SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5023-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES E. GRANT, JR., a/k/a
BYRON BROWN,

Defendant-Appellant.

Submitted December 20, 2016 – Decided June 27, 2017

Before Judges Espinosa, Suter, and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 12-09-0849.

Joseph E. Krakora, Public Defender, attorney for appellant (Alyssa Aiello, Assistant Deputy Public Defender, of counsel and on the briefs).

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Michael D. Grillo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant James E. Grant, Jr. appeals his convictions for the attempted murder of two police officers sitting in their patrol car and weapons charges following a jury trial. Among the evidence presented at trial was a videotape that included significant portions of inadmissible and prejudicial material, consisting of a non-testifying witness's recital of damaging and inadmissible hearsay statements she termed "gossip" and a detective's opinion that defendant was guilty. Because the trial judge permitted the videotape to be played without redaction, we are constrained to reverse defendant's convictions.

I.

Defendant was indicted in September 2012 on two counts of first-degree attempt to commit murder, N.J.S.A. 2C:11-3(a) and 2C:5-1; two counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); one count of second-degree possession of an assault firearm, N.J.S.A. 2C:39-5(f) and 2C:39-1(w); and one count of third-degree unlawful possession of a weapon, N.J.S.A. 2C:58-3 and N.J.S.A. 2C:39-5(c)(1) (Indictment No. 12-09-0849). He was convicted of all six charges following a jury trial in 2014. Subsequently, his motion for a new trial was denied.

Defendant was later indicted in 2013 for second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree

aggravated assault, N.J.S.A. 2C:12-1(b)(2); 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), arising from an unrelated incident on May 10, 2012. Defendant pled guilty to second-degree aggravated assault on March 13, 2014, and the other charges in that indictment were dismissed.

Defendant was sentenced in April 2014 on his convictions following trial and on his guilty plea to aggravated assault. For the attempted murder and weapons charges, defendant was sentenced to consecutive terms of fifteen years for each count of attempted murder for an aggregate sentence of thirty years in prison with an 85% period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. He was sentenced on the weapons counts to concurrent terms not exceeding seven years. On the aggravated assault charge, defendant was sentenced to a concurrent term of five years with an 85% period of parole ineligibility under NERA.

II.

A.

On May 14, 2012, near midnight, Officers Runyon and Palumbo were patrolling in their marked police vehicle on Stuyvesant Avenue in Trenton, near the 400 block, when they heard sounds that caused them to unroll their windows. Within seconds, their vehicle came

under fire from what sounded like a high-powered weapon and they sped away uninjured, radioing for back up. Subsequent investigation revealed that five shots hit the vehicle, three of which came very near to the officers, including one that dented the seat back behind the officers. The police found seven .30 caliber shell casings in the vicinity of the shooting, but never recovered the weapon.

D.C.,[1] known colloquially as "Twin," and his brother were picked up by the police for questioning. D.C., who was seventeen at the time, was a friend of defendant. Both D.C. and defendant resided in the same area as the shooting. D.C. testified at trial that defendant was upset about the recent death of Orenthia "Pookie" Upshur, the brother of defendant's girlfriend, who died in an automobile accident while fleeing from the police. D.C. testified that defendant had vowed revenge against the police.

D.C. testified that late on May 14, 2012, he stopped at defendant's house to retrieve a pair of shoes, but defendant was not at home. As D.C. was proceeding home, he had a chance encounter with defendant, who he observed, despite the darkness, was kneeling down in the yard of an abandoned house on Stuyvesant Avenue. D.C. greeted defendant, who told him to "[s]hut the f*ck up." D.C.

[1] We use initials because D.C. was a minor at the time of the incident.

testified defendant was holding a large rifle. When a police vehicle came down Stuyvesant Avenue in their direction, D.C. testified that defendant stood up, took a few steps forward, and fired between four and eleven shots at the vehicle. D.C. followed defendant, running from the scene, and stayed the night at defendant's house.

D.C. and his brother were both brought in by the police for questioning on May 18, 2012. In the presence of his mother, D.C. gave a videotaped statement where he described what occurred. On the tape, D.C. claimed he only heard the shots and saw defendant running; he did not see the rifle or defendant shooting it.

D.C. was charged with attempted murder. He testified at trial that after he was charged, he "ask[ed] for a lawyer and I went to tell them the truth." D.C. gave a formal statement to the police on June 5, 2012 in which he identified defendant as the shooter. Defendant was arrested and charged with the shooting.[2]

In addition to D.C.'s testimony, the State presented evidence of incriminating statements made by defendant to two fellow inmates at the Mercer County Corrections Center (the Workhouse). Defendant was incarcerated at the Workhouse in the same cellblock as Raheem Hickmond, who knew defendant. Hickmond testified defendant told

[2] D.C. later pled guilty to obstruction of administration of law and received a thirty-day suspended sentence.

him about his role in the shooting and specifically that he had "let off a shot - - a couple of shots" at the police. Defendant told him that "Twin" was with him that night, and that Twin "was the only one who knew about the shooting and that's how the cops found out." Hickmond testified "that [defendant] put a hit out on Twin" through another inmate, Willie Yeager, but it was "messed up" when Twin's grandmother instead of Twin was shot in the arm. Hickmond gave a formal statement to the police in November 2012. In exchange for his testimony, the prosecutor agreed to recommend a lighter sentence on his then pending charges.

Terrell Black met and became friends with defendant at the Workhouse. Black testified that defendant told him that he shot six rounds at the police on Stuyvesant Avenue. Defendant also told Black he was with a young boy who had braids and who apparently had talked to the police about the shooting. Black gave a formal statement to the police in July 2012. In exchange for his testimony in this and other cases, the prosecutor recommended a one-year sentence followed by probation.

B.

An issue arose at trial regarding the hour and one-half long videotape of D.C.'s interrogation by the police on May 18, 2012. Defense counsel wanted to play two excerpts from the tape, lasting a total of five minutes, to impeach D.C.'s testimony that he had

seen defendant shoot at the police. The prosecutor asserted the tape was more of a discussion than an interrogation, because D.C.'s mother made a number of comments on the tape. The prosecutor took the position that the entire video had to be shown, citing to N.J.R.E. 106. Without viewing the videotape, the judge said,

> [COURT]: I would prefer the entire video be shown because I would imagine that even if you did show part of it, he is going to want to go and bring the other part in . . . . [T]he preference is always to play it in its entirety.

After learning the video was long and there was no written transcript of it, the court stated,

> [COURT]: I'm not saying you can't — look, you handle it how you want. If you want to play certain portions of it, he is going to do the other parts; okay?

Defense counsel expressed concern because D.C.'s mother could be heard on the tape but was not going to be called as a witness at trial.

> [DEFENSE]: She . . . says things that are detrimental to my client on there. I think that should never be allowed because she's not a witness.

Defense counsel wanted to impeach D.C. with his prior inconsistent statements and acknowledged she could use the tape or "just ask him these questions, if he denied them, then play it." But the prosecutor reiterated that,

> [STATE]: [T]he problem for the State is now, Judge, how do I go about and now parcel out with the video what statement — exclude the [illegible] of the mother or whatever that she claims is prejudicial to her client? I can't do that now in the middle of a trial.

Defense counsel told the judge she had taken out the comments by D.C.'s mother, but the State continued to assert its position of playing the entire tape and the court vacillated.

> [DEFENSE]: I went through and . . . every time the mom interrupted I took her part out. She is not relevant to this case. She is not a part of this case. She is not a witness to anything so whatever she says or doesn't say should not be put in front of the jury.
>
> . . . .
>
> [STATE]: All I am saying, Judge, is, is that I don't know what she is talking about in regards to, I don't know what the State is going to play or the State is going to show.
>
> . . . .
>
> [COURT]: Here is what we're stuck doing. What we're stuck doing . . . is you playing the excerpts; okay? I am going to assume, based on your representation, that the excerpts that you're going to play deal specifically with the testimony provided by [D.C.] either in court under examination by [the prosecutor] or with regards to the statements that were addressed in court.
>
> . . . .
>
> [STATE]: [T]he State is going to intend on playing the rest of this video, Judge, and I don't know how we're going to get around it.

[COURT]: All right.

. . . .

[DEFENSE]: I just want to reiterate my objection to the mother's voice — I know there is nothing Your Honor can do, but I just want to put the objection on the record; that's all.

[COURT]: All I want to know is what are we doing with this tape; are we playing it in full, in half, in part? Just tell me.

[STATE]: You can't have your cake and eat it, too. If you're going to put portions in, then the State is going to put the rest of the portions in so do you want the full tape in or do you not want it in?

[COURT]: How do you want to handle it?

[DEFENSE]: I mean, I would rather put in my parts. I put in 15:08 to 16:12. I am talking about a time. And then I restart at 16:12:20 to 16:12:47 and then stop.[3]

[COURT]: Sure. Look, if that's how you want to proceed, I have no problem with that. I want you to handle your case the same way I want you to handle your case, the way you want it. It is not an issue with me.

Defense counsel pressed the court for clarification.

[DEFENSE]: My question, I guess, going forward is, if I make this effort, going through it like this, is the State then going to be allowed to play the entire missing parts? If

[3] The tape started at 15:56 and ended at 17:50, referencing military time. Defense counsel wanted to play the tape starting at 16:08 to 16:12, which is where D.C. describes the events after he encountered defendant on Stuyvesant Avenue.

> they are, then let's just play the whole thing.
>
> [COURT]: Well, for completeness, they are going to, but any statements that — any outbursts that the mother may make are going to have to be excised.

The State reiterated that D.C.'s mother was "an integral part of the conversation" and that she could not be taken out "and get a full completeness of what is being said in that room." The court responded,

> [COURT]: Look, the best that the Court can do is just hear the evidence, respond to the objections and you're in control of the — of your own respective evidence. And if it blows up on you, I will try to clean up the mess, but that is not my job.

The State then suggested that the situation could be addressed by a curative instruction regarding any statements on the tape by D.C.'s mother saying that "it is not evidence in the case, the jury should not consider it in any way whatever[.]" Defense counsel seemed persuaded.

> [DEFENSE]: We're making almost a joint decision to play the whole tape anyway. Since it is going to be played anyway, it doesn't make sense —
>
> [COURT]: I'm fine - if you want to play the whole thing and if you want to play the whole thing, I am fine with it, you know.
>
> [DEFENSE]: I am not going to object to anything in the tape, but I would like that curative instruction at the end and I would

> like it to be a Court exhibit, not a Defense exhibit, as well.

When the court would not agree to mark the tape as a court exhibit, it was marked as a joint exhibit by the parties. The court then advised counsel:

> [COURT]: I am sure nobody has anything to hide, but if you, if you're coming up on a part that you know that [D.C.'s mother] is going to say something really inflammatory, just skip it.
>
> [DEFENSE]: There are so many parts where she says things, it's hard to — literally, every stop and start is because mom is interrupting, mom is interrupting, mom is interrupting, so I think it is going to be difficult to pinpoint one thing and if we have a curative instruction, I think that is the best.

Before playing the entire tape, the judge gave the following instruction to the jury.

> [COURT]: Folks, we have — what is being presented to you at this point is a CD or DVD of a recording of a statement provided by [D.C.] subsequent to when he first came down to talk to the police, but prior to his being charged; okay? . . . [T]here are going to be some remarks or responses or some verbiage that you're going to hear from [D.C.]'s mother. And at the consent of the attorneys in this case, I need to advise you, first, that anything you hear that the mother may say has to be disregarded by you as hearsay, as being unreliable, not subject to cross-examination and cannot be considered by you in any way, shape or form in your decision-making process as to whether or not the State has met its burden in proving the charges against Mr. Grant so to the extent that you

> can, disregard, but note that you can't use anything that she said.
>
> For the most part, the dialogue you should focus . . . on is between the officer doing the questioning and [D.C.] in giving the responses.
>
> [(Emphasis added).]

C.

Three people could be seen and heard on the videotape: D.C., his mother and Detective Britton, who later testified at trial. On the tape, D.C. acknowledged his chance encounter with defendant, but stated that as he was walking away toward his own home, he heard shots ring out close by, turned toward defendant, and saw him running. D.C. then turned and ran in the opposite direction from defendant, toward his own home. When he arrived, the house was locked. He spent the night at his girlfriend's house nearby.

The detective questioned D.C. about his sequencing of events and how D.C.'s timeframes presented problems with his story. He told D.C. that the shooting was being attributed to him.

The detective told D.C. repeatedly that "the streets were talking" and those "streets" were saying that D.C was involved.

> [DETECTIVE]: We've brought in enough people. We've come to sort of an idea about what happened out there. . . . The streets put the right people in the right spot. . . . People know you were there. . . . People have put you guys together out there.

And then:

> [DETECTIVE]: Everybody on the street isn't saying Ski,[4] they saying Twin.
>
> [MOTHER]: They scared of Ski or something that they don't tell the truth. . . . I heard some gossip . . . . I heard something else about Ski. . . . There's a rumor saying, I don't put nobody's name on it, that [defendant] did it. This is between me and you [indicating the detective] . . . that he did it.
>
> . . . .
>
> [DETECTIVE]: This is what I'm trying to get to. Your mom knows the streets. . . . You're the only ones around. By the next morning, when this happens everyone thinks it's the craziest, baddest dude on the block [indicating defendant]. Then as the day goes on, it becomes [you].

The interview continues:

> [MOTHER]: What I heard today, three people came up to me and told me . . . that [defendant] was bragging about what he did. And that he's never going to be caught. . . . And all he was bragging about it, bragging about it, bragging about it. . . . Let me tell you what I heard about Ski today. . . . I thought he was a nice guy. . . . But what I heard today, you gotta watch it with him. . . . And I know he did it. . . . He say that he did it. He told three people. . . . And they said there's a lot of people out there that's scared, that Ski got a lot of people wrapped around his finger.
>
> [(Emphasis added).]

[4] Defendant is known by the street name "J-Ski."

The detective said "somebody is talking correctly. The people that were in that deli were taking correctly. Whatever they were saying, we followed it up and they were correct." At another point the detective said: "Somebody says that they heard you say you were out there and that you talked. This is some of the evidence." "I have somebody that is going to stand up and say I heard [D.C.] say this." At the end of the video, D.C. stated, "I'm sure he did it; sure he did it." The detective replied, "I'm sure he did it, you're sure he did it, we're all sure he did it. I wasn't there and she wasn't there," and stated further, "[u]nfortunately we have witnesses that put you there and put him there."

D.

Defendant appeals his convictions raising the following issues on appeal:

> POINT I. IN LIGHT OF THE GRAVE DANGER OF WRONGFUL CONVICTION POSED BY INHERENTLY UNRELIABLE JAILHOUSE SNITCH TESTIMONY, ITS INTRODUCTION AT TRIAL IS INCOMPATIBLE WITH THE DUE PROCESS RIGHTS GUARANTEED UNDER THE NEW JERSEY CONSTITUTION, AND THUS, THE STATE'S HEAVY RELIANCE ON SUCH TESTIMONY IN THIS CASE REQUIRES REVERSAL OF GRANT'S CONVICTIONS. IN THE ALTERNATIVE, REVERSAL IS REQUIRED BECAUSE THE COURT FAILED TO HOLD A PRETRIAL HEARING ON THE RELIABILITY OF THE JAILHOUSE SNITCH TESTIMONY AND FAILED TO PROPERLY INSTRUCT THE JURY ON HOW TO EVALUATE SUCH TESTIMONY. (Not Raised Below)

POINT TWO. THERE WAS NO EVIDENTIARY BASIS FOR THE INTRODUCTION OF [D.C.]'S TWO-HOUR VIDEOTAPED INTERVIEW DURING WHICH DETECTIVE BRITTON AND [D.C.]'S MOTHER, WHO WAS NOT A WITNESS AT TRIAL, MADE NUMEROUS STATEMENTS, BASED ENTIRELY ON INFORMATION RECEIVED FROM NON-TESTIFYING WITNESSES, ABOUT GRANT'S GUILT. THE INTRODUCTION OF THIS PREJUDICAL [sic] VIDEOTAPE VIOLATED THE PROHIBITION AGAINST HEARSAY AND GRANT'S RIGHT TO CONFRONTATION, AND REQUIRES REVERSAL OF GRANT'S CONVICTIONS.

A. The Doctrine of Completeness Did not Apply.

B. The Inadmissible Hearsay Statements Contained In the Videotape Violated Grant's Right to Confrontation.

C. Reversal is Required.

POINT III. REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT DENIED GRANT DUE PROCESS AND A FAIR TRIAL (Partially Raised Below)

A. The Prosecutor Improperly Bolstered The Credibility Of The State's Witnesses.

B. The Prosecutor Improperly Shifted The Burden Of Proof To The Defense.

C. The Prosecutor Improperly Suggested That Grant Was A Gang Member.

POINT IV. IN THE EVENT OF REVERSAL, GRANT SHOULD BE PERMITTED TO WITHDRAW HIS GUILTY PLEA UNDER INDICTMENT NO. 13-02-0248.[5]

[5] Defendant did not make a motion to withdraw his guilty plea in the trial court pursuant to Rule 3:9-3(e). As a result there is no order that is subject to review on appeal, R. 2:2-3. This issue is not, therefore, properly before us.

III.

The argument defendant raises in Point II requires us to review the trial court's evidentiary ruling to permit the unredacted videotape to be introduced into evidence. We grant substantial deference to the trial judge's discretion on evidentiary rulings unless it is a clear error of judgment or so wide of the mark that a manifest denial of justice results. See, e.g., State v. Koedatich, 112 N.J. 225, 313 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 813, 102 L. Ed. 2d 803 (1989); State v. Carter, 91 N.J. 86, 106 (1982); State v. Swint, 328 N.J. Super. 236, 253 (App. Div.), certif. denied, 165 N.J. 492 (2000).

A.

Defendant contends that playing the entire videotaped interview of D.C. violated his Sixth Amendment right to confrontation and the prohibition against hearsay. D.C.'s mother was never called as a witness at trial. Defendant had no ability to cross-examine her about her statements that indicated defendant was guilty. Moreover, although the judge gave a curative instruction prior to playing the videotape, defendant contends it was inadequate to address his inability to confront the witness on cross-examination.

The State does not dispute that defendant's right of confrontation was implicated by showing the entire tape to the

jury. The State contends that the doctrine of invited error bars defendant from contending it was error to play the full videotape to the jury, because defendant chose to play the entire tape to the jury, even though the court had not definitively ruled on the issue. Additionally, the State contends the curative instruction was sufficient to blunt any Confrontation Clause violation. We disagree with both contentions.

Both the Sixth Amendment of the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution provide that the accused in a criminal prosecution has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. "These constitutional provisions express a clear preference for the taking of testimony subject to cross-examination." State v. Cabbell, 207 N.J. 311, 328 (2011) (citing State ex rel. J.A., 195 N.J. 324, 342-43 (2008)). "Because '[t]he right of confrontation is an essential attribute of the right to a fair trial,' a defendant must be given 'a fair opportunity to defend against the State[']s accusations.'" State v. Basil, 202 N.J. 570, 590-591 (2010) (alterations in original) (quoting State v. Branch, 182 N.J. 338, 348 (2005)).

"The opportunity to cross-examine a witness is at the very core of the right of confrontation." Cabbell, supra, 207 N.J. at 328 (citing California v. Green, 399 U.S. 149, 158, 90 S. Ct.

1930, 1935, 26 L. Ed. 2d 489, 497 (1970)). The Confrontation Clause prohibits the use of a witness's out-of-court testimonial hearsay statement when a defendant has not had the opportunity to cross-examine the witness. J.A., supra, 195 N.J. at 342. "[A] statement made to the police is testimonial when it is given in 'circumstances objectively indicat[ing] that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" Cabbell, supra, 207 N.J. at 329 (alterations in original) (quoting Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224, 237 (2006)).

If the witness is absent from trial, a testimonial statement is admissible only where that witness "is unavailable, and . . . the defendant has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 197 (2004). "The [Confrontation] Clause does not bar admission of a statement so long as the [witness] is present at trial to defend or explain it." Cabbell, supra, 207 N.J. at 329 (alterations in original) (quoting Crawford, supra, 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9, 158 L. Ed. 2d at 197 n.9).

"The government bears the burden of proving the constitutional admissibility of a statement in response to a

Confrontation Clause challenge." Basil, supra, 202 N.J. at 596. The violation of a defendant's Sixth Amendment right to confrontation "is a fatal error, mandating a new trial, unless we are 'able to declare a belief that it was harmless beyond a reasonable doubt.'" Cabbell, supra, 207 N.J. at 338 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710-11 (1967)).

Here, the Confrontation Clause was clearly violated when the court permitted the entire videotape to be played to the jury, because it included statements by D.C.'s mother. She was not called as a witness. There was no indication that she was unavailable for trial. Defendant had no prior ability to cross-examine her. Because this violation, admitted by the State, constitutes a "fatal error," a new trial is mandated unless we determine the error was "harmless beyond a reasonable doubt." Ibid.

B.

In making this determination, we first examine the statements made by D.C.'s mother that defendant sought to redact. Specifically, D.C.'s mother said she had heard certain things about the defendant. She related that defendant "told three people" that he "did it"; he "was bragging about what he did[,] and that he's never gonna get caught"; and he had someone "talk

[to one of the detectives], [and say] it was the twins . . . [a]nd that way the person can get the [reward] money and give it to [defendant]." D.C.'s mother also said that "there's a lot of people out there that's scared" of [defendant]. She also expressed to the detective "then, you know, my house start getting shot up."

We agree with defendant that these statements all were inadmissible hearsay. D.C.'s mother was not called as a witness at trial; she was testifying about what others said, who also were not called as witnesses at trial. This testimony clearly was prejudicial. The statements by D.C.'s mother indicated that defendant had confessed, was to be feared, and was violent.

The error in failing to redact the inadmissible statements by D.C.'s mother was compounded, rather than cured, by the instruction the judge gave to the jury. Although telling the jury that D.C.'s mother's testimony should be ignored entirely, this direction at the same time was qualified. The jury was instructed to disregard what the mother said "to the extent that you can, disregard," and that they should focus on the dialogue between D.C. and the officer "for the most part." Moreover, there was no additional mention of the curative instruction in the judge's charge to the jury following summations.

The error in the court's evidentiary ruling was further exacerbated by an incorrect ruling on a defense objection during

the State's closing statement. The prosecutor referenced the mother's statement in the videotape by saying, "[a]nd what is interesting is his mother during the interview says, I'm afraid they are going to shoot up my . . . ." Defense counsel objected, reminding the judge that the jury had been "told to disregard her testimony, her statements," but defense counsel was overruled. This ruling effectively negated what was already a token effort to ameliorate the prejudice from D.C.'s mother's statements.

C.

At trial, defendant did not ask the court to redact the statements made by Detective Britton from the videotape. We consider them here, however, as essential pieces of the context for our review of the evidentiary ruling.

In the unredacted videotape, the detective made numerous statements in which he vouched for the correctness of the statements made by people on the streets and expressed his own belief in defendant's guilt. Responding to D.C.'s mother's statements about what was being said on the street, the detective confirmed that people thought defendant did the shooting, that he was "the craziest, baddest dude on the block," and that their beliefs were correct. Those statements included "The streets put the right people in the right spot" and "somebody is talking correctly. The people that were in that deli were taking

correctly. Whatever they were saying, we followed it up and they were correct." And, most damaging, the detective expressed his personal conviction that defendant was guilty: "I'm sure he did it, you're sure he did it, we're all sure he did it."

The admission of these statements was wholly improper. The detective's references to defendant's reputation as "the craziest, baddest dude on the block" constituted evidence of other bad conduct that was presented to the jury without any assessment of its admissibility pursuant to N.J.R.E. 404(b) and the factors set forth in State v. Cofield, 127 N.J. 328, 338 (1992). "Other-crimes evidence is considered highly prejudicial," State v. Vallejo, 198 N.J. 122, 133 (2009), having "a unique tendency to turn a jury against the defendant[,]" State v. Hernandez, 334 N.J. Super. 264, 269-70 (App. Div. 2000), aff'd as mod., 170 N.J. 106 (2001), quoting State v. Stevens, 115 N.J. 289, 305-06 (1989). That effect was undoubtedly exacerbated by the detective's expression of his personal opinion that defendant was guilty. See State v. Landeros, 20 N.J. 69, 74-75 (1955) (testimony at trial by Police Captain that defendant was "as guilty as Mrs. Murphy's pet pig" was so prejudicial that "fundamental fairness" required reversal of defendant's conviction.) Even without any objection or request from the defendant, the highly prejudicial nature of these comments required action by the trial judge.

D.

For the first time on appeal, defendant contends that Detective Britton's testimony at trial also violated the Confrontation Clause by referring to an out-of-court witness. At trial, Britton was asked:

> [STATE]: Based on information received in that conversation, did you develop a potential suspect in this case?
>
> [DETECTIVE]: In part and parcel to the other information, yes.
>
> [STATE]: Who was that?
>
> [DETECTIVE]: [D.C.]
>
> [STATE]: Later that day at 8:30 p.m. did you develop additional information related to your investigation?
>
> [DETECTIVE]: Yes.
>
> [STATE]: Based on that information, did you develop another suspect in your investigation?
>
> [DETECTIVE]: Yes.
>
> [STATE]: Who was that?
>
> [DETECTIVE]: James Grant.

"[B]oth the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." Branch, supra,

182 N.J. at 350. The right is also violated where an officer "impl[ies] to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant." Id. at 351. However, "[i]t is well settled that the hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so 'upon information received.'" State v. Bankston, 63 N.J. 262, 268 (1973) (citation omitted). However,

> [i]n contexts other than a photographic identification, the phrase "based on information received" may be used by police officers to explain their actions, but only if necessary to rebut a suggestion that they acted arbitrarily and only if the use of that phrase does not create an inference that the defendant has been implicated in a crime by some unknown person.
>
> [Branch, supra, 182 N.J. at 352.]

There was no suggestion that Detective Britton had acted arbitrarily or with ill motive. At trial, the detective indicated he "developed information," and he did not indicate that information came from an unidentified informant or witness. However, on the videotape, Detective Britton specifically said that he had someone who could put both D.C. and defendant at the location. He also said that he knew defendant was guilty. He referenced multiple times that the "streets were talking" and the "people in the deli" were talking. These statements implied that

the detective had one or more out-of-court witnesses that put defendant at the scene, and that the detective believed defendant was guilty based on that knowledge. This is the type of inference of superior knowledge that is not permitted under Branch or Bankston.

E.

Having reviewed the video statement within the context of trial as a whole, we cannot say that the introduction of the video statement was "harmless beyond a reasonable doubt." Chapman, supra, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710-11; see also State v. Taffaro, 195 N.J. 442, 454 (2008) (noting that the standard for plain error is whether the error was "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached" (quoting State v. Macon, 57 N.J. 325, 336 (1971))). All the witnesses were cooperating with the State for more favorable sentences. There was no physical evidence that tied defendant to the crimes. There was testimony that "[m]any, many [witnesses] fear retaliation. It is a big problem[,]" and that defendant in fact had retaliated by arranging to have someone shoot D.C., but that his grandmother was shot instead. The detective indicated he had superior knowledge from out-of-court witnesses, but the implication was that those

witnesses may be afraid to come forward. Defendant had no ability to confront this implication.

On this record, "the possibility of injustice" by playing the tape was "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached[.]" Taffaro, supra, 195 N.J. at 454 (quoting Macon, supra, 57 N.J. at 336. Thus, we are constrained to conclude that the Confrontation Clause was violated by playing the entire tape, which had the clear capacity to cause an unjust result by corroborating through out-of-court witnesses the testimony of those who did testify. We are therefore compelled to overturn defendant's convictions and remand for a new trial.

F.

We also reject the State's argument that defendant's contention is barred as invited error. The defense sought to play very limited excerpts of the tape for the specific purpose of impeaching D.C.'s testimony with his prior inconsistent statement pursuant to N.J.R.E. 607. It was the State that objected to that, indicating that the whole tape had to be played because the taped interview was more in the nature of a discussion rather than an interrogation. Although contending the whole videotape had to be played, the State failed to articulate how any additional portion

of the videotape was required to be admitted "in fairness" as permitted by N.J.R.E. 106.

The doctrine of invited error operates to bar a "disappointed litigant" from arguing on appeal that an adverse decision below was the product of error, "when that party urged the lower court to adopt the proposition now alleged to be error." State v. Munafo, 222 N.J. 480, 487 (2015) (quoting State v. A.R., 213 N.J. 542, 561 (2013)). The doctrine "is implicated only when a defendant in some way has led the court into error," State v. Jenkins, 178 N.J. 347, 359 (2004), "while pursuing a tactical advantage that does not work as planned." State v. Williams, 219 N.J. 89, 100 (2014) (citation omitted). "The doctrine of invited error 'is based on considerations of fairness and preservation of the integrity of the litigation process.'" N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010) (quoting Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996)). "Some measure of reliance by the court is necessary for the invited-error doctrine to come into play." Jenkins, supra, 178 N.J. at 359.

Although it was error to play the entire tape, it was not invited error by defense counsel. The State asked for the entire tape to be played to the jury, not the defense. We disagree that defense counsel's eventual capitulation, given the State's

position and indecision by the court, is the type of error contemplated by the invited error doctrine. There was no apparent tactical advantage to the defense given the comments by D.C.'s mother that incriminated defendant. Playing the whole tape was prompted by the State, which at the end asked for a curative instruction. Although the State contends the court did not indicate any preliminary ruling, the court stated repeatedly it was inclined to play the whole tape given the State's assertion this was the only way the tape could be handled. In a situation such as this, the court should have taken the time to listen to the tape in order to make a proper ruling. It was not sufficient for the court to simply allow the parties to do what they wanted and then "clean up" afterwards.

IV.

We comment briefly on the other issues raised on appeal. Defendant contends that his right to due process was violated by the "inherent unreliability" of "jailhouse snitch testimony" offered by the testimony of Hickmond and Black. However, the Supreme Court has considered this question and determined that the federal constitution does not bar the introduction of such evidence. See Kansas v. Ventris, 556 U.S. 586, 594, 129 S. Ct. 1841, 1847, 173 L. Ed. 2d 801, 809 (2009). Defendant offers no support for the proposition that such testimony should be barred

under our Constitution. Moreover, there was evidence here that the testimony of Hickmond and Black was corroborated by extrinsic details and by the timing of their statements.

The court provided the jury with the cooperating witness charge. See Model Jury Charge (Criminal), "Testimony of a Cooperating Co-Defendant or Witness" (2006). Additionally, it instructed the jury on credibility. These instructions were more than adequate to address the potential credibility issues raised by the testimony of a cooperating witness. Thus, there was no error in permitting the testimony of cooperating witnesses, nor in the charge that was given to the jury about those cooperating witnesses.

Defendant contends that the prosecutor bolstered the credibility of the witnesses through testimony and in summation that described the process for evaluating whether to use cooperating witness testimony. "It is within the sole and exclusive province of the jury to determine the credibility of the testimony of a witness." State v. Vandeweaghe, 351 N.J. Super. 467, 481 (App. Div. 2002), aff'd, 177 N.J. 229 (2003). "A prosecutor may argue that a witness [should be found] credible, so long as the prosecutor does not personally vouch for the witness's credibility or refer to matters outside the record as support for the witness's credibility." State v. Walden, 370 N.J.

Super. 549, 560 (App. Div.), certif. denied, 182 N.J. 148 (2004); State v. Scherzer, 301 N.J. Super. 363, 445 (App. Div.), certif. denied, 151 N.J. 466 (1997).

Because defense counsel did not timely object, this weighs against a finding of prosecutorial misconduct. State v. Echols, 199 N.J. 344, 360 (2009) ("Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made." (quoting State v. Timmendequas, 161 N.J. 515, 576 (1999))). The criticized line of questioning did not constitute a personal voucher for the jailhouse witnesses but related to the process used for verification. Moreover, another comment made in closing about the detective's fairness did not vouch for his truthfulness.

There was no improper shifting of the burden of proof as alleged by defendant when the prosecutor commented, without objection, about a newspaper article that was referenced by the defense. The State did not suggest defendant had an obligation to produce the newspaper, but merely "revealed [a] gap[] in the defense's case." Timmendequas, supra, 161 N.J. at 593.

Similarly, there was no improper reference to gang membership. The court was careful to avoid all reference to this and cautioned counsel to avoid that issue. We are not persuaded that the one isolated reference in the State's summation to a

"professional shooter" over the course of a multiday trial was error.[6] None of these statements were "of such a nature as to have been clearly capable of producing an unjust result[.]" R. 2:10-2.

Defendant's convictions under Indictment No. 12-09-0849 are reversed and remanded for a new trial.

[6] Although defense counsel objected to a power point presentation, which was playing simultaneously, because it used the word "associate," there was no actual objection to the phrase "professional shooter."