

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1035-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDRE MELLS, a/k/a RAHMEL JONES,
a/k/a RAMEEL JONES, a/k/a JOSH MELLS,
a/k/a RAHJAN MILLS, a/k/a ANDRE WHITE,
a/k/a AUNDRE MELLS, a/k/a TYREE WHITE,
a/k/a JAMALE EDWARDS, a/k/a TYRELL
WHITE, a/k/a TYREE SCOTT,

Defendant-Appellant.

Submitted November 1, 2016 – Decided April 3, 2017

Before Judges Fisher, Leone and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 11-12-2140.

Joseph E. Krakora, Public Defender, attorney
for appellant (Stephen P. Hunter, Assistant
Deputy Public Defender, of counsel and on the
brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, (Lucille M. Rosano, Special Deputy
Attorney General/Acting Assistant Prosecutor,
of counsel and on the brief).

PER CURIAM

Defendant appeals his convictions and sentence for first-degree murder and weapons offenses following a jury trial. Based upon our review of the record and the applicable law, we affirm defendant's convictions and sentence but remand for amendment of his judgment of conviction.

I.

On May 29, 2011, Idris Denmark was shot ten times at the New Hope Village apartment complex in Newark. The shooter first fired at Denmark and after Denmark fell to the ground, the shooter stood over him and fired additional shots at him. Ballistics evidence showed the shooter used two handguns. Denmark later died at the hospital from the gunshot wounds. Based on several eyewitness reports, defendant was arrested for the shooting.

A grand jury returned an indictment charging defendant with first-degree purposeful or knowing murder, N.J.S.A. 2C:11-3(a)(1) and (2), second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), and second-degree unlawful possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a). Defendant was charged in a second indictment with one count of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b).

The trial court held back-to-back trials on the indictments, during which a medical examiner testified concerning the manner and cause of Denmark's death, an expert testified concerning the

ballistics evidence, and law enforcement officers testified concerning their investigation. It was the testimony of three eyewitnesses to the shooting, however, that detailed defendant's actions and Denmark's murder.¹

Testimony of Jones

Between 1:00 and 1:30 p.m. on May 29, 2011, Jones was returning to her home at the New Hope Village apartment complex. She "saw a guy sitting on the ground," later identified as Denmark, whom she did not know by name but recognized as someone from the neighborhood.² Jones saw defendant walk up to Denmark and shoot him three or four times before fleeing the scene.³

Jones stood approximately forty-five feet away from defendant and Denmark when defendant opened fire. She saw defendant's face and described his attire as including "a black and white striped shirt," black pants that did not cover his ankles, and a brimless white hat known as a "[kufi]." Jones testified defendant was not

¹ Because this appeal only concerns issues pertinent to defendant's murder conviction, we do not summarize the facts developed at the trials pertinent to defendant's weapon charges.

² Jones had known defendant for about twelve years prior to the shooting. Defendant lived at the apartment complex when he was younger and remained a frequent visitor.

³ Based on the testimony of Hopkins, discussed infra, it can be reasonably inferred that Jones observed only the second round of gunshots fired at Denmark.

wearing a mask and that she "got a clear[,] good look at [defendant's] face."

Two weeks after the shooting, Jones gave a recorded statement to the police about the shooting. She also picked defendant's photograph out of a photo array "as the person [she] saw shooting the victim." Jones identified defendant as the shooter during the trial.

Testimony of Hopkins

Jones's mother, Hopkins, testified that she witnessed part of the shooting, but from a different vantage point. Hopkins lived in the New Hope Village apartment complex in a second-floor apartment that was in close proximity⁴ to the shooting. Hopkins first heard about four or five gunshots from outside her open window, went to the window and "saw a guy fall." Hopkins recognized the victim as someone from the neighborhood but did not know his name.

About two to three minutes later, an individual came into Hopkins's view and exchanged "words" with Denmark before shooting him. Hopkins saw only the side of the shooter's face but described

⁴ Hopkins described the distance between her apartment and the shooting as being within the size of the courtroom, close enough that she initially thought "one of the bullets had hit the window of [her] apartment," or even "came into the house" based on "how loud [the gunshots] were."

his attire as including "black or dark blue pants, a black and white shirt, or a blue and white shirt," and a "[kufi hat], white or off-white."

Hopkins met with the police two weeks after the shooting, gave a recorded statement, and reviewed a photo array. She selected defendant's photograph from the array but testified at trial she could not "say [he was] the actual shooter."

