SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3576-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PATRICK F. ALLEN,

Defendant-Appellant.

Argued December 7, 2017 – Decided April 5, 2018

Before Judges Simonelli, Haas and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 13-01-0043.

Daniel V. Gautieri, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Daniel V. Gautieri, of counsel and on the briefs).

Paul H. Heinzel, Assistant Prosecutor, argued the cause for respondent (Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney; Paul H. Heinzel, of counsel and on the brief).

PER CURIAM

A jury convicted defendant, Patrick F. Allen, of murdering his wife and committing other related offenses. The trial court sentenced him to thirty years' imprisonment with a thirty-year parole disqualifier.

Defendant appeals from his conviction, arguing that the trial court (1) failed to correctly rule on Gilmore[1] violations he alleged during jury selection; and (2) erred by allowing expert testimony that was based on net opinions, went beyond the witness's expertise, and improperly commented on the ultimate issue of defendant's guilt. In addition, he claims the trial court erred by improperly allowing the testimony of two law enforcement officers that was unduly prejudicial and then failed to properly instruct the jury to distinguish between their testimony and that of the State's crime scene expert. Defendant also argues that the court failed to adequately investigate alleged juror bias, and erred by incorrectly instructing the jury about certain writings between defendant and his late wife. We affirm.

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[1] A Gilmore claim relates to the alleged discriminatory use of peremptory challenges during jury selection. In State v. Gilmore, 103 N.J. 508 (1986), the Supreme Court considered the constraints placed on the use of peremptory challenges by the New Jersey Constitution. It held that potential jurors "who [were] members of a cognizable group" could not be removed "on the basis of their presumed group bias" but could be removed "on grounds of situation-specific bias." Id. at 517.

The facts developed at trial that led to defendant's arrest and conviction are summarized as follows. On November 18, 2011, defendant called 911 from his home and reported that his wife had "been attacked or something" and that she was on the floor and not breathing. He stated that he had been gone for an hour and a half to "drop something off" and did not know when it happened. Police responded to the call and found defendant in the kitchen area kneeling next to his wife who was lying on her back. The table and a chair were "flipped upside down," and a frying pan was "laying on the ground adjacent to the victim." Responding police officers observed scratch wounds on defendant's cheek and that there were no signs of forced entry or of any ransacking.

Defendant initially told the police that he had left his home at approximately 9:15 a.m. to get a bagel and to meet with a client. He arrived back at the house at 11:00 a.m. because he and his wife had planned to go to shopping. Defendant further stated that he had been having trouble paying his mortgage.

After being arrested and charged with killing his wife, defendant altered his story. In a statement given to police, he explained that he and his wife argued over financial problems, and during the course of the argument, she slapped him causing the scratch marks observed by the police officers. He said he left, went to a gas station, sat in the parking lot for an hour and

returned home to find his wife dead. Medical examiners later determined that the cause of death was strangulation and the victim being struck with a blunt object.

A grand jury returned an indictment charging defendant with murder, N.J.S.A. 2C:11-3(a)(1) and/or N.J.S.A. 2C:11-3(a)(2); possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); tampering with physical evidence, N.J.S.A. 2C:28-6(1); and hindering apprehension, N.J.S.A. 2C:29-3(b). The jury convicted him of committing each of the charged offenses. The trial court denied defendant's motion for a new trial, sentenced him and entered a judgment of conviction. This appeal followed.

On appeal, defendant presents the following arguments:

> POINT I
>
> THE TRIAL COURT FAILED TO ADEQUATELY RULE ON EACH PARTY'S STATE V. GILMORE, 103 N.J. 508 (1986), MOTIONS AND IMPROPERLY DEPRIVED DEFENDANT OF A PEREMPTORY CHALLENGE TO A JUROR WHO WAS RELATED TO A POLICE OFFICER.
>
> A. THE COURT ERRED IN FAILING TO DENY THE STATE'S GILMORE CHALLENGE AND VIOLATED HIS RIGHTS TO AN IMPARTIAL JURY WHEN IT PREVENTED HIM FROM UTILIZING A PEREMPTORY CHALLENGE.
>
> B. THE COURT ERRED IN FAILING TO RULE ON DEFENDANT'S GILMORE CHALLENGE BASED ON THE

MISTAKEN BELIEF THAT RACE HAD TO BE AN ISSUE IN THE CASE.

POINT II

THE STATE'S BLOOD-SPATTER/CRIME-SCENE EXPERT TESTIFIED WELL BEYOND THE SCOPE OF HIS EXPERTISE AND IMPROPERLY UTILIZED THE TESTIMONY OF OTHER EXPERTS TO OPINE THAT DEFENDANT WAS GUILTY. MOREOVER, OTHER POLICE OFFICERS TESTIFIED IN A QUASI-EXPERT CAPACITY, USING THEIR EXPERIENCE TO REFUTE DEFENDANT'S DEFENSE. (Not Raised Below).

A. THE BLOOD-SPATTER/CRIME-SCENE EXPERT'S TESTIMONY TRANSCENDED HIS LEGITIMATE FIELD OF EXPERTISE IN ORDER TO DELIVER A GUILTY VERDICT.

B. OFFICERS HENNELLY AND MAZZA IMPROPERLY UTILIZED THEIR EXPERIENCE TO PROVIDE LAY-OPINION TESTIMONY TO UNDERMINE PATRICK'S DEFENSE.

C. THE JUDGE'S CHARGE FAILED TO PROPERLY DISTINGUISH BETWEEN LAY- AND EXPERT- OPINION TESTIMONY.

D. THE IMPROPER TESTIMONY REQUIRES REVERSAL.

POINT III

THE JUDGE FAILED TO INVESTIGATE A JUROR'S ABILITY TO BE UNBIASED AFTER SHE RECEIVED A TELEPHONE CALL AT HOME FROM THE PROSECUTOR'S OFFICE, DENYING DEFENDANT OF THE ASSURANCE OF AN IMPARTIAL JURY AND A FAIR TRIAL.

POINT IV

DEFENDANT WAS PREJUDICED BY THE COURT'S INSTRUCTION REGARDING LETTERS DEFENDANT AND HIS WIFE WROTE TO EACH OTHER ALMOST A YEAR BEFORE THE HOMICIDE, BECAUSE THE LETTERS WERE ADMITTED ONLY TO DEMONSTRATE A POSSIBLE MOTIVE, WHILE THE JUDGE ADDED THAT THE LETTERS SHOWED THAT THE RELATIONSHIP BETWEEN THE SPOUSES "WAS NOT INCONSISTENT WITH THE COMMISSION OF HOMICIDE."

