SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3386-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KARLA FREEMAN,

Defendant-Appellant.

Submitted January 10, 2017 – Decided September 7, 2017

Before Judges Espinosa and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 04-02-0122.

Joseph E. Krakora, Public Defender, attorney for appellant (Craig S. Leeds, Designated Counsel, on the brief).

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Scott J. Gershman, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Karla Freeman challenges the denial of her petition for post-conviction relief (PCR), which raised various

claims of ineffective assistance of her trial and appellate counsel. The PCR judge evaluated all of defendant's claims and conducted a full evidentiary hearing before denying the petition. For the reasons that follow, we affirm the order denying relief, but remand for the limited purpose of correcting the judgment of conviction to reflect a final charge of second-degree robbery rather than first-degree robbery.

I.

In 2004, a grand jury sitting in Mercer County returned an indictment charging defendant and co-defendant, Maurice Turner, with first-degree murder, N.J.S.A. 2C:11-3(a)(1) (count one); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count two); two counts of first-degree robbery, N.J.S.A. 2C:15-1 (counts three and four); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count five); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count six). Defendant was charged alone with fourth-degree tampering with physical evidence, N.J.S.A. 2C:28-6(1) (count seven).

Defendant and Turner were tried to a jury in March 2006, but a mistrial was declared before the jury deliberated. Defendant's case was severed from Turner's and she was retried.

We repeat relevant facts from our 2010 opinion affirming her conviction:

> This matter stems from an incident that occurred in the early morning hours of May 24, 2003 that resulted in the death of William Goldware. . . .
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> At 2:44 a.m., the Trenton Police Department received a 911 call for which police responded to defendant's home address. . . . Inside the house, the officers observed a flipped-over barstool and a blood stain on the wall. On the second floor, they found defendant sitting on a bed in the bedroom. The bedroom showed obvious signs of struggle, as there was an overturned ironing board and blood on the walls and dresser. Defendant was crying and talking on the phone. She was wearing a blood-stained nightgown, and one of the fingernails on her left hand was missing. The fingernail was found in another bedroom.
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> Goldware was found lying in a puddle of blood on the bathroom floor. He was wearing boxer shorts, and he had twenty-four stab wounds, two of which were later described as fatal. . . .
>
> . . . .
>
> At headquarters, defendant executed a waiver of her Miranda[1] rights, and then described the evening's events . . . . She stated that while at Black Jack's, she saw Warren "Cisco" Littlejohn, whom she recognized. Cisco told her Goldware was interested in her, and she and Goldware exchanged phone numbers. Goldware later called her and asked if he could come over to her house. She said yes, and the two exchanged

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

several additional phone calls before Goldware arrived. While upstairs with Goldware, defendant heard a "screech," and an intruder began beating both her and Goldware. The intruder made demands for property, saying "[w]here the fuck it at?". When defendant responded with confusion, the intruder said "shut the fuck up, bitch." Defendant and Goldware then went into the bathroom, but they could not escape because of the bars on the window. Defendant told [Detective] Thomas that the intruder was 6'1", slim, twenty-nine years old, and that he "sounded like a black male." Defendant also stated that she believed the intruder had hit her and Goldware with the ironing board and stool.

Defendant reported that after the attack, she first called her grandmother because "when you're in trouble, you think about talking to your mom." Thomas asked why she felt she was in trouble if she did nothing wrong; defendant responded "I feel like I did something wrong." Before her grandmother answered the phone, defendant hung up and called 911. After relating this story, defendant asked Thomas if he thought she had committed the crime. He stated, "I think you did it or someone who you know did it," at which point defendant started "crying hysterically."

Defendant then told Thomas she killed Goldware and she agreed to give a formal statement to that effect. Defendant stated that Littlejohn facilitated a sex-for-money arrangement between defendant and Goldware, and Goldware came to defendant's house. A fight ensued when Goldware demanded sex and refused to pay for it. Defendant stated that during the fight, she grabbed a knife from her kitchen and when Goldware started to choke her, she used the knife to stab him.