On direct examination by the State, Hopkins testified she heard defendant and Denmark exchange "words" as defendant stood over Denmark immediately prior to the part of the shooting she directly observed. The prosecutor then asked Hopkins "what did [she] see, if anything, after those words?" (emphasis added). Hopkins responded that Denmark said "Dre." Defense counsel immediately requested a mistrial, arguing the prosecutor had agreed not to elicit testimony about what Hopkins heard Denmark say to defendant at the time of the shooting. The prosecutor acknowledged there was an agreement, but noted she asked Hopkins about what she saw, and Hopkins's answer to the question was unresponsive, unanticipated, and inconsistent with instructions given to Hopkins that she not testify concerning any statements she heard Denmark make.

The court denied defendant's motion for a mistrial, finding the State "did not ask [Hopkins] to tell the jury what she heard,"

and that the witness's statement, "she heard the alleged victim say 'Dre,' with nothing more," did not deprive defendant of a fair trial.

Following the denial, an issue arose as to whether the prosecutor had, in fact, advised Hopkins to refrain from testifying about what she heard Denmark say. Defendant renewed his motion for a mistrial. The court heard further argument and testimony outside of the jury's presence, including Hopkins's testimony that she was not advised to refrain from saying what she heard Denmark say to the shooter. Essex County Prosecutor's Office Detective Jason Ortiz testified he had advised Hopkins not to mention any statements made by Denmark during her trial testimony.

The court denied defendant's renewed mistrial motion and accepted Ortiz's testimony, finding Hopkins was instructed by the State not to testify about any statements made by Denmark. The court, however, ruled that Hopkins's testimony about the statement would be stricken and provided the jury with the following curative instruction that was agreed to by the parties:

I instruct you as follows: [] Hopkins testified that the alleged victim in this case called the shooter Dre. I am directing you to disregard that testimony. It is stricken. What does stricken mean? It means it is to be treated – you are to treat it as if it was never said. And it should not enter into your deliberations in any manner, for any purpose, at any time.

Following the court's instruction, the prosecutor completed the direct examination of Hopkins and defense counsel cross-examined her.

Testimony of LaStarr LaGrier

LaStarr LaGrier was the third eyewitness to the shooting to testify at trial. LaGrier was at the New Hope Village complex on the afternoon of May 29, 2011, and saw the shooting. About two months after Denmark's murder, LaGrier gave a recorded statement to Essex County Prosecutor's Office Detective Robert Parsons about what she observed. At trial, however, she could recall little of her observations, and denied any recollection of what she told Parsons during the statement.

The court conducted a hearing outside of the jury's presence pursuant to State v. Gross, 121 N.J. 1 (1990), to determine the admissibility of LaGrier's recorded statement. Based on the testimony presented, the court determined LaGrier's prior recorded statement was reliable and ruled it was admissible.⁵

LaGrier's recorded statement to Parsons was played for the jury. In pertinent part, LaGrier said she was present at the complex on May 29, 2011, and saw defendant, using two handguns, shoot Denmark and then flee the scene in an awaiting automobile.

⁵ Defendant does not appeal the court's ruling or challenge the admission of LaGrier's recorded statement as evidence.

Defendant's Election Not To Testify

After the State rested, defendant sought a ruling from the court as to whether he would be permitted to testify that he knew Denmark by the nickname "Nightmare," and had a prior relationship with Denmark as former cellmates in jail. Defendant argued the proffered testimony was admissible to show he had no motive to kill Denmark.

The trial court found the proffered testimony had no probative value and was intended only to "muddy up the victim" by raising irrelevant issues about Denmark's incarceration. The court ruled defendant could testify concerning his relationship with Denmark and lack of a motive to shoot him without reference to Denmark's nickname and incarceration. The court determined any purported probative value of the proffered testimony was outweighed by the risk of "confusing [the] issues [and] could mislead the jury," and ruled the testimony was inadmissible under N.J.R.E. 403. Defendant thereafter waived his right to testify.

