SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2389-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DREU FERGUSON, JR.,
a/k/a DREW FERGUSON,

Defendant-Appellant.

Submitted May 15, 2023 – Decided June 5, 2023

Before Judges Whipple, Mawla, and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 11-08-0708.

Joseph E. Krakora, Public Defender, attorney for appellant (Andrew R. Burroughs, Designated Counsel, on the brief).

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Andrew R. Araujo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Dreu Ferguson, Jr., appeals from an August 16, 2021 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. We affirm.

In 2015, a jury convicted defendant of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1); second-degree desecrating human remains, N.J.S.A. 2C:22-1(a)(1); and third-degree tampering with evidence, N.J.S.A. 2C:28-6(1). Defendant was sentenced to an extended life term with a sixty-three year and nine-month period of parole ineligibility. The victim was defendant's father, whose body was decomposing when police discovered his partially buried body beneath his home's front porch. We recounted the details of defendant's offenses, including: the fact and expert witness testimony; the victim's statements just prior to his homicide; and defendant's admissions to another jail inmate following his arrest; in our opinion affirming defendant's convictions and sentence. State v. Ferguson, No. A-5225-14 (App. Div. Aug. 11, 2017) (slip op. at 1-10). The issues raised on this appeal involve defendant's claims of ineffective assistance of counsel in the pretrial and trial phase of the case, and ineffective assistance of appellate counsel.

In 2014, the trial judge held a pretrial conference during which the following colloquy occurred:

> THE COURT: Okay. . . . Today is a [p]retrial [c]onference date with regard to both of these indictments.
>
> And I don't know if I took the time to explain to you before. I probably just did in very general terms. But today is your last opportunity to enter into a plea with regard to either one of these cases. Because once I sign this [o]rder and put a date on it, you're going to be moved on to the [t]rial [l]ist.
>
> Now, let me explain to you what that means. That means that once it gets on the [t]rial [l]ist, your opportunity to engage in plea negotiations is over.
>
> And what I mean by that is one of two things can happen. Either you can plead to the highest [c]ount of the indictment, of each one of the indictments, and without a sentencing recommendation from the State. Which means that I would sentence you to whatever it is that I would deem to be appropriate after I review a [p]resentence [r]eport. So you plead open facing the potential maximum consequences.
>
> The other thing is you try your case and you either get found guilty or not guilty. Or the State can dismiss either one of these with prejudice. And, again, I don't think that that's a probable avenue of relief right now.
>
> Anything after that, if you wish to plead guilty to anything, it's going to require the special approval of the Assignment Judge. It goes to me up the chain of command to the Presiding Judge, and then it would

have to go to the Assignment Judge herself if you wish to plead guilty to anything that would require a recommended sentence of less than something being open, meaning I would do it.

Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Okay. And your attorney did take some time. I understand that you did not sign the forms. You don't have to sign the forms because I'm going to sign them. I'm here to make sure that your rights are protected and you understand the consequences of what we're doing today and what the offers are at this point.

First and foremost, in connection with Indictment 11-05-[0]416, that's an aggravated assault charge. It's a second-degree offense. What I need to tell you is that second-degree offenses in New Jersey carry with it a maximum of [ten] years in New Jersey State Prison.

Do you understand that?

DEFENDANT: Yes.

THE COURT: So if you're convicted, there's also a potential for a discretionary extended term because of your past criminal history, which means that instead of sentencing you in the second-degree range, it bounces it up to a first-degree range[,] which would make it up to [twenty] years maximum.

Do you understand that?

DEFENDANT: Yes.

THE COURT: I could also give you a period of parole ineligibility of up to [seventeen] years. Do you understand that?

DEFENDANT: Yes.

THE COURT: The plea deal with regard to this particular charge is going to dismiss the charge in exchange for your plea of guilty to the other indictment which involves a murder charge, which I'm going to get to in a second.

Is that your understanding?

DEFENDANT: Yes.