I.

We begin our review by addressing defendant's contentions under Point II. The gist of those arguments relate to the State's expert's opinions and testimony elicited by defense counsel from two of the State's police witnesses during cross-examination. Defendant did not object or seek to strike any of the challenged testimony, nor were his arguments raised before the trial court in any other fashion. We therefore consider them under the "plain error" standard that is, whether defendant proved that an error occurred that was "clearly capable of producing an unjust result[.]" R. 2:10-2; State v. Prall, 213 N.J. 567, 581 (2018) (slip op. at 34); State v. Weston, 222 N.J. 277, 294-95 (2015).

A.

Applying that standard, we turn first to the challenged expert testimony of John Garkowski, the State's expert in bloodstain analysis and crime scene investigation. Garkowski was employed

by the Burlington County Prosecutor's Office as an agent in its crime scene investigation unit. He had previously retired after more than twenty-six years of service from the New Jersey State Police where he had spent more than sixteen years in the crime scene unit of the forensic investigation bureau. Over the course of his career, he attended numerous programs and workshops regarding crime scene investigation and taught courses on bloodstain analysis and crime scene reconstruction. He testified that he had participated in 2500 to 3000 criminal investigations, more than 100 of which were homicide investigations. He also had conducted over 500 bloodstain analyses and approximately 100 crime scene reconstructions.

Garkowski testified at length regarding the bloodstains present at defendant's home, opining as to how the stains were made and what they revealed about the murder weapon, the victim's movements and the position of her body. He said that the source of blood at the scene was a laceration on the victim's head and castoff blood stains found on the wall came from the frying pan, which had blood on its cooking surface that tested positive for the victim's DNA. Bloodstains on the furniture revealed that the table and chair were upright when the stains were deposited.

In forming his opinions about the victim's and defendant's injuries, Garkowski relied upon photographs taken of defendant by

the police and the prosecutor's office, crime scene and autopsy photos, DNA reports, and reports issued by two medical examiners. He testified that the autopsy photographs showed petechial hemorrhaging around the victim's eyes and gums that was "consistent with manual strangulation." A pattern abrasion on her chest reflected the weave of her sweater and was caused by the sweater being forced or rubbed against the skin. Abrasions on her neck were caused by a human hand and were consistent with her struggling to force her chin under the hand. Blood stains on the cuticles of her left hand, and the absence of blood on her fingers led him to conclude that blood had been removed from her fingers. A photograph from the crime scene showed the victim's sweater was "bunched," indicating that the attacker "held the sweater in a bunching fashion . . . and then pushed in towards the chest[.]"

Garkowski opined that the victim "was on her back in a supine position" when she sustained the neck injuries. The left hand of the attacker was holding onto and twisting the sweater creating the pattern abrasion on her chest. He concluded that damage to the heel of the boots that the victim was wearing and scuff marks on the floor indicated that she was on her back and struggling.

Regarding defendant's injuries, Garkowski testified that there were "several pattern abrasions on . . . defendant's chest[,]" a fingernail mark on his abdomen, three scratch marks

and a claw mark[2] on his face, and a fingernail impression on his neck. He explained that the pattern abrasions indicated that there was fabric or clothing between the nail and the skin.

Garkowski opined that the victim's left hand created the claw mark and fingernail impression while her right hand was "attempting to scratch or scrape through the shirt." He further explained that

> [t]he injuries to . . . defendant was [the victim] with her right hand reaching up, placing it on the chest, trying to push him off, scrape, scratch, do whatever she could do to get her attacker off her, and her left hand created at least two events, these two scratches to the left side of his face and also the claw mark and the fingernail mark.

Garkowski testified that he was familiar with the DNA analysis that had been performed on the victim's fingernails. He concluded that the reason the results were much lower for the sample from the fingernail of the right hand than the fingernail of the left hand was that there was a shirt blocking her right hand whereas there was no barrier between her left hand and defendant's face.

On cross-examination, defense counsel asked Garkowski whether he had reviewed "any reports by medical examiners." Garkowski

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[2] Garkowski explained that a scratch mark "tak[es] off the outer layer of skin," while a claw mark was "when a fingernail compromises both the epidermis, which is the outer layer of skin, and the dermis, which is the inner layer of skin at a very acute angle."

responded that he had reviewed reports prepared by the pathologists and replied affirmatively when asked if he had relied on "the . . . report in formulating [his] opinions in this case[.]" There was no further mention of those reports and defendant never requested a limiting instruction about the witness's reference to them.

Defendant argues that Garkowski's testimony went beyond his area of expertise. He contends that Garkowski was not a medical examiner or DNA expert and therefore his testimony about DNA calculations, the victim's injuries being consistent with struggling, and his description of how the crime occurred were improper. He claims that "Garkowski's blood-spatter expertise did not" qualify him to opine that defendant's "injuries were inflicted during the homicidal act." He also argues that Garkowski relied on the report of a medical examiner, a non-testifying witness, and jurors could have concluded that Garkowski's opinion that defendant "was on top of his dying wife when he was scratched" was supported by that doctor's report.

Defendant further contends that "Garkowski never provided any basis . . . for many of his opinions" including his interpretation of wounds and scratch marks, his "knowledge that certain types of fabrics would [cause] 'skips' in wounds that would affect a DNA analysis[,]" or his interpretation of DNA statistics. He claims that Garkowski's testimony on these subjects and on defendant's

position when his wife scratched his face violated the net opinion rule.

Defendant also claims that Garkowski opined as to the ultimate issue of his guilt, thereby improperly invading the province of the jury, when he "placed [defendant] on top of [the victim] at the time of her death, [by testifying] that [defendant's] injuries were caused when [his wife] 'was trying to push him off of her.'" Defendant argues that the trial judge "failed to perform his gatekeeper role and the jurors likely concluded that Garkowski had a basis for determining [his] guilt."

Applying the plain error standard to the trial court's admission of the challenged expert's testimony, see State v. Frisby, 174 N.J. 583, 591 (2002), we discern no error in Garkowski being allowed to testify, without objection, to his expert opinions. We find defendant's arguments to the contrary to be "without sufficient merit to warrant discussion in a written opinion[.]" R. 2:11-3(e)(2). We add the following brief comments.