The Verdict and Sentence

The jury found defendant guilty on all charges, including the separately tried charge of possession of a handgun by a previously convicted person. Defendant was sentenced to life in prison on the murder conviction under count one, with a parole ineligibility period of eighty-five percent of seventy-five years pursuant to

the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2(b).⁶ Defendant was sentenced on count two, second-degree unlawful possession of a handgun, to a ten-year custodial term subject to a five-year period of parole ineligibility. The court merged for purposes of sentencing count three, which charged second-degree possession of a weapon for an unlawful purpose, with the murder conviction under count one. The court sentenced defendant to a ten-year term with a five-year period of parole ineligibility on his separate conviction for second-degree certain persons not to have weapons. The court ordered that defendant serve the sentences concurrently. Defendant appealed.

On appeal, defendant makes the following arguments:

POINT I

THE IMPROPER ADMISSION OF HEARSAY EVIDENCE THAT THE VICTIM IDENTIFIED DEFENDANT AS THE SHOOTER REQUIRED A MISTRIAL RATHER THAN A JURY INSTRUCTION TO DISREGARD THE EVIDENCE BECAUSE THIS WAS A SITUATION "IN WHICH THE RISK THAT THE JURY WILL NOT, OR CANNOT, FOLLOW INSTRUCTIONS IS SO GREAT, AND THE CONSEQUENCES OF FAILURE SO VITAL TO THE DEFENDANT, THAT THE PRACTICAL AND HUMAN LIMITATIONS OF THE JURY SYSTEM CANNOT BE IGNORED." BRUTON V. UNITED STATES, [391 U.S. 123 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).] U.S. Const. [a]mend. VI; XIV; N.J. Const. [a]rt. I, ¶¶ 1, 10.

⁶ Defendant's judgment of conviction indicates he was sentenced on count one to a seventy-five-year prison term. The discrepancy between the trial court's oral decision and the judgment of conviction is discussed infra.

POINT II

THE JUDGE'S PRECLUSIONS ON DEFENDANT'S PROFFERED TRIAL TESTIMONY AND THE LIMITS ON DEFENSE COUNSEL'S SUMMATION DENIED DEFENDANT HIS RIGHTS TO PRESENT A COMPLETE DEFENSE AND TO HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL IN PRESENTING THAT DEFENSE. U.S. Const. [a]mend. VI, XIV; N.J. Const. [a]rt. I, ¶¶ 1, 10.

POINT III

THE IMPROPER ADMISSION OF PRIOR CONSISTENT STATEMENTS BY THE STATE'S MAIN WITNESSES, WHICH BOLSTERED THEIR CREDIBILITY, WAS PLAIN ERROR. U.S. Const. [a]mend. XIV; N.J. Const. [a]rt. I, ¶ 1. (Not Raised Below).

POINT IV

CUMULATIVE ERROR DENIED DEFENDANT A FAIR TRIAL. U.S. Const. [a]mend. XIV; N.J. Const. [a]rt. I, ¶ 1.

POINT V

THE JUDGE FAILED TO ADDRESS THE REAL-TIME CONSEQUENCES OF THIS SENTENCE, WHICH WERE SEVERE AND EXCESSIVE: LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE. U.S. Const. [a]mend. VIII, XIV; N.J. Const. [a]rt. I, ¶¶ 1, 12.

II.

We first address defendant's argument that the court erred by denying his requests for a mistrial.⁷ He contends Hopkins's

⁷ As noted, defendant made two mistrial motions. Both motions were based on the argument that Hopkins's testimony required a mistrial.

testimony was introduced in violation of the State's agreement and deprived him of a fair trial. For the first time on appeal, defendant also contends Hopkins's testimony constituted inadmissible hearsay.

"A mistrial should only be granted 'to prevent an obvious failure of justice.'" State v. Smith, 224 N.J. 36, 47 (2016) (quoting State v. Harvey, 151 N.J. 117, 205 (1997), cert. denied, 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683 (2000)). "Whether an event at trial justifies a mistrial is a decision 'entrusted to the sound discretion of the trial court.'" Ibid. (quoting Harvey, supra, 151 N.J. at 205). We "should not reverse a trial court's denial of a mistrial motion absent a 'clear showing' that 'the defendant suffered actual harm' or that the court otherwise 'abused its discretion.'" State v. Yough, 208 N.J. 385, 397 (2011) (quoting State v. LaBrutto, 114 N.J. 187, 207 (1989)).

Initially, we find no support in the record for defendant's contention that a mistrial was required because the State breached the agreement⁸ not to elicit testimony concerning Denmark's statements. Hopkins was instructed not to testify about the

Defendant does not distinguish between the motions in his brief on appeal and we discern no basis to treat them separately.

