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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0381-13T1
A-1741-13T1
A-2051-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AHMAR D. BUTLER,

Defendant-Appellant.

STATE OF NEW JERSEY

Plaintiff-Respondent,

v.

ANTWIONE A. PARSLEY,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JONATHAN P. THOMAS,

Defendant-Appellant.

Argued January 10, 2017 - Decided March 30, 2017

Before Judges Reisner, Rothstadt and Sumners.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Docket No. 12-01-0001.

James S. Friedman argued the cause for appellant Ahmar D. Butler.

Derrick Diaz, Assistant Prosecutor, argued the cause for respondent in A-0381-13 (John T. Lenahan, Salem County Prosecutor, attorney; Joseph D. Rutala, Assistant Prosecutor, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Antwione A. Parsley (Jason A. Coe, Assistant Deputy Public Defender, of counsel and on the brief).

John T. Lenahan, Salem County Prosecutor, attorney for respondent in A-1741-13 (Thomas A. DeSimone, Assistant Prosecutor, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Jonathan P. Thomas (Michele A. Adubato, Designated Counsel, on the brief).

John T. Lenahan, Salem County Prosecutor, attorney for respondent in A-2051-13 (Lisa M. Rastelli, Assistant Prosecutor, on the brief).

PER CURIAM

Following a joint trial, a jury convicted defendants Ahmar D. Butler and Jonathan P. Thomas of murder, N.J.S.A. 2C:11-3(a)(1), (2); aggravated assault, N.J.S.A. 2C:12-1(b)(1), (2); possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and

conspiracy to commit murder and aggravated assault, N.J.S.A. 2C:5-2. The jury convicted defendant Antwione A. Parsley of conspiracy to commit murder, N.J.S.A. 2C:5-2, N.J.S.A. 2C:11-3(a)(1), and conspiracy to commit aggravated assault N.J.S.A. 2C:5-2, N.J.S.A. 2C:12-1(b)(1). The court sentenced each defendant to a fifty-year prison term, with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendants appeal from their convictions and the sentences imposed. We have consolidated the three appeals for purposes of this opinion.

To put the issues in perspective, the State accused defendants of murdering Joseph Hayes because they believed Hayes was, in street parlance, a "snitch" or "rat." The State presented evidence that Hayes's name had appeared in pretrial discovery provided to defense attorneys in an unrelated criminal case involving Parsley and Thomas (the prior case). The State contended that, from the discovery, Thomas and Parsley deduced that Hayes had cooperated with the police in the prior case; they decided to kill him, and recruited Butler to assist them in the murder. Hayes was shot to death in 2008.

At the trial, which took place in 2013, the State presented eyewitnesses who placed the three defendants near the scene of the shooting. One witness saw Butler and Thomas with guns in their

hands, and saw them meeting with Parsley right after the shooting. Several other witnesses claimed that defendants later bragged to them about their participation in the murder. Some of those statements were allegedly made while the witnesses and defendants were incarcerated.

The State's key witnesses all had criminal convictions and some of them offered their information to the prosecutor's office in exchange for lenient plea agreements in their own criminal cases. At the trial, two of the witnesses recanted their prior sworn audiotaped statements. However, following a Gross¹ hearing, the trial court permitted the State to introduce those recorded statements, in redacted form.

In their appeals, defendants argue individually or collectively that the trial court erred by: admitting N.J.R.E. 404(b) evidence of prior bad acts and admitting unfairly prejudicial police testimony; refusing to order medical records and a psychiatric evaluation of a witness; giving improper jury instructions; denying their motions for a mistrial, new trial, and judgment of acquittal; and imposing excessive sentences. They also argue that the State failed to provide timely discovery; the prosecutor committed misconduct; and the effect of cumulative

¹ State v. Gross, 121 N.J. 1 (1990).

errors deprived them of a fair trial. They also challenge their sentences as excessive.

Finding no merit in any of those arguments, we affirm the convictions and the sentences in all three appeals.

I

In this section, we set forth the trial evidence in some detail, anticipating that it will be useful as background for the legal issues. This case arises from the shooting death of Joseph Hayes, who was known by his street name, P-Hood. Hayes resided on Carpenter Street in Salem City with his girlfriend and their one-year-old son. They lived in a two-story duplex, which was separated from an adjacent residence by an alley.

On the evening of September 7, 2008, Hayes and his girlfriend were at home when the doorbell rang. The girlfriend testified that Hayes went downstairs to open the front door and that she heard him close it and walk to the back door. She next heard two different sounds coming from seven or eight gunshots. She went downstairs and saw Hayes lying with his head in the doorway and his body outside. She called 9-1-1.

