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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0475-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY BAINES,
a/k/a ANTHONY R. BAINES,

Defendant-Appellant.

Submitted May 2, 2022 – Decided May 26, 2022

Before Judges Sabatino, Rothstadt, and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Indictment No. 17-02-0155.

Joseph E. Krakora, Public Defender, attorney for
appellant (Laura B. Lasota, Assistant Deputy Public
Defender, of counsel and on the brief).

Matthew J. Platkin, Acting Attorney General, attorney
for respondent (Kaili E. Matthews, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

As Justice Albin once rightly observed, "Trials are not perfectly orchestrated productions." State v. Yough, 208 N.J. 385, 388 (2011). Exceptional situations can arise in which, through no fault of counsel or the trial judge, an unexpected inflammatory event occurs during a case that makes it impossible, realistically, to have confidence that an untainted verdict will be rendered.

Even the most careful jury instructions and inquiries by the court of the jurors exposed to such a momentous inflammatory event may be inadequate to cure the taint. As the United States Supreme Court long ago recognized, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135 (1968). This is one of those very rare instances.

We are presented in this homicide case with an extraordinary situation stemming from an incident in which a central witness who had reluctantly testified for the prosecution that afternoon left the courthouse at the end of the day. In the presence of a group of jurors who were walking behind her, the witness engaged with an acquaintance in a loud and angry diatribe about her

testimony, proclaimed that she had not inculpated defendant as the victim's killer, and both of them stared back towards the jurors in what was perceived to be an intimidating manner.

The incident outside the courthouse alarmed several of the jurors, and one of them reported it to the sheriff's officer. The court interviewed seven jurors who indicated by a show of hands they had seen the outburst, and it excused two of them from further service. Although the other five jurors told the court they could remain impartial, two of them expressed that the incident had made them uncomfortable or nervous.

Defense counsel moved unsuccessfully for a mistrial, and the court duly instructed the jurors to disregard the incident in their deliberations. The jury proceeded to find defendant guilty of murder and other serious offenses. Defendant was sentenced to a lengthy prison term of fifty-eight years.

On appeal, defendant mainly argues this dramatic incident had such an inherent capacity to taint the jurors' ability to remain impartial, and that a mistrial should have been granted out of necessity. We are constrained to agree, despite the admirable efforts of the judge to try to salvage the trial.

For the reasons amplified in this opinion, we reverse the denial of defendant's motion for a mistrial, vacate his conviction and remand for a new trial before an untainted jury.

I.

This appeal arises from defendant Anthony Baines's conviction of murder, conspiracy to commit murder, and unlawful possession of weapons. The prosecution arose after a young woman was murdered in the backyard of what is known as a "trap house," where people sell and use drugs. The State's theory was that the woman was killed due to her knowing too much about a criminal enterprise in which defendant and his codefendants were involved. The murder of the victim was allegedly motivated by fear that she would bring negative attention to their ongoing illegal activities.

The codefendants¹ were also charged with the same offenses as defendant, and they ultimately entered into plea agreements with the State. Defendant chose to go to trial instead.

The State's proofs included the testimony of multiple witnesses who were either in or near the trap house at the time, or who were associated with the codefendants and the victim. The State also introduced (1) the gun used to kill

¹ The codefendants were G-Quan Johnson and Raeqwon Segers.

the victim; (2) a pair of work gloves and an alcohol bottle found next to the body that contained, among others', defendant's DNA; (3) defendant's and his associates' phone records; and (4) various photographs of the crime scene.

During the investigation, the witnesses gave conflicting accounts, often changed their versions of that night's events (which some blamed on their drug use the night of the murder), and at least one eventually testified she was being threatened by defendant for speaking with police and cooperating with the government. Two others allegedly were threatened if they would not provide an alibi attesting that defendant was with them the night of the murder.

The trial judge concisely summarized the case after the trial as follows:²

Defendant had a relationship with several individuals, including his co-defendants, who lived or recreated at a home commonly known as the brown house, presumably because of the color of the house. One of these individuals was the victim, Ms. Naye Perry. Defendant and co-defendants, among others, developed the belief that Ms. Perry, in their words, had to go, as she was untrustworthy. They thought she was stealing from them, setting them up for potential robbery, and was otherwise deleterious to their activities.

Defendant's own statement to the police revealed that he, and individuals nicknamed Montana and Snap, decided that Ms. Perry would be killed. In his

² We underline passages within the summary that refer to Tracey Coles, the witness whose outburst while leaving the courthouse was observed by half of the jurors.

statement, defendant admitted that he assisted in carrying out the plan by, at a minimum, being physically present and providing advice as to how to lure Ms. Perry out of the brown house and into an ambush.

While defendant stated that Snap was the one who shot Ms. Perry, the evidence in the case pointed convincingly to defendant being the one who shot Ms. Perry. Indeed, the evidence in the case established that on the evening in question it was defendant who was directing the efforts to eliminate Ms. Perry. Significant evidence adduced at trial included record showing that a phone connected to Snap was out of town at the time of the event.

Tracey Cole[s] testified that immediately before the killing, defendant told her to get inside the house and stay inside. He also -- she also placed defendant at the scene wearing a distinctive hoodie associated with the shooter.

The two co-defendants, Segers and Johnson, confirmed that defendant was alone in the yard with Ms. Perry at the time the shot rang out. They also testified to defendant having the murder weapon on his person.

Eric Barnes testified that he saw defendant shoot Ms. Perry.

After the killing, defendant threatened his then-girlfriend and her friend with violence if they would not provide an alibi. He also threatened Ms. Cole[s] to stay silent about events after the killing.

He lied to the police about which phone he had at the time of the shooting, what vehicle his girlfriend picked him up in, and he also fled the jurisdiction in order to

avoid arrest. This is just some of the substantial evidence against the defendant.

Dr. [Juniah] Shaikh testified that his autopsy established the cause of death as a single fatal gunshot wound to the back of Ms. Perry's head. A handgun, S-1 in evidence, was found feet from Ms. Perry's body and, as noted above was linked to the defendant by eyewitness testimony. Ms. Perry was approximately 24 years old at the time of her death. Given the findings by the Jury, defendant is the person who knowingly or purposely killed Ms. Perry.

[(Emphasis added).]

After appropriate mergers of various counts, the court sentenced defendant on the murder and conspiracy to commit murder counts to a fifty-eight-year prison term, subject to an eighty-five-percent parole ineligibility period under the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2. The court imposed a concurrent seven-year term, with a forty-two-month parole disqualifier, for possession of a weapon for an unlawful purpose. The court found that aggravating sentencing factors three, N.J.S.A. 2C:44-1(a)(3); six, N.J.S.A. 2C:44-1(a)(6); and nine, N.J.S.A. 2C:44-1(a)(9) applied, and that no mitigating factors pertained.

On appeal, defendant presents the following arguments for our consideration in his brief:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL AFTER SEVERAL JURORS REPORTED HEARING A STATE'S WITNESS YELLING OUTSIDE OF THE COURTHOUSE AFTER HAVING TESTIFIED.

POINT II

A WITNESS'S SPONTANEOUS AND INADMISSIBLE TESTIMONY THAT DEFENDANT WAS HIS DRUG DEALER WAS PREJUDICIAL AND WARRANTS A NEW TRIAL.

POINT III

DEFENDANT'S AGGREGATE 58-YEAR SENTENCE, SUBJECT TO AN 85% PAROLE DISQUALIFIER, IS EXCESSIVE AND SHOULD BE REDUCED.

A. THE SENTENCING COURT ERRED WHEN IT BASED AGGRAVATING FACTOR THREE, IN PART, ON DEFENDANT'S ALLEGED LACK OF REMORSE, FAILED TO FIND A SPECIFIC NEED FOR DETERRENCE WHEN IT APPLIED AGGRAVATING FACTOR NINE, AND IMPROPERLY WEIGHED THE AGGRAVATING FACTORS IT HAD FOUND.

B. THE TRIAL COURT FAILED TO APPLY MITIGATING FACTORS THAT WERE SUPPORTED BY THE RECORD.

C. THE SENTENCING COURT ERRED IN SETTING A TERM OF IMPRISONMENT AND IMPOSING FINES FOR A MERGED CONVICTION.

D. THIS MATTER SHOULD BE REMANDED
FOR RECONSIDERATION OF THE SENTENCE
BASED ON THE NEW YOUTH MITIGATING
FACTOR.

II.

The critical issue before us concerns defendant's motion for a mistrial, which was precipitated by Coles's outburst witnessed by at least seven jurors who were leaving the courthouse for the day. Because of the importance of the issue, we detail the trial record pertinent to this issue at considerable length.

A.

For context, we begin with a discussion of Coles's reluctant and often incoherent trial testimony during the State's case:

Coles's Trial Testimony

Coles lived in the house where the victim also lived and where the victim was shot and killed in the backyard. Coles did not witness the actual shooting.

Coles was the last witness called by the State on the afternoon of May 30, 2019. The prosecutor called her to confirm incriminating facts about defendant she had provided to investigators in four different statements dated June 30, July 7, September 12, and September 16, 2016. Her July 7 and September 16 police statements were sworn and transcribed, and they were marked for identification and used during the State's case.

Prior to trial, Coles told the police several details that either directly inculpated defendant or corroborated events that were part of the State's case. She told the police that, earlier in the afternoon of the murder, she saw a gun in the house and that it was taken by a "boy with short dreads." She also recounted that that afternoon, she saw defendant putting on the hoodie that was the same hoodie the State associated with the shooter. She stated that when she arrived back at the house later in the evening, defendant told her to, "Go inside, and don't come outside." In addition, Coles told the police that defendant sent her a message on Facebook a few days after the murder to make sure "she wasn't there that night" and had not seen anything.

When she was called to the witness stand by the prosecutor, Coles's testimony was frequently contradictory, begrudging, and hard to follow. She exhibited a strong unwillingness to confirm details she had previously given the police. She stated multiple times that she did not recall facts she had previously supplied.³ She denied observing events that she had formerly told the police she had seen. Instead, she repeatedly claimed she was "told" about events she earlier

³ For example, early into her direct examination, the judge interjected: "Excuse me. Hold on, stop. Ma'am, I know this is not familiar to you, but if you mean yes, you need to say yes. If you mean no, you need to say no. If the answer is something else, you need to tell us what that something else is."

told the police had happened, but that she had not witnessed them herself. She also often mumbled, prompting the court to admonish her to raise her voice and speak distinctly.

The prosecutor attempted to deal with Coles's recalcitrance by having Coles refer to her earlier written police statements to see if they refreshed her recollection. Sometimes that technique was successful, and Coles finally acknowledged what she had said before. But, in other instances, Coles continued to claim a lack of recollection or provided vague and non-responsive answers.

As her direct examination delved into the critical events, Coles initially testified she did not remember having any conversations with defendant, or having seen him wearing the hoodie. However, after being shown her police statements and directed by the prosecutor to specific passages within them, Coles relented and admitted she did speak with defendant the day of the murder. She twice insisted that before the murder, defendant only told her, "Go into the house," and denied he said more than that. Again, the prosecutor pointed Coles to her police statement. Having been shown the statement, Coles finally acknowledged that defendant had told her, "Go into the house, and don't come outside."

The prosecutor further asked Coles about the gun she had picked up in the house on the day of the shooting. Coles initially responded that she could not recall from where she had obtained the gun. To prompt her recollection, the prosecutor showed her another police statement she had provided on July 7. This caused Coles to acknowledge that she had been given the gun by "some boy" in the house who was "short with dreads."

The prosecutor also pressed Coles about her lack of recollection about the hoodie, and showed Coles her earlier police statement on the subject. She denied having observed anything about the hoodie, and she claimed that in her earlier statements, she "was just telling you what I was told." This prompted the prosecutor to approach the court at sidebar, where the prosecutor stated, "I think we have a combination here of feigned failure to recall in addition to denial of the accuracy of what's previously been given in this [statement.]"

The court then asked to review the relevant page from one of Coles's earlier statements. After doing so, the court responded:

THE COURT: All right. Well, if you want to make an application to treat her as a hostile witness, I would certainly grant that. And I think there's a little more digging here to flesh out whether or not she really is disclaiming that or whether or not you can bring her back to what's on the page. I think a few more questions have to be asked.

After defense counsel commented that Coles might not have had firsthand observation of these events, the court allowed the prosecutor to ask Coles about whether she had seen defendant, Rae,⁴ and G-Quan in the backyard. Coles insisted she had not, and refused to admit her contrary police statement was accurate. The judge interceded to clarify her testimony, and Coles steadfastly maintained that she had not seen the men and merely had passed along to the police "what she had been told."

The prosecutor resumed his examination, directing Coles to her previous police statement:

PROSECUTOR: Ms. Coles, I'm referring, again, to S-75, page 12 line 4 where you [were] asked: "Okay. What happens when you walk out the back door?" And you said, "Oh, I see Rae. I see Rae, G-Quan and AB^[5] in the backyard." Did you say that?

COLES: Yes, that's what I told you.

THE COURT: I'm sorry. Say that again, please.

COLES: Yes.

THE PROSECUTOR: So you did say that?

COLES: Yeah, that's what I told you.

⁴ Rae is the nickname of codefendant Raeqwon Segers.

^[5] AB is referring to Anthony Baines, the defendant.

THE PROSECUTOR: And what's your testimony today? Did you see that or not?

COLES: No, I did not see that . . . I did not see that.

THE PROSECUTOR: And on line 19 of page 12 where you asked, "And what do you see there?" And you answered, "I see them talking. AB putting on the hoodie." Line 21: "Okay. What color was the hoodie you saw him put on?" Line 22: "Black and white stripes, the top of the hood was black and white." Did you say that?

COLES: Yes.

THE PROSECUTOR: And what's your testimony today?

COLES: That's not what I seen.

[(Emphasis added).]

The judge interjected:

THE COURT: Let me ask you this, Miss. If you're saying that in your statement where you say you came down the stairs and you saw these individuals, and in your statement where you say you saw somebody wearing a hoodie, you're saying that those aren't accurate. Well, what did you see?

COLES: I'm saying that I don't know who it was. That's what I'm saying. I don't know who was back there. I just know that there was people back there. I don't know what people was back there. That's all I'm saying.

THE COURT: Well, why would you identify people specifically if you didn't know –

COLES: Because that's what I was told. That's what I was told. That's what I was told.

THE COURT: By who?

COLES: And I told them that. By Richie,^[6] that's what me and Richie, me and Richie discussed, and I told them that, too. I told them that previously. I told them that millions of times.

[(Emphasis added).]

Coles then asked to speak to her personal lawyer. The court noted Coles had an opportunity to speak with the lawyer earlier that day. Following a sidebar discussion, the prosecutor elected to move on to another subject.