Later, however, while Thomas was compiling defendant's statement defendant

presented a different version of the evening's events. She said "Detective, that's not what happened. Me and Maurice set him up to rob him, and Maurice stabbed him." When Thomas asked if she was sure, she replied "No, no, that's not what happened. . . . I killed him."

Detective Edgar Rios next interviewed defendant in order to clarify her answers. Defendant stated that Goldware called her and asked her how much it would cost to have sex; she informed him it would be $250. Goldware propositioned defendant which defendant told Rios, made her feel "sleazy" because she felt that Goldware thought he could have sex with her for free. Defendant admitted that she would not have had sex with Goldware for free but that she would have done it for $250; she needed money to pay her bills. Defendant further stated that after she had stabbed Goldware, she called her cousin's boyfriend, co-defendant Maurice Turner. When Turner arrived, she gave him the knife, told him she stabbed someone, and then directed him to leave. When asked why she called Turner, defendant stated, "[b]ecause I know he has a car. And I needed someone to get rid of the knife so I could tell you the story about someone breaking in and beating us up."

Upon meeting with Thomas again, defendant told him her sister told her she better tell Thomas the truth about what happened. Defendant executed another Miranda waiver form, and again related to Thomas that Littlejohn arranged a meeting between her and Goldware. When Goldware called her later that evening, she informed him that she was going home and that she would call him when she got there. After defendant left Black Jack's, she asked Turner for a ride home. She declined Turner's offer to go to an after-hours bar, stating that she "got some money coming to my house." After hearing this, Turner told

> defendant to leave her door open so that he could enter and rob Goldware. . . .
>
> . . . .
>
> Defendant then told Thomas that after Goldware arrived, she left the door open so that Turner could enter. Defendant heard Turner as he entered the house and climbed the stairs, so she distracted Goldware by kissing him. When Turner arrived in the bedroom, he pushed defendant and Goldware to the floor and began asking "where it's at?". Turner then stabbed Goldware "three or four times." Defendant and Goldware escaped to the bathroom, but Turner followed them. When Turner finally fled the scene, defendant first dialed her grandmother's telephone number before calling 911.
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> [State v. Freeman, No. A-1369-07 (App. Div. Sept. 10, 2010) (slip op. at 3-9) certif. denied, 205 N.J. 100 (2011).]

The jury found defendant not guilty of first-degree robbery and purposeful or knowing murder, but guilty of felony murder and second-degree robbery as a lesser-included offense of the first-degree charge. Counts three, five, six, and seven were dismissed.

The sentencing judge merged the robbery count into the felony murder count and sentenced defendant to a term of thirty years subject to a parole disqualifier for the full term.

Defendant appealed, arguing that her conviction should be reversed because the trial judge's jury charge "failed to instruct the jury on 'divergent factual versions' of causation

for felony murder." Id. at 18. We rejected defendant's claim that her conviction on the felony murder charge was precluded by her acquittal of purposeful or knowing murder or first-degree robbery because the felony murder statute "includes both first-degree and second-degree robbery, as a predicate offense for a conviction of felony murder." Id. at 31. The Supreme Court denied defendant's petition for certification. 205 N.J. 100 (2011).

Defendant filed a pro se PCR petition alleging ineffective assistance of trial counsel for failing to advise defendant to accept the State's pre-trial plea offer of fifteen years, and failure to locate, interview, and call a witness at trial who could have testified that defendant "consumed numerous alcoholic drinks" on the day of the murder and was intoxicated.

After PCR counsel was appointed, a brief containing additional claims was submitted including allegations that trial counsel was ineffective for failing to argue for dismissal of the indictment on double jeopardy grounds after the mistrial and for failing to discuss defendant's right to testify with her. Defendant also claimed appellate counsel failed to argue that the trial judge committed reversible error by denying trial counsel's request for a jury charge on conspiracy.

