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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5093-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TROY W. DONINI,

Defendant-Appellant.

Argued January 11, 2018 — Decided January 25, 2018

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Indictment
No. 14-12-0941.

Michele E. Friedman, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Mark H. Friedman, Assistant Deputy Public
Defender, of counsel and on the brief).

Kim L. Barfield, Assistant Prosecutor, argued
the cause for respondent (Jennifer Webb-McRae,
Cumberland County Prosecutor, attorney; Kim L.
Barfield, of counsel and on the brief).

PER CURIAM

A Cumberland County grand jury charged defendant in a five-count indictment with first-degree murder, N.J.S.A. 2C:11-3(a)(1) (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count two); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1) and (2), and N.J.S.A. 2C:11-3(a)(1) (count three); first-degree witness tampering, N.J.S.A. 2C:28-5(a) (count four); and fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4) (count five).

Following a multi-day trial, the jury convicted defendant on count three, and found him not guilty of the remaining charges.¹ The judge sentenced defendant to twenty years in prison, subject to the 85% parole ineligibility provisions of the No Early Release Act, N.J.S.A. 2C:43-7.2, with a five-year period of parole supervision upon release. The judge made this sentence consecutive to a sentence defendant was then serving on an unrelated matter. This appeal followed.

On appeal, defendant raises the following contentions:

POINT I

THE TRIAL JUDGE DENIED DEFENDANT A FAIR TRIAL BY UNDULY LIMITING HIS RIGHT TO PEREMPTORILY CHALLENGE PROSPECTIVE JURORS WHEN A VACANCY WAS FILLED ON A JURY PANEL THAT HAD BEEN SELECTED BUT NOT YET SWORN.

¹ Defendant was tried with a co-defendant, who was charged in counts one, two, and three of the indictment. The jury acquitted the co-defendant of all three charges.

POINT II

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT PRIOR INCONSISTENT STATEMENTS MADE BY THE STATE'S KEY WITNESS WERE ADMISSIBLE AS SUBSTANTIVE EVIDENCE.

POINT III

DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

After reviewing the record in light of the contentions advanced on appeal, we reverse and remand for further proceedings.

In light of the nature of the arguments raised in this appeal, a complete recitation of the facts developed at trial is not necessary. We begin with defendant's assertion in Point I that the trial judge mistakenly limited his right to exercise peremptory challenges in the selection of the jury.

After fourteen jurors were accepted by the parties on the first day of the trial, the judge determined they would not be sworn until the next trial day and excused them. Prior to the resumption of the trial, one of the jurors contacted the court and stated she was ill. The judge excused this juror.

Thus, on the next trial date, the jury selection process was scheduled to resume and a new group of prospective jurors was brought to the courtroom for voir dire. However, before the selection process resumed, and over defendant's objection, the

judge advised counsel that because there was only one seat left to fill on the jury, and because the attorneys had previously "agreed on all of the remaining jurors being jurors," the parties could only exercise their remaining peremptory challenges on the jurors placed in that final seat. Thus, defendant was barred from using his challenges to continue to shape the jury by excusing any of the other thirteen jurors after the fourteenth juror was seated.

This was obviously an error. As then-judge Virginia Long cogently observed over twenty-five years ago in State v. Nutter, 258 N.J. Super. 41, 60 (App. Div. 1992):

The trial judge also erred in refusing to allow [the] defendant the opportunity to exercise peremptory challenges when, after [fourteen] jurors were chosen and accepted by both sides but not sworn, one juror announced that he could not be impartial. The excusal of that juror and his replacement essentially changed the complexion of the jury and warranted reopening of voir dire to the extent that either side had peremptory challenges available and for so long as either side was in a position to exercise a challenge for cause. This is an important point. The trial judge's action here could well have led us to the conclusion that [the] defendant's right to a fair and impartial jury was compromised.

Contrary to the State's argument, the judge's mistake cannot be considered harmless. "[T]he denial of the right of peremptory challenge . . . is 'prejudicial per se and harmful[.]'" State v. Thompson, 142 N.J. Super. 274, 281 (App. Div. 1976) (quoting Wright

v. Bernstein, 23 N.J. 284, 294-95 (1957)). Thus, "a party is not required to make an affirmative showing that the denial of his [or her] right to peremptory challenge had resulted in prejudice and injury to his [or her] cause of action on the merits." Wright, 23 N.J. at 295.

Under these circumstances, we conclude that the judge mistakenly prevented defendant from using his remaining peremptory challenges on any of the fourteen jurors seated in the jury box before the selection process was fully completed and the jury was sworn. Therefore, we are constrained to reverse and remand this matter for further proceedings.

In light of our determination of this issue, we need not address the remaining arguments presented by defendant. However, if the State proceeds with a new trial, we briefly address Point II of defendant's brief. There, defendant argues that the judge mistakenly omitted a portion of Model Jury Charges (Criminal), "Prior Contradictory Statements of Witnesses (Not Defendant)" (approved May 23, 1994) (Model Charge) in his final charge to the jury. We agree.

Kentrai Molock was the key witness for the State. Under a grant of immunity, Molock testified that defendant admitted to him that he shot the victim because the victim owed defendant money on a drug deal, and had sold defendant a car "that broke down the

next day." Molock also asserted that defendant was part of a conversation Molock had with some gang members about killing the victim. However, when Molock first spoke to the police, he stated that defendant and the victim "had no beef" at the time of the murder. He also failed to advise the police that defendant admitted his involvement in the shooting or the meetings leading up to it.

It is well established that "[a]n apparently inconsistent pretrial statement of a witness . . . is not limited to . . . affecting the witness's credibility at trial. The rule is clear that such statements are [also] admissible for their substantive content." State v. Ramos, 217 N.J. Super. 530, 538 (App. Div. 1987). Here, Molock's initial statement that defendant "had no beef" with the victim was clearly inconsistent with his later testimony that defendant admitted shooting the victim because he was angry with him. Molock's failure to tell the police about defendant's involvement was also inconsistent with his later testimony that defendant was an active participant in the planning of the murder.

Accordingly, defendant's attorney asked the judge to give the Model Charge for prior contradictory statements given by witnesses. This charge instructs jurors that they may consider the witness's inconsistent statement "as substantive evidence or

proof of the truth of the prior contradictory statement or omitted statement."


The judge denied defense counsel's request, and drastically redacted the Model Charge to exclude any mention that Molock's prior inconsistent statements or omissions could be treated as substantive evidence and as proof of the truth of his initial statement to the police. The judge explained he was redacting the Model Charge because Molock claimed he believed defendant would kill him if he told the police the truth when he first met with them. However, the Model Charge specifically directs the judge to advise the jury of any reasons a witness provides to explain the prior inconsistent statement or omission, including that the witness lied or omitted facts for "self protection," with the jury thereafter determining the truth of the assertion.

Therefore, the judge clearly erred in redacting the Model Charge. Because "'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant," we are unable to conclude that this error was harmless under the circumstances of this case. State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). We also note that even if the mistake in limiting defendant's right to exercise peremptory challenges did not require reversal, the cumulative effect of that error and the

flawed jury instruction would provide further support for our conclusion that defendant's conviction² must be reversed. State v. Simms, 224 N.J. 393, 407 (2016) (citing State v. Weaver, 219 N.J. 131, 155 (2014) (discussing the duty of an appellate court to reverse a defendant's conviction "[w]hen legal errors cumulatively render a trial unfair").

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


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² Our conclusion that defendant's conviction must be reversed makes it unnecessary to address defendant's contention in Point III that the sentence the judge imposed was excessive.