SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5557-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEFFREY S. WILLIAMS,
a/k/a SMURF WILLIAMS,
and JEFFREY WILLIAMS,

Defendant-Appellant.

———————————————

Argued December 12, 2022 — Decided December 27, 2022

Before Judges Whipple, Mawla, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 17-12-1729.

Cody T. Mason, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Cody T. Mason, of counsel and on the briefs).

Melinda A. Harrigan, Assistant Prosecutor, argued the cause for respondent (Raymond S. Santiago,

Monmouth County Prosecutor, attorney; Melinda A. Harrigan, on the brief).

PER CURIAM

Defendant Jeffrey S. Williams appeals from his conviction for first-degree felony murder, N.J.S.A. 2C:11-3, second-degree possession of a firearm 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). We reverse and remand for a new trial for the reasons expressed in this opinion.

Around 11:00 p.m. on July 16, 2017, the victim Hector Mejia went to his estranged wife's home located on Liberty Street in Long Branch, to pay her support. Because his wife was not home, Mejia sat outside with several beers to wait for her, and eventually passed out or fell asleep. When she returned home, she discovered him shot dead.

Police responded and found Mejia laying on his back in a pool of blood, with a bullet wound to the center of his chest. Aside from twenty dollars found in Mejia's clothing, he was missing his backpack, wallet, phone, and the money he came to give his wife; his right pocket was turned partially inside out. An autopsy revealed he had been fatally shot at close range, from within two to two-and-one-half feet, in a downward direction.

Yolanda Starks, who lived across the street, approached police, and later gave them a statement about her observations around the time of the shooting. She saw Patricia Thorne's black SUV parked on Central Avenue. Thorne was in the driver's seat, and a man Starks knew as "Smurf" was talking to another man outside the SUV. Smurf was wearing an American flag shirt. Two younger men, Jarrett Brown and Terrence Bolls, came by on bikes and spoke to Thorne while she was in her car.

Starks observed Smurf, his friend, and the two younger men eventually wander away from the SUV and turn the corner onto Liberty Street. Shortly thereafter, Starks heard a bang and spotted Smurf walking or jogging toward Ellis Avenue, and saw Thorne pull out and head the same way. Starks identified defendant as Smurf from a photo array.

Detective Todd Coleman of the Long Branch Police Department retrieved footage from surveillance cameras in the area. These recordings corroborated Starks's observations. Although the video did not show the shooting, it showed two people get into Thorne's car after the shooting.

Detective Kevin Condon of the Monmouth County Prosecutor's Office (MCPO) located Thorne at her home the morning after the shooting and asked her to come down to the police station to give a statement. Thorne drove herself

to the station and was interviewed by Detectives Coleman and Adam Hess of the MCPO. Later, Detective Patrick Petruzziello of the MCPO replaced Detective Hess.

In her twelve-page statement, Thorne initially claimed she was sitting alone in her car parked on Central Avenue near the corner of Liberty Street. Defendant, whom she had known for four or five years, was standing by her car talking with some other people until he walked away. Twenty minutes later, Thorne heard a loud popping noise, which prompted her to drive off onto Ellis Avenue. Once she was on Ellis Avenue, defendant flagged her down, jumped in the passenger seat of her SUV, pointed a gun in her face, and threatened to shoot her if she did not give him a ride. She claimed she dropped him off on Brighton Avenue and then saw him later at a bar. While they were both in the bar, he texted her he did not trust "Old Boy" and he would "see [her] in [thirty-nine] years."

Thorne changed her statement and insisted defendant did not point a gun at her, but instead stated she saw something in his shirt, a bulge in his waistband, that could have been a gun. When defendant walked away from her SUV, he was headed towards Liberty Street, and after she heard the pop, she saw defendant walking fast across Central Avenue from Grant Court. He got in the

driver's side backseat of her SUV and then climbed into the front passenger seat. Defendant was talking to himself and at one point stated, "I thought it was on safety." She dropped him off at his home.

Police interviewed Brown, who stated he heard someone was passed out nearby in the neighborhood. Brown and Bolls rode their bikes onto Liberty Street and spotted a Hispanic man asleep on a porch with beer cans around him. Brown approached the man and "skimmed" the man's left pants pocket with the back of his hand, hoping to find something to steal. He found nothing and, before he could check the man's right pocket, the man suddenly groaned, and Brown walked away. He then saw two men, one of whom was Smurf. Smurf was wearing a baseball cap and a flag shirt. Brown crossed over Liberty Street and got back on his bicycle.

As he started to ride away, Brown turned and saw Smurf, who was "grabbing by his waistband," and the other man walk up to the Hispanic man and hunch down over him. Moments later, Brown heard a gunshot, and he quickly turned off Liberty Street. Brown then saw Smurf and the other man running onto Ellis Avenue, where they got into a black SUV. He had previously seen this SUV parked on Central Avenue earlier in the evening. Brown identified a photo of defendant as the man he knew as Smurf. He also identified

Smurf and the other man on a surveillance video obtained by the police, which showed the two men entering the black SUV.