After hearing oral argument, the PCR judge ordered an evidentiary hearing. On July 25, 2014, the judge heard the testimony of defendant's trial counsel, Robin Lord, and defendant. On January 5, 2015, the PCR judge entered an order accompanied by an eleven-page written decision denying defendant's petition.

On appeal, defendant raises the following arguments:

> POINT I
>
> DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE UNITED STATES AND NEW JERSEY CONSTITUTIONS AND THE LOWER COURT ERRED IN CONCLUDING OTHERWISE.
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> > A. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT ARGUING FOR DISMISSAL OF THE INDICTMENT BASED ON DOUBLE JEOPARDY GROUNDS AFTER THE FIRST TRIAL ENDED IN A MISTRIAL.
> >
> > B. TRIAL COUNSEL WAS INEFFECTIVE DURING THE PLEA NEGOTIATIONS BY FAILING TO FULLY AND PROPERLY CONVEY THE PLEA OFFER TO THE DEFENDANT SO THAT DEFENDANT COULD MAKE A KNOWING AND INFORMED DECISION.
> >
> > C. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO FULLY INVESTIGATE THE DEFENDANT'S CASE, AND THEREAFTER, PROFFER WITNESSES ON HER BEHALF.
> >
> > D. THE DEFENDANT WAS DEPRIVED OF HER RIGHT TO TESTIFY AT TRIAL ON HER OWN BEHALF BY VIRTUE OF TRIAL COUNSEL'S INEFFECTIVE PRESENTATION.

POINT II

THE PROSECUTOR'S REFUSAL TO OFFER A PLEA BARGAIN TO THE DEFENDANT PRIOR TO THE FIRST TRIAL WAS RETALIATORY, PUNITIVE AND DEPRIVED DEFENDANT OF EQUAL PROTECTION UNDER THE LAW.

POINT III

THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL BY IMPARTIAL JURY AND HIS DUE PROCESS RIGHT TO A FAIR TRIAL BECAUSE OF IMPROPER CHARGES TO THE JURY.

POINT IV

THE CUMULATIVE EFFECT OF THE ERRORS COMPLAINED OF RENDERED THE TRIAL UNFAIR.

POINT V

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON DIRECT APPEAL.

II.

To prove a claim for ineffective assistance, a defendant must show that counsel's performance was deficient, and that the deficiency caused him or her prejudice. State v. Goodwin, 173 N.J. 583, 596 (2002) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Counsel's performance qualifies as deficient only if it falls outside "the wide range of reasonable professional assistance." Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. Any such deficiency is prejudicial, moreover, only if there is a reasonable probability that "but for

counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Generally, a trial counsel's strategic choices are entitled to a considerable presumption of competence, so long as they are made after an appropriate investigation of relevant law and fact. State v. Harris, 181 N.J. 391, 488 (2004) (quoting Strickland, supra, 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005).

A PCR petitioner bears the burden of establishing his or her right to relief pursuant to that standard by the preponderance of the evidence. State v. Preciose, 129 N.J. 451, 459 (1992). A judge's findings in that regard after an evidentiary hearing must be afforded deference on review so long as they are supported by sufficient credible evidence in the record. Harris, supra, 181 N.J. at 415. That is particularly so to the extent those findings are colored by the court's credibility evaluations made after an opportunity to observe live testimony first-hand, State v. Nash, 212 N.J. 518, 540 (2013), and by its feel of the case, State v. Taccetta, 200 N.J. 183, 194 (2009). Its legal conclusions, however, are subject to de novo review on appeal. Nash, supra, 212 N.J. at 540-41.

A.

Defendant first claims that her trial counsel was ineffective for failing to move for a dismissal of her indictment after the mistrial. She argues the State caused the mistrial and should therefore have been barred from prosecuting her a second time for the same offenses.