THE COURT: Okay. Now, in connection with the other indictment, which is under Indictment 11-08-[0]708, you're charged in that indictment with four [c]ounts, murder in the first degree, second [c]ount desecrating human remains in the second degree, third [c]ount tampering with human remains, a third-degree offense, terroristic threats is the fourth [c]ount, which is also a third-degree offense.

Now, to outline each one of them, murder in the State of New Jersey carries with it a mandatory period of — if found guilty, a mandatory period of State [p]rison of [thirty] years. You have to do at least [thirty] years behind bars.

However, it also carries with it a maximum of life in prison. Do you understand that?

DEFENDANT: Yes.

THE COURT: Second-degree offenses, again, [ten] years. Third-degree offenses carry with it a maximum

of five years. And those are the last two [c]ounts. They're both five-year terms.

Now, there is a presumption of imprisonment of all second-degree and above offenses. So first- and second-degree offenses do carry a presumption of incarceration. That's as to [c]ounts [one] and [two] of that indictment, the murder indictment, and the one [c]ount of the other indictment.

There is a minimum period of parole ineligibility. Again, it's [thirty], as I've told you, on the murder charge. Your maximum sentence could be life in prison plus [thirty] years, with the maximum period of parole ineligibility. If you outlive it, I would be happy for you but surprised because it would be [sixty-three and two-thirds] years plus another [fifteen] years.

So if convicted, you face the possibility of essentially passing away while you're behind bars.

Do you understand that?

DEFENDANT: Yes.

THE COURT: Now, with regard to the offer on this, the plan would be to [do thirty with thirty] without parole, and all other charges — that's on the murder case — all other [c]ounts will be dismissed. And, of course, the other indictment would be dismissed as well.

Is that your understanding?

DEFENDANT: Yes.

. . . .

> THE COURT: Okay. All right. So, . . . this is going once, going twice, going three times, the last opportunity to enter into any plea, if you will, at this point in time, sir. Are you prepared to move forward then and get your case placed on the [t]rial [l]ist?
>
> DEFENDANT: (No audible response.)
>
> THE COURT: Yes?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay. It's an affirmative. He shook his head as well.
>
> All right. And you understand what the proofs are that are presented. And, of course, you do understand what the maximum term is.

Trial ensued and on the second day, the trial judge held an N.J.R.E. 104 hearing to address the admissibility of the victim's hearsay statement. The State intended to introduce testimony from one of the victim's brothers stating that the victim called him three times on May 12, 2009, approximately six days before the homicide. We recounted those conversations in our prior opinion, noting that the first time the victim told his brother

> he had locked himself in his car because defendant and his girlfriend . . . had threatened to kill him. [The brother] told the [victim] to call the police. Fifteen minutes later, the [victim] called [the brother] and sounded more relaxed, stating he was not going to call the police. About an hour and a half later, the [victim]

called [the brother] and reported, "everything [is] going to be okay."

[Ferguson, slip. op at 3 (eighth alteration in original).]

The trial judge ruled the statements were admissible under N.J.R.E. 803(c)(2) as an excited utterance. The judge found as follows:

> The first call was placed at 11:55 a.m. on May 12, 2009. It lasted for 135 seconds[—]about two minutes.
>
> The second call was about [sixty-nine] seconds. That occurred by [fifteen] minutes later or [thirteen] minutes later.
>
> And then the third occurred at . . . 1:30 in the afternoon.
>
> . . . .
>
> In the first call, [the victim's brother] indicated that he was not himself, that he seemed excited, that he seemed upset. Probably difficult to verbalize. And as counsel for . . . [d]efendant has indicated, he doesn't have an opportunity to actually physically observe him to see if he was trembling or otherwise. But clearly he could hear it in his voice, which is what the witness testified to. He knows how his brother sounds.
>
> And then the second call a couple moments later, . . . he continued to be excited. [The brother] told him to call the police. Apparently[,] that was not done.
>
> So the question, the real question then for the [c]ourt to determine is whether or not it was made while he was under the stress of the excitement from that

event. So we don't know the exact time of when this [argument] occurred that caused him to go out into his car and lock the doors.

But . . . [the brother] said it would only make sense that it would happen because [the victim] was upset.

And the [c]ourt believes [the brother]. He made a credible witness. He didn't fabricate anything to make something up, come in here to bolster his own testimony. . . . He has no horse in this race . . . .

So I think what the witness is saying is that it must have happened because otherwise it wouldn't make sense. . . . If it occurred the day before, why would he then go out in the car a day later, lock himself in, sound excited, sound upset, tell him that, . . . "[t]hey threatened to kill me."

What makes sense is that it happened. He escaped the house for a short time so he could get out of the house into the car so he could be protected. And then he locked the doors. And did the first thing that he could which is to call his brother to try to get him to calm him down.

The second phone call was thereafter placed. He was still excited. He was still trying to figure out whether he should call the police.

And then the third one, which leads me to believe that the first phone call was placed very close in time to when the disagreement or whatever had occurred in the house, is because by 1:30 he had calmed down. He was more like his old self.

> So I think that there is sufficient evidence before the [c]ourt to indicate that it occurred . . . [with]in a close period time. He was excited. An[] hour and a half later. If it had happened . . . the day before, why would an hour and a half later would he all of a sudden have calmed down to the point where he said, "Okay. He apologized." He wouldn't have apologized for something that happened a day before. He would only be apologizing for something that had occurred close in time.
>
> So he was calmed down enough at that point where he didn't feel the need, I guess, to call the police at that juncture. And [the brother] didn't feel the need, I guess, to go over to the house to check on his brother's condition to make certain that he was okay. Because by then, it was okay.
>
> So I think that the testimony certainly was made while he was under the stress and excitement from that event. He wasn't doing it to preserve testimony or giving it to the police so that it could be used at this point in time. He certainly didn't know that a couple weeks later he would have been killed at some point or that he wouldn't be here to be able to provide that testimony himself. It's certainly relevant to the event, as I've already indicated.

The judge then analyzed the victim's statement under N.J.R.E. 404(b). He found as follows:

> [T]he big issue in the case is . . . did this [d]efendant kill the decedent. And the other issue, of course, [is] the motive. So that would require the court . . . under State [v. Cofield, 127 N.J. 328 (1992)] to do an analysis. . . . [T]he other crime evidence must be relevant to a material issue.

And it is, you know, a series of events where he threatened to kill him. There was an ongoing pattern . . . where they were having difficulties within the house between [defendant] and [defendant's father].

So is it relevant to a material issue? It's relevant to the issue of whether . . . he did it certainly.

"The evidence must be similar in kind and reasonably close in time." So it's within a week of the crime of murder or so. So it's certainly close in time[]. It's similar in the sense that he threatened to kill him, although no further action was taken at that time. There was no evidence that there was a physical assault at the time that this occurred.

. . . .

He was not looking to preserve the statement for prosecutorial purposes, as I've already indicated.

The third step under Cofield is that it must be clear and convincing. . . . [The brother] appeared before the court. He testified. His memory probably of the events of that aren't great. It did occur . . . almost . . . six years ago. So[,] the specifics of the conversation other than from what he's testified to aren't altogether clear. But again, I wouldn't expect to remember word for word of what occurred this long after the fact.

. . . .

. . . [B]ased on the credibility of this witness . . . [h]e seems to be truthful and candid with the [c]ourt . . . .

The judge concluded the State met its burden under Cofield, and proved by clear and convincing evidence the probative value of the victim's statement that defendant threatened to kill him outweighed the prejudice.

In 2018, defendant filed a PCR petition, which was later supplemented by PCR counsel. He argued trial counsel was ineffective for: failing to advise him whether he should have accepted the plea deal or gone to trial; not informing him of the potential extended term; and failing to vigorously argue against the imposition of the extended term at sentencing. Appellate counsel was also ineffective for failing to raise the admission of the hearsay statements on appeal. The PCR judge ordered an evidentiary hearing.

Defendant testified at the hearing. He explained he had several attorneys and trial counsel was his seventh attorney. He stated none of the attorneys told him the State had a good case, yet the State's plea offer was to serve thirty years in prison. Defendant understood this to be the maximum sentence based on his conversation with others in jail; none of his attorneys told him this. His attorneys neither advised him to take the offer, nor to go to trial. His attorneys explained there were different maximum sentences between murder and aggravated manslaughter. However, none informed him what his maximum

sentence would be if he went to trial, advised him he could receive life imprisonment, or explained he was subject to an extended term.

Defendant assumed his maximum exposure for murder was thirty years, and therefore, rejected the State's offer, reasoning "why would we not go to trial?" He could not recall whether counsel told him thirty years was the maximum and counsel did not explain the kind of sentence he thought defendant would receive.

Defendant "believe[d]" his attorneys reviewed his prior criminal history with him. That history included a conviction for voluntary manslaughter in West Virginia, which defendant appealed and the Supreme Court of Appeals of West Virginia reversed. See State v. Ferguson, 662 S.E.2d 515 (W. Va. 2008). Following the reversal, the West Virginia prosecutor offered him time served in exchange for a guilty plea. Defendant rejected the offer and instead entered a no contest plea to the voluntary manslaughter charge. Defendant testified he understood the West Virginia conviction could not be used against him in the future even though it would be on his criminal record. He claimed New Jersey defense counsel reviewed the West Virginia plea with him but did not advise him whether it could be used against him if he was convicted in New Jersey.

Defendant claimed trial counsel did not review discovery, witness statements, DNA evidence, or the overall defense strategy with him. Counsel neither reviewed the strength of the State's case with defendant nor advised defendant whether to accept the plea offer. And counsel never told him whether he should go to trial.

Defendant testified counsel never reviewed pretrial forms, which explained the maximum sentence he could receive, and did not recall the court advising him the minimum sentence for murder was thirty years during the pre-trial conference. Rather, defendant first discovered he was subject to an extended term, in part because of the West Virginia plea, at sentencing. Defendant concluded his testimony with the following:

> [PCR COUNSEL:] . . . [I]f [trial counsel] advised you that you could get a life sentence and that the West Virginia [conviction] could be used against you, would you have taken the [thirty-]year plea deal?
>
> [DEFENDANT:] Well, honestly, I don't know. . . .
>
> [PCR COUNSEL:] . . . [D]id you rely on . . . your communications with [defendant] as part of your decision to go to trial and reject the [thirty-]year plea deal?
>
> [DEFENDANT:] No. I relied on . . . what I felt was a strong case. . . . I didn't think there was anything against me. (Laughs) I still don't. It's . . . unimaginable.

> [PCR COUNSEL:] And is [this] . . . at least in part because [trial counsel] never said to you this is a big risk, going to trial?
>
> [DEFENDANT:] Correct.

Trial counsel testified on behalf of the State at the PCR hearing. He explained he had been an attorney for approximately thirty-eight years and tried between 100 and 125 cases. He recalled defendant's trial and testified he provided him with the discovery he received and reviewed it with him throughout the case. Counsel had twenty-four meetings with defendant and discussed the strength of the State's case, including the pros and cons of going to trial, and his maximum sentencing exposure. Counsel explained the minimum sentence on the murder was thirty years, and further told defendant he could receive an extended term because of the West Virginia conviction and the other counts associated with the homicide of his father. On more than one occasion, he told defendant he was facing life imprisonment if convicted at trial.

Trial counsel testified the State's plea offer of thirty years never changed. He discussed the offer with defendant, and explained that "based on the circumstantial evidence with respect to the homicide[, it] was a difficult case to win . . . from a defense perspective." Counsel also discussed the fact the State would call the jailhouse prisoner to testify about defendant's admissions.

Defendant authorized trial counsel to counteroffer defendant would plead guilty to the desecration of human remains and receive time served, which was rejected.

Trial counsel testified he was aware of the West Virginia charge, conviction, appeal, reversal, and no contest plea. His billing records showed he researched the effect of the plea on the New Jersey proceedings. Trial counsel also reviewed the pretrial forms with defendant, but defendant refused to sign them. Counsel never advised defendant whether it was better to take the plea because defendant maintained his innocence and would be lying if he pled guilty. Trial counsel testified defendant is "a smart guy" and had suggested to counsel things to investigate. Defendant followed along and understood the procedural aspects of the case. Counsel explained he reviews the pretrial forms with every client, including sentencing exposure, and the plea offer. Defendant's case was no exception, as explained in the following colloquy:

> [PROSECUTOR:] Did you ever give [defendant] . . . an estimate of what you expected his sentence would be if he was convicted after trial?
>
> [TRIAL COUNSEL:] I mean . . . at that point, we were talking about . . . if he was convicted of the murder? I . . . would have told him that it would have been in excess of the . . . bottom number . . . of the [thirty years], mainly because of what happened in West

> Virginia and . . . the potential of the extended term. I kn[e]w he had another . . . conviction.
>
> [PROSECUTOR:] So you discussed . . . the potential for the West Virginia plea to affect the sentence?
>
> [TRIAL COUNSEL:] Yeah.
>
> . . . .
>
> . . . Because it was a homicide.

On cross-examination, trial counsel explained he and defendant were discussing the case for over two years and there was "no way that [counsel] would have represented him on a murder case for that long a period of time . . . and not mention[ed] to him what the maximum penalties were if he got convicted." Counsel testified a sentence in excess of thirty years was "definitely" a possibility "because [defendant] had a prior homicide . . . and [was] eligible for an extended term . . . ."

Trial counsel recounted that defendant thought there was a difference between a guilty plea and a no contest plea and "told [counsel] that he had been told that [the West Virginia conviction] couldn't be used against him." However, counsel's research "didn't find anything on point." Counsel specifically advised defendant the West Virginia conviction "would affect his sentence . . . [and] enhance his penalty." After reviewing the evidence and trial strategy, including

the results of the defense's motions to suppress, counsel left the decision whether to proceed to trial to defendant.

The PCR judge made oral findings. He found defendant's claims were not credible. The judge noted all of defendant's attorneys provided discovery and told him there was a thirty-year plea offer. Although defendant claimed discovery was incomplete "he couldn't say what was missing." Moreover, the judge found "it incredible that not one of those seven attorneys, including [trial counsel], told him in that conversation where the [thirty]-year [p]lea offer was extended that he[] was looking at life if convicted of the first-degree murder." Further, defendant assumed the maximum sentence was thirty years, "but[] then he admitted he assumed that because that's the information he got in the jail from other people . . . , not from his attorneys."

The judge noted defendant's attorneys reviewed his criminal history. Therefore, "if those attorneys went over his criminal history[,] they would have seen his prior aggravated manslaughter conviction, or the equivalent out of West Virginia. Again, [that] seven attorneys did not tell him at some point he was extended-term eligible, this [c]ourt finds incredible."

Citing the "tortured history" of the West Virginia prosecution, the PCR judge noted defendant was not "inexperienced . . . or uneducated . . . .

[Defendant] had been around the horn in the criminal justice system in West Virginia and now he returned to New Jersey. . . . [He] was aware of procedure and exposures."

The judge found defendant made his decision based on knowledge he acquired from others in jail, not because of the advice of counsel. He rejected defendant's claim he did not know he could receive a life sentence until sentencing because he was expressly advised of his exposure during the pre-trial conference.

The judge also credited trial counsel's testimony. He noted counsel's lengthy trial experience as "a veteran criminal trial attorney" and his detailed testimony regarding his review of the discovery and the number of meetings counsel had with defendant were supported by counsel's review of his billing records. Counsel's "demeanor and body" language underscored the believability of his testimony that he advised defendant he was facing life in prison if convicted. Indeed, when counsel "was asked if he went over the exposure[,] . . . his answer struck this [c]ourt as very truthful . . . . He advised that max exposure was life, and he said, 'obviously.' And, the way he said it. He says, '[o]bviously, his exposure was life.'"

Trial counsel also reviewed the pre-trial memorandum with defendant, which the judge pointed out "includes the potential exposures if convicted." The judge found counsel's discussion with defendant that he would either "win big" or "lose big" happened, and proved defendant knew he was "either going to go home or he was going to get, potentially, life in prison." The judge also credited counsel's testimony that because defendant maintained his innocence, counsel could not advise him to plead guilty and there was no choice but to proceed to trial.

Defendant's petition sought relief pursuant to Lafler v. Cooper, 566 U.S. 156 (2012), which the judge noted "essentially means he would take the [thirty]-year [p]lea offer that was" made by the State. However, the judge found defendant's testimony in this regard "interesting" and made the following findings:

> [U]nder Lafler the [c]ourt has to find the reasonable probability that he would have taken the [thirty] do [thirty] if presented with that knowledge.
>
> [Defendant] now is serving a life sentence. When presented with the question now, . . . would you plead to a [thirty] do [thirty], he still said he didn't know.

Therefore, there was no reasonable probability defendant would accept the plea, even if the court granted relief under Lafler.

The PCR judge also recounted the pre-trial conference where the judge advised defendant of his exposure to an extended term. He concluded defendant's testimony stating he "wasn't aware that he was potentially looking at life in prison" was not credible and counsel's "testimony [was] credible for these reasons." The judge concluded defendant: was advised he was facing the possibility of life if convicted; told counsel "on more than one occasion that he . . . was innocent and would not plead"; would not have taken a thirty year sentence "to this day"; and should have taken counsel's advice rather than listen to others at the jail.

Defendant raises the following points on appeal:

> POINT I AS DEFENDANT HAD SHOWN THAT HE RECEIVED INEFFEC[TI]VE . . . ASSISTANCE OF COUNSEL, THE PCR COURT ERRED BY DENYING DEFENDANT['S] PCR PETITION.
>
> > (1) Trial counsel was ineffective by failing to advise defendant of his maximum penal exposure should he reject the State's plea offer and proceed to trial.
> >
> > (2) Trial counsel was ineffective at sentencing.
>
> POINT II APPELLATE COUNSEL WAS INEFFECTIVE BY FAILING TO ARGUE THAT DEFENDANT WAS PREJUDICED BY IMPERMISSIBLE HEARSAY TESTIMONY.

I.

Where the PCR court has conducted an evidentiary hearing on a defendant's PCR petition, our review "is necessarily deferential to [the] PCR court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). We defer to a judge's findings because they are "substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Rockford, 213 N.J. 424, 440 (2013) (alteration in original) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). Where an evidentiary hearing has been held, we do not disturb "the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting Nash, 212 N.J. at 540).

II.

In Point I, defendant reasserts the ineffective assistance of trial counsel claims he raised at the PCR hearing. He argues counsel failed to: review discovery with him; advise him as to the strengths of the State's case; inform him of the expiration of the thirty-year plea offer; advise him of his potential sentence exposure if convicted; distinguish murder from aggravated manslaughter; advise him he was subject to an extended term; investigate and

inform him that his West Virginia conviction could be used to enhance his final sentence; and assist him with "mak[ing] an informed decision . . . whether to accept the State's plea offer or proceed [by] trial . . . ."

Ineffective assistance of counsel claims must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687-88 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 57-58 (1987). Under the first prong, a "defendant must show that counsel's performance was deficient" and counsel's errors were so egregious that they were "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The second prong requires a defendant to demonstrate the alleged defects prejudiced his right to a fair trial to the extent "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; Fritz, 105 N.J. at 60-61 (quoting Strickland, 466 U.S. at 694).

"[A]n extended term cannot be imposed unless the defendant is specifically apprised . . . of the potential number of years to which [they are] exposed." State v. Cartier, 210 N.J. Super. 379, 381 (App. Div. 1986). "No matter which way the defendant ultimately chooses to plead, [they] should know the risk [they] face[]." State v. Martin, 110 N.J. 10, 19 (1988) (vacating sentence

and remanding for hearing on mandatory extended term sentence); see also Lankford v. Idaho, 500 U.S. 110, 127 (1991) (holding due process of law was denied by the imposition of a death sentence when neither the defendant, nor his counsel, had notice of the possibility that such a sentence might be imposed). A defendant must demonstrate with "reasonable probability" that the result would have been different had he received proper advice from his plea attorney. Lafler, 566 U.S. at 163 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

Having thoroughly considered the record pursuant to these principles and our standard of review, we affirm substantially for the reasons expressed in the PCR judge's opinion. We add the following comments.

The record contains no objective evidence supporting defendant's claim trial counsel did not discuss with defendant the fact that he was extended-term eligible. The evidence in the record shows defendant knew the State's offer was not the maximum, and defendant was advised of the consequences of not accepting the offer. This occurred during the pre-trial conference, and like the PCR judge, we are convinced trial counsel also advised defendant accordingly.

We likewise reject defendant's claim trial counsel did not assist him in making an informed decision whether to proceed to trial. Aside from counsel's credible testimony he would not force a client claiming his innocence to plead

guilty, the objective evidence shows trial counsel was experienced and did not fail to advise his client about the effects of the West Virginia conviction in the event of a conviction in New Jersey. Further, we have no basis to second-guess the judge's detailed credibility findings regarding trial counsel's testimony about reviewing discovery with defendant, the strength of the State's case, and the sentencing exposure.

Defendant claims counsel was ineffective because the judgment of conviction (JOC) reflected the murder charge, which was later amended to aggravated manslaughter. Defendant raised the issue with the JOC on the initial appeal. Ferguson, slip op. at 11. We noted the parties agreed the JOC should be corrected "to reflect the jury found defendant not guilty of first-degree murder and guilty of first-degree aggravated manslaughter" and remanded for its correction. Id. at 20. Defendant was not prejudiced by this ministerial error because it did not affect his sentence.

Defendant asserts counsel failed to vigorously argue against an extended term. Our review of the sentencing record convinces us otherwise. The sentencing transcript shows counsel not only moved for a new trial, but vigorously opposed the State's motion for an extended term and argued in mitigation of the sentence and submitted a detailed sentencing memorandum.

III.

Defendant contends appellate counsel was ineffective for failing to challenge the admissibility of the victim's hearsay statement to the brother that defendant and his girlfriend were going to kill him. He contends the trial judge erred because the statement was not an excited utterance and "[n]othing in the record indicated that the declaration related to a 'startling' event; that the declaration was made under the 'stress of excitement caused by the event'; and[] whether there was a time for the declarant to 'deliberate or fabricate.'" He asserts this evidential ruling prejudiced him because it was pivotal, given the lack of DNA evidence, fingerprints, surveillance tapes, or witness testimony linking him to the homicide.

As with trial counsel, a defendant is also entitled to effective assistance of appellate counsel, but "appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant." State v. Morrison, 215 N.J. Super. 540, 549 (App. Div. 1987) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751-52.

We review a trial court's evidentiary rulings "under the abuse of discretion standard because . . . the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). "[T]he latitude initially afforded to the trial court in making a decision on the admissibility of evidence—one that is entrusted to the exercise of sound discretion—requires that appellate review, in equal measures, generously sustain that decision, provided it is supported by credible evidence in the record." Est. of Hanges, 202 N.J. at 384 (footnote omitted).

The trial judge's ruling the victim's statements to the brother constituted an excited utterance was sound and we affirm for the reasons expressed in his opinion. The evidence showed defendant threatened the victim, prompting the victim to call his brother while under the stress of the threat, and the statement was related to the threat. The trial judge's decision to admit this evidence was not an abuse of discretion. As a result, appellate counsel was not ineffective for not raising this claim on the initial appeal.

Affirmed.