⁸ The record does not reflect the basis for, or purpose of, the agreement.

statements, the prosecutor did not ask Hopkins about the statements, and Hopkins's answer to the question was unresponsive and inadvertent. Therefore, there was no basis for the court to grant a mistrial based on any claim that the State intentionally breached the agreement or engaged in any prosecutorial misconduct. See generally, State v. Jackson, 211 N.J. 394, 407-09 (2012) (discussing standard for grant of mistrial based on prosecutorial misconduct).

Nevertheless, defendant contends Hopkins's inadvertent testimony about Denmark's statement deprived him of a fair trial and required a mistrial. It is a "truism that every single thing that happens at trial cannot be completely controlled." State v. Vallejo, 198 N.J. 122, 132 (2009). "Attorneys will sometimes pose inartfully crafted questions, and even the most precise question may bring an unexpected response from a witness." Yough, supra, 208 N.J. at 397. "[I]nadmissible evidence frequently, often unavoidably, comes to the attention of the jury, and the record cannot be purged of all extraneous influence." State v. Winter, 96 N.J. 640, 646 (1984). However, "[n]ot every admission of inadmissible . . . evidence can be considered to be reversible error . . . ; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." Ibid. (alterations in original) (quoting Bruton v. United States, 391

U.S. 123, 135, 88 S. Ct. 1620, 1627, 20 L. Ed. 2d 476, 484 (1968)). We may not order a new trial in such circumstance unless we are convinced the inadmissible evidence coming before the jury was "clearly capable of producing an unjust result." R. 2:10-2; see also Yough, supra, 208 N.J. at 397-98.

Where a jury is exposed to otherwise inadmissible testimony, the decision to grant a mistrial "is one that is peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting." Winter, supra, 96 N.J. at 646-47. "To address a motion for a mistrial, trial courts must consider the unique circumstances of the case." Smith, supra, 224 N.J. at 47.

Our consideration of the court's denial of defendant's requests for a mistrial first requires a recognition of the unique circumstances presented here. Ibid. Defendant's request for a mistrial was not based on a claim that the jury heard testimony that was inadmissible under our Rules of Evidence. See, e.g., Harvey, supra, 151 N.J. at 204-06 (finding jury's exposure to inadmissible testimony about a suspect's polygraph test results did not require a mistrial). Defendant argued only that Hopkins's testimony was inadmissible under the parties' agreement. Thus, the measure of defendant's alleged actual harm is whether he suffered

any detriment based on his reliance on the parties' agreement. Cf. State v. Riley, 242 N.J. Super. 113, 119-20 (App. Div. 1990) (finding defendant's due process rights violated when he relied to his detriment on an agreement with the State that the State subsequently breached).

We do not minimize the State's obligation to honor its obligations and, as noted, the State does not dispute that Hopkins's non-responsive testimony contravened the agreement. However, defendant did not argue before the trial court, and makes no showing here, that his defense or trial strategy was prejudiced because Hopkins gave non-responsive testimony, which was promptly stricken, in contravention of the agreement. Defendant has not demonstrated he pursued a particular course of action, or abandoned one, in reliance on the agreement. In fact, the record is devoid of any evidence defendant suffered any harm based the contravention of the agreement that provided the sole basis for his mistrial motions. Defendant's failure to demonstrate he suffered any harm undermines his claim the court erred by denying his mistrial motions. Yough, supra, 208 N.J. at 397.

Defendant argues for the first time on appeal that Hopkins's testimony constituted inadmissible hearsay, N.J.R.E. 802, and therefore he was prejudiced because the jury was exposed to inadmissible evidence. Although we generally would decline to

consider the argument because it was not raised before the trial court and does not involve jurisdictional or public interest concerns, State v. Robinson, 200 N.J. 1, 20 (2009), we choose to address the merits of defendant's contention here.

In response to defendant's objection to Hopkins's testimony and mistrial motions, the judge expressly noted that the parties did not request a ruling on the admissibility of Hopkins's testimony under our Rules of Evidence. The judge observed that defendant relied solely on the parties' agreement as the benchmark for resolution of defendant's objection to Hopkins's testimony and requests for a mistrial. Fairly read, the judge's comments and observations constituted an invitation for the parties to request that he consider the admissibility of the testimony under the rules. The invitation was declined, however, and defendant elected to have the judge rule on the testimony's admissibility, and strike it, solely under the terms of the agreement.