"It is basic that a defendant is entitled to have a trial proceed to its normal conclusion. Subsumed in this constitutional protection is the policy to be protected from the harassment of successive prosecutions, . . . and to receive only one punishment for an offense." State v. Rechtschaffer, 70 N.J. 395, 404 (1976) (citing Downum v. United States, 372 U.S. 734, 736, 83 S. Ct. 1033, 1034, 10 L. Ed. 2d 100, 102-03 (1963)). Although jeopardy attaches once the "jury is impaneled and sworn," State v. Farmer, 48 N.J. 145, 169 (1966), cert. denied, 386 U.S. 991, 87 S. Ct. 1305, 18 L. Ed. 2d 335 (1967), termination of a trial thereafter, but before conclusion with a final verdict, does not invariably preclude subsequent prosecution of a defendant for the same charges. State v. Loyal, 164 N.J. 418, 435 (2000). Unless termination was improper, "the defendant's right to have his initial trial completed is subordinated to the public's interest in fair trials and

reliable judgments." Ibid. (citing Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974, 978 (1949)).

Whether a mistrial bars re-prosecution depends on the circumstances of each case. Illinois v. Somerville, 410 U.S. 458, 464, 93 S. Ct. 1066, 1070, 35 L. Ed. 2d 425, 431 (1973). Generally, subsequent retrial is constitutionally permissible so long as there was "sufficient legal reason and manifest necessity to terminate [the] trial," Loyal, supra, 164 N.J. at 435, or the defendant consents to the termination, United States v. Dinitz, 424 U.S. 600, 607, 611, 96 S. Ct. 1075, 1079-81, 47 L. Ed. 2d 267, 274, 276 (1976), and provided, in either case, that the mistrial was not brought about by "bad faith, inexcusable neglect or inadvertence[,] or oppressive conduct on the part of the State." Farmer, supra, 48 N.J. at 174. Statutory protection against double jeopardy echoes the constitutional standard in relevant respect. See N.J.S.A. 2C:1-9(d) (delineating proper circumstances for termination, including where made with defendant's consent or "required by a sufficient legal reason and a manifest or absolute or overriding necessity").

Here, the mistrial was ordered after a detective, called by the State, testified on cross-examination that defendant had provided investigators with certain incriminating evidence

against Turner. After confirming that investigators obtained a warrant for phone records for the phones of three individuals, the detective not only identified defendant as the source of the information, but volunteered that one of the phone numbers she provided belonged to Turner:

> Q Who gave you these phone numbers to put in your affidavit to get the warrant?
>
> A We initially got those phone numbers from Karla Freeman at the police station.
>
> Q At the police department?
>
> A Yes.
>
> Q Karla Freeman gave all three phone numbers?
>
> A Yes. She obtained those -- she knew her cell phone number, she gave us her cell phone number. Then she retrieved the two numbers from her cell phone belonging to Maurice Turner and also the victim.
>
> . . . .
>
> She stated she had Maurice Turner's cell phone number, but she did not know it by heart. It was in her cell phone.

After hearing these responses, Turner's counsel moved for a mistrial pursuant to United States v. Bruton, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622, 20 L. Ed. 2d 476, 479 (1968), on the ground that there was no way for him to cross-examine defendant, the source of the information incriminating his client. The

detective was then questioned out of the jury's presence and acknowledged he had never interviewed defendant himself and had no personal knowledge of the incriminating statement. Defendant's counsel joined in the motion, and the trial judge granted a mistrial the following day although defendant fails to provide any record of that decision in her appellate appendix.

The PCR judge concluded that defendant's counsel was not ineffective for failing to request a dismissal after the mistrial, because termination was justified by manifest necessity, and defendant did not object to the mistrial.

