUMMATION -- ABOUT THE ISSUE OF WHETHER DEFENDANT'S PERSONAL BUSINESS CARD FAILED TO COMPLY WITH INTERNAL REGULATIONS OF THE STATE POLICE WAS A BRAZEN ATTEMPT TO INFLUENCE THE VERDICT WITH INADMISSIBLE "PRIOR BAD ACTS" EVIDENCE THAT HAD NO ACTUAL RELEVANCE TO THE CASE; ALTERNATIVELY, NO JURY INSTRUCTION WAS DELIVERED REGARDING THAT EVIDENCE. (NOT RAISED BELOW).

As noted in the Statement of Facts, the defendant's defense to the allegation that he improperly retained or displayed an official NJSP wallet ID while he was suspended was that he surrendered the only such ID that he possessed on September 19, 2016, and that, if he displayed anything in the 2017 and 2018 traffic stops in question, it was an unofficial NJSP business card that bears a considerable resemblance to the wallet ID, and which everyone agreed he had no duty to surrender when suspended. The State's response to that defense was an appalling attempt to smear defendant with irrelevant "bad acts"

evidence -- confronting him on cross-examination with the fact that he was in apparent violation of NJSP Standard Operating Procedures (SOPs) when he had a business card printed in a format that did not conform to those SOPs. (16T 174-7 to 175-18) The prosecutor then took time on summation to remind the jury of that supposed infraction, going so far as to accuse defendant of something he was not charged with: having "crafted" a business card that looked similar to an official ID. (20T 140-2 to 16)

What the State did in this regard was to attempt, underhandedly, to do what the judge refused to allow them to do via jury instruction: expand the case against defendant to include more than the allegations about the wallet ID. The judge had specifically told the State that because the indictment was narrowly focused on the retention or display of official NJSP ID, she would not charge the jury on a broader theory of guilt requested by the State that any attempt by defendant to identify himself as a police officer by any means in order to avoid a ticket would be official misconduct.[13] (20T 3-25 to 11-10) What was done

[13] In addition to the obvious fact that such a broad theory had not been indicted, that broader theory had another more obvious failing: defendant was still a police officer while suspended. State v. Bullock, 136 N.J. 149, 156 (1994). Indeed, that was the only reason why his actions while suspended could even conceivably be official misconduct. Identifying himself as an officer/trooper unto itself was not the issue; he was one! Rather, he was indicted for official misconduct because the State alleged that he used a wallet ID that only a non-suspended officer could possess. He was not forbidden from possessing the business card.

here, via cross-examination and then summation, was to accuse defendant of dishonest, forbidden wrongdoing that had absolutely no relevance to the case. Because the State went far outside the bounds of N.J.R.E. 404(b) in doing so, and thereby violated defendant's rights to due process and a fair trial guaranteed by the Fourteenth Amendment and the state constitution, defendant's convictions should be reversed and the matter remanded for retrial.

N.J.R.E. 404(b) sharply limits the admission of evidence of other crimes or wrongs. This limitation is essential to guard against the risk "that the jury may convict the defendant because he is a 'bad' person in general" rather than because of the evidence adduced at trial. State v. Cofield, 127 N.J. 328, 336 (1992). "Because evidence of a previous misconduct 'has a unique tendency' to prejudice a jury, it must be admitted with caution." State v. Willis, 225 N.J. 85, 97 (2016). Prior-bad-act evidence "has the 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." Id. (internal quotation marks omitted).

To make certain that such evidence will be used only for appropriate, limited purposes and not to demonstrate the defendant's propensity to commit crime, Cofield set out a four-pronged test for the admissibility of evidence 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.

Cofield, 127 N.J. at 338. As the Cofield court rightly emphasized, admitting evidence of other bad acts is the exception, not the rule. Id. at 337. As such, N.J.R.E. 404(b) is a rule of exclusion, not a rule of inclusion. Willis, 225 N.J. at 100.

The "bad acts" evidence in this case about the defendant's apparent failure to properly design his NJSP business cards failed to meet prongs (1) or (4) of the Cofield test. Moreover, even if the evidence had somehow been admissible in a very limited manner, the failure to give any limiting instruction to the jury to not consider the violation of formatting rules regarding NJSP business cards as proof of any of the counts against defendant was reversible error.

Whether defendant was carrying a non-conforming business card was not relevant to any material issue in dispute, which is a prerequisite for admission of other-bad-act evidence. Willis, 225 N.J. at 98. The other-bad-act evidence "cannot merely be offered to indicate that because the defendant is disposed toward wrongful acts generally, he is probably guilty of the present act." Id. (internal citation omitted). No relationship existed, and none was proffered, between the SOP formatting violation and the allegations against defendant of official misconduct and theft.

Because the other-bad-act evidence had zero probative value, the prejudice of

its admission also outweighed its non-existent probative value under prong four of Cofield. Inappropriately establishing -- and then arguing to the jury in summation -- that defendant was in violation of an NJSP SOP by having business cards that looked somewhat like an official wallet ID had no legal bearing on a case that was prosecuted solely based on misuse or mis-retention of the actual wallet ID. What the State was doing was trying to surreptitiously expand the allegations against defendant in a manner that the judge made clear would be improper to do. As noted in other points, the State had a weak case regarding the retention or display of the actual wallet ID. The video and photographic evidence regarding the display of the wallet ID was so blurry as to be essentially useless. There was no actual proof that defendant had not in fact lost his wallet ID in January 2016 and never recovered it. Consequently, the admission of this bad-act evidence was especially harmful in this case and was clearly capable of influencing the jury's verdict because it improperly sought to distract the jury's attention away from the real issue about the wallet ID and toward a different alleged (but not indicted) "misconduct" of defendant's. This was an attempt by the State to smear defendant in front of the jury, and it was plain error to allow it, especially in such a close case.

Finally, the failure to issue any instruction to the jurors about how to use this evidence compounds the harm of admitting it. The Supreme Court has held that a clear, explicit instruction on the appropriate use of other-bad-act evidence is necessary in every case. State v. Oliver, 133 N.J. 141, 158 (1993). Because of its

"inherently prejudicial nature," whenever bad-acts evidence is admitted under N.J.R.E. 404(b), "the court must instruct the jury on the limited use of the evidence." State v. Marrero, 148 N.J. 469, 495 (1997) (emphasis added); see also State v. Barden, 195 N.J. 375, 390 (2008); Cofield, 127 N.J. at 341; State v. Stevens, 115 N.J. 289, 304, 308-09 (1989). That rule applies even if it is defense counsel who elicits the testimony, and even if counsel did not request a limiting instruction. State v. Clausell, 121 N.J. 298, 322-23 (1990). The instruction should be given twice: when the evidence is presented, and again in the final jury charge. Barden, 195 N.J. at 390; State v. Compton, 304 N.J. Super. 477, 483 (App. Div. 1997), certif. den. 153 N.J. 51 (1998).

Whenever evidence of prior bad acts is before a jury, "a court must precisely instruct the jury [pursuant to N.J.R.E. 404(b)] that the proper use of such evidence is to prove a relevant issue in dispute and not to impugn the character of the defendant." State v. Blakney, 189 N.J. 88, 92 (2006). Indeed, "because 'the inherently prejudicial nature of such evidence casts doubt on a jury's ability to follow even the most precise limiting instruction,'" the court's instruction "should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence." Cofield, 127 N.J. at 341, quoting Stevens, 115 N.J. at 304. See also State v. G.S., 145 N.J. 460, 472 (1996) (a limiting instruction must not only specify the proper purposes for which the evidence can be used; it must also "caution against a consideration of that

evidence for improper purposes"); State v. Cusick, 219 N.J. Super. 452, 467 (App. Div. 1987) (same).

The instruction "must include ... 'sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.'" State v. Hernandez, 170 N.J. 106, 131 (2001), quoting State v. Fortin, 162 N.J. 517, 534 (2000). "[T]he essential point to be made in [a] limiting instruction" on other crimes evidence is that such evidence cannot be considered "to prove defendant's disposition to commit the crimes with which he was charged." Stevens, 115 N.J. at 309; see also State v. Reddish, 181 N.J. 553, 611 (2004) ("An explicit instruction that the jury should not make any inferences about defendant's propensity to commit [bad acts] is an essential point to be made in the limiting instruction").

Whether the error is viewed as the improper cross-examination and argument by the State, or the failure to give the appropriate limiting instruction, in either event the error should be fatal to these convictions and result in a reversal and remand for retrial. Reversal is necessarily required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case or the defense case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 252-253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury

will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless).

POINT VI

THE STATE IMPROPERLY ELICITED A LAY OPINION FROM THE BUREAU CHIEF IN CHARGE OF INTERNAL INVESTIGATIONS IN THE STATE POLICE THAT DEFENDANT HAD DONE EXACTLY WHAT THE STATE WAS ACCUSING DEFENDANT OF DOING: THAT HE IMPROPERLY RETAINED HIS OFFICIAL STATE-POLICE WALLET IDENTIFICATION CARD AFTER FALSELY REPORTING IT TO BE STOLEN. (NOT RAISED BELOW)

One of the principal credibility calls that the jury had to make in this case was to decide if, in January 2016, defendant had falsely reported his NJSP wallet ID to be stolen, and then retained that ID when he surrendered all his other IDs at the time of his suspension in September 2016. That was a tough thing for the State to prove. In January 2016, defendant had no idea he was being investigated for criminal behavior, so his motive to have an extra ID on-hand was seemingly non-existent; moreover, despite a thorough search of defendant's person, house, and car, that original wallet ID was never found. The State's response to that difficult dearth of actual proof was to figuratively put its thumb on the credibility scale with the introduction of inadmissible evidence: the lay opinion of Eric Barlow, the NJSP Bureau Chief in charge of internal investigations who

supervised the investigation into the allegations regarding the wallet ID.

Bureau Chief Barlow testified: "What we came to realize was that once [defendant] turned over the credit card ID or the wallet ID, he now had a second one, which was inevitably the first one which he [had] reported stolen or missing. So we knew he was in possession of one." (12T 97-4 to 9) (emphasis added) Because the New Jersey Supreme Court has been very clear that such opinion testimony, from a lay witness, is utterly inadmissible when the topic is a matter, such as the characterization or interpretation of a particular person's actions, that is exclusively within the province of the jury to decide based merely on the factual evidence it has heard, and because this particular improper lay opinion was offered to bolster the State's case on the most critical factual dispute before this jury, not only was N.J.R.E. 701 clearly violated, but defendant was also denied due process and a fair trial under the Fourteenth Amendment and the state constitution. Consequently, defendant's convictions should be reversed, and the matter remanded for retrial.

N.J.R.E. 701 provides: "If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." That rule has been clearly interpreted in State v. McLean, 205 N.J. 438, 457-458 (2011), to only allow a "narrow" category of lay opinion: that which will "assist

the trier of fact by helping to explain the witness's testimony or by shedding light on the determination of the disputed factual issue"; moreover, such lay opinion is specifically "limit[ed] to the perceptions of the testifying witness." Id.

McLean held that it went beyond that narrow area of permissible lay opinion for an officer to testify that he believed he had witnessed a drug deal. Id. at 461. The Court held that the construction of the "perception" requirement is extremely strict: lay opinion is admissible only if it is "firmly rooted in the personal observations and perceptions of the lay witness in the traditional meaning of the [sic] N.J.R.E. 701," id. at 459. Citing State v. Labrutto, 114 N.J. 187, 199-200 (1989), the McLean Court defined the "perception" requirement as "rest[ing] on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell, or hearing." (Emphasis added).

Consequently, the Court in McLean stated that permissible lay opinion testimony is "an ordinary fact-based recitation by a witness with firsthand knowledge," and "does not convey information about what the officer 'believed,' 'thought,' or 'suspected.'" Id. at 460 (emphasis added); see also State v. Derry, 250 N.J. 611, 632-634 (2022) (lay opinion under N.J.R.E. 701 by an FBI agent -- about the meaning of slang terms used in a conversation in which he did not participate -- was improper under McLean because it was not based on perception, but instead on the officer's belief or understanding); State v.

Hyman, 451 N.J. Super. 429, 450-452 (App. Div. 2017) (same as Derry); State v. Simms, 224 N.J. 393, 404 (2016) (detective, like in McLean, improperly opined that he believed he witnessed a drug deal); State v. Smith, 436 N.J. Super. 556, 574-575 (App. Div. 2014) (reversing for plain error when police officer offered the lay opinion that defendant's actions were typical of a suspect trying to dispose of evidence after a crime; the officer was improperly "interpreting facts for the jury" rather than simply testifying to facts).

Barlow's testimony here ran grossly afoul of these principles. Plainly and simply, he was offering his opinion to the jury that the State's theory of the case was correct. The State was entitled to offer facts to support such a conclusion -- e.g., "Defendant reported his wallet ID stolen. The NJSP replaced it, and, after defendant surrendered the replacement, defendant appeared to display a wallet ID at traffic stops" -- but, under McLean and its progeny, the State was not allowed to offer a witness to give an opinion interpreting those facts: telling the jury that the head of the NJSP investigation into defendant's conduct concluded from the very same evidence that this jury was presented that defendant clearly retained the ID and had falsely reported it stolen. Yet that is precisely what Bureau Chief Barlow did here.

Nothing was more important in this case than the jurors' resolution of this factual dispute. The State's theory that defendant falsely reported his ID stolen and retained it later rather than surrendering it was the underlying basis for all

three charges for which defendant was convicted: official misconduct, pattern of official misconduct, and theft. Bureau Chief Barlow's improper lay-opinion testimony that "once [defendant] turned over the credit card ID or the wallet ID, he now had a second one, which was inevitably the first one which he [had] reported stolen or missing. So we knew he was in possession of one" was so grossly in violation of McLean as to constitute plain error clearly capable of producing an unjust result. (12T 97-4 to 9) (emphasis added)

Reversal of the resulting convictions is necessarily required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's evidence or the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). Defendant's convictions should be reversed, and the matter remanded for retrial.

POINT VII

THE DEFENSE WAS IMPROPERLY BARRED FROM INTRODUCING EVIDENCE OF DEFENDANT'S CONDUCT AT OTHER CONTEMPORANEOUS TRAFFIC STOPS -- SPECIFICALLY THAT, AT THOSE STOPS, DEFENDANT OFFERED HIS BUSINESS CARD, AND DID NOT DISPLAY HIS STATE-POLICE WALLET IDENTIFICATION CARD. THAT EVIDENCE WAS ADMISSIBLE EVIDENCE OF HABIT UNDER N.J.R.E. 406. (RULING AT 9T 69-18 TO 71-4)

Just before opening statements, the State moved to bar defendant from presenting evidence that, at three other traffic stops around the same time, defendant did not show an official NJSP wallet ID to the officer conducting the stop and instead was released with only a warning upon showing his business card or some other unofficial ID.[14] When asked by the judge for the legal basis to present such evidence, defense counsel replied that it was evidence of defendant's "habits. . . when he was stopped." (9T 69-1 to 3) (emphasis added) Nevertheless, the judge barred the evidence, holding it to be inadmissible and irrelevant. (9T 69-18 to 71-4)

Because, in fact, the judge viewed the admissibility of competent habit

[14] At the time of the motion, the State was specifically addressing the fact that defendant planned on calling the three officers who made these additional stops (9T 66-14 to 17), but, obviously, the court's ruling also served to bar defendant himself from mentioning his conduct at those other stops when he testified.

evidence far too restrictively, and the improper exclusion of such evidence in this case cannot be deemed to be harmless beyond a reasonable doubt, defendant's conviction must be reversed and the matter remanded for retrial. The ruling was contrary to N.J.R.E. 406, as well as violative of defendant's Sixth Amendment right to present a defense, his Fourteenth Amendment right to due process and a fair trial and his corresponding rights under the state constitution.

N.J.R.E. 406(a) provides: "Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice." The purpose of habit evidence is to show the "person's regular practice of responding to a particular kind of situation with a specific type of conduct." State v. Kately, 270 N.J. Super. 356, 362 (App. Div. 1994). Certainly, the principal purpose of this habit evidence was not only to prove just that sort of conformity, but then also to allow a negative inference thereafter -- that defendant does not ordinarily display an NJSP wallet ID in these circumstances, so he did not do so in the four traffic stops for which he was indicted -- but one has to wonder: what is wrong with that? Negative inferences are drawn by jurors from conduct, or non-conduct, all the time in the criminal law.

Indeed, in State v. Marroccelli, 448 N.J. Super 349, 372-373 (App. Div. 2017), this Court held similar habit evidence to have been improperly excluded and also held that habit evidence can be properly used to prove a negative. There,

the defendant in a death-by-auto case sought to introduce habit evidence that she "never" speeds and "never" drives in the left lane. The trial judge was held to have viewed Rule 406 too restrictively when he held that a habit of not doing something is not admissible under the rule. That particular defendant's driving habits were relevant to counter the State's evidence that she drove in a particular way on the night in question. Id. Here, similarly, defendant's habit in three other traffic stops of not displaying a wallet ID was admissible under N.J.R.E. 406 as habit to prove that he did not do that in any of the four charged instances either.

A defendant has an absolute Sixth Amendment-based right to present evidence that challenges the core of the State's case. State v. Fort, 101 N.J. 123, 128-129 (1985). Habit evidence that defendant did not display an official NJSP wallet ID in three other traffic stops directly challenges the State's assertion that he did so in these four stops. Indeed, the State introduced habit evidence regarding one of the traffic stops and another matter in its own case. Officer Eichen testified that it is his habit not to accept a business card as acceptable proof that one is in law enforcement (14T 45-3 to 6), and the prosecutor cited that fact in summation. (20T 138-17 to 19) Major Fraulo testified about his habits in conforming to standard practice when suspending a member of the NJSP. (11T 146-5 to 9)

As argued in other points, the most important issue before the jury was the credibility of defendant's version of events versus the State's. The habit

evidence regarding his conduct at other similar stops supported defendant's claims that he did not retain and did not display the wallet ID. It directly bore upon the most important matter before the jury and its improper exclusion thus cannot be deemed harmless beyond a reasonable doubt with respect to any of defendant's convictions. Reversal of the resulting convictions is necessarily required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's evidence or the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). Defendant's convictions should be reversed, and the matter remanded for retrial.

POINT VIII

THE JUDGE FAILED TO ASSIGN A BURDEN OF PROOF BEYOND A REASONABLE DOUBT TO THE JURY'S ANSWERING OF THE "YES/NO" INTERROGATORIES ON THE VERDICT SHEET; MOREOVER, THE USE OF SUCH INTERROGATORIES, PARTICULARLY FOR THE STANDARD ELEMENTS OF A CRIME, ARE IMPROPER UNDER STATE V. SIMON. (NOT RAISED BELOW)

As noted in Point II, supra, the judge chose to split the verdict on official misconduct into two questions: (1) a "Guilty/Not Guilty" question on all of the non-benefit elements of that crime, and (2) a separate "Yes/No" question on the benefit element. (Da 13 to 14) The same thing was done with the theft count, asking two questions: (1) a "Guilty/Not Guilty" question on the ordinary elements of theft and (2) a separate "Yes/No" question on the issue of whether the wallet ID was a "public record or writing." (Da 14)

Two problems immediately are evident from the approach that was used. First, while the judge told the jury to vote "not guilty" if they had a reasonable doubt, she never told them that that same burden of proof governed the "Yes/No" questions. Second, submitting the elements of a crime in individual "Yes/No" format violates the decision in State v. Simon, 79 N.J. 191, 204 (1979), which reversed convictions for that very error. With respect to both errors, defendant's Sixth Amendment right to a jury trial, his Fourteenth Amendment rights to a fair

trial and due process, and his corresponding state-constitutional rights were violated, and his convictions[15] should be reversed and the matter remanded for retrial.

Proper and comprehensive jury instructions are critical to preserving a defendant's right to due process and a fair trial, even when no objection is lodged. State v. McKinney, 223 N.J. 475, 495 (2015) (reversing for plain error in the robbery instruction). One of the most basic principles of New Jersey criminal law is that "[a]n essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." Id., quoting State v. Afanador, 151 N.J. 41, 54 (1997); State v. Concepcion, 111 N.J. 373, 379 (1988) ("Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial"). It is "structural error," irremediable by harmless-error analysis, for a jury to deliberate under the wrong -– or an absent, or an improperly-explained -– burden of proof. Sullivan v. Louisiana, 508 U.S. 275, 277-278 (1993); State v. Vick, 117 N.J. 288, 292 (1989).

Here, there is simply never a spot in the jury instructions where the judge ever tells the jury that if they have a reasonable doubt on resolution of the "Yes/No" questions, they should answer, "No." A lay jury cannot be expected

[15] While this point addresses errors in the way the official-misconduct and theft counts were presented to the jury, and error in the presentation of the official-misconduct count necessarily taints the verdict for a pattern of official misconduct as well.

to intuit that if a reasonable doubt equates to a "Not Guilty" answer for a "Guilty/Not Guilty" question, it also necessarily means the jury must answer "No" to a "Yes/No" question if they are not sure of the answer beyond a reasonable doubt. They need to be told how the concept of reasonable doubt played into answering the "Yes/No" questions, and they were not. That omission alone is structural error that demands a reversal of the convictions.

But the errors did not end there. Particularly with respect to the ordinary elements of a crime -- like the "benefit" element of official misconduct -- Simon makes it clear that it is reversible error to sever individual elements of that crime into "Yes/No" questions to be answered by the jury. 79 N.J. at 199-204; see also State v. McAllister, 211 N.J. Super. 355, 363 (App. Div. 1986).

There was simply no justification for so directly violating Simon, and then doing so without assigning a burden of proof to the "Yes/No" questions that were asked, and without telling the jury that a reasonable doubt on those questions should lead to a "No" answer. Id. at 291. "[T]here is simply no substitute for a jury verdict." Id.; see also State v. Bailey, 231 N.J. 474, 489 (2018) (conviction reversed when jury instruction failed to define an element properly and thus "the jury could not have made a finding on that issue"). The Sixth Amendment and the state constitution guarantee no less than a proper jury verdict on every element of the crime, even if an element is uncontested or conceded, and without a proper explanation of that element, with a proper

explanation of the burden of proof, the verdict is not valid. Vick, 117 N.J. at 291; Bailey, 231 N.J. at 489. Thus, even where there has been no objection lodged by trial counsel, a failure of proper instruction on such a fundamental matter will necessarily be deemed plain error worthy of reversal. State v. Jordan, 147 N.J. 409, 422-423 (1997), citing Vick, 117 N.J. at 291. The convictions should be reversed and the matter remanded for retrial.

POINT IX

IF OTHERWISE UPHELD, THE THEFT CONVICTION SHOULD BE MODIFIED TO A DISORDERLY-PERSONS OFFENSE; COMMON SENSE DICTATES THAT THE LEGISLATURE DID NOT INTEND A STATE-EMPLOYEE IDENTIFICATION CARD TO CONSTITUTE A "PUBLIC RECORD, WRITING, OR INSTRUMENT" THAT, WHEN MERELY RETAINED INAPPROPRIATELY, CAUSES THE EMPLOYEE TO BE GUILTY OF COMMITTING A THIRD-DEGREE CRIME, PUNISHABLE BY UP TO FIVE YEARS IN PRISON, RATHER THAN A MERE DISORDERLY-PERSONS OFFENSE. (RULING AT 20T 11-25 TO 16-1)

The "theft" in this case was alleged to be defendant's retention of the NJSP wallet ID once he was suspended. Ordinarily, the theft of such a small item would be a disorderly-persons offense. N.J.S.A. 2C:20-2b(4). But the State alleged, over defense objection, and the judge accepted (17T 114-17 to 133-7; 18T 33-16 to 47-11), that the ID was a "public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant," N.J.S.A. 2C:20-2b(2)(g) -- which elevates the theft to third-degree -- and, thus, the judge denied the motion for a judgment of acquittal on the third-degree aspect of the theft. (20T 11-25 to 16-1)

Because, in fact, at a bare minimum the rule of lenity requires that such an ambiguous statute be interpreted against the State, the Court should hold that N.J.S.A. 2C:20-2b(2)(g) does not cover a State-employee ID card and that this

theft was, at most, a disorderly-persons theft. Defendant's rights to due process under the Fourteenth Amendment and the state constitution were violated by a conviction of too high a degree unsupported by the evidence.

One of the first rules of statutory interpretation is to give a difficult-to-interpret statute a "commonsense" reading. State v. Gelman, 195 N.J. 475, 482 (2008), citing DiProspero v. Penn, 183 N.J. 477, 492 (2005). Here, one has to realize that there are tens of thousands of state employees in New Jersey, almost all of whom have ID cards. Sometimes they will have will multiple copies of such cards. It is hard to believe that the Legislature would have intended that retaining one of those cards at a time when one should technically turn it in -- like upon retirement -- is a third-degree crime that could conceivably be the cause of discretionary forfeiture of a state pension under N.J.S.A. 43:1-3b. See State v. Anderson, 248 N.J. 53, 71-72 (2021) (discussing the difference between crimes that require mandatory forfeiture of pension, like official misconduct, under N.J.S.A. 43:1-3.1, and other lesser crimes that can result in discretionary forfeiture of pension).

There is nothing in the statute or the legislative record to indicate that such a harsh result was intended by the language of N.J.S.A. 2C:20-2b(2)(g). Indeed, the only case addressing that statute is State v. Saavedra, 222 N.J. 39, 45 (2015), applying it to the obvious instance of an employee who stole "highly confidential" documents from the North Bergen Board of Education. A state-

employee ID card is not anything like those Saavedra documents. According to Gelman, which reached a similar result on a vexing question of the interpretation of a prostitution statute, the only proper result where the statutory meaning is not clear, and neither is the legislative intent, is to apply the "doctrine of lenity" and adopt the more lenient interpretation of the statute. 195 N.J. at 482-483. This Court should follow Gelman in that regard and, if no other relief is granted on the theft conviction, lower its degree to a disorderly-persons offense.

CONCLUSION

For all of the reasons set forth in Points I through VIII, the defendant's convictions should be reversed and the matter remanded for retrial. Alternatively, for the reasons in Point IX, defendant's conviction for theft should be reduced to a disorderly-persons offense..

Respectfully submitted,

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Date: March 18, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-2755-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Monmouth County.
MARC W. DENNIS,	:	
Defendant-Appellant.	:	Sat Below: Hon. Lourdes C. Lucas, J.S.C., and a jury.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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June 20, 2024

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PRELIMINARY STATEMENT

Defendant was one of a small group of New Jersey State Police ("NJSP") Troopers who had authority to perform maintenance, called calibration, on the approximately five hundred ninety-five instruments used by all police in New Jersey to test individuals suspected of driving while intoxicated, in the Alcohol and Drug Testing Unit ("ADTU"). In early October 2015, another Trooper in ADTU accused defendant of performing three calibrations without using a type of thermometer required by law, because defendant's thermometer had a dead battery. Defendant did not perform further calibrations, and about two months later, a supervisor told defendant he should consider transferring out of ADTU. About one month later, in January 2016, defendant reported he had lost one of three official identifications issued to him by NJSP, called either the "wallet ID" or the "credit card ID." Eight months later, defendant was suspended, at which time, he was ordered to surrender virtually all property of NJSP, including all his uniforms, all his IDs, and his service weapon. Defendant was also told that he had no police power while suspended and was prohibited from carrying an off-duty gun. The solemn ritual of suspension, a regimented procedure used by the NJSP, guaranteed defendant was notified of the suspension, and its consequences, personally, face-to-face.

About eighteen months later, NJSP learned that defendant, who was still-

suspended, had identified himself as a member of NJSP to a local police officer who stopped defendant for a traffic moving violation. NJSP investigated further and discovered multiple instances in which defendant avoided potential traffic tickets. NJSP obtained videos of some of these encounters, and saw from them that on two separate occasions, defendant displayed what looked like the wallet ID that he had reported as stolen in January 2016.

Defendant was indicted, and the Superseding Indictment on which he was tried included three counts related to the allegedly unlawful calibrations, while the remaining three counts concerned his post-suspension avoidance of traffic tickets. Trial included testimony from thirteen State witnesses, six defense witnesses, including defendant, video evidence of four traffic stops, and other evidence. The jury convicted defendant of the theft of the wallet ID, and the counts of official misconduct, and pattern of official misconduct, related to that theft, necessarily concluding defendant had been untruthful when he reported the wallet ID stolen, had kept it, and had used it to avoid traffic tickets. This decision was unsurprising, for during his approximately five hours of testimony, defendant claimed (1) that he actually presented some officers, but not all, with a "business card" that NJSP permitted, except that defendant's was non-conforming to NJSP rules, and looked suspiciously like the wallet ID that was clearly visible in two of the traffic videos; (2) that prior to being accused by his

NJSP co-worker of calibrating instruments with a non-functioning thermometer, defendant and his accuser had had a dispute that caused NJSP to tell the men to communicate through a third trooper for approximately three to four months, which assignment the third trooper could not recall; (3) that defendant's own reports to NJSP and the police department of the town in which he claimed to have lost his wallet ID included the wrong date he lost it; and (4) that the officer who reported him to NJSP had called him "Trooper" not because he showed the officer the wallet ID, but because the officer, who saw defendant at night for less than twenty seconds, remembered defendant from a training course defendant taught many years earlier. In sum, the State presented evidence on which the jury could easily have decided defendant was not truthful about all these matters.

The present appeal includes a hodgepodge of asserted trial errors, most subject to a plain-error analysis. None have any merit, as either no error occurred, or any error was induced by defendant, and so not correctable, or the error was not capable of producing an unjust result. This Court should affirm defendant's conviction and sentence without modification.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

Defendant was indicted on December 14, 2016. (5T7-20 to 22). Superseding Indictment 17-06-0118-S issued in June 2017. (1T3-3 to 5). A

second Superseding Indictment, 18-12-202-S, was returned on December 20, 2018. (5T8-2 to 5; Da1). It charged defendant in six counts: Counts One and Two each charged second-degree official misconduct, in violation of N.J.S.A. 2C:30-2; Count Three charged second-degree pattern of official misconduct, in violation of N.J.S.A. 2C:30-7; Count Four charged third-degree tampering with public records, in violation of N.J.S.A. 2C:28-7(a)(1) and (2); Count Five charged third-degree theft by unlawful taking, in violation of N.J.S.A. 2C:20-3 and N.J.S.A. 2C:20-2(b)(2)(g); and Count Six charged fourth-degree falsifying records, in violation of N.J.S.A. 2C:21-4(a). (Da1-12.)

Trial on the Second Superseding Indictment took place on various dates from April 11, 2022, to May 10, 2022. (7T – 21T). Defendant was convicted on Counts Two, Three and Five, but acquitted on Counts One, Four and Six. (21T47-15 to 59-12).

Defendant was sentenced on March 15, 2023. (22T). On the second-degree official misconduct conviction (Count Two), defendant was sentenced to five years of imprisonment, with five years of parole ineligibility. (22T132-8 to 13). On the second-degree pattern of official misconduct conviction (Count Three), defendant was sentenced to a concurrent term of five years of imprisonment, with five years of parole ineligibility. (22T133-1 to 7). The third-degree theft conviction (Count Five) merged with Count Two. (22T133-

11 to 15). Mandatory fines were also imposed. (22T132-22 to 25; 22T133-8 to 10). The court also ordered forfeiture of defendant's pension and future public employment, since his conviction of official misconduct involved dishonest conduct. (22T130-3 to 131-18; Da19).

Defendant filed his Notice of Appeal on May 12, 2023. (Da20-23).

COUNTER-STATEMENT OF FACTS

A. Defendant works calibrating breath test equipment.

Defendant attended the NJSP Academy sometime between November 2000, and May 2001. (15T139-7 to 12). He was then sent to his first assignment, in Cape May County. (15T139-21 to 140-2). In May 2008, defendant was transferred into the ADTU, the unit responsible to maintain all evidential breath testing devices in New Jersey. (10T9-19 to 23; see 10T16-22 to 17-5 (describing the certification process generally); 11T19-8 to 16; 15T150-22 to 25). He worked there continuously until October 2015. (15T151-6 to 8). As a Field Coordinator, defendant had to periodically calibrate breath testing instruments used by New Jersey law enforcement on persons suspected of driving while intoxicated, in violation of N.J.S.A. 39:4-50 ("DWI"). (10T13-9 to 11; 11T16-24 to 17-10).[1] In 2015, New Jersey used an instrument known as the Alcotest

[1] In April 2022, there were approximately nine to ten Field Coordinators assigned to the ADTU. (10T89-19 to 90-2).

7110 MKIII-C. (10T10-19 to 22).[2] The approximately 595 Alcotest instruments are located in municipal police stations throughout New Jersey, and in multiple NJSP barracks. (10T10-6 to 8; 10T11-17 to 21; 11T16-19 to 21).

The calibration procedure required defendant use a specific type of thermometer, called a NIST traceable digital thermometer. (10T18-13 to 15; 10T20-7 to 21-1; 10T28-17 to 19).[3] Failure to perform a proper recalibration, including use of the NIST thermometer, would make any breath test performed on the instrument invalid, and therefore inadmissible, in any trial on a charge of DWI. (10T13-1 to 6; 10T29-6 to 18). Defendant knew this from his extensive training, which included an instruction course from Indiana University, training by the instrument's manufacturer, and an on-the-job apprenticeship with a Certified Field Coordinator, before becoming certified himself. (10T13-16 to 21-1).

B. Defendant is suspended.

1. Three of defendant's calibrations are questioned.

Defendant took scheduled vacation from the end of September 2015 to October 4, 2015. (15T170-4 to 171-11). While defendant was away, his

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[2] Use of the Alcotest instrument was approved by the Supreme Court, subject to certain conditions, in State v. Chun, 194 N.J. 54 (2008).

[3] "NIST" is the National Institute of Standards and Technology. (11T22-12 to 15; see State v. Cassidy, 235 N.J. 482, 552 (2018)).

equipment, including his NIST Thermometer, was held by the Alcotest Project Manager of the ADTU, Sergeant Thomas Snyder, in case it might be needed by another Field Coordinator. (10T9-13 to 18; 10T33-12 to 19; 10T91-15 to 92-7; 15T170-6 to 11; 15T171-12 to 24). On October 2, 2015, Snyder checked defendant's NIST thermometer and discovered that the battery was dead. (10T33-20 to 35-22). Snyder did not replace the battery, but instead reinserted it backwards, after initialing and dating it. (10T35-17 to 22).[4]

When defendant returned to work on October 6, 2015, (15T174-18 to 24), he performed two calibrations. (10T35-22 to 24; S-5; S-6). The next day, he performed another. (10T35-22 to 24; S-7). A day later, at day's end, Snyder discovered the dead battery was still in defendant's thermometer, and confronted defendant about it, as it should have prevented him from performing the three calibrations. (10T39-1 to 40-25; 10T79-24 to 80-3). Paperwork signed by defendant showed each of the three calibrations was performed. (10T51-23 to 54-25; S-5; S-6; S-7).[5] Defendant, feeling Snyder was "setting [him] up," and

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[4] Snyder did not replace the battery because he was not sure whether defendant was using the inoperable NIST Thermometer when performing calibrations. (10T135-4 to 10). Snyder expected defendant to realize that the battery was dead and change it. (10T136-12 to 13).

[5] Every calibration produces documents that must be introduced before individual breath test results are admissible in any DWI trial. (10T47-18 to 49-4; 10T196-1 to 197-19; see Chun, 194 N.J. at 142-45).

"upset" to the point the men had a shouting match, left the building without any resolution of the matter. (10T150-2 to 21; 16T46-5 to 16).

Snyder told his supervisor, the Assistant Head of the ADTU, Sergeant First Class ("SFC") Robert Tormo, about the incident; and defendant called Tormo after Snyder did. (10T36-20 to 37-3; 16T46-21 to 47-6). On or about December 1, 2015, a meeting was held among Tormo, defendant's immediate Supervisor—SFC William Cross—defendant, and Snyder. (10T69-15 to 70-8; 11T26-7 to 12; 16T47-25 to 49-2).[6] Defendant was surprised to see Cross. (16T48-23 to 25). Tormo, Cross, and Snyder were dressed in jackets and ties, looking "formal and proper," and their manner was severe. (16T49-1 to 10).

The very brief meeting was convened to get defendant's side of the events, which Cross thought was "only fair." (10T70-8 to 15; 11T26-13 to 15; 11T26-22 to 25; 11T30-3 to 5). Tormo told defendant he was not a "good fit" for ADTU, which defendant understood to mean they wanted him to leave the unit. (16T161-4 to 12). Defendant asked that a representative from his union attend. (10T70-12 to 13; 16T51-13 to 25). When told no union representative was deemed necessary, defendant left the room. (10T70-15 to 18; 10T186-17 to 187-24; 16T52-1 to 13; 16T53-16 to 22). Defendant believed that even if he had

[6] Various circumstances prevented the meeting from taking place sooner. (10T73-2 to 12; 11T27-3 to 28-8; 16T47-7 to 18).

made a mistake by not using a NIST thermometer, it "probably" would have been investigated by NJSP Office of Professional Standards ("OPS"), its version of Internal Affairs. (11T118-14 to 21; 16T50-21 to 51-5; 16T52-13 to 21). In the common area, Cross asked defendant if he was willing to perjure himself about performing the calibrations. (10T70-17 to 25; 11T28-19 to 29-11; 16T53-24 to 54-12). Defendant did not respond and left. (10T70-25 to 71-1; 11T29-12 to 30-5; 16T54-12 to 18). Defendant was so upset that he drove from Hamilton, where ADTU was located, to NJSP headquarters, in West Trenton. There, a troop doctor approved stress leave. (16T54-9 to 55-15; 16T63-1 to 20).

2. Defendant reports he lost his identification and gets a replacement.

About a month after the December 2015 meeting, defendant filed a "Special Report" with his employer. (Pa18). The report, addressed to SFC Cross, indicated that defendant lost his personal wallet, which contained one of his official identification cards from NJSP. (11T30-17 to 34-17; Pa18; Pa28-29). The report was dated January 6, 2016, for an incident that purportedly took place on January 4, 2016. (11T32-5 to 18; Pa18). However, defendant presented evidence at trial that he lost the wallet five days earlier, on New Year's Eve.

Defendant testified that he went to the doctor's office on New Year's Eve and was "certain" he lost his wallet there. (16T78-20 to 80-13). When he realized later that day it was missing, defendant returned to the office, which was already closed,

and searched garbage cans and the parking lot. (16T81-9 to 82-13). Defendant's fiancée, Christine Ogle, testified that defendant told her no later than New Year's Day that he had lost the NJSP wallet identification. (15T39-13 to 40-6; 15T45-24 to 46-2). Ogle called and emailed the doctor's office to which defendant had gone. (15T46-7 to 17). She drove there on New Year's Day, and looked around the parking lot herself, without success. (15T49-7 to 20; 15T50-25 to 51-1). While Ogle testified that she called the doctor's office but got no answer because it was New Year's Day, defendant presented another story. (15T45-24 to 46-9; 16T177-12 to 178-14). Defendant claimed his own report inaccurately stated that the loss took place on January 4 because he still hoped the wallet would turn up. (16T83-13 to 19). If that were true, then his written report was false in that defendant wrote that when he called the morning after he realized his wallet was missing, which would have been New Year's Day, and not January 5, the office "was open but they again advised they did not have the wallet." (Pa18). At trial, defendant stated that he remembered "definitely calling the office" on New Year's Day. (16T178-11 to 14).

Defendant also identified a police report he filed with the Brick Township Police Department. (16T85-2 to 5; Pa57-61). Defendant said the report was dated January 19, 2016, because he did not "initially report it to Brick Township," and was told to do so by a NJSP lieutenant in his new unit. (16T89-14 to 23; Pa57). According to the "Special Report" that defendant filed almost

two weeks earlier, he had "contacted" two police departments, including Brick Township, before submitting it, apparently without filing a report with either police department. (Pa18; see 16T85-6 to 9). Defendant testified that he only "reported" the missing wallet to Brick Township Police. (16T179-17 to 22). Like the Special Report, his report to the Brick Police stated that he only realized he had lost the wallet on January 4, not New Year's Eve. (Pa59).

Responding to the Special Report, NJSP issued a replacement wallet identification to defendant in January 2016. (16T86-7 to 87-15). Frances Scozzafava, a forensic photographer for NJSP for more than twenty-one years, testified that she worked in the unit responsible to issue identification cards for enlisted members. (11T79-5 to 81-6). She explained how a trooper's "wallet ID" differed from their "billfold ID." (11T97-11 to 102-18). For example, only the wallet ID had a "very bright golden triangle." (11T101-1 to 17). The triangle, the NJSP insignia, appeared "in the center of" the wallet ID's front side. (11T98-5 to 13). Only that insignia was embossed. (11T97-23 to 98-13). For that reason, that triangle was reflective, meaning it would "reflect differently" if the ID was moved "back and forth." (11T98-25 to 99-6). Neither of the two IDs comprising the billfold ID contained the NJSP insignia in the center. (11T98-10 to 13; 11T102-12 to 14). The rear of the wallet ID provided that it was property of NJSP. (11T100-20 to 25; Pa29).

Scozzafava testified that enlisted members got new identification cards when they were promoted. (11T102-19 to 103-3). When her unit delivered the new IDs, it collected the obsolete ones, and destroyed them, for security purposes. (11T103-3 to 18). Her unit maintained records on all IDs issued to enlisted members. (11T103-25 to 104-3). Reviewing defendant's records, she found billfold IDs and the wallet ID were issued to him in 2014. (11T104-4 to 20). On January 15, 2016, defendant got a new wallet ID, after defendant submitted a nearly-identical copy of the "Special Report" to Scozzafava's unit; she identified her handwriting on the upper right-hand side of the form, recording the date of issuance and type of ID issued. (11T104-21 to 108-7; Pa19).[7]

3. Defendant is served with NJSP charges and suspended.

On September 19, 2016, NJSP Lieutenant Glen Ross, defendant's supervisor, was notified defendant was to be suspended that day. After Ross collected defendant's firearm, Ross, Captain Tanya Schultz, and defendant drove in one car to the OPS office. (11T159-5 to 160-15). There, defendant met an attorney provided by his union, Robert Ebberup, Esq. (11T152-13 to 16; Pa20-21). NJSP Lieutenant

[7] S-17 differed from S-12 only in that the former included a single additional line of text, which stated that defendant took "full responsibility for failing to safeguard" his ID. (Compare Pa18 with Pa19). The difference was noted during trial, but never explained.

Joseph Fraulo of OPS had ready "the documentation needed to request for suspension of a member and to facilitate the suspension." (11T120-22 to 121-4). Fraulo gave those documents to defendant. (11T122-18 to 123-3). In turn, three letters were read aloud in defendant's presence.

The first notified defendant that he was suspended, with the date, time, and nature and reason of the suspension. (11T125-9 to 131-13; Pa20-21). Fraulo identified his own signature on the notice, which he affixed after it was read aloud to defendant and signed by him. (11T130-17 to 131-13; Pa21).

The second letter directed defendant to "turn in all [NJSP] badges, identification cards, and other [NJSP] owned property and equipment assigned to" him, with the exception of NJSP rules and regulations. (11T134-2 to 136-20; Pa22-23). It further advised defendant that, while suspended, he was "relieved of all law enforcement powers and [NJSP] privileges." (11T136-15 to 17; Pa22). Defendant was also barred from carrying an off-duty weapon, and was "subject to the laws, statutes, and ordinances of the United States, its territories and possessions, or of any state of the United States or of any political subdivision thereof." (Pa22). Defendant signed that form, too, after it was read to him aloud. (11T136-21 to 137-19; Pa23).

The third letter was read aloud by Fraulo to Captain Schultz. That letter directed Schultz to ensure that **all** of defendant's IDs, equipment, weapons issued by NJSP, uniforms and other property of NJSP be retrieved by NJSP. (11T140-25 to

145-14; Pa24-25). After that letter was read aloud, it was signed by defendant, Schultz, and Fraulo. (11T144-17 to 145-4; Pa25). Defendant clearly understood at meeting's end that he did not have any police powers. (16T126-8 to 127-17). The ritual was consistent with NJSP's ordinary procedure, part of what defendant called its "quasi-military" organization. (11T147-13 to 148-2; 11T150-9 to 14; 15T152-7 to 10).

Ross watched the reading of the suspension documents to defendant at OPS, after which he, Schultz, and defendant drove together back to their building. (11T160-17 to 161-5). There, Ross collected defendant's IDs and badges, among other items. (11T162-16 to 24). Ross took defendant's billfold ID, consisting of two pieces, and the smaller "credit card size ID badge," i.e., the wallet ID. (11T163-10 to 23). Once done, Ross drove defendant to either his own residence, or that of defendant's girlfriend, where Ross took defendant's NJSP bulletproof vest and handcuffs. (11T164-11 to 165-18). Three days later, Ross collected defendant's uniforms, plus other equipment issued by NJSP, intending to collect all NJSP property. (11T165-24 to 166-6).

Ross identified the inventory of defendant's gear he created on a NJSP form. (11T167-2 to 168-2; Pa26-27). The inventory listed approximately 54 different categories of items collected; in some cases, there were multiple items in one category. (Pa26-27). While the form included a code for items that were "missing,"

nothing was noted as missing. (Ibid.) The second page listed "Billfold ID and 2 Cards" and "Wallet ID Card," a total of three items, as being returned in satisfactory condition. (11T169-10 to 170-2; 11T170-12 to 17; Pa27). Ross confirmed defendant surrendered only one wallet ID. (11T174-11 to 13). Ross identified S-28 as defendant's wallet ID, and S-29 and S-30 as defendant's two billfold IDs. (11T171-1 to 23; 11T172-13 to 173-2; Pa28-29; Pa30-31; Pa 32-33). Ross showed the wallet ID and one of the billfold IDs to the jury, remarking the billfold ID was "almost twice the size" of the wallet ID. (11T173-9 to 23).

C. While suspended, defendant misleads various police officers to avoid the possible issuance of traffic tickets.

Between March 27, 2017, and March 27, 2018, while he remained suspended, defendant was pulled over by police on suspicion of committing moving motor vehicle offenses at least four times. Each time, the officer allowed defendant to proceed without issuing him a ticket. Each encounter was recorded, and the relevant videos, all with audio, were played for the jury.

1. Lakehurst, March 27, 2017.

On March 27, 2017, Robert Schroeck was on duty for the Lakehurst Police Department. (14T6-8 to 9; 14T7-9 to 13; 14T7-24 to 8-2). Video from his body-worn camera, viewed by the jury, showed his encounter with defendant, driving

a Dodge Durango. (14T8-3 to 11-3; S-43[8]). As the video confirmed, Schroeck did not issue a ticket to defendant. (14T11-5 to 8). He said that he had discretion to issue a warning instead. (14T12-15 to 13-4).

The video, and still photographs taken from it, showed Schroeck approaching defendant's car on the passenger side. (S-43; Pa34-39[9]; Pa50-52[10]). While Ogle reclined in the front passenger seat, defendant held in his right hand, and showed Schroeck, a two-section black object. In the upper portion, there was a white item, which in its center, contained printing consistent with the NJSP insignia, inside a yellow triangle. (Ibid.) Schroeck, familiar with the NJSP insignia, opined, with the assistance of the video, that defendant displayed a NJSP ID to him, but he was unsure. (14T19-12 to 15; 14T24-15 to 23; 14T28-1 to 3). The entire encounter took under one minute. (14T27-13 to 15; S-43).

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[8] The four videos, S-38 (Toms River); S-43 (Lakehurst); S-48 (Berkeley Township), and S-52 (Marlboro) were previously delivered to this Court. (Da24-26). Additional copies can be supplied on request.

[9] An earlier witness, Laura Kushner, an NJSP forensic photographer, testified that S-36A, S-36B, and S-36C were still photographs taken from Schroeck's video, that she enhanced through a software program. (13T36-9 to 37-18; 13T44-19 to 48-1; Pa34-39). The process did not allow anything to be added to what appeared, rather it only made the image easier to see. (13T45-22 to 46-6).

[10] Schroeck identified S-58A, S-58B, and S-58C as still images taken from his bodycam video. (14T14-12 to 15-6; Pa50-52). All six photographs were admitted into evidence. (14T18-17 to 18).

2. Berkeley Township, November 18, 2017.

At approximately 2:19 a.m., on November 18, 2017, Officer Thomas Eichen of Berkeley Township pulled over defendant's Dodge Durango. (14T34-16 to 22; 14T35-19 to 23; 14T36-24 to 37-3; S-48). Eichen's body-worn camera recorded a portion of that encounter, which was shown to the jury. (14T38-21 to 40-19; S-48). As in the Lakehurst stop, the encounter was very short. Eichen asked for the driver's license and registration, but did not recall seeing one, or being handed anything. (14T40-21 to 41-4; S-48). Eichen explained that when he stopped a law enforcement officer, he would allow them to proceed when shown a badge or official identification. (14T44-20 to 45-2). On the other hand, a driver producing a mere business card would not satisfy Eichen that the driver worked in law enforcement. (14T45-3 to 6). Eichen said the brevity of the video was not consistent with his encounters with civilian drivers. (14T46-14 to 16; S-48). While he might typically hold a civilian for about three minutes, this encounter was complete in "about 14 seconds." (14T47-4 to 12; 14T48-11 to 21; S-48). Based on the video, Eichen believed he was presented with "some form of I.D. or badge that showed that he was law enforcement." (14T50-12 to 16; S-48). He confirmed he did not issue any summonses to the driver, whose gender he could not recall, but who sounded like a male. (14T46-17 to 23). Eichen rejected the assertion he recognized defendant from meeting him on a

prior occasion. (14T50-23 to 51-1).

3. Marlboro Township, January 20, 2018.

Officer Pawel Wcislo of Marlboro Township was on duty at approximately 8:00 p.m., on January 20, 2018, trying to spot speeding drivers. (14T56-15 to 21; 14T58-5 to 59-3). He observed a 2016 Dodge Durango that appeared to be going 80 mph or higher, which he followed and eventually stopped, in a parking lot of a commercial business. (14T59-4 to 10; 14T105-8 to 19). Wcislo identified a photo of himself standing next to defendant's Dodge Durango. (14T61-3 to 62-2; Pa49[11]). The parking lot was well-lit. (14T59-23 to 25). As his body-worn camera recorded, Wcislo approached on the driver's side; the window was already rolled down. (14T62-20 to 63-3; S-52). The male driver had "his wallet up and it was open." (14T63-3 to 4; S-52). He displayed a NJSP ID. (14T60-3 to 5; S-52; Pa48). Wcislo had a good view of what was in the driver's hand because, as the video showed, Wcislo used a flashlight, and the car's interior lights were on. (14T68-11 to 22; 14T69-24 to 70-4; S-52; Pa48). Wcislo identified a still photograph of the driver showing the item to him, when Wcislo was about two feet from the driver, whose face was well-lit. (14T70-12 to 71-22; Pa48). Wcislo, who had been shown NJSP IDs by other

[11] The trial exhibit showed the car's license plate, which has been redacted in the State's Appendix. (Pa49).

NJSP members he had stopped before January 20, 2018, recognized the NJSP insignia that this driver was showing, and asked whether the driver was "on the job?" or something similar, by which he meant the driver was a police officer. (14T60-6 to 7; 14T63-12 to 16; 14T64-1 to 24; S-52; Pa48). Any doubt regarding what defendant showed Wcislo was eliminated when Wcislo identified four enhanced still photographs from his body-worn camera video. (14T73-4 to 75-21; Pa40-47).[12] The driver didn't deny he worked in law enforcement, but instead apologized, after which Wcislo extended the driver "professional courtesy," and let him proceed without issuing a ticket. (14T60-7 to 12; 14T63-7 to 11; 14T63-17 to 25; S-52). Once Wcislo saw the NJSP ID, he concluded that defendant worked in law enforcement. (14T72-10 to 21).

4. Toms River, March 27, 2018.

Officer Robert Westfall of the Toms River Police Department encountered defendant on March 27, 2018. (13T72-1 to 7; 13T73-2 to 11; 13T74-7 to 20; 13T78-19 to 20; 13T82-8 to 20; 13T83-8 to 84-7; S-38). Video from Westfall's car showed that when he came up to the open driver's side window, he was approximately a foot to eighteen inches from defendant. (13T83-8 to 12; 13T84-23 to 85-3; 13T94-23 to 95-17; 13T101-2 to 11; S-38). The audio revealed that

[12] Kushner confirmed that S-37A through S-37D were enhancements she made from Wcislo's video, again without altering or changing the images in any way. (13T49-19 to 50-6; 13T52-2 to 5; Pa40-47).

defendant disputed the facts and chuckled dismissively. (13T85-14 to 22; S-38.) At that point, defendant "held up his ID. It was a [NJSP] ID." (13T85-22 to 24). Westfall read "New Jersey State Police," and saw the "golden triangle" on it. (13T86-19 to 23; 13T87-15 to 17). He recognized the NJSP ID because he had seen it more than once before that night. (13T88-24 to 89-9). Westfall characterized what he saw as a bifold wallet. (13T87-10 to 13). Based on seeing the ID, Westfall addressed defendant as "Trooper." (13T85-22 to 86-1). Westfall let defendant go with a warning. (13T88-5 to 23).

D. The unsuccessful search for defendant's ID.

Westfall later recalled there might be an issue with defendant being suspended, so he contacted NJSP. (13T104-21 to 106-1). After Westfall alerted NJSP that defendant had presented his ID, NJSP contacted defendant's attorney. (13T105-24 to 106-1; 12T95-16 to 101-2). In a June 21, 2018, email, Lieutenant Eric Barlow told the attorney, Ebberup, that NJSP believed that defendant had found the wallet ID he reported as lost and possessed it. (12T98-20 to 101-2; 12T104-4 to 7; S-33). NJSP demanded its return. (12T100-3 to 5).

Despite two follow-up communications, nothing was delivered. (12T101-3 to 21). As a result, NJSP obtained warrants to search defendant, his residence, and his personal car for the ID, which took place on August 22, 2018—two months after the email had been sent. (12T101-22 to 102-4; 12T103-21 to 23).

The searches failed to produce the wallet ID. (11T207-2 to 5; 12T108-3 to 7).

E. Defendant's explanations for the traffic stops.

At trial, defendant offered two defenses to the four traffic stops. The first concerned the document that he clearly showed Officers Schroeck and Wcislo, according to video and photographic evidence. NJSP allows members to create business cards on NJSP equipment, but they are neither considered property of NJSP, nor need to be surrendered by a suspended trooper. (11T109-5 to 21; 11T152-17 to 23; 11T216-21 to 218-4). Defendant had a business card while in ADTU, and, in "late January, early February of" 2016, he made a new one after his transfer to the Missing Persons Unit. (15T52-3 to 5; 16T60-9 to 11; 16T61-24 to 62-2; 16T62-24 to 63-2). For the latter one, defendant picked a type that appeared similar to the wallet NJSP ID. (16T63-21 to 64-6; 16T64-22 to 66-10; 16T75-11 to 18; Pa62). The photographs and videos showed his business card. (16T128-21 to 129-8). Defendant did not believe he was doing anything wrong by displaying the business card during traffic stops. (16T72-6 to 8; 16T116-7 to 15; 16T117-15 to 17; 16T128-12 to 15; 16T167-18 to 168-6).[13] Defendant denied displaying a copy of S-28 which he had reported stolen. (16T72-9 to 19).

But a NJSP Standard Operating Procedure ("SOP") concerning NJSP

[13] No evidence suggested defendant sought clarification from NJSP whether he could represent himself as law enforcement after the first post-suspension stop.

business cards, dated July 27, 2012, dictated four acceptable formats and styles for the cards. (16T171-11 to 172-23; 16T174-4 to 175-11; Pa53-56). In each, the NJSP insignia, including the inverted triangle, appears on the upper left-hand side of the card. (Pa56). Defendant conceded his card did not look like any of the four approved cards and thus violated the SOP. (16T175-12 to 17).

Defendant's second defense, specific to the last stop chronologically, was that Officer Westfall recognized him as a Trooper from a course defendant had taught to thirty or more students, with one of Westfall's superiors. (15T144-19 to 149-11). According to defendant, that supervisor, Christopher Dudzik, introduced defendant to Officer Westfall at the conference. (15T149-3 to 7). Defendant denied showing Westfall any ID during the stop, despite the video evidence of the earlier Lakehurst and Marlboro stops. (16T114-15 to 20). Defendant presented Dudzik's testimony, in part, to corroborate defendant's claim of the introduction. (15T90-10 to 11; 15T106-23 to 107-3). But while Dudzik confirmed he taught various courses with defendant, Dudzik could not recall teaching Westfall at a conference, or if Westfall ever took a course that defendant taught. (15T108-8 to 12; 15T129-23 to 130-1; 15T130-23 to 25).[14]

[14] The State's rebuttal witness, retired NJSP SFC Adam Stanks (16T192-15 to 193-21), further called defendant's credibility into question. Defendant claimed that in 2014, after a disagreement between himself and Snyder, Stanks was appointed to be an intermediary between the men, which lasted about three to four months. (15T154-16 to 164-15). Stanks did not recall any such assignment

F. The Verdicts.

Based on the above evidence, the jury convicted defendant of the three counts that concerned his theft of his NJSP ID, and his misuse of the ID in multiple encounters with traffic police – official misconduct, pattern of official misconduct, and theft of movable property. (21T49-19 to 53-5; 21T54-21 to 57-20). The jury found defendant not guilty of the three counts that concerned his calibrations of Alcotest instruments – official misconduct, tampering with public records, and falsifying records. (21T47-15 to 49-18; 21T53-6 to 54-20; 21T57-21 to 59-10). This appeal follows.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DEFTLY HANDLED THE JURY NOTES SO AS TO AVOID COERCING VERDICTS.

Defendant argues the judge committed reversible error in handling jury deliberations, contending that the judge's responses to two jury notes coerced the verdicts. The record reveals that no error occurred.

On May 2, 2024, when one of the State's proposed rebuttal witnesses reported he had been exposed to a person who tested positive for Covid, the trial's length became an issue. (17T16-19 to 17-8). The judge told the jury the case was being

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and was not aware of any tension between the two men. (16T191-24 to 197-21).

adjourned until May 9, sparking a voir dire with multiple jurors who had pre-existing travel plans. (17T47-16 to 60-12). When one juror was dismissed, only thirteen jurors remained. (17T58-23 to 59-1).

The jury was charged, after closing arguments, on the afternoon of May 9. (20T152-24 to 213-3). The next morning, the alternate juror was selected, and the jury began deliberations at approximately 9:28 a.m. (21T15-3 to 18-18). Even before that happened, defense counsel urged the court to tell the jurors the parties had agreed to continue with less than twelve jurors if deliberations did not conclude that day, so the jury would not rush. (21T11-22 to 12-9).[15] The court declined to do so, seeing no indication that this was the case. (21T12-10 to 17). After about three hours of deliberations, the jury was brought back into the courtroom and was excused for lunch. (21T21-15 to 22-24). About seventy minutes later, the jurors reconvened in the courtroom and were sent to continue with their deliberations. (21T23-2 to 14).

At approximately 2:22 p.m., the jury's first note was received, which indicated that the jury was deadlocked and asked the court's advice. (21T23-14 to 23). The

[15] Initially, defendant was agreeable to proceeding to a verdict with a jury of less than twelve, as the Court Rules permit. (20T41-11 to 24). See R. 1:8-2(a). Before that was reduced to writing, as the rule requires, defendant rescinded his agreement. (21T30-7 to 25).

court proposed, and gave, the standard Czachor[16] instruction to continue deliberations. (21T23-24 to 26-18). After the jury returned to deliberations, defense counsel again raised the issue that two or three jurors had planned to begin vacations the next day, and again urged the court to advise the jury of the parties' agreement to continue with a jury of less than twelve. (21T26-21 to 27-6). The court declined, noting that it might "influence the deliberations." (21T28-3 to 10). After defendant rescinded his agreement to proceed to a verdict with a smaller jury, the court again declined to "speculate" whether the jurors were rushing, noting that "they have been diligent, they have been dedicated, and they have given no indication that there's any concern, again, with them being able to deliberate or not deliberate." (21T34-7 to 15).

At approximately 4:28 p.m., having deliberated an additional two hours – more than five hours total – the jury sent its second note, which indicated that it was "still deadlocked;" it noted that two jurors were leaving for vacation on May 11, and that the jury had decided "some of the counts" in the indictment, and sought the judge's advice. (21T35-25 to 36-10; 21T45-6 to 13). The judge brought the jury out at 4:43 p.m., and essentially repeated its Czachor instruction to continue deliberations, encouraging them to continue "for a little while longer." (21T40-22 to 42-12; 21T42-24 to 43-2). Before sending the jury back, the judge told the jurors

[16] State v. Czachor, 82 N.J. 392, 405 n.4 (1980).

that she would find out how late they could continue that day, and further told them they should feel free to notify the court again if they felt it necessary; but the judge also said that discussion of how to proceed at day's end would be deferred. (21T42-13 to 21). After the jury left, the court noted that the jurors had "[i]n no way" indicated that they felt rushed, that none of them had raised hands when they were instructed to continue, and they "expressed a willingness to continue deliberations." (21T46-2 to 15).

At approximately 5:08 p.m., the court announced the third, and final, jury note, which indicated that the jury had reached a unanimous verdict. (21T46-17 to 22). Defendant was convicted on counts Two, Three, and Five, and was acquitted on counts One, Four, and Six. (21T47-15 to 59-12).

This Court should accord the trial judge deference "in exercising control over matters pertaining to the jury." State v. R.D., 169 N.J. 551, 559-60 (2001). That includes responding to a note indicating the jury is deadlocked. State v. Czachor, 82 N.J. at 407 (holding judge should be guided by factors like complexity of trial and quality and duration of deliberations); State v. Harris, 457 N.J. Super. 34, 48 (App. Div. 2018) (recognizing abuse of discretion standard applies), certif. denied, 238 N.J. 498, certif. denied, 238 N.J. 510 (2019). Here, defendant concedes that the judge's providing a Czachor instruction in answer to the first jury note was entirely appropriate. (Db18-21).

Neither of defendant's objections to the judge's response to the second jury note[17] has merit. First, the judge was not obligated to give the model supplemental charge, "Judge's Inquiry When Jury Reports Inability to Reach Verdict." (See Da27).[18] A Czachor instruction may be given more than once to a jury. State v. Figueroa, 190 N.J. 219, 234-35 (2007) (citing Czachor, 82 N.J. at 406). In this case, nothing suggested that the jury had reached an "impasse" prohibiting a second Czachor instruction. Rather, the jury revealed it had reached some decisions in less than one day of deliberations, but also asked the judge what it should do. (21T36-3 to 10). See Figueroa, 190 N.J. at 239-40 (considering brevity of deliberations, no error for judge to avoid asking whether further deliberations would likely be fruitful); cf. State v. Adim, 410 N.J. Super. 410, 420-21, 424 (App. Div. 2009) (ruling when second jury note came before 10:00 a.m. of second day of deliberations indicating no agreement on any counts and each juror was "firm on their decision," and nobody believed further

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[17] Defendant asserts the judge had already given two Czachor instructions (Db22), but that is misleading. The first utterance of those principles came in the main instructions, which was given before the jury received the case to begin deliberations. (20T203-6 to 204-1).

[18] The Model Jury Instruction is not to be given before at least one Czachor instruction is given, and even then should only be provided if the jury indicates its deliberations have reached "an impasse." A footnote in the charge provides that the judge may, in her discretion, decide when the instruction should be given, in consultation with the parties. (Da27).

discussions would be helpful, judge was required to discharge jury). As nothing in this jury's second note even hinted further deliberations would be futile, the judge was entitled to repeat the original Czachor instruction, rather than give the instruction defendant urges.

Nor did the judge coerce a verdict by telling the jury she would inquire how late they could deliberate that day. For one thing, the judge told the jury to deliver another note if the group felt it necessary. (21T42-13 to 17). For another, the judge advised "there are options" if they could not conclude after deliberating "a little while longer." (21T42-17 to 43-1). With these statements, the judge said nothing indicating any time constraint, or that the jury either must conclude, or return. See Figueroa, 190 N.J. at 226-27, 242-43 (holding judge's statement to the jury on Wednesday that he was free all weekend, and "we will be here as long as it takes you to go through this process" gave impression that the jury "would be required to continue to deliberate for as long as it might take to reach unanimity"). Her decision to defer addressing the vacation issue, (21T44-15 to 19), to avoid "potentially influenc[ing] the ongoing deliberations," (21T27-19 to 29-19), was an appropriate exercise of discretion that simply permitted further deliberation. See United States v. Graham, 758 F.2d 879, 881-82, 883-85 (3d Cir.) (finding court's failure to respond to jury question about ending early for Yom Kippur did not coerce jury in absence of evidence jury

influenced "by a prescribed deadline or the approaching holiday"), cert. denied, 474 U.S. 901 (1985); People v. Reid, 554 N.E.2d 174, 179-80 (Ill. 1990) (judge may properly refuse to answer jury question if response might suggest an "expression of the trial court's opinion on the evidence"). Indeed, had the judge addressed the vacation issue, she very possibly would have created a problem like that in Figueroa.

As this Court acknowledged in Harris, a verdict that is merely "forced" is not one that is coerced in violation of constitutional rights. 457 N.J. Super. at 48-51. Especially when, as here, some of those verdicts were acquittals. See Graham, 758 F.2d at 885 (noting "significan[ce]" that jury left many counts unresolved) (brackets added). The judge carefully observed that line, so that her second instruction to continue deliberations was not an abuse of discretion.

POINT II

THE TRIAL COURT CORRECTLY CHARGED THE JURY ON OFFICIAL MISCONDUCT WHICH PROPERLY FOUND DEFENDANT GUILTY OF THAT CRIME.

Defendant asserts, for the first time on appeal, that the jury never returned a verdict on count two, because it failed to answer the verdict-sheet question whether defendant received or sought a benefit or sought to injure another or deprive another of a benefit. First, as a threshold matter, because defendant

never objected to the verdict sheet at trial, he waived the right to appellate review. State v. Rodriguez, 254 N.J. Super. 339, 347-49 (App. Div. 1992) (per curiam) (failure to timely object to issue concerning polling of jurors resulted in waiver of appellate rights); see generally State v. Robinson, 200 N.J. 1, 19-20 (2009) (appellate review "is not limitless"). And defendant's argument does not fall within the "finite, qualified exceptions" to waiver permitted by R. 2:10-2 (allowing review of a trial error "of such a nature as to have been clearly capable of producing an unjust result"), Robinson, 200 N.J. at 20, or within this Court's inherent authority to correct plain error "in the interests of justice," ibid. Rather, the record reveals that a valid verdict was returned. Nonetheless, error, if any, in the trial judge not answering the specific verdict-sheet question was not capable of producing an unjust result, nor requires this Court's intervention "in the interests of justice." Thus, defendant's claim should be rejected.

Official misconduct is a second-degree crime, unless the benefit or harm has a pecuniary value, which is $200 or less. N.J.S.A. 2C:30-2 (last paragraph). In the latter case, official misconduct is a crime of the third degree. (Ibid.)

Because the judge rejected defendant's argument below that the indictment presented a question whether defendant was charged with obtaining a pecuniary benefit, the grading of Count Two for official misconduct was not presented by the jury charge as an issue for the jury to decide. (17T81-9 to 99-

2; 20T176-7 to 177-9). Defendant never argued to the jury that Count Two involved a pecuniary benefit, never mind one of $200 or less. (20T96-17 to 97-13). Therefore, Question 1(b) on the verdict sheet for Count Two, which made no mention of a dollar figure, (see Da13-14), was unnecessary, meaningless, and thus, had no impact on the verdict. See R. 3:19-1(b) (purpose of a verdict sheet that goes beyond general verdicts is to "facilitate the determination of the grade of the offense under the Code of Criminal Justice or otherwise simplify the determination of a verdict"). Because the verdict sheet's omission of an answer to Question 1(b) was inconsequential, it was not "clearly capable of producing an unjust result." See State v. Mendez, 345 N.J. Super. 498, 514 (App. Div. 2001) (holding question on verdict sheet was "superfluous," so any error in jury charge related to it was not plain error), aff'd, 175 N.J. 201 (2002).

"A verdict sheet is intended for recordation of the jury's verdict and is not designed to supplement oral jury instructions." State v. Gandhi, 201 N.J. 161, 196 (2010). This Court's inquiry focuses "on whether the jury understood the elements [of the offense] as instructed by the judge, and was not misled by the verdict sheet." Id. at 196-97 (brackets added). So long as (1) the court's oral jury instructions "were sufficient to convey an understanding of the elements to the jury," and (2) the verdict sheet was not misleading, then "any error in the verdict sheet can be regarded as harmless." Id. at 197. The circumstances here

satisfied those two conditions.

The charge here conveyed an understanding of the elements to the jury, by instructing that the crime of official misconduct includes three elements: (1) defendant was a public servant at the relevant times; (2) defendant committed an act relating to his office knowing that it was unauthorized; and (3) defendant's purpose in so acting was to benefit himself or another or to injure or deprive another of a benefit. (Compare 20T166-21 to 178-11 with Model Jury Charges (Criminal), "Official Misconduct (N.J.S.A. 2C:30-2)" at 1 (rev. Sept. 11, 2006)). Defendant nowhere argues otherwise. And the verdict sheet was not misleading. Question 1(a) under Count Two asked whether defendant was not guilty or guilty. The jury's answer to that question, that defendant was guilty of the crime, incorporated all three elements of the offense. Which the jurors confirmed when the judge received their verdict and polled them on it. (21T49-19 to 51-14). With their unanimous agreement in open court, the verdict was recorded as final. Rodriguez, 254 N.J. Super. at 347-49; R. 1:8-10; see also Ogundipe v. State, 33 A.3d 984, 992 (Md. 2011) ("the contents of the verdict sheet do not constitute the jury's verdict"), cert. denied, 566 U.S. 966 (2012); People v. Clark, 742 N.Y.S.2d 70, 72 (N.Y. App. Div.) (same), appeal denied, 774 N.E.2d 227 (N.Y. 2002).

Defendant's contention Question1(a) did not incorporate all three

elements of official misconduct is **not** based on any language, or absence of language, in the question itself, but instead depends on defendant's misreading of it. His misreading is confirmed by Question 1(b), which, by its own terms, required that the jury have already concluded defendant was guilty of official misconduct before facing it. (Da14) ("If guilty, answer the following question") (emphasis added). Defendant's argument thus also misreads Question 1(b) by omitting this prefatory clause.

Confirming that the absence of an answer to Question1(b) was not plain error are the facts that (1) the judge "clarified that the verdict sheet was separate from the charge," and was "not to be evaluated as evidence," (20T204-7 to 11), and that (2) the judge "encouraged the jury to present any questions of law arising during deliberation to the court for clarification" (20T208-3 to 10). Ghandi, 201 N.J. at 197-98. "[A]ny doubt" the verdict sheet error does not require reversal "is resolved by the fact that the judge's oral instructions as to the elements of the crimes were submitted to the jury in writing and available in the jury room during the deliberations." State v. Reese, 267 N.J. Super. 278, 289 (App. Div.), certif. denied, 134 N.J. 563 (1993), cited with approval in Gandhi, 201 N.J. at 196-97; see State v. Cuff, 239 N.J. 321, 342 (2019).[19]

Since defendant's conviction of official misconduct is valid and did not

[19] The jury got the written instructions in the jury room. (21T19-4 to 8).

amount to plain error, the same result should obtain for his conviction of pattern of official misconduct. Thus, defendant's convictions on Counts Two and Three should stand.

POINT III

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON DEFENDANT'S LEGAL DUTIES, WHILE FACT WITNESSES PROPERLY EVIDENCED THAT DEFENDANT KNOWINGLY VIOLATED THOSE DUTIES FOR THE JURY TO RENDER A VALID GUILTY VERDICT OF OFFICIAL MISCONDUCT.

Defendant contends that the judge failed to instruct the jury on defendant's legal duties and then compounded that error by wrongly allowing the State's witnesses to define defendant's official duties. The argument misapprehends the proper division between the judge's role to permit a charge of official misconduct to be presented to a jury on finding a clear duty existed, and the jury's role to find whether defendant knew of the duty alleged to have been violated, and knowingly violated it.

Whether a duty has been imposed on a public servant is a legal issue. State v. Brady, 452 N.J. Super. 143, 164-65 (App. Div.), appeal denied, 231 N.J. 525 (2017); State v. Grimes, 235 N.J. Super. 75, 89 (App. Div.), certif. denied, 118 N.J. 222 (1989). In both Brady and Grimes, the count of official misconduct

was dismissed because the asserted law was not clear enough "to subject defendant to a criminal prosecution," and not because the judge failed to properly instruct the jury on the law. Grimes, 235 N.J. Super. at 90; see Brady, 452 N.J. Super. at 173-74 (noting State's inability to identify source of alleged duty). Here, once the judge determined as a matter of law that defendant had a clear duty to obey NJSP rules and regulations – such an unexceptional proposition it was not disputed – she then properly presented the counts alleging knowing violation of that duty to the jury for its determination whether that violation was proven. (20T168-23 to 170-19; 20T178-12 to 180-8).

To guide that endeavor, the trial judge's instructions tracked the model jury charge for official misconduct on its second element, that defendant "committed an act relating to his office knowing that it was unauthorized, or knowingly refrained from performing a duty which is imposed upon him by law, or which is clearly inherent in the nature of his office." (Compare 20T171-10 to 14 (emphasis added) with Model Jury Charges (Criminal), "Official Misconduct (N.J.S.A. 2C:30-2)" at 1 (rev. Sept. 11, 2006)). The judge's further elaboration of that second element took up more than four pages of transcript. (See 20T171-22 to 176-6).

In two respects, the judge did not read the model charge verbatim, once by accident, the other on purpose. In neither case did error occur. First, the

judge apparently did not read the following correctly: "For an act to be related to a public servant's office it must be connected to his/her official duties. An act is not connected to a public servant's official duties merely because a public servant performs the act." (Compare 20T172-9 to 12 with Model Jury Charges (Criminal), "Official Misconduct (N.J.S.A. 2C:30-2)" at 2 (rev. Sept. 11, 2006)). As other sections of the charge made this requirement abundantly clear, this did not amount to plain error.

Here, the judge instructed the jurors that: (1) the indictment alleged defendant was required by rules and regulations of NJSP to turn in all IDs, and to refrain from misrepresenting himself to be active member of NJSP while suspended (20T168-23 to 170-19); (2) the State must prove defendant "committed an act relating to his office" (20T171-10); (3) the State must prove defendant "committed an act relating to his office, or refrained from performing an act required to be performed as part of his office" (20T171-22 to 172-1); and (4) "An act is unauthorized if it is committed in breach of some prescribed duty of the public servant's office." (20T172-13 to 15). Considering the jury instructions in their entirety, as this Court should, "its entirety overcame any omission specifically to have better instructed the jury." State v. Delibero, 149 N.J. 90, 106-07 (1997).

Second, the judge added language concerning inherent duties of all public

officers holding positions of trust, quoting Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 474-76, cert. denied, 344 U.S. 838 (1952). (20T172-19 to 173-23). She told them, among other things, that public officers like defendant "are under an inescapable obligation to serve the public with the highest fidelity." They are required "to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably." "Above all," such persons have a duty "to display good faith, honesty and integrity." (20T172-19 to 173-5). That addition was lawful and appropriate.

Whether defendant knew of the duty to obey NJSP rules and regulations, and knowingly violated it, was a question of fact for the jury to decide, based on admitted evidence, which, by necessity, had to include the rules and regulations allegedly violated. State v. Kueny, 411 N.J. Super. 392, 395-96, 405-08 (App. Div. 2010) (noting failure of State to introduce into evidence any statute, standard operating procedure of defendant's employing police department, or "order, rule or regulation" prescribing duty that would support conviction for official misconduct, court reversed conviction because the State failed to show the misconduct somehow related to the wrongdoer's public office); see Grimes, 235 N.J. Super. at 89 ("Unlike most crimes, as to which ignorance of the law is not material, see N.J.S.A. 2C:2-4, an essential element of this kind of official misconduct is defendant's knowledge that the act he

commits is unauthorized.").

In fact, the role of evidence in establishing the second element of official misconduct in this very scenario has been set out, in State v. Bullock, 264 N.J. Super. 419 (App. Div. 1993), rev'd, 136 N.J. 149 (1994). In Bullock, a jury convicted the defendant, a suspended new Jersey State Trooper, of committing official misconduct by displaying his ID card, "which he said he had lost," in two instances. 264 N.J. Super. at 420; 136 N.J. at 151. Evidence at trial, including testimony and NJSP forms signed by Bullock, showed Bullock was "stripped of all police powers, required to return all equipment which had been issued to him, and advised of the conditions of his suspension including the fact that he could no longer carry an off-duty weapon." 264 N.J. Super. at 421; see 136 N.J. at 156 (Bullock "signed a form advising him of the terms of his suspension"). In other words, Bullock "reverted" "to the status of an ordinary citizen." 264 N.J. Super. at 421. Yet, according to trial testimony, Bullock "was obligated to abide by the rules and regulations governing behavior of a State Trooper." Ibid. All of those things, including the display of the allegedly lost ID, were proven here.

The Supreme Court reversed this Court's opinion in Bullock that a suspended trooper was not a "public servant" subject to prosecution for official misconduct. 136 N.J. at 150-51. But the Court went further, and "briefly address[ed] the issue

whether his conduct sufficiently related to his office to satisfy the requirements of" N.J.S.A. 2C:30-2. Id. at 156. It answered that question in the affirmative: "The jury readily could have found that [Bullock] purported to act not as a private citizen but as a state trooper in violation of" N.J.S.A. 2C:30-2. Id. at 157 (emphasis and brackets added). In other words, the jury readily could have found as a fact that Bullock knowingly exercised "police powers" when he did not have that right. Its conclusion, that Bullock knew he did not have the right to exercise police powers rested on the details of his suspension that the jury learned. 264 N.J. Super. at 421.[20] The same happened here; just like Bullock, defendant knowingly exercised police powers by identifying himself to others as a trooper, when he did not have that right. That finding had to be made by the jury, so no error occurred in this division of responsibilities between the judge and the jury.

POINT IV

NO SPECIFIC UNANIMITY CHARGE WAS REQUIRED ON THE OFFICIAL MISCONDUCT-RELATED COUNTS.

Defendant claims that the judge should have given the jury interrogatories to specify which conduct they found to make up official misconduct, under Count Two,

[20] Bullock interacted with a drug dealer by informing the dealer he was a police officer, and possibly showing the dealer a police ID, and separately told a police officer he was a state trooper, and showed his NJSP ID, in an attempt to avoid arrest for carrying an unlicensed BB gun. 136 N.J. at 151-52.

and to make up a pattern of official misconduct, under Count Three. Binding caselaw establishes that this contention is without merit.

An indictment for official misconduct "may allege a series of acts spread across a considerable period of time." State v. Weleck, 10 N.J. 355, 374 (1952). That is, a "continuing offense." State v. Diorio, 216 N.J. 598, 614-16 (2014) (discussing Weleck). That is how the counts of official misconduct and pattern of official misconduct in the Second Superseding Indictment were styled, as the jury was told. (Da4-7; 20T168-23 to 170-19; 20T178-12 to 180-8).

Ordinarily, the jury need not be unanimous on "preliminary factual issues" that underlay the verdict in such cases. State v. Parker, 124 N.J. 628, 633-34 (1991) (internal quotation omitted), cert. denied, 503 U.S. 939 (1992). However, because the crime in N.J.S.A. 2C:30-2 "is necessarily broad so as to cover a wide variety of misbehavior by public officials," id. at 647-48 (Pollock, J., dissenting) (internal quotation omitted), our Supreme Court has imposed additional scrutiny in such cases to determine if the jury need agree unanimously on the specific acts giving rise to the guilty verdict. The Court has asked (1) whether the allegations of misconduct "were contradictory or only marginally related to each other," or instead were "conceptually-similar acts," and (2) whether there is "any tangible indication of jury confusion" in the record. Id. at 639. Here, the convictions of the two relevant counts were clearly based on

"conceptually-similar acts," and there was no tangible indication of jury confusion. The acquittals all related to the counts concerning the calibrations, and the convictions all related to the counts concerning the retention and misuse of the stolen NJSP ID. Thus, as in Parker, there was no danger here of a "fragmented verdict," or "genuine possibility of jury confusion about its responsibility unanimously to find defendant guilty of official misconduct" requiring specific unanimity. 124 N.J. at 641-42.

The two distinct acts charged for official misconduct under Count Two were (1) defendant's knowing theft of his NJSP wallet ID, and (2) his knowing display of that same ID, both for the same reason of knowingly, and "improperly[,] represent[ing] himself to be an active duty member of the [NJSP] when in fact he was suspended." (20T170-8 to 15). Obviously, defendant could not display the ID unless he possessed it, and to possess it, he had to steal it by failing to surrender it with the other ID he surrendered. These plainly are conceptually-similar acts.

"Furthermore, the jury never exhibited any signs of confusion." Parker, 124 N.J. at 639. Defendant cannot point to any jury note to support his argument, as none exists. This conclusion is further buttressed by the fact the jury acquitted defendant of all the counts that concerned his alleged failure to use the NIST thermometer when calibrating certain Alcotest instruments.

(21T47-15 to 49-18 (Count One); 21T53-6 to 54-20 (Count Four); 21T57-21 to 59-10 (Count Six)). See Parker, 124 N.J. at 640 (noting jury verdicts that included some acquittals showed jury "carefully sifted through all of the evidence"). And this case is far stronger than Parker, because the jury convicted defendant both of the theft of the wallet ID (21T54-21 to 56-9), and of engaging in a pattern of official misconduct (21T51-15 to 53-5), which required the jury to find defendant "knowingly committed two or more acts" of official misconduct (20T178-12 to 180-19).[21] The acts from which the jury could choose included the acts charged in Counts One, Four, and Six, of which defendant was acquitted, and the acts charged in Counts Two and Five. Clearly, the jury concluded defendant displayed his stolen ID at least once, to arrive at the "two or more acts" required for conviction under Count Three. Cf. Parker, 124 N.J. at 640-41 (rejecting argument defendant could not have committed official misconduct because jury acquitted of other criminal acts alleged in indictment).

Defendant's reliance on State v. Gonzalez, 444 N.J. Super. 62 (App. Div.), certif. denied, 226 N.J. 209 (2016), and State v. Frisby, 174 N.J. 583 (2002), is misplaced. The fatal flaw in Gonzalez was that the jury instructions allowed the

[21] Contrary to defendant's argument, the proof of defendant's display of his stolen ID was overwhelmingly strong. It included multiple videos, enhanced photographs, testimony, and the exposure of defendant's asserted alibi, his "business card," as noncompliant with a NJSP SOP.

jurors to convict him when they did not agree which of two completely separate crimes, robbery and aggravated assault, Gonzalez joined. 444 N.J. Super. at 72-76. The allegations were "contradictory," so that specific unanimity was required. Id. at 78 (noting jury was presented with "two consecutive but separate offenses that involved application of discrete legal concepts not easily grasped by laypersons"). And in Frisby, the judge charged the jurors that the State made "two separate contentions," one requiring the defendant to be present at the scene of the crime, while the other required the defendant to be a different location. 174 N.J. at 598-600. No such contradiction existed here.

The general unanimity instruction given to the jury, (20T203-6 to 204-6), sufficed in this case. The conscientious jury discharged its duty with care and collective wisdom. Thus, no specific unanimity charge was required.

POINT V

THE STATE'S EXTRINSIC EVIDENCE IMPEACHING DEFENDANT'S EXHIBIT WAS INTRINSIC EVIDENCE THAT WAS PROPERLY ADMITTED.

Because defendant never objected to the admission of State exhibit S-60, the NJSP SOP on business cards, at trial, (16T171-11 to 172-22; Pa53-56), this Court's standard of review is whether plain error occurred in permitting cross-examination of defendant on that exhibit. (16T172-24 to 175-18). Here, there was no error, period. The SOP was intrinsic evidence that directly rebutted the

defendant's own evidence, including exhibit D-15, defendant's alleged "business card." (Pa62). Therefore, it was properly admitted under N.J.R.E. 401 and N.J.R.E. 403.

Defendant's premise that the State needed to satisfy N.J.R.E. 404(b) is wrong, as demonstrated in State v. Canfield, 470 N.J. Super. 234 (App. Div. 2022), modified on other grounds, 252 N.J. 497 (2023). There, Canfield was convicted at trial of aggravated manslaughter, among other crimes. Id. at 256. The victim was the former boyfriend and father of the child of Canfield's sister-in-law. Id. at 256, 261. Canfield objected that admission of a particular photograph of a hypodermic syringe found in his sister-in-law's bedroom (which was not the scene of the crime, but was both inside Canfield's house, and nearby) violated N.J.R.E. 404(b). Id. at 261-62, 335-36.

The panel affirmed the denial of the objection. Id. at 336. The panel explained that the State had to disprove the affirmative defense of use of force in self-protection. Id. at 339. The State argued the self-defense claim was fabricated, and the photograph evidenced both that Canfield had access to his sister-in-law's syringes, and that her syringes were identical to one found near the victim's body. Ibid. This qualified as intrinsic evidence because Canfield asserted he acted to defend himself when the victim, armed with a syringe, approached Canfield. Id. at 338-39. This Court ruled the photograph would

"directly prove" the murder charge "by tending to disprove defendant's self-defense claim." Id. at 339. For that reason, "the State was not required to satisfy the preconditions for admissibility of Rule 404(b)." Ibid.[22]

Canfield is equally applicable here. When defendant introduced his "business card" to explain what he was seen offering the police in two of the four videos, (16T65-2 to 75-18), the State was allowed, if not obligated, to offer contrary evidence showing that the "business card," which resembled defendant's wallet ID, violated NJSP standards, making it more likely the card was not the item defendant showed the police. Thus, the admission of this evidence was entirely proper.

POINT VI

DEFENSE COUNSEL INJECTED THE ISSUE OF LAY OPINION INTO THE CASE STRATEGICALLY, AND ITS ADMISSION WAS, AT BEST, PROPER, OR, AT LEAST, NOT PLAIN ERROR.

Because defendant never objected to the lay opinion testimony of Eric Barlow at trial (12T97-4 to 10), this Court's standard of review is whether plain error occurred admitting that opinion. For multiple reasons, defendant's argument error took place that mandates a new trial has no merit.

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[22] While defendant does not argue for exclusion under N.J.R.E. 403, any such argument would be fruitless as well. 470 N.J. Super. at 339-40.

A. Defendant's argument is precluded as invited error.

"Mistakes at trial are subject to the invited-error doctrine." State v. A.R., 213 N.J. 542, 561 (2013). Any trial errors "induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal." Ibid. (internal quotation omitted). That is precisely what happened here, as defendant purposely induced the testimony to which he now objects.

In a pretrial hearing, the State moved to limit defense arguments and have certain defense witnesses ruled irrelevant. (9T7-3 to 10). One was Ebberup, the attorney who represented defendant when he was suspended. (9T55-22 to 25; Pa21). In response, defense counsel argued the fact three search warrants "were executed and nothing was found is obviously an important fact for the [d]efense as far as this allegedly stolen ID." (9T57-19 to 23). Counsel proffered that Ebberup would testify that he was told to bring defendant to a certain place but did not know ahead of time that the searches would take place. (9T58-1 to 12). Counsel intended "to elicit testimony from Mr. Ebberup that they had no forewarning that these warrants were going to be executed, which only makes it more reliable that the [d]efendant never had this stolen ID in the first place." (9T58-19 to 23). Counsel further proffered that Ebberup gave defendant's business card to NJSP, supporting defendant's claim that it was the card, not the

missing wallet ID, which he showed "the officers who had pulled him over." (9T59-4 to 25).

In response, the State proffered its intention "to enter into evidence documentary email references in which the [NJSP] did notify" Ebberup they sought the wallet ID. (9T63-20 to 23). The State argued the notice to Ebberup "would diminish the relevance of that particular issue." (9T63-24 to 64-3). At no point did defense counsel assert counsel was unaware of the email that became S-33. (9T64-6 to 65-25).[23] The trial court denied the State's motion to bar Ebberup's testimony. (9T65-23 to 25).

As a result, defendant immediately thrust the "business-card" defense into the case. In his opening statement, counsel argued that the evidence would show a NJSP employee named "Garland" tried to pressure the various police officers to say that defendant showed them a wallet ID, when Garland possessed defendant's surrendered ID. (9T162-10 to 167-6).

During the State's case, NJSP Lieutenant Wesley Garland testified that he searched defendant's person for the wallet ID, pursuant to search warrants obtained for defendant's person, car, and residence, because NJSP "wanted to determine if [defendant] was still in possession of [NJSP] identification."

[23] Defendant, when he testified, implicitly conceded that he saw S-33 in pretrial discovery. (16T124-4 to 23).

(11T199-22 to 200-18). Nobody searching any of the three places found the wallet ID. (11T207-2 to 5). To suggest why the searches proved fruitless, Garland noted that his NJSP colleague, Barlow, contacted defendant's attorney almost two months before the searches to demand return of the wallet ID. (11T201-19 to 202-11; 11T205-13 to 207-1). On direct examination, Garland discussed collecting video evidence on the four traffic stops, and having certain still frames enhanced, but Garland nowhere opined on the contents of any video. (11T187-10 to 190-19).

In cross-examination, defendant injected the issue of opinion testimony on what the videos depicted into the case. Specifically, counsel asked Garland whether Kushner had offered Garland an opinion as to whether the ID could be identified from enhanced photographs.[24] (11T222-22 to 223-4). Defense counsel informed the judge that the purpose of the question was to impeach Garland's credibility by pointing to an inconsistent statement about his conversation with Kushner in a report he authored. (12T7-16 to 8-10). After extensive colloquy, (12T8-11 to 70-20), including the judge's statement that Kushner's "gratuitous" opinion on what appeared in the photographs was "irrelevant," (12T34-9 to 16), the judge instructed the jury to disregard

[24] In his direct testimony, Garland merely said he forwarded still photographs to NJSP's Photography Unit for possible enhancement. (11T189-2 to 190-19).

Garland's testimony regarding his conversation with Kushner. (12T75-8 to 12). The judge further informed the jury that "[w]hat the photographs depict is for your ultimate determination." (12T75-13 to 14).

Barlow testified immediately after Garland. (12T92-18 to 116-9). The entire thrust of his direct examination evidenced that defendant's attorney knew well before the day of the search that NJSP believed defendant had the wallet ID, so defendant had plenty of time to hide or discard it; Barlow did not view any of the videos in court. (12T93-20 to 104-12).[25] From an email, S-33, (12T97-23 to 98-20), the jury learned Barlow had told Ebberup that NJSP was aware defendant presented a NJSP wallet ID when stopped by police, and believed defendant "located the initial identification and has it in his possession," and demanded its surrender. (12T99-1 to 100-8). The email was sent about two months before the fruitless searches took place. (12T102-3 to 4; 12T104-4 to 7). Barlow's statement—that NJSP had concluded defendant had the wallet ID he reportedly lost—was made to explain the purpose for the email to defendant's attorney; Barlow did not mention on direct that he had reviewed video or photographic evidence. (12T95-16 to 97-10). Only on cross-examination, when counsel demanded to know the basis for Barlow's statement

[25] On direct, Barlow testified he was a Captain at the relevant time. (12T93-20 to 94-2). He clarified on cross-examination that he was a Lieutenant when he sent the email, in June 2018. (12T105-25 to 106-12).

in the email that NJSP "was aware" defendant presented his wallet ID when stopped, did Barlow state that he had watched the videos. (12T111-19 to 112-3). Answering counsel's question, without prompting, Barlow qualified that what he saw "resembled a credit card [NJSP] ID." (12T111-25 to 112-3). Highlighting the answer, counsel had Barlow repeat that the item "resembled" the wallet ID. (12T112-4 to 5). Counsel did not request the judge to re-instruct the jurors that it was for their determination as to what appeared in the videos and photographs. (12T112-6 to 118-19).

But defendant pursued the matter further. Before Kushner testified, counsel stated the intention to cross-examine her was whether she could identify the item in the photographs. (13T6-8 to 25). The State confirmed that her direct testimony would be limited to authenticating the enhanced photographs, to which defendant refused to stipulate. (13T12-2 to 17). The court ruled that its intention was to allow cross-examination of what Kushner told Garland, for the jury to assess whether an inconsistency existed in a report Garland made. (13T17-5 to 18-20; 13T23-7 to 11; 13T24-5 to 7). On direct, Kushner said she "produced some stills of the object that the driver had in his hand" during the Lakehurst stop. (13T47-7 to 11). She also said she "produced" enhanced photos from the Marlboro video. (13T49-6 to 50-6). On cross-examination, defense counsel raised the issue of Kushner's opinion as expressed to Garland, over the

State's objection that counsel was eliciting a lay opinion. (13T65-19 to 70-13). Counsel emphasized that Kushner told Garland she could not "positively" say it was a NJSP ID. (13T70-11 to 13). At that point, the judge reminded the jury of her prior instruction, and again told the jury that "[w]hat is ultimately depicted in those photographs . . . is for your determination." (13T69-18 to 20).

Defendant testified at length about the searches. (16T119-19 to 126-7). He denied learning from Ebberup that NJSP had told Ebberup "they think you have a card," so that he had no advance knowledge that he, his car, and his house would be searched. (16T121-6 to 13; 16T124-4 to 125-5).

As these facts show, counsel argued throughout the case defendant had no advance knowledge of the searches NJSP conducted, so their failure to find the wallet ID proved he did not possess it or show it when stopped by the officers. The State responded exactly as it said it would, which resulted in Barlow's lay opinion, which was offered not to provide direct evidence of what the videos showed, but rather to explain why Barlow contacted defendant's attorney before the searches took place.

Defendant clearly had a motive to secure a second wallet ID before being suspended. By January 2016, defendant knew he was accused of failing to perform three calibrations, knew he was accused of making false certifications on forms associated with those calibrations, knew that he would not be permitted

to perform any more calibrations, and knew he was likely to be re-assigned to a different unit. He could reasonably anticipate being suspended, even while being investigated, as NJSP rules stated. (Pa2 (Art. 2, § 2)). And the evidence defendant presented that the wallet ID was lost was contradictory, calling his credibility on the entire topic into question. This evidence, combined with the videos, photographs and officer testimony of the four stops, created a strong case for conviction. Therefore, Barlow's statement did not "compromise the fairness of the trial," A.R., 213 N.J. at 563, or "cut mortally into the substantive rights of the defendant," State v. Corsaro, 107 N.J. 339, 345 (1987). Thus, the invited-error doctrine surely applies here.

Testimony of an officer suggesting police have superior knowledge than what is presented to the jury is subject to the invited-error doctrine. State v. Kemp, 195 N.J. 136, 153-56 (2008). The alleged error here, which the State does not concede, see Point VI(2), below, an officer opining on guilt, see, e.g., State v. McLean, 205 N.J. 438, 460-61 (2011), should likewise come within the doctrine. Especially as this jury had before it the actual videos and photographs on which Barlow's statement was based, and unlike instances where an officer lacks corroboration for the factual testimony underlying the opinion. See McLean, 205 N.J. at 445-46; cf. State v. Hedgespeth, 249 N.J. 234, 240-41, 252-53 (2021) (erroneous evidence ruling that precluded defendant from challenging

uncorroborated testimony of police ruled not harmless). Moreover, defense counsel minimized any potential harm by getting both Barlow and Kushner to admit what appeared on the videos only resembled a wallet ID, which was an argument he wanted the jury to adopt. In summation, defense counsel emphasized the fruitless searches. (20T86-24 to 90-3; 20T93-16 to 21). He argued that Kushner "can't say for sure that's a [NJSP] ID." (20T92-9 to 20). He made those points to argue that the jury could not conclude beyond a reasonable doubt that what appeared in the videos and photographs was the wallet ID, as even "[t]heir own photographer," meaning Kushner, "couldn't." (20T100-19 to 101-5). And defendant testified, presenting his denials directly to the jury.

In sum, defendant, acting with full knowledge of the risk, gambled that presenting evidence the searches failed to produce the wallet ID because defendant did not have it, outweighed any harm from the jury learning why NJSP conducted the searches. The "disappointed litigant" should not be permitted to "manipulate[e] the system" by complaining the risk did not succeed. See A.R., 213 N.J. at 561-62.

B. Barlow's opinion was properly admitted.

Barlow had the right to tell the jury that what appeared in the videos and the photographs "resembled" a NJSP wallet ID, with which he was obviously

far more familiar than they were. See State v. Singh, 245 N.J. 1, 4-5 (2021); id. at 19-20 (distinguishing McLean and rejecting arguments that availability of video and objects about which officer opined rendered lay opinion "unhelpful," and that officer's testimony "usurped the jury's role" in making necessary comparison). After Singh, the Court held in State v. Sanchez, 247 N.J. 450 (2021), that when video evidence is of "relatively low quality," and a witness rationally is "more likely to correctly identify" the disputed item than is the jury, the witness's lay opinion may be deemed helpful to the jury, and admissible. Id. at 473; accord, United States v. Henderson, 68 F.3d 323, 325-27 (9th Cir. 1995) (ruling officer who testified he had seen defendant wearing particular type of coat could offer lay opinion on identity of person appearing in photograph, because he had "specialized knowledge"). That happened here, as Barlow was far more familiar with NJSP IDs than were the jurors, and so admission of his opinion was not erroneous.

C. Admission of Barlow's opinion was not plain error.

If any error occurred, the standard of review for this evidence issue is plain error, since there was no objection below. State v. Medina, 242 N.J. 397, 411-12 (2020). The admission of the opinion was not "clearly capable of producing an unjust result." R. 2:10-2. For one thing, Barlow was not viewing any of the videos when he made the statement to the jury. (12T96-5 to 97-10).

For another, defense counsel forced Barlow to concede that his opinion was based solely on his review of the videos, which were before the jury, and that what Barlow saw "resembled" the wallet ID. (12T111-19 to 112-5). That removed any implication NJSP had "superior knowledge" beyond what the jury received. Third, the judge had already advised the jury that it would decide what appeared in the videos, which advice she repeated after Kushner testified. There was no error, let alone plain error.

POINT VII

THE JUDGE PROPERLY DENIED DEFENDANT'S OFFER OF CONDUCT AT THREE OTHER TRAFFIC STOPS BECAUSE IT WAS NOT HABIT EVIDENCE.

Habitual conduct admissible pursuant to N.J.R.E. 406(a) "denotes one's regular response to a repeated situation," the doing of which "may become semiautomatic." State v. Kately, 270 N.J. Super. 356, 362 (App. Div. 1994) (quoting McCormick on Evidence § 195 at 825-26 (Strong ed., 4th ed. 1992)). For example, in Kately, the defendant's testimony of "nightly drinking was properly admitted as habit evidence because it was relevant and it described with specificity his routine practice of drinking in a particular situation." Id. at 363. Similarly, in State v. Marroccelli, 448 N.J. Super. 349 (App. Div. 2017), this Court held that evidence Marroccelli "never" drove in the left lane of a highway,

and "never exceed[ed] the speed limit," was admissible as habit evidence. Id. at 372-73 (brackets added); see also State v. Radziwil, 235 N.J. Super. 557, 563-66 (App. Div. 1989) (testimony Radziwil patronized same establishment "nearly every weekend," and "invariably" became intoxicated shortly after he arrived, held admissible as relevant to show he became intoxicated there the night he was involved in nearby fatal accident, since it was weekend night, and defendant admitted stopping at establishment) .

On the other hand, in Showalter v. Barilari, Inc., 312 N.J. Super. 494 (App. Div. 1998), this Court held that evidence of "various instances" two witnesses saw "underage friends being served alcoholic beverages" in a pub failed to qualify as habit evidence showing the pub "had a practice of serving alcohol to minors in circumstances in which it knew or should have known their underage status." Id. at 510-13.

Defendant's proffer of a handful of instances in which he allegedly may have not produced his business card, (9T67-12 to 70-2),[26] simply fails to meet the high threshold to qualify as habit evidence. As in Showalter, defendant

[26] Defendant did not proffer that the proposed witnesses would confirm defendant showed them his business card, but only that they "could potentially be shown the business cards in question or a union card that the [d]efendant also legally possessed, and – and could be asked to jog their memory, 'Did he show you this.'" (9T68-5 to 9). Thus, defendant failed to even evidence the conduct he claimed represented his habit.

tendered far too little information to permit the judge to find a habit. 312 N.J. Super. at 512-13. The proponent of habit evidence bears the burden to prove the foundation for its admission. Sharpe v. Bestop, Inc., 158 N.J. 329, 331 (1999) (per curiam) ("before a court may admit evidence of habit, the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere tendency to act in a given manner, but rather, conduct that is semiautomatic in nature"); Radziwil, 235 N.J. Super. at 565-66; State v. Bogus, 223 N.J. Super. 409, 428 (App. Div.), certif. denied, 111 N.J. 567 (1988). Defendant came nowhere close to meeting his burden.

In reality, defendant tried to present a few instances of allegedly lawful conduct to argue he did not commit the charged crimes. But a character trait, (see Kately, 270 N.J. Super. at 362 (noting that habit and character trait "are easily confused")), may not be proven by specific incidents. State v. Mahoney, 188 N.J. 359, 373 (noting New Jersey evidence rules bar evidence "concerning how defendant acted in instances other than those at issue in the case"), cert. denied, 549 U.S. 995 (2006); accord, United States v. Walker, 191 F.3d 326, 336 (2d Cir. 1999) (holding preparation of non-fraudulent asylum applications not relevant to charges concerning other applications), cert. denied, 529 U.S. 1080 (2000); United States v. Scarpa, 897 F.2d 63, 70 (2d Cir.) (ruling "defendant may not seek to establish his innocence . . . through proof of the

absence of criminal acts on specific occasions"), cert. denied, 498 U.S. 816 (1990) (ellipsis added). Here, defendant offered evidence of a claimed character trait, not habit. The judge properly ruled such evidence inadmissible.

POINT VIII

THE JURY INSTRUCTIONS ON GRADING OF THE THEFT CHARGE WERE NOT PLAINLY ERRONEOUS, AND THE SPECIAL INTERROGATORY FOR THAT CHARGE WAS REQUIRED BY APPRENDI V. NEW JERSEY.

Defendant contends that the structure of the verdict sheet's two questions regarding Count Five, alleging theft of movable property, was plainly erroneous in two regards. First, Question 1(b) allegedly fatally failed to inform the jury of the State's burden of proof on that question, which concerned the grading of the crime. Second, bifurcation of the verdict into two questions, one for guilt, and the other for grading, allegedly violated a prohibition against such splitting imposed by controlling caselaw. Neither argument was raised below, as defendant concedes, and neither argument satisfies the requirements of the applicable plain-error doctrine.

A. The jury understood its obligation to apply the standard of beyond a reasonable doubt.

The judge omitted from the jury charge the obligation of the State to prove the ID was a public record, writing or instrument beyond a reasonable doubt, as the Model Jury Charge requires. (Compare 20T197-15 to 198-12 with Model

Jury Charge (Criminal), "Theft of Movable Property (N.J.S.A. 2C:20-3a)" at 3 (rev. Feb. 11, 2008)). However, that omission did not create plain error. Plain error in this context means "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Montalvo, 229 N.J. 300, 321 (2017). The error "must be considered in light of the entire charge and must be evaluated in light of the overall strength of the State's case." State v. Walker, 203 N.J. 73, 90 (2010). If the charge as a whole is adequate, an isolated omission is not plain error. State v. Josephs, 174 N.J. 44, 98-100 (2002). As to "reasonable doubt" specifically, "reasonable-doubt instructions must be considered in their entirety." State v. Medina, 147 N.J. 43, 51-52 (1996), cert. denied, 520 U.S. 1190, cert. denied, 520 U.S. 1214 (1997). "Only those instructions that overall lessen the State's burden of proof violate due process." Id. at 52.

Here, the trial judge instructed the jury that defendant was presumed innocent, that the State had the burden to prove each element of each crime beyond a reasonable doubt, and that the State's burden never shifted to defendant. (20T154-24 to 155-6). The judge also explained the concept of reasonable doubt and instructed that whether defendant had been proven guilty

beyond a reasonable doubt should be based on all the evidence presented. (20T155-19 to 156-11; 20T158-19 to 23). And the jury was aware that, regardless whether the evidence was direct or circumstantial, or a combination, it must be convinced beyond a reasonable doubt to convict. (20T161-4 to 13; 20T162-10 to 15). The judge also explained how character evidence might affect the jury's verdict, but conviction must rest on evidence beyond a reasonable doubt. (20T164-4 to 17).

Then, the judge addressed the specific charges. There, she told the jury that each crime must be considered separately, and each element of each crime must be proven beyond a reasonable doubt.[27] In discussing the verdict sheet, the judge charged that the "verdicts as to each and every one of the questions that I am reading is to be unanimous." (20T205-8 to 10) (emphasis added). That is, the jurors were told that the answers to the additional questions were "verdicts," just as much as their answers to the questions asking for an answer of either "not

[27] The judge used the term "reasonable doubt" more than fifty times while discussing the six crimes. (20T166-1 to 20; 20T171-6 to 8; 20T171-17 to 172-1; 20T174-19 to 22; 20T175-6 to 9; 20T176-1 to 6; 20T176-7 to 11; 20T177-20 to 178-6; 20T178-7 to 11; 20T180-10 to 19; 20T180-20 to 22; 20T182-2 to 6; 20T182-7 to 10; 20T182-12 to 16; 20T182-21 to 183-7; 20T183-13 to 20; 20T184-4 to 20; 20T186-24 to 187-17; 20T187-18 to 21; 20T188-8 to 10; 20T188-11 to 16; 20T188-25 to 189-3; 20T189-3 to 6; 20T190-1 to 12; 20T190-13 to 19; 20T190-20 to 21; 20T191-16 to 22; 20T191-23 to 25; 20T192-14 to 23; 20T193-18 to 24; 20T193-25 to 194-3; 20T195-20 to 22; 20T195-23 to 196-1; 20T196-21 to 197-9; 20T197-10 to 14; 20T199-20 to 25; 20T200-1 to 4; 20T200-24 to 201-2; 20T201-21 to 25; 20T202-1 to 6).

guilty" or "guilty," and she told them, twice, the verdict on each charge "must be unanimous." (20T203-8 to 10; 20T204-2 to 5).

Further, for Counts One and Two (the official misconduct charges), which on the verdict sheet were structured identically to Count Five (the theft charge), (Da13-15), the jury was twice instructed that it must answer Question B under the reasonable-doubt standard. (20T176-7 to 177-9; 20T178-7 to 11). Concerning Count Four (tampering with records), which on the verdict sheet was also structured identically to Count Five, (Da14-15), the judge instructed the jury that Question B involved a fourth element that also had to be found beyond a reasonable doubt, but only needed to be answered if the jury found defendant guilty of the first three elements, which was the subject of Question A. (20T190-13 to 192-23). In three instances, the jury was told that its answer to Question B should be determined by the beyond-a-reasonable-doubt standard.

The "overwhelming tenor" of the jury charge "was to convey to the jury that the State bore the burden of proof beyond a reasonable doubt on each and every element of the case." State v. Purnell, 126 N.J. 518, 544 (1992). That is, "[t]he concept of the State's burden to prove guilt beyond a reasonable doubt permeates the trial court's jury charge." Ibid. For that reason, there was no plain error in the charge on Question B for the theft charge. See Medina, 147 N.J. at 52-56 (rejecting argument that a number of deviations from model jury

charge on reasonable doubt "improperly diminished the State's burden of proof;" Court pointed to jury's acquittal on two of five counts as confirmation of its conclusion); State v. Brooks, 309 N.J. Super. 43, 62-64 (App. Div.) (holding that while substitution of "you must determine" for "the State must prove beyond a reasonable doubt" was "unfortunate," "jury fully understood the obligation placed on the State by the law"), certif. denied, 156 N.J. 386 (1998); State v. Hudson, 286 N.J. Super. 149, 152-54 (App. Div. 1995) (no plain error in judge's "augmentation of the model charge" on reasonable doubt).

This precise issue was decided in State v. D'Amato, 218 N.J. Super. 595 (App. Div. 1987), certif. denied, 110 N.J. 170 (1988). The judge's failure to charge the jury, that its verdict on the grading question related to a theft charge had to be found beyond a reasonable doubt, was not plain error, because the whole jury charge advised the jury of the State's obligation to prove all elements by proof beyond a reasonable doubt. Id. at 603-05. Likewise, in State v. Mendez, 175 N.J. 201 (2002), Mendez did not object to the portion of the charge that failed to indicate that a special interrogatory asking for a "yes" or "no" answer was subject to the "beyond a reasonable doubt" standard. 175 N.J. at 207, 214. The Court held any flaw in the special interrogatory omitting that standard was not plain error, as the jury charge "clearly instructed jurors that they had to be convinced of the State's proofs beyond a reasonable doubt." Id.

at 214-15.

Further, the overall strength of the State's case that the wallet ID was a "public record" or a "public writing" was undeniable. On its reverse side, the ID not only stated that it was the property of NJSP, but also that "return postage" was "guaranteed" if the ID was found by a member of the public. (Pa29). The jury was instructed that the crime was one of the third degree if the stolen item "is a public record, writing or instrument kept . . . according to law with or in keeping of any public office." (20T197-15 to 23 (emphasis added; ellipsis added)).[28] Here, the jury surely knew the ID was "kept" by NJSP, in light of the evidence of NJSP's collection of all of defendant's IDs at the time he was suspended.

B. Use of the special interrogatory was mandatory.

Inclusion of Question 1(b) was entirely appropriate because the judge faced a grading issue concerning the theft charge. Unless the jury found that the wallet ID qualified as a "public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public

[28] The jury instruction on this issue was the subject of extensive discussion in the charge conference. (18T33-16 to 47-12). Defense counsel approved the jury instruction before it was given. (19T4-12 to 5-9). After the judge instructed the jury, defense counsel stated no objection to this charge, even as he requested a change to Question 1(a) on Count Five on the verdict sheet, which the court granted. (20T211-11 to 212-17; 20T213-5 to 215-11).

servant," then the charged theft by unlawful taking was only a disorderly persons offense, and not a third-degree crime. N.J.S.A. 2C:20-2b(2)(g) & N.J.S.A. 2C:20-2b(4). This was discussed one week before the jury was charged. (17T112-16 to 127-9). While N.J.S.A. 2C:20-2(b)(2)(g) was cited in the Indictment, (Da10), the jury charge quite rightly did not require the jury to find the "public writing" as an element of the crime. (20T192-24 to 197-14).

While the use of special interrogatories may have been "discouraged" at one time, (see State v. Simon, 79 N.J. 191, 204 (1979)), there never was a "*per se* rule forbidding their use." State v. M.L., 253 N.J. Super. 13, 26 (App. Div. 1991) (per curiam) (italics in original), certif. denied, 127 N.J. 560 (1992). Indeed, Simon itself noted that in certain situations they may be necessary because "legal consequences require subsidiary or collateral findings of fact." 79 N.J. at 203. One of the cases cited in Simon for that proposition, United States v. Haim, 218 F. Supp. 922 (S.D.N.Y. 1963), see 79 N.J. at 203, addressed the very situation presented here, where a simple guilty verdict lacking specification of the critical fact for grading purposes might be either a felony or a misdemeanor. 218 F. Supp. at 927-28 (dictum) (suggesting a special verdict could indicate which of four alleged objects of the charged conspiracy were proven, as three were felonies, but the fourth was a misdemeanor).

So even under Simon the use of the special interrogatory for the theft

charge was necessary. And defendant nowhere acknowledges the sea change made by Apprendi v. New Jersey, 530 U.S. 466 (2000). That case held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added), quoted in State v. Watson, 346 N.J. Super. 521, 531-32 (App. Div. 2002), certif. denied, 176 N.J. 278 (2003). In Watson, this Court "urge[d]" trial courts to use special interrogatories in cases involving charges subject to the Graves Act when use or possession of a firearm is not an element of the offense. Id. at 534. This special interrogatory was necessary.

State v. Brooks, cited above, also disposes of defendant's specific complaint on "splitting" the elements by using two questions on the verdict sheet. There, the use of two questions to determine whether passion/provocation had been disproven beyond a reasonable doubt, so that the defendant was guilty of murder, was held entirely appropriate. 309 N.J. Super. at 64-65.

Defendant misreads State v. Simon by arguing otherwise. In Simon, the error was that the judge submitted the special interrogatories by themselves, and accepted the jury's verdicts, before instructing the jury on the remaining elements of the various offenses. 79 N.J. at 197-98. The jury therefore decided some elements before receiving "full and adequate" charges, producing the

potential to "lead[] the jury to adverse findings on the ultimate issue of guilt," which risk was "greatly aggravated by the submission to the jury of the special interrogatories wholly apart from its final deliberations in conjunction with complete instructions governing all aspects of the case." Id. at 198, 203 (brackets added). That circumstance simply was not present here, because the grading question was submitted to, and decided by, the jury at the same time as the question of guilt. This claim too should be rejected.

POINT IX

NO BASIS EXISTS TO DOWNGRADE THE JURY VERDICT THAT DEFENDANT COMMITTED THEFT BY UNLAWFUL TAKING IN THE THIRD DEGREE TO A DISORDERLY-PERSONS OFFENSE.

Defendant objects that his conviction for theft of movable property should be reduced from a third-degree crime to a disorderly persons offense, for three reasons. As none of them is valid, this contention has no merit.

Since it only affected grading, the State had no duty to prove defendant knew the wallet ID qualified as a "public record, writing or instrument." See State v. Combariati, 186 N.J. Super. 375, 377-81 (Law Div. 1982), aff'd mem., 192 N.J. Super. 131 (App. Div. 1983), certif. denied, 97 N.J. 694 (1984). In Combariati, the argument that the State must prove defendant knew the purse he stole contained drugs to convict him of stealing drugs was rejected. Id. at 376-

81. The court held the State need prove only the item was "property of another," but was not obligated to prove either "a more specific attribute of the property" or "defendant's knowledge of the same." Id. at 379. Those issues were relevant only to grading. Id. at 377.[29]

While only a Law Division decision, Combariati's holding should be applied for three reasons. First, in affirming the decision, this Court expressly approved of the trial judge's ruling. 192 N.J. Super. at 132. Second, the trial judge cited decisions in accord from appellate courts in three states, plus a leading treatise. 186 N.J. Super. at 380. Appellate courts in at least another five states have reached the same conclusion. See Lawrence v. State, 269 P.3d 672, 675 & n.3 (Alaska Ct. App. 2012); Chadwell v. State, 37 Ark. App. 9, 10-12, 822 S.W.2d 402 (Ark. Ct. App. 1992); State v. Solway, 88 P.3d 784, 787 (Idaho Ct. App. 2004); People v. Moneyham, 753 N.E.2d 1229, 1232 (Ill. App. Ct.), appeal denied, 763 N.E.2d 775 (Ill. 2001); State v. Burns, 444 S.W.3d 527, 529-30 (Mo. Ct. App. 2014). Third, the rationale of these cases has been applied to other statutes by both the New Jersey Supreme Court and this Court. See State v. Smith, 197 N.J. 325, 326, 331-39 (2009) (holding that the "State was not required to prove that, at the time that he knowingly possessed the firearm,

[29] Of course, the State must prove grading issues beyond a reasonable doubt, as happened here. See Combariati, 186 N.J. Super. at 377.

[Smith] also knew that it was defaced" to be convicted.); State v. Torres, 236 N.J. Super. 6, 6-7, 9-13 (App. Div. 1989) (holding that the State need not prove Torres knew the quantity of drugs he possessed to be convicted of first-degree possession with intent to distribute, because quantity affected grading only), certif. denied, 122 N.J. 153 (1990); State v. Dixon, 346 N.J. Super. 126 (App. Div. 2001) (holding that the State need not prove Dixon knew the facts that elevated eluding from a third-degree crime to a second-degree crime), certif. denied, 172 N.J. 181 (2002). In other words, a thief like defendant assumes the risk of his criminal conduct.

Because the State was not required to prove defendant knew the nature of the stolen wallet ID, there is no basis to apply the rule of lenity. That rule only concerns the elements of the crime, of which the defendant must be given "fair warning." State v. D.G.M., 439 N.J. Super. 630, 641-42 (App. Div. 2015) (internal quotation omitted). Indeed, in Smith, the Court noted Smith's argument the rule should apply, but never discussed it because it was not applicable. 197 N.J. at 331-39.

Nor does State v. Saavedra, 222 N.J. 39 (2015), help defendant. While the documents at issue there were confidential, that was wholly unnecessary to prove. Rather, the grading of the crime rested on the facts Saavedra worked for the North Bergen Board of Education, and therefore was a public servant, and

that the documents that were property of her employer, and that the documents she stole were public records, writings or instruments. Id. at 46, 57-59, 61-63. The same rationale should apply to the nonconfidential public record/writing here—defendant's NJSP ID.

In sum, there is no basis to downgrade defendant's conviction for third-degree theft by unlawful taking to a disorderly-persons offense.

CONCLUSION

For all these reasons, this Court should affirm defendant's convictions and sentence.

Respectfully submitted,

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