RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2147-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

G.T.C.,

Defendant-Appellant.

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Submitted September 29, 2022 – Decided May 30, 2023

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 14-05-0052.

John T. Doyle, attorney for appellant.

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Sarah D. Brigham, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

A jury convicted defendant G.T.C. of conspiring with his ex-paramour, R.B. (Rayna), to commit the crimes of aggravated sexual assault and endangering the welfare of a child on Rayna's niece, A.B., and nephew, S.C..[1] The jury also convicted defendant of thirteen other offenses arising out of defendant's involvement in Rayna's participation in sex acts with her nephew, S.C., Rayna's direction of sex acts between the children, and Rayna's recording and photographing of the children engaged in the sex acts.

Defendant appeals from an order denying his post-conviction relief (PCR) petition without an evidentiary hearing and denying his motion for a new trial based on newly discovered evidence. He argues the court erred by rejecting his claims his trial and appellate counsel were ineffective by failing to challenge what he contends were erroneous jury instructions and by failing to contest the State's claim one of the victims, S.C., was related to Rayna by a sufficient degree of affinity to support his conviction for first-degree aggravated sexual assault of that child. He also asserts the PCR court erred by rejecting his claim trial counsel was ineffective by failing to impeach Rayna

[1] We use initials and pseudonyms to refer to defendant, the juvenile victims of the offenses for which he was convicted, and others to protect the victims' privacy and because records relating to child victims of sexual assault are excluded from public access under Rule 1:38-3(c)(9). See also N.J.S.A. 2A:82-46(a).

during her testimony at trial based on a letter she sent defendant following his arrest and by failing to seek a new trial based on what he contends is newly discovered evidence — letters he received from Rayna following his trial. We affirm.

I.

To provide context for our discussion of the issues presented, we first detail the charges returned by the grand jury against defendant, the evidence presented at defendant's trial, and the jury's verdict. We then set forth the claims asserted in support of defendant's PCR petition, and the PCR court's disposition of those claims. Last, we address defendant's arguments on appeal.

A.

As we explained in our decision on defendant's direct appeal, State v. G.T.C., No. A-2723-14 (App. Div. Mar. 13, 2018), the charges for which defendant was convicted arise from claims defendant and Rayna conspired to sexually assault and endanger the welfare of Rayna's eight-year-old niece A.B. and thirteen-year-old nephew S.C., by having S.C. engage in sex acts with Rayna and having the children perform sex acts with each other. Slip op. at 2. Defendant did not physically participate in the sex acts, but he solicited Rayna to engage in the acts, planned the assaults and activity with Rayna, listened to

the assaults and activity over the phone, and requested and obtained photographs of the assaults and activity — including photographs of the children performing sex acts with each other — from Rayna. Ibid.

A grand jury returned an initial indictment charging defendant and Rayna with thirteen offenses. Following Rayna's entry of a plea of guilty to some of the charges, the grand jury returned a superseding indictment charging defendant with the following offenses:[2]

> Count One - second-degree conspiracy to commit aggravated sexual assault and endangering the welfare of a child, N.J.S.A. 2C:5-2, N.J.S.A. 2C:14-2 and N.J.S.A. 2C:24-4;[3]

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[2] The superseding indictment charged defendant with the same offenses charged in the original indictment but modified the time frames in which the alleged offenses were committed. The superseding indictment also did not charge defendant's former co-defendant Rayna with any offenses because she had pleaded to charges in the original indictment. G.T.C., slip op. at 3.

[3] Count one alleged defendant and Rayna conspired to commit the following offenses: aggravated sexual assault on A.B.; aggravated sexual assault on S.C.; endangering the welfare of a child, "A.B. and/or S.C.," by permitting the children to engage in a sexual act or in the simulation of a sexual act; endangering the welfare of a child, "A.B. and/or S.C.," by photographing or filming one or the other child in a prohibited sexual act or simulation of such an act; endangering the welfare of a child, "A.B. and/or S.C.," by giving, providing, mailing, delivering, transferring, distributing, circulating, or disseminating a photograph, film, videotape, or computer program or file depicting one or both of the children in a prohibited sexual act or simulation of a sexual act; and engaging in sexual conduct that would impair or debauch the morals of a child, "A.B. and/or S.C."

Count Two - first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) and N.J.S.A. 2C:2-6, of A.B.;

Count Three - first-degree aggravated sexual assault, N.J.S.A. 2C:2-6 and N.J.S.A. 2C:14-2(a)(2)(a), of S.C.;

Count Four - second-degree endangering the welfare of a child, "A.B. and/or S.C.," N.J.S.A. 2C:24-4(b)(3) and N.J.S.A. 2C:2-6;

Count Five - second-degree endangering the welfare of a child, "A.B. and/or S.C.," N.J.S.A. 2C:24-4(b)(4) and N.J.S.A. 2C:2-6;

Count Six - third-degree endangering the welfare of a child, "A.B. and/or S.C.," N.J.S.A. 2C:24-4(a) and N.J.S.A. 2C:2-6;

Count Seven - second-degree endangering the welfare of a child, "A.B. and/or S.C.," N.J.S.A. 2C:24-4(b)(5)(a) and N.J.S.A. 2C:2-6;

Count Eight - fourth-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(b);

Count Nine - second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(3) and N.J.S.A. 2C:2-6;

Count Ten - second-degree endangering the welfare of a child, "A.B.," N.J.S.A. 2C:24-4(b)(4) and N.J.S.A. 2C:2-6;

Count Eleven - third-degree endangering the welfare of a child, "A.B.," N.J.S.A. 2C:24-4(a) and N.J.S.A. 2C:2-6;

> Count Twelve - second-degree endangering the welfare of a child, "A.B.," N.J.S.A. 2C:24-4(b)(5)(a) and N.J.S.A. 2C:2-6; and
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> Count Thirteen - fourth-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(b) and N.J.S.A. 2C:2-6.[4]

As we recounted in our decision on defendant's direct appeal, the trial evidence established defendant and Rayna began an intimate relationship in August 2010. G.T.C., slip op. at 5. Rayna resided with her mother, brother, sister-in-law, and brother's children, A.B. and S.C. Ibid. S.C. and A.B. are step-brother and sister. Id. at 5 n.3. Defendant visited Rayna's home when she was present with A.B. and S.C. Id. at 5.