Two police officers responded to the dispatch calls. When they arrived at the duplex, they heard a woman screaming from the rear of the residence. The officers proceeded to that location, where they observed a black male lying across the threshold of the

back door with blood covering his face and chest area. The woman identified the victim as Hayes.

Hayes was pronounced dead at the scene. A medical examiner later determined that Hayes died of multiple gunshot wounds, including one to the head that caused massive brain damage, three to the left side of the chest and back, one to the abdomen, and two to the hip region. The examiner saw no evidence of close range firing, explaining there was no gunpowder residue on the body. The parties stipulated that bullets removed from Hayes's body were discharged from two different firearms; the ammunition was consistent, respectively, with a .38 caliber gun and a .45 caliber gun.²

Lieutenant Timothy Haslett of the prosecutor's office was called to the scene, and recognized the deceased victim as Hayes. Haslett testified that the police, with the girlfriend's consent, searched the home and recovered a small amount of marijuana and a box that held fifty bullets of which twelve were missing. They did not find a gun. They recovered a cell phone from the victim's body, which revealed that Hayes had received a call shortly before

² Ballistics experts from the State Police also recovered spent shell casings in the grass behind Hayes's residence, as well as bullets lodged in a door and a window frame, and in a neighbor's bedroom.

his death. The officers designated the caller, later identified as Maurice Brown, as a person of interest, although he was not arrested in connection with the murder.

The police interviewed the girlfriend several times. According to the police, in one statement, taken at the hospital, the girlfriend told them that about three weeks before the murder, an unknown black male had approached her in the parking lot of a Sunoco on Market Street and had threatened to shoot Hayes in the head. However, at the trial, the girlfriend claimed that when she gave the earlier statement she was very upset and may have misspoken. She testified that the man never spoke to her; rather, a former co-worker had told her about the threat. She testified that she did not report the threat to the police or pay much attention to it, explaining that "a lot of people didn't like him [Hayes] because of what they thought they knew."

The day after the shooting, Thomas Minter gave an audiotaped statement to Lieutenants Anthony Rastelli of the prosecutor's office and Robert Eller of the Salem Police Department (PD). At trial, however, Minter recanted, and a redacted version of his taped sworn statement was played for the jury.

In his taped statement, Minter told Rastelli and Eller that the previous evening, he was riding his bicycle on Hedge Street when he saw Parsley and Thomas cross Hedge Street and walk toward

an alley that led to Carpenter Street. He recognized the men as "Head Mack" (Parsley) and "Dirty Bird" (Thomas). After turning the corner about three minutes later, he heard seven gunshots.

Minter said that at 2:00 p.m. the next day, or approximately one hour before meeting with the investigators, he was riding his bicycle when he saw the two men again. After approaching them, he overheard Thomas say: "See what I did to that nigger" and Parsley reply: "[Y]eah, they know not to fuck with us." Minter said the men were talking about the shooting and that he also heard them say that "P-Hood" or "PJ" (Hayes) was mentioned in "[s]omebody else's discovery packet." Minter, who had known Parsley and Thomas for several years, described Thomas as "five-eight, a hundred forty pounds, braids, [and] dark skin," and Parsley as "'bout ninety, light skinned, [and] low cut hair." Minter told the investigators that he went to the police station because he knew Hayes had been shot and killed the night before.

On September 8, 2008, September 15, 2008, and February 6, 2009, investigators interviewed Maurice Brown, who was identified in Hayes's phone records as the last caller. Haslett, who conducted two of the interviews, said that witnesses reported

seeing Maurice³ running from the scene after the shooting. Haslett, however, said that Maurice had lied during his interviews and had been subsequently indicted for perjury, but testified that there was insufficient information to consider him a suspect in Hayes's murder. Haslett was also aware of another shooting in the area that morning, but said the two incidents were not related.

On May 23, 2011, Sergeant Facemyer and Investigator Ray-DiGregorio of the prosecutor's office obtained an "audio/video recorded" statement from Darryl Massengill. Because Massengill was also an uncooperative witness, the State relied on his prior sworn, taped statement, which was played for the jury with certain redactions.

In his taped statement, Massengill told Facemyer and Ray-DiGregorio that he had a conversation with "Ahmar Spence" (Butler) also known by his street name, "O'Slay," about "things" in the Salem area. During their conversation, Butler confessed to killing Hayes. Butler told Massengill that he had confronted Hayes about the appearance of his name in some discovery papers and that, on the night of the murder, "he went to [Hayes's] house, knocked on the door, [Hayes] answered the door. That's about it." Butler

³ Meaning no disrespect, we refer to Maurice Brown by his first name, to differentiate him from a witness, discussed later, named Shameek Brown.

admitted to Massengill that he had fired shots at Hayes, but did not tell Massengill how many shots he had fired or whether Hayes had a weapon.