On July 20, 2017, police brought Thorne back to the police station, and she gave a second statement, which was videotaped. This time she stated: defendant had been with David Searight the night of the shooting; both defendant and Searight got in her car after the shooting; defendant told Searight "that wasn't supposed to happen"; and defendant changed his clothes when they returned to his apartment, may have put his clothes in a bag and threw the bag in a dumpster at his apartment complex.

Police spoke with Searight the same day. In his statement, Searight said he saw Brown going through both of Mejia's pockets and believed Brown took Mejia's wallet. He and defendant then approached Mejia, who suddenly began moving, prompting defendant to grab him by the shirt and pull out a gun. Mejia started yelling and defendant pointed the gun at his face. Searight then saw defendant shoot Mejia. Brown rode off on his bike, and Searight and defendant fled the scene on foot.

Searight and defendant spotted Thorne's car, and Searight jumped in the front seat while defendant got in the back. When defendant got into the car, he told Thorne he shot "the dude." Defendant said if Searight or Thorne told

anyone, he would kill them. Defendant had the gun in his lap and had Mejia's phone, which Searight had not seen him take. As they were driving on Cedar Street towards defendant's apartment, defendant threw the phone out the window.

Once they were in defendant's apartment, defendant cleaned the gun and repeated his threat. He changed his clothing, including the flag shirt, and put them in a dumpster. Searight, Thorne, and defendant then left and went to a bar.

Searight identified defendant as the shooter from a photo array. He also identified Brown from another photo array. Police later located the lower half of Mejia's phone in a grassy area off Cedar Avenue. The gun and defendant's clothing were never recovered.

Police located defendant and brought him to the MCPO. During the ride, Detective Coleman heard defendant say "his life was over" and "he was going to jail for life."

A grand jury subsequently charged defendant with: first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count one); first-degree felony murder, N.J.S.A. 2C:11-3 (count two); first-degree armed robbery, N.J.S.A. 2C:15-1 (count three); second-degree possession of a firearm for an unlawful purpose, N.J.S.A.

2C:39-4(a) (count four); and second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count five).

Trial took place between September 15 and October 5, 2018. The jury learned the parties had stipulated defendant had never applied for, nor been issued, a gun permit. During Starks's testimony, the State played the surveillance video gathered after Mejia's murder, including her identification of Smurf as defendant. Starks also identified defendant as Smurf in court. Brown testified in accordance with his statement to police.

When Thorne testified, she recanted large portions of both of her prior statements to police. In addition to claiming she had been drinking throughout the day of the incident, she also claimed she was under the influence of Xanax, and police threatened her into giving a statement. As a result, the trial judge permitted the State to play key portions of her statements to police for the jury.

Searight testified he had previously been convicted of several crimes and had recently been sentenced to five years in prison. He testified consistent with his statement to police and identified defendant as the shooter. Searight was reluctant to testify because he was scared. He testified defendant called him after the shooting to make sure he would not say anything to police. The

prosecutor played the surveillance video from defendant's apartment complex, and Searight identified defendant carrying a bag of clothes to a dumpster.

Detective Hess testified Thorne did not appear intoxicated when she was interviewed. He testified Searight was very upset and scared during his interview with police. He noted Searight mentioned defendant throwing away Mejia's phone before anyone mentioned the phone to him, and defendant's cellphone records corroborated Searight's claim defendant contacted him after the shooting.

Detective Condon testified when Thorne was brought back to the station, she did not say she had taken Xanax. According to Condon, Thorne was not intimidated during her interview, she was not a "pushover," and it was not easy for her to incriminate defendant. She repeatedly denied certain aspects of the events that occurred, which the police knew to be true.

Investigator Lauren Diangelo testified for the defense. She reviewed video from the bar the night of the incident and July 17, 2017, and it showed Thorne arriving at 12:44 a.m. and leaving at 2:17 a.m.

The jury acquitted defendant of count one but found him guilty of the lesser-included offense of reckless manslaughter. It convicted on counts two, four, and five and acquitted defendant on count three.

Defendant moved to vacate the conviction on count two, arguing the jury charge was faulty and inconsistent with the verdict rendered by the jury. The trial judge denied the motion.

At sentencing, the judge merged count one into count two and sentenced defendant to an aggregate sentence of thirty years flat. The judge imposed a thirty-year term of imprisonment, with thirty years of parole ineligibility on count two; and two concurrent seven-year terms of imprisonment, with forty-two months of parole ineligibility, on counts four and five. The judge ordered $455 in fines and costs.

Defendant raises the following points on appeal:

> POINT I
>
> THE FELONY MURDER CONVICTION MUST BE VACATED BECAUSE THE JURY EITHER BASED THE CONVICTION ON AN UNSUPPORTED PREDICATE FELONY OR RETURNED A LEGALLY INCONSISTENT VERDICT.
>
> > A. The Court's Instructions Allowed the Jury to Convict on Felony Murder Based on an Unsupported Offense.
> >
> > B. The Jury Could Not Validly Convict on Felony Murder While Acquitting on the Predicate Robbery.