The Supreme Court has instructed that courts should take "a liberal approach when assessing a person's qualifications [and any] thinness and other vulnerabilities in an expert's background [is] to be explored in cross-examination[.]" State v. Jenewicz, 193 N.J. 440, 454-55 (2008). Moreover, "[e]xpert testimony

'otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by [the jury].'" State v. Cain, 224 N.J. 410, 420 (2016) (quoting N.J.R.E. 704). Defendant has not established that Garkowski's testimony warranted exclusion, sua sponte, because "'the risk of . . . undue prejudice, confusion of issues, or misleading the jury' substantially outweighs its probative value," State v. Sowell, 213 N.J. 89, 100 (2013) (alteration in original) (quoting N.J.R.E. 403), nor did he establish that Garkowski's conclusions constituted impermissible net opinions "that [were] not supported by factual evidence or other data." State v. Townsend, 186 N.J. 473, 494 (2006) (citations omitted). Finally, Garkowski's reliance on information he received from pathology reports and his passing reference to the doctors who wrote them was consistent with N.J.R.E. 703. See Agha v. Feiner, 198 N.J. 50, 63 (2009). The appropriateness of the testimony was highlighted by defendant's failure to raise any objection or seek a limiting instruction to the jury. We find no error in the court allowing the expert's testimony.

B.

Next, we address defendant's contention that two law enforcement officers, Frank Mazza of the Middletown Township Police Department and Detective Edwin Hennelly of the Monmouth

County Prosecutor's office, were allowed to give impermissible opinion testimony that exceeded the limits of lay opinion.

i.

Mazza testified that he was one of the officers dispatched to respond to defendant's 911 call. On direct examination, he testified about being told by another officer that there had been a homicide and he described his contact with defendant, including his observation that defendant had "fairly fresh scratches on his face." Mazza never opined on direct whether he believed the scratches were either offensive or defensive in nature.

Despite Mazza not addressing the nature of the scratches on direct, on cross-examination, defense counsel elicited testimony from Mazza about whether he had any training in determining whether wounds were either "defensive" or "offensive." In response, Mazza explained that he was instructed on those determinations as part of his domestic violence training. Counsel followed up with questions about the witness's training and then asked "what was it about the scratches on my client's face that . . . led you to the determination they were defensive wounds?" The State objected to the question, arguing that there was no "relevance to the witness'[s] opinion about whether they're defensive or not." The court permitted the question and, in response, Mazza explained that he relied on the fact that the scratches "were . . .

horizontal in nature, and they were rather deep." He expanded his explanation by stating that

> consistent with [his] training and experience as well as simple common sense, if two subjects were engaged in a physical altercation and one being a female, because females do tend to have nails, she was defending herself by doing something along these lines as she was being attacked. That's how the wounds would be sustained on the suspect, the attacker.

Upon further cross-examination, however, defense counsel confirmed with the witness that "[a]bsolutely[,]" "[a] slap in the face can be offensive or defensive . . . [a]nd from a horizontal slap in the face, whether offensive or defensive, somebody can get scratched[.]" Defense counsel then asked Mazza "do you see a problem then with your determination that these were defensive wounds simply because they were horizontal?" The State again objected, arguing that Mazza was not an expert in crime scene reconstruction and that he had not testified on direct that the scratches were defensive. The court replied that Mazza did not have to be an expert, that he said he had "training in the field [and he] looked at it, from his training and experience[.]" It permitted the question, testimony continued and, during further cross-examination, Mazza repeated that he believed based on his training the wounds to defendant were defensive, but conceded they "[a]bsolutely" could have been offensive, that "there[was]

reasonable doubt that it would be a defensive wound[,]" and he "[a]bsolutely[,]" "could be wrong" about his conclusion.

On appeal, defendant argues that "the judge reinforced the jurors' likely conclusion that Mazza was more than an ordinary lay witness" when he "found that Mazza did not need to be an expert to explain the wounds on [defendant's] face because he had 'training and experience.'" He claims that Mazza improperly used his experience to explain that the victim "had scratched [defendant] while she was under attack."

Here, again we find defendant's contentions to be "without sufficient to merit to warrant discussion in a written opinion[.]" R. 2:11-3(e)(2). We only observe that, clearly, the judge had very little to do with the admission of the challenged testimony which was intentionally elicited by defense counsel. Although we are not convinced that any error occurred, even if there was error, "except in the most extreme cases, trial errors originating with defense counsel will not present grounds for reversal on appeal." State v. Berry, 140 N.J. 280, 302-03 (1995) (citations omitted). If allowing the testimony was erroneous, which it was not, it would be the result of "invited error." "Under that settled principle of law, trial errors that were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal. . . ." State v. Bailey, 231

N.J. 474, 490 (2018) (slip op. at 30) (quoting State v. A.R., 213 N.J. 542, 561 (2013)). Moreover, defendant failed to establish the admission of the testimony caused a miscarriage of justice.

ii.

We turn to Hennelly's testimony. He testified at trial about his and another officer's videotaped interview of defendant, which was played for the jury during his testimony. Hennelly also testified that officers were allowed to lie to or try to trick a suspect when interviewing them and that such deception was an interviewing technique.

After the video was played for the jury and during his ensuing cross-examination, Hennelly was asked by defense counsel about statements he made during the interview concerning defendant's suggestion that his wife was killed during a burglary[3] and Hennelly's rejection of that suggestion because he understood from the police department's investigation that defendant killed his wife. In response to further cross-examination, Hennelly stated to defense counsel that "100 percent I don't believe your client" and he was "confident [defendant] did it, absolutely." In response to counsel's further inquiry, Hennelly testified that based on the

[3] Hennelly testified that defendant implied that someone came into his house after defendant had a violent altercation with his wife.

investigation, he "didn't believe [defendant's] explanations to that point."

Hennelly agreed that, during the interview, defendant "never made a statement that in any way indicated that he had anything to do with his wife's death[.]" He also acknowledged that he made statements during the interview to defendant that he did not believe defendant intended to kill his wife, but said, at the time, he was not aware of the extent of the victim's injuries or that she had been strangled. Defense counsel inquired of Hennelly, "you still have no information, as we sit here today, that it was [intentional] either, correct?" Hennelly responded that he "believe[d] it was intentional[.]"