Turning to a new topic, the prosecutor asked Coles about a conversation she allegedly had with defendant a few days after the murder. The prosecutor asked her, "Do you remember having a conversation with [defendant] about whether or not you had talked to the police?" Coles said she did not remember. Then the prosecutor showed her one of her earlier statements to refresh her recollection. After reviewing it, Coles responded:

COLES: He called me on Facebook and he asked me was I speaking to you guys. Something about snitching

^[6] Coles apparently was involved in an intimate relationship with Richie. Richie's given name is Elias Etheridge-Garris. He also stayed at the house, and another witness alleged Richie was in the backyard with defendant and a "brown-skinned boy" when defendant murdered the victim. Richie also testified at trial for the State.

on the situation. I told him how can I snitch on the situation that I have no clue about. And from there we just had a normal conversation.

THE PROSECUTOR: But what did he respond -- how did he respond when you said, "How can I snitch on a situation I have no clue about?"

COLES: He said, You're right; you wasn't there.

THE PROSECUTOR: What else did he say?

COLES: That's all I wanted to hear from you.

THE PROSECUTOR: Okay. And that question was about the [victim] situation, correct?

COLES: Yeah.

THE PROSECUTOR: Did he think you moved to Newark because of this?

COLES: I guess. That's what he called me for.

THE PROSECUTOR: Okay. He called you to ask you why you moved to Newark?

COLES: I don't really recall all of that information.

THE PROSECUTOR: Is it fair to say that he did ask you –

COLES: Yes, he asked that question about -- asked me about snitching and why I moved to Newark while we was on the phone. I don't know if that was the reason he call me. I don't remember.
[(Emphasis added).]

On cross-examination of Coles, defense counsel elicited from her that she had told the police various things at Richie's direction. Even so, Coles continued to admit that defendant had told her, "Go inside, and don't come outside." She also admitted that she had observed defendant "putting on the hoodie at the bottom of my steps." Coles then changed her version again, and claimed that Eric Barnes⁷ had instructed her to tell the police that he and defendant had switched hoodies.

Defense counsel also brought out on cross that Coles was "drunk" the night of the shooting and had also been under the influence of prescription medication. The back-and-forth continued between the defense attorney and Coles about what she said in her earlier statements and why she was changing it now.

On redirect of Coles, the prosecutor showed her a photo of the back porch of the house, which the police had shown her during her July 7 interview. The photo, which had been moved into evidence earlier in the trial, contained an "X" where Coles had marked a spot where she had told police she had seen a transfer of the hoodie to defendant. Coles acknowledged on redirect she had done so,

⁷ Eric Barnes is the owner of the house where Coles and the victim lived. He testified at trial as a witness for the State that he saw defendant murder the victim.

and had signed the photo, but did not recall why she did that. She also confirmed that the transfer had taken place around 11:00 p.m., before she left the house to go to a store. Video surveillance confirms that Coles was at the store at the time of the shooting.

On recross, however, Coles stated again that she had "no clue" why she had marked an X at that spot, and that she had not been truthful when the police interviewed her about the subject on July 7. She further asserted on recross that she also had not told police the truth when they initially interviewed her on June 30 either.

Lastly, defense counsel got Coles to acknowledge that it is possible some of her trial testimony was not true, although she added, "I'm telling you what I know to my knowledge."

At that point, Coles stepped down from the witness stand. The court excused the jurors, noting the trial would resume the following Tuesday.

Coles's Outburst Outside of the Courthouse

On the morning of Tuesday, June 4, 2019, after the jurors arrived at the courthouse but before the trial resumed for the day, Juror No. 10 asked the sheriff's officer for the jurors and the witnesses to be excused at the end of the day in a "staggered fashion." The sheriff's officer told this to the judge, who

then relayed this information to counsel. The judge explained to counsel that the juror had told the sheriff's officer that "last week, as [the jurors] left, there was a witness who was close by to the jurors and I believe the term she used was that the witness was yelling at them."

The sheriff's officer confirmed to the judge what the juror had said to him. The judge told counsel, "I don't have any more details than that. So what I would like to do is have the juror come out and we will talk to the juror and find out when it was, where it was, what was said, were any other jurors around." Counsel agreed to this plan. In all of the ensuing interviews, the jurors were each placed under oath.

Juror No. 10's Interview

Juror No. 10 was the first to be interviewed. The judge asked Juror No. 10 why she made the request to the sheriff's officer to be dismissed at a time different from the witnesses. Juror No. 10 testified that:

On Thursday,^[8] we were dismissed and a group of us -
- myself and two other -- three other members of the
jury were walking downstairs and out the building and
some of the people in the court and one of the witnesses
that testified Thursday were walking ahead of us just a
little bit and one of the -- the witness kept turning
around and looking at us and making comments. We

^[8] Thursday, May 30, was the last day of trial for that week, and trial resumed Tuesday, June 4. Trial was not held on Friday, May 31 or Monday, June 3.

couldn't understand what she was saying, but they were seemingly derogative comments and it made us feel very uncomfortable. We hung back a little bit, but felt a little threatened walking to the parking garage.

[(Emphasis added).]

Juror No. 10 identified the witness as Coles, who was the last witness called on that day of trial.

Juror No. 10 continued, "It started the minute we left the building. And as I said, we hung back a little bit just to wait, but, you know, [Coles], in particular, she kept turning around and looking at us. And as I said, we couldn't understand what she was saying, but it was definitely of a derogatory nature."

Juror No. 10 said Coles was walking with other people⁹ who had been in the courtroom watching that day, but she could only specifically identify one of them: a "girl that was sitting over . . . on the left [of the courtroom]. She had the baby outside in the stroller."

The judge asked counsel if they had any follow up questions for Juror No. 10. Defense counsel wanted to know whether the derogatory comments Juror No. 10 alleged the witness made were "derogatory comments addressed to the jurors or regarding [defendant] or perhaps some of the other witnesses." The

⁹ It is unclear from the jurors' interviews whether Coles was only with the woman with the baby stroller, or with other people as well.

prosecutor wanted to know whether this incident would "affect [her] ability to continue as a juror in this case, to be fair and impartial, etc." The judge said he would ask both queries, as well as whether Juror No. 10 could identify the other jurors who were part of the interaction.

Resuming the interview, the judge asked the juror:

THE COURT: When you say that the comments were derogatory, can you tell us whether or not it was derogatory towards you, towards [defendant], towards other witnesses, towards the Court?

JUROR NO. 10: I don't know exactly what she was saying, but you -- but by the tone of her voice -- I mean, she was yelling. And by the tone of her voice, you could just tell that it was of a derogatory nature. We couldn't understand exactly what she was saying, but one of the other jurors did say that he heard her talking about the trial.

[(Emphasis added).]

Then Juror No. 10 identified the appearances and seat locations¹⁰ of three other jurors with whom she observed this incident. Finally, the judge asked her, "Is there anything about what occurred Thursday that would affect your ability to be fair and impartial in deciding this case?" The juror said no, but that she "brought it up because we felt kind of uncomfortable about it." (Emphasis

¹⁰ Juror No. 10 did not know the other jurors by name.

added). The court asked counsel if they had any other questions, but they did not.

Once Juror No. 10 was sent back to the jury room, the judge asked counsel how they wanted to proceed:

THE COURT: So we have a bit of a mystery in terms of figuring out who was there. I think the only way to do it is to have everybody come out. Well, I guess there is two ways, one we could have her go in and ask her to have those four or three step out or we could have the whole panel come out and I would say, you know, an issue came up, there may have been contact with a witness on Thursday, who was there, raise their hands. Which way would you like to do it?