POINT II

THE COURT ERRED WHEN IT REFUSED TO VOIR DIRE THE JURY FOLLOWING THREE INCIDENTS OF JUROR TAINT.

POINT III

THE COURT VIOLATED [DEFENDANT'S] CONFRONTATION RIGHTS WHEN IT BARRED HIM FROM FULLY EXPLORING SEARIGHT'S PLEA DEAL.

POINT IV

THE COURT ABUSED ITS DISCRETION WHEN IT ADMITTED THORNE'S JULY 20 STATEMENT AS A PRIOR INCONSISTENT STATEMENT.

POINT V

THE STATE BOLSTERED ITS CASE WITH IMPROPER OPINION TESTIMONY, EMOTIONAL APPEALS, AND BAD-ACT EVIDENCE.

POINT VI

THE WEAPON CONVICTIONS MUST BE VACATED BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED ON THE NECESSARY ELEMENTS. (NOT RAISED BELOW).

I.

In Point I, defendant argues the trial judge erred when he declined to vacate the felony murder conviction. He asserts the jury charge was

inconsistent, and therefore erroneous, because it repeatedly instructed the jury it could find defendant guilty of felony murder for causing Mejia's death while attempting to commit a robbery, and defendant was not charged with attempt.

It is axiomatic that "[a]ppropriate and proper charges to a jury are essential for a fair trial." State v. Maloney, 216 N.J. 91, 104 (2013) (alteration in original) (quoting State v. Green, 86 N.J. 281, 287 (1981)). "Erroneous instructions on matters or issues that are material to the jury's deliberation are presumed to be reversible error . . . ." State v. Jordan, 147 N.J. 409, 422 (1997); accord State v. McKinney, 223 N.J. 475, 495-96 (2015). The presumption of prejudicial error exists even when no objection was raised below by defense counsel. State v. Hodde, 181 N.J. 375, 384 (2004); State v. Federico, 103 N.J. 169, 176 (1986).

The model jury charge for felony murder directs the trial court to "[d]elete language relating to attempt or flight throughout [the] charge if not applicable." Model Jury Charges (Criminal), "Felony Murder – Slayer Participant" (N.J.S.A. 2C:11-3(a)(3)) (rev. Mar. 2004). "Attempted robbery occurs where the actor intends a theft but is interrupted before he actually harms anyone or even threatens harm." State v. Samuels, 189 N.J. 236, 250 (2007).

We have considered the record and, as we must, read the jury charge on felony murder as a whole. State v. Garrison, 228 N.J. 182, 201 (2017). The

numerous erroneous references to attempted robbery as a possible alternate predicate offense and the repetition of this mistake on the verdict sheet, prove the jury was improperly charged, which prejudiced defendant because it resulted in an inconsistent verdict. We part ways with the trial judge's assertion the error was not prejudicial because the jury could have disregarded the attempt language as irrelevant, as they were previously instructed only on a completed robbery. The insertion of attempted robbery gave the jury an option to convict on unsupported facts and evidence. For these reasons, we vacate defendant's felony murder conviction.

II.

Defendant argues there were three incidents during trial which tainted the jury and require a reversal. We address the first two incidents together because they involved the same juror, and separately address the third incident involving defendant's conduct.

A.

After dismissing the jury for the weekend at the conclusion of the third day of trial, the trial judge informed the parties Juror Two had approached his law clerk after lunch and advised she felt "uncomfortable" during lunch because Thorne was seated nearby. The judge noted nothing "untoward" had occurred,

as there had been no conversation between Thorne and any of the jurors, including Juror Two.

The clerk stated although Juror Two was waiting in the hallway and had a question for the court, she was reluctant to re-enter the courtroom with everyone present. The judge directed the clerk to tell Juror Two to leave and he would speak with her when court resumed the following Tuesday. The judge noted he did not find it surprising a juror would feel uncomfortable under such circumstances, and he would "give [Juror Two] some assurances" and direct her to walk away if she recognized anyone associated with the trial. However, the judge never spoke with Juror Two and instead addressed Thorne regarding the situation.

The second incident involving the same juror occurred ten days later, prior to the resumption of trial. Juror Two again spoke to the clerk and asked to speak with the judge because she was scared. The clerk instructed Juror Two not to discuss anything with her fellow jurors and escorted her to the courtroom. Juror Two had a colloquy with the judge in the presence of counsel, but outside of defendant's presence. She informed the judge she believed she saw "some of the women" from the trial at the grocery store the previous evening. Although

nothing happened, she was concerned because she worked with many families in the county and was known as

> the white lady with dreads. There's not many in Monmouth County[. S]o, . . . all this stuff started . . . coming over me last night, where I'm like, am I known? Are these people going to know me? And I don't know if I have the capacity to be able to make that decision on this man's life, knowing, . . . what I'm hearing. So I'm very scared right now.
>
> . . . .
>
> So I'm like, very, very, overwhelmed and scared right now.

The judge assured the juror she had nothing to worry about and asked her if she discussed her concerns with her fellow jurors. She confirmed she did not.