During an August 2010 sexual encounter between defendant and Rayna, he asked her if she would let S.C. join them. Ibid. Rayna told defendant she would, but she never did. Ibid. Rayna testified at trial that she understood the discussion as "role-playing," but defendant later asked if she would have sex with S.C. while defendant watched. Id. at 5-6. According to Rayna, she told defendant she would not have sex with S.C., and explained she only told defendant S.C. could join their

[4] The indictment alleged the crimes charged in counts one, two, three, four, five, seven, eight, nine, ten, twelve, and thirteen were committed between on or about November 28, 2010, and on or about January 22, 2011, and the crimes charged in counts six and eleven were committed between on about August 5, 2010, and on or about January 23, 2011.

sexual encounters for defendant's entertainment. Id. at 6. Defendant told Rayna she made him feel guilty, and then sent Rayna a picture of his penis and asked her to compare it to S.C.'s penis. Ibid.

The following day, Rayna exchanged text messages with defendant in which defendant told Rayna to "have some fun" with S.C. Ibid. Rayna testified she understood defendant's message directed her "to do something sexual with [S.C.]." Ibid. Rayna then took a photograph of S.C.'s penis and a photograph of herself performing oral sex on thirteen-year-old S.C., and sent them to defendant. Ibid. Defendant responded, stating it was "hot" and "he was turned on by it." Ibid.

Weeks later, Rayna spoke to defendant over the telephone and said she was home alone with S.C. Ibid. Defendant told her "it was a perfect time to do it, because nobody was home." Ibid. Rayna testified she told defendant S.C. was nervous, and she gave the phone to S.C. Ibid. S.C. testified at trial that defendant then bribed him into having sex with Rayna. Ibid. Rayna explained that S.C. gave the phone back to her and he appeared "more comfortable with doing what [they] were gonna do." Ibid. Rayna testified she and S.C. then had intercourse while defendant listened over the telephone. Ibid. After Rayna had intercourse with S.C., defendant sent her a picture of his penis and said what she and S.C. had done was "hot." Id. at 6-7.

The following month, defendant planned to sleep at Rayna's home. Id. at 7. Defendant told Rayna he wanted to give A.B. Benadryl and have her lay in bed with them. Ibid. On the evening he slept over, defendant asked Rayna to bring A.B to the bed, but Rayna made excuses and did not do so. Ibid. Rayna testified defendant became aggravated because she had said she "was gonna do stuff and . . . never did it." Ibid. During the following few weeks, Rayna and defendant stopped talking, but Rayna continued to send daily text messages to defendant saying she loved him. Ibid.

By early December 2010, defendant and Rayna had rekindled their relationship and, at defendant's request, Rayna began sending defendant pictures showing eight-year-old A.B. with her leg behind her head wearing no underwear, masturbating, and playing dress-up naked in stockings. Ibid. Rayna testified defendant "liked them," asked for more, and requested Rayna take sexual photos of A.B. Ibid.

In January 2011, Rayna photographed A.B. engaging in oral sex with thirteen-year-old S.C., and sent the photograph to defendant. Id. at 8. Defendant responded in a text message asking if they "were having fun." Ibid. Defendant and Rayna were arrested the following day. Ibid.

At trial, Rayna testified she sent defendant "like [forty]" sexually explicit pictures of S.C. and A.B. during the six months prior to their arrest. Ibid. The police investigation recovered 1,123 messages from defendant's phone, all of which were introduced into evidence. Ibid. Some of the messages were read to the jury, including, for example, text messages sent in November 2010 in which defendant asked Rayna if she "mess[ed] with little man anymore?," if "he love[d] [her] sucking him?" and defendant "want[ed] to see." Ibid.

In other messages he sent to Rayna in November 2010, defendant said, "Play with [S.C.] or [A.B.] and let me see," "Think [A.B.] will let you lick her," and "I want to show them love. I'll eat [A.B] and suck [S.C.]." Id. at 8-9. In other messages from defendant's phone read to the jury, he asked Rayna if her brother "would let the kids stay with us in [Atlantic City]" and stated, "[t]hey will drink with us that night. I'll get a room, and they can sleep with us. I can watch [S.C.] cum in you. We can take turns," and he and S.C. could have sexual intercourse with A.B. Id. at 9. Defendant also sent messages asking Rayna to "do [him] a favor" when she got home by taking pictures of A.B. while she was "half asleep and [ ] won't remember," describing the performance of sex acts on the children, and asking if Rayna liked touching A.B.'s genitalia while taking pictures for him. Ibid.

Defendant did not present any witnesses at trial. The jury found defendant guilty on all the charges. The court imposed an aggregate fifty-five-year sentence, with forty-five years subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2, directed he comply with the requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23, and required he serve the special sentence of parole supervision for life, N.J.S.A. 2C:43–6.4. We affirmed defendant's conviction and remanded for resentencing for the court to conduct a Yarbough[5] analysis of the consecutive sentences imposed.[6] Id. at 31. The Supreme Court denied defendant's petition for certification, State v. G.T.C., 235 N.J. 344 (2018).

Defendant filed a pro se PCR petition for certification during the pendency of his direct appeal. The court dismissed the petition without prejudice. Following our affirmance of his conviction on direct appeal, and the Supreme Court's denial of his petition for certification, defendant filed a pro se PCR petition claiming

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[5] State v. Yarbough, 100 N.J. 627 (1985).

[6] At the resentencing on remand, the court imposed the identical sentence as that originally imposed, but later amended the judgment of conviction to reflect an aggregate sixty-year term of imprisonment. On defendant's appeal from the resentencing, the State and defendant agreed to a remand for the court to impose a sentence not to exceed fifty-five years, with the caveat defendant could argue for a lesser sentence. At his subsequent resentencing, the court imposed an aggregate fifty-three-year custodial term, subject to the same conditions as the original sentence.

ineffective assistance of his trial and appellate counsel, and that the cumulative errors of his counsel deprived him of a fair proceeding. Following assignment of PCR counsel, defendant filed an amended verified PCR petition, which detailed the procedural history of the matter and asserted defendant's trial counsel was ineffective by: "allowing the jury to be presented with a jury charge and verdict sheet which contained [']and/or[] language that clearly permitted jurors to arrive at non-unanimous verdict[s]," and also by "failing to utilize pretrial correspondence sent from co-defendant [Rayna] to [defendant] to impeach [Rayna] when she testified at trial."

After hearing oral argument, the court rendered an oral decision denying defendant's PCR petition without an evidentiary hearing. Pertinent here, the court determined Rule 3:22-4(a) barred defendant's claim trial counsel was ineffective by failing to challenge jury charges that included the term "and/or," and therefore deprived defendant of unanimous verdicts, because the jury charge could have been challenged on defendant's direct appeal.

The court also addressed the merits of defendant's claim trial counsel erred by failing to challenge the jury charges that included the term "and/or." More particularly, defendant claimed that by including the phrase "and/or" in certain of the jury charges to refer to the victims of some of the offenses charged as "A.B.

and/or S.C.," the jury may not have reached a unanimous verdict as to whether defendant committed a charged offense against the same alleged victim. Defendant argued counsel's failure to object to the use of the phrase constituted deficient performance and deprived him of a fair trial — and the requisite unanimous jury verdict — to which he is constitutionally entitled.

The court rejected the claim, noting that although the court's instructions on the crime of conspiracy charged in count one included references to "A.B. and/or S.C.," in describing the separate offenses it was alleged defendant and Rayna conspired to commit, the verdict sheet required the jury to separately determine defendant's guilt or innocence on his alleged conspiracy to commit each of those offenses. The court further observed the verdict sheet showed the jury found defendant guilty of conspiring to commit multiple offenses only as against A.B., and a single offense only as against S.C., and therefore the jury returned a unanimous guilty verdict on the conspiracy charge in count one that was unaffected by the use of the term "and/or."

Similarly, the court noted that the jury instructions, and verdict sheet, made clear the jury was required to determine defendant's guilt or innocence on charges he committed crimes against S.C. only under count three, and against A.B. only under counts two, nine, ten, eleven, and twelve. Thus, because those counts did

not use "and/or" to identify the alleged victim of the crimes charged, defendant's claim concerning the use of the phrase did not apply to them.

The court further explained the jury instructions utilizing "and/or" to refer to A.B. and S.C. as the alleged victims only applied to counts four, five, six, and seven. The court also reasoned that because defendant was convicted of offenses for which the jury was asked to determine defendant's guilt only as to each child separately, the use of "and/or" to identify the victims of other crimes charged was of no moment.

The court determined Rule 3:22-4(a) did not bar defendant's claim his appellate counsel was ineffective by failing to challenge the jury charges on direct appeal, but the court found defendant did not establish he suffered prejudice due to counsel's purported error because the charge, when read as a whole, did not support a conclusion the jury could have been "confused or misinformed." The court found the trial court provided the jury with "specific instructions . . . on how to consider the 'and/or' language," followed those instructions "with a general unanimity charge," and directed the jury to consider each charge separately.

The court entered an order denying the PCR petition without an evidentiary hearing. This appeal followed.

Defendant presents the following arguments for our consideration:

POINT I

DEFENDANT'S PCR PETITION SHOULD NOT HAVE BEEN PROCEDURALLY BARRED AS TO TRIAL AND APPELLATE COUNSELS' FAILURE TO OBJECT TO, AND PROPERLY CHALLENGE, THE CONSISTENT USE OF "AND/OR" IN THE TRIAL COURT'S JURY CHARGE, JURY INSTRUCTIONS, AND VERDICT SHEET, THUS LEADING TO THE POSSIBILITY OF A NONUNANIMOUS VERDICT[.]

POINT II

THIS MATTER MUST BE REMANDED FOR A NEW TRIAL, OR AT THE VERY LEAST AN EVIDENTIARY HEARING, BECAUSE DEFENDANT CLEARLY ESTABLISHED A PRIMA FACIE CASE OF TRIAL AND APPELLATE COUNSELS' INEFFECTIVENESS.

A. Trial and Appellate Counsel Failed to Object to, and Effectively Challenge, the Use of "And/Or" In the Trial Court's Jury Charges.

B. Trial Counsel's Failure to Impeach [Rayna] By Way of Her Post-Arrest Letter to Defendant, Which Essentially Served to Exculpate him of these Charges, and Appellate Counsel's Failure to Appeal It, Amounted to Ineffective Assistance Of Counsel[.]

POINT III

TRIAL AND APPELLATE COUNSEL'S FAILURE TO RAISE THE FACT THAT THE MINOR KNOWN AS S.C. WAS NOT RELATED TO [RAYNA] BY

WITHIN THREE DEGREES OF AFFINITY OR BLOOD, AS REQUIRED TO PROVE THE ELEMENTS OF FIRST-DEGREE AGGRAVATED SEXUAL ASSAULT UNDER 2C:14(2)(a), AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL, THEREBY TRIGGERING THE NECESSITY FOR AN ADDITIONAL JURY CHARGE OF SECOND-DEGREE SEXUAL ASSAULT, NEVER REQUESTED BY TRIAL COUNSEL, AND THEREBY AMOUNTED TO A GRAVE TRIAL ERROR WHICH GREATLY AFFECTED THE OUTCOME OF THE CASE[.]

POINT IV

THE FAILURE OF TRIAL COUNSEL TO EVER RAISE THE ISSUE CONCERNING EITHER THE LETTERS SENT FROM [RAYNA] OR THE LACK OF A TRUE BLOOD RELATION, OR CONSANGUINITY, BETWEEN [RAYNA] AND S.C. ARE TANTAMOUNT TO NEWLY DISCOVERED EVIDENCE THAT WAS NEVER PREVIOUS[LY] ADDRESSED TO THE COURT AND, LIKE THE [STATE V. NASH, 212 N.J. 528 (2013)] CASE, THESE ERRORS NOT ONLY CON[S]TITUTE INEFFECTIVE ASSISTANCE OF COUNSEL PER SE, BUT ALSO WARRANT THAT THIS CASE BE REMANDED FOR A NEW TRIAL, TO AVOID A MANIFEST INJUSTICE[.]

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard also applies to

mixed questions of law and fact. Id. at 420. Where an evidentiary hearing has not been held, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court . . . ." Id. at 421. We apply that standard here. Ibid.

Defendant argues the court erred by rejecting his PCR claim his trial and appellate counsel provided ineffective assistance by failing to challenge the court's jury instructions and trial counsel was ineffective by failing to utilize a letter written by Rayna to challenge her credibility at trial. We consider defendant's ineffective assistance of counsel claims under the two-part standard established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 686 (1984), and later adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), as the standard applicable under the New Jersey Constitution, to determine whether a defendant has been deprived of the effective assistance of counsel.

Under the first prong of the Strickland standard, a petitioner must show counsel's performance was deficient. 466 U.S. at 687. A petitioner must demonstrate counsel's handling of the matter "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88.

Under Strickland's second prong, a defendant must "affirmatively prove" "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 693-94). A petitioner must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. "The error committed must be so serious as to undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004) (citing Strickland, 466 U.S. at 694).

"The right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal." State v. O'Neil, 219 N.J. 598, 610-11 (2014); accord State v. Guzman, 313 N.J. Super. 363, 374 (App. Div. 1998); see also State v. Morrison, 215 N.J. Super. 540, 545 (App. Div. 1987) (citing Evitts v. Lucey, 469 U.S. 387 (1985)) ("[D]ue process guarantees a criminal defendant effective assistance of counsel on a first appeal as of right"). We apply the Strickland standard to determine an ineffective assistance of appellate counsel claim. Harris, 181 N.J. at 518; Morrison, 215 N.J. Super. at 546.

A.

Defendant argues the PCR court erred by finding Rule 3:22-4 bars his claim trial and appellate counsel were ineffective by failing to challenge the jury charges and verdict sheet that included the phrase "and/or." We agree.

"Issues that could and should have been raised on direct appeal from [a] defendant's conviction are barred by Rule 3:22-4(a) unless the exceptions to the Rule have been established." State v. Reevey, 417 N.J. Super. 134, 148 (App. Div. 2010) (citing R. 3:22-4(a)(1)-(3)). In pertinent part, the Rule provides that "[a]ny ground for relief not raised in the proceedings resulting in the conviction . . . or in any appeal taken in any such proceedings is barred from assertion" in a PCR petition unless the court finds "that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice."[7] R. 3:22-4(a)(2).

Where, as here, defendant could have raised his challenge to the jury instructions on direct appeal, his claim trial and appellate counsel erred by failing to challenge the instructions is barred unless he "establish[es] 'that enforcement of the bar to preclude claims, including one for ineffective

[7] The Rule also includes two additional exceptions to the bar: where "the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding," R. 3:22-4(a)(1); and where "denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey," R. 3:22-4(a)(3). We do not address either exception because defendant does not claim either applies here.

assistance of counsel, would result in fundamental injustice.'" Reevey, 417 N.J. Super. at 148-49 (quoting R. 3:22-4(a)(2)).

Defendant satisfied that burden here because, as noted, his petition presents a claim counsel were constitutionally ineffective by failing to challenge at trial and on his direct appeal jury instructions he contends violated his constitutional right to a unanimous jury verdict. See State v. Lipsky, 164 N.J. Super. 39, 45 (App. Div. 1978) (citation omitted) ("The constitutional guarantee of a jury trial in criminal causes . . . is violated unless the verdict is the product of [twelve] jurors who have heard all the evidence and arguments and who have deliberated together to reach a unanimous decision."). Thus, even though defendant could have challenged the jury instructions at trial and on direct appeal, we reject the PCR court's conclusion, and the State's argument, the claim is barred under Rule 3:22-4 because to do so would require that we ignore the merits of his ineffective assistance of counsel claims, and that "would result in a fundamental injustice." See State v. Hannah, 248 N.J. 148, 178 n.8 (2021) (explaining Rule 3:22-4(a) provides "that fundamental injustice includes ineffective assistance of counsel."); see also State v. Cupe, 289 N.J. Super. 1, 8-9 (1996) (quoting State v. Mitchell,

126 N.J. 565, 584-85 (1992)) (finding "a genuinely alleged serious defect in the jury charges will circumvent the procedural" bar in Rule 3:22-4).

B.

As noted, defendant argues the PCR court erred by rejecting his PCR claim that trial counsel was ineffective by failing to object to what he contends was the erroneous use of the phrase "and/or" in portions of the jury instructions and the court's discussion of the verdict sheet. He further argues the PCR court erred by rejecting his PCR claim appellate counsel was ineffective by failing to argue defendant's convictions should be reversed due to the court's use of the phrase. Defendant claims use of the phrase constituted plain error because it "engendered great doubt and confusion as to whether the jury was unanimous with respect to some portion, or all, aspects of the verdict" and whether he was convicted based on a finding on "less than all the elements of the crimes."

Defendant's challenge to the use of "and/or" in the jury charges applies to separately identifiable categories of offenses charged in the indictment. In the first category, defendant challenges the use of the phrase "and/or" in the offenses for which the jury was instructed on the elements of accomplice liability under N.J.S.A. 2C:6-2. The offenses in which the accomplice liability

charge was given are those in counts two, three, four, five, six, seven, nine, ten, eleven, twelve, and thirteen.

The second category of offenses for which the jury instructions included the phrase "and/or" are those which the alleged victims of the offenses charged are identified as "A.B. and/or S.C." Those offenses are set forth in counts one, four, five, six, and seven.

There is one crime charged in the indictment, fourth-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(b), in which "and/or" was not utilized by the court to either define accomplice liability or to identify the victim of the offense. As such, defendant's claim counsel were ineffective by failing to challenge the use of "and/or" in the jury charge is inapplicable to defendant's conviction on that charge. The PCR court therefore correctly rejected defendant's claim his conviction on count eight should be reversed because counsel did not object to a purported error in the jury charge on that count.

Defendant claims the trial court erred by using the phrase "and/or" in the instruction on accomplice liability under N.J.S.A. 2C:2-6 that applied to the crimes charged in counts two, three, four, five, six, seven, nine, ten, eleven, twelve, and thirteen. Defendant argues use of the phrase permitted certain

jurors to find he was an accomplice by engaging in one form of conduct, while other jurors may have found he engaged in a different form of conduct, and thereby deprived him of his right to unanimous verdict on the offenses in which he was charged, and convicted, as an accomplice.

N.J.S.A. 2C:2-6 defines the standard by which an individual may be found guilty of a crime committed by another. In pertinent part, the statute provides "[a] person is an accomplice of another person in the commission of an offense if: (1) [w]ith the purpose of promoting or facilitating the commission of the offense; he (a) [s]olicits such other person to commit it; [or] (b) [a]ids or agrees or attempts to aid such other person in planning or committing it[.]" N.J.S.A. 2C:2-6(c)(1)(a), (b).

The trial court's instruction on accomplice liability directly tracked the elements defined in N.J.S.A. 2C:2-6(c)(1)(a), (b). The court, however, instructed the jury that in determining defendant's liability on the offenses for which he was charged as an accomplice, it could find defendant guilty if it determined he acted "with the purpose of promoting or facilitating commission of the offense[s], . . . [he] solicit[ed] [Rayna] to commit [them] and/or aid[ed] or agree[d] or attempt[ed] to aid" her in committing them. (Emphasis added).

In State v. Gonzalez, 444 N.J. Super. 62 (App. Div. 2016), we reversed the defendant's conviction as a co-conspirator and accomplice on robbery and aggravated assault charges. We found the trial court's use of the term "and/or" during the jury instructions impermissibly "left open the possibility that some jurors could have found defendant conspired in or was an accomplice in the robbery but not the assault, while other jurors could have found he conspired in or was an accomplice in the assault but not the robbery." Id. at 76.

We find no similar error in the court's instruction on accomplice liability here because its use of "and/or" did not deprive defendant of the unanimous jury verdict to which he is entitled. Although "[u]nanimity generally 'requires "jurors to be in substantial agreement as to just what a defendant did" before determining [their] guilt,'" State v. Macchia, 253 N.J. 232, 252 (2023) (quoting State v. Frisby, 174 N.J. 583, 596 (2002)), "the jury need not unanimously agree on . . . 'which of several possible means the defendant used to commit an element of the crime,'" id. at 253 (quoting Richardson v. United States, 526 U.S. 813, 817 (1999)). Stated differently, "when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." Ibid. (quoting Schad v. Arizona, 501 U.S. 624, 649-50 (1991) (Scalia, J., concurring)).

Here, the court's instruction concerning accomplice liability solely defined the means by which defendant may have been culpable for Rayna's conduct. Thus, allowing the jurors to determine whether his culpability was based on soliciting "and/or" aiding or attempting to aid Rayna did not implicate, or violate, his right to a unanimous jury. See ibid. For the same reasons, the court's jury instruction on accomplice liability as to the crimes charged in counts two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, and thirteen was correct. And, again, counsel were not ineffective by failing to assert a meritless challenge to the accomplice instruction as applied to those counts of the indictment. See State v. Worlock, 117 N.J. 596, 625 (1990) (citing Strickland, 466 U.S. at 688) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

Defendant also argues the trial court erred by defining the victims of certain offenses as "A.B. and/or S.C.," and he claims counsel were ineffective for failing to challenge those instructions. This argument is limited to only counts one, four, five, six, and seven of the indictment because those are the only counts of the indictment in which "A.B. and/or S.C." are identified as the victims of the offenses charged and those are the only counts for which the court used the phrase in the jury instructions. Thus, because we have

determined the court's use of "and/or" in its instruction on accomplice liability was proper, and because the court did not use "and/or" in its instructions on the crimes charged in counts two, three, nine, ten, eleven, twelve, and thirteen, we affirm the court's denial of PCR on defendant's convictions on those counts. We therefore consider the trial court's use of "and/or" in the jury charge on the remaining counts at issue — one, four, five, six, and seven.[8]

Defendant was convicted of conspiracy under count one. The indictment alleges defendant conspired with Rayna to commit six separately defined crimes: (1) aggravated sexual assault of A.B., N.J.S.A. 2C:14-2; (2) aggravated sexual assault of S.C., N.J.S.A. 2C:14-2(a)(2)(a); (3) endangering the welfare of "A.B. and/or S.C.," N.J.S.A. 2C:24-4(b)(3); (4) endangering the welfare of "A.B. and/or S.C.," N.J.S.A. 2C:24-4(b)(4); (5) endangering the welfare of "A.B. and/or S.C.," N.J.S.A. 2C:24-4(b)(5); and (6) endangering the welfare of "A.B. and/or S.C.," N.J.S.A. 2C:24-4(a). Consistent with the charges in the indictment, during its instructions on the final four crimes defendant was charged with conspiring to commit, the court directed the jury it

[8] As noted, the court did not use "and/or" in its instruction on the crime charged in count eight and, for that reason, defendant's PCR claim founded on his counsels' purported errors in failing to challenge the jury charge on that offense was properly rejected by the PCR court.

should convict defendant of conspiracy to commit those four offenses if it determined beyond a reasonable doubt he committed them as to "A.B. and/or S.C."

The court recognized the problems presented by use of "and/or" in the jury charge and on the verdict sheet. At various times during the jury charge and its explanation of the verdict sheet, the court attempted to explain the manner in which the phrase should be applied in determining defendant's guilt or innocence on the charges. In our view, the explanations provided were vague and, overall, they did not make clear the point the court attempted to convey — that where "A.B. and/or S.C." was used, the jury could determine defendant was guilty only where it unanimously agreed defendant conspired to commit the alleged crime either A.B. or S.C.[9] In our view, that vagueness erroneously permitted the possibility the jury could have returned a guilty verdict based on a conspiracy to commit any one of the four offenses, with some jurors finding defendant conspired to commit an offense as to A.B. and

[9] For example, in its efforts to explain the manner in which the jury was to apply "and/or" in the jury instruction and the verdict sheet, the court instructed, "A.B. and/or S.C. — so it could be both of them or one of them," and "See where it says and/or at the end of the sentence on 2? What that means is when I said they have to prove each of the elements, what that means is this could be an and/or, two or three or an and/or. You don't have to get both 2 and 3."

other jurors finding defendant conspired to commit the offense as to S.C. See Gonzalez, 444 N.J. Super. at 76. Such findings go to an essential element of the crimes charged and require a unanimous verdict of the jury. Macchia, 253 N.J. at 252-54; see also State v. Gentry, 183 N.J. 30, 33 (2005) (explaining a jury must unanimously agree "on which acts were committed against which victim").

We are not, however, convinced the trial court's error in instructing the jury on those four offenses within the conspiracy charge, and counsels' failure to challenge the instructions at trial and on direct appeal, establish a prima facie ineffective assistance of counsel claim. That is because the verdict sheet required the jury to make separate findings as to whether defendant conspired with Rayna to commit each of the six alleged crimes. In returning its verdict, the jury separately and unanimously found defendant conspired with Rayna to commit an aggravated sexual assault on A.B. and an aggravated sexual assault on S.C. The jury instructions and verdict sheet on those two charges did not include "and/or," and therefore the jury, which was polled following its return of a verdict on each of the charges in the indictment, unanimously agreed defendant conspired to commit an aggravated sexual assault on A.B. and

unanimously agreed defendant conspired to commit an aggravated sexual assault on S.C.

Defendant's conviction on the charge of conspiracy is therefore well supported regardless of the jury findings he also conspired to commit the four other offenses for which the instructions included "and/or." As a result, defendant suffered no prejudice from his counsels' failure to challenge the use of "and/or" in the jury charge on conspiracy. Even if the jurors had not reached a unanimous verdict on the charge he conspired to commit one or more of those four offenses as to either A.B. or S.C., defendant was convicted of conspiracy to commit two other crimes — first-degree aggravated sexual assaults — for which "and/or" was not part of the jury instructions or the verdict sheet. Defendant's PCR claim based on his counsel's alleged failure to challenge the use of "and/or" in the jury charge on conspiracy therefore fails under Strickland's second prong; defendant did not establish that but for his counsel's error there is a reasonable probability the result of his trial or direct appeal would have been different. See Strickland, 466 U.S. at 694.

Counts four, five, six, and seven charge defendant with various crimes allegedly committed on "A.B. and/or S.C." The court's instructions concomitantly informed the jurors they could convict defendant if he

committed the offense as to "A.B. and/or S.C." For the reasons noted, we find the instruction in error, see Gonzalez, 444 N.J. Super. at 76, but under the circumstances presented here we are not convinced counsels' failure to challenge the erroneous instruction resulted in any prejudice to defendant under the Strickland standard.

We recognize that "erroneous instructions in a criminal case" to which no objection was made at trial "are 'poor candidates for rehabilitation under the plain error theory.'" State v. Adams, 194 N.J. 186, 207 (2008) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). In O'Neil, the Court applied the Strickland standard to a defendant's claim appellate counsel was ineffective by failing to challenge an incorrect jury charge. 219 N.J. at 615-17. In doing so, the Court considered whether there was "a reasonable probability" that, but for counsel's error, "the result of the [appellate] proceeding would have been different." Id. at 617. The Court also determined that, based on the circumstances presented, the defendant was prejudiced by the incorrect jury instruction because there was a "reasonable probability that, if properly instructed, the outcome [of the trial] would have been different." Ibid.

A challenge to an erroneous jury instruction on a direct appeal under the plain error standard "requires demonstration of '[l]egal impropriety in the

charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Burns, 192 N.J. 312, 341 (2007) (alteration in original) (quoting Jordan, 147 N.J. Super. at 422). In making that assessment, the error in the jury charge "must be considered in light of the entire charge and must be evaluated in the light 'of the overall strength of the State's case.'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

Measured against these standards, we are not convinced there is a reasonable probability that had defendant's trial and appellate counsel challenged the court's error in using the phrase "A.B. and/or S.C." to define the elements of the offenses charged in counts four, five, six, and seven, the result of defendant's trial or appeal would have been different. See Strickland, 466 U.S. at 694; O'Neil, 219 N.J. at 615-17. The evidence against defendant on each of the charges as to each of the children — both A.B. and S.C. — was overwhelming. Moreover, the jury found defendant guilty of committing other endangering the welfare of a child offenses as to A.B. only — including aggravated sexual assault, filming A.B. engaged in sexual acts, and

distributing photographs of A.B. engaged in sexual acts under counts one, nine, and twelve, that otherwise support defendant's convictions of the four offenses — in counts four, five, six, and seven — for which the jury instructions included "A.B. and/or S.C."

Based on the evidence presented, and the jury's determination defendant committed acts as to A.B. that otherwise are encompassed by the charges in counts four, five, six, and seven, we cannot conclude defendant established a reasonable probability that but for the court's erroneous use of "A.B. and/or S.C." in the jury charge and verdict sheet on those counts, and counsels' failure to object to the charge, the result of defendant's trial or direct appeal would have been different. See Strickland, 466 U.S. at 687.

In sum, we reject defendant's claim he sustained his burden under the Strickland standard to establish a prima facie ineffective assistance of counsel claim based on counsels' failure to object to, or challenge, the court's use of "and/or" in certain jury instructions and the verdict sheet. See O'Neil, 219 N.J. at 617.

C.

Count three of the indictment charged defendant with committing first-degree aggravated assault, N.J.S.A. 2C:14-2(a)(2)(a), as an accomplice to

Rayna by soliciting Rayna and/or aiding Rayna in the commission of an act of sexual penetration with S.C., while S.C. was at least thirteen years of age but less than sixteen years of age, and S.C. was related to Rayna by blood or affinity to the third degree. Defendant claims the court erred by rejecting his claim trial and appellate counsel were ineffective by failing to raise as a defense to the charge that Rayna is not related to S.C. within three degrees of affinity or blood. Defendant argues counsel should have asserted S.C. is related to Rayna by four degrees of affinity.