On cross-examination, Minter and Massengill both acknowledged that they had criminal histories. However, Minter had not sought or received any favorable treatment from the State in exchange for giving his original statement. On the other hand, Massengill acknowledged that in the Spring of 2011 he had written a letter to the prosecutor's office offering to provide valuable information in the Hayes case, "so long as it's beneficial for both of us." At the time, he had been charged with first-degree robbery as well as drug and gun charges. He had agreed to cooperate with the State by giving a statement and testifying against Butler in exchange for favorable deals in these pending cases. On May 23, 2011, the same day he had given the statement, Massengill had entered guilty pleas in connection with the drug, gun and robbery charges.

Massengill, however, denied at trial any knowledge of a letter written by his attorney to the prosecutor's office, dated January 23, 2012, seeking information about a \$5000 reward for information in the Hayes case. He also denied knowing details about Hayes's murder such as how many shots were fired or how many weapons were used, and admitted never telling anyone during the intervening two

years about his conversation with Butler.

Unlike Minter and Massengill, three other state witnesses - Malcolm Lamont Moore, Leslie Bundy, and Shameek Brown - did not recant their prior statements to the police. All three of those witnesses acknowledged that they had criminal records. Moore and Brown also acknowledged that they had entered into cooperation agreements with the State in return for more lenient sentences on the charges pending against them. Bundy, who admitted having prior convictions for drug-related offenses, hindering apprehension, and resisting arrest, denied that he had received any benefit for his testimony, but acknowledged that in December 2012, he had agreed to cooperate with the prosecutor's office in an unrelated case.

Moore testified that on the night of the murder, he was working on his car's stereo system in front of his house on Hedge Street when he noticed Parsley sitting alone in a parked car across the street. Moore approached Parsley and started a conversation, which was interrupted when Parsley's phone rang. Parsley answered the phone and started to close the car window, but then disconnected the call. No more than a minute later, Moore heard five or more gunshots from the direction of Hayes's house on Carpenter Street.

Seconds later, Moore saw Butler and Thomas running from

Carpenter Street towards Hedge Street, along the side of his house. They were both wearing all black and carrying guns. Contrary to his prior statement, Moore described the weapons as small handguns, not "automatics." He watched as the two men got into the car with Parsley, who then drove off. After they left, Moore heard screaming coming from Carpenter Street and walked over to where he could see Hayes's body lying half outside the house. He also saw Hayes's girlfriend.

Moore continued to see Parsley almost daily after the shooting. In May 2010, Parsley went to Moore's house about three times a week to play "Call of Duty," a video game. During one of those visits, Moore asked Parsley why he always chose the same gun to play the game. Parsley replied that it was the same kind of gun "used to kill P-Hood." Parsley told Moore that he got rid of his guns by throwing them off a bridge into the Pennsville River.

Moore said he spoke to the police in March 2011, about two-and-a-half years after Hayes's death, because Hayes was a "good friend" and "it was bad what happened to him." He was also in a "tight jam" and "look'n at some serious time, about 20 years," and felt he had "some information to trade." The State introduced evidence that, on June 15, 2010, Moore was charged with robbery, aggravated assault, credit card theft, and conspiracy. On April 1, 2011, he signed a cooperation agreement and pled guilty to an

amended charge of theft, and in return, he agreed to testify in this case.⁴

Leslie Bundy testified that in February 2009, he had provided information in this case to a representative of the prosecutor's office and he had returned in June 2011 to provide a taped statement. Consistent with his statement, Bundy testified at trial that on the night of Hayes's murder, he was walking with a friend on Thompson Street when he noticed a gray car with three people inside, one of whom was Thomas. Further down Thompson Street, he saw Hayes with a group of people. After stopping to talk, Bundy continued to walk from Thompson to Miller Streets on the way to his sister's house on Carpenter Street. Along the way, Bundy saw Thomas and another man walking on Miller Street toward an open lot behind Hayes's house.

Shortly after arriving at his sister's house, Bundy heard gunshots and someone called his sister about the shooting. He ran to Hayes's house and saw Hayes lying in his back doorway. Bundy stayed about twenty or twenty-five minutes until the police arrived. On his walk back, he saw Parsley standing on Miller

⁴ Moore testified that he also had entered into three other cooperation agreements to testify against a total of seven people. In all these cases, Moore said he withheld information for a "substantial period of time" before coming forward to get a deal for himself and to "do what was right."