The judge then informed counsel he intended to excuse Juror Two because she was "obviously . . . completely emotionally upset, sobbing in the courtroom" and had "clearly indicated that she can't be fair and impartial" and "would be utterly distracted during the course of the trial." Counsel agreed.

Defense counsel requested the judge voir dire the jury because Juror Two "shed[] light into what other jurors may be thinking." The State objected and the judge denied the request, reasoning a voir dire was unnecessary because there was no indication the other jurors were similarly affected, and Juror Two denied communicating her concerns to any of her fellow jurors.

B.

During the fourth day of trial, while Thorne was on the stand and her recorded statement was being played for the jury, defendant's mother left the courtroom and could be heard crying outside. Defendant became agitated and began making gestures and shaking his head before his mother left the courtroom, causing the judge to stop trial and direct the jury to exit the courtroom for a short break. As the jury was leaving, the following occurred:

> THE DEFENDANT: I don't need this. I don't – and man. Man, how low, man. What the fuck man? That n****'s got my mom crying. Man, all you n****s lying on me and shit. And you don't believe in the fucking statement. Y'all trying to put me away for fucking the rest of my life, man. Get the fuck out of here, man.
>
> THE COURT: Open the door.
>
> (Pause in proceedings)
>
> THE DEFENDANT: The fucking [j]udge ain't playing this right man. Fuck you, n****r.
>
> COURT OFFICER: Mr. Williams, sit down. Sit down.
>
> THE DEFENDANT: They shouldn't have made you a fucking attorney, man.
>
> COURT OFFICER: Sit down. Sit down.
>
> THE DEFENDANT: Fuck them. The fucking [j]udge ain't playing this right, man. My mom—fucking mom crying and shit.

(Pause in proceedings)

COURT OFFICER: Could I ask you [to] wait upstairs or outside, please?

THE COURT: One second.

COURT OFFICER: You have to leave.

COURT OFFICER: Come on.

THE COURT: Okay. You can be excused, Ms. Thorne. Wait in the hallway. We're going to resume testimony in a few minutes. You—yes, you may. All right. It's now 10:51. I just wanted the record to reflect that—that toward the end of that session, before we took a break, before Mr. Williams started to verbally outburst in front of the jury, he was making gestures, shaking his head, throwing his hands up. I'm . . . sure his attorneys, . . . will or have told him that making gestures like that in front of the jury just does not help a person in his situation. As far as you're concerned, Mr. Williams –

THE DEFENDANT: Man. I am sorry.

THE COURT: . . . [S]o far, you've been conducting yourself . . . in an appropriate manner. But if it does get to the point where you're being disruptive, I have no choice but to remove you from the [c]ourtroom. I'd rather not do that. I don't think you want to do that. I'm sure your attorneys don't want to do that.

THE DEFENDANT: So what? You're not helping me. You with the State. Everything . . . my attorneys do, try to put in, you deny it. Everything.

THE COURT: Well –

> THE DEFENDANT: You're not . . . paying my attorney's fee. You're playing against us. You want me to go down. Come on, man.
>
> THE COURT: Well, I'm not even . . . going to respond to that, Mr. Williams.
>
> THE DEFENDANT: Come on, bro.
>
> THE COURT: Do you need to use the restroom?
>
> THE DEFENDANT: Yeah. I want to use the restroom.

After defendant used the restroom and returned to the courtroom his attorney explained defendant wished to address the court and the following colloquy ensued:

> THE DEFENDANT: Thank you, [y]our [h]onor. . . . I apologize. So, . . . I am a mama's boy and . . . that hurts when I hear my [m]om cry[l]ike that, . . . it hurts me bad.
>
> THE COURT: All right. I plead guilty to that too, so –
>
> THE DEFENDANT: . . . I can't see her hurt. Like, you know what I mean? And . . . things that they saying on . . . the DVD did make my [m]om hurt and that makes me hurt. . . . I don't never want to see her hurt, and I apologize for me cursing at you, and saying disrespectful things to you, and disrespectful things to the [c]ourt, and the jury, and the State, and the Prosecutor's Office.
>
> THE COURT: All right.

> THE DEFENDANT: And . . . I apologize. Thank you, [j]udge.
>
> THE COURT: . . . I accept your . . . remarks and every day I comment to you about how . . . your being dressed appropriately. Right?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you're conducting yourself in a civil manner. . . . I think I say that to you either at the beginning or at the end of every day.
>
> THE DEFENDANT: Yes.

The judge noted, at defense counsel's request, he had prepared a limiting instruction and asked counsel to review it. The State and defense counsel told the judge the instruction was acceptable. The judge then read the following instruction to the jury:

> You have been instructed by me and you have sworn an oath to decide this case based solely upon the evidence that will be presented during the trial. Specifically, the only evidence that you are permitted to consider is testimony of . . . witnesses who take the oath and testify in [c]ourt along with any . . . exhibits[,] which may be admitted into evidence.
>
> . . . .
>
> You may have heard some statements or remarks made by . . . defendant in open [c]ourt. He did not make these statements as a witness. His statements are not evidence. You must totally disregard any statements[,]

> which you may have heard or anything that you may have seen.
>
> Again, the only evidence that you are permitted to consider is testimony of witnesses who take the oath and testify in [c]ourt, along with any exhibits which may be admitted into evidence.
>
> Indeed, I instruct you to totally . . . disregard any such statements made by the defendant. The defendant is entitled to have the jury consider all of the evidence admitted at trial and nothing else. Despite any statements of the defendant that you may have heard, I remind you that the defendant continues to be presumed to be innocent.

Following the instruction, the judge excused the jury for lunch and allowed defense counsel to privately listen to the recording of defendant's outburst off the record. When the matter resumed, defense counsel moved for a mistrial because, during the outburst, defendant stated: "Take me back to the fucking County," which defense counsel stated was an obvious reference to county jail. Defense counsel also stated his co-counsel believed Juror Seven "looked conflicted and concerned" after the judge advised the jury during the cautionary instruction "nothing that the defendant says is evidence and that should not be considered . . . ."

The prosecutor cited State v. Montgomery, a case in which the defendant attacked his defense counsel, court officers, and attempted to flee the courtroom

following the close of the State's case. 427 N.J. Super. 403, 405 (App. Div. 2012). The prosecutor argued the judge should not grant a mistrial because one was not granted for far worse conduct in Montgomery. Notwithstanding the State's opposition to the mistrial motion, the prosecutor stated: "We'd suggest the cautionary instruction, and . . . if the[c]ourt were to just potentially even ask [the jury] if they . . . still can be fair and impartial, I'm assuming . . . they can follow [y]our [h]onor's instruction and do that."

The judge found the motion was "precipitated by the defendant's own conduct." He noted he was "a little confused" regarding the portion of defendant's comments directed at him "because [he] really ha[d]n't made any adverse decisions so far in this case." The judge was satisfied the curative instruction counsel agreed to was enough, and he was "not going to . . . address any particular juror based upon an attorney's interpretation of a facial expression." When defense counsel pointed out that even the State suggested "asking the jury whether or not they can be fair and impartial, based on the limited instruction or cautionary instruction [the judge] gave[,]" the judge responded "even if the State is requesting that, I wouldn't do that . . . at this stage, under these circumstances."

C.

A motion for a mistrial should be granted only in those situations which would otherwise result in manifest injustice. State v. Yough, 208 N.J. 385, 397 (2011). Whether to deny such a motion is left to the trial judge's sound discretion, and we will only reverse where there is an abuse of discretion. State v. Smith, 224 N.J. 36, 47 (2016).

The Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee criminal defendants "the right to . . . trial by an impartial jury." State v. Williams, 93 N.J. 39, 60 (1983). "[A] defendant is entitled to a jury that is free of outside influences and will decide the case according to the evidence and arguments presented in court in the course of the criminal trial itself." Ibid. Therefore, a trial court must take action to assure jurors have not become prejudiced because of facts which "could 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) (citing Panko v. Flintkote Co., 7 N.J. 55, 61 (1951)); accord State v. Harris, 181 N.J. 391, 506-07 (2004). "The test is 'not whether the irregular matter actually influenced the result but whether it had the

capacity of doing so.'" Scherzer, 301 N.J. Super. at 486 (quoting Panko, 7 N.J. at 61).

Where there is a realistic possibility prejudicial information reached the jury mid-trial, the trial court should conduct a voir dire to determine whether any exposure occurred. State v. Bisaccia, 319 N.J. Super. 1, 12-13 (App. Div. 1999). If there has been exposure, the trial judge should then interview the affected jurors individually to determine what was learned and whether the jurors remain capable of fulfilling their duties in an impartial manner. Ibid.; accord State v. R.D., 169 N.J. 551, 557-58 (2001).

The incidents with Juror Two do not persuade us the trial judge erred when he declined to voir dire the other jurors. There is no evidence Juror Two interacted with Thorne or the other unidentified women who might have been present at trial. Juror Two's expression of discomfort after sitting near Thorne and her fears after seeing women in a grocery store were idiosyncratic, generalized concerns, and a voir dire of the entire jury was unnecessary. Indeed, Juror Two was clear she had not spoken to her fellow jurors about these incidents or her concerns.

We take a different view regarding defendant's outburst. There is no doubt a defendant whose conduct purports to taint the jury should not benefit from his

behavior. Montgomery, 427 N.J. Super. at 407. It is also beyond dispute the jury is presumed to follow a court's limiting instruction. State v. Winder, 200 N.J. 231, 256 (2009). Our difficulty is not with the instruction the judge gave, but with his refusal to make certain the jury was not impacted by defendant's outburst.[1]

In Montgomery, we upheld the trial judge's denial of a mistrial motion, noting the trial judge gave the jury a cautionary instruction, but also "[a]ll jurors acknowledged that they understood the instruction and could comply with it." 427 N.J. Super. at 406 (emphasis added). This process satisfied the trial judge the jurors understood his instruction. Ibid. We cited, with approval, examples from other jurisdictions where courts denied mistrial motions

> where the trial judge questioned the jurors about their ability to remain fair and impartial after witnessing the incident, solicited a show of hands from the jurors responding to the judge's questions about the incident, gave a prompt curative instruction to remain fair and impartial, and gave a final instruction to only consider the evidence presented at trial during deliberations.
>
> [Id. at 408 (citations omitted).]