At that point, the State objected to the question asking whether Hennelly had any evidence that the crime was intentional. The judge sustained the objection noting that the jury had seen the video, heard the audio, and knew the questions and answers. Defendant never sought to strike any part of Hennelly's testimony or ask for any curative instruction.

Defendant argues on appeal that Hennelly's testimony that, in his experience, burglaries did not occur when there was a police presence in the neighborhood, and that the investigation revealed that defendant's home was not burglarized "was improper lay-opinion testimony" because he was not "present at the scene at the

time of the homicide [and the] testimony [did not] assist the jury in determining a fact in issue." He further claims that Hennelly's testimony that the "investigation revealed that a burglar had not entered [defendant's] home and killed defendant's wife was an opinion on the ultimate issue in the case — [defendant's] guilt" that "improperly invade[d] the province of the jury[,]" and "suggested to the jury that Hennelly knew facts in addition to those that were in evidence[,]" and "the State is not permitted to suggest that there is evidence outside the record that supports a defendant's guilt."

Defendant maintains that the trial court should have stricken Hennelly's response of "[t]hat's what the investigation revealed" to defense counsel's question asking whether Hennelly believed defendant killed his wife. He argues that the testimony "improperly suggested that his guilt was more than Hennelly's opinion — it was an established fact." Defendant further faults the trial court for "not direct[ing] jurors to strike Hennelly's answer or issue a curative instruction" when it sustained the State's objection to defense counsel's question regarding whether Hennelly had any information that the crime was committed intentionally.

Defendant also argues that Hennelly improperly commented on defendant's credibility. He claims that "[w]hen Hennelly

repeatedly testified that he deemed [defendant] to be incredible based on the police 'investigation,' he encouraged jurors to prematurely view [defendant] as guilty and fatally violated [his] right to jury trial." He contends "[t]he judge failed to act in his gatekeeper role to strike improper opinion testimony[.]"

We agree with defendant's contention that generally, it is improper for a police office to offer an opinion as to a defendant's guilt or credibility. Frisby, 174 N.J. at 594-95. But here, again, Hennelly never testified on direct about the matters that defendant now challenges. His testimony was intentionally elicited by defense counsel during his cross-examination of the witness. Moreover, because the jury already viewed the videotape, its members already knew that Hennelly doubted defendant's version of the events and his view as to defendant's culpability.

We conclude that, under these circumstances, like Mazza's challenged testimony, if there was any error, and we find none, it was clearly invited by defendant and, in light of the other overwhelming evidence of defendant's guilt, it was not "clearly capable of producing an unjust result." See Prall, 231 N.J. at 581 (quoting R. 2:10-2) (stating an appellate court "must determine whether either claimed 'error [was] sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it

otherwise might not have reached.'" Id. at 25 (alterations in original) (quoting State v. Daniels, 182 N.J. 80, 95 (2004)).

Finally, defendant argues that the court's jury charge about expert testimony failed to "distinguish between Hennelly, who had provided an opinion of [defendant's] guilt as a lay witness, and Garkowski, who had done the same as an expert." Citing State v. Landeros, 20 N.J. 69, 75 (1955), defendant claims error because "[t]he judge did not disavow jurors of the notion, that an experienced police officer's opinion was entitled to special weight."

Applying the plain error standard because defendant did not object to the jury charge, see Townsend, 186 N.J. at 498, we find defendant's contention to again be "without sufficient merit to warrant [further] discussion" in this opinion. R. 2:11-3(e)(2). Suffice it to say, we conclude no error was committed by the trial court when it delivered the model jury charge for expert testimony and named each of the expert witnesses to whom it applied, which included Garkowski and excluded Hennelly.

II.

Defendant argues in Point III of his brief that the trial judge erred by failing to appropriately investigate juror bias after one of the jurors received a phone call from the Prosecutor's

Office on an unrelated matter. After the defense rested, but before closing arguments, the court was notified that one of the jurors had been contacted by a representative of the County Prosecutor's Office.

Upon learning of the phone call, the court questioned the juror in the presence of counsel. In response to the court's inquiry, the juror reported that she had received the call at 8:00 on a Friday night and that the representative had said he was responding to a message she had left approximately nine months earlier involving insurance fraud. The juror explained that the message she had left concerned her "mortgage investor" who had "gone rogue with all [of her] insurance funds" from Hurricane Sandy. She said the situation remained unresolved. In response to the call, the juror told the prosecutor's representative she was serving on a jury. The representative asked for the names of the defendant and prosecutor and said he could not speak to her, but left his phone number and told her to call him after the trial was over.

After the juror's explanation about the conversation, defense counsel conferred with defendant and confirmed that defendant had no objection to the juror continuing to serve. On the record, the court told the juror that after "discuss[ing] everything with counsel[,]" it concluded the call "was inadvertent[,]" had

"nothing to do with the subject matter of this case, [and] would not interfere with [the juror's] ability to sit as a juror[.]" Without objection, the court told the juror she was "going to continue as a juror in this case."

On appeal, defendant argues that the court failed to "adequately investigate the issue of juror taint," and "[t]he judge should have either dismissed the juror or conducted a probing voir dire[.]" He contends that "the juror may well have had an affinity with the prosecutor's office when she entered her deliberations and voted to convict" because she may have believed that the prosecutor would assist her with her insurance fraud matter.

We conclude that the trial court properly exercised its discretion, see State v. R.D., 169 N.J. 551, 558 (2001), by questioning the juror and allowing her to continue to serve, especially in light of defendant's consent to the procedure followed by the court and its decision to allow the juror to continue to serve. We find no merit to defendant's arguments to the contrary as we discern nothing in the record that indicates the brief, unrelated telephone contact between the juror and the prosecutor's office would "have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." State v. Scherzer, 301 N.J. Super.

363, 486 (App. Div. 1997) (quoting Panko v. Flintkote Co., 7 N.J. 55, 61 (1951)).

III.

In Point IV of his brief, defendant challenges as "unduly prejudicial" the trial court's jury instruction regarding the jurors' consideration of an undated letter sent by defendant's wife to him, a card and note that he sent to her, as well as what was apparently an earlier letter she sent to defendant in 2010 at Christmas time. Each of the letters and cards addressed problems they were having with finances caused by decisions made by defendant independent of his wife, how his actions affected their marriage and their plans for the future, his plans for resolving the problems and her forgiving defendant.

Prior to instructing the jury, the trial court conducted a charge conference off the record. Afterward, the court went on the record to address issues that arose during the conference. Other than referring to one unrelated issue, the court noted that "[a]ll the other issues that counsel has raised I've addressed either previously or the parties have agreed." Defendant did not object or otherwise disagree with the court's statement.

During the ensuing summations, defense counsel relied upon the content of the victim's writings to argue that the State failed to meet its burden. He contended that the writings showed that

defendant's wife knew about the couple's financial problems and was committed to working through them with defendant. According to defense counsel, the writings disproved the State's theory of motive.

When the trial court charged the jury about the evidence, it generally instructed the jurors "to consider . . . specific items of evidence only in the manner and for the purposes that [the court] instruct[s] you. You cannot use it for any other purpose." Referring to the specific writings, the court told the jurors they had to treat differently the victim's and defendant's letters to each other. The court stated:

> These statements of [the victim] can only be considered by you for two purposes. The first is as evidence of [her] state of mind, of her understanding of how she and the defendant were going to work out their financial problems, and the state of her knowledge concerning the couple's finances and debts in the months preceding the murder.
>
> The second is as evidence of the relationship between [the victim] and the defendant to show that the relationship was not inconsistent with the commission of homicide.
>
> The State has taken the position that the defendant's motive for killing [his wife] arose when she discovered the extent and urgency of the family's financial problems which the defendant had been affirmatively acting to conceal from her and she confronted the defendant about it. The defense denies that [defendant] had any such motive.

. . . .

You may use [the victim's] statements only as proof of [her] state of mind and as proof of the state of the relationship generally as I have previously explained, nothing more.

To determine the defendant's state of mind and motive, you may consider the nature of the defendant's acts and his conduct and all that he said and did during the pertinent timeframe and from the surrounding circumstances. For one example, the letter . . . allegedly written by the defendant to [his wife], was admitted into [e]vidence, and you are allowed to consider it on the issue of the defendant's state of mind.

. . . .

If you find any or all of this evidence credible, you may consider it on the issue of whether or not there was a motive for the defendant to kill [his wife]. Defendant's motive to kill [her] must be developed from the evidence independent of the decedent's statements concerning the nature of the relationship. [The victim's] statements are admitted only to show her state of mind and conduct. It is for you to decide whether [her] state of mind and conduct provided the motive for the defendant to kill her.

[(Emphasis added).]

Defendant argues on appeal that the instruction to the jury that it could consider the victim's written statements "as evidence of the relationship between [her] and the defendant to show that the relationship was not inconsistent with the commission of

homicide" was "unduly prejudicial" and violated his due process rights. Defendant contends that the trial court derived the instruction from State v. Calleia, 206 N.J. 274, 286 (2011), and that the facts in that case are distinguishable from the facts here.

Defendant also claims that the court "instructed the jurors to consider that problems in [his] marriage constituted a basis for them to conclude that [he] killed his wife." He contends that "but for the outrageous and unsupported charge, the jurors may have concluded that [his wife's] rage over [his] concealment of the bank's foreclosure letters caused her to strike him in anger and that . . . the ensuing fight and homicide may have supported a passion/provocation manslaughter verdict, rather than murder." Finally, defendant argues that the court did not provide a proper limiting instruction when "it suggested that any marital problems were consistent with [his] guilt of murder." He maintains that because the charge made "it more likely that the jurors would convict him of murder rather than passion/provocation manslaughter[,]" the matter should be remanded for a new trial. We disagree.

We again apply the plain error standard of review to defendant's challenge, as he did not object to the charge. We evaluate the court's charge "in light of the totality of the

circumstances including all the instructions to the jury, [and] the arguments of counsel." Townsend, 186 N.J. at 499 (alteration in original) (quoting State v. Marshall, 123 N.J. 1, 145 (1991)); see also State v. Morton, 155 N.J. 383, 423 (1998) (finding "argument of counsel . . . can mitigate the prejudicial effect of an erroneous charge" (citing Marshall, 123 N.J. at 145)).

We conclude that the trial court did not commit any error in the manner it charged the jury about the letters or in relying upon the Supreme Court's language in Calleia. In Calleia, the Court considered whether a "deceased victim's hearsay statements regarding her state of mind were [admissible] as evidence suggestive of [the] defendant's motive." Calleia, 206 N.J. at 278. The victim and the defendant were married and the statements concerned her unhappiness with her marriage and her intent to seek a divorce. Id. at 284.

The Court explained that "[a] deceased victim's then-existing state of mind cannot directly prove a defendant's motive" and that "a fact probative of the victim's state of mind, standing alone, does not tend to prove any material fact about a defendant's conduct or state of mind." Id. at 291-92 (citing State v. Downey, 206 N.J. Super. 382, 391 (App. Div. 1986)). However, it held that "when a victim's state-of-mind hearsay statements are relevant to show the declarant's own conduct, and when such conduct is known

or probably known to the defendant, it also can give rise to motive, and the statements become admissible for that purpose, subject to the usual balancing under N.J.R.E. 403." Id. at 296. It further found that "[a] victim's hearsay statements need not indisputably show a concrete motive; rather, 'a tendency in reason' to illustrate a possible motive is enough." Ibid. (quoting N.J.R.E. 401). Although the Court did not specifically rule upon the trial court's jury instruction in Calleia, which mirrored the instruction given in this case, the Court emphasized the specific language when quoting the charge given to the jury. See id. at 286.

We also find no error in the trial court informing the jury that, in addition to considering the victim's statements as evidence of her state of mind and knowledge of the couple's financial problems, it could consider whether her statements were consistent with the State's theory of motive. Contrary to defendant's arguments, the judge did not instruct the jurors "to consider that problems in [his] marriage constituted a basis for them to conclude that [he] killed his wife." Rather, considering the charge as a whole, the court gave a proper limiting instruction regarding the use of the victim's statements. It specifically, told the jury that they had to determine the defendant's state of mind and motive through "the nature of the defendant's acts and

his conduct and all that he said and did during the pertinent timeframe and from the surrounding circumstances" and not from what the victim said in her letters. Under these circumstances, we find no error in the court's charge.

IV.