Defendant does not dispute that the mistrial here was legally justified, the testimony which led to the mistrial was elicited during cross-examination, the mistrial motion was initially made by Turner's counsel, and that defendant's counsel joined in the motion. She asserts that the State should be held accountable for the mistake made by its own witness, particularly in light of the extensive attention given in pretrial practice to the exclusion of inculpatory statements like the one that triggered the mistrial, and the State's insistence on conducting a joint trial in spite of the potential pitfalls. Defendant does not allege bad faith or oppressive conduct, but argues that the State's "inexcusable neglect" should have barred her retrial.

We are satisfied that there was no inexcusable neglect, as the detective unexpectedly provided inadmissible testimony in response to a question from defendant's counsel. Dismissal of the indictment on double jeopardy grounds was not required and defendant's counsel cannot be deemed ineffective for failing to make a meritless motion. State v. Worlock, 117 N.J. 596, 625 (1990).

B.

Defendant next argues that her trial counsel was ineffective for failure to adequately explain to her a favorable plea offer, asserting that, had she properly understood its terms, she would have accepted it.

The constitutional right of a criminal defendant to effective assistance of counsel extends to the plea bargaining stage. State v. Taccetta, 351 N.J. Super. 196, 200 (App. Div.), certif. denied, 174 N.J. 544 (2002). A counsel's "gross misadvice of sentencing exposure that prevents [a] defendant from making a fair evaluation of a plea offer and induces him [or her] to reject a plea agreement he [or she] otherwise would likely have accepted constitutes remediable ineffective assistance." Ibid. (citations omitted).

Defendant testified at the hearing that the State made no plea offer prior to the first trial, but offered a

recommendation of a fifteen-year term in return for her plea to manslaughter and robbery. Defendant testified that she objected to pleading guilty to manslaughter, as she felt she did not "assist" Turner in killing Goldware. Defendant claimed that Lord did not explain to her that her willing participation in the robbery was legally sufficient to establish felony murder. Defendant now claims that she would have accepted the plea offer had she known that. The plea agreement also required defendant to testify against Turner. Defendant admitted that she was reluctant to testify against Turner because he was a gang member, but explained she would have done it because of her son.

Lord testified that she had sought a deal for a fifteen-year sentence, but could not recall whether the State made such an offer and could not find a written record of a plea offer in her files. Lord explained that it was her practice to advise her client as to any plea offer.

The judge noted that defendant had expressed reluctance to testify against Turner, and was confident she would not be held responsible for Goldware's murder. The judge concluded that defendant willingly rejected the plea offer; failed to demonstrate that Lord's advice was deficient; and defendant's claim that she did not understand the charges was insufficient to meet the standard for establishing an ineffective assistance

claim. We find no reason to disturb the findings of the PCR judge and find no evidence that defendant's counsel failed to adequately convey the plea offer to defendant.

C.

Defendant next claims that her trial counsel was ineffective for failing to interview two witnesses that she suggested and to advise her of the opportunity to call character witnesses so that she could have suggested others who might testify on her behalf.

At the hearing, defendant testified that Lord conveyed a plea offer from the State after the first trial ended in a mistrial: In return for a guilty plea to manslaughter and robbery, she was offered a fifteen-year sentence.

Defendant testified that she asked Lord to interview Robin Bromley and Rotina Priester. Defendant suggested Priester could have served as a character witness to counter what she perceived as her portrayal at trial as a "monster" and a "horrible person." In her affidavit, defendant claimed Bromley could have testified that she and defendant had been drinking that day and perhaps supported a defense of voluntary intoxication. On cross-examination, the State confronted defendant with Bromley's statement to police that defendant had told Bromley not to return to her house the night of the murder. Lord had no

specific recollection of defendant recommending that she interview these two potential witnesses.

The PCR judge concluded that defendant had failed to establish any prejudice from trial counsel's failure to investigate or call either witness. The judge noted that counsel's general disinclination to call such witnesses was a reasonable strategic choice entitled to some deference, and doubted, in any event, that Bromley's testimony would have been helpful in light of her statement to the police, or that any favorable testimony from character witnesses would have influenced the outcome of defendant's case.