In any event, we find no merit to defendant's claim he was prejudiced because Hopkins's testimony constituted inadmissible hearsay. The evidence showed Hopkins heard gunshots, rushed to her window, and saw Denmark falling to the ground. Within moments, defendant stood near where Denmark had fallen, and fired additional shots at him. It was during the few moments defendant, armed with a handgun, hovered near Denmark, and before he fired the second

round of shots, that Denmark said "Dre." Thus, the evidence established Denmark's statement related to a startling event, was made under the stress of excitement caused by the event, and was made without an opportunity for deliberation or fabrication. We are therefore convinced the statement constituted an excited utterance under N.J.R.E. 803(c)(2),⁹ State ex rel. J.A., 195 N.J. 324, 340 (2008), and was admissible evidence¹⁰ but for the parties' agreement.

In sum, we are satisfied there is no support for defendant's contention that he suffered prejudice from Hopkins's stricken testimony because it was inadmissible hearsay. The testimony was

⁹ Defendant suggests the State entered into the agreement in recognition that Denmark's statement was inadmissible as a dying declaration because it was not clear it was made while Denmark "believed in the imminence of [his] impending death." N.J.R.E. 804(b)(2). We express no opinion on the admissibility of Denmark's statement under the dying declaration exception to the hearsay rule.

¹⁰ Although defendant does not argue Hopkins's testimony violated his confrontation rights, we find no support in the record for such a contention. Under the circumstances presented, it could not be logically concluded that the statement Hopkins attributed to Denmark was testimonial. See, e.g., State v. Buda, 195 N.J. 278, 304 (2008) (finding child's "spontaneous and unprompted hearsay statement" was nontestimonial because "spontaneous statements do not bear the indicia of 'a formal statement to government officers' but instead are akin to 'a casual remark made to an acquaintance'" (quoting Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177, 192 (2004))). As a result, Hopkins's testimony about the statement did not violate defendant's constitutional right to confront the witnesses against him.

admissible under N.J.R.E. 803(c)(2) and defendant suffered no actual harm as a result of the contravention of the parties' agreement. Moreover, at trial defendant was identified as the shooter by three eyewitnesses, two of whom knew defendant prior to Denmark's murder. See Smith, supra, 224 N.J. at 51 (finding whether a mistrial is necessary requires consideration of the strength of the evidence present). Defendant therefore failed to make a clear showing that the contravention of the agreement caused actual harm, or that introduction of the testimony was capable of producing an unjust result. Yough, supra, 208 N.J. at 397; R. 2:10-2.

Although defendant failed to show Hopkins's testimony resulted in any actual harm requiring a mistrial, the court was nevertheless required to address the testimony's inadmissibility under the parties' agreement. The court chose to do so by providing a curative instruction directing the jury to disregard the testimony. Granting a "mistrial is not a proper exercise of discretion," where there is "an appropriate alternative course of action." State v. Allah, 170 N.J. 269, 281 (2002). "For example, a curative instruction, a short adjournment or continuance, or some other remedy, may provide a viable alternative to a mistrial, depending on the facts of the case." Smith, supra, 224 N.J. at 47.

A trial judge is "permitted and encouraged to correct errors that occur during trial" and "[a] curative jury instruction is one method to remedy trial error, and is sometimes required to address testimony that should not have been heard by the jury." State v. McKinney, 223 N.J. 475, 497 (2015). "[T]he decision to provide a curative instruction . . . is left to the sound discretion of the trial judge." Ibid. Whether the jury's exposure to otherwise inadmissible evidence can "be neutralized through a curative instruction or undermines the fairness of a trial are matters 'peculiarly within the competence of the trial judge.'" Yough, supra, 208 N.J. at 397 (quoting Winter, supra, 96 N.J. at 646-47).

We find no basis to conclude the judge abused his discretion by giving the curative instruction here. As noted, Hopkins's testimony was otherwise admissible, and defendant did not suffer any harm resulting from the inadvertent contravention of the parties' agreement that the testimony would not be admitted at trial. Under these circumstances, we are satisfied it was not an abuse of discretion for the court to reject the "extraordinary remedy," of a mistrial and instead provide the curative instruction. A mistrial was not required "to prevent an obvious failure of justice," Harvey, supra, 151 N.J. at 205.