We address last defendant's Gilmore argument in Point I, which alleges that the trial court failed to rule on the parties' objections during jury selection, and challenges the court's refusal to allow defendant to exercise a peremptory challenge to a white female veniremember. The issues arose during jury selection when the prosecutor alleged that defendant, who is white, was improperly using peremptory challenges to exclude white females from the jury, and defendant alleged the State was improperly using its peremptory challenges to exclude black men. The trial court found defendant's claim against the State was not valid because race was not an issue in the case and, after warning defendant that his challenges to white women would be scrutinized, it prevented defendant from exercising a challenge to one white female veniremember, while accepting them to other white women. We agree with the court's resolution of the Gilmore issues, but for slightly different reasons.

During jury selection, the prosecutor objected when defense counsel sought to use his tenth peremptory challenge to exclude a

white woman from the panel. The prosecutor contended that eight of defendant's peremptory challenges had been used to excuse white females[4] and that defendant was purposely discriminating because the victim was a white female. The court then asked defense counsel to provide his reasons for excusing the white female jurors. Defense counsel explained that one woman "had several police officers in her family and her father was retired chief of the Bricktown Police[,]" and another had family members who worked for the Federal Bureau of Investigation. Counsel explained that the third woman "had all sorts of issues [including] some domestic violence or divorce [and] some kind of murder or criminal activity[.]" Counsel was unable to access his notes to provide reasons for the remaining women he challenged, but said they were excused for "similar things, law enforcement."

The court noted that under Gilmore, once the State made a prima facie case of discrimination, the defendant must present evidence that his peremptory challenges "were justified on the basis of situation[-]specific bias rather than impermissible group bias." Then, the court must evaluate the State's prima facie case against the defendant's evidence of situation-specific bias to

[4] The State later contended that eight of the ten challenges had been exercised against females and seven of those were against white females.

determine whether the State has proven the challenges were exercised on constitutionally impermissible grounds.

The court permitted defense counsel to respond to the State's claim that counsel was excusing white females based on group bias. Counsel argued that he would have challenged two men, but the State challenged them first. He said that twenty percent of the jurors he disqualified were not white females and that there was "more than a reasonable basis and legitimate reason" to disqualify the jurors "on a one-by-one basis[.]"

The prosecutor responded that two challenged women had no law enforcement background, acknowledged that another worked within the court system, knew Sheriff's officers, and her mother was a victim of domestic violence, but a third one, who was the veniremember that prompted the State's objection, was a retired executive assistant who had filed for personal bankruptcy three years ago and had no law enforcement connections. He argued that even the jurors who "indicated they had law enforcement in their family or knew people who were in law enforcement were questioned by [the court] and indicated they could be fair." Defense counsel disputed that two of the women had no connections to law enforcement, arguing that one had a nephew who was a police officer and the other was related to a police officer. Further, the third woman had connections to the Navy.

The court found that the first two steps of the Gilmore analysis had been satisfied, but that the third step "remain[ed] to be seen." It allowed defense counsel's peremptory challenge to the third woman, but warned counsel to "be very cautious and careful from this point on" and admonished that "[i]f [he] exercise[d] the challenge against any white female jurors, [his] feet [would] be to the fire and [he would] have to explain to [the court] in detail why that juror [was] not a suitable juror to be seated in th[e] case."

Defense counsel raised a separate Gilmore claim, arguing that the State had excused two of three black males and asked that the State's feet "be held to the fire as well." The court commented that "African-Americans [did not] have any component in this case" noting there was a "Caucasian defendant and a Caucasian victim." There was no further discussion regarding defendant's contention.

When jury selection resumed on a subsequent day, the court noted that defendant had submitted a memorandum stating again counsel's reasons for exercising peremptory challenges to the white females and "tak[ing] issue with the State challenging African-Americans on the jury." The logic of defendant's argument, however, "escape[d the court] because race [was] a non-factor in [the] case."

The prosecutor responded to the arguments raised by

defendant's memorandum, arguing again defendant was impermissibly excluding white women from the jury, and that the first two prongs of Gilmore had been met, but that because the court had refrained from making a finding as to the third prong that there had been a "constitutional violation[,]" the court had not yet found a Gilmore violation, but instead issued a warning to defense counsel. The prosecutor maintained that such a violation occurred. Although he acknowledged that defendant's explanations for his challenges to the female jurors included some which were "bias-specific neutral in terms of gender or race[,]" such as relationships with people in law enforcement, the prosecutor believed that there were "male jurors who [had] closer connections to law enforcement" who defendant did not challenge.

Relying on State v. Andrews, 216 N.J. 271 (2013), the prosecutor argued the court did not have to dismiss the panel and start anew and stated that he did not object to the panel as presently constituted and did not want to start over. He requested the court "to be cognizant of the issue moving forward" and to scrutinize, as it previously had said it would, any future peremptory challenges exercised by defense counsel against white females.

Turning to defendant's Gilmore claim, the prosecutor acknowledged he had struck three black men from the jury, but

noted that he had used eight challenges, four against men and four against women while two black men and two black women were seated on the jury. He explained he excused one black male who said that "he thought the criminal justice system was unfair[,]" and that he was falsely accused of domestic violence in the past, and another black veniremember who seemed to be opinionated and might "pose a difficulty in deliberations listening to other people's opinions[,]" as well as a third member who mumbled and who counsel had difficulty understanding and thought he might have difficulty during deliberations.

Defense counsel responded by again explaining the two excused female juror's relationship to others in law enforcement. He contended it was premature to conclude he was "systematically eliminating white women" because he was only halfway through his twenty challenges and explained that there were non-discriminatory reasons for each of his challenges, such as their being a victim of a crime, or having involvement with law enforcement or the military. He also claimed one of the female jurors he excused said she would be a good juror because she was smart, which led him to be concerned that she was arrogant and not open-minded.

Defense counsel also argued that race did not have to be a factor in the case before a Gilmore challenge could be brought on the basis of race. The prosecutor agreed with defense counsel,

but noted that under State v. Osorio, 199 N.J. 486 (2009), the court could consider "whether the challenged jurors share[d] the immutable characteristic of the victim and not the defendant . . . in determining whether discrimination occurred[.]"

Defense counsel also claimed that if there were males on the jury with military or law enforcement connections it was "very likely" that he was "getting to them[.]" He presumed that the State was "going to want to eliminate males from the jury for the obvious reasons of this case" and argued that it was proper for him to wait to eliminate males to see if the State would do it first, thus conserving his challenges.

The court reiterated that it would allow the challenge to the last white female, finding that she was "tainted because she was challenged in open court." It decided that no future challenges would be exercised in the presence of the jury until the parties and the court had first discussed the challenge outside of the jury's presence.

The State subsequently exercised only one additional challenge. That veniremember was a white male. Defendant's next two challenges were to men. His following challenge was to a woman who knew one of the witnesses and the court accepted the challenge without objection. Defendant's next two challenges were to men followed by another to a white female, to which the

prosecutor objected.

During voir dire, the challenged female juror related that she had an uncle who was a retired New York State trooper, but she did not have a close relationship with him, seeing him infrequently at weddings and funerals. She denied that her relationship with him would impact her ability to be fair and impartial. The woman also said that her brother had his car stolen in the 1980s, she was not involved in the case, no one was caught and the car was later found. She believed she would be a good juror because she listened well and was fair. She lived with her husband and two sons, had a bachelor's degree in marketing, was never in the military, and was employed as an administrative assistant. Her husband did "tech support for a printing company." She mainly watched comedy on television, had bumper stickers from her children's schools and liked to garden and make crafts in her spare time.

In response to the prosecutor's objection, defense counsel explained that the woman "had an uncle who was a state trooper in New York State . . . and her brother was the victim of a crime." The prosecutor viewed the woman's law enforcement connection as "tenuous" and the woman's brother being a victim as too remote in time to matter.

The court would not accept defendant's challenge to the juror.

According to the court, it did not "see anything inappropriate about any of her responses . . . that would relate to [the] case." It said, without more, it would not permit the challenge.

Defense counsel then challenged another white female, reasoning that she had a cousin who was a New York City police officer and that she had said, "I'd like to think I would be fair," not that "she would be fair[.]" The prosecutor did not object and the court excused the veniremember after defense counsel stated that the woman "appear[ed] to be Hispanic[.]" Defendant's penultimate challenge was to a woman who formerly worked as a probation officer and was currently employed by the court system as an Assistant Division Manager of the Criminal Division. The court excused the woman without objection. Defendant's final challenge was to a man.

On appeal, defendant argues that he "was denied his rights to a fairly-constituted jury and due process[.]" He maintains that "the entire jury-selection process was infected by the [trial court's] failure to follow the legal procedures set forth in both Gilmore and Osorio" because the trial court did not make the findings required by those cases. He argues that the trial court failed to adequately address the Gilmore challenges raised by both parties, failed to recognize that striking venire members "with friends or relatives in law enforcement is a legitimate situation-

specific bias[,]" and improperly precluded defendant from exercising a peremptory challenge as to a woman whose relative was a retired police officer. He also contends that defendant was "chilled" from challenging other jurors with ties to law enforcement. Defendant argues that under these circumstances the proper remedy is reversal of his conviction. We disagree.

We begin our review by acknowledging the deference we give to a trial court's Gilmore determinations. We will not disturb "a trial court's ruling on the issue of discriminatory intent . . . unless it is clearly erroneous." State v. Thompson, 224 N.J. 324, 344 (2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (adopting federal standard of appellate review)). "A trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" Id. at 345 (quoting State v. Elders, 192 N.J. 224, 244 (2007)). "An appellate court should not disturb the trial court's findings merely because 'it might have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close case." Ibid. (quoting Elders, 192 N.J. at 244).

When a litigant's selection of jurors is discriminatory, not only is a particular party harmed, but "the very integrity of the courts is jeopardized[.]" Miller-El v. Dretke, 545 U.S. 231, 237-

38 (2005) (citing Powers v. Ohio, 499 U.S. 400, 412 (1991)). A litigant may not be deprived of the right to trial by an impartial jury by his or her opponent's excluding jurors based on race, Thompson, 224 N.J. at 340, or gender. State v. Chevalier, 340 N.J. Super. 339, 347 (App. Div. 2001) (noting "[w]omen constitute a cognizable group within the intendment of Gilmore" (citing Gilmore, 103 N.J. at 508, 524)).

The burden is on the party objecting to a peremptory challenge to prove purposeful discrimination based on the "totality of the relevant facts[.]" Batson v. Kentucky, 476 U.S. 79, 94 (1986) (citing Washington v. Davis, 426 U.S. 229, 239-42 (1976)); see also Gilmore, 103 N.J. at 534. "The opponent of the strike bears the burden of persuasion regarding racial [or gender] motivation, and a trial court finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is entitled to great deference." Thompson, 224 N.J. at 344 (quoting Davis v. Ayala, 576 U.S. ___, ___, 135 S. Ct. 2187, 2199 (2015)). When multiple challenges are raised at trial, "it is essential that separate findings be made with respect to each disputed challenge." State v. Clark, 316 N.J. Super. 462, 473 (App. Div. 1998), appeal after remand, 324 N.J. Super. 558 (App. Div. 1999).

In considering each challenge, the trial court must conduct

a three-step analysis. First, the court must determine whether the party objecting to the challenge made "a prima facie showing that the peremptory challenge was exercised on [a discriminatory] basis . . . . That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of discrimination." Osorio, 199 N.J. at 492. The first step can be established by evidence

> (1) that the prosecutor [or defendant] struck most or all of the members of the identified group from the venire; (2) that the prosecutor [or defendant] used a disproportionate number of his or her peremptories against the group; (3) that the prosecutor [or defendant] failed to ask or propose questions to the challenged jurors; (4) that other than their race, the challenged jurors are as heterogeneous as the community as a whole; and (5) that the challenged jurors, unlike the victims, are the same race as defendant.
>
> [Id. at 504 (quoting State v. Watkins, 114 N.J. 259, 266 (1989)).]

If a prima facie claim is found, "the burden then shifts to the party exercising the peremptory challenge to prove a [gender or] race- or ethnicity-neutral basis supporting the peremptory challenge." Id. at 492. The second step requires the party exercising the peremptory challenge to provide evidence "that the peremptory challenges under review are justifiable on the basis of concerns about situation-specific bias." Gilmore, 103 N.J. at 537. The court must determine whether counsel provided a

"reasoned, neutral basis for the challenge or if the explanations tendered are pretext." Osorio, 199 N.J. at 492. The party "must satisfy the court that [it] exercised such peremptories on grounds that are reasonably relevant to the particular case on trial or its parties or witnesses[.]" Gilmore, 103 N.J. at 538 (first alteration in original) (quoting People v. Wheeler, 583 P.2d 748, 765 (Cal. 1978)). "[T]he trial court is charged with the difficult task of deciding whether the reasons articulated by the [party exercising the challenge] are genuine and reasonable grounds for constitutionally permissible challenges or whether they are 'sham excuses belatedly contrived to avoid admitting acts of group discrimination.'" State v. Townes, 220 N.J. Super. 38, 43 (App. Div. 1987) (quoting Gilmore, 103 N.J. at 538).

If the court is satisfied that legitimate nondiscriminatory grounds have been advanced in response to the objection, it must then determine under "the third step . . . whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias." Osorio, 199 N.J. at 492-93; Thompson, 224 N.J. at 341. The third step requires that

> the court must consider whether [the party exercising the peremptory challenge] has applied the proffered reasons for the exercise

> of the disputed challenges even-handedly to all prospective jurors. A nondiscriminatory reason for exercising a peremptory challenge which appears genuine and reasonable on its face may become suspect if the only prospective jurors with that characteristic who the [party exercising the peremptory challenge] has excused are members of a cognizable group.
>
> In addition, the court must consider the overall pattern of the [party exercising the peremptory challenge]'s use of its peremptory challenges. Even if the reasons for each individual challenge appear sufficient when considered in isolation from the . . . other challenges, the use of a disproportionate number of peremptory challenges to remove members of a cognizable group may warrant a finding that those reasons are not genuine and reasonable.
>
> Finally, the court must consider the composition of the jury ultimately selected to try the case. Although the presence on the jury of some members of the group alleged to have been improperly excluded does not relieve the trial court of the responsibility to ascertain if any prospective juror was peremptorily challenged on a discriminatory basis, this circumstance may be highly probative of the ultimate question whether the . . . proffered nondiscriminatory reasons for exercising peremptory challenges are genuine and reasonable.
>
> [Osorio, 199 N.J. at 506 (alterations in original) (quoting Clark, 316 N.J. Super. at 473-74).]

If the court determines there has been an impermissible use of peremptory challenges, there are various remedies available to address any harm.

> These remedies include dismissing the empaneled jury member(s) and the venire and beginning jury selection anew; reseating the wrongfully excused juror(s); reseating the wrongfully excused juror(s) and ordering forfeiture by the offending party of his or her improperly exercised peremptory challenge(s); permitting trial courts to require challenges to prospective jurors outside the presence of the jury; granting additional peremptory challenges to the aggrieved party, particularly when wrongfully dismissed jurors are no longer available; or a combination of these remedies as the individual case requires.
>
> [Andrews, 216 N.J. at 293.]

Applying these guiding principles, we conclude the trial court imperfectly fulfilled its obligation to set forth clear findings as to each of the parties' Gilmore claims. See Clark, 316 N.J. Super. at 473. We disagree with defendant, however, that a new trial is warranted because of the lack of findings as we can easily infer the trial court's findings, which are entitled to our "substantial deference[,]" id. at 473, from its comments and actions. See e.g., State ex rel. J.P.F., 368 N.J. Super. 24, 31 (App. Div. 2004) (drawing inferences on appeal "[f]rom the totality of the [trial] judge's findings); see also Townes, 220 N.J. Super. at 43-44 (rejecting a remand in favor of "apply[ing] Gilmore's principles to the record on appeal"). First, the trial court found that the prosecutor established a prima facie claim of discrimination based upon defendant exercising seven of his first

ten peremptory challenges to excuse white women. See Thompson, 224 N.J. at 346 (finding "defendant established a prima facie claim by pointing out that the prosecutor exercised seven of [her] nine peremptory challenges to strike African Americans" (citing Osorio, 199 N.J. at 503)).

Second, the trial court considered each of defendant's explanations for his challenges and obliviously concluded that, at that point, although very close to doing so, the prosecutor had not yet "carried the ultimate burden of proving, by a preponderance of the evidence, that [defendant] exercised [his] peremptory challenges on constitutionally-impermissible grounds of presumed group bias." Townes, 220 N.J. Super. at 44 (quoting Gilmore, 103 N.J. at 539). It was only when defendant exercised a challenge to another white female veniremember that the court was satisfied that the evidence established a lack of legitimate grounds for defendant's challenges.

Significantly, the court did not prevent defendant from challenging subsequent white females and limited its rejection of defendant's exclusion to the one juror for whom defendant's reasons for challenging were tenuous at best. It is apparent that the court found, in light of that juror's response to the court's voir dire inquiry, neither her relative's involvement in law enforcement nor her brother's car being stolen decades ago,

provided sufficient justification for her removal, especially with defendant's earlier rampant removal of white female veniremembers.

We similarly discern no error in the court's rejection of defendant's Gilmore claim against the State, which he raised only in response to the State's claim that defendant was systematically excluding white females from the jury. We do so, however, for reasons other than the court's finding that race was not an issue in the case, as we agree with both parties that race need not be an issue for a proper Gilmore claim to be viable. Rather, we conclude from our review of the record, see Townes, 220 N.J. Super. at 43-44, defendant failed to establish a prima facie claim of discriminatory use of peremptory challenges.

The record supports a finding that defendant did not establish a prima facie case of discrimination under the first step of the Gilmore test. When defendant raised the issue, the State had used eight challenges, four against women and four against men, three of whom were black. Two black men and two black women were seated on the jury. Although the State struck three of five black male jurors, it used only three out of eight challenges against black males and the challenged jurors were not the same race as defendant. Osorio, 199 N.J. at 504. In any event, the State provided race-neutral reasons for striking the three jurors: One thought the criminal justice system was not always fair and had

been falsely accused of domestic violence, and as to the other two, their ability to be effective in deliberations. Significantly, two black males remained on the jury, undermining defendant's attempt to show, by a preponderance of the evidence, that the State exercised its peremptory challenges in a constitutionally-impermissible manner. See Clark, 316 N.J. Super. at 474 (finding "the presence on the jury of some members of the group alleged to have been improperly excluded . . . may be highly probative of the ultimate question whether the prosecution's proffered nondiscriminatory reasons for exercising peremptory challenges are genuine and reasonable" (citation omitted)).

Under these circumstances, we discern no reason to conclude that the trial court's findings or actions were so clearly mistaken or improper to warrant vacating defendant's conviction and remanding for a new trial.

Affirmed.