"[W]hen a petitioner claims [her] trial attorney inadequately investigated [her] case, [she] must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.) (citing R. 1:6-6), certif. denied, 162 N.J. 199 (1999).

We are satisfied that defendant failed to provide any support for her claim of ineffective assistance here and we will not second-guess her counsel's strategic decision not to call a witnesses who could have provided damaging testimony at trial.

D.

Defendant next claims that she was deprived of her right to testify at trial as her trial counsel failed to adequately advise her of that right.

At the evidentiary hearing, defendant could not recall counsel ever having discussed with her the option of testifying at trial. When asked whether she wanted to testify, she initially replied in the affirmative, but quickly clarified, "I did but I didn't." She continued:

> the only reason why I didn't is because the things that's going on right now out there with those streets, about snitching and telling. But I also was under -- I thought that the evidence spoke for itself. I really didn't feel that I was going to get convicted of felony murder. I really didn't feel that I was.

Defendant acknowledged that she never told counsel she wanted to testify, and that counsel never advised her against testifying.

Lord testified that she had no specific recollection of what advice she provided to defendant, but her practice was to explain "the pros and cons" of testifying at trial to her clients. When shown a portion of the trial transcript indicating she told the trial judge that she had spoken with defendant about her right to testify, Lord's recollection was

refreshed that she had done so and conveyed to the trial judge "it remains [defendant's] position she will not testify."

A criminal defendant possesses a fundamental right to testify on his or her own behalf at trial, a right which may be waived "only by [the defendant's own] 'intentional relinquishment or abandonment.'" State v. Savage, 120 N.J. 594, 628 (1990) (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938)). To inform the defendant's decision whether to testify, counsel has a duty to "advis[e him or her] of the benefits inherent in exercising that right and the consequences inherent in waiving it." Id. at 631. A failure in that regard may give rise to a claim for ineffective assistance. Ibid.

The trial record demonstrates that defendant was apprised by the trial judge of her right to testify, stated that she had no questions about it, and was permitted fifteen minutes to discuss the matter with counsel prior to making a decision. At the conclusion of that discussion, counsel informed the court, and defendant confirmed, that she wished to remain silent.

Defendant's claims that she wanted to testify but declined because she was uninformed find no support in the record. Nor did defendant's testimony at the hearing, where she was, at best, ambivalent about her desire to testify, buttress her

claim. The PCR judge's conclusion that counsel was not ineffective for failure to advise defendant of her right to testify finds ample support in the record.

E.

Defendant next contends that appellate counsel's failure to raise the prosecutor's refusal to offer a plea bargain prior to the first trial, and to challenge the jury charge on accomplice liability on direct appeal deprived her of effective assistance of counsel.

The constitutional guarantee of effective assistance of counsel extends to a defendant's representation on a first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985). Claims for ineffective assistance of appellate counsel are evaluated according to the same standard as those regarding trial counsel. State v. Gaither, 396 N.J. Super. 508, 513-14 (App. Div. 2007), certif. denied, 194 N.J. 444 (2008).

"The decision whether to offer a plea bargain is a matter of prosecutorial authority and discretion." State v. Gruber, 362 N.J. Super. 519, 537 (App. Div.), certif. denied, 178 N.J. 251 (2003). "[A] defendant has no legal entitlement to compel a plea offer or a plea bargain; the decision whether to engage in such bargaining rests with the prosecutor." State v. Williams,

277 N.J. Super. 40, 46 (1994).

Defendant relied on a statement made by the prosecutor to a detective at a pretrial hearing and overheard by defendant. After defendant's counsel had demanded outstanding discovery, the prosecutor told the detective, "if [defendant's counsel] was going to make it hard on [the prosecutor], then [the prosecutor was] going to make it hard on [defendant]."