[1] We accept that part of defendant's outburst included a comment that he wanted to return to jail. Although the transcript does not reflect the comment, neither the judge nor the State contradicted defense counsel's assertion defendant made the comment.

Moreover, the defendant's conduct in Montgomery was calculated to cause a mistrial because of the "overwhelming evidence of . . . guilt." Ibid. We noted the "outburst was not the result of 'pent-up' frustrations or stress . . . ." Id. at 409-10.

Our recitation of the transcript above shows defendant's outburst was not calculated. His conduct was borne of sadness and upset over his mother's condition. Defendant apologized and even the trial judge recognized his behavior was out of the norm.

To be clear, we do not excuse defendant's conduct. As the trial judge noted, the court is not without a remedy if a defendant engages in disruptive conduct during a trial. However, the failure to ascertain whether the jurors were impacted by defendant's conduct means neither the judge nor we are capable of discerning whether the jury remained fair and impartial. For these reasons, we are constrained to vacate defendant's convictions and remand for a new trial.

III.

Points III, IV, and V of defendant's brief attack certain evidentiary rulings. In Point III, he argues the judge committed reversible error in refusing to permit him to inquire further into Searight's criminal history as a possible source of bias. In Point IV, defendant asserts the judge abused his discretion by admitting

Thorne's statements to police as a prior inconsistent statement. Point V argues the State improperly bolstered its case by: allowing Condon to offer an opinion endorsing the credibility of Thorne and Searight; and introducing Thorne's statement and testimony from Thorne and Searight eliciting sympathy for the victim, and painting defendant as a bad person. Although we have reversed in favor of a new trial, we address these issues because they are likely to arise again.

A.

In January 2016, Searight pled guilty to fourth-degree attempted trespassing, and was sentenced to probation. In May 2016, he pled guilty to third-degree escape from detention, and was again sentenced to a probationary term. In conjunction with the plea deal, the State dismissed seven other mostly drug-related charges. In October 2016, he pled guilty to third-degree burglary and received his third probationary term. In return for this plea, the State dismissed five other charges.

Searight was still serving his probationary term in all three matters when Mejia was killed and when Searight gave his statement to police related to the shooting. Searight then committed new offenses in October 2017 and was charged with second-degree robbery and terroristic threats. In March 2018, he

pled guilty to the lesser crime of third-degree theft and three counts of third-degree violation of probation (VOP), and on May 25, 2018, he was sentenced to a five-year term of imprisonment on the theft charge and three concurrent five-year terms on the VOPs. As part of this plea deal, the State dismissed the terroristic threats charge and two unrelated disorderly persons offenses, and Searight agreed to testify against his co-defendant in the theft case.

At trial, the prosecutor elicited testimony from Searight regarding his criminal history. The jury learned Searight pled guilty to trespassing and escape in 2016 and was sentenced to probation. He also pled guilty to third-degree theft in March 2018 and was sentenced to five years in prison in May 2018. Notably, Searight's testimony that he was sentenced in May 2018 for theft and escape, and would have to serve ten years in prison, was incorrect.

During cross-examination, the jury learned the correct plea and sentencing information related to the March 2018 plea and the May 2018 sentence. Searight explained he pled guilty to third-degree theft and three other third-degree offenses, and each of these crimes carried a maximum sentence of five years.

Defense counsel then asked whether Searight had faced a possible twenty-year sentence had he not accepted a plea deal, and the prosecutor objected. The trial judge sustained the objection, ruling defense counsel was not permitted to

explore the details of any plea agreements since Searight was not a co-defendant in this case.

Defense counsel then asked Searight whether, as part of the March 2018 plea deal, he agreed to testify against his co-defendant in the theft case. When the prosecutor objected, defense counsel stated he was trying to make the point Searight's 2018 guilty plea and agreement to testify for the State in the theft case may have something to do with his cooperation with the State in this matter. The trial judge sustained the objection for the same reason as the last.

Defense counsel then asked Searight whether he remembered giving the factual basis for his March 2018 plea to the third-degree theft. The prosecutor objected. Defense counsel explained although Searight testified he never "put his hands on . . . Mejia" and he "wouldn't do that[,]" he testified during the 2016 plea he had touched the victim in that case while going through his pants pockets in search of money. The trial judge sustained the objection as improper under N.J.R.E. 608 and 609, and noted it improperly ventured into eliciting prior bad acts under N.J.R.E. 404(b), and was irrelevant.

"We defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). "We will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it

constitutes 'a clear error in judgment.'" Ibid. (quoting State v. Medina, 242 N.J. 397, 412 (2020)). Reversal of a conviction is only warranted when a mistaken evidentiary ruling has the "clear capacity to cause an unjust result." Ibid.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee the right of defendants to confront the witnesses against them. State v. Jackson, 243 N.J. 52, 65 (2020). Under N.J.R.E. 611(b), an accused may cross-examine a witness about the subject of any direct examination and matters affecting the witness's credibility. A defendant may explore the motivation of a state's witness in testifying, including any potential bias. Jackson, 243 N.J. at 65; State v. Bass, 224 N.J. 285, 301 (2016).

