SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0802-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROGER COVIL,

Defendant-Appellant.

Argued March 1, 2017 – Decided April 30, 2018

Before Judges Fuentes, Carroll and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 10-08-0474.

Daniel S. Rockoff, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Daniel S. Rockoff, of counsel and on the brief).

Alexander Mech, Assistant Prosecutor, argued the cause for respondent (Michael H. Robertson, Somerset County Prosecutor, attorney; Alexander Mech, of counsel and on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

A Somerset County grand jury returned an indictment charging defendant Roger Covil[1] with first degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(1), (count one); second degree conspiracy to distribute cocaine, N.J.S.A. 2C:5-2 (count two); and fourth degree resisting arrest, N.J.S.A. 2C:29-2a (count three). After the court denied his motion to suppress evidence, defendant stood trial before a jury. At the close of the State's case, the trial judge granted defendant's motion pursuant to Rule 3:18-1 and dismissed counts two and three of the indictment.

The jury found defendant guilty of first degree possession of more than five ounces of cocaine with intent to distribute. The trial judge, sitting as the trier of fact, found defendant guilty of a related disorderly persons offense of possession with intent to use drug paraphernalia, N.J.S.A. 2C:36-2. After merging this offense with the first degree conviction, the judge granted the State's motion to impose a discretionary extended term under N.J.S.A. 2C:43-6(f). The judge sentenced defendant to an extended

[1] The indictment also named Chris Hardley, a/k/a Chris Covil, and Kiesha Hardley as co-defendants on counts one, two, and three, and included a fourth count charging Chris Hardley with second degree possession of a firearm while committing an offense related to a controlled dangerous substance, N.J.S.A. 2C:39-4.1(a). The court granted defendant's pretrial motion to sever pursuant to Rule 3:15-2(b).

term of twenty-two years imprisonment, with eighty-eight months of parole ineligibility.[2]

In this appeal, defendant argues, inter alia, that the Somerset County Prosecutor's Office (SCPO) seized a package located in a private facility operated by the United Parcel Service (UPS), without a warrant or under circumstances constituting a valid exception to the warrant requirement. Defendant also argues the testimony at trial of the State's expert witnesses usurped the jury's function to determine the essential elements of the charged offense, in violation of the Supreme Court's recent decisions in State v. Simms, 224 N.J. 393 (2016) and State v. Cain, 224 N.J. 410 (2016).[3] Finally, defendant argues the Criminal Part violated his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel when it admitted incriminating statements contained in his pro se writ of replevin that he filed in response to the State's civil forfeiture action.

After reviewing the record developed before the trial court, we reverse. The opinion testimony of the State's expert witnesses

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[2] In this case, N.J.S.A. 2C:43-6(f) authorized the imposition of a parole ineligibility period of between "one-third and one-half of the sentence imposed by the court or three years, whichever is greater[.]"

[3] In State v. Green, 447 N.J. Super. 317, 328 (App. Div. 2016). we held that the Court's holding in Cain should be given pipeline retroactivity.

constituted a quasi-pronouncement of defendant's guilt, thereby usurping the jury's exclusive role as the finder of fact. We reject, however, defendant's constitutional challenge to the State's seizure of the UPS package, decline to decide the remaining arguments, and remand this matter for a new trial.

I

The UPS Package

We derive the following facts from the evidence presented at the hearing conducted by the Criminal Part to decide defendant's motion to suppress the evidence of cocaine found in the UPS package.

In the early morning hours of June 25, 2010, New Jersey State Police Sergeant Peter Ciano received information that a package located at the UPS distribution center in Bound Book, New Jersey may possibly contain cocaine. Ciano "passed off" this information to Captain Steven Ughetta of the SCPO. At approximately seven o'clock in the morning that same day, Ughetta telephoned SCPO Sergeant Joseph Walsh and directed him to drive to the UPS distribution center to investigate.

While en route, Walsh contacted Ciano to gather additional information. Ciano gave Walsh the package's UPS tracking number and told him the package was shipped from Phoenix, Arizona to a

particular address[4] on Coventry Lane in Somerset. In response to defense counsel's questions, Ciano made clear at the N.J.R.E. 104(a) hearing that he did not have any personal knowledge about the reliability of the information he provided to Ughetta or Walsh:

> Q. Do you recall what information you provided to [Walsh,] the Sergeant for the Somerset County Prosecutor's Office in or about June 25th of 2010?
>
> A. Specifically, no, but obviously it was some sort of parcel that was coming in, that it was going to his area. And then I provided to him if he wanted to take a look at and see what it was about. But, you know, specifics I don't know, I just know, obviously it was a parcel that was coming in.
>
> Q. That's all you can recall?
>
> A. Yeah. I don't have no reports. Two years ago, I can barely remember what I did last week, but yes.
>
> Q. When you say you don't have reports, is it your policy not to prepare any reports?
>
> A. Not when I don't have direct involvement in it. These packages, when I get these packages, they come in, they're just considered suspicious packages, so I pass it off as just being that. Whether it's actually drugs in there, or money, or nothing, I'm just passing the information along. Because I don't do reports on stuff like that because a lot of times it turns out to be nothing sometimes.

[4] We omit the exact address of the property to protect the privacy of the residents.

> Q. And you didn't prepare a report in this particular case?
>
> A. No, because I get these calls about three o'clock in the morning, write it down on a piece of paper, depending on what kind of day I'm having. I take the paper and after I pass off the information, it leaves my hands, that's it, there's nothing else to do with me.
>
> Q. So you have no idea whether the information you provided was reliable or not?
>
> A. No. It's . . . the information I get is reliable. I've been doing this for over seven years, parcels, and they've given me thousands of parcels, and probably about five turned out to be legit. So I take their word. If I find something suspicious, but I make it clear whoever I'm passing that information off to it's just that as a suspicious package. Don't go kicking in doors based on what I'm telling you, you develop your own [probable cause] to do what you need to do as far as your investigation. That's how I end it with everybody.
>
> [Emphasis added.]

Walsh arrived at the UPS facility at approximately 7:40 a.m. and identified himself as a law enforcement agent to "the security personnel for UPS." He told the UPS security staff that "there was a questionable package that might have been in his facility, containing narcotics." Walsh provided the tracking number of the package. The UPS staff located the package as part of a delivery shipment that was already loaded on a UPS truck, scheduled to be delivered between 10 a.m. and 11 a.m. that day. Walsh entered the

storage compartment of the truck and confirmed the package's tracking number.