The prosecutor did not deny making the statement but explained:

> Judge, I believe it was said with respect to [counsel], but it's -- the notion is that [counsel] has approached us for consideration on behalf of her client. And I just talked to the detective, and I said, if it's going to be hard for us, we're not going to have any consideration for her.
>
> Personally, Judge, I was talking to the lead detective, and I didn't know we were going to be subject to eavesdropping. If I caused [counsel] some concern, I'm sorry.

Defendant's counsel then moved to have the prosecutor removed from the case, arguing it was unacceptable for the prosecutor to penalize defendant for requesting discovery that should already have been provided. Counsel surmised that the prosecutor would also "penalize" defendant by not offering her "a lenient plea bargain." The prosecutor responded that he "had conversations with the family of the victim" and was "not

inclined to give [defendant] a plea bargain." The judge denied defendant's motion and the matter was not raised on direct appeal.

At the PCR hearing, Lord recalled what she perceived as the prosecutor's unreasonable refusal to make a plea offer and, with reference to the incident at the pretrial hearing, her belief that he was simply being "vindictive" because of her discovery request. Appellate counsel did not testify.

The judge concluded that defendant had not demonstrated any deficiency in appellate counsel's performance in not raising the issue. The judge doubted counsel would have been successful if the issue has been raised, particularly given the State's plea offer prior to the second trial, which cut defendant's exposure "in half." The judge found that defendant had not demonstrated prejudice, and had not shown that further litigation of the prosecutorial misconduct claim would have changed the outcome of her case.

While we do not condone the prosecutor's comment, we agree with the PCR judge that defendant failed to demonstrate prejudice and was ultimately offered a favorable plea agreement which she rejected. The judge appropriately concluded that appellate counsel was not ineffective for failing to raise this claim of prosecutorial misconduct on appeal.

Similarly, we find no merit to defendant's claim that appellate counsel was ineffective for failing to challenge the jury instructions as to accomplice liability on appeal.

Even though defendant was never charged with conspiracy, defense counsel requested that the trial judge instruct the jury that defendant could not be convicted of felony murder if the jury found she was an accomplice to the robbery predicated on conspiracy alone. The judge declined to give the requested charge, but agreed to give an instruction based on the model charge for accomplice liability without reference to the word "conspiracy."

During closing arguments, the prosecutor remarked:

> [Turner] said after he got the money, it would be half and half. He was going to take the money, he was going to share in the proceeds. That is a conspiracy; she is an accomplice. They're going to share in the loot they were going to get from William Goldware.

As a result of this comment, defendant's counsel renewed her request, but the court again denied the motion and gave the following instruction based on the model charge:

> A person is legally accountable for the conduct of another person, when she is an accomplice of such person in the commission of an offense.
>
> Thus, a person is an accomplice of another person in the commission of an offense, if[,] with the purpose of promoting

> or facilitating the commission of the offense, she aids, or agrees, or attempts to aid such person, such other person in planning or committing the crime.

Defendant argued that this charge was misleading in light of the prosecutor's mention of "conspiracy," and could have influenced the jury to convict defendant of felony murder based on that inappropriate predicate offense.

The PCR judge disagreed, noting that defendant was never charged with conspiracy, and concluded that appellate counsel could not have been ineffective for failing to argue that the trial judge should have issued instructions as to an uncharged offense. We agree.

Defendant has not shown a likelihood that the jury was so confused that it convicted defendant of felony murder based on a predicate offense with which she was never charged due exclusively to a fleeting mention of conspiracy by the prosecutor. As defendant's challenge to the jury instruction lacked merit, it follows that appellate counsel could not have been ineffective for failing to raise it. See Worlock, supra, 117 N.J. at 625 ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

Defendant's remaining arguments lack sufficient merit to warrant any further discussion in our opinion. R. 2:11-3(e)(2).

Affirmed. We remand for the limited purpose of correcting the judgment of conviction to reflect a final charge of second-degree robbery rather than first-degree robbery.