SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6200-12T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GIUSEPPE TEDESCO,

Defendant-Appellant.

Argued October 20, 2016 – Decided March 6, 2017

Before Judges Lihotz, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Sussex County, Indictment No. 10-08-0289.

Anthony J. Iacullo argued the cause for appellant (Iacullo Martino, L.L.C., attorneys; Mr. Iacullo, of counsel and on the briefs; Joshua H. Reinitz, on the briefs).

Susan Lichter, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Ms. Lichter, of counsel and on the brief).

PER CURIAM

Defendant Giuseppe Tedesco appeals from the judgment of conviction entered after a jury found him guilty of first-degree

murder, N.J.S.A. 2C:11-3(a), second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b), and second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a). The case arises from the 2010 fatal shooting of twenty-two-year-old A.R. (Allison)[1] in her parents' home in Hoptacong. For the murder conviction, the trial judge sentenced defendant to a seventy-year term of incarceration, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On appeal, defendant raises the following points for our consideration:

> POINT ONE
>
> ADMISSION OF 404(B) EVIDENCE THAT DEFENDANT SLASHED THE VICTIM'S TIRES THE NIGHT BEFORE THE INCIDENT IS REVERSIBLE ERROR.
>
> POINT TWO
>
> THE MISCONDUCT COMMITTED BY THE STATE DURING ITS SUMMATION IS SO FAR BEYOND PERMISSIBLE COMMENT THAT IT MANDATES REVERSAL.
>
> POINT THREE
>
> THE COURT'S ADMISSION OF DEFENDANT'S DRUNK STATEMENT TO HIS FRIENDS VIOLATED THE RULES OF COURT AND CONTROLLING PRECEDENT WHEN IT FAILED TO GRANT AN EVIDENTIARY HEARING AND THEN IMPROPERLY INSTRUCTED THE JURY.

[1] We use fictitious names to identify lay fact witnesses and the victim in order to protect the privacy of the witnesses and the victim's family.

POINT FOUR

EX-PARTE CONVERSATIONS BETWEEN THE JURY AIDE AND JURORS IMPERILED THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

POINT FIVE

REBUTTAL TESTIMONY ABOUT THE VICTIM'S STATE OF MIND WAS HEARSAY AND DID NOT SATISFY ANY EXCEPTION MERITING EXCLUSION.

POINT SIX

THE STATE'S EXPERT TESTIFIED WELL BEYOND HIS REPORT OVER THE OBJECTION OF THE DEFENDANT RESULTING IN PREJUDICE.

POINT SEVEN

THE COURT IMPOSED AN EXCESSIVE SENTENCE.

POINT EIGHT

INTRODUCTION OF EVIDENCE FROM DEFENDANT'S FACEBOOK PAGE IS ERROR.

In addition, defendant presents the following arguments in his reply brief:

POINT ONE

THE COURT IMPROPERLY PERMITTED THE INTRODUCTION OF 404(B) EVIDENCE OF TIRE SLASHINGS WHEN IT PREMISED ITS DECISION ON INFORMATION OUTSIDE THE RECORD OF THE HEARING WHICH DENIED THE DEFENDANT A FAIR TRIAL.

POINT TWO

THE TRIAL COURT ERRED IN NOT CONDUCTING A HEARING REGARDING THE INTOXICATED HEARSAY STATEMENTS ATTRIBUTED TO THE DEFENDANT

REGARDING HIS DESIRE TO HARM [THE VICTIM] SHOULD SHE HAVE A PARAMOUR.

POINT THREE

THE STATE'S ACTIONS AT TRIAL CUMULATIVELY DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND IS ANALOGOUS TO NEWLY DECIDED STATE V. RIVERA.

POINT FOUR

THE EXPERT'S OPINION WENT BEYOND THE FOUR CORNERS OF HIS REPORT.

POINT FIVE

THE STATE'S ARGUMENT REGARDING FACEBOOK IS MISGUIDED. THE DEFENDANT'S OBJECTION WAS TO THE INTRODUCTION OF A QUOTE ON HIS OWN FACEBOOK PAGE NOT ANYTHING RELATED TO THE "FAKE" FACEBOOK PAGE.

Following our review of the record and controlling legal principles, we affirm.

I.

We discern the following facts from the trial evidence. In March 2010, defendant was twenty-four years old and living at home with his mother and stepfather in Hopatcong. He was on disability leave from his job. While on leave, he reconnected with high school friends J.D. (Jerry) and D.D. (David) on Facebook. Defendant also knew Allison in high school, as they briefly dated in 2007 or 2008 and remained friends.

Weeks before the shooting, defendant and Allison went to a bar in New York City accompanied by David, Jerry, and Jerry's

girlfriend, Ma.M. (Martha). At the bar, defendant became highly intoxicated. According to Jerry, at one point, while they were in the bathroom, defendant said he loved Allison and would do anything to be with her. He described defendant as "mad," adding, "[H]e just wanted to be with her and then he punched the wall" and started crying. David could not recall any comments from defendant about Allison that night, but testified he previously heard defendant "pretty much" proclaim his love for Allison. Martha similarly testified defendant was in love with Allison, but noted they were not dating.

On the ride home from the bar, defendant told Jerry he did not want to live if he could not have Allison, that he had a gun at home, that he wanted Jerry to kill her, and that "he would kill her if he had to." Martha testified that defendant said he loved Allison, "he couldn't live without her," and he would "kill anyone if . . . she was with someone else." Martha noted there were also "a couple of occasions" when defendant said that "[i]f he found out she was dating someone it would not be a good situation; then he would probably hurt the person that was with her." When asked about these remarks at trial, defendant described them as "drunken babble," and said he and Allison later laughed about them.

Me.M. (Melissa) testified she went to the same middle

school as defendant and met him again through a mutual friend in 2006. They communicated by instant messages, text, and on Facebook, and met "[a] handful of times." At some point, "within a year before this incident," defendant told Melissa that Allison was an ex-girlfriend and that he was trying to get back together with her, but Allison may have been dating someone else or she was not interested. Another night, they were talking online when defendant told Melissa that he was trying to contact Allison and that "if she's not going to be with me, she's not going to be with anybody else." Melissa told him not to say such things and "signed off."

From March 19 to 21, 2010, defendant and Allison went to Boston to celebrate his birthday. G.L. (Gary), who never met defendant, believed Allison went there with friends; he called her eight times between 1:35 a.m. and 1:57 a.m. on March 20. During the drive home that weekend, defendant learned Gary made these calls. Defendant later told Jerry that while they were away, Allison had received a text in the morning "from a guy," that he had confronted her about it, and that he had been "really mad" that someone had texted her. Defendant also told David that he went to Boston with Allison "to sway her back or something," but had become upset with her.

Around this time, Gary received a "friend request" on

Facebook from someone named Mariangela Della Venta. Defendant explained that in late December 2009 or early January 2010, he created this fake Facebook page using a fictitious female identity "to get information for people" and to "joke" with his friends. Defendant claimed that on the way home from Boston, Allison asked him to use the fake page to gather information about Gary.

On Tuesday evening, March 23, 2010, Allison went to Gary's home in Livingston. Allison left around 10:00 p.m., but within minutes, she called Gary to say she had a flat tire. Earlier that night, J.B. (Judy), a friend of defendant's since high school, received a phone call from defendant. Defendant told her he slashed Allison's tires. On March 26, 2010, Allison again went to Gary's home and parked her car in the same space as three nights before. She left around 1:00 a.m., but soon discovered two more slashed tires.

On March 27, 2010, Allison's parents were going out for the evening and her mother asked Allison to join them because her daughter "seemed a little upset." Allison decided to stay home. That same evening, defendant was at his mother's home preparing to attend a birthday party for Judy at a club in Hoboken. Defendant planned to go to the party with Jerry and Martha, but around 8:00 p.m., they told defendant their plans

had changed for the evening. Around the same time, David sent a text to defendant asking if he wanted a ride. Defendant responded "he would rather go solo," and would "meet up with you guys later."

Before leaving home, defendant exchanged text messages with Allison. Defendant asked Allison if she wanted to "get together" for his upcoming birthday, but she declined, stating, "I don't think [I] can. Sorry. Have fun . . . ." Defendant testified he decided to stop at Allison's house before driving to Hoboken because the "texts didn't seem right" and "were very short." He took his gun, a Beretta, for self-protection, explaining that he was traveling alone to the party in Hoboken, that he was carrying "a lot of money," that he was wearing nice clothes and a "big chain," and that he was driving a "brand new truck." Defendant carried the gun in his waistband between his belt and jeans.

Defendant drove to Allison's house and parked his truck about "a block away," rather than in the vacant space in her driveway. He left his cell phone in his vehicle, and walked to Allison's house. Allison opened the front door for him. Before defendant left, Allison was shot six times. A short time later, a passing motorist observed defendant running out of Allison's house at "full blast," looking "scared to death."

Upon reaching his car, defendant put his gun in the center console, where he had left his cell phone. He called his biological father to say he was shot, but did not mention what happened to Allison. Defendant later explained, "[T]here was nothing that [he] could do for [Allison] [because] . . . she had passed." His father told him to go home.

When defendant arrived home, he parked his car in the driveway and went inside to tell his mother and stepfather that he was shot. His mother became hysterical, while his stepfather tried to stop the bleeding. Defendant told his mother that the shooting took place at Allison's house, but did not tell her that Allison was dead.

Defendant's stepfather drove him to the hospital. On the way there, defendant received a call from his mother asking for Allison's address, which he provided. His mother called 9-1-1 to report that her son was shot in the hand.

At the hospital, defendant received treatment from Hakan Kutlu, M.D., a surgeon, for a gunshot wound to his left hand. Dr. Kutlu determined a bullet entered at the base of defendant's left thumb and exited at the base of his small finger.

Meanwhile, Patrolmen Ryan Tracey and David Kraus of the Hopatcong Police Department went to defendant's home, where defendant's mother told them the shooting occurred at the house

where her son's friend lived; she further stated her son drove home that night in the Durango parked in the driveway. Patrolman Tracey observed blood inside the Durango and on the door handle, steering wheel, and driver's seat.

The police then responded to Allison's house, where they observed blood on the walkway leading to the open front door. Looking inside, they saw a lifeless body at the base of the stairs. The officers entered and searched the home for other possible victims. Patrolman Kraus later returned to defendant's home, where defendant's mother told him that her son owned a registered handgun.

At 11:30 p.m. on March 27, 2010, Detectives Rita Gallo and David Monisera of the New Jersey State Police Crime Scene Investigation Unit (CSI) arrived at Allison's house to complete a homicide investigation. They observed no sign of forced entry; they found Allison lying on her back at the bottom of the stairs leading from the landing to the foyer on the lower level.

The detectives recovered six shell casings. Detective Gallo observed Allison had three gunshot wounds through her sweater, and one gunshot wound in her hand, chin, nose and left temple. She noted the chest wounds had fibers from her sweater that were "almost melted," suggesting shots fired at close range; further, the stippling marks caused by gunpowder

deposited near the chin wound suggested a round entered her face "at very close range." She explained the blood from a wound near Allison's ear showed "she definitely wasn't upright because the blood isn't running down her face."

Meanwhile, Detective Thomas Redfern of CSI North went to the hospital and spoke with defendant in the emergency room. Detective Redfern took possession of defendant's clothes, noting there were reddish-brown stains on his jeans.

Detective Kenneth Wise arrived at defendant's home at approximately 4:38 a.m. on March 28, 2010. Pursuant to a warrant already obtained, he searched defendant's bedroom and found a box of fifty Remington 25-caliber rounds with eight rounds missing. He also recovered the 25-caliber Beretta from the Durango's center console. He observed red-brown stains on the Beretta consistent with blood, and found two live rounds in the gun.

On March 28, 2010, Junaid R. Shaikh, M.D., a forensic pathologist with approximately twenty years of experience, performed an autopsy. The autopsy revealed six gunshot wounds, five of which showed evidence of close-range firing from a distance of "18 inches or less." Dr. Shaikh could not determine the order of the shots. All six bullets were "frontal entrance wounds." In his report, he described the entry wounds, the

wound tracks, and associated injuries. At trial, Dr. Shaikh testified regarding each wound, noting several of the wounds would have affected Allison's ability to "struggle or fight back." He concluded that the cause of death was multiple gunshot wounds and that the manner of death was homicide.

The State also presented several experts employed by the New Jersey State Police. Brett Hutchinson, an expert in DNA analysis, determined the blood on the landing outside the house and on the gun's trigger and slide contained defendant's DNA. Judith Link, an expert in gunshot residue analysis, performed a chemical examination of Allison's sweater and found evidence of nitrites from gunpowder. Gerard Burkhart, an expert in firearms identification, testified the Beretta was operable.[2] Using Link's findings, Burkhart conducted test firings to replicate the gunshot residue on the victim's sweater, and determined the shot to the lower abdomen was fired from a distance of less than twelve inches, while the two shots to the chest were fired from no further away than five feet, six inches.

Defendant also testified at trial. He confirmed his trip to Boston with Allison, claiming she had received a number of phone calls but had ignored all of them. Defendant denied slashing Allison's tires or telling Judy he did it. He further

[2] The parties stipulated defendant's gun discharged the shell casings recovered at the crime scene.

denied making any threats against Allison when intoxicated, or knowing Gary lived in Livingston. Defendant acknowledged posting a picture of his Beretta on his real Facebook page.

Defendant claimed he acted in self-defense on the evening of March 27, 2010. He said after Allison let him into her house, they sat in the living room and talked and he asked for a glass of water. After he returned the glass to the kitchen, he turned around and saw Allison standing in the doorway holding his gun. She asked, "[W]hat is this[?]" Defendant believed the gun fell out of his pants while they were sitting on the sofa and "somehow the safety got off."

Defendant said he started to walk towards Allison and reach for the gun, but Allison "kind of put like a little bit of a grip into the gun" and it "went off when I tried to pull it out," and a bullet struck her in the right hand. She stumbled backwards and their feet became tangled in a rug, causing both to fall down the stairs, with the gun discharging "a couple more shots." One bullet struck defendant in the hand. Defendant said the gun was in both of their hands when they fell, with his finger on the trigger and his eyes closed.

After striking his head at the bottom of the stairs, defendant said Allison "[got] the gun and it was leveled at my head." As he tried to push the gun away, he twisted her left

hand and the gun went off two more times, striking Allison in the face. Defendant denied pulling the trigger for those two shots. After he felt Allison's hand go limp, he grabbed the gun and fell forward onto the stairs, hitting his arm on a step while his finger was on the trigger. He explained, "I must have pulled the trigger, and that last shot went to I believe the side of her head." He estimated the entire incident lasted fifteen to twenty seconds.

After the shooting, defendant said he went upstairs into the kitchen, looking for "[a]nything that could help," but did not notice the wall phone. He went back down the stairs and stepped over Allison's body; he shook her shoulder and called her name, with no response. At that point, he realized Allison was dead; scared, he left the house and ran to his car.

Defendant denied planning to hurt Allison, noting she was "a wonderful, non-violent person," she was his friend, and he "cared for her very much." He described the shooting as an "unfortunate . . . set of circumstances." He explained, "I had no problems whatsoever. We were not arguing. We had no bad words. There was no threats." On cross-examination, defendant acknowledged he violated the law when he took the Beretta to Allison's house, because he did not have a permit to carry the firearm. He also acknowledged that he had firearms training and

attended a shooting range.

The State called two witnesses on rebuttal. Gary confirmed the week before the incident he exchanged approximately fifteen messages with "Della Venta," the fake Facebook identity defendant created. Gary received the last message from "Della Venta" around 5:30 or 6:00 p.m. on March 27, 2010. In these messages, Gary revealed his name, the town where he lived, and information about his relationship with Allison, including that they had dated and were "hooking up a little bit."

Allison's mother testified that she spoke with her daughter on March 26, 2010, about the drive home from Boston the previous weekend. Her daughter said that after she received a text or call during the trip, defendant grabbed the phone from her hands and started to argue with her.

The next evening, Allison's mother spoke again with her daughter, recalling that she "really looked upset." At that time, Allison expressed concern about the tire-slashing incidents and told her mother she believed defendant was stalking her. She asked her mother about getting a restraining order against him.

II.

We first consider defendant's claim the trial court committed reversible error by admitting the evidence of the two

prior tire-slashing incidents under N.J.R.E. 404(b). We disagree.

The trial court conducted a pretrial hearing pursuant to N.J.R.E. 104 to determine the admissibility of the March 23 and 26, 2010 tire-slashing incidents. Gary and Judy testified at the hearing. Gary said that on March 23, Allison drove to Livingston after work and parked her car on the street in front of his house. Allison left his house around 10:00 p.m. She called him about five minutes later, stating her left front tire was flat. Gary said he never saw the flat tire, explaining "she had driven on it," so it was "completely ruined."

At 8:30 p.m. on March 26, 2010, Allison again drove to Gary's house and parked the "[s]ame exact way" as three days earlier, with her driver's side facing the street. She left before 1:00 a.m., but called Gary immediately to tell him both left tires were "completely flat." The next morning, Gary noticed a "slit mark" on the top of each left tire.

Judy testified next, stating on March 23, 2010, at 8:54 p.m., she received a phone call from defendant, who said he had slashed Allison's tires at "someone's house" in Livingston. She said defendant sounded "[a] little bit panicked and surprised, but almost in a proud way that he had done it." She also said defendant previously talked about Allison seeing someone who

lived in Livingston; defendant told her he loved Allison and wanted them to get back together. Judy admitted not telling anyone about this conversation until two years after the murder, explaining she was scared. Judy's phone records confirmed defendant called her on the evening of March 23.

The court ruled both incidents were admissible under N.J.R.E. 404(b), applying the four-prong test set forth in State v. Cofield, 127 N.J. 328, 338 (1992), governing admissibility of prior bad acts. Regarding the first prong, the court found the evidence was relevant because defendant's "expressed intentions to his friends, the statement that he made to [Judy, and] the manner in which he uttered that statement according to her testimony[,]" went directly to the issues of motive and intent, and to the issue of the validity of his self-defense claim. The court further stated it was relevant to determine whether defendant intended to harm Allison.

Regarding the second prong, the court found the events were reasonably close in time and similar in nature to the offense charged, as they involved acts of violence.

Addressing the third prong, the court was "firmly convinced" defendant committed the March 23 act due to his purported admission. Regarding the March 26 incident, the court found the factual circumstances were identical

> in terms of what took place, the vehicle being parked in the very location that it had been before, the vehicle's tires being slashed on the left side, the area of the vehicle that would be facing the street and in close — in the timeframe of three days now between these two episodes is, in my view, a circumstance that the [c]ourt should consider in terms of evaluating the credibility or worth of the circumstantial evidence.

Regarding the fourth prong, the court found the evidence was "highly probative" because it "would go to the issue of negating any contention by this defendant that he was seeking to portray his acts as being in defense of any assaultive conduct towards him by the deceased."

We review a trial court's ruling on the admissibility of other crimes, wrongs, or bad acts evidence for abuse of discretion. State v. Barden, 195 N.J. 375, 390-91 (2008). We afford great deference to the court's ruling and will reverse only where there was a clear error or judgment. Ibid.

N.J.R.E. 404(b) governs other crimes, wrongs, or acts evidence as follows:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

"'Because N.J.R.E. 404(b) is a rule of exclusion rather than a rule of inclusion,' the proponent of evidence of other crimes, wrongs or acts must satisfy a four-prong test." State v. Carlucci, 217 N.J. 129, 140 (2014) (quoting State v. P.S., 202 N.J. 232, 255 (2010)). Under the four-prong test, in order for other crime or wrongs evidence to be admissible under N.J.R.E. 404(b), the evidence of the other crime, wrong or act: (1) "must be admissible as relevant to a material issue;" (2) "must be similar in kind and reasonably close in time to the offense charged;" (3) "evident of the other crime must be clear and convincing;" and (4) its probative value "must not be outweighed by its apparent prejudice." Cofield, supra, 127 N.J. at 338.

To satisfy the first prong, the evidence must have "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." See N.J.R.E. 401 (defining "[r]elevant evidence"). The evidence must also concern a material issue, "such as motive, intent, or an element of the charged offense." State v. Rose, 206 N.J. 141, 160 (2011) (quoting P.S., supra, 202 N.J. at 256).

Proof of the second prong is not required in all cases, but only in those that replicate facts in Cofield, where "evidence of drug possession that occurred subsequent to the drug incident that was the subject of the prosecution was relevant to prove

possession of the drugs in the charged offense." Barden, supra, 195 N.J. at 389.

The third prong requires clear and convincing proof that the person against whom the evidence is introduced actually committed the other crime or wrong. Carlucci, supra, 217 N.J. at 143. "[T]he prosecution must establish that the act of uncharged misconduct . . . actually happened by 'clear and convincing' evidence." Rose, supra, 206 N.J. at 160.

Last, the fourth prong is "generally the most difficult part of the test." Barden, supra, 195 N.J. at 389. "Because of the damaging nature of such evidence, the trial court must engage in a 'careful and pragmatic evaluation' of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice." Ibid. (quoting State v. Stevens, 190 N.J. 289, 303 (1989)). The analysis incorporates balancing prejudice versus probative value required by N.J.R.E. 403, but does not require, as does N.J.R.E. 403, that the prejudice substantially outweigh the probative value of the evidence. State v. Reddish, 181 N.J. 553, 608 (2004). Rather, the risk of undue prejudice must merely outweigh the probative value. Ibid. (citations omitted).

However, a "very strong" showing of prejudice is required to exclude motive evidence under this prong. State v. Castagna,

400 N.J. Super. 164, 180 (App. Div. 2008) (quoting State v. Covell, 157 N.J. 554, 570 (1999)). "A wide range of motive evidence is generally permitted, and even where prejudicial, its admission has been allowed in recognition that it may have 'extremely high probative value.'" Rose, supra, 206 N.J. at 165 (quoting State v. Long, 173 N.J. 138, 164-65 (2002)).

In addition, the trial court must also consider the availability of other less prejudicial evidence to establish the same issue on which the State offers other crimes or wrongs evidence. P.S., supra, 202 N.J. at 256. In order to minimize "the inherent prejudice in the admission of other-crimes evidence, our courts require the trial court to sanitize the evidence when appropriate." Barden, supra, 195 N.J. at 390 (citation omitted).

Applying these standards, we find no abuse of discretion in the court's pretrial ruling. Regarding the first prong, defendant contends the tire slashing incidents were not relevant to the "narrow question presented in this trial." However, we find the court properly admitted this evidence for the limited purpose of determining defendant's motive and intent, specifically, whether he intended to harm Allison and whether he had a motive for the killing.

Defendant does not challenge the second prong of the test.

Regarding the third prong, defendant contends the record was "devoid of any evidence, direct or circumstantial, tying the [d]efendant to the tire slashing of March 26." However, we discern substantial circumstantial evidence defendant committed the second slashing. As the trial court noted, someone slashed Allison's tires twice, at the exact same location, within three days. Moreover, the court credited Judy's testimony that defendant admitted to her he committed the first slashing, an admission supported by phone records. We find the court did not abuse its discretion in concluding the State produced clear and convincing evidence defendant slashed Allison's tires on both occasions.

Last, regarding prong four, defendant contends the court should not have admitted the evidence because it was highly prejudicial. Notwithstanding the prejudicial nature of the evidence, we find the trial court did not abuse its discretion due to its "extremely high probative value." Rose, supra, 206 N.J. at 165. Here, the evidence was essential to rebut defendant's claims of accident and self-defense, and to establish his motive and intent to harm Allison.

Moreover, following the testimony of Gary and Judy at trial, the court instructed the jury on the limited use of this evidence. The court gave a similar instruction in its final

charge. We conclude these limiting instructions were sufficient to prevent any prejudice from outweighing the probative value of the evidence. Barden, supra, 195 N.J. at 390.

We find defendant's remaining arguments on this issue to lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

III.

Defendant next argues the prosecutor's misconduct during summation deprived him of a fair trial. Specifically, defendant argues the prosecutor erred by (1) making inflammatory statements and using PowerPoint slides, constituting a "call to arms," (2) casting aspersions on the defense and defense counsel, (3) vouching for the State's case and witnesses, and (4) making inaccurate factual and legal assertions. Defendant also argues the court's request to withhold his objections until the end of summation made it impossible to remedy these errors. We reject these claims as lacking sufficient merit to warrant a new trial.

We review de novo claims of prosecutorial misconduct during summation. State v. Smith, 212 N.J. 365, 387 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013). Here, defense counsel moved for a mistrial at the completion of the State's summation, which the court denied. We review a

motion for a mistrial under a deferential standard, and will not disturb the trial court's decision unless there is an abuse of discretion that results in manifest injustice. State v. Jackson, 211 N.J. 394, 407 (2012).

Prosecutors in criminal cases "are expected to make vigorous and forceful closing arguments to juries." State v. Frost, 158 N.J. 76, 82 (1999) (citation omitted). They are "afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." Ibid. (citations omitted). They may comment on the facts or what may be reasonably inferred from the evidence. State v. Wakefield, 190 N.J. 397, 457 (2007), cert. denied, 522 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008). "However, 'the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done.'" State v. Smith, 167 N.J. 158, 177 (2001) (quoting Frost, supra, 158 N.J. at 83).

When making a closing argument, a prosecutor may not "make inaccurate legal or factual assertions," Frost, supra, 158 N.J. at 85, or "cast unjustified aspersions on the defense or defense counsel," Smith, supra, 167 N.J. at 177. Prosecutors may not make "inflammatory and highly emotional" appeals that divert a jury from a fair consideration of the evidence. State v.

Marshall, 123 N.J. 1, 161 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993). They further cannot "express a personal belief or opinion as to the truthfulness of his or her own witness's testimony." State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993). Last, prosecutors cannot make "call to arms" comments directing jurors to "send a message to the community." State v. Neal, 361 N.J. Super. 522, 537 (App. Div. 2003).

Where prosecutorial misconduct has occurred, courts should not reverse unless the conduct was "so egregious that it deprived the defendant of a fair trial." Wakefield, supra, 190 N.J. at 438 (quoting Smith, supra, 167 N.J. at 181). The prosecutor's conduct must "substantially prejudice the defendant's fundamental right to have a jury fairly evaluate the merits of his [or her] defense" in order to warrant reversal. State v. Roach, 146 N.J. 208, 219, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996) (citation omitted).

In determining whether prosecutorial misconduct warrants reversal, courts should consider "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." Smith, supra, 167 N.J.

at 182 (citing State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001)). Even if the evidence of guilt is overwhelming, it cannot be a basis for depriving a defendant of his or her right to a fair trial. Frost, supra, 158 N.J. at 87.

However, "[o]ur task is to consider the 'fair import' of the State's summation in its entirety." Jackson, supra, 211 N.J. at 409 (quoting Wakefield, supra, 190 N.J. at 457). An isolated improper comment may be insufficiently prejudicial to warrant reversal, especially where the trial judge instructed the jury that counsel's statements are not evidence. State v. Setzer, 268 N.J. Super. 553, 566 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994). We may also consider whether statements in the defense counsel's summation prompted the prosecutor's comments. Smith, supra, 212 N.J. at 403-04.

Here, defense counsel first objected to the prosecutor's statements minutes into the summation, but the court instructed counsel to save his objections for the end. Despite this timely objection, we find the prosecutor's statements do not constitute reversible error. We address defendant's specific arguments in turn.

1. Call to Arms

As noted, the State utilized a PowerPoint presentation

during its summation. Defendant contends specific slides, and the prosecutor's accompanying statements, contained inflammatory material constituting an impermissible "call to arms." We disagree.

First, defendant contends the prosecutor erred by stating, "[Allison] did let him in. And you know why? Because they were friends, because she trusted him. . . . She's a [twenty-two-year-old] girl and she's known him for a long time. Put yourself in her shoes. She said, no, he's not going to do anything." Defendant claims inviting jurors to "put yourself in her shoes" constitutes error. The State argues this statement was necessary to explain why Allison opened the door for defendant on the night she died; further, it constituted a fair response to defense counsel's summation statement that defendant went to Allison's house "to see his friend" and that Allison "opened the door." Smith, supra, 212 N.J. at 403-04. While emotional and personalized arguments inviting jurors to consider how they would respond to a particular situation are clearly improper, see State v. Blakney, 189 N.J. 88, 95 (2006), we discern no basis to find this isolated statement impermissibly inflamed the jury.

Defendant next challenges the following statements commenting on defendant running from Allison's house:

> And as he ran, . . . he ran with his bleeding left hand at some point clutched to his chest, because we had — you remember we had — this is his blood[,] and on his cross was his blood. And he ran holding it. And I don't think he was praying for her life.

Defendant contends this religious imagery had no legitimate use other than to incite the jurors. We find that comments about defendant leaving the house and running to his vehicle were reasonable inferences drawn from the evidence. The record shows defendant testified he was shot in the hand and that after realizing Allison was dead, left the house and ran to his car. Detective Redfern described "reddish-brown stains" on defendant's cross necklace. We therefore find these statements were fair comment on the evidence. To the extent the religious imagery crossed the line of proper argument, we do not find this isolated reference denied defendant a fair trial.

Defendant also challenges several PowerPoint slides. Specifically, one slide contained an enlarged picture of defendant's gun, with the barrel facing the jury. Another contained a photograph of Allison next to bullet points stating, "career," "daughter," and "wonderful." Another slide described defendant's Beretta as "The Murder Weapon." The State also presented a slide titled "The Truth," with a photo of defendant in the hospital labeled "the living," and a photo of defendant's body with her bullet wounds, labeled "the dead."

We find these slides were not unduly inflammatory or prejudicial. The jury had already seen photographs of Allison's wounds and heard testimony regarding defendant's hand wound. Defendant noted Allison was "wonderful" and the jury heard she was a college graduate during trial. Furthermore, the trial court found the "murder weapon" slide was proper, as the State had a right to comment on the weapon used to kill Allison. We find these slides did not over-simplify the law, nor was there a basis to conclude these slides had an impermissible impact on the jurors. See State v. Michaels, 264 N.J. Super. 579, 641 (App. Div. 1993) ("There is no basis on which to conclude that placing the word 'guilty' on a board had . . . an immediate impact upon the jurors . . . ."), aff'd, 136 N.J. 299 (1994).

2. Casting Aspersions

Defendant next argues the State improperly cast aspersions on his defense and on defense counsel. Specifically, defendant challenges the prosecutor's characterization of defendant's testimony as presenting the "spaghetti defense."

> The defendant Mr. Tedesco testified in I like to call it the spaghetti defense . . . . [Defendant] said, well, I don't know what happened. And then he said, oh, it was an accident. And then he said part of it was self[-]defense. And then . . . I asked him, one of my first questions, ["]was this a tragic accident or self[-] defense,["] and he said, ["]oh, a little bit

> of both. ["] Throw it up on the wall and see what sticks.

Defendant contends the term "spaghetti defense" cast potential "ethnic aspersions" on defendant, who is Italian, and degraded his counsel's trial tactics.

We conclude defendant's argument lacks merit. In discussing the term "spaghetti defense," the judge was not convinced the term was intended as an "adverse reflection upon individuals of Italian descent or ethnicity." Rather, the judge found it was "a more generic use of the word." We agree, as there was nothing in the record to suggest the reference to spaghetti was a derogatory slur against defendant. Moreover, we find the metaphor used by the prosecutor constituted fair comment in light of defendant's testimony.

Defendant also challenges a PowerPoint slide describing his version of events that included a bullet point, "Tailored to fit the evidence." Contrary to defendant's assertion, we find this slide did not "imbue" defendant with the "stain of dishonesty" or impugn his counsel's credibility. The "tailored" statement was one bullet point among nine; for example, other points stated that defendant's testimony was "physically impossible" and "medically impossible." Further, the prosecutor explained in detail the implausibility of defendant's version when evaluated against the largely uncontroverted physical and

medical evidence of record. We conclude this single bullet point, in the context of the entire summation, did not deprive defendant of a fair trial.

3. Vouching for the State's case and witnesses

Defendant next argues the prosecutor improperly vouched for her case and witnesses by comparing the State's twenty-five witnesses to the one witness in defendant's case. Defendant also challenges the prosecutor's use of an animated slide showing the State's witnesses tipping the scale towards murder.

During her summation, the prosecutor stated, "All [twenty-five] of the State's witnesses were unbiased and believable and supported what [Allison's] wounds told to you." She later added, "It's either he didn't do it, if you believe the one, or he did do it, or you believe the [twenty-five]." In response to these statements, at the close of summation, defense counsel asked the court to instruct the jury, "it's not the number of the witnesses, it's the quality." The court granted defendant's request, instructing the jury:

> It is not the number of witnesses that each party calls in the case that is important. Rather, it is the quality of the testimony that the various witnesses give to you. That is the important criterion for you to consider and evaluate putting into effect these particular instructions.

We find this instruction sufficient to overcome any

prejudice to defendant. The court should generally give curative instructions immediately, and should specifically address the problematic statements at issue. See State v. Vallejo, 198 N.J. 122, 134-35 (2009). Although the judge gave this instruction during his jury charge, we find it sufficient to cure any prejudice, and conclude the prosecutor's comments did not deprive defendant of a fair trial. Wakefield, supra, 190 N.J. at 438.

Defendant also argues the prosecutor improperly vouched for herself by referring to comments defendant allegedly made outside the presence of the jury. At closing, the prosecutor referenced defendant as "[t]he man who shooed me away when I was done with my cross-examination, who as you were walking out stood up and cuffed his mouth and whispered something to me. The man who murdered [Allison]."

The court found that the reference to the defendant cupping his hands towards the prosecutor was not a part of the evidence in this case, struck it from her summation, and instructed the jury to disregard it. We find this clear curative instruction to the jury removed any prejudice to defendant. Smith, supra, 167 N.J. at 182.

4. Inaccurate Assertions

Defendant next argues the prosecutor misstated the law and

facts during summation. First, he objects to the prosecutor's attribution of statements to Allison regarding what she may have said to defendant. Describing Allison and defendant's interactions, the prosecutor stated, "[Allison] told [defendant], I don't want to be with you, Giuseppe Tedesco, I want to be with [Gary] . . . ." Defendant also highlights the prosecutor's characterization of text messages between defendant and Allison, when she noted, "The text messages said, [']I don't want to just be your — I don't want to be your girlfriend, I don't really want to be your friend, don't talk to me anymore[']."

Deciding the motion for mistrial, the judge found the first statements were speculative and not grounded in the evidence, and later instructed the jury to disregard these comments because they were "not based on evidence from which reasonable inferences can be drawn." Although the judge did not specifically address the texts, we find the language of the curative instruction sufficient to cover both statements.

Defendant also challenges the prosecutor's comments suggesting he told his father and mother, "I just killed [Allison]." Contrary to defendant's assertion of falsity, the court noted this statement was a reasonable inference based on the "dynamics of what was taking place at that particular point

in time," that defendant's parents would have asked him how he was shot, and defendant would have answered. As defendant admitted to shooting Allison, albeit by accident and then in self-defense, we find this comment proper as a reasonable inference from the testimony.

Defendant next argues the State erred by twice referring to defendant holding his firearm "gangster style." The prosecutor stated, "Remember when [defendant] took the stand and he showed you[,] and I said how were you holding the gun? Like this, gangster style." However, in denying the motion for a mistrial, the court ruled that it would strike the reference to "gangster style" and, during the final charge, instructed the jury to disregard the comment. We find the judge's response sufficient.

Defendant contends the State erred by suggesting "the reason [defendant] didn't shoot her in the foyer [was] because he wanted to confront her, because he wanted to look at her when he did it," and that defendant thought, "if I can't have [her] nobody can." She also stated Allison likely "begged for her life" and said "I'll go have the cake with you, we'll be friends" when defendant arrived at her house. Given the unexpected appearance of defendant at her home with a gun and the testimony of defendant's statements about Allison, we find the prosecutor drew a reasonable inference from the evidence in

the record in making these comments.

Defendant further challenges the prosecutor's statements interpreting the medical testimony. While some comments may have misstated certain details of the expert testimony, we find they were not so inaccurate to constitute reversible error. Moreover, the judge instructed the jury that counsel's statements were not evidence. Therefore, we find these comments did not deprive defendant of a fair trial.

Defendant similarly argues the prosecutor misstated the law in her summation and PowerPoint. While the prosecutor made some minor misstatements, neither the comments nor the slides deprived defendant of a fair trial. The prosecutor told the jurors the court would instruct them on the law about murder, aggravated manslaughter and other charges. The judge later gave these instructions; he also told the jurors to apply the law to the facts to arrive at a fair and correct verdict, and that "you must accept the law as given to you by me." We conclude defendant was not prejudiced by the remarks.

5. Cumulative Errors

Finally, defendant argues the court's refusal to permit timely objections made any curative instructions insufficient to overcome the prejudice of improper comments, and the resulting cumulative effects of the prosecutor's errors denied him a fair

trial. We disagree.

As noted, defense counsel initially objected to the prosecutor's remarks during summation, at which point the judge directed he hold his objections until closing. After the prosecutor completed her summation, defendant moved for a mistrial. The judge denied the motion, determining he could address the matters with curative instructions. Defendant contends, however, the delay between his objection and the judge's later curative instructions rendered them ineffective.

Our Supreme Court has held that a motion for mistrial immediately after a summation on the basis of a prosecutor's improper remarks can be "tantamount to a timely objection" and provides the judge sufficient opportunity to cure the improprieties. State v. Farrell, 61 N.J. 99, 106 (1972). We further "recognize that an objection immediately following summation does permit curative action by the judge." State v. Bauman, 298 N.J. Super. 176, 207 (App. Div.), certif. denied, 150 N.J. 25 (1997). As noted, because we found the judge's curative actions sufficient, we do not believe the alleged delay, even accounting for the time the jurors took for lunch after the summations, prejudiced defendant in this matter.

Finally, defendant contends the cumulative effect of the prosecutor's errors overcame the court's curative instructions.

As a corollary to our analysis regarding the specific issues previously addressed, with no finding of error, we reject defendant's argument that cumulative errors deprived him of a fair trial. We find defendant arguments lack sufficient merit to warrant further discussion. See R. 2:11-3(e)(2).

IV.

Defendant next argues the trial court erred by admitting statements he made to his friends while intoxicated, and by failing to properly instruct the jury on these statements. We disagree.

First, defendant contends the court erred in failing to hold a N.J.R.E. 104(c) hearing on these statements. Prior to trial, defendant requested a 104(c) hearing, which the trial court denied.

"The trial judge has broad discretion in determining the admissibility of potentially prejudicial evidence." State v. Scherzer, 301 N.J. Super. 363, 424 (App. Div.) (citing State v. Wilson, 135 N.J. 4, 20 (1994)), certif. denied, 151 N.J. 466 (1997). Absent a clear abuse of discretion, we will not overturn the decision unless it was so wide of the mark that a manifest denial of justice resulted. Ibid.

In criminal proceedings, "the admissibility of a defendant's statement which is offered against the defendant is

subject to Rule 104(c)." N.J.R.E. 803(b). N.J.R.E. 104(c), however, requires a preliminary hearing only where "by virtue of any rule of law" a preliminary determination as to admissibility is required. Commentary to N.J.R.E. 803(b) indicates, "Where there is any question regarding the admissibility or scope of admissibly of an alleged statement of a defendant . . . the better practice appears to be to conduct a preliminary hearing . . . ." Biunno, Current N.J. Rules of Evidence, cmt. 6 on N.J.R.E. 803(b) (2016). However, we have suggested an N.J.R.E. 104(c) hearing is unnecessary if the defendant's statement to a non-police witness was made prior to or during the commission of the crime. See State v. Baldwin, 296 N.J. Super. 391, 398-99 (App. Div.), certif. denied, 149 N.J. 143 (1997).

Based on this standard, we find the trial judge appropriately denied defendant's request for a N.J.R.E. 104 hearing. Defendant argued a hearing was necessary to determine whether defendant's statements were reliable, and whether the probative value outweighed the prejudice pursuant to N.J.R.E. 403. However, the judge correctly noted each witness would be available at trial for direct and cross-examination, and that defense counsel could argue the circumstances under which the statements were made suggested they were not believable. The court further noted the evidence was probative as it related to

defendant's mental state regarding his relationship with Allison. Moreover, defendant made these statements to his friends, and not under any coercion by police. For these reasons, we find the trial judge did not err in denying defendant's request for a hearing.

Defendant also argues the trial court erred by failing to give the jury a Kociolek[3] charge. Defendant did not request this charge at trial, restricting our review to whether plain error exists, meaning error "clearly capable of producing an unjust result." R. 2:10-2. Absent plain error, "no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict." R. 1:7-2.

The Kociolek charge pertains to the reliability of an inculpatory statement made by the defendant to any witness. State v. Jordan, 147 N.J. 409, 420-21 (1997). As explained in Kociolek, the court should instruct the jury to "receive, weigh and consider such evidence with caution in view of the generally recognized risk of inaccuracy and error in communication and recollection of verbal utterances and misconstruction by the hearer." Id. at 420 (quoting Kociolek, supra, 23 N.J. at 421).

[3] State v. Kociolek, 23 N.J. 400 (1957).

According to defendant, the failure to give the charge was plain error, as such charges could have led the jury to a different result. Although the Court has directed the Kociolek charge should be given whether or not specifically requested, the Court held the omission of such charge is not reversible per se. Jordan, supra, 147 N.J. at 428. "Where such a charge has not been given, its absence must be viewed within the factual context of the case and the charge as a whole to determine whether its omission was capable of producing an unjust result." State v. Crumb, 307 N.J. Super. 204, 251 (App. Div. l997), certif. denied, 153 N.J. 215 (1998).

We discern no plain error here. There was substantial evidence establishing defendant's guilt in addition to his oral statements to his friends. Moreover, the court clearly instructed the jury during its final charges that, in determining credibility of a witness, they should consider how the facts were obtained, the witness's ability to recollect the event, and the extent to which each witness was corroborated or contradicted. We find no capacity for an unjust result.

V.

Defendant argues ex-parte conversations between the jury aide and jurors denied him a fair trial. We disagree.

First, on December 13, 2012, juror number thirteen

approached the jury aide to report she recognized a man in the courtroom who was making her nervous. The judge questioned the juror, who said the man knew her husband and had visited her home, and she noted another juror also knew the man. The juror stated the man "rubs me the wrong way," and said she was distracted when he first entered the courtroom. However, she said there would be no problem if the man sat where she could not see him. Both the prosecutor and defense counsel indicated the man, a retired police officer, had no connection to the case.

The judge then determined there was "no need to make any further issue with regard to this." Defense counsel objected, noting the involvement of the second juror. However, the judge stated he was satisfied the case could continue as neither side was associated with the man.

Second, at the close of testimony on December 19, 2012, the judge advised counsel the jury aide had a conversation with the jurors, which the aide described as follows:

> I always speak with my husband during the luncheon break. And he said he had heard on the radio that people were being asked to leave off any Christmas lights tonight in support of those — of what had happened in [Newtown,] Connecticut. And I thought this was a great thing to do, and I, in turn, told the jurors as they were coming back. And I also told the judge.

The aide further stated the jurors thought it was "a good idea to do something like that."

After excusing the aide, the judge told counsel, due to the "tragic events of Newtown, Connecticut," he was considering giving the jury a general charge to evaluate the case based only on the evidence at trial and "not to take into account factors of sympathy or any national events that have transpired during the trial." Defense counsel expressed concern about highlighting the Newtown incident, suggesting the court simply charge the jury to decide the case based on the evidence and not outside influences. The judge suggested they revisit the issue in January.

We review a trial judge's decisions in handling jury issues for abuse of discretion. State v. R.D., 169 N.J. 551, 559 (2001). "We traditionally have accorded trial courts deference in exercising control over matters pertaining to the jury." Id. at 559-60.

"The Sixth Amendment to the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee criminal defendants 'the right to . . . trial by an impartial jury.'" Id. at 557 (quoting U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 10). A criminal defendant "is entitled to a jury that is free of outside influences and will decide the case

according to the evidence and arguments presented in court in the course of the criminal trial itself." State v. Williams, 93 N.J. 39, 60 (1983) (citation omitted). "The securing and preservation of an impartial jury goes to the very essence of a fair trial." Ibid.

"[I]f during the course of the trial it becomes apparent that a juror may have been exposed to extraneous information, the trial court must act swiftly to overcome any potential bias and to expose factors impinging on the juror's impartiality." R.D., supra, 169 N.J. at 557-58 (citing State v. Bey, 112 N.J. 45, 83-84 (1988)). Accordingly, the court must "investigate and . . . determine whether the jurors are capable of fulfilling their duty in an impartial and unbiased manner." State v. McGuire, 419 N.J. Super. 88, 153 (App. Div.), certif. denied, 208 N.J. 335 (2011).

However, our Court has recognized that "the trial court is in the best position to determine whether the jury has been tainted." R.D., supra, 169 N.J. at 559. In making that determination, the trial court must "consider the gravity of the extraneous information in relation to the case, the demeanor and credibility of the juror or jurors who were exposed to the extraneous information, and the overall impact of the matter on the fairness of the proceedings." Ibid. "The decision to grant

a new trial based on jury taint resides in the discretion of the trial court . . . ." Id. at 558.

We conclude neither of the two incidents identified by defendant denied him a fair trial. Regarding the first incident, the judge did not abuse his discretion by finding it was unnecessary to voir dire the other juror, based on his thorough inquiry of juror number thirteen. See R.D., supra, 169 N.J. at 561 ("Although the court should not simply accept the juror's word that no extraneous information was imparted to the others, the court's own thorough inquiry of the juror should answer the question whether additional voir dire is necessary to assure that impermissible tainting of the other jurors did not occur.").

Regarding the second incident, we find the judge thoroughly questioned the aide, and addressed a possible curative charge with counsel. Defense counsel objected to any special instruction and he apparently did not ask the judge to revisit the issue. We find the judge conducted an appropriate investigation and did not abuse his discretion in determining the jury could continue as impartial decision-makers. McGuire, supra, 419 N.J. Super. at 153.

Defendant also contends there is inadequate description of these ex parte conversations in the record in order to permit us

to make a determination on the prejudice to defendant. See State v. Basit, 378 N.J. Super. 125, 136-37 (App. Div. 2005). This claim lacks merit, as we find the record fully detailed the events that transpired.

VI.

Next, we briefly address defendant's additional claims of error in the trial judge's evidentiary rulings. Defendant contends the trial judge erred by: permitting rebuttal testimony about the victim's state of mind; permitting the State's expert to testify beyond his report; and permitting introduction of evidence from defendant's Facebook page. We will not disturb the trial court's evidentiary rulings absent a clear abuse of discretion. See State v. McLaughlin, 205 N.J. 185, 205 (2011).

Defendant first argues the court erred by admitting rebuttal testimony from Allison's mother recounting conversations with her daughter, where they discussed obtaining a restraining order after the tire-slashing incident. The court ruled these statements were admissible under the "state of mind" hearsay exception, N.J.R.E. 803(c)(3), in order to rebut defendant's claim of accident or self-defense. The court found this testimony was offered "to address the issue of what was on the mind of [Allison] at this time."

"[T]o be admissible under the state of mind exception to

the hearsay rule, the declarant's state of mind must be 'in issue.'" McLaughlin, supra, 205 N.J. at 206 (citation omitted). "The necessary predicate to admission of such evidence is that: a) the statement reflects a mental or physical condition of the declarant which constitutes a genuine issue in the case or b) the statement is otherwise relevant to prove or explain the declarant's conduct." State v. Downey, 206 N.J. Super. 382, 390 (App. Div. 1986). So long as it meets the relevancy requirement, a speaker's declaration of fear may be admissible "to establish[] that the decedent was not the aggressor, did not commit suicide and was not accidentally killed." State v. Scharf, 225 N.J. 547, 570 (2016) (quoting State v. Machado, 111 N.J. 480, 485 (1988)). However, the court may exclude such evidence pursuant to N.J.R.E. 403 if the risk of prejudice substantially outweighs its probative value. Id. at 579-80.

We find the judge properly admitted Allison's statement to rebut defendant's claims the shooting was an accident and in self-defense. Defendant argues, although he claimed self-defense, his testimony indicated the "first several shots were accidental." Defendant therefore contends Allison's state of mind as to her fear of defendant was irrelevant. However, the standard applies to claims of accident. Scharf, supra, 225 N.J. at 580. Moreover, defendant testified that Allison pointed the

gun at him, and otherwise suggested she was the aggressor. Thus evidence of her state of mind was relevant to show she "so feared defendant that she was an unlikely aggressor." State v. Chavies, 345 N.J. Super. 254, 273 (App. Div. 2001). We find the court did not abuse its discretion in admitting this testimony, and any potential for prejudice did not outweigh its probative value.

Defendant next argues the court erred by allowing the medical examiner, Dr. Shaikh, to testify beyond the scope of his autopsy report and area of expertise by offering opinions on the effect of each bullet wound.

At trial, Dr. Shaikh was qualified as an expert in forensic pathology. He then testified to the contents of his autopsy report, and described Allison's six gunshot wounds. The State then sought to elicit Dr. Shaikh's opinion on the effects of these wounds. Defense counsel objected, challenging Dr. Shaikh's "ability to render an opinion with respect to that." The court overruled this objection. The State then sought to elicit Dr. Shaikh's opinion on whether the injuries would have prevented Allison from fighting back, to which defendant objected and the court again overruled.

Evidentiary challenges regarding the scope of expert testimony are governed by N.J.R.E. 702, which states, "If

scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." For expert testimony to be admissible, it must meet three requirements:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.
>
> [State v. Kelly, 97 N.J. 178, 208 (1984).]

Defendant argues the State violated Rule 3:13-3(b)(1)(I), requiring parties to provide in discovery a copy of the expert's report, or, if the expert did not prepare a report, "a statement of facts and opinions to which the expert is expected to testify." This requirement is a continuing obligation. R. 3:13-3(f). Defendant contends the State elicited testimony beyond the "four corners" of Dr. Singh's report without providing proper notice.

We disagree. N.J.R.E. 705 permits an expert to testify "in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise." Here, Dr. Shaikh's report clearly

indicated Allison's "manner of death" was "[h]omicide." A medical expert may opine that a death was a "homicide" in order to rule out the possibility that a victim's injuries were accidental. See State v. Baluch, 341 N.J. Super. 141, 185 (App. Div.), certif. denied, 170 N.J. 89 (2001). Dr. Sheikh testified to his opinions that certain gunshot wounds would have affected the victim's ability to struggle or fight back, and therefore were relevant to determine her cause of death. We find N.J.R.E. 705 permits this testimony, as it constituted the "underlying facts" for his opinion that Allison died by homicide.

Furthermore, we find Dr. Sheikh did not exceed the scope of his expertise, as forensic pathologists may testify regarding the effect of bullet wounds on internal systems. See State v. Jamerson, 153 N.J. 318, 337-38 (1998) (citing Commonwealth v. Guess, 273 Pa. Super. 72, 416 A.2d 1094 (1979)). We therefore decline to reverse on this basis.

Last, defendant argues the trial court erred by allowing the introduction of evidence from his Facebook page. The issue arose when defense counsel asked defendant about his fake Facebook page during direct examination. On cross-examination, defendant acknowledged he had a real Facebook page. The prosecutor asked defendant about a quote on the page, from the "Sopranos" television show, which read, "I know how to treat

people, those that are nice to me get treats, those who aren't . . . well I got this severance thing that I do."

The prosecutor later sought to move printouts from both Facebook pages into evidence, which the court permitted over defendant's objection. The prosecutor further referenced this quote during her summation, and one of the PowerPoint slides contained this quote. During defendant's motion for a mistrial after the summations, defendant argued use of the quote was improper. The trial court denied the motion, explaining, "Here the defendant utilized that phrase himself. The State had a right to comment on that."

The scope of cross-examination is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness." N.J.R.E. 611(b). However, "[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Ibid. Because the scope of cross-examination rests in the broad discretion of the trial court, its decision will not be disturbed absent clear error and prejudice. Wakefield, supra, 190 N.J. at 451-52; State v. Messino, 378 N.J. Super. 559, 583 (App. Div.), certif. denied, 185 N.J. 297 (2005).

Here, cross-examination of defendant regarding postings on his real Facebook page was proper because defense counsel raised

the Facebook issue on direct examination. The prosecution appropriately utilized the contents of defendant's Facebook posts to counter defendant's testimony he was not the aggressor. Moreover, the defendant put his own credibility at issue by testifying. We find the judge did not abuse his discretion by permitting introduction of these statements.

VII.

Last, defendant contends his sentence was excessive because the court improperly relied on the nature and circumstance of Allison's death as an aggravating factor. We disagree.

Our review of sentencing decisions is governed by an abuse of discretion standard. State v. Blackmon, 202 N.J. 283, 297 (2010). We will modify a sentence only where the judgment of the court is such that it "shocks the judicial conscience." State v. Roth, 95 N.J. 334, 364 (1984) (citing State v. Whitaker, 79 N.J. 503, 512 (1979)). We will affirm the sentence so long as the judge properly identifies and balances the aggravating and mitigating factors, which are supported by sufficient credible evidence in the record. State v. Cassady, 198 N.J. 165, 180-81 (2009).

Here, the judge found aggravating factors one (the act was committed in a heinous, cruel, or depraved manner), three (risk defendant will re-offend), and nine (need for deterrence).

N.J.S.A. 2C:44-1(a)(1), (3), (9). Defendant argues aggravating factor one is inapplicable, contending the court "failed to identify any cruel, heinous or depraved act outside of the murder itself," as there was no evidence of torture, or that the crime was a purposeless act. See State v. Ramseur, 106 N.J. 123, 209 (1987) (noting "depravity of mind" refers to people who murder "without purpose or meaning"). However, the judge spoke at length regarding his reasoning, noting defendant's conduct was heinous because the evidence led to "no other conclusion than that this defendant executed [Allison] on the evening of March 27, 2010." We find the trial judge did not abuse his discretion in finding this factor, and we decline to remand for resentencing.

Any arguments not specifically addressed lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.