As to its point of origin, the package was shipped via air overnight by "Bill Smith, Honeywell Aerospace, [a specific number address], Harbor Circle, Phoenix, Arizona[.]" The name of the ostensible recipient was "Cathy Land, [a specific number address], Coventry Lane, Somerset, New Jersey." A subsequent search of motor vehicle records revealed no one named "Cathy Land" resided at that address. UPS records also indicated that six similar packages had been delivered to a Coventry Lane address within the past month.

Walsh removed the package from the delivery truck and brought it to the UPS security office. He then telephoned an Assistant Prosecutor to determine "if we can proceed to apply for a Superior Court search warrant." He described to the prosecutor the information he had obtained up to that point. Walsh testified that, at that point, he believed he had sufficient information to establish probable cause to open the package. However, the Assistant Prosecutor instructed him to establish probable cause by using an officer with a trained dog to sniff the package.

Walsh was unable to get a canine unit from the Somerset County Sheriff's Department. He finally discovered that the Hillsborough Police Department had a trained dog named "Fritz" whose "handler"

was Police Officer Christopher Englehardt. According to Walsh, he was told that Englehardt was "on vacation, and was actively out of the State of New Jersey." However, "moments later the dog handler" advised Walsh that he was "available, but he can't come out to the UPS facility." Englehardt was willing to meet Walsh "halfway" if Walsh could bring the package to the SCPO Organized Crime and Narcotics Task Force building at an undisclosed location approximately six miles from the UPS facility. Walsh agreed.

Walsh gave the following account of what occurred next:

> He told me to take the package and put it in an office located in that facility, which I did. He then brought the dog into the facility and began running it through different rooms. I followed the handler as that happened, and he advised me, and I saw the dog's attention drawn to the UPS package that I placed in the one room. And the . . . the K-9 handler advised me that his dog was alerting on that package for the presence of narcotics.

Walsh had previously assigned SCPO Detective Jeffrey Dockery "as the case agent for this case." After the handler told Walsh of the dog's alleged alert "on that package for the presence of narcotics," Walsh contacted Dockery and directed him to meet with Assistant Prosecutor Brian Stack "as he was going to be the affiant for the search warrant." Walsh then drove the package back to the UPS facility.

Assistant Prosecutor Stack appeared before a Superior Court Judge on the morning of June 25, 2010, and questioned Detective Dockery under oath to establish probable cause for the issuance of a warrant to search the package. At this point, we must emphasize that Dockery did not have personal knowledge about the events that had transpired involving Walsh or New Jersey State Police Sergeant Ciano. Dockery's testimony in support of the warrant was based entirely on information provided to him by Walsh.

After Stack asked Dockery a question concerning his training and employment history with the SCPO, the judge asked Dockery:

> THE COURT: You have prior experience with delivery of items to the U.S. postal service or the UPS, or . . . Federal Express?
>
> A. Yes.
>
> THE COURT: Alright, I'm satisfied.
>
> PROSECUTOR: Thank you. Detective Dockery this is somewhat of a time sensitive investigation correct?
>
> A. Yes.
>
> PROSECUTOR: Specifically within the last hour or two the State Police contacted Task Force detectives and informed them that in connection with the investigation that they were conducting, they became aware that a UPS package described on page two of the warrant[5]

[5] Page two of the search warrant is a handwritten description of the dimensions and color of the package, including the UPS tracking number, and a handwritten description of the Coventry Lane address.

contains a large quantity of cocaine, and it's being delivery [sic] to Franklin Township, is that correct?

A. That's correct.[6]

PROSECUTOR: And they said that was in connection with a much larger investigation that they have been conducting for a while is that correct?

A. Correct.

PROSECUTOR: So they gave a specific tracking number and told us that this box contains cocaine is that correct?

A. Correct.

PROSECUTOR: Now to corroborate the information provided by the State Police[,] a trained narcotics K-9 was deployed to sniff the box, is that correct?

A. Correct.

PROSECUTOR: Specifically the Hillsborough Township trained narcotics K-9, Fritz, and his handler, Officer Engelhardt, were dispatched to Bound Brook where the package is currently located at the UPS facility, correct?

A. That's correct.

PROSECUTOR: Fritz, is a graduate of the Union County Sheriff's Department K-9 training academy. He's trained to detect approximately seven types of controlled dangerous substances. . . . [H]e's been working for the

[6] At the hearing on defendant's motion to suppress, Dockery admitted that he never spoke to the State Police. He testified that "[a]ll the information that I applied for this warrant came from Sergeant Walsh."

> past three years. He's had approximately a thousand training sniffs, and a hundred and fifty working searches. Of those approximately a hundred and fifty working searches, Fritz has given a positive indication approximately a hundred and twenty times[,] of the other thirty times, he did not, . . . give an indication. Of those a hundred and twenty positive indications, given by Fritz, the presence of narcotics was . . . found all a hundred and twenty times, either through seizure of drugs, or . . . from an admission, from people involved that narcotics are recently there[,] is that correct?
>
> A. That is correct.
>
> PROSECUTOR: So basically the dog has had no incorrect working sniffs, is that correct?
>
> A. To my knowledge no.
>
> PROSECUTOR: Okay. So his handler went out today to the Bound Brook facility and sniffed the package described under, as premises one, on page two of the warrant is that correct?
>
> A. That is correct.
>
> [Emphasis added.]

The transcript of Dockery's search warrant testimony also apprises the judge that "approximately 6 similar packages were mailed" to the address at Coventry Lane. In response to the prosecutor's leading questions, Dockery described what the State was seeking from the court:

> PROSECUTOR: Okay so basically, based on your training and experience, what frequently happens in these cases, is that an individual will order the package, have it . . . shipped

> to either address or a nearby address and then try to intercept the package from the handler, and take it inside[,] is that correct?
>
> A. That is correct.
>
> PROSECUTOR: So what you're seeking permission to do is after confirming the existence of cocaine, in premises one,[7] [at] which is the UPS box, you're seeking permission to search [an address on] Coventry Lane, which is the address of the package, on one condition, the condition being that the package is accepted in, and transported inside of Coventry Lane, someone comes out, picks up the package, and takes it in, to [an address on] Coventry Lane, is that correct?
>
> A. That is correct.

The transcript of the search warrant application shows Dockery completed his testimony at 9:36 a.m.