DEFENSE COUNSEL: I would prefer the second, Judge, rather than have her go in and try to –

THE COURT: Ferret it out.

DEFENSE COUNSEL: Yes.

THE COURT: [Mr. Prosecutor]?

PROSECUTOR: I agree, Judge; that's fine.

THE COURT: All right. Very good.

[(Emphasis added).]

Jurors Who Saw the Incident Identify Themselves

The jury was brought into the courtroom and the judge explained:
[I]t has come to the Court's attention that there may have been some interaction between jurors and a

witness Thursday upon your dismissal from the courtroom. We're obligated to explore that with the jurors who were present to find out what happened. Nobody is in trouble for it, but we just need to find out what occurred.

So for those of you who were involved in the interaction with the witness, I would like you to raise your hand at this time.

Six jurors, in addition to Juror No.10, raised their hands: Juror Nos. 6, 9, 11, 12, 14, and 15. The judge instructed the jury to go back to the jury room but to not discuss the situation amongst themselves. Then, the judge called Juror No. 9 to be interviewed.

Juror No. 9's Interview

The interview began:

THE COURT: Well, why don't you tell us what happened Thursday?

JUROR NO. 9: Well, we were walking out with the witness and her friends. It was very uncomfortable. The witness was very loud. She was saying -- can I say what she said?

Q: Yes.

A: Are you sure?

Q: Positive.

A: She said, I told you I wasn't going to tell them that AB did it. I told them everything else but that. And

they were just like staring at us and it was very awkward, but she was very, very loud.

Q: Can you just tell me again what she said, please.

A: She said -- I told you I wasn't going to tell them that AB did it, but I told them everything else.

Q: I can see you're a little nervous.

A: I am a little nervous, yeah. And I looked at the detective and I was like, uh, and he just looked at me.

Q: All right. What detective did you look at?

A: A younger one, not the guy who was testifying. I think he might have testified before.

Q: Okay.

A: But it was just very awkward.

Q: Now, where exactly did this occur?

A: Right as we were walking out.

Q: You mean out in the hallway here?

A: No, downstairs.

Q: Okay. But you were still in the building?

A: Yes.

Q: All right. So like where the security checkpoint is?

A: Correct.

[(Emphasis added).]

Juror No. 9 told the court she was not with the other jurors when she heard this remark.

The judge asked counsel if they wanted to ask Juror No. 9 anything else. Both the prosecutor and defense counsel wanted to know if Juror No. 9 repeated what the witness said to other jurors. The judge posed this query and the juror said she did not.

Lastly, the judge asked Juror No. 9 if "there [was] anything that Ms. Coles said or did outside of the courtroom that would interfere with [her] ability to be a fair and impartial juror in this case?" Juror No. 9 said there was not.

Juror No. 11's Interview

Juror No. 11 testified that when he left the courthouse on May 30, he was walking behind Coles and other people who were also in the courtroom that day. The "group" of jurors that also encountered the witness were walking behind Juror No. 11.¹¹ Although he didn't hear the witness say anything specifically, he testified that Coles and her acquaintances

were talking loud. And then suddenly, I think as I was approaching them, I slowly -- slowed down my steps so

¹¹ It appears that Juror Nos. 6, 10, 14, and 15 were walking near each other. Juror No. 9 was apparently near this group, but closer to the witness. Juror No. 11 was walking by himself, and Juror No. 12 was also walking by himself.

I would not either approach them or go around them and then they started looking at me, but they didn't say anything. They were just looking at me. I don't know if they said anything after, you know, in a lower tone of voice, but I felt a little bit uncomfortable. Okay. So that's why I said to you before, not directly, but just a look and then they talked among themselves and I headed to the parking lot and that was it.

[(Emphasis added).]

The judge asked Juror No. 11, "Tell me what it was about how they looked at you that made you feel uncomfortable." Juror No. 11 replied, "I guess maybe they were curious as to -- you know, who else was actually walking behind them and they looked back and -- but that was it, I guess. There was no words, nothing like that, just the looks"

Juror No. 11 told the court this incident would not affect his impartiality, but he still felt "a little bit" uncomfortable. He testified that he hadn't spoken to any of the other jurors about it.

The judge next asked counsel if they had any other questions for the juror. At the request of defense counsel, the judge agreed for the remaining interviews to ask about where the people who were walking with Coles had been sitting in the courtroom, as a possible indicator of their partisanship.¹²

¹² For example, defendant indicated to counsel that the woman with the stroller with whom Coles was walking was codefendant G-Quan's cousin.

Juror No. 11 said the people were on the right side of the courtroom, sitting behind the prosecutor.

The judge finished by asking Juror No. 11, "So thinking about what occurred on Thursday outside of the courtroom, is there anything about that experience that would affect your ability to be fair and impartial in this case?" He answered, "No. I just feel a little bit not comfortable with the situation."

Juror No. 12's Interview

Next, Juror No. 12 explained what he observed:

So on Thursday afternoon, when we left here, I was downstairs outside the building and the witness was outside with her friend or someone with a stroller and a baby. They were obviously upset, talking loud. I realized that it was the witness so I walked as fast as I could to get away and walked through the passageway back to Broad Street and then crossed the street. And when I was across the street, I could see the witness and her friend visibly yelling at each other and being upset, but I was not -- couldn't hear anything concrete of what they were saying.

[(Emphasis added).]

Juror No. 12 said the woman with the stroller was sitting on the right side of the courtroom behind the prosecutor. The judge asked:

THE COURT: Did they make any gestures towards you that you observed?

JUROR NO. 12: No. I don't think they realized that I was there because I walked by them as quick as I could to get away.

Q: So is it fair to say that what you saw was their -- let's call it a conversation between themselves, as opposed to something that was directed to you?

A: Yes.

Q: Did you see them have any interaction with any of the other jurors?

A: No.

The judge next asked Juror No. 12 whether he discussed the incident with any other jurors. Juror No. 12 said that morning Juror No. 10 asked him if he also saw the witness incident on Thursday, to which he replied that he did. He also said that in the jury room, two other jurors mentioned they saw the "same thing," but no one gave more specific details than what he knew from his own experience.

The judge asked counsel if they had any follow-up questions. Both counsel wanted to know the identity of the jurors with whom Juror No. 12 spoke. Juror No. 12 identified that Juror No. 10 was the one with whom he spoke before entering the courthouse earlier that morning. He said Juror Nos. 14 and 15 were the ones who said they had a similar experience as him.

The judge finally asked him, "Is there anything about what you experienced Thursday that would affect your ability to be fair and impartial in this case?" Juror No. 12 answered, "No because I didn't hear anything."

Juror No. 14's Interview

Juror No. 14 was interviewed next.

THE COURT: Did anything of any significance occur to you as you were leaving the courtroom involving any of the jurors or any of the witnesses?

JUROR NO. 14: Just the witness just was in the hallway when we were leaving just ahead of us.

Q: And did you hear her say or do anything?

A: Not -- I didn't really understand what she was talking about, but they were just loud in their conversation.

Q: Was she speaking with the people she was with or was she trying to talk to the jury?

A: No, she was talking to the people she was with, not the jury.

Q: Did she go down the elevator separate from you?

A: Separate from me. We only saw her outside.

Q: Okay. And when you saw her outside, did anything occur?

A: No, they were walking ahead of us. We kind of like laid back a little bit and let them go ahead of us, but

they were going the same path we were going like towards the garage.

Q: All right. And did the witness or any of her friends say or do anything?

A: No, no. They were ahead of us. It's just that, you know, a little like, why are they -- they should have waited for -- you know, held them there and then let us go.

[(Emphasis added).]

There were no follow up questions for Juror No. 14 from counsel.

As with the other jurors, the judge asked, "Is there anything about what occurred that would affect your ability to be fair and impartial in this case?" Juror No. 14 replied, "No. No bearing. It is just that I was thinking personally that if they could hold [the witnesses] or either hold [the jury], either way, so either we can go or they can go, but not us going together."

Juror No. 15's Interview

Juror No. 15 was interviewed next, and her testimony was very similar to that of Juror No. 14. Juror No. 15 said she and the other jurors saw the witness with a group of women, one of whom had a stroller downstairs in the courthouse after trial had ended that day. She recognized the women from the courtroom and the hallway of the courthouse.

Juror No. 15 said, "they were talking loud about -- I don't know about what. I couldn't hear exactly what they were saying, but they were loud." (Emphasis added). Juror No. 15 and the other jurors began to walk slowly so they would not have to interact with the witness.

But because Juror No. 15 was walking behind the witness, she testified that, "a few times [the witness and her friends] would turn around and look at [the jurors] and then they kept on walking and that was it." However the jurors continued to walk behind the witness the entire path from the courthouse to the parking garage.

The judge asked:

THE COURT: Okay. All right. Did anyone in that group ahead of you make any gestures that you could recognize towards you or the jurors that you were with?

JUROR NO. 15: No.

Q: And how did you feel coming across this other group as you did?

A: Well, a little nervous; that's why we slowed down because -- I don't know. We're sitting in the jury and listening to all of this so I don't want to be around them.

Q: I understand. All right. And that's appropriate because those are my instructions to you at the beginning of the trial that you shouldn't be mixing with the witnesses, correct?

A: Right.

[(Emphasis added).]

Counsel did not have any follow up questions. Finally, the judge asked Juror No. 15, "Is there anything about what happened Thursday after you were dismissed that would affect your ability to be fair and impartial in this case?"

Juror No. 15 said no.

Juror No. 6's Interview

Juror No. 6 was the last juror to be interviewed. He testified that he was walking the same path as the witness and "the person she was with, with the baby carriage," towards Broad Street. He "could hear them arguing back and forth. They were like at the top on the Broad Street side and we were coming up, so I kind of just slowed my pace. And there was a couple of jurors with us. We just kind of paused our pace and tried to give them the distance." The judge confirmed:

THE COURT: Did you hear anything that they were saying?

JUROR NO. 6: They were just yelling. They were loud.

Q: But they were yelling between themselves?

A: Between and to themselves, yes.

Q: Did they make any gestures towards you or the group you were with?

A: No, I don't think they even acknowledged or even knew we were there. They were just intent on a conversation that was very loud between themselves.

Q: And how did you feel coming across them as you did?

A: They just didn't look happy. My thing was just trying to keep distance. That was my goal. I didn't want to hear what they were doing. And then they turned down -- and then they turned down the block towards the parking lot so I just kind of hung back, hung back and then they got quiet and then I kind of bolted up to the parking lot and got into my car.

Q: You didn't actually run, did you?

A: No, but, you know, I, I picked up my pace, yes, because I wanted to be not anywhere near it and then I got in my car and drove off.

[(Emphasis added).]

Juror No. 6 said he was walking with Juror Nos. 14 and 15, and also saw Juror No. 11 "on the side" and "he was also paused and waiting." Regarding whether he discussed the incident with other jurors, he said, "No, not really, no." The judge followed up:

THE COURT: Have you spoken to any other juror about what happened Thursday?

JUROR NO. 6: No.

Q: And when you say, No, not really to the question of did anybody speak to you about it –

A: No, they didn't, but I guess it was mentioned when they said, Oh -- they had a talk in the room when we first came in. It was like, I just wanted to tell them what happened on Thursday with the witness and that was pretty much what was said. It just blanked my mind to be honest so I didn't even think about it. And the woman, Juror 9, I think it was who came to you at the beginning, the woman –

Q: Are you able to describe her, what she looks like?

A: Older lady, white, gray hair.

Q: That's Juror No. 10.

A: Juror 10. Sorry. She said, Oh, you know, I talked to them. And I was like, Oh, yeah, I heard the witness and that was the extent of what was said.

Q: All right; okay.

[(Emphasis added).]

Defense counsel wanted to know specifically what Juror No. 10 said. The judge then asked Juror No. 6:

THE COURT: All right, sir. You've told us that when you came in this morning and the jurors were all together, Juror No. 10 said to you –

JUROR NO. 6: She didn't say it to me. It was more of a general, I wanted to tell them what happened.

Q: Okay. Were all the jurors in the room when she said this?

A: Yeah. When we just all walked in.

Q: Well, did she say this after you were in the deliberation room or before?

A: After, after we walked in.

Q: And did she kind of announce it to the group?

A: No it was more like -- it was just kind of like, Oh, I, you know -- how would you describe it. [She said] I think it's really important that I tell them what happened. And so I was like, What happened. [She said] [w]e heard the witness. And I was like, Oh, yeah, I kind of heard that, too, and that's why when you had us come out, I raised my hand. I totally forgot what was going on, but I was like, Yeah, I heard them, like I had described. Like they were a block away or something. That was pretty much it. Nobody really talked about it and it was all just like, Yeah, you should bring that up because it is important. We all worried that it should be brought up and that was the extent.

[(Emphasis added).]

The judge then asked Juror No. 6, "[I]s there anything about what happened Thursday and thereafter that would affect your ability to be fair and impartial in the case?" and he answered that there was not.

The judge asked counsel if they wanted to call any other jurors, but they both declined.¹³

The Post-Interviews Colloquy and Defendant's Mistrial Motion

Following the juror interviews, the judge asked counsel for their positions. The prosecutor argued, "it sounds to me that for all of the jurors, other than No. 9, all they observed, these jurors was Tracey Coles and another individual or individuals yelling loudly to each other." None of the witness's comments were directed towards the jurors. He emphasized that each juror "said they could still be fair and impartial."

Defense counsel viewed the interview testimony differently, and moved for a mistrial. He argued, "You have Juror No. 10 saying that she felt threatened. You have Juror No. 15 saying, I felt nervous and I didn't want to be around them. Granted, they are not supposed to be around them. And then you have another juror saying, It made me feel uncomfortable." Defense counsel continued:

It's impossible to know how those feelings will play into the juror's individual deliberations, whether they'll be reluctant to convict because they have some concerns about being threatened in the future, whether they will convict because they think that the people they are dealing with have a nature of carrying out threats,

¹³ Defendant did not request in the trial court, and has not argued on appeal, that the remaining jurors be interviewed. Even so, there are sufficient indicia of taint that emerged from the jurors who were interviewed to warrant a remedy.

and it's impossible to know whether what they experienced will spill over into their deliberations.

Counsel elaborated further:

And then you also have a situation where the entire jury panel is told that something happened, people do say, Well, what happened, and the juror who relays that information says, I wasn't really paying attention so I'm not entirely sure about everything that was said.^[14] You have a real potential in what is the most serious case that comes before the Court for the jury to have -- to be tainted in some manner and I don't even know which way that taint would go.