Nonetheless, "a trial court may 'impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant.'" Jackson, 243 N.J. at 66 (quoting Delaware v. Van Ardsall, 475 U.S. 673, 679 (1986)). However, the competing interest proffered to limit a defendant's confrontation right must be considered closely. State v. Budis, 125 N.J. 519, 532 (1991).

In Bass, a jury rejected the defendant's claim of self-defense and convicted him of the December 2006 murder of Jessica Shabazz, the attempted murder of James Sinclair, and two weapons offenses. 224 N.J. at 290. The trial court barred defense counsel from cross-examining Sinclair, the State's key witness, regarding the details of a plea deal he had accepted in an unrelated matter prior to defendant's trial. Id. at 291-92. Specifically, after being charged with first-degree robbery for an offense committed in January 2008, Sinclair avoided a possible life sentence by pleading guilty to third-degree theft and burglary in return for a probationary term. Id. at 290-91, 297. Sinclair had also agreed to testify against his co-defendants in that case. Id. at 306. When Sinclair testified at the defendant's trial, he was serving the first year of his probationary sentence. Id. at 306-07.

We affirmed the defendant's convictions and sentence, concluding the trial court had properly curtailed defense counsel's cross-examination of Sinclair regarding his plea deal because Sinclair had already been sentenced for his 2008 offense at the time of the defendant's trial. Id. at 298-99. Our Supreme Court reversed, holding the pendency of an unrelated "first-degree charge may have served as a powerful incentive for Sinclair to cooperate with the State as it prepared for [the] defendant's trial." Id. at 307.

The Court held the jury should have been informed that, after the 2006 shooting: Sinclair allegedly committed an offense, which exposed him to a lengthy term of incarceration; he entered into a plea bargain with the State, as the State prepared for defendant's trial; and by virtue of his plea bargain, he faced only a probationary, rather than a lengthy, prison term. Ibid. Because Sinclair was a pivotal witness against the defendant and had been presented by the State as a calm and levelheaded individual who had only attempted to protect Shabazz, the Court held the trial court's preclusion of evidence regarding Sinclair's possible bias could have altered the outcome of the defendant's trial. Id. at 310-11.

The Court emphasized "[a] defendant's claim that there is an inference of bias is particularly compelling when the witness is under investigation, or charges are pending against the witness, at the time that he or she testifies." Id. at 304. Moreover, "a charge against a witness that has been resolved by dismissal or sentencing before the witness testifies may be an appropriate subject for cross-examination[,]" if the witness might "have been subject to pressure" when identifying the defendant as the perpetrator prior to or at trial "by virtue of [their] 'vulnerable status as a probationer, as well as [their] possible

concern that [they] might be a suspect in the investigation.'" Id. at 304 (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)).

For these reasons, we conclude the trial judge should have permitted the defense to elicit testimony from Searight regarding the fact: he was on probation when police questioned him; he committed offenses after Mejia's murder; he agreed to a plea deal, which included a downgraded offense prior to defendant's trial; and agreed to testify against his co-defendant in the theft case. Considering the prosecutor elicited incorrect information regarding the terms of Searight's May 2018 plea deal, it was also an error to exclude testimony confirming Searight could have been sentenced to twenty years in prison and agreed to testify against his co-defendant.

Although defendant argues the jury should have learned Searight was extended-term eligible as a persistent offender, the record does not show this was ever under consideration by the State. Likewise, the judge did not err when he barred testimony regarding Searight's three plea agreements in 2016, or the factual assertions Searight made at the time of his 2018 guilty plea to theft. The original charges and possible prison time Searight faced in 2016 were a closed matter.

B.

The trial judge did not err when he admitted Thorne's statement to police as a prior inconsistent statement. A prior inconsistent statement may be admitted for impeachment purposes and as substantive evidence, provided the witness is available for cross-examination. State v. Gross, 121 N.J. 1, 8 (1990). Under N.J.R.E. 607(a)(2), "[t]he party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless the statement is in a form admissible under Rule 803(a)(1) . . . ." Admissibility of a prior inconsistent statement under N.J.R.E. 803(a)(1), must be determined at a N.J.R.E. 104 hearing outside the presence of the jury. State v. Baluch, 341 N.J. Super. 141, 179 (App. Div. 2001). "[T]he purpose of the [N.J.R.E. 104] inquiry 'is not to determine the credibility of the out-of-court statements' but 'whether the prior statement was made or signed under circumstances establishing sufficient reliability that the factfinder may fairly consider it as substantive evidence.'" State v. Spruell, 121 N.J. 32, 46 (1990) (quoting State v. Gross, 216 N.J. Super. 98, 110 (App. Div. 1987)). The burden rests with the proponent of the statement to prove its reliability by a preponderance of the evidence. Gross, 121 N.J. at 15-16.

The trial judge conducted a Gross hearing, at which the State played Thorne's videotaped statement and considered Coleman and Condon's testimony. Following the hearing, the judge made detailed credibility findings and addressed the factors articulated in Gross. 121 N.J. at 10. Our review of the record convinces us the trial judge's findings following the Gross hearing were sound, and the decision to admit Thorne's statement was not an abuse of discretion.

C.

In Point V, defendant argues the State improperly bolstered its case by: introducing various opinions endorsing the credibility of Thorne and Searight; eliciting sympathy for the victim; and painting defendant as a bad person.

Having thoroughly reviewed the record, we conclude these arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). None of the arguments raised by defendant constituted error, let alone plain error to warrant our intervention. R. 2:10-2.

IV.

In Point VI, defendant contends the trial judge committed plain error by failing to instruct the jury on key elements of the two weapons offenses. At

trial, defense counsel stated he found the jury charge acceptable, and the challenge to the charge is raised for the first time on appeal.

The judge administered the model charge for possessing a weapon with a purpose to use it unlawfully against the person or property of another, N.J.S.A. 2C:39-4(d). He did not give the model charge for the offense charged in count four, possessing a firearm with a purpose to use it unlawfully against the person or property of another, N.J.S.A. 2C:39-4(a).

Regarding count five, the judge initially followed the model charge and stated:

> The defendant is charged with . . . unlawful possession of a handgun. The statute upon which this count is based reads in pertinent part as follows.
>
> Any person who knowingly has in his possession any handgun without first having obtained a permit to carry the same is guilty of a crime. In order to convict the defendant, the State must prove each of the following elements beyond a reasonable doubt: that there was a handgun, that the defendant knowingly possessed the handgun, and that the defendant did not have a permit to possess such a weapon.
>
> The first element that the State must prove beyond a reasonable doubt is that there was a handgun. I've already given you this definition, but I'll give it to you again.
>
> . . . .

> The second element the State must prove beyond a reasonable doubt is that the defendant knowingly possessed the handgun. To possess an item under the law, one must have made a knowing, intentional control or that item accompanied by a knowledge of its character.
>
> . . . .
>
> Possession means a conscious, knowing possession, either actual or constructive. I've already given you the definitions of actual and constructive possession with respect to the previous charge.
>
> [(emphasis added).]

The judge did not read the last two paragraphs of the model charge, which state:

> The third element that the State must prove beyond a reasonable doubt is that the defendant did not have a permit to possess such a handgun. If you find that the defendant knowingly possessed the handgun, and that there is no evidence that defendant had a valid permit to carry such a handgun, then you may infer, if you think it appropriate to do so based upon the facts presented, that defendant had no such permit.[] Note, however, that as with all other elements, the State bears the burden of showing, beyond a reasonable doubt, the lack of a valid permit and that you may draw the inference only if you feel it appropriate to do so under all the facts and circumstances.
>
> If you find that the State has failed to prove any of the elements of the crime beyond a reasonable doubt, your verdict must be not guilty. On the other hand, if you are satisfied that the State has proven each and

> every element of the crime beyond a reasonable doubt, your verdict must be guilty.
>
> [Model Jury Charges (Criminal), "Unlawful Possession of a Handgun (Second Degree) (N.J.S.A. 2C:39-5(b))" (rev. June 11, 2018).]

Before a jury can convict, it is essential that it find the State has proven each element of the offense beyond a reasonable doubt. State v. Paden-Battle, 464 N.J. Super. 125, 139 (App. Div. 2020). Each element of each crime must be separately charged. Green, 318 N.J. Super. at 376, 381.

The judge did not follow the model charge and administered the wrong charge for the offense charged in count four. Notwithstanding the fact the jury was given the wrong charge, there was never any doubt the weapon used to kill Mejia was a handgun. This fact was repeatedly mentioned in the charges on murder, robbery, felony murder, and possession of a firearm without a permit. However, because we have reversed defendant's convictions for different reasons, on defendant's re-trial, the judge must administer the correct charge to eliminate all room for doubt.

We reach a similar conclusion regarding the charge administered on count five. We note that at the outset of the charging process, the judge instructed the jury to treat the stipulations in this case as it would the other evidence; it could be accepted or rejected by the jury in its role as the factfinder. However, the

judge did not inform the jury the State had the burden of proving defendant did not have a gun permit, which is an essential element of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). State v. Ingram, 98 N.J. 489, 499-500 (1985). The jury was not bound by stipulated facts on any essential element of an offense. State v. Wesner, 372 N.J. Super. 489, 493-94 (App. Div. 2004). Although the record reflects the jury was informed accordingly, the information was not conveyed as an element of the count five offense. At defendant's re-trial, the judge should follow the model charge and charge the jury on all of the three elements of count five, including the State's burden to prove defendant lacked a permit.

V.

Finally, in Point VII, defendant points the judgment of conviction incorrectly reflected the fees the judge ordered at sentencing. Other than noting defendant is correct, we need not reach this argument because he will receive a new trial.

Reversed and remanded. We do not retain jurisdiction.