We reject defendant's contention for two reasons. First, defendant waived the argument because it was not raised before the PCR court.[10] An issue is "not properly preserved for appellate review" that was not "raised before the trial court, because its factual antecedents never were subjected to

[10] In the point heading of his brief in which the argument is made, defendant cites to the May 28, 2014 trial transcript in an apparent effort to comply with Rule 2:6-2(a)(6)'s requirement that point headings in briefs on appeal include "the place in the record where the opinion or ruling in question is located." Defendant failed to comply with the Rule because he cited to trial testimony and the claimed error which is the subject of the point heading is asserted to have occurred during the PCR proceeding, not trial. Additionally, since he did not make the argument before the PCR court, defendant should have noted in the point heading that the "issue was not raised below" as required by the Rule. We make these observations only to point out that despite the citation to the record in the point heading, the ineffective assistance of counsel issue raised in Point III of defendant's brief is made for the first time on appeal.

the rigors of an adversary hearing, and because its legal propriety never was ruled on by the trial court." State v. Robinson, 200 N.J. 1, 18-19 (2009).

As the Court has explained, "[a]ppellate review is not limitless," and a reviewing court's "jurisdiction . . . rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves." Id. at 19. "It would be unfair, and contrary to our established rules, to decide" an issue where the litigants were "deprived of the opportunity to establish a record that might have resolved the issue" and the trial court "was never called on to rule on the" issue. State v. Witt, 223 N.J. 409, 419 (2015). For those reasons alone, we reject defendant's argument the PCR court's order should be reversed based on a claim never presented to the court in the first instance.

Moreover, even if we considered the claim, we would reject it on the merits based on the evidence presented at trial. The record shows S.C. is Rayna's brother's stepson. That is, S.C.'s mother is married to Rayna's brother.

Defendant's argument about the purported lack of affinity between Rayna and S.C. is untethered to any legal authority. Instead, defendant relies solely on a chart he contends establishes S.C. is in four degrees of affinity to Rayna. The chart indicates that, for example, a person is four degrees of

affinity from a nephew-in-law. Relying on that indication on the chart, defendant claims Rayna is four degrees of affinity from S.C. for purposes of determining culpability under N.J.S.A. 2C:14-2(a)(2)(a), and his trial and appellate counsel should have argued as such.

We reject defendant's reliance on the chart because it was not presented to the PCR court, it has not been authenticated in any manner, and it is submitted without any citation to its source. In other words, there is no basis in the record to accept the chart as authoritative in any manner as to the issue of what constitutes three degrees of affinity under N.J.S.A. 2C:14-2(a)(2)(a). Thus, defendant fails to demonstrate counsel were ineffective by failing to make an argument challenging the State's proofs on the requisite degree of affinity because he did not present any competent evidence or argument supporting his claim. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) (explaining a PCR petition "must do more than make bald assertions" to prevail).

Moreover, the chart upon which defendant solely relies does not support defendant's claim and, in fact, undermines it. The chart suggests that a person stands in four degrees of affinity to a niece- or nephew-in-law but, in a "note," the chart states that "step relationships . . . are considered to be the same as

blood relationships." Thus, accepting the note's plain language, Rayna's brother's step-son, S.C., stands in the same relationship for determining degrees of blood and affinity as would Rayna's brother's biological son. And, according to the chart, any biological son of Rayna's brother is within three degrees of blood with Rayna.

In other words, according to the chart upon which defendant relies, Rayna is within three degrees of blood from S.C. As such, defendant fails to show there was any argument counsel could have successfully made based on Rayna's degrees of blood or affinity with S.C. under N.J.S.A. 2C:14-2(a)(2)(a). Counsels' performances were not deficient by failing to make an argument defendant's own purported evidence establishes is meritless. See State v. O'Neal, 190 N.J. 601, 619 (2007) (holding "[i]t is not ineffective assistance of counsel for defense counsel not to file a meritless motion").

Defendant's argument is also inconsistent with the ordinary meaning of the plain language of N.J.S.A. 2C:14-2(a)(2)(a). In pertinent part, the statute provides that "[a]n actor is guilty of aggravated sexual assault if the actor commits an act of sexual penetration with another person" where "[t]he victim is at least [thirteen] but less than [sixteen] years old[,] and [t]he actor is related to the victim by blood or affinity to the third degree." N.J.S.A. 2C:14-

2(a)(2)(a). The statute does not define the term "blood or affinity," so we therefore apply the words' "generally accepted meaning[s], according to the approved usage of the language." N.J.S.A. 1:1-1.

Affinity is defined as "[t]he relation that one spouse has to the blood relatives of the other spouse." Affinity, Black's Law Dictionary (11th ed. 2019); State v. Brown, 311 N.J. Super. 273, 276 (Law Div. 1997). In a relationship by marriage, "the [spouses] are one" and therefore one spouse "stands in the same degree of affinity to [the other spouse]'s blood relatives as [that spouse] stands to them by consanguinity, and vice versa." 3 Wharton's Criminal Law § 49:5 (16th ed. 2021). These definitions are not only consistent with defendant's chart, they comport with the model jury instruction on the elements of the crime of aggravated sexual assault under N.J.S.A. 2C:14-2(a)(2)(a). The instruction explains third degree blood and affinity relations include "uncles, aunts, nieces, nephews, great grandparents, great grandchildren." Model Jury Charges (Criminal), "Aggravated Sexual Assault Victim At Least 13 But Less Than 16 (N.J.S.A. 2C:14-2(a)(2))" (revised Mar. 10, 2008); see also Cannel, N.J. Criminal Code Annotated, cmt. 2 on N.J.S.A. 2C:14-2 (2022) (citing 23 Am. Jr. 2d Descent and Distribution §§ 52, 55 (1983)) (explaining under N.J.S.A. 2C:14-2(a)(2)(a) "the prohibited

relationships include uncles and aunts by blood or marriage" because of the statute's use "of the word 'affinity'").

We are also persuaded it would be incongruous to interpret N.J.S.A. 2C:14-2(a)(2)(a) in the manner suggested by defendant. Accepting defendant's interpretation would illogically render it a less serious crime for an aunt to commit an act of sexual penetration with her brother's stepson than it would if the aunt committed the identical act with her brother's biological son of the same age. See Brown, 311 N.J. Super. at 278-79 (rejecting an interpretation of N.J.S.A. 2C:14-2(a)(2)(a) that a stepbrother and stepsister were not within any degree of affinity because it "would yield an absurd result" that biological brothers and sisters would be prosecuted for a more serious crime than stepbrothers and stepsisters for engaging the same conduct). We find no language in N.J.S.A. 2C:14-2(a)(2)(a) supporting such an absurd result and we will not therefore interpret the statute in such a manner. See ibid.; Pfannenstein v. Surrey, 475 N.J. Super. 83, 95 (App. Div. 2023) (quoting Hubbard v. Reed, 168 N.J. 387, 392 (2001)) ("If . . . a literal interpretation of a provision would lead to an absurd result or would be inconsistent with the statute's overall purpose, 'that interpretation should be rejected' and 'the spirit of the law should control.'").

In sum, even if defendant had not waived the argument by failing to raise it before the PCR court, defendant failed to satisfy either prong of the Strickland standard on his claim counsel erred by failing to argue he could not be convicted of first-degree aggravated sexual assault under N.J.S.A. 2C:14-2(a)(2)(a) because the State did not prove Rayna was within three degrees of blood or affinity with S.C. Again, trial and appellate counsel's performance was not deficient, and defendant suffered no prejudice, under the Strickland standard by any failure to make a meritless argument. See O'Neal, 190 N.J. at 619.

D.

Defendant argues trial counsel was ineffective by failing to cross-examine Rayna concerning a letter she wrote to defendant while he was incarcerated awaiting trial. The letter included statements such as, "I want to apologize for being selfish. Asking you to take this on your own was wrong, and inconsiderate. I am sorry. As much as I want this to be your fault, it isn't." The letter includes the statement, "There is so much more involved in this th[a]n you even know, and I want so bad to tell you." The letter also includes declarations she is "scared" and she misses defendant, and a request that defendant smile at her when he sees her in court. Defendant claims the letter should have been used by counsel to cross-examine Rayna, because the letter "would have completely undermined

[Rayna's] credibility to the point where essentially no jury would have convicted him of the[] charges."

"Although a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012) (citation omitted). Here, even if trial counsel's performance was deficient by failing to cross-examine Rayna about the letter, we affirm the court's denial of defendant's PCR claim founded on the error. Other than his conclusory assertions, defendant makes no showing there is a reasonable probability that had the cross-examination taken place, the result of the trial would have different. Strickland, 466 U.S. at 693-94; Gideon, 244 N.J. at 551. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. And, under the Strickland standard, "prejudice must be proved; it is not presumed." Fritz, 105 N.J. at 52.

Defendant has not made any showing that cross-examination of Rayna concerning the letter would have changed the result. The letter includes expressions of remorse and guilt, as well as vague expressions of acceptance

of responsibility for the incidents that caused defendant and Rayna to be charged. But, Rayna testified in detail about her criminal involvement with A.B. and S.C., and she directly implicated defendant in her actions, describing how he solicited her to engage in sexual penetration with S.C. and to have two children commit sexual penetration on each other for defendant's enjoyment and for the photographs he requested and received. There is nothing in the letter that undermines Rayna's testimony concerning what defendant solicited her to do. Further, her expressions of guilt and regret, and her acceptance of responsibility for her actions do not support defendant's claim Rayna's credibility would have been undermined by any cross-examination about the letter. Indeed, defendant does not even offer a suggestion as to what cross-examination based on the letter would have revealed that might have made a difference in the outcome of his trial. See Cummings, 321 N.J. Super. at 170 (explaining a PCR petition "must do more than make bald assertions" and "must assert the facts" upon which the claims are based).

Additionally, although Rayna was an important witness for the State, its case did not rest entirely on her testimony. There was other evidence independent of Rayna's testimony providing significant proof of defendant's guilt, including the numerous text messages he sent Rayna concerning the

children, and the compelling testimony of S.C. Thus, even if Rayna was cross-examined concerning the letter, the evidence substantially corroborated the essential elements of Rayna's testimony such that there is no basis to find a reasonable probability the cross-examination would have resulted in a different trial outcome. See State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 696) (noting that, in assessing Strickland's second prong, the court considers the weight of the other evidence presented to the jury).

The court correctly denied defendant's claim trial counsel was ineffective by failing to cross-examine Rayna on the letter. Defendant did not sustain his burden under Strickland's second prong. Strickland, 466 U.S. at 694.

E.

Defendant sporadically claims in his brief on appeal that his counsel rendered deficient performance under the United States Supreme Court's decision in United States v. Cronic, 466 U.S. 648 (1984). In Cronic, the Supreme Court held that prejudice under Strickland's second prong may be presumed where there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id. at 658. Circumstances supporting the presumption "involve

the complete denial of a right to counsel altogether, actual or constructive." Fritz, 105, N.J. at 54. Thus, the Cronic presumption is inapplicable where, as here, there is no showing defendant was completely denied the right to counsel and there are only alleged discrete errors by a defendant's counsel. Bell v. Cone, 535 U.S. 685, 696-98 (2002).

Defendant also claims the PCR court erred by denying his petition without an evidentiary hearing. A PCR petitioner is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013). A court should conduct an evidentiary hearing on a PCR petition only if the petitioner establishes a prima facie case in support of PCR, material issues of disputed fact cannot be resolved by reference to the existing record, and an evidentiary hearing is necessary to resolve the claims for relief. Id. at 354 (citing R. 3:22-10(b)); see also State v. Preciose, 129 N.J. 451, 462 (1992) (a PCR court should grant an evidentiary hearing "if a defendant has presented a prima facie claim in support of [PCR]."). The PCR court did not err by finding defendant failed to make any showing an evidentiary hearing was warranted here.

We also reject defendant's claim he is entitled to a new trial based on newly discovered evidence. The claim lacks sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2), other than to note defendant

failed to raise the issue before the PCR court, see Robinson, 200 N.J. at 18-20, and the purported newly discovered evidence upon which the claim is hoisted fails to meet any of the standards for newly discovered evidence required to support a new trial motion as explained by the Court in State v. Szemple, 247 N.J. 82, 99 (2021).[11]

Any remaining arguments made on defendant's behalf that we have not expressly addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

[11] For evidence to qualify as newly discovered supporting a motion for a new trial, a defendant must show the evidence is: (1) "material to the issue and not merely cumulative or impeaching or contradictory;" (2) discovered since trial and "not discoverable by reasonable diligence beforehand;" and (3) "of the sort that would probably change the jury's verdict if a new trial were granted." Szemple, 247 N.J. at 99 (quoting State v. Carter, 85 N.J. 300, 314 (1981)).