"The Supreme 'Court has consistently stressed the importance of immediacy and specificity when trial judges provide curative

instructions to alleviate potential prejudice to a defendant from inadmissible evidence that has seeped into a trial.'" State v. Rivera, 437 N.J. Super. 434, 461 (App. Div. 2014) (quoting Vallejo, supra, 198 N.J. at 135). The trial judge's curative instruction satisfied that standard here. Defendant does not contend otherwise. See Winter, supra, 96 N.J. at 649 (finding a prompt and comprehensive curative instruction was sufficient to counter any prejudice resulting from inadmissible testimony).

We also reject defendant's contention that just as a jury cannot be relied upon to ignore an erroneous admission of an extrajudicial confession, Bruton, supra, 391 U.S. at 132, 88 S. Ct. at 1625-26, 20 L. Ed. 2d at 482-83, the jury here could not ignore Hopkins's testimony about Denmark's statement. In Bruton, the Court found a curative instruction directing the jury to disregard a non-testifying codefendant's confession implicating the defendant in the commission of a crime was insufficient to ameliorate the violation of the defendant's confrontation rights. Id. at 136-37, 88 S. Ct. at 1628, 20 L. Ed. 2d at 485-86.

The Bruton Court stressed the "devastating" prejudice to a defendant when "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial," particularly as the jury was not told that accomplice

testimony "is inevitably suspect." Id. at 135-36, 88 S. Ct. at 1628-29, 20 L. Ed. 2d at 485.

Those are not the circumstances here. Moreover, the principles in Bruton are also inapplicable here because, as argued before the trial court, the admission of Hopkins's testimony did not violate defendant's constitutional rights; it violated only the State's agreement that such testimony would not be introduced. Relying on our decision in Riley, supra, 242 N.J. Super. at 119, defendant now contends that Hopkins's testimony, provided in contravention of the agreement, resulted in a violation of defendant's due process rights because "[d]ue process requires that the government fulfill its promise when a defendant relies to his detriment on that promise" As noted above, however, Hopkins's testimony was non-responsive and the breach inadvertent. In addition, defendant did not argue at trial, and makes no showing here, that he suffered any harm as a result of any reliance on the State's agreement.

Accordingly, the court provided the curative jury instruction without the necessity of addressing the constitutional issues the Supreme Court addressed in Bruton, and only in response to defendant's claim that Hopkins's inadvertent testimony contravened his agreement with the State. "One of the foundations of our jury system is that the jury is presumed to follow the trial court's

instructions." State v. Burns, 192 N.J. 312, 335 (2007). "We hold in high regard the capacity and integrity of juries," and their capability "of following the trial court's curative instruction." Mahoney v. Podolnick, 168 N.J. 202, 222 (2001). "We act on the belief and expectation that jurors will follow the instructions given them by the court." State v. T.J.M., 220 N.J. 220, 237 (2015).

Moreover, although the presumption that jurors follow the court's instructions "is not inviolate," State v. Bey, 112 N.J. 45, 81 (1988), a defendant must present "evidence demonstrating otherwise." State v. Montgomery, 427 N.J. Super. 403, 410 (App. Div. 2012), certif. denied, 213 N.J. 387 (2013). There is nothing in the record suggesting the jurors ignored the court's instruction and defendant has not shown otherwise.

III.

Defendant next argues the judge erred by ruling defendant could not testify that Denmark's nickname was "Nightmare" and that he spent time with Denmark in jail because the testimony supported a defense of third-party guilt. Defendant argues the judge's decision violated his due process right to present a complete defense and that the proffered testimony satisfied the standard for admission of evidence of third-party guilt under State v. Sturdivant, 31 N.J. 165 (1959), cert. denied, 362 U.S. 956, 80 S.

Ct. 873, 4 L. Ed. 2d 873 (1960). The State contends defendant's proffered testimony was completely speculative as to any alleged third-party guilt, and that the court properly precluded the evidence under N.J.R.E. 403.

The trial court barred defendant's proffered testimony regarding Denmark's nickname and jail time, which would permit the jury to infer Denmark had a criminal history, finding the probative value of such testimony was outweighed by its potential to confuse the issues and mislead the jury. During summation, the court also sustained the State's objections to defense counsel's arguments that Denmark's reckless lifestyle provided evidence of third-party guilt. The court found such comments were unsupported by the evidentiary record and instructed the jury to disregard them.

We accord deference to a trial court's evidentiary rulings "absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Nantambu, 221 N.J. 390, 402 (2015) (quoting State v. Harris, 209 N.J. 431, 439 (2012)). In the present matter, we do not discern any abuse of discretion in the court's rulings.

"The fundamental principle guiding the admission of evidence is relevance." State v. Weaver, 219 N.J. 131, 149 (2014). Evidence is relevant if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action."

N.J.R.E. 401. Nevertheless, even "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." N.J.R.E. 403.

Defendant argues the court erred by analyzing the proffered testimony solely under Rule 403, without any reference to the legal standard governing third-party guilt. At trial, however, defense counsel did not proffer the defendant's putative testimony as evidence of third-party guilt. Instead, it was argued that the putative testimony concerning Denmark's nickname and past incarceration with defendant showed defendant did not have a motive to murder Denmark. Presented in that context, the court did not abuse its discretion by determining that the testimony had no probative value as to defendant's possible motive and finding the testimony was unduly prejudicial to the State because its introduction would have done nothing more than sully Denmark's reputation for no relevant purpose. See, e.g., State ex rel. S.G., 348 N.J. Super. 77, 87 (App. Div. 2002) (finding evidence of a victim's character inadmissible where there was no factual nexus that made the evidence probative on the issue of guilt), rev'd on other grounds, 175 N.J. 132 (2003).

Even assuming defendant had actually proffered the testimony as evidence of third-party guilt, the court's decision to exclude it was not an abuse of discretion. A defendant has a constitutional right under the due process clause of the Fourteenth Amendment to offer evidence of third-party guilt. See Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Third-party guilt evidence is admissible only when "the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case." State v. Loftin, 146 N.J. 295, 345 (1996) (quoting Sturdivant, supra, 31 N.J. at 179). "Testimony concerning third-party guilt is not admissible unless there is evidence linking a third party to the crime." State v. Perry, 225 N.J. 222, 242 (2016). Thus, the defendant must do more than "introduce evidence of some hostile or indecent event and 'leave its connection with the case to mere conjecture.'" Id. at 239 (quoting Sturdivant, supra, 31 N.J. at 179).

"[The] standard does not require a defendant to provide evidence that substantially proves the guilt of another, but to provide evidence that creates the possibility of reasonable doubt." Id. at 238 (quoting State v. Cotto, 182 N.J. 316, 332 (2005)). "Indeed, even if there is no evidence linking another specific suspect to the crime, we 'have recognized that evidence that tends to create reasonable doubt that someone else,

generically, rather than defendant, committed the offense, is admissible.'" Id. at 238-39 (quoting Loftin, supra, 146 N.J. at 345).

Applying this standard, defendant presented nothing demonstrating that the testimony concerning Denmark's nickname, "Nightmare," or past incarceration with defendant shared any rational connection between third parties and Denmark's murder. Defendant merely sought to elicit "some hostile event," Sturdivant, supra, 31 N.J. at 179, Denmark's incarceration, as well as Denmark's inflammatory nickname. The proffered testimony simply had no "rational tendency to engender a reasonable doubt" as to the State's evidence against defendant, but rather left the connection between the proffered testimony and the present case to "mere conjecture." Ibid.; see also State v. Koedatich, 112 N.J. 225, 305 (1988) (explaining a defendant may not attempt to show another had the motive to commit a crime "where the proffered evidence of motive simply affords" the possibility of third-party guilt), cert. denied, 488 U.S. 1017, 109 S. Ct. 813, 102 L. Ed. 2d 803 (1989).

For these reasons, we conclude the trial court did not abuse its discretion in precluding defendant's proffered testimony under Rule 403, and the testimony was otherwise inadmissible to establish third-party guilt. Perry, supra, 225 N.J. at 242. For the same

reasons, it was not an abuse of court's discretion to prohibit defense counsel from arguing Denmark lived a reckless lifestyle and therefore may have been a target for murder by others. There was no evidence supporting those arguments. See Loftin, supra, 146 N.J. at 347 ("The scope of defendant's summation argument must not exceed the 'four corners of the evidence'" developed at trial (quoting State v. Reynolds, 41 N.J. 163, 176, cert. denied, 377 U.S. 1000, 84 S. Ct. 1930, 12 L. Ed. 2d 1050 (1964))); State v. Reddish, 181 N.J. 553, 629 (2004) ("A trial court must exclude from summation those arguments that the evidence does not reasonably support.").