Based on this sworn testimony, the judge issued a search warrant permitting the law enforcement agents to open the package located at the UPS facility. The judge also authorized an anticipatory search warrant for the premises listed on the package as the delivery address on Coventry Lane. The judge conditioned the execution of this second warrant upon "someone transporting Premises #1 (The UPS Box) inside Premises #2," the delivery address. The judge who conducted the evidentiary hearing on

[7] "Premises one" refers to the handwritten description of the UPS facility on page two of the search warrant.

defendant's motion to suppress was not the same judge who issued the search warrant.

The motion judge found the package contained a "suspected quantity of cocaine (over 5 ounces) which was field tested with positive results for cocaine content. . . . A subsequent analysis at the New Jersey State Police Laboratory concluded that the UPS package contained 1,006.6 grams of cocaine (35.50 ounces)."

Armed with the search warrant, the SCPO Organized Crime and Narcotics Task Force established surveillance around the Coventry Lane delivery address listed on the UPS package. SCPO Detective Selim Senel, wearing a UPS driver uniform, delivered the package to the address listed on the label. When no one responded, the detective left the package on the front porch, as required by UPS policy. Senel then drove to where Walsh was waiting on Route 27, and the two drove back to the Coventry Lane address in an unmarked truck.

The motion judge found that SCPO Detective Jonathan Tuchmatulin situated himself approximately 200 to 300 feet from the residence and observed the apartment's front door with binoculars. SCPO Detectives Meredith Roberts and David Lissner observed the Coventry Lane location from an unmarked minivan. They observed a man, later identified as defendant Roger Covil, walk around a parking lot for approximately fifteen minutes. After

Covil left the lot, Detectives Roberts and Lissner observed a green Chevrolet Malibu circle the parking lot twice before exiting onto Westminster Road. The vehicle's driver was later identified as co-defendant Christopher Hardley.

Tuchmatulin testified that defendant walked up to the porch of the Coventry Lane address and picked up the UPS package. Defendant opened the front door, stepped inside the threshold, and appeared to converse with an unknown individual inside the residence. Approximately thirty seconds later, defendant walked away from the residence with the package in his hands. He walked south along the grass toward the back of the townhouse complex. Walsh testified that he began to approach defendant, and identified himself as a law enforcement officer. At this point, defendant "began to run and tore a shipping label off the package."

The motion judge found defendant discarded both the package and the shipping label; the arresting officers recovered both items. When the detectives finally surrounded defendant, he stopped running and placed his hands over his head. The SCPO agents arrested defendant and seized several items from his person, including three cellular phones and a wallet. SCPO Detectives executed the anticipatory search warrant for the address listed on the UPS package label. They seized a seal-a-meal food sealer, three boxes of heat-sealable bags, two bags of rubber bands, two

additional cellular phones, UPS packaging materials, and $70,863 in cash. The officers did not find any other contraband, such as illicit drugs, scales, cutting agents, or other paraphernalia.

II

Against these facts, defendant now raises the following arguments:

POINT I

> BECAUSE A POLICE OFFICER ILLEGALLY SEIZED AN OPAQUE, SEALED PACKAGE FROM A PRIVATE CARRIER WITHOUT A WARRANT OR VALID EXCEPTION TO THE WARRANT REQUIREMENT, THE COURT ERRED IN DENYING [DEFENDANT'S] MOTION TO SUPPRESS.

POINT II

> EXPERT TESTIMONY BY THE PROSECUTOR'S CASE AGENT THAT [DEFENDANT] HAD INTENDED TO DISTRIBUTE CDS WAS UNDULY PREJUDICIAL BECAUSE (1) THE CASE AGENT IMMEDIATELY SHATTERED THE HYPOTHETICAL VENEER, AND (2) EXPERT TESTIMONY WAS INAPPROPRIATE FOR SUCH STRAIGHTFORWARD FACTS.

POINT III

> AFTER A STATE EXPERT SPECULATED, OVER DEFENSE COUNSEL'S OBJECTION, THAT [DEFENDANT] HAD ALREADY PROFITED FROM UNCHARGED PRIOR BAD ACTS, AND THAT THESE UNCHARGED PRIOR BAD ACTS SUGGESTED FUTURE BAD ACTS, THE COURT FAILED TO FORMALLY ANALYZE WHETHER THE EXPERT COULD OPINE ON PRIOR BAD ACTS, AND FURTHER FAILED TO INSTRUCT THE JURY ON THE LIMITED USE OF PROPENSITY EVIDENCE.

POINT IV

> BECAUSE THE STATE OBTAINED [DEFENDANT'S] STATEMENT IN A QUASI-CRIMINAL FORFEITURE ACTION BY (1) FAILING TO RE-ADMINISTER MIRANDA RIGHTS; (2) CONTACTING [DEFENDANT] DIRECTLY POST-INDICTMENT; AND (3) SEIZING HIS PROPERTY AND THREATENING TO PERMANENTLY DEPRIVE HIM OF IT, THE COURT ERRED BY PERMITTING THE STATE TO USE THE RESULTING STATEMENT IN SUPPORT OF ITS CRIMINAL CASE.

We begin our analysis with Point I. Defendant argued to the motion judge, as he does in this appeal, that the cocaine found in the UPS package and other evidence related to it should be suppressed because the SCPO agents did not have a warrant to seize the package from the UPS facility and transport it to a location six miles away for the purpose of conducting a canine "sniff" search. Defendant argues Sergeant Walsh's seizure of the package was unreasonable because Walsh did not have any way to assess or corroborate the reliability of the information State Police Sergeant Ciano provided to Captain Ughetta. The package was facially innocuous and Walsh did not have any information about the source of Ciano's "tip." Indeed, as Ciano noted at the suppression hearing: "I've been doing this for over seven years . . . they've given me thousands of parcels, and probably about five turned out to be legit."

Defendant argues these undisputed facts established that Walsh did not have even a reasonable suspicion of criminality at

the time he seized the package from the UPS facility. Cf. United States v. Place, 462 U.S. 696, 706 (1983) (permitting warrantless seizures of personal luggage from the custody of the owner on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime). Relying on Place, the motion judge found "that the removal of the package from the UPS facility did not constitute a seizure under the Fourth Amendment."

The judge found Walsh "possessed specific and articulable facts that warranted a reasonable belief that the package addressed to "Cathy Land" at the Coventry Lane [address] contained narcotics, specifically cocaine." The judge based this finding on the "tip from the State Police that included who the package was sent to, where the package originated from, and the tracking number, along with the fact that the police suspected the package contained cocaine." The judge concluded that once Walsh "corroborated that information[,] he had probable cause to believe that the package contained narcotics."

We disagree. We are bound to defer to the motion judge's factual findings "so long as those findings are supported by sufficient credible evidence in the record." State v. Terry, ___ N.J. ___, ___ (2018) (slip op. at 22) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). Here, the evidence the State presented

at the suppression hearing does not support the judge's conclusion that at the time SCPO Sergeant Walsh removed the package from the UPS facility, he "had probable cause to believe that the package contained narcotics." It is well-settled that

> [t]he probable cause standard is a well-grounded suspicion that a crime has been or is being committed. Probable cause exists where the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed. The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.
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> [State v. O'Neal, 190 N.J. 601, 612 (2007) (quoting State v. Moore, 181 N.J. 40, 45-46 (2004) (alterations in original)).]

State Police Sergeant Ciano and SCPO Sergeant Walsh both candidly testified that at the time Walsh reported to the UPS facility, there was no reasonably reliable evidence to believe the package contained any form of contraband. The information Ciano "passed off" to the SCPO did not even satisfy the lesser standard of "reasonable, articulable suspicion" the Supreme Court endorsed in Place. Place, 462 U.S. at 702. However, our disagreement with the motion judge's conclusion on this issue does not impugn the validity of the measures Walsh took to determine whether there were grounds to request the issuance of a search warrant.

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution equally guarantee that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The United States Supreme Court has construed the text of the Fourth Amendment to protect the people from two types of governmental intrusions: unreasonable "searches" and unreasonable "seizures." United States v. Jacobsen, 466 U.S. 109, 113 (1984). The Court held that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." Ibid. (emphasis added).

Here, Walsh seized the package when he exercised dominion over it to remove it from the UPS facility and transport it to the SCPO facility six miles away. Although this is an undeniable fact, its implications to the constitutional concept of seizure under the Fourth Amendment is far more opaque. As a keystone of his defense, defendant denies any "possessory interest" in the package. And following the same theme of irony, the State's case depends on proving defendant had a "possessory interest" in the package. To resolve this conundrum, our Supreme Court has

construed our State's Constitution as granting automatic standing on a defendant "in cases where the defendant is charged with an offense in which possession of the seized evidence at the time of the contested search is an essential element of guilt." State v. Hinton, 216 N.J. 211, 233-34 (2013) (quoting State v. Alston, 88 N.J. 211, 228 (1981)).

However, standing only gives defendant the right to challenge the State's action. To prevail in his constitutional challenge, defendant must show that the State "trammeled" a "reasonable or legitimate expectation of privacy[.]" Id. at 233. In determining whether a person has a reasonable expectation of privacy under the Fourth Amendment, a court must assess: (1) whether the "individual has manifested a subjective expectation of privacy" in the item at issue; and (2) whether that expectation is objectively reasonable. Id. at 230 (quoting California v. Ciraolo, 476 U.S. 207, 211 (1986)). By contrast, Article I, Paragraph 7 of the New Jersey Constitution requires a court only to examine the inquiry's second prong, to wit, whether the proffered expectation of privacy is objectively reasonable. Id. at 236 (quoting State v. Hempele, 120 N.J. 182, 198—99 (1990)).

Here, the UPS package was addressed to "Cathy Land," not defendant. Defendant cannot claim a reasonable expectation of privacy in an undelivered package addressed to a person with whom

he has no connection. Defendant's decision to pick up the package despite these undisputed facts does not establish he had a constitutionally cognizable privacy interest in the package prior to its leaving the UPS facility.

Although defendant did not have a privacy interest in the package, the question that must be answered is whether the interception of the package constituted an unlawful seizure. In Arizona v. Hicks, 480 U.S. 321 (1987), the Court held that law enforcement agents did not seize an item, within the meaning of the Fourth Amendment, when they momentarily examined it. Hicks, 480 U.S. at 324. The Court reached a similar conclusion in Place, where police officers seized a piece of luggage at an airport from a passenger who had just arrived, based only on the officers' suspicion the luggage contained marijuana. Place, 462 U.S. at 698-99. The Court upheld the officers' right to retain the luggage to permit a trained narcotics dog to sniff it, provided this activity did not take an extended period of time. Id. at 707.

Our Supreme Court recently reviewed the constitutional implications of "dog sniffs" in the context of a lawful motor vehicle stop. State v. Dunbar, 229 N.J. 521 (2017). The Court in Dunbar endorsed the United States Supreme Court's characterization in Place that "canine sniff is *sui generis*," and consequently "does not transform an otherwise lawful seizure into

a search that triggers constitutional protections." Id. at 538. The Court ultimately determined that the federal standard in Place was consistent with our State's constitutional jurisprudence and reaffirmed the validity of the "canine sniff" procedure, provided it did not "unreasonably prolong[] [the] traffic stop[.]" Id. at 539. Thus, the Court in Dunbar held "that an officer does not need reasonable suspicion independent from the justification for a traffic stop in order to conduct a canine sniff." Id. 540.

The situation here is analogous. Even if defendant had established a possessory interest in the package, the State's interference with the package occurred while the package was in transit, and Sergeant Walsh's actions did not prolong the package's delivery time. We thus hold that Sergeant Walsh's temporary removal of the package from the UPS facility, with the consent of the UPS staff, in order to conduct a canine sniff, did constitute a lawful seizure within the meaning of the Fourth Amendment.

As a matter of closure of this issue, we next address defendant's challenge to the warrant issued by the Superior Court after the canine's positive response to the package. The principal evidence the State presented in support of its application for the issuance of the search warrant came from the testimony of SCPO Detective Dockery. Relying only on unsupported speculation, defendant's appellate counsel argues that Walsh and Dockery agreed

to "falsely" represent to the judge that "Walsh had remained at the UPS facility, and that the canine officer had come to him."

Although appellate counsel does not offer any evidence to support such a serious accusation against two law enforcement agents, we are compelled to address Dockery's erroneous testimony concerning the location of the package at the time the handler and the trained dog responded to conduct the "sniff search." As the record we have described at length shows, Dockery testified that the canine sniff test occurred at the UPS facility. We note that Dockery merely responded to a series of leading questions posed by the Assistant Prosecutor. The record also demonstrates that neither the Assistant Prosecutor nor Dockery had any personal knowledge about any of the factual details presented to the judge who issued the warrant. The record shows Dockery served only as a conduit used by the prosecutor to present the State's evidence through a series of leading questions. Thus, the State's presentation of the facts came through the Assistant Prosecutor, not from Dockery.

We start our discussion of this issue by noting that "[i]n the absence of bad faith, no search or seizure made with a search warrant shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution." R. 3:5-7(g)

(emphasis added). A judge considering the issuance of a search warrant may rely on hearsay for the purpose of establishing probable cause, as long as the affiant, or in this case the testifying officer, "provide[s] the warrant-issuing judge with a substantial basis for crediting the hearsay." State v. Novembrino, 105 N.J. 95, 121 (1987). The crucial finding of probable cause must be made by an impartial judge, not by a police officer or the State's legal representative. Ibid. In order for the judge to play this critically important constitutional role, the judge

> must properly be made aware of the underlying facts or circumstances which would warrant a prudent [person] in believing that the law was being violated. Legal proof sufficient to establish guilt is, of course, not required; but suspicion and good faith on the officer's part, without more, will not suffice.
>
> [Ibid. (quoting State v. Macri, 39 N.J. 250, 257 (1963)).]

We conclude that Dockery's testimony misidentifying the location of the package is ultimately immaterial to the validity of the search warrant. The finding of probable cause was based on the narcotics dog's reaction after sniffing the package, the information provided by the State Police, and the results of Walsh's investigation after meeting with the UPS security staff. Despite this, the Assistant Prosecutor who presented this evidence should have disclosed to the judge that Dockery was not testifying

from personal knowledge. This would have permitted the warrant judge to determine whether there was a substantial basis for crediting the hearsay. Novembrino, 105 N.J. at 121.

III

We next address defendant's challenge to the opinion testimony of the State's witnesses at trial, as reflected in Point II. The trial record shows the trial judge considered the arguments of counsel concerning this issue outside the presence of the jury. Defense counsel strenuously objected to the use of expert testimony as a means of proving defendant had the intent to distribute the cocaine found in the UPS package. Counsel was particularly concerned with the language in the hypothetical question the prosecutor intended to ask the expert witness in order to elicit an opinion as to whether the evidence gathered by the State established a basis to find an intent to distribute cocaine. Exhibiting his frustration with how the ostensible "hypothetical" question tracked the specific details of defendant's case, counsel stated:

> [I]t's almost ridiculous what's happening here, in reality. But I'll hold my comments for some other forum.
>
> The additional sentence is so minutely crafted, with such detail, it never, almost in 100 years could you find another set of facts like that.

> I mean, a hypothetical question is supposed to be, well, you know, assume these facts. And now we're getting into such minutia in this case, that I think we're going to step over that line that the Supreme Court has cautioned us not to step over. To me, that's the problem with moving on from UPS box contains 1,000 grams of cocaine wrapped in plastic. I think that's all they[8] need. They don't need all this other stuff.
>
> . . . .
>
> What the prosecutor's doing here is making the tailoring of this hypothetical almost to the point of absurdity.

The prosecutor asserted that expert testimony was "appropriate to assist the jurors in understanding the difference between drugs possessed for distribution, as opposed to personal use, or how drug traffickers package and distribute illegal drugs." The judge modified and ultimately approved the State's application to pose a hypothetical question to SCPO Detective Omar Belgrave. After an extensive voir dire by the prosecutor about his law enforcement background, special training in the field of narcotic trafficking, and expertise in the area of narcotic distribution, the trial judge granted the State's motion to "qualify" Detective Belgrave "as an expert in the area of the identification, trafficking, and distribution of narcotics."

[8] We presume "they" referred to the jurors.

When the State called Detective Belgrave as an expert witness, the prosecutor presented him with the following hypothetical scenario:

> Q. Okay, Detective Belgrave, I'm going to ask you a hypothetical question based upon assumed facts. So assume the following hypothetical set of facts.
>
> A package containing 1,006.6 grams of cocaine is delivered to a person's apartment. The person picks up the package, police search the package, the person, and the person's apartment. The package contains 1,006.6 grams of cocaine, wrapped in plastic.
>
> Seized from the person is $656, in the following denominations: 32, $20.00 bills, and 16, $1 bills. No personal use drug paraphernalia is seized from the person or his apartment.
>
> Two bags of rubber bands are seized in the person's bedroom. In the person's bedroom closet is $70,863 in cash, in the following denominations: 330, $100 bills; 147 $50 bills; 1,449 $20.00 bills; 108 $10 bills; 89 $5 bills; and 32, $.25 coins.
>
> In the basement is seized one roll of plastic shrink wrap. In the hallway closet is a Seal-a-Meal vacuum storage system, and three boxes of Food Saver heat sealable bags.

Based on this "hypothetical," the prosecutor asked Belgrave the following question:

> Q. So my question for you, is based upon these hypothetical facts, do you have an opinion as to whether the cocaine in this hypothetical is possessed with intent to distribute?

> A. My opinion is in this hypothetical, is yes, that cocaine was possessed with the intent to distribute.

Belgrave explained that his opinion was based upon the quantity of the cocaine found in the "package," the amount of money found in the bedroom closet, and the presence of packaging material in the hallway closet. Belgrave further opined that it was not unusual for the police not to have discovered any cocaine in the "hypothetical" drug trafficker's apartment because "you'll see a separation of the narcotics, the paraphernalia, and sometimes the money." When the prosecutor asked him what would be the reason for keeping the money separate, Belgrave stated: "You'll see that large scale distributors are going to have all of these items in separate locations, commonly known as stash houses." (Emphasis added).

The prosecutor also asked Belgrave to opine concerning the money seized by the police in the "hypothetical," which the prosecutor informed the witness amounted to "$70,863 in the following denominations: 330 bills; 147 $50 bills; 1,449 $20 [bills]; 108 $10 bills; 89 $5 bills; and 32 $.25 coins." Based on this information, Belgrave stated: "In your hypothetical that amount of money is huge. It's not common for someone, a family even to keep that large amount of money in their home." This prompted an immediate objection from defense counsel. The

prosecutor argued that this question was "based on his expert opinion, [his] training and experience." The judge sustained defense counsel's objection and in the presence of the jury stated: "[H]is expert opinion is in matters related to the identification, trafficking, and distribution of narcotics, and not what the average American family might have in their home." The prosecutor then asked Belgrave, based on his training and experience: "[W]hat do drugs dealers keep in terms of cash?" (Emphasis added). Belgrave responded: "Drug dealers usually have a large amount of cash in their homes, or in their vehicles."

The amount of cocaine mentioned in the hypothetical, 1,006.46 grams, was the exact amount of cocaine contained in the UPS package. According to Belgrave:

> one gram of cocaine, drug bibles[9] have, can make ten lines. In my experience, that's too many lines for one gram of cocaine. We're looking about four, three to four lines per gram.
>
> PROSECUTOR: And when you say lines, you're talking about a dose of cocaine that a user usually uses?
>
> A. Yes.

[9] Belgrave did not define "drug bibles" in his direct testimony. On cross-examination, Belgrave told defense counsel that the "Drug Bible" was an actual "publication of some kind." However, he did not know who publishes it. When defense counsel asked him if he was relying on this unknown publication as a basis for his opinion, Belgrave responded: "My opinion is not based on the Drug Bible, no."

> PROSECUTOR: And how many lines would the amount of cocaine of 1,066.6 grams yield?
>
> A. Well, if you're breaking it up to three to four lines per gram, you're talking about 3,000 lines, 4,000 lines, depending, I guess, how long your line is.
>
> PROSECUTOR: How much cocaine does a personal user of cocaine usually have in their possession?
>
> A. My experience of dealing with cocaine users, and a personal user of cocaine, will have anywhere between two or three grams, even 3.5 grams, which is commonly known as an eight ball. And you'll see cocaine users buy that amount.
>
> PROSECUTOR: So in this hypothetical there's 1,006.6 grams, is based on your opinion, something different than a personal user?
>
> A. Yes.

In addition to his testimony as a fact witness, the State also called Detective Dockery as an expert witness "in cell phone use . . . in drug operations or drug activity." The prosecutor's voir dire of Dockery covered his background and experience as a law enforcement agent, and his involvement in the investigation that led to defendant's arrest, with a particular reference to his involvement with three cellphones the State seized from defendant. In response to the prosecutor's questions, Dockery confirmed he was "familiar with how drug dealers and drug users use cell phones to accomplish their goal of either purchasing or selling drugs."

At the conclusion of the voir dire, the prosecutor formally moved for the trial court to admit Detective Dockery "as an expert in the area of modus operandi of drug trafficking." In response to defense counsel's request to be heard at sidebar, the judge excused the jury from the courtroom to discuss with counsel the phraseology of the State's proposed "hypothetical question." Defense counsel specifically objected with the last question of the proposed hypothetical, which counsel claimed had "nothing to do with prepaid cell phones, and how prepaid cell phones are used in drug trafficking."

The prosecutor argued the trial judge had previously approved this particular aspect of Dockery's expert testimony, as memorialized in the court's December 2, 2013 order.[10] The prosecutor noted for the record that in "the first paragraph" of this order, the court granted the State's motion to admit Dockery's "expert opinion in the area of the modus operandi of drug trafficking, that the possession of multiple cell phones in this case is indicative of conduct commonly associated with drug

[10] This issue was addressed by a different judge in pretrial hearings. In an omnibus written opinion dated July 24, 2012, the judge decided the scope and substance of Detective Dockery's expert testimony: "The State will elicit an expert opinion from Detective Dockery that drug dealers use multiple cell phones in the illegal drug trade. His expert opinion is admissible as evidence of modus operandi of drug traffickers."

trafficking[.]" The prosecutor also noted that the order indicated that Dockery "may render his opinion in response to a hypothetical set of facts and questions that possession of five cell phones may be considered as evidence that the cocaine seized was possessed with the intent to distribute, not for personal use."

Once again, defense counsel seemed frustrated by this outcome. He characterized the prosecutor's position as "crazy." Defense counsel claimed the pretrial hearing concerning Dockery's "expert testimony" did not have anything to do with "other evidence in the case . . . it had to do with cell phones being indicative of drug trafficking. And that's what's in his report . . . there's nothing else." The trial judge acceded to defense counsel's concerns and revised the proposed hypothetical question to limit Dockery's opinion testimony and replace the reference to "drug trafficking" with "possession with intent to distribute."

When the jury returned to the courtroom, the judge granted the State's motion to admit Detective Dockery as an expert witness and instructed the jurors about the role of expert witnesses:

> In legal terminology, an expert witness is a witness who has some special knowledge, skill, experience, or training, that is not possessed by the ordinary juror, and who thus may be able to provide assistance to you in understanding the evidence presented and determining the facts in this case.

> Now, in this case Detective Omar Belgrave was offered, and qualified as an expert witness in the identification, trafficking, and distribution of controlled dangerous substance. Detective Dockery has now been offered, and I find that he is an expert, and qualified by training, education, and experience, in the area of cell phone use in regard to the distribution of controlled dangerous substance[s].
>
> You are not bound by an expert's opinion, but you should consider each opinion and give it the weight to which you deem it is entitled, whether that weight be great or slight is for you to determine, or you may reject it.

The prosecutor asked Dockery the following hypothetical question:

> Kindly assume the following hypothetical set of facts. A package containing 1,006.6 grams of cocaine is in a person's possession; the person has three cell phones on his person; one is a New Jersey area code with a known subscriber, the other two are prepaid cell phones with no subscriber information, and limited, if any, call history or contact information.
>
> The person has two cell phones in his bedroom, they are prepaid phones, they have limited if any call history, or contact information.

Against this ostensible "hypothetical" set of facts, the prosecutor asked Dockery if he had "an opinion as to whether the possession of the five cell phones in the hypothetical question is indicative of conduct commonly associated with possession with intent to distribute cocaine[.]" Dockery responded: "I believe

that there were, it is evident that these phones were used in the distribution - -[.]" Before Dockery could complete his answer, defense counsel immediately objected, arguing he was "personalizing this case." The trial judge instructed the prosecutor to orient Dockery's responses within the confines of the hypothetical. In an effort to comply with the judge's instruction, the prosecutor asked Dockery the following question:

> PROSECUTOR: I'm going to ask that you orient your response in the confines of the hypothetical. So I'll . . . ask the question again.
>
> Based on those hypothetical facts, do you have an opinion as to whether the possession of five cell phones in this hypothetical question is indicative of conduct commonly associated with possession with intent to distribute cocaine?
>
> A. Yes, I do believe that this conduct is consistent with how phones would be used . . . to . . . distribute narcotics[.]"

Dockery also opined that there were other factors to support his opinion. He testified that it was "very common for people to try to muddy the water . . . by using telephone numbers from different area codes[.]" The facts in the hypothetical did not indicate that there were five cell phones with different area codes. However, Dockery testified about the various cellphones he seized from defendant as part of his earlier testimony that described his role as an investigator of defendant's case. Stated

differently, Dockery's testimony as a fact witness, which touched upon the evidence gathering phase of defendant's case, significantly affected his "opinion" testimony as an expert witness.

Defense counsel made this point clear in the course of his cross-examination. Dockery confirmed that his personal investigation of defendant served as a basis for his expert opinion:

> DEFENSE COUNSEL: . . . Before you became an expert today, you were a fact witness, right?
>
> A. Yes, correct.
>
> DEFENSE COUNSEL: And then you were given the facts, and then you were asked to provide an opinion when he's qualifying you as an expert, right?
>
> A. That's correct.
>
> DEFENSE COUNSEL: Okay. So you're the case agent in this case, right?
>
> A. Yes, I am.
>
> DEFENSE COUNSEL: This is your case?
>
> A. Yes it is.
>
> DEFENSE COUNSEL: Well, did you assign yourself to give this expert opinion?
>
> A. In this case, regarding the cell phones, yes, I did.
>
> . . . .

DEFENSE COUNSEL: Are you aware of any scientific study that supports your opinion that prepaid cell phones are commonly used by drug distributors, or possession with intent to distribute?

. . . .

A. Outside of my experience, no.

. . . .

DEFENSE COUNSEL: You testified as an expert in court on how many times?

A. One other time.

DEFENSE COUNSEL: One other time. And nothing to do with cell phones?

A. Correct.

. . . .

DEFENSE COUNSEL: And in and of themselves, prepaid cell phones are just innocuous items of equipment, correct?

A. Correct.

DEFENSE COUNSEL: Okay. And the reason in your opinion [that] they take on significance is because of the . . . 1,006 grams of cocaine, right?

A. On top of the other things that have come out, given my investigation, the lack of contacts, the lack of call history, the number of the amount of phones that I have.

[Emphasis added.]

Defendant argues Dockery's testimony "merely characterized straightforward facts as evidence of guilt," thereby rendering his

expert opinion unduly prejudicial. Defendant asserts jurors are "adequately equipped" to determine whether the possession of several prepaid cell phones with little to no subscriber information is indicative of an intent to distribute narcotics. The State does not respond to this argument in its appellate brief.

The admissibility of expert testimony rests in the trial court's sound discretion. State v. Summers, 176 N.J. 306, 312 (2003). Our State's jurisprudence concerning the use of expert testimony in cases involving possession of narcotics with intent to distribute was significantly revised by our Supreme Court in Cain, 224 N.J. at 420-21 and Simms, 224 N.J. at 404. The record we have described in great detail here shows the State heavily relied on the expert opinion testimony of Detectives Belgrave and Dockery to establish defendant's intent to distribute the cocaine found in the UPS package. In other words, the State characterized defendant as a drug dealer, not just a drug user. We conclude the approach employed by the State to prove defendant's intent to distribute cocaine is irreconcilable with the Supreme Court's recent decisions on the subject. We thus reach the same conclusion the Court reached in Cain: "[T]he use of the expert testimony in this case had the clear capacity to cause an unjust result." Cain, 224 N.J. at 414.

Pursuant to N.J.R.E. 702, a qualified expert may testify in the form of an opinion "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." As a prerequisite to its admissibility, expert testimony should "relate[] to a relevant subject that is beyond the understanding of the average person of ordinary experience, education, and knowledge." State v. Odom, 116 N.J. 65, 71 (1989). It is incumbent upon the proffering party to show: (1) "the intended testimony concerns a subject matter beyond the ken of an average juror;" (2) the expert's testimony would be "reliable;" and (3) the proffered witness has sufficient expertise. State v. Reeds, 197 N.J. 280, 290 (2009) (citing State v. Jenewicz, 193 N.J. 440, 454 (2008)).

Trial judges are responsible to perform a gatekeeping function to ensure expert testimony is both needed and appropriate. State v. Nesbitt, 185 N.J. 504, 514-15 (2006). The judge's responsibility in this respect is not absolved even if the parties fail to object to the admission of inappropriate expert testimony. Id. at 515. Although otherwise admissible expert testimony is not automatically objectionable when it "embraces an ultimate issue to be decided by the trier of fact[,]" N.J.R.E. 704, the trial court may exclude such testimony if its risk of undue prejudice substantially outweighs its probative value. N.J.R.E. 403.

Courts in this state have long recognized that the use of expert testimony is permitted to explain the advanced methods employed by drug traffickers, packagers, and distributors. Reeds, 197 N.J. at 290—91 (citing Odom, 116 N.J. at 76). Our Supreme Court recently reaffirmed that the average juror is "not knowledgeable about the arcana of drug-distribution schemes." Cain, 224 N.J. at 426. Therefore, law enforcement officers with extensive training and experience in the world of drug distribution have "specialized knowledge" sufficient to satisfy N.J.R.E. 702. See Nesbitt, 185 N.J. at 515 ("We do not presume that ordinary members of the public who are called on to serve as jurors are versed in the many ways in which a seller of crack cocaine can act in concert with others in the business of distributing drugs on the street.").

Although our Supreme Court acknowledges the "beneficial and appropriate role" of expert testimony in the drug distribution context, that is not to say there are no appreciable limits imposed upon that role. Reeds, 197 N.J. at 284—85. For instance, case law in this state "does not license the use of a narcotics expert to tell a jury that which is obvious." Nesbitt, 185 N.J. at 514. Therefore, it is inappropriate for the State to present a law enforcement officer's expert testimony concerning straightforward facts. See State v. Sowell, 213 N.J. 89, 100—01, 102 (2013) ("It

is not appropriate to summarize straightforward but disputed evidence in the form of a hypothetical and then elicit an expert opinion about what happened. That approach improperly bolsters the State's proofs with expert testimony and can usurp the jury's sole responsibility to find the facts."); see also Cain, 224 N.J. at 427 ("The jury brings a breadth of collective experience, knowledge, and wisdom to the task. Expert testimony . . . is not a substitute for jurors performing their traditional function of sorting through all of the evidence and using their common sense to make simple logical deductions.").

Our Supreme Court has permitted the State to introduce experts to help jurors understand "the indicia of a distribution operation, such as how drug traffickers package and process drugs for distribution." Cain, 224 N.J. at 426; see also Odom, 116 N.J. at 73–75. Similarly, the Court has allowed expert testimony to shed light on the value of drugs, the significance of particular quantities and concentrations of drugs, the use of logos on narcotics packaging materials, and the function or use of specific drug paraphernalia. Cain, 224 N.J. at 426 (citing United States v. Mejia, 448 F.3d 436, 441, 449 (D.C. Cir. 2006)); Sowell, 213 N.J. at 100–05.

In State v. Berry, 140 N.J. 280, 301–02 (1995), the Court stated the experts may testify about the roles participants play

in street-level drug transactions, such as "why drug dealers use juveniles as 'mules' to carry drugs." In Nesbitt, the Court found the State properly introduced expert testimony to explain a criminal defendant's role in a drug distribution scheme when the defendant had no personal contact with the drugs themselves. Nesbitt, 185 N.J. at 515. Finally, in Reeds, the Court approved the State's use of expert testimony to explain a drug trafficker's practice of traveling with multiple persons in a borrowed car to secure drugs at a less expensive rate. Reeds, 197 N.J. at 294–95. In all of the foregoing circumstances, the Court determined the significance of the various transactions, roles, and trafficking methods were "sufficiently beyond the common understanding of jurors" to meet the requirements of N.J.R.E. 702. McLean, 205 N.J. at 451.

By contrast, Sowell is an example of a case in which our Supreme Court found the facts did not permit expert testimony. In Sowell, a visitor at a prison handed a concealed object to the inmate she was visiting. Sowell, 213 N.J. at 93. The inmate then placed the item in a bag of potato chips. Ibid. To divert attention, the inmate kissed the visitor while the transfer was taking place. Ibid. Minutes later, officers found heroin in the bag of potato chips. Ibid. In addition to the eyewitness testimony of one of the corrections officers, as well as a video

depicting the transfer, the State proffered expert testimony suggesting "an exchange of narcotics took place." Ibid.

Here, the State offered Detective Dockery to opine on the drug-related implications associated with possessing multiple pre-paid cell phones. Simply put, this is not an area that falls within the jury's "breadth of collective experience, knowledge, and wisdom[.]" Cain, 224 N.J. at 427. Rather, defendant's possession of multiple cell phones with little to no call history or subscriber information is easily distinguishable from the facts at issue in Sowell, where officers directly observed a narcotics transaction, and a finding of guilt required nothing more than the jury's most basic inferential reasoning.

As our Supreme Court stated in Nesbitt, the law does not presume that "ordinary members of the public" have awareness of the many ways in which drug distributors "act in concert with others[.]" Nesbitt, 185 N.J. at 515. That language applies with full force in this case. Therefore, Detective Dockery's expert opinion was not impermissibly based upon straightforward facts.

Here, the most prejudicial aspect of the State's use of expert witnesses is predicated on the formulation of the "hypothetical" scenarios presented to both Detectives Belgrave and Dockery. The record shows the prosecutor asked these two witnesses to base their opinions on so-called "hypothetical scenarios" that tracked,

with uncanny transparency, the factual testimony of the State's witnesses. The frustration expressed by defense counsel when he characterized this approach as "ridiculous" and "absurd" was predicated on his appreciation that these expert witnesses' opinion testimony were usurping the jury's constitutional role to decide whether the State proved defendant's guilt beyond a reasonable doubt.

Our Supreme Court has expressed its unequivocal disapproval of this approach:

> A hypothetical question in a drug case should not be used as a prosecutorial tool to sum up an entire case in a single question for the purpose of eliciting an expert's opinion on a defendant's guilt. The practice of assuming in a hypothetical question an unnamed "individual" when every detail of the question makes clear the reference is to the defendant serves no purpose and will not dissipate the prejudice of inappropriate opinion testimony. After the jury is informed about the significance of evidence that requires the assistance of expert testimony, such as quantity and packaging of drugs, and other indicia of drug distribution not commonly understood by lay persons, jurors are capable of processing the information received at trial, of drawing inferences, and making logical deductions in carrying out their duties as the ultimate finders of fact.
>
> Straightforward facts that are not in dispute should not require a hypothetical, even when expert testimony may be of assistance to the jury.
>
> [Simms, 224 N.J. at 408 (citations omitted).]

Here, the hypothetical question the prosecutor presented to Detective Belgrave included the precise amount of cocaine found in the UPS package, the fact that the package was wrapped in plastic, and the precise amount of currency found in defendant's apartment, which was further broken down by the denominations of the bills. Based on these undisputed facts, the prosecutor asked Belgrave whether he had "an opinion as to whether the cocaine in this hypothetical is possessed with intent to distribute"; to which Belgrave responded: "My opinion is in this hypothetical, is yes, that cocaine was possessed with the intent to distribute." We hold this approach contravenes the Supreme Court's holding in Cain and Simms.

Detective Dockery also exceeded the scope of the hypothetical presented to him when he relied on facts gathered from his role as the lead investigator of defendant's case. The record shows Dockery failed to abide by a hypothetical veneer and instead opined directly on defendant's conduct. This testimony violated defendant's constitutional right to a fair trial. Dockery's opinion that defendant possessed the requisite intent to distribute narcotics usurped the jury's exclusive responsibility to determine defendant's guilt. In Cain, the Court made clear that the State cannot elicit expert testimony suggesting the defendant embodied the requisite intent to distribute narcotics:

> We have come to the conclusion that an expert is no better qualified than a juror to determine the defendant's state of mind after the expert has given testimony on the peculiar characteristics of drug distribution that are beyond the jurors' common understanding. In drug cases, such ultimate-issue testimony may be viewed as an expert's quasi-pronouncement of guilt that intrudes on the exclusive domain of the jury as factfinder and may result in impermissible bolstering of fact witnesses. The prejudice and potential confusion caused by such testimony substantially outweighs any probative value it may possess.
>
> . . . .
>
> Going forward, in drug cases, an expert witness may not opine on the defendant's state of mind. Whether a defendant possessed a controlled dangerous substance with the intent to distribute is an ultimate issue of fact to be decided by the jury.
>
> [Id. at 427–29.]

Here, no "special expertise" was required to prove defendant possessed the cocaine found in the UPS package with the intent to distribute it. The opinions expressed by the State's two expert witnesses deprived defendant of a fair trial because they unconstitutionally usurped the jury's exclusive role as the finder of defendant's guilt. In this light, we do not need to reach defendant's remaining arguments.[11]

[11] In the event the State decides to retry defendant, the trial court should reexamine the arguments related to the admissibility

Reversed and remanded. We do not retain jurisdiction.

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of any statements defendant made related to the forfeiture action. See State v. Melendez, ___ N.J. Super. ___,___ (App. Div. 2018).