Defense counsel asked that, "at a minimum," Juror No. 9—who specifically heard the statement the witness said—be excused "to protect against whatever influence that has and I think Juror No. 10 who clearly says she felt threatened should be excused so she doesn't have to have that interfere with her deliberations." The prosecutor responded that the jurors were not tainted because of his perception they kept distance from the witnesses, as instructed. Regarding Juror No. 10, the prosecutor argued that she said she could be impartial and that the court should rely on that assertion.

^[14] Defense counsel is referring to the testimony of Juror No. 6.

Juror No. 9 Re-Interviewed

Upon hearing these arguments, the judge told counsel he would like to hear from Juror No. 9 again "to inquire of her whether or not she is going to be able to disregard the statements that she overheard on the street. I don't think I asked her that question specifically¹⁵ and I think that answer would be informative to my decision."

Juror No. 9 returned to the courtroom. The judge began:

THE COURT: So you told us what you heard on the street from Ms. Coles. And I believe you told us that you heard her say, I told you that I wasn't going to say that AB did it, but I told them everything else. Am I correct about that?

JUROR NO. 9: Correct.

Q: Now, do you recall earlier in this process when I told you that as a juror you have to make your decision in this case based upon what is said in this courtroom, the evidence in this courtroom and nothing else? Do you recall that?

A: Correct. I do.

Q: Would you be able to set aside and separate out what you heard Ms. Coles say on the street from the evidence as presented in the courtroom?

A: Yes, I can.

¹⁵ In fact, the judge had asked Juror No. 9 this during the first interview. She said she would be able to remain impartial.

Q: And by that, just so I'm clear, what she said or did in the street should in no way, shape or form play any role in your deciding this case. And my question is: Would you be able to do that? And it's okay if you can't, but you need to be honest with us right now.

A: Yes, I can.

Q: All right.

After this, counsel did not have any follow up questions or argument.

The Court Denies a Mistrial but Excuses Juror No. 10

In an oral ruling, the court denied defendant's motion for a mistrial but excused Juror No. 10. The court further denied—at least initially—defendant's application to excuse Juror No. 9:

All right. So [defense counsel] asked for a mistrial. I am mindful that a mistrial is guided by, among others, the case of Wade v. Hunter, 336 U.S. 634[] (1949), which is an old case, which only means that this doctrine is quite long standing, where the Court finds a sufficient legal reason and manifest necessity to terminate a trial, the Defendant's right to have his initial trial completed is subordinated to the public's interest in fair trials and reliable judgments.

[Defense counsel] argues essentially that there is taint with regard to the jurors here based upon what happened outside the courtroom Thursday afternoon. And in listening to the testimony of the jurors overall, the Court is left with the following impressions.

First, I think all of the jurors were entirely credible and forthright and diligent in their responses in bringing

this matter to the attention of the Court. As [the prosecutor], points out, that is exactly what they were instructed to do and swore to do at the beginning of the trial and certainly they cannot be faulted for doing just that.

[(Emphasis added).]

The judge then summarized his impressions of the interviewed jurors' testimony:

The scenario that they brought to the Court's attention reflects perhaps too short of a gap between the witness leaving and the jurors leaving so that the jurors were in proximity to the witness and her friend or perhaps not friend. We don't know because we don't know what was being said among the two of them.

Only one juror heard specific comments and that's Juror No. 9. None of the jurors felt threatened in any way except for Juror No. 10.

Getting back to the scenario, it appears that Ms. Coles was in a heated discussion with at least the young lady with the stroller and perhaps others about, I think it's safe to assume, what occurred in the courtroom given that they were both here, and this occurred immediately after the events.

The jurors did their best to hang back, but, of course, they saw and heard what they described because it was loud and out in public view. [Defense counsel], argues that, at a minimum, Juror No. 10 and Juror No. 9 must go if there is no mistrial.

Then the judge elaborated as to why he was denying the mistrial:

First, I don't think that the events warrant a complete mistrial in this case. It is anticipated in any trial that there may be contact between the jurors and witnesses or parties and that's why we give the instructions that we do. The fact that there is some type of interaction does not mean that there must be a mistrial. It must be something more than that. I think the jurors, other than Juror 10 were completely unaffected by the interactions.

[(Emphasis added).]

The judge then gave his assessment of Juror No. 9:

I had an opportunity to look at them all closely and although Juror No. 9, as I noted, was nervous, I think that's the nerves that associate with being put on a witness stand in a courtroom and asked questions by the Court. I don't think that it was nervousness based upon anything that she saw or heard and she indicated that she would be able to completely separate out what she saw and heard on the street from what she saw and heard in the courtroom.

I had the opportunity to look her in the eye from not a foot away and gauge her response and I find her to be entirely truthful. I do believe that she will be able to separate it out. I don't think that there is any reason to excuse Juror No. 9 so I am denying not only the Defendant's request for mistrial, but the Defendant's request to excuse Juror No. 9.

The judge's thoughts on Juror No. 10 differed:

I see Juror No. 10 in a bit of a different light because she is the only juror who felt threatened by these interactions. For whatever reason, she is under the belief that the actions of Ms. Coles or perhaps her

friends were directed towards the jurors. In her words, she felt that it was threatening; that is a thought that was not expressed by any of the other jurors who observed this scene. We don't know how she will decide the case, of course, but we do have three alternates on this case. And I don't want her personal feelings of feeling threatened to reflect upon [defendant].

I think the -- I think a rational juror could look at Ms. Coles' testimony and find that she was, in a very ham-handed fashion, trying to lie for the benefit of [defendant] and therefore think that she is associated with [defendant]. And if the juror believes that she was threatened by Ms. Coles, well, by inference, she may feel that she is being threatened by [defendant].

And given that that may be the case and the fact that we are almost through the State's case and have three alternates, I believe the best course of action is to excuse Juror No. 10 and we will go with two alternates instead of three. That is my decision. The request for a mistrial is denied. The request to excuse Juror No. 9 is denied. The request to excuse Juror No. 10 is granted.

The judge subsequently dismissed Juror No. 10.

The Court's Instructions to the Jurors

The rest of the jury was brought out and the judge explained to the jury not to infer anything from the dismissal of Juror No. 10:

Ladies and gentlemen, as you look around, you will see that Juror No. 10 has been excused. You are not to read anything into her being excused. It was my decision to excuse her based upon the information that I had at the time. She didn't do anything wrong. It is just that I had

to make a decision and that's what the decision was so don't guess or speculate about why or what happened or anything of that nature. It should play absolutely no role in your deciding this case. It happens. We're going to continue on with the case.

The Trial Resumes, and Juror No. 9 is Excused the Next Day

The State called its next witness, and the trial resumed. Before the trial began the next day—Thursday, June 6—when counsel and the judge were discussing jury charges and any final applications to the court, defense counsel renewed his request to excuse Juror No. 9. The State did not oppose the request and the court accordingly dismissed Juror No. 9.

The court noted it did not "believe that there was any error in keeping Juror No. 9 on," but also noted the State had consented to the motion, both the State and defense had rested, and there was an additional alternate. The court did not see "any prejudice to the process by dismissing her." The judge told counsel what he planned to say to Juror No. 9 and then to the rest of the jury about her absence, and both counsel approved and did not add anything else when asked.

The jury was brought back in, and the judge advised, "Ladies and gentlemen, you will see that Juror No. 9 is no longer with you. She has been excused. You're not to speculate as to the reasons why she has been excused.

Her being excused should play absolutely no role in your deliberations on this matter."

The Trial Concludes

Following closing arguments and the court's charge, the jury convicted defendant of all counts of the indictment.

B.

Nothing in our system of criminal justice is more fundamental than the right to a fair trial before a jury. See U.S. Const., amend. VI; N.J. Const. (1947), art. I, ¶ 10; Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (applying the Sixth Amendment's right to trial by jury to the states); State v. Dunne, 124 N.J. 303, 311-12 (1991) (tracing New Jersey's history affording criminal defendants a right to jury trials). The fair and impartial ability of the jurors to evaluate the facts and apply to them, without prejudice, the court's instructions, must always be safeguarded. See State v. Little, 246 N.J. 402, 414 (2021). The entire trial process, from jury selection through deliberations and a verdict, must be conducted in a manner that strives to eliminate any bias, whether explicit or implicit, a juror may have about a particular defendant, counsel, or witness. See State v. Andujar, 247 N.J. 275, 315-16 (2021). As our Supreme Court has recognized, implicit biases "are activated involuntarily and without an

individual's awareness or intentional control." Id. at 302-03 (citation omitted). "[I]mplicit bias is no less real and no less problematic than intentional bias." Id. at 303.

To assure that jurors discharge their functions objectively and without distraction, it is imperative they be protected from threats or fear of reprisal. Jury tampering offenses, for example, are very serious crimes, and can be punishable as a first-degree offense. N.J.S.A. 2C:29-8(a)(1) (treating such corrupting or influencing conduct in a murder case as a first-degree offense). In addition, jurors must be shielded from prejudicial outside influences during their service. See, e.g., State v. R.D., 169 N.J. 551, 557 (2001); State v. Bey, 112 N.J. 45, 75 (1988).

Case law in this State has addressed what a court should do in situations when it comes to light, as here, that a jury has been potentially tainted by exposure to outside influences, by observation of highly inflammatory events during the case, or by conduct that might intimidate them. See, e.g., Bey, 112 N.J. at 75-85 (holding a mistrial was required due to high volume of mid-trial publicity).

In general, the court has a responsibility to conduct, with the participation of counsel, a reasonable investigation of such potential taint. Id. at 86-87. The

court must ascertain, usually through juror interviews, the extent to which the taint, if any, may impede the ability of jurors to continue their service and consider the evidence with a fair and open mind. Ibid.

A new trial "is not necessary in every instance where it appears an individual juror has been exposed to outside influences." R.D., 169 N.J. at 559. In State v. Bey, our Supreme Court held that if "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., 169 N.J. at 557-58 (citing Bey, 112 N.J. at 83-84). The court is obliged to interrogate the juror, in the presence of counsel, to determine if there is a taint; if so, the "inquiry must expand to determine whether any other jurors have been tainted thereby." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 1:16-1 (2022). The trial court must then determine whether the trial may proceed after excusing the tainted juror or jurors, or whether a mistrial is necessary. Ibid.; see also State v. Bisaccia, 319 N.J. Super. 1, 13 (App. Div. 1999) (stating that if actual juror taint is possible, court must voir dire affected juror and, in appropriate circumstances, the remaining jurors).

"An appropriate voir dire of a juror allegedly in possession of extraneous information mid-trial should inquire into the specific nature of the extraneous information, and whether the juror intentionally or inadvertently has imparted any of that information to other jurors." R.D., 169 N.J. at 560. "Depending on the juror's answers to searching questions by the court, the court must then determine whether it is necessary to voir dire individually other jurors to ensure the impartiality of the jury." Ibid.

In determining whether to grant a new trial, a 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.

The inquiry about whether extraneous information had the capacity to influence the result of the jury requires an examination of whether there was at least an opportunity for the extraneous information to reach the remaining jurors when that extraneous information is knowledge unique to one juror who is excused mid-trial.

[Ibid.]

"The decision to grant a new trial based on jury taint resides in the discretion of the trial court. But, if juror misconduct or bias has a tendency to influence the

jury, a new trial should be granted without further inquiry as to its actual effect." State v. Brown, 442 N.J. Super. 153, 181 (App. Div. 2015).

As another example applying these principles, in State v. Negrete, 432 N.J. Super. 23, 25 (App. Div. 2013), this court held that a juror's disclosures had the capacity to influence the other jurors and thus warranted a mistrial. The participation of this juror—who disclosed during deliberations that he had heard information about the crime scene prior to trial that was not introduced as evidence in the trial—in jury deliberations violated defendant's right to an independent trial and reversal of the conviction was required. Id. at 26.

When, as here, a source of potential taint emerges, the trial court has wide discretion on how to respond to the ad hoc problem with an appropriate remedy. See, e.g., R.D., 169 N.J. at 558-63; Brown, 442 N.J. Super. at 181-82. After conducting voir dire, the court has numerous options, including removing one or more jurors from the panel, providing cautionary instructions to the remaining jurors, monitoring the situation as it might continue to unfold, and taking preventive measures to assure the jurors are not exposed to any further prejudicial factors. R.D., 169 N.J. at 562-63. In extreme instances, none of these measures can realistically assure that a fair trial can be completed, and a mistrial is warranted out of necessity. Id. at 558-59.

The principle of manifest necessity is well established in case law concerning mistrials. Most recently, this court applied the concept in State v. Zadroga, ___ N.J. Super. ___ (App. Div. 2022), in affirming a trial court's decision to order a mistrial in a vehicular homicide case in which a testifying nurse made a "bombshell" revelation that the State laboratory had tested the wrong blood sample and misreported that the defendant driver had an excessive blood alcohol content. Slip op. at 25. The principle of manifest necessity requires a trial to be halted in extraordinary situations to serve "the ends of public justice." State v. Smith, 465 N.J. Super. 515, 536-37 (App. Div. 2020) (in which manifest necessity required a mistrial of a lengthy jury case that could not be completed during the COVID-19 pandemic).

We are mindful of the high degree of deference and discretion that should be accorded to trial judges who are called upon to address these extemporaneous situations of potential jury taint. The court must respond with little time or briefing under great pressure, and it must ferret out for itself the pertinent facts and circumstances. These are exceedingly difficult situations, with the rights of defendants, as well as the interests of the jurors, the victims' families, and the witnesses, all at stake.

Generally, "an appellate court reviews the trial court's jury-related decisions under the abuse of discretion standard." Brown, 442 N.J. Super. at 182 (citation omitted). This standard "respects the trial court's unique perspective," while showing traditional deference to the court in "exercising control over matters pertaining to the jury." Ibid. However, "an appellate court is not bound by a determination when the 'particular circumstances present such a strong likelihood of prejudice that, as a matter of law,' the juror should have been removed." State v. Loftin, 191 N.J. 172, 192 (2007) (quoting State v. Biegenwald, 106 N.J. 13, 91 (1987)). In a similar vein, an appellate court "will not disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice." State v. Harvey, 151 N.J. 117, 205 (1997) (citing State v. DiRienzo, 53 N.J. 360, 383 (1969)).

Bearing in mind these deferential principles, we conclude this is a rare situation in which the incident provoked by Coles while leaving the courthouse was inherently so invidious as to cast an enduring shadow of prejudice and taint over the jurors' functions for the remainder of the trial. We say that with the utmost respect for the trial judge, who diligently investigated the situation and endeavored to salvage a trial that had been going on for over a week.

The outburst by Coles witnessed by seven jurors outside of the confines of the courtroom had the inherent capacity to prejudice their minds, whether consciously or subconsciously. According to at least three of the interviewed jurors, there was at least some discussion about the event in the jury room before the court was notified about it. Although the court sensibly dismissed Juror Nos. 9 and 10, that was not enough to dispel the incident's potentially permeating impact. The remaining five jurors who also witnessed the incident participated in the deliberations that produced the guilty verdict. "A new trial will be granted where jury misconduct or intrusion of irregular influences into the jury deliberation 'could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge.'" See State v. Wormley, 305 N.J. Super. 57 (App. Div. 1997) (quoting State v. Grant, 254 N.J. Super. 571, 583 (App. Div. 1992)).

We cannot minimize the significance of Coles's animated vocal eruption in the presence of the jurors on their way out of the courthouse that Thursday afternoon. She was visibly angry about being called by the State to testify against defendant, loudly making it clear to the woman beside her that she had

made sure she did not testify that she saw defendant take part in a murder.¹⁶ Some of the jurors reported that Coles and the other woman had glared in their direction. Coles was not merely an incidental witness; both the prosecutor and defense counsel prominently discussed her testimony in their summations.

According to their testimony, several of the interviewed jurors told the judge the incident made them feel uncomfortable—to such an extent that one of the jurors asked a sheriff's officer to see if their departure from the courthouse could be staggered. The potential intimidation occurred in a context in which the jurors had already heard testimony about an alleged attempt by defendant to intimidate Coles not to cooperate with the police against him. The jurors also heard evidence of two other persons allegedly pressured to provide an alibi.

What's more, the jurors were to render a verdict in a case that involved the assassination of a woman "who knew too much" about a criminal enterprise. There was an elevated risk here for a juror to naturally feel insecure or uneasy about what had transpired. Indeed, several of the jurors who were interviewed

¹⁶ Although Coles's words are open to different interpretations, it is reasonable to infer from her police statements that she had more knowledge of defendant's wrongdoing but tried to withhold that in her testimony. We recognize that Juror No. 9 denied repeating Coles's words to the other jurors. Even so, it is concerning that Juror No. 9 remained on the jury for an additional day after she was interviewed before the prosecutor ultimately consented to defendant's earlier motion to have her removed.

elaborated about their efforts to distance themselves from Coles and her companions after they encountered the situation, suggesting it bothered them. We do not presume, as the prosecutor argues, those jurors stepped away solely because of the court's general instruction to the jurors at the outset of the trial not to interact with the trial participants.

To be sure, we recognize that the interviewed jurors who were not excused all told the judge they could be impartial during the rest of the case, and that the judge issued a detailed cautionary instruction urging them to disregard the incident. Even so, there are some exceptional circumstances in which such an instruction realistically cannot be presumed to be effective in wiping away all taint. State v. Herbert, 457 N.J. Super. 490, 504 (App. Div. 2019). This is such an exceptional case.

There are sufficient indicia of taint that emerged from the jurors who were interviewed to warrant a remedy. At least two of them, Juror Nos. 11 and 15, had expressed to the court the incident made them respectively, to some extent, "uncomfortable," and "nervous." The record shows those two jurors remained through deliberations and voted to convict defendant. Despite their promises to be fair, their continued participation under these unusual circumstances was capable of tainting the outcome. See R. 2:10-2 (appellate court is not obligated

to disregard error of trial court if "it is of such a nature as to have been clearly capable of producing an unjust result").¹⁷

Based on the totality of circumstances, defendant's motion for a mistrial should have been granted, out of necessity and an abundance of caution to assure that constitutional rights were not imperiled by Coles's "very loud" and animated diatribe.

We add one more observation. Given this loud and inflammatory outburst that nearly half of the jurors witnessed and which made several of them uneasy, it would have been better practice, in hindsight, for the court to have interviewed all of the remaining jurors, even those who did not raise their hands when initially asked whether they had seen it. It presumably would not have taken much longer to bring in the other eight jurors after seven had already been questioned. Such questioning might have detected whether any of the discussions within the jury room, or the surrounding disruption, affected any jurors who had not seen the event first-hand. We recognize no such request was made by counsel to the court, but mention this point to the extent it may provide

¹⁷ In this regard, the State arguably could have been prejudiced by allowing potentially fearful jurors to remain in the jury room, but the ultimate verdict was not adverse to the State. Indeed, that concern may be, why on further reflection, the prosecutor agreed to the dismissal of Juror No. 9.

guidance for the future. At times a court must take extra measures in the interests of justice to preserve a fair trial, even without counsel requesting it. In any event, the omission of such further interviews is not dispositive here because there are already sufficient grounds to require a mistrial.

C.

In reaching this conclusion, we stress an important caveat. There is no indication to us that Coles's alarming outburst and hostility was staged before the jurors at the behest of defendant. If that were so, it would drastically change our mistrial analysis. A defendant who hypothetically may not be faring well at trial should not be rewarded for using a third-party agent to sabotage the trial process and provoke a mistrial. But there is no evidence or claim of that nefarious manipulation presented here.

We recognize the taint issue is a difficult one, with legitimate competing interests raised by both the State and the defense. We do not ignore the burdens and costs of trying this highly charged case again before a new jury. It might be expedient to sustain this verdict, because the remaining jurors who were exposed to or who discussed the Coles incident professed an ability to not allow it to affect their deliberations. Still, when all is said and done, the better course in this exceptional situation, one with a defendant facing five decades in prison,

is to have the case tried before a jury that we can have confidence is untainted by what unfortunately occurred.

For these reasons, we are constrained to reverse the denial of defendant's motion for a mistrial, to vacate his conviction, and to remand for a new trial.

D.

Although our disposition ordering a new trial makes it unnecessary to reach the two other issues raised on appeal, we very briefly comment on them for sake of completeness.

As for prosecution witness Eric Barnes's spontaneous utterance when he was being cross-examined by defense counsel that defendant was a drug dealer, we discern no reversible error. Barnes's comment responded to a series of questions by defense counsel probing into his "relationship" with defendant. Defense counsel asked Barnes specifically why he had defendant's phone number, and why defendant had previously called him on the phone. Barnes replied he had defendant's phone number for, "Transactions," which defense counsel followed with, "[To] [b]uy drugs from you?" Barnes clarified that he "used to buy drugs from [defendant]." Then defense counsel accentuated the point with, "So you and him were in the drug business together?" and Barnes replied, "Yes." Barnes said the two have a "drug relationship."

This revelation of drug dealing clearly was the result of defendant's own attempt to impeach Barnes. Any error or undue prejudice was invited by the defense. State v. Corsaro, 107 N.J. 339, 345 (1987). No relief is warranted.

We likewise reject defendants' challenges to his sentence for murder. The trial court reasonably weighed the aggravating factors and reasonably found no mitigating factors. State v. Case, 220 N.J. 49, 54 (2014). Defendant has a significant record of juvenile offenses that included six within a three-year period from 2009 through 2012. The lengthy sentence imposed for killing this victim "who knew too much" does not shock the conscience. State v. Bieniek, 200 N.J. 601, 607-08 (2010). We reject, as a matter of law, defendant's argument that the new mitigating factor for youthful offenders under the age of twenty-six applies retroactively. State v. Bellamy, 468 N.J. Super. 29, 48 (App. Div. 2021).

Reversed as to the denial of the mistrial motion, conviction vacated, and remanded for a new trial.

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



CLERK OF THE APPELLATE DIVISION