IV.

Defendant also argues the court erred by admitting prior consistent statements made by Jones and Hopkins to the police. In response to a question posed by the prosecutor, Jones stated that her trial testimony was "essentially" what she told the police. Hopkins similarly responded to a question from the prosecutor, stating that her trial testimony was "basically" the same as what she told the police. Defendant claims the testimony was inadmissible under N.J.R.E. 607 and N.J.R.E. 803(a)(2) because it was not provided for the purpose of rebutting a charge of recent fabrication.

We review defendant's argument under the plain error standard because there was no objection at trial. State v. R.K., 220 N.J. 444, 458 (2015); State v. Gore, 205 N.J. 363, 383 (2011); R. 2:10-2. We therefore consider whether defendant has shown admission of the testimony was "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2; State v. Frisby, 174 N.J. 583, 591 (2002). We conclude it was not.

The State concedes that prior consistent statements are not admissible to bolster a witness's testimony or credibility. N.J.R.E. 607; N.J.R.E. 803(a)(2); Neno v. Clinton, 167 N.J. 573, 580 (2001). The State, however, contends that Jones's and Hopkins's responses to the respective questions were not capable of producing an unjust result. We agree.

Jones and Hopkins testified at length about their knowledge concerning Denmark's murder. They were subject to extensive and probing cross-examination about their perceptions of the event, their recollections, and statements they made to the police. We are satisfied that the rigors of cross-examination provided a sufficient challenge to their credibility, and thus their brief affirmations concerning their prior statements to the police were not capable of producing an unjust outcome. R. 2:10-2.

V.

Defendant argues that if this court determines each alleged error is insufficient to warrant reversal, the effect of each error in the aggregate denied defendant a fair trial. "[E]ven when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008); see also State v. Wakefield, 190 N.J. 397, 538 (2007) ("the predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair"), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008).

As we have discussed, defendant has not demonstrated any prejudicial error occurred at trial. The principle of cumulative error, therefore, has no application here. See Weaver, supra, 219 N.J. at 155 ("If a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair.").

VI.

Last, defendant argues the court erred by failing to consider the "real-time consequences" of his sentence because service of the minimum period of parole ineligibility under NERA, N.J.S.A. 2C:43-7.2, will exceed his life expectancy. See N.J.S.A. 2C:44-

1(c)(2); State v. Ramsey, 415 N.J. Super. 257, 271-72 (App. Div. 2010), certif. denied, 205 N.J. 77 (2011); State v. Marinez, 370 N.J. Super. 49, 57-59 (App. Div.), certif. denied, 182 N.J. 142 (2004). The record shows, however, that the judge considered the real-time consequences of the sentence, expressly advising defendant of the years he would be required to serve before eligibility for parole.

We review a "trial court's 'sentencing determination under a deferential [abuse of discretion] standard of review,'" State v. Grate, 220 N.J. 317, 337 (2015) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)), and may "not substitute [our] judgment for the judgment of the sentencing court." Lawless, supra, 214 N.J. at 606. We must affirm a sentence

unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

We are satisfied defendant's sentence was not excessive and was supported by the judge's findings. The court followed the statutory guidelines and made detailed findings concerning the


aggravating and mitigating factors under N.J.S.A. 2C:44-1 that are supported by credible evidence in the record.¹¹ Moreover, based on the court's findings, the life sentence imposed does not shock our judicial conscience.

The judgment of conviction does not, however, accurately reflect defendant's sentence. The judgment of conviction erroneously states that defendant was sentenced to a term of seventy-five years on his murder conviction when, in fact, during the sentencing proceeding the court imposed a life term subject to NERA for the conviction. See State v. Pohl, 40 N.J. Super. 416, 423 (App. Div. 1956) ("where there is a conflict between the oral sentence and the written commitment, the former will control if clearly stated and adequately shown, since it is the true source of the sentence"). Although the judge accurately observed at sentencing that the eighty-five percent period of parole supervision under NERA for defendants sentenced to life imprisonment is calculated based on seventy-five years, N.J.S.A. 2C:43-7.2(b), the sentence imposed was a life term and the judgment must be amended to reflect that sentence.

¹¹ The court did not find any mitigating factors under N.J.S.A. 2C:44-1(b).

Defendant's conviction and sentence are affirmed. The matter is remanded for correction of the judgment of conviction. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION