SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3898-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAVON C. PITTMAN, a/k/a
SHAQUAN C. PITTMAN,

Defendant-Appellant.

Submitted September 20, 2023 – Decided October 23, 2023

Before Judges Currier, Firko and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 18-03-0129.

Joseph E. Krakora, Public Defender, attorney for appellant (Ruth E. Hunter, Designated Counsel, on the brief).

William A. Daniel, Union County Prosecutor, attorney for respondent (Meredith L. Balo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant was charged with first-degree murder and other offenses following an altercation with Kevinray Hall during which Hall was shot with a gun and subsequently died. After being convicted of the lesser-included offense of passion/provocation manslaughter and unlawful possession of a gun, defendant raises multiple issues on appeal regarding the trial proceedings and his sentence. Because the trial court did not make any factual findings regarding the inconsistency of prior statements made by the only eyewitness to the events—Andrae Vogleson—nor did it conduct a Gross[1] hearing to evaluate the reliability of the prior statements, we are constrained to reverse the convictions and remand for a new trial.

I.

Defendant was charged in an indictment with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count two); and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1) (count three). The trial took place in March 2020.

After Vogleson failed to appear in court pursuant to a subpoena, the judge issued a material witness warrant. When the detectives located Vogleson, he

[1] State v. Gross, 121 N.J. 1 (1990).

stated he did not intend to cooperate or testify. Therefore, the court ordered him to remain under the custody of the State in a hotel until his testimony was completed.

During his trial testimony, Vogleson described the events of December 2, 2017, stating Hall called him, requesting they meet. Vogleson recalled when he saw Hall, he appeared "[i]ntoxicated . . . [b]ecause he was wobbly and moving around a little funny." Vogleson said Hall "was smoking something" that "had a funny smell" and was "wrapped in a brown wrap." Vogleson was not sure what the item was, although he knew it was not marijuana or a cigarette. Vogleson thought Hall was smoking "embalming fluid" which Vogleson believed is also known as phencyclidine (PCP). The autopsy report revealed Hall had a blood alcohol content of 0.113 and PCP was discovered in his blood.

Vogleson and Hall went to Vogleson's home to get a bottle of vodka. Vogleson noticed Hall was " walking zigzag-ish a little bit." At one point Hall had to sit down "so he could catch hi[m]self." Although Vogleson described Hall's speech as "a little impaired," he "underst[ood] what [Hall] was saying." Eventually the pair arrived outside a store, where Vogleson's brother had left the vodka. They both took a drink from the bottle.

According to Vogleson, defendant came out of the store and encountered him and Hall. Vogleson knew defendant but was not sure whether defendant and Hall were acquainted. Vogleson stated he was walking ahead of the two other men when he "heard commotion." When he turned, he saw defendant and Hall "going at it." Vogleson testified he saw Hall "trying to attack" defendant and punch him while defendant was backing up. Vogleson saw Hall fall on top of defendant, and Vogleson "tried to break it up."

During the altercation, Vogleson heard gun "shots going off" but did not know who was firing or where the shots were coming from. He did not see a gun. Vogleson also believed he saw a flash but could not discern where it came from because Hall and defendant "w[ere] entwined with each other." Vogleson recalled that after the shots were fired, defendant was standing up and Hall was on the ground. Vogleson saw blood coming out of Hall's mouth and heard him gasping for air.

Vogleson stated he ran down the street for help, yelling that Hall had been shot. When he returned, Vogleson saw Hall laying on the ground, but defendant was gone. Vogleson called the police.

When he spoke to police immediately after these events, Vogleson said he did not know what had happened; he stated he was walking on the street and

came upon Hall laying on the ground. In the early morning hours of December 3, while being questioned at the police station, Vogleson continued to state he had not seen what happened. It was not until police showed him video footage in which he was seen at the scene that Vogleson admitted being present for the events. Vogleson also questioned whether he was a witness or a suspect.

Vogleson testified he did not see Hall or defendant with a gun at any time prior to the physical encounter. He did not see a weapon at the scene when he returned.

During Vogleson's testimony, he stated he spoke to the police at the prosecutor's office following these events on December 2, 2017 and recalled giving another statement a few days later. However, he testified he did not tell the police the truth at that time. He also stated he did not recall what he said on either occasion. He subsequently said he "probably" told the police the truth during the second statement.

During a sidebar conversation, the judge informed the prosecutor that if he "want[ed] to make an application to have [Vogleson] treated as a hostile witness under [N.J.R.E.] 611(c), [the judge] would grant that application." The prosecutor stated he would make the application and the court granted it,

permitting the State to ask the witness leading questions as to any prior inconsistent statements.

The prosecutor then questioned Vogleson regarding the statement he gave police on December 5. Vogleson said he was truthful in the answers he gave detectives during the statement. However, as the prosecutor went through the statement with him, Vogleson said some of it was a lie. For instance, in the statement he said defendant and Hall were grabbing each other. But at trial he said Hall was "attacking" defendant and defendant was backing away from him. He said his trial testimony was the truth.

In the statement, Vogleson said that defendant fell, and Hall was "trying to go after him again. [Hall] f[e]ll[] over [defendant]. Next thing you know I hear shots go off. He pulled the gun out, like—he never pulled it out like this." After reading this portion of the statement to defendant before the jury, the prosecutor asked defendant if he made a gesture in the statement at that point.

Vogleson responded that he "never said that [defendant] pulled any gun out," and that he told the detectives that he "didn't see any gun. [He] just heard shots." Vogleson stated that his prior statement was "inaccurate," that he only told the detective "that I didn't see no gun. The only thing I heard was the shots."

The prosecutor continued to read from the transcript of the prior statement during which Vogleson said:

> I think he [was] digging in his pocket and he was lighting off through his hoodie. All I hear[d] was pap and it sounded like a cap gun. So it was, like, pap, pap, pap, but I didn't know if he hit him or I didn't know if, like I said, they were on top of each other. So I don't [know]—if he—they was scuffling and then . . . [the] gun was just going off or if he was in his pocket doing this. But I just hear[d] it and . . . I'm like, yo, chill, chill. I hear[d] it. [Hall] still ha[d] him . . . I don't know if he . . . hit him at all or what happened. Because like I said, it was dark. I just seen the spark, and [Hall] was still holding onto him while they were on the ground.

During the statement, Vogleson said he ran for help. When he got back to the area of the altercation, defendant was gone. He said when the police came, he gave them the wrong information. Vogleson testified everything in the statement was accurate except the part where he said Hall and defendant were "tussling with each other." He reiterated he saw Hall attack defendant and said he told police that information. The prosecutor noted that specific detail was not in any of the multiple statements Vogleson gave to police after the incident.

Vogleson also said he did not recall stating defendant shot from what Vogleson believed was inside his hoodie. He added that if he said that, it was inaccurate. At trial, he said he did not know if defendant shot through his hoodie

because he only saw a spark and did not know where it came from. Vogleson reiterated several times he did not see defendant shoot Hall.

The prosecutor also confronted Vogleson with the statement he gave police on December 3. In that statement, he told police he was walking down the street, turned the corner and saw his friend—Hall—lying on the ground. He did not mention defendant, the "tussle" or a gun going off.

Vogleson denied seeing Hall rob defendant or try to take money or other personal items from defendant that night. He only saw Hall attacking and chasing defendant. Vogleson recalled that after the shots were fired, defendant was standing and Hall was on the ground.

During cross-examination, defendant reiterated he did not see a gun or the shooting. He stated when he told the police about the shot through defendant's hoodie, that is what he believed happened, not what he saw.

When the prosecutor began redirect examination, he sought to read an additional portion from the December 5 statement where Vogleson told the detective: "I'm like this is the situation where [I was] at the wrong place at the wrong time. You know what I'm saying? Now it came out, one of my friends got murdered in front of me." Defense counsel objected, stating the use of the word "murder" was highly prejudicial and a legal conclusion. The prosecutor

responded that he was presenting the testimony as a prior inconsistent statement because "[u]sing that word implies [Vogleson] knows who shot who, which is in direct contradiction to what I believe to be a very reasonable inference a jury could draw . . . ." Defense counsel then argued the statement was not inconsistent because a literal reading of the statement reflected Vogleson was referring to the police saying Hall was murdered.

The trial judge overruled the objection and permitted the statement, saying:

> This witness is giving var[ious] versions of events depending on the time and even inconsistent with himself on the stand. But he has now clarified under redirect that his position is he did not see from what direction the bullets came; that's in direct contradiction to what is in this December 5[] statement, which is that he saw this man shooting through the hoodie.
>
> The State has the right to explore it. The State has the right to confront him with his prior statements.
>
> The word "murdered" is certainly a legal conclusion potentially. It may also just be a euphemism. His understanding of the meaning of the word can be explored on further examination by [defense counsel].

The judge gave the jury the following curative instruction after the testimony about the statement:

> Ladies and gentlemen of the jury, you've just heard through that testimony from Mr. Vogleson that at some point during his conversations with the authorities he used the term "murdered."
>
> What Mr. Vogleson said about the nature of the acts that are at issue here is not controlling upon you. Those were simply his words used at that time.
>
> As a jury, you're going to have to do several things. You're going to have to, [number] 1, determine whether or not that is what Mr. Vogleson said on that day at that time. You're going to have to determine whether or not if you think he said those words, whether or not they're credible, and you will have to decide what weight to give them.
>
> If you do accept that statement by Mr. Vogleson, that is not conclusive on the outcome of the case. It is your job to determine whether or not a crime has been committed here based upon all the facts and circumstances of the case as you find them to be after you have heard all of the evidence put before you during the trial.
>
> Mr. Vogleson's characterization of events is in no way controlling upon you and should not be taken as being controlling upon you.

During its investigation, law enforcement obtained surveillance video footage from cameras in the area. One video recording came from a homeowner—Collin Longsworth—who had a video doorbell camera.

Longsworth testified during the trial that he was at home when he heard voices outside his window and "what [he] thought were two firecrackers." He

looked at his doorbell camera, which faced the street in front of his home. He explained the doorbell has "a feature called live view where if you just go into your phone, which controls the doorbell . . . [y]ou can press live view, and it will turn on the camera immediately, and it will show you exactly what the camera is seeing at the moment." When Longsworth activated "live view," he did not see anything on the camera and no longer heard any noises, "so [he] assumed nothing was going on."

After Longsworth heard a voice outside again, he turned on the doorbell camera, through which he "saw a gentleman standing . . . right at the edge of the sidewalk in front of the house looking down speaking." Longsworth "assumed that . . . [the person was] looking at . . . someone laying on the ground," so he "stopped the video and . . . called 9[-]1[-]1."

On cross-examination defense counsel attempted to ask Longsworth what words he heard spoken outside his window that prompted him to turn on the doorbell camera a second time. The State objected and the judge sustained the objection. In his statement to police, Longsworth said he heard a person repeatedly saying: "Don't f[***] him up. Don't f[***] him up."

The State also presented Monica Ghannam, a forensic scientist with the Union County Prosecutor's Office Forensic Laboratory. She testified the

Laboratory received possible saliva swabs, possible blood swabs, cell phone swabs, a sweatshirt, a jacket, a Black & Mild cigar, and a black wallet, as well as reference or known samples from Hall, Vogleson, and defendant. Ghannam testified that after conducting DNA tests of each item, defendant had a matching DNA profile to swabs taken from: suspected blood from the grass near the sidewalk; suspected blood from the street; the cell phone; the jacket; and the cigar. A DNA mixture was found on defendant's wallet. Hall's DNA was "excluded" from the mixture. Ghannam explained that meant that unique characteristics of his DNA were not consistently found within the mixture of DNA on the wallet.

The State produced additional witnesses, but their testimony is not relevant to the issues before us and particularly the issue requiring reversal. Therefore, we have not included further unnecessary testimony here.

Defendant testified at trial. He stated he went to the area of these events on December 2, 2017 to spend time with a friend. At about 4:30 p.m., Vogleson arrived at the friend's house. Defendant said he had met Vogleson before. After approximately two hours, defendant said he left the house and went to a nearby store to buy diapers and "a Dutch" for his friend's brother.

When defendant came out of the store, he saw Vogleson and Hall. Defendant did not know Hall. He stated Vogleson was carrying a bottle of liquor and was drunk. Although defendant started to walk away, he stated he turned back when Vogleson called out to him asking to buy drugs. Defendant said he told Vogleson, "I don't have any drugs. . . . I work, bro." Defendant stated he wanted to "get[] away" from Vogleson and Hall and go back to his friend's house. Defendant recalled he was holding a Black & Mild cigar in his hand and holding his "Dutch."

Defendant began walking away when he "hear[d] a voice behind [him] say, 'Yo, cuz, yo, cuz.'" Defendant saw a man wearing a hoodie and did not recognize him at first, but when he saw Vogleson walking down the street, he assumed the man in the hoodie was "[Vogleson's] boy." Defendant then realized it was Hall calling to him. Defendant walked up to Hall and repeated that he did not have any drugs.

According to defendant, Hall then reached into his pocket, so defendant began "backing up a little bit because [he] fe[lt] like something bad [wa]s about to happen." He stated Hall then pulled a gun out, and defendant asked Hall not to shoot him. Defendant testified that Hall said, "Man, you know what this is; give me everything." Defendant took out his wallet and a ten-dollar bill and

gave the items to Hall. Hall also asked for defendant's phone, and defendant gave him a "government phone" he had on him but not his personal phone he had in his back pocket. Defendant testified Hall told him to empty his pockets, but defendant told him all he had was ten dollars. Throughout this encounter, Hall had the gun pointed at defendant's face.

According to defendant, Hall then pushed defendant "with both hands" and defendant fell to the ground. Defendant said to Vogleson, "Yo, come get your mans." Defendant testified that Hall got on top of him and hit him with the gun, and told him to "shut the f[***] up." He stated he heard Vogleson saying "Don't f[***] him up, don't f[***] him up. Just don't f[***] him up." Defendant stated Hall responded, "I'm about to kill this [n-word]." Defendant said he then "just went for the gun."

Defendant said he was trying to take the gun out of Hall's hands and get Hall off him, then he planned to run down the street before Hall could shoot at him. But after Hall would not let go of the gun, defendant tried to keep the barrel away from his face. Defendant continually told Hall to get off him, and Hall said, "Oh, now you a tough ass, bro?" Defendant then heard the gun fire and heard something drop. Defendant said he was still pinned down by Hall. He eventually felt Hall "loosen up," and as defendant pushed Hall off himself,

Hall "fell over". Defendant said he picked up his keys and started running away. He did not see a gun on the ground.

Defendant said he thought about calling the police but felt the police would not "believe what [he] just went through." Instead, he went back to his friend's house where he saw Vogleson and made some phone calls.

Investigators found defendant's wallet in the spot where Hall was laying after being shot. A $10 bill was recovered from Hall's clothing. Investigators did not find a gun.

On March 17, 2020, the jury found defendant not guilty of murder as charged in count one but guilty of the lesser-included offense of passion/provocation manslaughter, N.J.S.A. 2C:11-4(b)(2), and guilty of unlawful possession of a weapon (count three).

The court sentenced defendant to an eight-year prison term on count one with an eighty-five percent period of parole ineligibility and eight years on count three with a forty-eight-month period of parole ineligibility. Both sentences were to run concurrently.

II.

On appeal, defendant raises the following points for our consideration:

POINT I

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON HOW IT COULD AND COULD NOT USE PRIOR CONVICTION EVIDENCE.

POINT II

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ADMIT SPECULATIVE OUT[-]OF[-] COURT STATEMENTS FROM ITS OWN WITNESS WITHOUT A HEARING OR INSTRUCTIONS.

A. The December 5[] Statement Was Improperly Admitted Because It Was Not Inconsistent with the Witness'[s] Trial Testimony, [t]he Statement Contained Inadmissible Speculation, There Was No Gross Hearing to Determine [t]he Statement's Reliability, [a]nd [t]he Trial Court Failed [t]o Properly Instruct [t]he Jury.

B. The December 6 Statement Was Improperly Admitted Because It Was Not Inconsistent, There Was No Gross Hearing, [t]he Witness Lacked Personal Knowledge [o]f [t]he Event, [a]nd [t]he Statement Was Substantially More Prejudicial [t]han Probative.

POINT III

THE TRIAL COURT WRONGLY PROHIBITED THE DEFENSE FROM ELICITING TESTIMONY FROM A STATE'S WITNESS ABOUT STATEMENTS HE HEARD DURING THE CONFRONTATION AT ISSUE AS PREJUDICIAL TO THE STATE UNDER N.J.R.E. 403.

POINT IV

THE PROSECUTOR MISREPRESENTED THE EVIDENCE IN CLOSING ARGUMENTS, FALSELY STATING THAT DNA EVIDENCE

"SCIENTIFICALLY PROVED" THAT THERE WAS NO ROBBERY AND THAT A WITNESS DID NOT HEAR THE INCIDENT DEFENDANT DESCRIBED.

A. The State Wrongly Argued [t]hat No Independent Evidence Existed to Corroborate [t]he Defense Story, Even Though [t]he Trial Court Had Suppressed [t]hat Evidence.

B. The State Wrongly Argued [t]hat DNA Evidence Scientifically Proved [t]hat [t]he Defense Case Was [a] "Fabrication."[.]

C. The Closing Argument Substantially Prejudiced [t]he Defense.

POINT V
THE CUMULATIVE EFFECT OF THE ERRORS DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL.

POINT VI
AT SENTENCING, THE TRIAL COURT ERRONEOUSLY RELIED ON ITS BELIEF THAT THE JURY WAS TOO LENIENT AND DEFENDANT'S DECISION TO TESTIFY IN HIS OWN DEFENSE AS AGGRAVATING FACTORS.

A.

We begin our review with Point II, addressing defendant's contentions regarding the court's admission of Vogleson's prior statements made to police. Because the court admitted the statements over the objection of defense counsel, we review the admission for harmless error. We must determine "whether in all

[of the] circumstances there [is] a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." State v. G.E.P., 243 N.J. 362, 389 (2020) (second alteration in original) (quoting State v. Mohammed, 226 N.J. 71, 86-87 (2016)). "In such cases, the reviewing court asks whether the error is 'clearly capable of producing an unjust result.'" Mohammed, 226 N.J. at 87 (quoting R. 2:10-2).

Defendant contends Vogleson's December 5, 2017 statement to the police in which Vogleson speculated that defendant could have shot Hall from inside a pocket in his hoodie was improperly admitted as a prior inconsistent statement because the statement was not inconsistent with trial testimony, and Vogleson lacked personal knowledge to make the statement because he did not see the gun or the shooting. Defendant further asserts the trial court failed to conduct the required hearing under Gross before permitting the State to introduce prior statements made by its own witness, and it failed to provide the jury with the proper instructions regarding the use of the statement. The State responds that if the admission of the statement without a hearing was error, it was harmless error.

When Vogleson refused to comply with the subpoena for his trial testimony, the court issued a material witness warrant. When law enforcement

brought Vogleson into court, the judge told him that if "there is a difference between [his] testimony on the stand and [his] answers to those same questions on a prior occasion in [his] statement," the court would have to hold a Gross hearing. Therefore, the judge was aware of the necessity of a Gross hearing if Vogleson's trial testimony was inconsistent with his prior statements.

At the beginning of Vogleson's testimony, he testified that he did not remember the first time he saw defendant on December 2, 2017, and he continued to testify that he did not remember certain parts of the night or statements he made to the police thereafter, even when the prosecutor tried to refresh his recollection.

Vogleson then testified that he saw Hall "chasing after [defendant]" and "trying to attack [defendant]." In response, the prosecutor confronted Vogleson with the December 5 statement in which he told police he did not "know what took place for them to start tussling with each other," and that he saw defendant and Hall "tussling" and "grabbing each other." Vogleson told the prosecutor those comments in the statement were not true. He reiterated he saw Hall "attacking" defendant. And defendant "was backing away from [Hall] and [Hall] was coming towards [defendant]." The prosecutor acknowledged at that point

before the jury that the testimony differed regarding the detail of Hall attacking defendant or the two men just grabbing each other.

This detail was a crucial issue in the case. During Vogleson's December 5 statement, he described Hall and defendant as "tussling" and "grabbing" each other. But during trial he said Hall was "attacking" defendant and defendant was backing away.

However, the next reference the State made to the December 5 statement cemented the conclusion that the use of the statement without the proper hearing and jury instructions had a clear capacity to achieve an unfair result. Defense counsel objected during a side bar discussion to the admission of the following portion of the December 5 statement in which Vogleson said: "I think [defendant's] . . . digging in his pocket and [the gun is] lighting off through his hoodie." Defense counsel argued Vogleson was "speculat[ing] [as to] how the gun [went] off." In response, the judge told defense counsel he could "get into whether or not that's speculation on cross-examination."

When the direct examination resumed, Vogleson testified that he "never said that [defendant] pulled any gun out," and that he told the detectives that he "didn't see any gun. [He] just heard shots." Vogleson said that his prior statement was "inaccurate."

The prosecutor referred to the December 5 and trial testimony inconsistencies during its closing argument, stating that Vogleson lied when he testified at trial that he could not see who fired the gun because he was scared of the potential consequences of incriminating defendant. The prosecutor also argued that Vogleson was truthful in his December 5 statement. The State used the inconsistencies to bolster its theory of the case.

Vogleson said there were portions of the December 5 statement that were inaccurate. The State was permitted to confront its own witness with a prior statement—for the express purpose of revealing the inconsistencies between the statement and the trial testimony. That action triggered the necessity for an analysis whether the statement was inconsistent and if it was admissible under N.J.R.E. 803(a)(1), and finally a Gross hearing to determine whether the prior statement was sufficiently reliable. The court did not undertake any of these procedures.

"It is well established that a propounding party witness'[s] out-of-court written or recorded statement sought to be admitted under N.J.R.E. 803(a)(1)(A) . . . must be evaluated by the trial judge at a[] . . . Gross hearing . . . ." State v. Baluch, 341 N.J. Super. 141, 179 (2001) (quoting State v. Spruell, 121 N.J. 32, 46 (1990) (internal quotation marks omitted)). A Gross hearing is a "hearing

that the trial court conducts to determine the admissibility of a witness's inconsistent out-of-court statement—offered by the party calling that witness—by assessing whether the statement is reliable." State v. Greene, 242 N.J. 530, 540 n.2 (2020). The hearing takes place "outside of the jury's presence," and the judge must "consider[] a number of factors 'to determine whether the statement was made or signed under circumstances establishing sufficient reliability that the factfinder may fairly consider it as substantive evidence.'" Baluch, 341 N.J. Super. at 179 (quoting Spruell, 121 N.J. at 46).

We disagree with the State that the failure to conduct a Gross hearing was harmless error. Because the trial court instructed the jury that the prior inconsistent statement could be used for its truth, there was a need to first determine whether the statement was reliable. If the jury considered Vogleson's prior inconsistent statement that he "th[ought] [defendant was] digging in his pocket and he was lighting off through his hoodie" for its truth, that was the only testimony at trial from an eyewitness that defendant possessed the gun and shot Hall. Therefore, this "error [was] 'sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached.'" See State v. Jackson, 243 N.J. 52, 73 (2020) (alterations in original) (quoting State v. Prall, 231 N.J. 567, 581 (2018)).

We are therefore constrained to vacate the convictions and remand the matter for a new trial. The court shall conduct a Gross hearing to determine the reliability of any prior statements the State intends to introduce into evidence through Vogleson. Depending on the outcome of the Gross hearing and the court's ruling regarding the prior statements, the court shall also discuss with counsel the need for the Model Jury Charge (Criminal), Recanting Witness (Substantive) instruction.

In light of our decision, we need not address defendant's arguments regarding cumulative errors or his sentence. We briefly address Points I, III and IV for the parties' and court's guidance in conducting the new trial.

B.

We begin with Point I. Prior to defendant testifying at trial, defense counsel asked the judge whether he intended to have a Sands/Brunson[2] hearing to rule on the admissibility of defendant's prior convictions. The judge responded, "I instructed the parties to meet and confer on it, and I haven't heard anything."

Defense counsel asked defendant on direct examination whether he was convicted of two offenses in 2016 for a second-degree and a fourth-degree

[2] State v. Sands, 76 N.J. 127 (1978); State v. Brunson, 132 N.J. 377 (1993).

crime, and whether they arose from the same incident. Counsel also asked defendant details about his sentence, the time spent in jail, and whether defendant was currently on probation. On cross-examination, the prosecutor asked about the degree of the offenses and date of the convictions. The jury was not instructed at that time as to how to consider and weigh that evidence. The jury also was not instructed during the jury charge as to the limited use of the prior convictions.

N.J.R.E. 609(a)(1) provides that a "witness's conviction of a crime, subject to [N.J.R.E.] 403, shall be admitted" only "[f]or the purpose of attacking the credibility of any witness." Where the witness is the defendant, and "the prior conviction is the same or similar to one of the offenses charged" or the trial court makes a determination that the admission of prior conviction evidence would "pose[] a risk of undue prejudice to [the] defendant," only the following evidence about the prior conviction may be introduced: "the degree of the crimes, the dates of the convictions, and the sentences imposed." N.J.R.E. 609(a)(2)(B). "[E]vidence of the specific crimes of which defendant was convicted" may not be introduced. Ibid.

"Trial courts are expected to 'explain carefully the limited purpose of prior conviction evidence' in order to reduce 'the danger that a jury might improperly

use a prior conviction as evidence of the defendant's criminal propensity.'" State v. Hamilton, 193 N.J. 255, 265 (2008) (quoting Sands, 76 N.J. at 142 n.3). Therefore, "accompanying limiting instructions are necessary to further contain the evidence's prejudicial effect." Ibid. Our Court has stated that the "rationale for admitting prior-conviction evidence is that a jury is able to follow a trial court's limiting instruction and consider [that] evidence . . . only to assess a defendant's credibility" and not guilt. Brunson, 132 N.J. at 386.

The court erred in not providing the jury with a limiting instruction on the proper use of defendant's prior convictions. If defendant testifies again at a second trial and his prior convictions are introduced, the court shall give the jury the appropriate limiting instruction.

C.

We turn to Point III and address defendant's contention that the court impermissibly excluded Longsworth from testifying he heard someone outside his home "repeatedly shouting, 'don't f[***] him up' shortly before he heard shots." Defendant asserts this testimony was important to the defense theory that there was a significant altercation prior to Hall being shot.

Defense counsel sought to introduce the evidence from Longsworth during cross-examination. The State objected on the grounds of hearsay.

Defense counsel conceded Longsworth did not know who made the statement. However, he did not intend to elicit the testimony for its truth but rather to show the firecracker noise did not cause Longsworth to look at the Ring camera, rather the "alarming-type comment, don't f[***] him up" had an effect on him as the listener.

The trial judge asked what the relevance of the testimony was, to which defense counsel responded it was relevant because there were several different videos of the incident, and "there [we]re periods of time in which there [was] no video in between the shot" and when the police arrived. Counsel did not proffer any hearsay exception to permit the introduction of the evidence.

The court sustained the State's objection and declined to admit the testimony because the declarant was unknown and "the relevance of the statement [wa]s infinitesimally small." Thus, "the potential for prejudice [wa]s significant under [N.J.R.E.] 403."

We discern no reason to disturb the court's ruling on this evidential issue. If defendant wanted to introduce the evidence as he stated, to demonstrate its effect on Longsworth, that intent was achieved as Longsworth testified the words he heard caused him to check his doorbell camera.

On appeal, defendant raises, for the first time, N.J.R.E. 803(c)(1)—present sense impression—as an applicable hearsay exception. In citing Rule 803(c)(1), defendant has changed the tenor of his argument for admissibility as the rule permits the admission of the statement as substantive evidence. We are unconvinced that Rule 803(c)(1) is applicable to these circumstances. Longsworth only hears the words. He does not know if the declarant is perceiving an event or if the statement has been made during or immediately after the declarant perceived it.

Defendant further asserts it was necessary for the jury to hear the specific words Longsworth heard because the words established there was a fight before he heard the shots. However, both defendant and Vogleson described there was an altercation between defendant and Hall. Therefore, the testimony was not needed from Longsworth. The court did not abuse its discretion in denying admission of the language. However, because the testimony was inadmissible, it was improper for the State to argue in its summation that Longsworth did not hear any noises indicating a significant encounter was taking place in front of his house. See State v. Garcia, 245 N.J. 412, 435-36 (2021) (stating that if evidence is deemed inadmissible, a party, "including the prosecutor," does not have the "right to freely portray a false picture of events").

D.

In Point IV, defendant contends the prosecutor's comments in the closing argument regarding the lack of DNA evidence on Hall's wallet were improper. Because defendant did not object, we review the comments for plain error. In addition, we note that "[i]f defense counsel fails to object contemporaneously to the prosecutor's comments, 'the reviewing court may infer that counsel did not consider the remarks to be inappropriate.'" State v. Clark, 251 N.J. 266, 290 (2022) (quoting State v. Vasquez, 265 N.J. Super. 528, 560 (App. Div. 1993)).

During summation, defense counsel told the jury defendant identified the wallet found at the scene as his. Therefore, it was logical that defendant's DNA was found on the wallet. Counsel also told the jury that Hall's DNA was not found on the wallet, but "there was a mixture of DNA on the wallet." Counsel referred to Ghannam's testimony, arguing the testing was not conclusive that because Hall's DNA was not on the wallet, it established he did not touch it.

In the prosecutor's summation, he stated: "The wallet, the DNA evidence. The only person's DNA that's found on this wallet is [defendant]'s. Not only is Kevinray Hall's DNA not found on it, he is excluded as a possible contributor."

There was no impropriety in the State's comments. "Generally, remarks by a prosecutor, made in response to remarks by opposing counsel, are

harmless." State v. C.H., 264 N.J. Super. 112, 135 (App. Div. 1993) (citing State v. DiPaglia, 64 N.J. 288, 297 (1974)). The prosecutor was permitted to respond to defense counsel's suggestion that the DNA evidence was not conclusive and emphasize Ghannam's testimony that the DNA test results showed Hall's DNA was not on the wallet. The prosecutor attacked defense counsel's hypothesis that the DNA test was unable to detect Hall's DNA as he may have been a minor contributor. It was a fair comment that the DNA evidence did not establish Hall had touched defendant's wallet.

Moreover, the jurors were instructed they could give expert testimony "the weight to which [they] deem[ed] it [wa]s entitled, whether that be great or slight," or they could reject the testimony. Whether the DNA evidence sufficiently supported a finding that Hall had not touched the wallet was their determination to make. The prosecutor's comments did not deprive defendant of a fair trial. See, e.g., State v. McGuire, 419 N.J. Super. 88, 147 (App. Div. 2011) ("The prosecutor argued that the absence of even the [defendant's] family's own DNA in the apartment demonstrated unusual efforts to clean the apartment and eliminate evidence. These arguments were based on reasonable inferences drawn from the evidence produced at trial.").

For the reasons stated above, because the court erred in not holding a Gross hearing regarding Vogleson's prior statements, we vacate the convictions and remand for a new trial.

Vacated and remanded for a new trial. We do not retain jurisdiction.