Street "at the top of" an alley between Hedge and Carpenter Streets. He next saw Thomas and the other man come out of the alley and talk to Parsley. Bundy went one way and the other three men "went running the other way." Bundy said all three men were wearing black.

Bundy reported seeing Parsley a week later in the "B-1" Intake Unit at the Salem County jail, where Bundy was "locked up for child support." He overheard Parsley say to another inmate in the "dining area" that he had taken care of P-Hood (Hayes). About ten minutes later, he overheard another conversation in the "rec yard," during which Parsley was "hollering across the fence," telling someone not to worry because "the situation with P-Hood was taken care of."

Shameek Brown testified that on February 27, 2013, he was incarcerated in the "B-3" unit at the Salem County jail at the same time as Butler and Thomas. That morning, he overheard Thomas tell Butler "how a man named P [Hayes] would still be here if he wasn't snitching or trying to take the stand." He next heard Butler say: "[T]hese rat-ass niggas." In response, Thomas said: "[Y]ou know me, I shoot first, ask questions later. I had to get that rat-ass nigga out of here." Brown explained that it was "rec time," that Thomas was standing outside of Butler's cell during their conversation, and that Brown was going up the steps to his

cell on the second tier. Brown said he kept notes about what he had heard, but the parties stipulated at trial that a search of his residence failed to locate them. After hearing the conversation between Butler and Thomas, Brown said he contacted his attorney.

Brown acknowledged that his criminal record included convictions for criminal trespass in 2011 and obstruction of the administration of law in 2012. He further acknowledged that he was detained in the Salem County jail in February 2013, after failing to make bail on charges that included third-degree resisting arrest, third-degree escape, third and fourth-degree violations of probation, and third-degree possession of a controlled dangerous substance. On March 5, 2013, he gave a statement to the police, and two days later he signed a cooperation agreement in exchange for "a good deal" and entered guilty pleas on the five pending charges against him. On March 9, 2013, he was released from jail.

To corroborate Brown's description of what took place at the jail, the State presented Corrections Officer David DeMarco to narrate a video taken at the jail on the morning of February 27, 2013. DeMarco, who had been on duty that day, testified that a pod or housing unit consisted of cells on two tiers. He explained that the video showed the inmates in the "DU Unit" (the

disciplinary unit) during their "out of cell time."⁵ The video showed Thomas, who was standing in front of cells eight and nine, Butler, who was inside cell eight, and Brown, who was walking down the stairs from his cell on the second tier. At some point, Brown and Thomas went to the outdoor "rec area." Thomas later returned to the cells and slid a piece of paper under the door of Butler's cell. DeMarco did not see Thomas pass the paper to Butler at the time the video was taken.

While sitting at the desk in the unit, DeMarco saw Thomas and Butler talking, but did not hear their conversation. He recalled telling them "a couple times" to stop talking. He also made rounds, but did not notice anything unusual. He said that Brown never mentioned overhearing a conversation about murder and that Brown did not appear upset.

Defendants did not testify. Butler did not offer any witnesses on his behalf.

Thomas presented Corey Simmons as a witness. Simmons said that he was in the Salem County jail at the end of February 2013 and that he never heard Thomas mention any crime. On cross-examination, Simmons admitted that he never overheard any

⁵ To avoid any prejudice from that testimony, with counsel's agreement, the judge told the jury that Thomas, Butler and Brown were only in the DU unit for classification purposes before being moved to another housing unit.

discussions between Thomas and other inmates, and that he was housed in cell twenty-four and Thomas was in cell four. Thomas also presented Kendall Rollines, another inmate in the Salem County jail at the end of February 2013, who said that, while in jail, he never heard Thomas mention his case or any other crime. Rollines similarly acknowledged on cross-examination that he was not housed in the same pod as Thomas.

Parsley recalled DeMarco as his only witness, to give further testimony about the configuration of the jail unit where Brown, Thomas and Butler were housed at the time of the video.

II

On his appeal, Butler presents the following points of argument:

A. THE 404(B) EVIDENCE SHOULD NOT HAVE BEEN PRESENTED TO THE JURY BECAUSE IT DID NOT SATISFY ALL OF THE PREREQUISITES FOR ADMISSION, AND THE TRIAL COURT'S DECISION TO ALLOW THE STATE TO USE THIS EVIDENCE WAS REVERSIBLE ERROR.

B. THE TRIAL COURT'S DECISION TO DENY THE MISTRIAL MOTION MADE IN CONNECTION WITH HASLETT'S TESTIMONY WAS REVERSIBLE ERROR.

C. BUTLER'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED, AND THE TRIAL COURT'S FAILURE TO DO SO WAS REVERSIBLE ERROR.

D. BUTLER'S CONVICTIONS MUST BE VACATED BECAUSE THE JURY INSTRUCTIONS IN THIS CASE, WHICH CONSISTED ALMOST EXCLUSIVELY OF "CANNED"

STATEMENTS OF LAW, WERE FATALLY FLAWED (NOT RAISED BELOW).

E. BUTLER'S CONVICTIONS MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF THE ERRORS THAT OCCURRED DURING HIS TRIAL.

F. ASSUMING ARGUENDO THAT THE STATE SUCCESSFULLY PROVED BUTLER'S GUILT OF THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT, HIS SENTENCE WAS EXCESSIVE GIVEN THE TRUE NATURE AND EXTENT OF HIS RELATIVE INVOLVEMENT IN THE UNDERLYING INCIDENT.

On his appeal, Parsley presents these points of argument:

POINT I

BY INTRODUCING EVIDENCE THAT NON-TESTIFYING WITNESSES HAD PROVIDED INCUHPATORY STATEMENTS ABOUT THE DEFENDANTS' GUILT, THE STATE VIOLATED PARSLEY'S CONFRONTATION RIGHT, THE RULE IN STATE V. BANKSTON AND THE RULES OF EVIDENCE. (RAISED BELOW).

POINT II

EVIDENCE THAT PARSLEY HAD PREVIOUSLY BEEN INCARCERATED IN THE SALEM COUNTY JAIL WAS NOT RELEVANT TO A MATERIAL ISSUE IN DISPUTE AT TRIAL, AND THEREFORE SHOULD NOT HAVE BEEN ADMITTED UNDER N.J.R.E. 404(B). (PARTIALLY RAISED BELOW).

POINT III

IMPROPER PROSECUTORIAL APPEALS TO THE JURY'S EMOTIONS, THROUGH PHOTOS OF THE VICTIM'S BODY AND REFERENCES TO THE IMPACT OF THE HOMICIDE ON THE VICTIM'S FAMILY, WERE IMPROPER AND REQUIRE REVERSAL. (NOT RAISED BELOW).

POINT IV

IN FAILING TO FOLLOW THE MODEL JURY CHARGE ON CONSPIRACY, THE TRIAL COURT GAVE A CHARGE WHICH WAS BOTH MISLEADING AND CONFUSING. (NOT RAISED BELOW).

On his appeal, Thomas presents the following points of argument:

POINT I

THE DENIAL OF THE DEFENSE MOTION FOR MISTRIAL BASED UPON THE ADMISSION OF HEARSAY TESTIMONY IN VIOLATION OF DEFENDANT'S RIGHT OF CONFRONTATION WAS ERROR.

POINT II

THE ADMISSION OF N.J.R.E. 404 (B) EVIDENCE REGARDING THE PRIOR COMPLAINT AGAINST HIM FOR A FIRST DEGREE OFFENSE WITH LIFE IN PRISON WAS ERROR AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT III

THE DENIAL OF DEFENDANT'S MOTION FOR PSYCHIATRIC EVALUATION OF SHAMEEK BROWN AND FOR HIS MENTAL HEALTH RECORDS WAS ERROR.

POINT IV

THE FAILURE OF THE STATE TO MAKE TIMELY DISCLOSURE OF DISCOVERY VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL.

POINT V

ADMISSION OF IRREVELANT IMMATERIAL AND EXTREMELY PREJUDICIAL EVIDENCE CONTRARY

TO N.J.R.E. 403 DEPRIVED DEFENDANT OF A
FAIR TRIAL.

POINT VI

DENIAL OF THE DEFENDANT'S MOTION FOR A
NEW TRIAL WAS ERROR.

POINT VII

THE SENTENCE IMPOSED UPON THE DEFENDANT
OF FIFTY (50) YEARS WITH 85% PAROLE
INELIGIBILITY WAS EXCESSIVE AND SHOULD BE
MODIFIED AND REDUCED. (NOT RAISED
BELOW).

POINT VIII

THE AGGREGATE ERRORS DENIED DEFENDANT A
FAIR TRIAL. (NOT RAISED BELOW).

III

The N.J.R.E. 404(b) issues, raised in some form by each
defendant, were cogently and correctly addressed by the trial
judge in an oral opinion on April 3, 2013, addressing pre-trial
motions. We affirm for the reasons he stated. We add the following
comments.

In order to prove defendants' motive for killing Hayes, the
State needed to introduce evidence that Hayes had given the police
information about Thomas and Parsley in a previous criminal case.
Without that evidence, there would have been no context for the
testimony of the witnesses who heard defendants make incriminating
statements about the killing. The evidence was relevant to all

three defendants - including Butler - because the State's evidence demonstrated that Butler shared his co-defendants' motive, to kill Hayes because he was a "rat."

The trial judge conducted a thorough analysis of the four factors set forth in State v. Cofield, 127 N.J. 328 (1992):

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.

[Id. at 338.]

The judge determined that the State had satisfied prongs one, three and four, and that prong two (that the incidents were similar in kind) was not applicable. See State v. Williams, 190 N.J. 114, 131 (2007) (holding that the court need not apply prong two where it is not relevant).

However, the judge also limited the evidence to avoid unfair prejudice to defendants. Although Parsley and Thomas were originally charged with murder in that prior case, the jury was not told that information. Instead, after consulting with counsel, the judge determined that the jury would be told that the two men were charged with first-degree crimes that could result in life

imprisonment. That would reasonably explain why they might be seriously concerned and resentful about Hayes's cooperation with the police. On the other hand, to allow defendants to put the matter in context, the judge also told the jury that the charges were reduced to third-degree offenses carrying a penalty of probation. That, plus the fact that the charges were resolved almost a year before Hayes's murder, permitted defendants to argue to the jury that Hayes's cooperation with the police was insignificant and they had no reason to retaliate against him.

We conclude that the judge properly limited and sanitized the evidence about the prior charges. See State v. Jenkins, 178 N.J. 347, 366 (2004); see also State v. Garrison, __ N.J. __, __ (2017) (slip op. at 21-22). The judge also gave the jury several appropriately-worded instructions about the limited purposes for which they could consider the evidence about the prior charges.

The judge also permitted testimony from the jailhouse informants that they heard defendants make incriminating admissions while they were incarcerated in the same correctional facilities as defendants. On this appeal, Parsley and Thomas argue that this was prejudicial error. We disagree. The witnesses' testimony would have been incoherent without that information, and defendants could not have cross-examined them effectively without acknowledging where the alleged conversations

took place.

Again, the judge carefully protected defendants from undue prejudice by telling the jury that a person's incarceration in a jail is not evidence of guilt and may simply be a result of inability to post bail. See State v. Rose, 206 N.J. 141, 165-66 (2011) (approving limiting instructions where the jury learned that defendant was incarcerated). Although there was a reference to the fact that Butler and Thomas were in the Disciplinary Unit of the jail, the judge explained to the jury that they were only housed there for intake processing because the other units of the jail were overcrowded. Consequently, we find no merit in Thomas's argument that the mention of his being housed in Unit B-3 was unfairly prejudicial.

This case is very similar to Rose, in which the Court recognized that where a defendant was charged with trying to kill someone who had accused him of a crime, the State needed to be able to introduce evidence of the prior charge in order to make clear defendant's motive to recruit someone to kill the complaining witness. The Court's description of the issue in Rose is very pertinent here:

Thus, despite the potential prejudice of admitting evidence that defendant was incarcerated on charges that he attempted to kill Mosley, it was also the most probative piece of evidence in the case. Forcing the

prosecution to ignore such a key piece of evidence would have left the jury with more questions than answers. Without that knowledge, the jurors would have been left with a huge gap in understanding the evidence at the center of the case; they would have known that defendant wanted Mosley killed but would have had no idea why that was the case. At a very basic level the evidence was classic motive evidence. A wide range of motive evidence is generally permitted, and even where prejudicial, its admission has been allowed in recognition that it may have "extremely high probative value."

[Rose, supra, 206 N.J. at 164-65 (quoting State v. Long, 173 N.J. 138, 164-65 (2002)).]

In summary, we review the trial judge's decision to admit evidence, including evidence subject to N.J.R.E. 404(b), for abuse of discretion. See State v. Willis, 225 N.J. 85, 96 (2016); State v. J.M., 225 N.J. 146, 157 (2016). We conclude that the trial judge did not abuse his discretion in admitting this N.J.R.E. 404(b) evidence, with appropriate limiting instructions.

IV

Next we address the issue - raised by all three defendants - concerning Lt. Haslett's testimony that, based on information received, the police investigation focused on defendants as suspects. Haslett testified that early in the investigation, information developed that suggested a potential motive, based on the victim having given the police information in a previous case. He also stated that the police received information that caused

them to focus on defendants as potential suspects. He testified that defendants were arrested for the murder in June 2011.

In response to a defense objection, the trial judge precluded the prosecutor from asking any further questions about the focus of the police investigation. The judge denied a defense application for a mistrial, but offered to give a limiting instruction. Defense counsel declined that offer.

Defendants now argue that Haslett's testimony about the focus of the police investigation unfairly conveyed to the jury that unidentified witnesses, whom the defense could not cross-examine, gave the police incriminating information about them. In another context, that could be a serious concern. See State v. Bankston, 63 N.J. 263 (1973); State v. Branch, 182 N.J. 338 (2005). However, in this case, it would have been clear to the jury that the police focused on defendants because a number of witnesses, who testified at the trial, had implicated them.

Haslett's trial testimony was immediately followed by the testimony of Thomas Minter, who had given the police a statement the day after the murder. Although Minter claimed at the trial that he could not recall giving the statement, which was sworn and audio-recorded, the statement was played for the jury. In the recorded statement, Minter told the police that he heard Butler and Parsley talking about killing Hayes because his name was in

someone's discovery packet. Minter testified at the trial, and defense counsel had the opportunity to cross-examine him.

In addition, Leslie Bundy confirmed that in February 2009, he gave the police a statement incriminating Parsley and Thomas. In May 2011, Massengill gave the police a statement implicating Butler. And, as detailed in section I above, the State presented additional witnesses who gave the police statements incriminating defendants, prior to defendants' arrest in 2011. On this record, there is no realistic likelihood that the jury would have been left with the impression that the police investigation focused on defendants due to unnamed witnesses, as opposed to the witnesses the State called at trial.

In addition, viewed in context, Haslett's limited testimony actually paved the way for the introduction of some of the most useful defense evidence. Haslett's testimony was aimed at anticipating and rebutting a defense attack on the sufficiency of the investigation. After Haslett gave his fairly general direct testimony about how the investigation was conducted, the defense cross-examined him at great length in an attempt to discredit the police investigation. In cross-examining Haslett about the investigation and whether it was sloppy or thorough, the defense attorneys were permitted to elicit testimony about a wide variety of hearsay, aimed at demonstrating that a third party may have

shot Hayes but that the police failed to follow up on leads relating to that possibility.

For example, the judge allowed defense counsel to ask Haslett about the girlfriend's report that a man she did not know, who drove a maroon car, told her that he was going to shoot Hayes in the head. Defense counsel also elicited from Haslett that a maroon car was seen speeding past Hayes's house near the time of the shooting, and that Hayes was a drug dealer whose criminal vocation could be dangerous. They also cross-examined Haslett about Maurice Brown, who was seen running from the area where Hayes was shot.

Finally, after the prosecutor referred in his summation to Haslett's remark about the focus of the investigation, the judge gave the jury a curative instruction that Haslett's statement was not evidence of defendant's guilt. We find no basis on which to conclude that Haslett's brief testimony on that issue had the clear capacity to produce an unjust result. R. 2:10-2.

V

Except as addressed below, defendants' remaining challenges to their convictions are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Defendant Thomas argues that the trial court should have permitted discovery of Shameek Brown's medical records and should have ordered a psychological evaluation of Brown before allowing

him to testify. The trial judge considered and properly rejected those arguments for reasons he set forth in an oral opinion on April 3, 2013. His opinion is consistent with this court's recent decision in State v. Kane, __ N.J. Super. __ (App. Div. 2017). We review the judge's decision for abuse of discretion, and we find none. Id. at __ (slip op. at 12). Defendant's appellate contentions are without sufficient merit to warrant further discussion. R. 2:11-3(e)(2).

Based on our de novo review of the issue, we conclude there was ample evidence on which to convict defendants, if the jury found the State's witnesses credible. See State v. Williams, 218 N.J. 576, 593-94 (2014). None of the defendants was entitled to a directed verdict of acquittal, R. 3:18-1, or a judgment of acquittal notwithstanding the verdict, R. 3:18-2. See State v. Reyes, 50 N.J. 454 (1967); State v. Speth, 323 N.J. Super. 67, 81 (App. Div. 1999). Nor was any defendant entitled to a new trial. After reading the entire trial transcript, we find that the verdict was not a miscarriage of justice. See R. 3:20-1; State v. Perez, 177 N.J. 540, 555 (2003).

There were no objections to the jury charge, and we find no plain error in any aspect of the charge. R. 1:7-2; R. 2:10-2. Contrary to Parsley's argument, asserted for the first time on appeal, the charge, together with the judge's supplemental

instruction during deliberations, sufficiently communicated to the jury that it must consider each charge separately as to each defendant.

We affirm defendants' convictions.

VI

Finally, we address the challenges to the sentences imposed. Butler and Parsley were sentenced on August 13, 2013. Thomas was sentenced on September 6, 2013. Each defendant was sentenced to fifty years in prison subject to NERA, thus requiring that they each serve forty-two and one-half years without parole. So long as a sentencing judge appropriately considers and applies the mitigating and aggravating factors supported by the record, and explains how he arrived at the sentence, we owe his sentencing decision substantial deference. State v. Case, 220 N.J. 49, 65 (2014). In this case, we find no basis to disturb the sentences imposed. They were appropriately explained and do not "shock the judicial conscience." Ibid. (quoting State v. Roth, 95 N.J. 334, 365 (1984)).

Butler was sentenced first. The State moved for imposition of an extended term based on Butler's prior indictable convictions. The State also relied on aggravating factors three (risk of re-offense), six (defendant's prior criminal record), and nine (need for deterrence). See N.J.S.A. 2C:44-1(a). The State also argued

that factor one (the crime was committed in an especially cruel or heinous manner) was applicable, because the victim was shot seven times and the killing was in retribution for the victim's prior cooperation with law enforcement. In opposing the extended term motion, and in addressing the length of the sentence to be imposed, defense counsel argued that defendant's prior record was for non-violent, non-weapons-related offenses and did not merit any significant weight.

The judge declined to impose an extended term, noting that "the nature of the offenses for which the defendant has been convicted would militate away from an extended term." He also merged all of defendant's other convictions in this case into the murder count and only imposed a sentence for the murder conviction. The judge also declined to find aggravating factor one.

However, in considering aggravating factor three and six, the judge considered Butler's multiple prior arrests, one juvenile adjudication, nine disorderly persons offenses and four prior indictable convictions. Based on Butler's criminal record, the judge found there was a risk that he would commit another offense, his prior criminal record was entitled to weight, and that there was a strong need to deter defendant and others from committing murder. The judge found no mitigating factors. After finding that the aggravating factors "substantially outweigh the

mitigating factors," he imposed a term of fifty years subject to NERA.

On this appeal, Butler primarily argues that he played "a relatively reduced role in the actions and events that gave rise to this case." He contends that Thomas and Parsley were the "primary actors" and thus Butler should have received a lighter sentence than his co-defendants. We cannot agree. Butler personally participated in shooting the victim to death. Butler does not suggest that the judge overlooked any specific mitigating factors.

Moreover, although the judge did not find aggravating factor one, the manner of the shooting was particularly violent; many more bullets were fired than needed to kill the victim. Moreover, the record strongly supports the conclusion that Hayes was killed because all of the defendants – including Butler – believed he was a "rat." Killing a cooperating witness strikes at the heart of the criminal justice system. We agree with the judge that factor nine – personal and general deterrence – deserved weight in the sentencing decision. We affirm the sentence.

Defendant Parsley contends that the court should have imposed a lesser sentence on him than on his co-defendants because he was convicted of conspiracy to murder Hayes, while the co-defendants were convicted of actually murdering him. Parsley contends that

his role "was limited to driving the getaway car and/or disposing of the murder weapon(s)." The record does not support that argument. Moreover, Parsley concedes that he had thirty-three prior arrests and four prior indictable convictions. Notably, three of those prior convictions were for weapons offenses: possession of a weapon for an unlawful purpose, unlawful possession of a weapon, and possession of a weapon by a convicted felon. He also had a conviction for fourth-degree aggravated assault. Parsley's brief does not cite any statutory mitigating factors.

Contrary to Parsley's argument on this appeal, the judge followed the procedures set forth in State v. Pierce, 188 N.J. 155 (2006), in arriving at the sentence. The judge considered defendant's seven juvenile adjudications, five disorderly persons offenses and four indictable convictions. The judge also found that the nature of the offenses for which Parsley had been convicted weighed heavily in the decision to impose a sentence in the extended term range, and that the aggravating factors (three, six and nine) outweighed the non-existent mitigating factors. We find nothing excessive or conscience-shocking in the fifty-year sentence itself or in the fact that the judge imposed on Parsley the same sentence as the co-defendants. See Case, supra, 220 N.J. at 65. We affirm the sentence.

Defendant Thomas asserts that his sentence was unduly

punitive, excessive and an abuse of discretion. He contends that his prior criminal record was relatively minor, and argues that the minimum legal sentence of thirty years without parole would have been more appropriate. We find no merit in those arguments.

In arriving at the sentence, the judge appropriately considered Thomas's ten juvenile adjudications, including multiple probation violations, three adult disorderly persons offenses, and three indictable convictions. The judge also considered the fact that, at the time Thomas committed this murder in 2008, he was on probation for possession of a handgun. The judge determined that aggravating factors three, six and nine applied, for reasons he explained, and found that the aggravating factors outweighed the non-existent mitigating factors. We find no abuse of discretion or other error in the fifty-year NERA sentence. See Case, supra, 220 N.J. at 65. We affirm the sentence.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION