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

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5189-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANK L. MARSH, a/k/a FRANK  
LEWIS MARSH, JR.,

Defendant-Appellant.

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Submitted November 6, 2017 – Decided April 26, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey,  
Law Division, Middlesex County, Indictment  
No. 09-02-0348.

Joel C. Seltzer, attorney for appellant.

Andrew C. Carey, Middlesex County  
Prosecutor, attorney for respondent (Joie  
Piderit, Assistant Prosecutor, of counsel  
and on the brief).

PER CURIAM

Defendant Frank L. Marsh appeals from a June 13, 2016 order  
denying his post-conviction relief (PCR) petition. We affirm.

I.

In 2011, a jury convicted defendant of first-degree murder for hire, N.J.S.A. 2C:11-3(a)(1) and N.J.S.A. 2C:11-3(b)(4)(d); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). On April 13, 2011, defendant was sentenced to life in prison without the possibility of parole on the murder charge, and to concurrent ten year terms of imprisonment on each of the weapons charges.

Defendant filed a direct appeal. We affirmed his convictions and the sentence imposed for murder. We directed the sentences imposed on the weapons charges be merged with the sentence imposed for murder, and ordered the trial court to correct the judgment of conviction accordingly. See State v. Marsh, No. A-6279-10 (App. Div. Oct. 16, 2014). Defendant filed a petition for certification, which the Supreme Court denied by order of April 24, 2015.

We highlight the evidence giving rise to defendant's conviction. In 2008, Raymond Troxell and Vincent Russo owned a delicatessen, and often argued over financial matters. At 6:30 a.m. on December 16, 2008, the police were dispatched to the delicatessen after receiving a report Russo did not come home

the previous evening. The police found Russo's lifeless body inside.

Medical examiner Tara Briley examined Russo's body at the scene and estimated he had been dead for approximately twelve hours. The autopsy revealed he died from a single gunshot wound to the head, fired at close range. No spent bullet casings were found at the scene. A bottle containing Oxycontin was found on a desk near his body.

John Kissel, a friend of both defendant and Troxell, testified for the State. Kissel reported that, in October or November of 2008, Kissel, defendant, and Troxell were together in a bar when Troxell said he wanted Russo killed. Defendant told Troxell he would kill Russo, and Troxell agreed to pay him \$3000.

Kissel owned Alpha Cab Company (Alpha Cab), where both Troxell and defendant worked as cab drivers. Kissel testified that at approximately 7:00 p.m. on December 15, 2008, defendant appeared in Kissel's office at Alpha Cab and told Kissel "the thing with Ray and Vinnie [was] done." When Kissel asked what he meant, defendant confirmed he killed Russo. According to Kissel, defendant told him he went to the delicatessen to get some Percocet pills from Russo. While there, defendant shot Russo in the head.

Later that evening, Kissel, Troxell, and defendant met at Troxell's home, where Kissel noticed Troxell had "a wad of money." Although Kissel did not see Troxell give money to defendant, Kissel saw Troxell walk toward Kissel with money in his hand and defendant left shortly thereafter. Two days later, Kissel contacted the police and reported defendant and Troxell murdered Russo.

The dispatcher from Alpha Cab testified that defendant once showed the dispatcher his "two-shot Derringer." The State's ballistics expert testified bullet fragments found in Russo's body could have been fired from a Derringer. Defendant worked the evening of December 15, 2008, but the dispatcher was unable to confirm defendant's whereabouts between 6:50 p.m. and 8:10 p.m. Defendant's cellular telephone records and cellular tower activity revealed that, starting at 7:09 p.m. on December 15, 2008, defendant was driving away from the crime scene and toward Alpha Cab.

Charles Chicarella testified he was a friend of defendant and that on December 15, 2008, he called defendant several times throughout the day in an effort to obtain Oxycontin from him. Chicarella ultimately met with defendant at around 10:00 p.m., at which time defendant gave him two pills. The pills looked the same as those that were found in the bottle by Russo's body.

On December 17, 2008, Sergeant Paul Miller of the Middlesex County Prosecutor's Office (Prosecutor's Office) interviewed Troxell, following which he was arrested for Russo's murder.<sup>1</sup> The Prosecutor's Office also immediately looked for and arrested defendant. In defendant's home the Prosecutor's Office found eight long-arm guns, two handguns, and an empty American Derringer "gun box"; the Derringer that fit such box was never located.

Defendant testified. He denied he killed Russo. On December 15, 2008, he worked for Alpha Cab from 2:00 p.m. until approximately 11:00 p.m. He claimed that, after completing a fare at about 6:30 p.m., he returned to the cab stand, arriving at approximately 6:50 p.m. At that time, defendant confronted Kissel about money Kissel owed to him. Defendant left the cab stand at 7:20 p.m. to pick up new fares. At around 10:00 p.m., defendant met Chicarella and sold him two Oxycodone pills; defendant denied the pills came from the bottle found near Russo's body. Later that evening defendant, Troxell and Kissel

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<sup>1</sup> Raymond Troxell was also convicted by jury of first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2), N.J.S.A. 2C:11-3(b)(4), and N.J.S.A. 2C:11-3(b)(4)(e). Defendant and Troxell were tried separately. We affirmed Troxell's conviction on direct appeal. See State v. Troxell, 434 N.J. Super. 502, 505 (App. Div. 2014).

met at Troxell's home, where Kissel paid defendant the money he owed him.

In his direct appeal, one of defendant's primary contentions was the prosecutor engaged in acts of misconduct during the trial. We addressed each alleged act and determined there was either (1) no misconduct; (2) the misconduct was insufficient to have deprived defendant of a fair trial, see State v. Feaster, 156 N.J. 1, 59 (1998); or (3) the trial court's instructions provided the appropriate guidance the jury required to reach a verdict based upon the evidence.

Defendant also contended on direct appeal the trial court permitted the introduction of inadmissible evidence. We rejected those claims as well, finding the evidence was either admissible, did not prejudice defendant, or the court's instruction to the jury cured any potential prejudice.

In 2015, defendant filed a PCR petition alleging, without elaboration, ineffective assistance of counsel, prosecutorial misconduct, "violation of constitutional rights," and the "cumulative affect [sic]" of the aforementioned alleged wrongs. The arguments he asserted before the PCR court that are relevant to the issues on appeal are: (1) the cumulative effect of the prosecutor's acts of misconduct deprived him of a fair trial; (2) during the trial, his counsel failed to object to some of

the prosecutor's acts of misconduct; and (3) counsel failed to meet with him in preparation for trial.

The PCR court rejected defendant's arguments. The court found whether the prosecutor engaged in acts of misconduct was previously decided on direct appeal and the PCR court was without authority to issue a contravening decision. The PCR court also commented the jury had sufficient evidence upon which to find defendant guilty. As for defendant's claim trial counsel failed to meet with him in preparation for trial, the PCR court stated such claim was "wholly unsupported."

## II.

On appeal, defendant makes the following arguments:

POINT I – THE TRIAL COURT BELOW ON PCR REVIEW ERRED IN NOT GRANTING A HEARING OR NEW TRIAL ON THE MERITS.

- A. Strickland Standards Have Been Met Here.
- B. Trial Counsel Was Deficient In This Matter.
- C. Failure To Object Permits Inadequate Level Of Analysis Under Plain Error Rule (R. 2:10-2).
- D. The Failure Of The Court To Grant A Mistrial Or Mistrials Denied Defendant A Fair Trial.
- E. Defendant's Request For Relief Is Not Barred Under Rule 3:22-5.

POINT II — THE ACTIONS OF THE PROSECUTOR IN THIS MATTER WERE EGREGIOUS, REPETITIVE AND CUMULATIVE DEPRIVING THE DEFENDANT OF A FAIR TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE 14th AMENDMENT OF THE UNITED STATES CONSTITUTION AND NEW JERSEY CONSTITUTION.

A. A Constitutional Approach To The Issue Of Prosecutorial Misconduct Is Now In Place And Should Be Used For Review.

In his brief, defendant clarifies his arguments. He acknowledges we reviewed the question of prosecutorial misconduct on direct appeal and concluded none of the prosecutor's actions warranted a reversal and remand for a new trial. However, he contends defense counsel's failure to object reduced the standard of review of these acts of misconduct and errors to plain error. He suggests had counsel objected to these acts and errors, the outcome may have been different. He also requests we again review the prosecutor's acts of misconduct and grant a mistrial.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee a defendant in a criminal proceeding the right to the assistance of counsel. State v. Nash, 212 N.J. 518, 541 (2013). This right includes "the right to the effective assistance of counsel." Ibid. (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)).



The Court established a two-part test in Strickland, later adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687. Under the first prong of this test, a petitioner must show counsel's performance "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88.

"The first prong of the test is satisfied by showing counsel's acts or omissions fell outside the wide range of professionally competent assistance considered in light of all the circumstances of the case." State v. Allegro, 193 N.J. 352, 366 (2008) (quoting State v. Castagna, 187 N.J. 293, 314 (2006)). "[T]here is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Castagna, 187 N.J. at 314 (quoting Strickland, 466 U.S. at 689).

Under the second prong, a defendant "must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. That is, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "The error

committed must be so serious as to undermine the court's confidence in the jury's verdict or the result reached."

Castagna, 187 N.J. at 315.

Here, defendant does not assert any error by the trial court or any act of prosecutorial misconduct that was not reviewed on direct appeal. As previously stated, we found the alleged acts of prosecutorial misconduct or errors by the trial court did not exist, were not prejudicial, and were rendered harmless by the court's instructions. We need not delve into the merits of these arguments again. R. 3:22-5; State v. McQuaid, 147 N.J. 464, 483 (1997) ("[A] defendant may not use a petition for post-conviction relief as an opportunity to relitigate a claim already decided on the merits.").

However, defendant does argue trial counsel was ineffective by failing to object to these acts and errors, maintaining that had he done so, the standard of appellate review on these issues would not have been plain error. We reject this argument, because the outcome would have been the same regardless whether defendant objected.

Defendant does correctly state trial counsel's failure to object resulted in a review under the plain error instead of the harmless error standard. See R. 2:10-2. However, application of the plain error and harmless error rules requires an

identical determination of whether the error is "clearly capable of producing an unjust result." R. 2:10-2. Our Supreme Court has "made clear that '[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature[.]'" State v. Colbert, 190 N.J. 14, 30 (2007) (quoting R. 2:10-2). The Court explained:

The use with respect to 'harmless error' of the same formula we had stated for 'plain error' was simply an acknowledgment that after all was said, the question for the appellate court was simply whether in all the circumstances there was a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits . . . .

[Id. at 30-31 (quoting State v. Macon, 57 N.J. 325, 338 (1971)).]

Thus, application of the plain error standard did not result in any prejudice to defendant.


Second, defendant did not prove prejudice under the second prong of Strickland. That is, he failed to establish by a preponderance of the evidence there is a reasonable probability he suffered any prejudice as the result of his counsel's purported errors. Strickland, 466 U.S. at 687.

Finally, defendant contends trial counsel failed to meet with him a sufficient number of times before trial. Defendant does not specify how trial counsel rendered ineffective

assistance as a result or how the failure to meet more often caused defendant prejudice. "[A] petitioner must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). A court need not hold a hearing if, as is the case here, "the defendant's allegations are too vague, conclusory, or speculative to warrant" one. State v. Marshall, 148 N.J. 89, 158 (1997). Certainly defendant has failed to provide any evidence trial counsel failed to prepare adequately for trial.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION