SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2460-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD BURRIS,

Defendant-Appellant.

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Argued October 17, 2022 – Decided January 30, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 97-10-2297.

Bruce I. Afran argued the cause for appellant.

Lauren Bonfiglio, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Lauren Bonfiglio, of counsel and on the brief).

PER CURIAM

Defendant Donald Burris challenges the denial of his petition for post-conviction relief (PCR). At his 1999 trial, defendant conceded that he shot and killed his former girlfriend, Peggy Selvaggio. However, he claimed he was experiencing a dissociative episode brought on by a combination of fatigue, alcohol consumption, and emotional distress, and therefore, he did not have the purposeful or knowing state of mind needed to support a murder charge. The jury disagreed, and defendant was convicted of murder and related weapons offenses. The court sentenced defendant to an aggregate sentence of sixty-five years with an eighty-five percent period of parole disqualification. We affirmed the convictions on direct appeal. State v. Burris, 357 N.J. Super. 326, 339 (App. Div. 2002).[1]

The court denied defendant's PCR petition in a comprehensive, well-reasoned, sixty-page written decision and accompanying January 21, 2020 order. We affirm.

In his petition for PCR and in this appeal from its denial, defendant argues that a new trial is necessary based on his discovery of new evidence. He now contends he took a sleeping medication, Ambien, on the night he killed

[1] We reversed the imposed parole disqualifier portion of the sentence and remanded. Defendant was resentenced to a term of sixty-five years with a thirty-year period of parole ineligibility.

Selvaggio, and that side effects of the drug may have triggered or contributed to his alleged dissociative episode. Defendant contends that in the years since his conviction, scientists have learned that Ambien may cause patients to perform tasks and behaviors while unaware of their actions, and that this information would have changed the outcome of the trial if it had been known in 1997.

Defendant also alleges that deposition testimony given by Selvaggio's brother in a later civil suit calls into question certain testimony of Selvaggio's lawyer during defendant's trial. In addition, defendant contends the prosecutor committed misconduct by withholding evidence from discovery and making improper statements during summation, and that his trial and appellate counsel were both ineffective for various reasons.

I.

We derive the facts necessary for analysis of the PCR issues from the trial testimony.

In July 1995, defendant was married to his second wife when he began a romantic relationship with Selvaggio. He later divorced his wife. He and Selvaggio moved in together and later became engaged.

During the relationship, Selvaggio asked defendant for money several times. She requested monies to invest in a bar and a liquor store where she

worked; she desired to become a part owner of both businesses. In total, defendant "loaned" Selvaggio between $250,000 and $300,000. Defendant also bought Selvaggio a Corvette, jewelry, and other gifts, and paid for renovations to her mother's house. In the early summer of 1997, defendant told Selvaggio he could not loan her any more money because he had already refinanced a house he owned, depleted his children's education funds and was running out of money.[2]

In July 1997, while the two were in Florida for Selvaggio's mother's funeral, Selvaggio broke off the engagement and told defendant she was moving out of their shared condominium in Voorhees. Although they both returned to New Jersey, defendant went back to Florida on July 23 because he had booked a house rental there before Selvaggio ended the relationship.

Two of Selvaggio's liquor store coworkers testified they overheard Selvaggio's side of a conversation on August 1 when defendant called her at the store. The witnesses stated Selvaggio began the conversation in a businesslike tone with Selvaggio saying she intended to pay defendant back the money she owed him. However, Selvaggio became angry, shouted expletives into the phone, and told defendant to stop "calling and bothering" her. According to her

[2] Defendant had six children with his first wife.

coworkers, Selvaggio exclaimed, "Don't threaten to kill me"! She also said that if defendant continued to "harass" her she would obtain a court order against him. Selvaggio told defendant to fax her lawyer a breakdown of what she owed him before she ended the call. Two days later, Selvaggio moved out of the condo and into a residence located behind the bar where she worked in Berlin.

Attorney Thomas Coleman testified that on August 4, 1997, he met with Selvaggio and her brother, Leonard "Ted" Selvaggio, to discuss their mother's estate. During the meeting, they also talked about Selvaggio's financial entanglement with defendant and Coleman advised Selvaggio concerning her debts. He testified he also explained to Selvaggio how she could apply for a restraining order and "how in essence the loans[,] the gifts would involve that and [defendant's] conduct could play into that as well."

Also on August 4, defendant began to drive back to New Jersey from Florida in his Chevrolet Tahoe. He stopped in North Carolina for the night. On August 5, defendant continued his drive, stopping for dinner in Maryland with friends and arriving at the couples' condo in Voorhees around 9:00 p.m.

In addition to her other jobs, Selvaggio worked as a cocktail waitress at Harrah's Casino in Atlantic City. On August 6, 1997, Selvaggio reported for her 4:00 a.m. shift and spoke to a coworker, Abigail Paisley. Paisley testified that

Selvaggio looked as though she had been crying. Selvaggio told Paisley she had received a fax from defendant earlier that night but had not read it. Selvaggio told Paisley she was thinking of getting a restraining order against defendant so he could not contact her. Shortly thereafter, Selvaggio was told she could leave work early, because only one server was needed on the casino floor. Selvaggio left the casino at around 3:45 a.m. and rode the 3:55 a.m. shuttle bus to the employee parking lot.

Meanwhile, at around 3:30 a.m., Wayne Patterson, another Harrah's employee who knew Selvaggio, was waiting in the employee parking lot to catch the next shuttle bus to the casino to begin his own work shift. Patterson observed a man, who he identified at trial as defendant, get out of a dark Chevrolet Tahoe in the employee parking lot near the bus stop and walk toward a white Corvette. Patterson knew the Corvette was Selvaggio's and because he thought defendant might be attempting to steal it, he watched defendant carefully and tried to make eye contact so defendant would know he had been observed. Patterson said defendant had no difficulty walking toward the Corvette.

Patterson saw defendant get into the Corvette and lean over to the passenger seat before putting down the window and lighting a cigarette. Patterson realized defendant could not turn the car on and lower the window

without a key, so he decided defendant knew Selvaggio and there was nothing to worry about. Shortly thereafter, as Patterson walked toward an arriving shuttle bus to board it, he heard the sound of a shotgun round being chambered coming from the Corvette. He explained he recognized the noise because he was an experienced hunter.

Selvaggio arrived in the parking lot on another bus, driven by Norman Cain. Moments later, she called 9-1-1 from a pay phone next to the bus shelter, but only stated her location before being disconnected. When the 9-1-1 operator, William Wray, called back to learn why the call had been placed, Selvaggio answered, telling Wray her boyfriend had placed a gun in her car and left. Wray tried to clarify whether someone had pointed a gun at Selvaggio and she said her boyfriend had come back and taken the gun out of her car. Wray then heard "what sounded like [two] or [three] [gun]shots" and a "female scream." The jury heard the recording of the 9-1-1 call.

Three other Harrah employees who were in the parking lot at the time testified they heard gunshots: William Lanyon said he heard two or three shots,

screams, and then two or three more shots, while William Hopper and David Cox both testified they heard two shots, screams, a time lapse, then three shots.[3]

Lanyon recounted that he saw defendant walking from the direction of a fence, carrying what he thought was a rifle. Lanyon said there was nothing about defendant's gait to suggest he was impaired in any way. Hopper and Cox saw a dark-colored SUV drive from the area near the bus stop out of the parking lot. At the bus stop, Hopper and Cox found numerous items on the ground near the phone including Selvaggio's Harrah's identification card, a hairbrush, and other belongings. They also saw the pay phone's receiver "dangling," and "a few drops of blood."

Atlantic City police officer Ralph Garrett, who was in his patrol vehicle in a nearby parking lot, heard gunfire that seemed "extra loud" to him, and drove over to investigate. After encountering Cox and Hopper, who reported their observations, Garrett then drove in the direction Hopper said the SUV went. The officer also "got on the air" to tell other officers about the incident, that whoever fired the gunshots had left the scene in a "dark colored vehicle," and the direction he thought the vehicle was going when it left the parking lot.

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[3] A detective's report stated that Cox and Hopper said they heard two shots, screams, and then two more shots. Cox testified at trial that the detective was mistaken in his notes.

Cox and Hopper also told Harrah's security officer, Joseph Martorano, what they had seen and heard. While searching the parking lot together, Hopper and Martorano discovered Selvaggio's body lying in the weeds along the fence where Lanyon had seen defendant walking, approximately forty to fifty feet from the bus shelter. They saw gunshot wounds in the center of her back and the side of her face. Selvaggio was pronounced dead at around 4:20 a.m.

Meanwhile, Atlantic City police officers Michael LoSasso and Paul Wegner were on routine patrol when they received a dispatch message reporting a dark-colored SUV leaving the scene of a gun-related incident. Just then, defendant's vehicle, which matched that description, passed them from the opposite direction. LoSasso testified he made brief eye contact with defendant, and described defendant giving him an "'[o]h, shit' look" and then quickly diverting his gaze. LoSasso turned his vehicle around and pursued defendant for several blocks.

LoSasso initiated a "high risk stop" at around 4:06 a.m. He used a public address system to order defendant to exit his car, put his hands behind his head, kneel down, and follow other instructions. Defendant complied without difficulty, and multiple officers testified that his conduct was normal. They also

reported an odor of alcohol on his breath. Defendant was arrested, placed in the back seat of a patrol car, and read his Miranda[4] rights.

Police looked into defendant's car to confirm there was no one else inside, and observed a shotgun leaning on the passenger seat, several boxes of bullets in a bag on the front seat, and three empty beer bottles. The officers had not yet received details of the incident with Selvaggio, but only knew that a "female" had been involved in a shooting, so Officer William Jackson went to the car where defendant was sitting and asked him, "Where's the female?" Defendant gave Jackson an "annoyed" look and responded, "What female? I don't know what you're talking about."

A few minutes later, the officers learned Selvaggio's body was found. Sergeant Daniel McCausland then asked defendant his name and where he was from, which defendant provided, and asked if he knew why he had been stopped. Defendant nodded yes, and McCausland told him police had found Selvaggio's body; defendant nodded again and looked down at the floor of the patrol car.

An officer read defendant his Miranda rights a second time. He testified that defendant showed "no emotion" and said nothing to him, but appeared alert and awake. However, within fifteen minutes of being placed in the police car,

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

defendant fell asleep. He did not wake for four hours, until 8:43 a.m., when he was asked to get out of the car at police headquarters.

There, defendant was advised of his Miranda rights a third time before being interviewed by Investigator Bruce DeShields and Investigator Lawrence Wade. Defendant was alert and responsive, but "visibly shaken" and "upset." He repeatedly professed his love for Selvaggio. When Wade told him Selvaggio was dead, defendant said several times, "If Peggy is dead, then just take me out and kill me." Defendant answered questions about his biographical information, relationship with Selvaggio, and whereabouts on August 5, 1997, and "[u]p to a certain point" was able to tell officers "exactly what happened." However, defendant stated multiple times that he could not remember anything about the events of August 6, 1997, from 2:11 a.m., when he received a page from Selvaggio, until the time he was taken out of the police car at headquarters.

Forensic pathologist Lyla Perez testified regarding the autopsy of Selvaggio's body and the wounds she identified and opined as to how the wounds were inflicted. Her examination revealed the following six gunshot wound "tracks": (1) through Selvaggio's face; (2) through her shoulder and out her back; (3) and (4) through her breasts, producing multiple perforations; (5) into the front of her chest, fracturing her ribs and lacerating her heart and left lung; and

(6) through her right arm. Dr. Perez concluded the shot to Selvaggio's face was fired at close range, based on the presence of soot around the entry wound. The wound through Selvaggio's back showed abraded areas suggesting her skin "slapp[ed] the asphalt." To sustain that injury, Selvaggio would have been "face up . . . on the ground with her back touching the ground." Dr. Perez also noted holes in the sleeves of Selvaggio's shirt and jacket that did not correspond to any wounds and opined that these were caused by a seventh shot.

Three spent shotgun shells and "wadding" from projectiles were found near the bus shelter. A projectile was found jammed inside the shotgun taken from defendant's vehicle. The ammunition retrieved from the car included several types of bullets, including Brenneke slugs. Ballistics expert Emanuel Kappelsohn testified that the shells at the scene were from Brenneke slugs—a brand known to penetrate more deeply and cause more "devastating" wounds than the other types of bullets in the car.

Kappelsohn stated that defendant's shotgun, when fully loaded, could hold up to five rounds of ammunition. He agreed with Dr. Perez's assessment that Selvaggio had been shot six times, and explained that a seventh shot went through Selvaggio's clothing and lodged in her purse, where it was recovered. Kappelsohn stated that if defendant began shooting with the shotgun filled to

capacity he would have had to reload before firing the final two shots. He also explained the method by which the shotgun was fired and reloaded, detailing the several steps to complete each of these operations. Kappelsohn said that type of shotgun was "particularly loud" and had a noticeable "kick" or recoil.

Kappelsohn opined that the two wound tracks through Selvaggio's breasts came from bullets fired from a distance, and may have resulted from the shooter "'overleading' a moving target" as she ran away from the bus station toward the fence where her body was found. Kappelsohn also said that the wound through Selvaggio's back, based on the "splatter[]" below the exit wound, was inflicted "from above her head as she was on her back on the pavement."

Kappelsohn stated that because there was a combination of close-range and distant shots fired from different angles, it was likely that in addition to Selvaggio running away, defendant also moved during the shooting rather than standing in one place. He also opined that based on "the number of shots fired, the movement by both the victim and the shooter, the shooter's need to reload at least two shots during the course of the shooting," and other factors, the shooting likely lasted "at least fifteen to twenty . . . seconds." Kappelsohn stated this was "statistically five to six times longer than the average time span of a typical

shooting, which has been calculated at slightly over three . . . seconds from start to finish."

The defense admitted that defendant shot Selvaggio, but he did so while in a dissociated, trance-like state during which he had no conscious control of his actions. Defendant presented several experts to support his theory.

Gerald Cooke, Ph.D., a clinical and forensic psychologist, evaluated defendant on February 25, 1998. According to defendant, he arrived back at the condo around 9:00 p.m. on August 5, after driving from Florida. His sons came to visit around 11:00 p.m., and they talked about some letters defendant had sent Selvaggio. Around 12:45 a.m., defendant sent Selvaggio another fax regarding the $300,000 she owed him. Defendant told Dr. Cooke he consumed "a couple" of scotch and waters during this time, and that his sons left around 1:30 a.m.

At around 2:00 a.m., defendant decided to go and see Selvaggio at her house; he arrived there around 2:15 a.m. Defendant told Dr. Cooke he brought his shotgun with him to give to Selvaggio, who had paged him at 2:11 a.m. Defendant told Dr. Cooke he realized Selvaggio's home alarm system was activated and so he decided to drive the sixty miles to her workplace in Atlantic City instead. Defendant arrived at the Harrah's parking lot around 3:20 a.m. He

placed the shotgun in Selvaggio's Corvette and went back to his car to wait for her.

Defendant reported to Dr. Cooke that around 4:00 a.m., Selvaggio ran over to his car and asked what he wanted. Defendant told her to look into her car; she did so and saw the shotgun. Defendant informed Selvaggio that the gun was "for her to use." He said she responded, "That's sick. I'm going to call 9[-]1[-]1." Selvaggio went over to the pay phone by the bus shelter. According to Dr. Cooke, defendant thought to himself, "What am I going to do now, she's going to call the police and have me locked up." So he said he retrieved the gun from the Corvette and began to drive away in his Tahoe. However, defendant then thought, "What if she calls the police and I g[et] stopped with the gun"?

Defendant told Dr. Cooke he drove back to leave the gun with Selvaggio, and got out of his car with it. He stated that "all of a sudden" Selvaggio was "right in front of him," and he asked her if she had called the police. Defendant recalled Selvaggio saying she had, and that he replied, "Now you're going to put me in jail." Defendant told Dr. Cooke he could not remember anything after that, until he was pulled over by police.

In formulating his opinion, Dr. Cooke considered the interview, the results of psychological testing, and reports from law enforcement regarding

defendant's arrest and subsequent questioning. He opined that defendant was a "naïve and suggestible" person who had a tendency to "bottle[] up emotions until the stress builds up to an intolerable level." Dr. Cooke said when that happens, defendant "may become overwhelmed" causing "hysterical dissociative symptoms [to] appear" that are "consistent with an altered state of consciousness."

Dr. Cooke stated that defendant's anxiety, depression, and bottled-up anger at Selvaggio, combined with "fatigue" after the drive from Florida and alcohol consumption, "set the stage for a dissociative reaction at the time of the shooting." Dr. Cooke opined that defendant's behavior was inconsistent with a purposeful or knowing intent to kill Selvaggio, because he "[did] nothing to avoid detection." He also stated that when a person is in a dissociated state, "others around them may perceive their behavior as purposeful but, in fact, the individual is in an altered state of consciousness in which they are not aware of their actions."

Gary M. Glass, M.D., and Robert Sadoff, M.D., conducted psychiatric evaluations of defendant on March 9, 1998.[5] Defendant provided a similar account of the August 5-6 events. He stated he left the shotgun in Selvaggio's

[5] They authored separate reports.

car because there had been an attempted break-in at the bar where she worked and she was now living behind the bar. According to Dr. Glass, defendant said he brought three bottles of beer with him and recalled walking down five flights of stairs to leave the condo instead of taking the elevator. Defendant said he received a page from Selvaggio at 2:11 a.m., so he knew she was not at home. Defendant drank the beers on his way to Harrah's.

Defendant reiterated that he recalled Selvaggio calling 9-1-1 and his response that he would be going to jail but his next memory was seeing the flashing lights of a police car behind him.

Dr. Glass opined that at the time of the shooting, defendant "was functioning in an overtired state, was influenced by considerable alcoholic intake . . . and under enormous pressure" from the end of his romantic relationship and the "financial burden he was" facing. Dr. Glass stated that defendant's behavior was "consistent with dissociation" because he had "awareness of the events up to the moment of the shooting and then is blank for a period of time until he is apprehended." He testified that defendant was "not aware of what he was doing," "was not able to control his behaviors," and "did not act in a knowing and purposeful manner when he shot Peggy Selvaggio."

Dr. Sadoff also issued a report, confirming his opinions as to psychological diagnoses and defendant's state of mind at the time of the shooting were "consistent with" Drs. Glass's and Cooke's. Dr. Sadoff agreed that "because of the pressure that [defendant] was under and the lack of sleep and the effect of alcohol," he "did experience a dissociative disorder, not otherwise specified, at the time of the shooting." Dr. Sadoff said that when a person experiences such a "disorder," he is unable "to act in a conscious, knowing or purposeful manner" even if his actions seem deliberate to an outsider.

In rebuttal, the State presented the testimony of psychiatrist Daniel Greenfield, M.D., M.P.H., M.S. In preparing his report, Dr. Greenfield considered: police reports; witness statements; Dr. Perez's and Kappelsohn's forensic reports, and his interviews with them; the 9-1-1 recording; letters and faxes from defendant to Selvaggio from July and August 1997; his own personal drive between Selvaggio's house and the scene of the crime; an examination of the scene and the shotgun; and the other psychological experts' reports. Dr. Greenfield also interviewed and performed testing with defendant in September 1998.

During the interview, defendant gave Dr. Greenfield an account of the night of the shooting. He said he did not remember driving to Atlantic City, but

"the next thing [he knew]" he was parked in front of Selvaggio's Corvette. He again said that when he talked to Selvaggio, she became upset about the gun and went to call 9-1-1; he remembered saying, "So you're going to put me in jail," but nothing more until he was pulled over.

Dr. Greenfield outlined for the jury defendant's actions on the night of the shooting: driving, noticing a page from Selvaggio at 2:11 a.m., realizing he could not get into Selvaggio's house without setting off the alarm, making the longer drive to Atlantic City, putting the gun and ammunition into Selvaggio's car, conversing with Selvaggio, taking the gun back out of the car, and leaving and then returning to confront Selvaggio. He also noted Kappelsohn's finding of six bullet wounds and conclusion that the action required skilled shooting.

Dr. Greenfield found that defendant's description of his actions demonstrated he remembered most events, and that many of his movements throughout the night required "deductive reasoning" and "sufficient cognitive capacity to make . . . complex decision[s]." He concluded that even if defendant was fatigued from the Florida trip or intoxicated from drinking alcohol, his behavior demonstrated that he was not so impaired that he was incapable of engaging in "purposeful, goal directed, logical, planned, knowing and complicated" behavior.

Although Dr. Greenfield agreed defendant was depressed, he disagreed with the defense experts' diagnoses of a dissociative disorder, stating that even if defendant experienced "a dissociative event or a 'blackout'" during the shooting, this single event would not warrant that diagnosis. Dr. Greenfield also disagreed with the other experts' opinion that a person having a "dissociative episode" is not responsible for their conduct. Instead, the psychologist stated, "the behavior speaks for itself" and "determinatively decides whether a person knew what he was doing during that particular period of time" even if he later forgets what happened.

Dr. Greenfield concluded defendant was not in a dissociated state when he killed Selvaggio, but rather behaved in a "logical and sequential and planned way with a goal of doing what he did." He also opined that while defendant may not initially have planned to shoot and kill Selvaggio, "at the time that he actually did shoot her, he was aware of what he was doing" and "engaged in knowing, purposeful, and goal-directed behaviors (for example in reloading and rechambering his shotgun) in order to accomplish shooting [her]."

II.

On appeal, defendant challenges the denial of his PCR petition. He presents the following points for our consideration:

POINT I

NEWLY DISCOVERED EVIDENCE OF THE ADVERSE EFFECTS OF AMBIEN REQUIRES A NEW TRIAL

A. Newly-Discovered Evidence as the Basis for a New Trial

B. The Adverse Effects of Ambien Now Provide an Independent Basis for a Diminished Capacity Defense that Did Not Exist at the Time of Trial

C. The Adverse Effects of Ambien Would Also Establish an Affirmative Defense of Involuntary Intoxication

POINT II

TED AND DAVID SELVAGGIO'S CIVIL TRIAL TESTIMONY WAS UNKNOWN AT THE TIME OF TRIAL AND COULD REASONABLY CAUSE A JURY TO REJECT THE STATE'S CLAIMS THAT PEGGY HAD BEEN THREATENED BY DEFENDANT AND WANTED A RESTRAINING ORDER AGAINST HIM, EVIDENCE CENTRAL TO THE PROSECUTION'S CLAIMS OF KNOWING INTENT

POINT III

THE PROSECUTION'S WITHHOLDING OF EVIDENCE AND OTHER MISCONDUCT PREJUDICED THE INTEGRITY OF THE TRIAL AND VIOLATED DEFENDANT'S DUE PROCESS RIGHTS REQUIRING THAT THE CONVICTION BE VACATED AND/OR THAT RE-TRIAL BE BARRED

A. The Prosecutor Withheld the Statement of Bus Driver Norman Cain

B. The Prosecutor Withheld the FBI Acoustics Report

C. The Prosecutor Withheld the Pre-Trial Interview Notes of Ted Selvaggio, Peggy's Brother

D. The Prosecutor Withheld Alarm Records That Would Have Supported the Defense Position that Don Burris Took a Gun and Shells to Peggy's Car Because He Believed She had Fears for Her Safety

E. The Prosecutor Defamed and Maligned Defendant's Psychiatric Experts Without Justification or Basis in the Record

F. The Prosecutor's False Statement that Don Burris Had Inherited His Money Prejudiced His Defense

G. The Prosecutor's Remarks as to Defendant's Alleged Adultery

POINT IV
DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

A. Defense Counsel's Failure to Consult a Forensic Pathologist or Acoustics Expert to Challenge the Seven Shot Theory Was Deficient and Prejudicial

B. Counsel Was Ineffective for Failing to Request an Instruction Under State v. Erazo That A Threat to Put Defendant in Jail Was Adequate Provocation for Purposes of Passion-Provocation Manslaughter

C. Counsel Was Ineffective for Failing to Request an Instruction on Voluntary Intoxication

D. Defense experts Glass and Sadoff were Constitutionally Ineffective for their Mistaken

Testimony that Defendant Took the Stairs When He Left His Home on the Night of the Shooting

E. Defense Counsel's Disclosure to Dr. Glass of the Portion of Defendant's Letter Referring to the 1975 Palermo Case Caused the Jury to Hear Confidential Material that Made Defendant Appear to Be Fabricating his Dissociation Defense

F. Defense Counsel Was Ineffective for Inviting Police Investigator Lawrence Wade to Offer an Opinion on Defendant's Guilt and Failing to Object When the Prosecutor Asked Similar Questions

POINT V
INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE AS A MATTER OF PLAIN ERROR THE PROSECUTOR'S INSULTING AND DISPARAGING ARGUMENT AS TO DEFENDANT'S EXPERTS; SUCH ACTIONS ALSO COMPRISE PROSECUTORIAL MISCONDUCT; See POINT III-E, supra

A. Appellate Counsel Was Ineffective for Failing to Raise, as Plain Error on Appeal, a Claim of Prosecutorial Misconduct Under State v. Smith, 167 N.J. 158 (2001)

B. The Prosecutor's Conduct in Mocking and Deriding Defendant's Psychiatric Experts and their Ethics Deprived Defendant of Due Process and a Fair Trial

In general, "[a] jury verdict that has been upheld on appeal 'should not be disturbed except for the clearest of reasons.'" State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Ways, 180 N.J. 171, 187 (2004)). The petitioner has

the burden to establish his right to relief by a preponderance of the credible evidence. Ibid. We defer to the PCR court's factual findings when they are supported by substantial and credible evidence in the record but review questions of law de novo. Id. at 540-41.

A.

We begin with defendant's assertions in Points I and II that his post-trial discovery of new evidence warrants reversal of his convictions and remand for a new proceeding.

Rule 3:22-4(a) bars a petitioner from presenting a claim on PCR that could have been raised at trial or on direct appeal. However, there is an exception if the petitioner can show that the facts that form the basis for relief "could not have been discovered earlier through the exercise of reasonable diligence." Ibid. Under this exception, a defendant must show not only that the evidence supporting their claim is newly discovered, but also "material to the issue and not merely cumulative or impeaching or contradictory" and "of the sort that would probably change the jury's verdict if a new trial were granted." State v. Carter, 85 N.J. 300, 314 (1981).

For purposes of this test, material evidence is "any evidence that would 'have some bearing on the claims being advanced,'" such as evidence that

supports a defense like an alibi, third party guilt, or a general denial of guilt. Ways, 180 N.J. at 188 (quoting State v. Henries, 306 N.J. Super. 512, 531 (App. Div. 1997)). Deciding whether evidence is "merely cumulative[] or impeaching . . . requires an evaluation of the probable impact [the] evidence would have on a jury verdict." Id. at 188-89.

In addition, "newly discovered" evidence presented by a PCR petitioner "must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication." Id. at 187-88. "[S]ketchy" evidence, even if it appears exculpatory, need not be taken at face value and may be found insufficient to warrant a new trial. See State v. Buonadonna, 122 N.J. 22, 50-51 (1991) (affirming denial of PCR petition where new evidence consisted of affidavits from the defendant's relatives, who could have made their alleged knowledge known prior to trial).

Defendant initially contends that newly discovered evidence about the side-effects of the sleep-inducing drug Ambien requires a new trial. He alleges he took the medication on the night of the shooting. Defendant asserts scientists did not identify the potential of Ambien to cause "dangerous parasomnias" until 2007 and these effects were unknown when he was prescribed it in 1996 and at the time of his trial. Defendant argues this previously unavailable evidence

would have supported an additional possible cause for his alleged dissociative episode. He also contends the Ambien evidence could establish the affirmative defense of involuntary intoxication under N.J.S.A. 2C:2-8.

In support of his claims, defendant submitted various documents detailing the side effects of Ambien, including a notice from the Food and Drug Administration (FDA) website dated March 14, 2007, stating that Ambien carries a risk of "complex sleep-related behaviors, which may include sleep-driving" and an FDA press release on the same date stating additional "complex sleep-related behaviors" associated with Ambien usage were "making phone calls[] and preparing and eating food (while asleep)." The FDA requested that manufacturers of Ambien and other sedative-hypnotic drugs "strengthen their product labeling to include stronger language" concerning this potential side-effect.

Defendant also provided a copy of the warning label Ambien's maker created in response to the FDA's notice. It stated that Ambien may cause "Abnormal Thinking and Behavioral Changes," explaining that "[c]omplex behaviors such as "sleep-driving" (i.e., driving while not fully awake after ingestion of a sedative-hypnotic, with amnesia for the event) have been reported," as have "[o]ther complex behaviors (e.g., preparing and eating food,

making phone calls, or having sex)." The label stated that these behaviors "may occur with Ambien alone at therapeutic doses," but that using alcohol and other central nervous system depressants with Ambien "appears to increase the risk." The manufacturer also stated that sleep medicines like Ambien may cause a patient to "not remember what has happened for several hours after taking the medicine." However, the label also noted that "[m]emory problems are not common while taking Ambien," and can usually be "avoided if you take Ambien only when you are able to get a full night's sleep ([seven] to [eight] hours) before you need to be active again."

Defendant submitted a July 5, 2016 certification from Dr. Cooke, in which the doctor stated defendant told him during the 1998 evaluation that he was having "problems sleeping for which he took Ambien.'"[6] Dr. Cooke said he "did not factor Ambien into" his evaluation "because the adverse effects of Ambien, and particularly the dangerous parasomnias with associated complex behaviors like sleep-driving, were unknown" at the time of the interview. Defendant also provided a letter written by Dr. Cooke to defense counsel in 2008. Dr. Cooke was responding to the attorney's request about "the effects of [defendant's]

[6] In the 1998 report, Dr. Cooke wrote: "[Defendant] had sleep problems for which he took Ambien, Ben[a]dryl, and Xanax. He indicates that the trouble sleeping began when he started living with [Selvaggio]."

medications on the lik[e]lihood of a dissociative reaction." Dr. Cooke stated that the side effects of Ambien may include "dizziness, drowsiness, fatigue and hallucinations," which "would make a dissociative reaction more likely." The doctor also said the side effects of Xanax—"drowsiness, fatigue, memory impairment, depression and mental impairment"—"would increase the likelihood of a dissociative reaction."

Defendant also submitted his own certification, dated July 9, 2016, in which he stated he was prescribed Ambien by Dr. Harvey Koenig for a "sleep disorder." He attached a doctor's note from a December 1996 visit, most of which is illegible, but which appears to state defendant could take Ambien or Benadryl. In his certification, defendant stated he was told to take Ambien only when he could set aside "at least [eight] hours to sleep." Since he often transported Selvaggio to and from work at night, defendant said he did not take it on the nights Selvaggio worked at Harrah's. However, in the early morning hours of August 6, 1997, defendant said he took Ambien shortly after his sons left the condo because he "needed a good night's rest." Defendant certified he has "no memory of what happened after taking Ambien" until "after [he] was taken out of the police car and questioned by [police]."

As discussed, defendant retained two psychiatrists and a psychologist to evaluate him and render opinions regarding his state of mind at the time of the murder. These reports were issued in 1998. None of the three defense experts stated that defendant told them he took Ambien on the night of the shooting. Although Dr. Glass noted in his report that defendant stated he had "problems with sleep," and that he took "several medicines" for various medical conditions, it does not mention an Ambien prescription.

Eleven years after the jury found defendant guilty of murder, his PCR counsel retained a fourth expert—a psychiatrist, Kenneth J. Weiss, M.D.—to evaluate defendant. PCR counsel told Dr. Weiss defendant was using a medication for insomnia that had the potential to influence behavior and memory and the expert was asked to "revisit the matter, with an eye toward a reformulation of [defendant's] mental capacity at the time in question." During the 2010 interview, defendant told the psychiatrist that Dr. Koenig had given him samples of Ambien and he recalled taking it at about 1:30 a.m. on the morning of the shooting. Defendant said he had recently heard about "odd behavior among Ambien users and then connected the drug to his situation."

Dr. Weiss stated in his report that Ambien can cause "[o]ccurrences of seemingly purposeful behaviors during the sleep period [that] are not

remembered," and that medically these episodes can be considered "'partial awakenings,' implying that the individual is still asleep." He also noted that concomitant use of alcohol "may increase the risk of sleep-associated behaviors." Dr. Weiss opined there was "a possibility" that defendant was "'asleep' at the time of the shooting, in the sense that he had a partial awakening from sleep." He said it was "likely that [defendant's] violent behavior was brought about by a combination of substances and that the amnesia or 'blackout' was Ambien's typical effect." Dr. Weiss concluded that defendant "lacked capacity to have acted with knowledge and purpose at the time of the shooting."

Defendant also presented a report to the PCR court from a toxicologist who opined that "[t]he co-ingestion of alcohol and sleep deprivation will increase the likelihood of amnesia and parasomnia or complex behaviors." The expert further stated there was a limited body of knowledge regarding the side effects of Ambien in the late 1990s.

After reviewing defendant's substantial PCR submission, the court found that although the adverse effects of Ambien may not have been fully known in 1999, defendant still failed to satisfy the other prongs of the Carter[7] test. The court found the new expert opinions that defendant may have been in an

[7] 85 N.J. at 314.

Ambien-induced dissociative state when he shot Selvaggio were "based solely on inferences and [defendant's] own post-conviction statements." The court reasoned that "[w]hether [] defendant was in a dissociative state from Ambien or from some other source [was] immaterial" because the jury rejected defendant's dissociation theory when it convicted him of murder, regardless of the claimed cause of the alleged dissociation. The jury heard defense experts opine regarding the presence of multiple factors contributing to defendant's dissociative state: including his fatigue from driving to New Jersey from Florida, the consumption of two or three alcoholic drinks, and his psychological state of mind after his relationship with Selvaggio ended. Therefore, the PCR court concluded that defendant could not demonstrate the newly presented evidence regarding Ambien would probably change the verdict.

Evidence concerning new scientific discoveries and developments occurring after a defendant's conviction may be considered "newly discovered evidence" when considering a PCR petition. State v. Behn, 375 N.J. Super. 409, 429 (2005). However, the evidence must still meet the other two Carter factors; it must be material rather than "merely cumulative, impeaching, or contradictory," and it must have the "probable effect" of changing the outcome of the case. Id. at 431-33 (quoting Ways, 180 N.J. at 188-89).

Defendant asserts the evidence concerning Ambien's side effects is material because it provides a different explanation for his dissociative episode than that presented at trial. Alternatively, he contends the Ambien evidence would provide grounds for an involuntary intoxication defense.

We are satisfied the PCR court did not err in concluding the Ambien evidence does not rise to the level of evidence that would "probably change the jury's verdict if a new trial were granted." Carter, 85 N.J. at 314. There was extensive evidence to support the jury's finding that defendant's conduct was purposeful or knowing. As Dr. Greenfield testified, even if defendant's account of the events to Drs. Cooke, Glass, and Sadoff was accepted as true, he made numerous decisions and performed multiple complex acts even after he allegedly took Ambien, including driving; placing the shotgun in Selvaggio's car; speaking to her; deciding to retrieve the gun and leave; changing his mind and bringing the shotgun back; and then firing the gun at Selvaggio seven times, hitting her with six of the shots. The jury heard Kappelsohn describe the gun as quite loud and it produced a noticeable recoil "kick." Defendant had to complete several motions to shoot and reload the shotgun. Defendant then walked back to his car and left the scene, obeyed all traffic laws until he was stopped, and followed all police commands during his arrest. While the Ambien product

warning label and FDA press release state that there is a risk of "sleep-driving," preparing food, and performing other domestic tasks "while asleep" after taking the drug, nothing presented by defendant suggests a person may engage in a course of conduct as extended, varied, or violent as defendant's behavior, without waking up. Moreover, defendant did not experience any instances of sleep driving, waking up in a strange place or lapses of memory on any other occasion he ingested Ambien.

Furthermore, the only evidence that defendant took an Ambien pill on August 6, 1997 is his own statement in a certification presented more than a decade after his trial. Despite being evaluated by three defense experts, none recorded in their reports any statement by defendant that he took Ambien in the early morning hours prior to the shooting. Nor did defendant inform any law enforcement during the multiple interviews conducted after the events. This was despite the detailed account of the events defendant otherwise provides.

One of defendant's psychological experts mentioned Ambien. In recounting defendant's medication history, Dr. Cooke reported that defendant stated he was on blood pressure medication from time to time and "he had sleep problems for which he took Ambien, Benadryl, and Xanax." Defendant told all the doctors he had two or three drinks with his sons at 1 or 1:30 a.m. but did not

inform any evaluator or law enforcement he had taken Ambien. Although defendant and his expert witnesses may not have known that Ambien could cause certain side effects, they did know that Ambien would cause a person to become drowsy and fall asleep, since that is its primary medicinal function. Since the dissociation defense presented at trial was based in part on defendant's fatigue, it is unlikely he would have forgotten to tell law enforcement and all of the evaluating experts that he took a sleeping pill just hours before the shooting. Although all the effects of Ambien may not have been fully known in 1998, the fact that defendant took a sleeping pill was solely within his own knowledge and not newly discovered evidence.

The jury also heard differing accounts from defendant regarding his memory lapse. He told police he could not remember anything after he received a page from Selvaggio at 2:11 a.m.; he told his experts he could not recall anything after Selvaggio told him she called 9-1-1 in the Harrah's parking lot around 4:00 a.m.; and in his PCR certification, defendant stated his lapse in memory began after he took Ambien and laid down in bed around 1:30 a.m. Defendant never told anyone before the 2016 PCR certification that he had gone to bed before deciding to visit Selvaggio at 2:00 a.m.

Our review of the extensive materials leads to a conclusion that defendant's newly discovered evidence is "sketchy" as described in Buonadonna, 122 N.J. at 50-51. It does not provide grounds for the grant of a new trial.

We also reject defendant's alternate argument, that the Ambien evidence would provide a basis for an involuntary intoxication defense. N.J.S.A. 2C:2-8(d) provides that "[i]ntoxication which (1) is not self-induced or (2) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct did not know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong." The jury concluded defendant committed a knowing and purposeful act. Defendant cannot demonstrate by clear and convincing evidence that his Ambien intoxication prevented him from knowing what he was doing or that it was wrong.

B.

We turn to defendant's assertion regarding deposition testimony given by Ted Selvaggio in a civil lawsuit.[8] Defendant contends the testimony, taken in a

[8] The Estate of Peggy Selvaggio filed a wrongful death suit against Harrah's and the City of Atlantic City following these events.

deposition two years after his trial, contradicted testimony given by Selvaggio's lawyer, Coleman, in this matter. He asserts the testimony "directly dispute[d] Coleman's claims that [Selvaggio] was afraid of [defendant] and wanted a restraining order," and also would have "undercut" testimony by Selvaggio's coworkers about the August 1, 1997 phone call they overheard.

Evidence that may impeach a witness but that is "not of great significance and would probably not alter the outcome of a verdict" is insufficient to satisfy the Carter standard, but evidence that "would have the probable effect of raising a reasonable doubt as to the defendant's guilt" would satisfy it. Ways, 180 N.J. at 189; see also Henries, 306 N.J. Super. at 530-31 (concluding new evidence that sole witness who identified defendant and linked him to crimes suffered from extensive psychiatric disorders was "impeaching," and new trial was warranted because the evidence impacted witness's ability to perceive and remember events).

As stated, Coleman briefly testified during the trial that he and Selvaggio discussed the possibility of her getting a restraining order against defendant. The conversation flowed from the discussion the two were having regarding the money Selvaggio owed defendant. Coleman said he explained to Selvaggio the type of conduct a court considered in granting an application for a temporary

restraining order. Coleman said Selvaggio decided not to seek a restraining order.

On cross-examination, defense counsel referred to a "summary" of an interview Coleman had with an investigator and the prosecutor, asking, "[i]t doesn't say anything about a restraining order, does it?" Coleman answered, "[i]t does not." On redirect, Coleman said he did mention the discussion he had with Selvaggio about a restraining order during the interview.

During his 2000 deposition in the civil case, Ted Selvaggio testified that during the August 4, 1997 meeting, "[Coleman] suggest[ed] a restraining order and [Selvaggio] said, I don't need a restraining order." Ted said this "signified to [him] that [Selvaggio] wasn't in fear of physical harm" from defendant.

The PCR court found defendant could have discovered this evidence prior to trial. Because defendant knew Ted was present at the meeting with Coleman and Selvaggio, the court found defendant could have obtained Ted's account of the meeting through "reasonable independent means." The court also found that Ted's testimony in the civil case was "immaterial to the issue of [defendant's] guilt," and could only have been used to impeach Coleman's testimony. In addition, Selvaggio's co-workers also testified that Selvaggio had discussed getting a restraining order against defendant. Therefore, the court found Ted's

testimony would be unlikely to affect the outcome if introduced during a new trial.

We agree the evidence did not meet the Carter test to warrant a new trial. Defendant could have contacted Ted to inquire about the meeting with Coleman and any other knowledge he had about Selvaggio's actions and feelings in the days before her death. Therefore, the deposition testimony is not evidence which "could not have been discovered earlier through the exercise of reasonable diligence" as required by Rule 3:22-4(a).

Further, this evidence is "merely . . . impeaching." Carter, 85 N.J. at 314. Ted's account of the meeting does not go to the ultimate issue in the case—defendant's guilt. No matter who raised the issue of a restraining order at the meeting, Coleman testified that Selvaggio did not want to apply for one. Ted verified this during his deposition. Moreover, unlike in Henries, Coleman was not the sole, key person tying defendant to Selvaggio's death. See 306 N.J. Super at 530-31. Given the abundance of evidence connecting defendant to the shooting, and defendant's admitting to being the shooter, we are confident Ted's deposition testimony "would probably not alter the outcome of a verdict." Ways, 180 N.J. at 189.

C.

We next address defendant's assertions that the State committed prosecutorial misconduct by withholding four particular items of evidence and making improper prejudicial statements during summation. We are not persuaded.

The State's suppression of evidence favorable to a defendant is a violation of due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). Three elements must be considered when deciding whether a Brady violation has occurred: "(1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and (3) the evidence must be material to the defendant's case." State v. Brown, 236 N.J. 497, 518 (2019).

Evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). This standard "does not require demonstration by a preponderance [of the evidence] that disclosure of the suppressed evidence would have resulted

ultimately in the defendant's acquittal." Kyles v. Whitley, 514 U.S. 419, 434 (1995). A "reasonable probability" of a different result is shown when the undisclosed, favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 434-35 (quoting Bagley, 473 U.S. at 678).

However, a new trial is not "automatically" warranted "whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'" Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting United States v. Keogh, 391 F.2d 138, 148 (2nd Cir. 1968)). Evidence that is "merely cumulative or repetitious as to the purpose for which it could have been used" does not warrant reversal. State v. Russo, 333 N.J. Super. 119, 134 (App. Div. 2000).

When deciding whether evidence is material, the potential effect of the withheld information must be considered "in the context of the entire record," State v. Marshall, 123 N.J. 1, 199-200 (1991), with attention to "the strength of the State's case, the timing of disclosure of the withheld evidence, the relevance of the suppressed evidence, and the withheld evidence's admissibility." Brown, 236 N.J. at 519. Where a defendant claims that multiple pieces of evidence were

suppressed, their effect on the outcome of the trial is "considered collectively, not item by item." Kyles, 514 U.S. at 436.

Where the reliability of a witness "'may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility" may be found to satisfy suppression under Brady. Giglio, 405 U.S. at 154 (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

Defendant first contends the State withheld a statement by casino bus driver Norman Cain, in which Cain stated he "saw a man near a Corvette sitting on top of the car." Defendant asserts this statement contradicted Patterson's testimony who said he observed defendant sitting inside Selvaggio's Corvette around 3:30 a.m. He states the discrepancy would have undermined the State's claim that defendant acted purposefully by establishing he did not "hid[e] inside" the car with the shotgun waiting for his victim.

Cain gave two statements: (1) at 4 a.m. he saw someone in the parking lot he could not identify; and (2) at 3:45 a.m. he saw a man near a Corvette, sitting on the car. Defendant had the first statement but contended the second one was not produced.

The PCR court found that although the State could not verify whether Cain's second statement was given to the defense prior to trial, "such disclosure

was not necessary" because the statement was "neither material nor exculpatory." Cain was not called as a witness during trial. However, defendant asserted he would have used the statement to impeach Patterson.

The PCR court found that Cain's statement was not truly contradictory, because he and Patterson observed defendant at different times. Therefore, defendant's claim of prosecutorial misconduct was unsupported. We discern no error in this determination.

D.

Defendant next asserts the prosecutor withheld an FBI acoustics report in which the federal agency stated it could not "positively" identify any gunshots on the recording of Selvaggio's 9-1-1 call.[9] Defendant learned of the report's existence when the State's expert, Kappelsohn, mentioned it at trial.[10] Defendant contends the prosecution's "concealment" of the FBI report "interfered with [defendant's] ability to develop a response to the seven shot theory ahead of trial." If the FBI could not identify any gunshots on the tape, defendant states it

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[9] The 9-1-1 recording was provided to the FBI to analyze the number of shots that were fired.

[10] When Kappelsohn referenced the FBI report, defense counsel objected, stating he did not have the document. When the prosecutor admitted he could not prove it had been the court instructed the jury to disregard any statements concerning the report.

would have undermined the State's seven shots theory, which was "suggestive of knowing purpose." He further says the withheld evidence "deprived the defense of [the] strategic choice" to pursue a four-shot theory.

The PCR court found that because the FBI report and any references to it were stricken from the record, defendant "[could] not demonstrate that material evidence was withheld." The court stated it was "unlikely that the inconclusive nature of the FBI report would have prompted further investigation into the number of shots fired" because even Kappelsohn agreed it was difficult to conclusively establish the number of shots fired based solely on the sounds in the 9-1-1 audio tape. The court found the FBI report was not material nor exculpatory and the prosecution's failure to disclose it did not warrant reversal of the verdict and a new trial.

Defendant has not established any error. Since the FBI could not conclusively determine whether any of the sounds on the 9-1-1 tape were gunshots, it would not have been helpful to establish a defense theory of four gunshots. Moreover, the court advised the jury to disregard the brief reference to it. Therefore, the State did not rely on the report to establish the number of fired shots. Instead, it focused on the wounds sustained by Selvaggio and the testimony of multiple witnesses about the number of shots each heard.

E.

Defendant also challenges the State's failure to disclose notes the prosecutor took during a pre-trial interview of Ted. The notes stated that Ted met with Selvaggio and Coleman to discuss their mother's will and the money Selvaggio owed defendant. The notes made no reference to any discussion of a restraining order or about Selvaggio being afraid of defendant.

The PCR court found defendant failed to demonstrate the notes contained material evidence. The judge stated the content of the notes did not "go to the heart of the matter" or "provide any probative value on the issue of [defendant's] guilt or ability to act purposely." In addition, the notes contained statements about fights between defendant and Selvaggio, which could have harmed defendant's strategy. Because the court found the notes were "neither material or exculpatory," it rejected defendant's prosecutorial misconduct claim.

Although not raised, it is likely these notes were protected work product under Rule 3:13-3(d) and therefore not discoverable by defendant. However, as stated above, the nondisclosure of the notes did not prevent defendant from contacting Ted as he was aware Ted was at the meeting with Coleman and Selvaggio. And defendant has not established a reasonable probability that the notes would have changed the outcome of the trial. See Bagley, 473 U.S. at 682.

F.

Lastly, defendant contends the State withheld a contract for a security system Selvaggio installed at her house five days before her death. He asserts this evidence would have bolstered his claim that he brought the shotgun to Selvaggio's workplace because he intended to give it to her for protection after a recent burglary, not because he planned to shoot her.

The PCR court found the evidence was not material. The court noted that Dr. Glass and another witness testified that Selvaggio's house had been burglarized and that she had installed a new alarm system. Therefore, the court stated it was "unclear how the defense could have used the alarm company records . . . other than to duplicate that testimony." In addition, the records did not support defendant's claim that he brought the shotgun with him on August 6, 1997 because Selvaggio asked him for a gun, particularly since Selvaggio's behavior in calling 9-1-1 after he put the gun in her car contradicted that claim. The court concluded the records were "merely cumulative," and that there was no prosecutorial misconduct.

We agree. The contract was cumulative evidence. Two witnesses testified before the jury that Selvaggio had an alarm system installed in response to a recent break-in. As we have found no error regarding the court's determination

concerning the four pieces of withheld evidence, even taken together, the evidence does not "put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435. Defendant has not demonstrated a Brady violation regarding the evidence and therefore has failed to establish prosecutorial misconduct on these grounds.

G.

Defendant further contends the prosecution made prejudicial statements while examining witnesses and during summation that warrant reversal of his convictions. We are unconvinced.

Because defendant did not object to the prosecutor's remarks when they were made, we review the comments for plain error. See State v. Tilghman, 345 N.J. Super. 571, 575 (App. Div. 2001). A failure to object suggests that defense counsel did not believe the prosecutor's remarks were prejudicial when made and deprives the trial court of the chance to take curative action. State v. Frost, 158 N.J. 76, 83-84 (1999).

We first consider the prosecutor's statements in summation regarding the defense psychological experts. Defendant asserts the prosecutor "gratuitously demeaned and degraded" his experts during summation by referring to them as "sleek," "smooth," and "expensive" and questioning their methods and opinions.

He contends the prosecutor suggested the defense experts were "influenced by money" and that the State's expert, who was paid less, was more believable. Defendant argues that because his defense depended on the credibility of his experts' opinions concerning his mental state during the shooting, the prosecutor's statements deprived him of a fair trial.

"Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented," and they are "expected to make vigorous and forceful closing arguments to juries." Id. at 82. However, a prosecutor "must refrain from improper methods that result in a wrongful conviction." State v. Smith, 167 N.J. 158, 177 (2001).

In addition, a prosecutor is "prohibited from casting unjustified aspersions on the defense or defense counsel." State v. Nelson, 173 N.J. 417, 461 (2002). "[D]erogatory name-calling" is not condoned. State v. Wakefield, 190 N.J. 397, 467 (2007) (quoting State v. Williams, 113 N.J. 393, 456 (1988)).

However, a finding that a prosecutor has made an improper statement "does not end a reviewing court's inquiry; in order to merit reversal, the misconduct must have deprived the defendant of a fair trial." State v. Hawk, 327 N.J. Super. 276, 281 (App. Div. 2000). The prosecutor's conduct must have

been "so egregious," State v. Ramseur, 106 N.J. 123, 322 (1987), that it "substantially prejudiced [the] defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 575 (1999). Additionally, statements that would otherwise be prejudicial "may be deemed harmless if made in response to defense arguments." State v. McGuire, 419 N.J. Super. 88, 145 (App. Div. 2011). A "single metaphor" or instance of "name-calling" will not rise to the level of reversible misconduct if it does not implicate the defendant's right to a fair trial. Wakefield, 190 N.J. at 467 (declining to reverse where prosecutor likened defendant to "the wolf taking the lives of the two helpless sheep"). Overall, a court "must assess the prosecutor's comments in the context of the entire trial record," Nelson, 173 N.J. at 472, including whether the trial was lengthy and the prosecutor's remarks were short or "errant." State v. Engel, 249 N.J. Super. 336, 382 (App. Div. 1991).

Against that backdrop we consider the specific comments. During direct examination, defense counsel asked the psychological experts to disclose the amount of their fees. He also questioned the State's witnesses—Dr. Greenfield and Kappelsohn—about their fees, inquiring of the latter whether his opinion was "molded by the side that hires [him]." Throughout the trial, defense counsel repeatedly extolled Drs. Cooke, Glass, and Sadoff for being well-respected and

experienced psychologists. During summation, defense counsel stated that defendant had "hired the most respected people" in the psychology field, rather than "go[ing] out and hir[ing] some . . . poor guy to come here and to say what we want him to say."

In the State's summation, the prosecutor remarked that Drs. Cooke, Glass, and Sadoff had opined that defendant was "in some sort of dissociative state" when he killed Selvaggio. He continued:

> And after all they should know because they are experts. If my arithmetic is right, some $26,000 worth of experts. And it's suggested to you that Dr. Greenfield, the $3,200 to $4,000 expert that the State was able to afford concurs that the defense may be right. Dr. Greenfield did no such thing. Dr. Greenfield said that it's true that the defendant may, may have suffered a dissociative state at the time of the shooting, but that is miles away from conceding that the defense may be right.

The prosecutor then said that "no matter how well respected" defendant's experts were and "no matter how much money" they were paid, they had "engage[d] in . . . several leaps" of reasoning when formulating their diagnoses. He later referred to Dr. Greenfield as "the much maligned Dr. Greenfield who wasn't as smooth or as slick or as expensive as the experts produced by the defense."

In considering defendant's contentions on this issue, the PCR court found the prosecutor had only summarized the respective psychological testimony, and that his reference to the experts' fees did not include any implication of bias or insinuate that defendant's experts fabricated any testimony. The court also found the prosecutor's remarks were in response to defense counsel's closing argument in which counsel gave "high praise" to his experts' qualifications.

A prosecutor "may not, in ways that are excessive, 'directly demean[] the credibility of a defense witness.'" State v. Negron, 355 N.J. Super. 556, 577 (App. Div. 2002) (quoting Smith, 167 N.J. at 178). More specifically, they may not imply that a defense expert's testimony "was fabricated or contrived with the assistance of defense counsel," and may not attempt to "discredit[] the motivation of expert witnesses 'without support in the record.'" Smith, 167 N.J. at 180, 184 (quoting State v. Moore, 122 N.J. 420, 462 (1991)).

Our careful review reveals that the prosecutor's remarks were not improper and did not rise to the level of reversible misconduct. Defense counsel asked the defense experts to disclose the amount of their fees and he continually touted the experts' qualifications, including during his summation. The prosecutor was permitted to make fair comment on the evidence, including the fee amounts, and to respond to counsel's comments by arguing that despite their

qualifications, the defense experts may have used faulty methods or arrived at incorrect conclusions. Moreover, the jury was instructed on what weight, if any, they should accord the testimony.

The reference to the expert fees was brief, and the prosecutor did not insinuate that Drs. Cooke, Sadoff, and Glass colluded with defense counsel to fabricate testimony or that because they were well-paid, their testimony was less credible. Instead, the prosecutor argued that Dr. Greenfield's testimony should not be discounted merely because he was paid less money than defendant's experts. In fact, the prosecutor appeared to suggest that the difference in the amount of fees paid was of no import and the jurors should instead evaluate the content of the testimony in relation to the other evidence in the record. The comments did not prejudice defendant's right to a fair trial. See Ramseur, 106 N.J. at 323; Timmendequas, 161 N.J. at 575.

H.

Defendant contends an additional statement made by the prosecutor during his summation was sufficient misconduct to warrant reversal of the verdict. We disagree.

In his closing argument, the prosecutor said:

> Now, there was also evidence in this case about [defendant] and his life, much of it favorable. The fact

> that he was able to earn a good living, support his children even after leaving his first wife; the fact that he was able to inherit a lot of money, enough so that he could deal with these demands that [Selvaggio] made or rather the investments that he wanted to make in [Selvaggio]. . . .

Defendant did not object to the statement.

Defendant contends he did not "inherit" the money he loaned to Selvaggio. During the PCR proceedings, the State acknowledged there was no evidence defendant inherited any money. Defendant asserted in his PCR petition and before this court that the incorrect statement undermined his strategy by implying that the monies he loaned to Selvaggio were not as much of a source of stress to him as he claimed.

The PCR court found defendant did not demonstrate the statement was "clearly capable of producing an unjust result." The judge found there was "ample evidence" that defendant's loans to Selvaggio created a hardship for him and he had sought their repayment. Therefore, the court found the remark did not sufficiently undermine defendant's claims of financial stress to arise to misconduct warranting reversal.

We see no error. The prosecutor did not state he had knowledge of any "inheritance." In the same sentence, he said defendant was able to "earn a good living," implying defendant had worked for his money. As the PCR court noted,

there was an abundance of evidence that Selvaggio borrowed large amounts of money from defendant and that these loans, and Selvaggio's failure to pay back what she owed, caused defendant financial and emotional strain. The single misstated word does not warrant reversal.

I.

Defendant also points to instances of improper derogatory comments that deprived him of a fair trial. There were no objections to these comments.

First, defendant references a statement made during the questioning of Dr. Greenfield when the prosecutor asked whether it was "of [] consequence" to the expert that defendant and Selvaggio "engaged in consensual sex on their second date or third date" while defendant "was still married" to his second wife. Dr. Greenfield said it was "nothing unusual."

He also argues that a statement by the prosecutor referencing a popular song about an adulterous relationship was unfairly prejudicial and "derogatory." Defendant asserts these statements implied to the jury he was an immoral person.

The PCR court found the prosecutor elicited testimony from Drs. Glass and Greenfield "only after [defendant] introduced the position that he was morally offended and repulsed by the sexually abusive nature of his relationship" with Selvaggio. Therefore, the question was not inappropriate

under the circumstances. As to the mention of the song, the court found the issue of defendant's adultery was "given little focus during trial" and "did not have the potential to prejudice the outcome."

During the trial, defense counsel repeatedly raised the subject of defendant's and Selvaggio's sexual relationship, emphasizing the negative aspects of the liaison in his opening and closing statements and eliciting testimony from his experts about the effect Selvaggio's sexual demands had on defendant's mental health. For instance, Dr. Glass testified that defendant, who had "traditional" sexual desires, was "repulsed" by Selvaggio's "distasteful" ones. On cross-examination, the prosecutor asked Dr. Glass whether it was "inconsistent" for defendant, who was married when he began seeing Selvaggio, to be offended by Selvaggio's behavior but not by adultery. Dr. Glass replied that the two things had "nothing to do with [each] other."

We are satisfied the brief references to adultery were not the type of "derogatory" remarks deemed misconduct in cases like Wakefield, 190 N.J. at 467, and State v. Pennington, 119 N.J. 547, 576-77 (1990). Defense counsel opened the door for the prosecutor to ask Dr. Glass questions about the subject on cross-examination, by eliciting testimony about unorthodox aspects of defendant's sexual relationship with Selvaggio. A similar fleeting question was

later asked of Dr. Greenfield. When both experts said defendant's adultery was nothing noteworthy, the prosecutor did not press the subject. He also did not mention the adulterous nature of defendant's relationship during summation or make any comment regarding defendant's immorality during the trial.

J.

Defendant next contends a reference to a pop song during the State's closing also was misconduct warranting reversal. We again disagree.

During the defense summation, counsel highlighted defendant's statement to the police: "If Peggy is dead, take me out and shoot me," arguing it was evidence that defendant was unaware of his actions when he shot her. The prosecutor responded to the argument in his own closing statement, stating:

> What about that "[i]f" Peggy is dead stuff? I mean, I use the word on purpose because it's so big [a part] apparently of the defense. If Peggy is dead. In all candor, ladies and gentlemen, I have never seen so much made of so little a word, the word "if"; putting it in the context of everything that went on during the major crimes interview, the use of the word ["if"] doesn't signify that this is the first time [defendant] is aware that Peggy is dead. It's nothing more than a figure of speech. Nothing more than an expression, a lament, if you will. You may have heard this kind of corky pop song that they play on, like, these light music stations sometimes[,] a song that a woman sings about a[n] . . . assumably sexual relationship with a married man, and there's a refrain in the song where she sings, "If loving you is wrong, I don't want to be right." Now,

> she's not saying that she's not sure that having an adult[erous] relationship is wrong. Of course, she knows it's wrong, but the expression [is] a figure of speech, a lament that says, [e]ven though it's wrong, I'm still going to continue this affair; that's all the meaning that needs to be put in the words "[i]f Peggy is dead, we don't have to do this." It's a lament, it's a recognition that sure enough with Peggy dead, [defendant's] life is over.

Defendant did not object.

We need only briefly address this contention. The reference to a popular song about an adulterous relationship was not made in the context of defendant's relationship being "wrong," but instead was an attempt to draw a parallel between the use of the word "if" in the song to defendant's use of that word when talking to police. This clumsy reference did not implicate defendant's right to a fair trial. See Wakefield, 190 N.J. at 467.

III.

We lastly address defendant's ineffective assistance of counsel contentions. Defendant asserts trial counsel was ineffective in: (1) failing to retain a forensic pathologist and acoustics expert; (2) failing to request the passion-provocation manslaughter jury charge; (3) failing to request the voluntary intoxication jury instruction; (4) improperly disclosing privileged material; and (5) improperly inviting a witness to opine on defendant's guilt.

Defendant further asserts his experts were ineffective by testifying that he took the stairs to leave his condo on the night of these events. And he asserts appellate counsel was ineffective in failing to argue on appeal that the State improperly referenced expert fees in closing arguments.

To succeed on a claim of ineffective assistance of counsel, a defendant must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984),[11] by a preponderance of the evidence. State v. Gaitan, 209 N.J. 339, 350 (2012). First, they must show that "counsel's performance was deficient." Strickland, 466 U.S. at 687. This requires demonstrating that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. The Constitution requires "reasonably effective assistance," so an attorney's performance may not be attacked unless they did not act "within the range of competence demanded of attorneys in criminal cases" and instead "fell below an objective standard of reasonableness." Id. at 687-688.

When assessing the first Strickland prong, "[j]udicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to

[11] The New Jersey Supreme Court adopted the Strickland test in State v. Fritz, 105 N.J. 42, 58 (1987).

eliminate the distorting effects of hindsight." Id. at 689. "Merely because a trial strategy fails does not mean that counsel was ineffective." State v. Bey, 161 N.J. 233, 251 (1999). Thus, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "the defendant must overcome the presumption that, under the circumstances, the challenged action [by counsel] 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Further, the court must not focus on the defendant's dissatisfaction with counsel's "exercise of judgment during the trial," "while ignoring the totality of counsel's performance in the context of the State's evidence of [the] defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006).

For the second prong of the Strickland test, the defendant must show that "the deficient performance prejudiced the defense." 466 U.S. at 687. This means that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid. It is insufficient for the defendant to show that the errors "had some conceivable effect on the outcome." Id. at 693. However, they are "not required to show with mathematical precision that [they] would have been acquitted . . . but for trial counsel's mistakes." State v. Echols,

398 N.J. Super. 192, 203 (App. Div. 2008), rev'd on other grounds, 199 N.J. 344 (2009). Instead, a defendant must demonstrate that "[their] attorney's errors and omissions were of such significance as to undermine confidence in the outcome." Ibid. Ultimately, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if [it] had no effect on the judgment." Strickland, 466 U.S. at 691.

A.

Defendant initially asserts his counsel was ineffective because he did not consult a forensic pathologist, acoustics, or ballistics expert to refute the State's theory that he fired seven shots at Selvaggio. He contends that counsel's decision to accept the seven-shot theory "unquestionably prejudiced" him by "[giving] the prosecutor an unchallenged, open door" to raise the need to reload the gun after five shots, which discredited the dissociation defense.

Instead, defendant states there was sufficient evidence to support a four-shot theory and counsel's failure to consult with other experts to advance this defense was "an unjustified lapse" in acceptable conduct. Defendant asserts his PCR counsel consulted a pathologist who reviewed the forensic evidence and concluded Selvaggio's wounds were caused by only four bullets, and an acoustics expert, who could not reach a conclusion as to the exact number of

shots fired after listening to the 9-1-1- audiotape.[12] Defendant contends that if trial counsel had consulted with similar experts, their testimony could have led the jury to believe the dissociation defense and to reach a verdict of guilty of passion-provocation manslaughter instead of murder.

The Strickland Court held that an attorney's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 466 U.S. at 690. Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. Even the exercise of great skill at trial is insufficient if counsel has neglected to perform necessary investigations or failed to interview essential witnesses. Fritz, 105 N.J. at 63-64.

When reviewing an attorney's actions, a court must "directly assess[]" any decision not to investigate a given issue or area "for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

In addressing defendant's argument that his attorney was deficient in not seeking out his own forensic experts to combat the seven-shot theory, the PCR

[12] The expert stated four of the shots were gunfire; two could not be identified as gunshots, and two were "questionable" and could not be "conclusively ruled out as having a firearm source."

court found that counsel made a conscious strategic choice to incorporate the State's seven-shot theory into the defense, "in an attempt to use the abnormal length of the shooting and amount of shots fired as further evidence that [defendant] experienced dissociation at the time of the shooting." The court noted that: (1) counsel's cross-examination of Kappelsohn highlighted the fact that the shooting in this case took an unusually long time; (2) his examination of Dr. Cooke elicited testimony that people experiencing dissociation often "operate in slow motion," providing an explanation for the length of the shooting; (3) he prompted testimony from Dr. Glass that a shooter with purposeful intent would more likely fire only a few shots and flee quickly, unlike defendant; and (4) he emphasized during his closing argument that the psychological experts all testified that a person in a dissociated state may shoot a gun "three times or five times or ten times" but remain in a fugue state and unable to perceive their own actions. In addition, the court noted the jury was presented with evidence, such as the fact that only four shells and bullets were found, suggesting the seven-shot theory could be wrong.

The court found defense counsel was not required to challenge "every point in the State's case" to demonstrate effective representation. In addition, counsel's notes indicating he considered finding a forensic pathologist but

decided not to, were evidence that counsel's actions were "a strategic decision and not mere oversight." The court concluded that counsel's decision to counter the State's claims by explaining that a high number of shots was consistent with dissociation, while ultimately unsuccessful, was "not evidence of ineffectiveness."

We agree that defendant has not demonstrated trial counsel was deficient in his investigation and preparation for trial. Counsel formulated the dissociative state theory and carefully developed evidence to support it. Counsel established that defendant did not attempt to conceal himself or his gun before or after the shooting; defendant behaved strangely by putting a gun in Selvaggio's car, taking it out and driving away, and then driving back; the shooting took an unusual length of time; defendant did not flee the scene in a hurry, try to evade detection by police, or take the quickest route to get out of Atlantic City; defendant did not appear to know what the arresting officers were talking about when they mentioned a "female" and he became distraught when told that Selvaggio was dead, all to persuade the jury that defendant was acting in a dissociated state and did not know what he was doing.

Defendant's presentation of the case dovetailed with the State's seven-shot theory, enabling defense counsel to highlight the number of shots fired as

evidence of dissociation. Counsel also attempted to minimize the argument that the firing of seven shots required reloading the gun by eliciting expert testimony that the reloading function could be performed by a dissociated individual.

Moreover, defendant's PCR acoustics expert could not opine there were only four shots fired. And the PCR forensic pathologist was unable to examine Selvaggio's body, in contrast to Dr. Perez who inspected the body and opined as to the number of sustained wounds.

The PCR court properly analyzed defendant's contention and determined trial counsel made a reasonable decision that made any further investigation or retention of experts unnecessary. See Strickland, 466 U.S. at 691. That this strategy was ultimately unsuccessful does not render counsel's performance deficient. See Bey, 161 N.J. at 251. We discern no error.

B.

Defendant next contends his counsel was ineffective by failing to request a more specific instruction on passion-provocation manslaughter to tell the jury that Selvaggio's threat to put him in jail constituted adequate provocation "as a matter of law." He relies on State v. Erazo, 126 N.J. 112, 121-26 (1991), and argues that a different instruction would have changed the outcome of the trial.

During the charge conference, defense counsel requested a charge on passion-provocation manslaughter. The State objected. The trial court agreed there was an "appropriate basis" for the charge because of evidence from various witnesses that defendant may have been upset or angry with Selvaggio at the time of the shooting.

The trial court instructed the jury following Model Criminal Jury Charge "Murder, Passion/Provocation and Aggravated/Reckless Manslaughter." Model Jury Charges (Criminal), "Murder, Passion/Provocation ad Aggravated Reckless Manslaughter (N.J.S.A. 2C:11-3(a)(1) and (2); 2C:11-4(a), (b)(1) and (b)(2))" (rev. June 8, 2015). There was no objection to the charge.

Preliminarily, the PCR court found defendant's argument regarding the passion/provocation instruction was barred under Rule 3:22-5 because defendant unsuccessfully raised the issue in his direct appeal. Nevertheless, the court addressed the contention on the merits. The PCR court noted the trial court granted defense counsel's request for the charge and the instruction given was "appropriate and complete." As a result, counsel was not ineffective for failing to request specific language be added to the charge.

We need not discuss this issue at length. Defendant did not object to the instruction's language during trial and did not raise the specific argument that

the trial judge should have charged the jury that Selvaggio's alleged "threat" was adequate provocation "as a matter of law" on direct appeal. He could have done so, as all the facts needed to make the argument were present in the trial record. The argument is barred from consideration on PCR under Rule 3:22-4(a), which forbids a petitioner from presenting a claim on PCR that could have been raised at trial or on direct appeal, and Rule 3:22-5, which prevents presentation of claims that have been previously litigated.

In fact, defendant did challenge the wording of this charge on other grounds in his direct appeal, arguing that the trial judge improperly failed to instruct the jurors "that a continuing course of ill treatment could provide the basis for a verdict of passion[-]provocation manslaughter." Burris, 357 N.J. Super. at 329. We did not address the argument in detail, finding it "[did] not merit discussion" under Rule 2:11-3(e)(2). Id. at 339. This finding implies the court found no error in the charge.

Nevertheless, defendant has not demonstrated trial counsel was constitutionally ineffective because Erazo does not stand for the proposition that a "threat to put [someone] in jail" is always, per se, sufficient provocation to support a passion-provocation manslaughter charge as defendant asserts. Nor

did the Erazo Court require the inclusion of a statement to that effect in the jury charge on passion-provocation manslaughter.

Furthermore, the only evidence that Selvaggio made this threat was defendant's account of events to his psychological experts, which was contradicted by police witnesses' testimony that defendant told them he could not remember anything after 2:11 a.m., hours before the shooting. And when defendant recounted the events to his experts, he stated Selvaggio was going to and then did call the police. He himself drew the inference that he would go to jail. Selvaggio never said it.

"No party is entitled to have the jury charged in his or her own words," and "all that is necessary is that the charge as a whole be accurate." State v. Jordan, 147 N.J. 409, 422 (1997). Even if defendant's theory of the case was that Selvaggio provoked him into killing her, rather than he dissociated and killed her without realizing it, the trial court was not required to instruct the jury that Selvaggio's call to 9-1-1 was sufficient provocation as a matter of law. Defense counsel was successful in having the court charge the jury with passion/provocation. The court followed the model charge in its instruction. Counsel was not ineffective in not requesting any additional language unsupported by the evidence or case law.

C.

Defendant next contends trial counsel was ineffective by failing to request an instruction on voluntary intoxication as an affirmative defense to the murder charge. He states the court would have given the charge if requested, because the record was "replete with evidence" supporting the defense, including testimony that he drank whiskey and beer on the night of the shooting, fell asleep shortly after his arrest, and "could not remember anything after receiving [Selvaggio's] page at 2:11 in the morning."

The PCR court again found the argument was barred under Rule 3:22-4 as it should have been raised on direct appeal. The court nevertheless considered and rejected the argument on the merits, finding there was insufficient evidence to support the instruction. Although defendant consumed alcohol prior to the shooting, there was significant other evidence that suggested he was not intoxicated to the degree required for the instruction. In particular, the court noted defendant did not drive erratically when fleeing from Harrah's, he followed the arresting officers' directions, and was alert and responsive to police questioning.

In addition, the PCR court found defense counsel intentionally chose not to pursue a voluntary intoxication defense but instead to focus on dissociation

as a defense to defendant's actions. During trial, defense counsel was adamant that he was not defending the case on voluntary intoxication. The court found this was "a strategic decision rather than an error in performance." And in light of the evidence discussed, the instruction likely would not have affected the jury's verdict.

Under N.J.S.A. 2C:2-8(a), voluntary intoxication is not a defense to a criminal charge "unless it negatives an element of the offense." A defendant "will not be relieved of criminal responsibility because he was under the influence of intoxicants or drugs voluntarily taken." State v. Maik, 60 N.J. 203, 214 (1972). However, under narrow circumstances, voluntary intoxication is an available defense if purpose or knowledge is a component of the charged offense. State v. Stasio, 78 N.J. 467, 482 (1979). Regardless, "the influence of liquor or drugs [that are] voluntarily taken, no matter how pervasive that influence may be, will not lead to an acquittal" and "cannot reduce [a homicide] below murder in the second degree." Maik, 60 N.J. at 215.

A jury instruction on voluntary intoxication is required "only if there exists a rational basis for the conclusion that [the] defendant's 'faculties' were so 'prostrated' that he or she was incapable of forming an intent to commit the crime." State v. Mauricio, 117 N.J. 402, 418-19 (1990). Even if a defendant

engages in "bizarre" or "violent" behavior while under the influence of intoxicating substances, that is not enough to require the instruction, if there is insufficient evidence that the defendant was incapable of purposeful action. State v. Cameron, 104 N.J. 42, 57 (1986).

As with defendant's earlier argument concerning the passion-provocation manslaughter instruction, this issue should have been addressed on direct appeal as it is a matter within the trial court record. Therefore, it should be barred under Rule 3:22-4.

Like the PCR court, we have nonetheless considered the contention and find it lacks merit. Defense counsel was clear during the trial that defendant was not raising an intoxication defense. Rather, counsel elicited testimony that defendant had been drinking whiskey and beer prior to the shooting, to suggest this consumption was one of the factors contributing to his dissociative state. The failure to request a voluntary intoxication instruction was a conscious strategic decision well within the bounds of reasonable professional assistance. Furthermore, the evidence in the case did not establish a rational basis to conclude that defendant's faculties were prostrated to such a degree that voluntary intoxication would have been a defense. See Mauricio, 117 N.J. at 418-19. In addition to defendant's ability to drive away from the scene of the

shooting and to follow police instructions without issue, he also shot Selvaggio multiple times which required very accurate marksmanship. Although police noted an odor of alcohol on his breath, no witness indicated that defendant's gait was unsteady, that his speech was slurred, or that he appeared so intoxicated that he could not act with purpose. There were no grounds presented upon which to issue the instruction or to support a change in the outcome of the trial.

D.

We turn to defendant's contention that his expert witnesses Drs. Glass and Sadoff incorrectly testified, based on an alleged typographical error in Dr. Sadoff's report, that defendant walked down the stairs to leave his home on the night of the shooting rather than using the elevator. Defendant asserts this testimony rendered the witnesses "constitutionally ineffective" as experts, because it allowed the prosecutor to suggest that defendant intentionally avoided the elevator to "secretly" bring his shotgun out of the building, which undercut his dissociation defense.

Dr. Sadoff stated in his report that defendant "took the elevator down the stairs." At trial, the prosecutor asked Dr. Sadoff whether defendant told him that "he decided to walk [the gun and ammunition] down the five flights of stairs to put them in his vehicle." Dr. Sadoff answered, "Yes." The PCR petition

included a certification from Dr. Sadoff stating he intended to write in his report that defendant "took the elevator downstairs."

The PCR court found defendant had not demonstrated he was prejudiced by the alleged inaccuracy in Dr. Sadoff's report. Although Dr. Glass also testified that defendant walked down five flights of stairs to leave the condo, the expert added that this behavior was "not inconsistent with not wanting to encounter someone [while] carrying a shotgun." The court also found that the "few and isolated references" to defendant taking the stairs "were not heavily relied on by the State in making its case that [defendant] knowingly shot [Selvaggio]." The court concluded that defendant did not establish ineffective assistance of counsel because he could not show that correcting the alleged misstatement would have affected the outcome of the trial.

We discern no error in the court's findings on this issue. There is no evidence that counsel was aware of any typographical error in Dr. Sadoff's report. Further, Dr. Glass's report also stated that defendant described taking the stairs when he left his condo. Therefore, there was no inconsistency for counsel to detect. Defendant has not established that his counsel or the experts acted outside the bounds of reasonable professional assistance with regard to this issue. See Strickland, 466 U.S. at 687-88.

E.

We turn to defendant's assertion of ineffective assistance arising out of his trial counsel's disclosure to Dr. Glass of a letter as part of the materials provided to the psychologist to aid in the preparation of his expert report. The five-page letter was written by defendant and sent to his former defense attorney, Frank Hartman, ten days after the shooting. The document, titled "Mental Cruelty Items," contained twenty-five paragraphs describing Selvaggio's abuse against defendant. At the end of the letter was a paragraph stating, "1975 case Bob Palermo shot someone in Pleasantville aquited [sic] on temporary insanity. I believe he shot them [six] times in the head." Because Dr. Glass relied on the letter when preparing his report, it was turned over to the State.

Defendant asserts the Palermo reference in the letter was a privileged attorney-client communication under N.J.R.E. 504 and that counsel's disclosure of it to Dr. Glass, whether "inadvertent" or not, constituted ineffective assistance because it allowed the State to introduce it to the jury. He contends the improperly disclosed material allowed the jury to draw the inference he had fabricated his dissociation defense "modeled on Palermo."

The prosecutor asked Dr. Glass about the letter at trial, and Dr. Glass responded that defendant sent it to Hartman shortly after his arrest. Dr. Glass

testified that the Palermo case "[didn't] play any role in [his] evaluation." He viewed it simply as evidence that defendant was "aware that people have committed crimes and [have been] acquitted because of insanity." However, Dr. Glass did say that the Palermo reference "enter[ed] into [his] judgment."

In his PCR certification, defendant explained that he mentioned Palermo in the letter "because [he] saw similarities in the facts that would suggest that [he] had a viable diminished capacity defense." Defendant said he "never intended for anyone other than Mr. Hartman . . . to see or read [his] reference to the Palermo case" and was not aware that his trial attorney was in possession of the letter because he had never discussed it with him. Defendant stated he "did not consent to [the] disclos[ure of] the letter to [his] experts," and "never would have waived [his] right to the attorney-client privilege with respect to" the Palermo reference.

The PCR court found the disclosure of the portion of the letter referencing the Palermo case was not prejudicial to defendant's case. Although Dr. Glass told the jury the Palermo reference may have entered into his judgment, the expert nevertheless concluded that defendant truly suffered a dissociative episode. The court also found that although the letter was a protected communication under Rule 504, defendant waived the attorney-client privilege

when he provided it to Dr. Glass as support for his psychological defense. The court concluded defense counsel was not ineffective by giving Dr. Glass the letter.

Rule 504 provides that communications between lawyer and client made "in the course of that relationship and in professional confidence" are privileged and a client may refuse to disclose any such communication and prevent their lawyer from disclosing it. Waiver of the privilege "rests solely with the client." In re Grand Jury Subpoena Issued to Galasso, 389 N.J. Super. 281, 298 (App. Div. 2006). Further, inadvertent production of a privileged document by an attorney does not constitute a waiver. Kinsella v. NYT Television, 370 N.J. Super. 311, 317 (2004). However, a party may not choose to divulge only information that is favorable to their position, but assert the attorney-client privilege "to preclude disclosure of the detrimental facts." United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 567 (App. Div. 1984).

An implied waiver of the privilege may occur if the holder, "without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." N.J.R.E. 530(a). For example, in Coyle v. Est. of Simon, 247 N.J. Super. 277, 281 (App. Div. 1991), the plaintiffs in a medical malpractice action gave their

attorney written statements reciting the factual basis of their claims, and the attorney in turn gave copies of the statements to expert witnesses. This court found the attorney-client privilege was waived when the statements were submitted to the experts. Ibid. Because the plaintiffs expected the experts to use the statements in preparing their reports and testimony, the communications themselves were to be used as evidence and thus were "no longer secret." Id. at 282. The portions of the statements used by the experts therefore had to be disclosed to the defendants in discovery. Id. at 282-83.

Defendant has not demonstrated counsel's disclosure to Dr. Glass of defendant's letter constituted ineffective assistance. These circumstances are analogous to those in Coyle. Counsel reasonably decided that a list of "Mental Cruelty Items" in which defendant described negative aspects of his relationship with Selvaggio would be pertinent to Dr. Glass's psychological evaluation. Thereafter, the entire letter was subject to discovery. When the letter was mentioned during the trial, there was no objection to it; defendant did not assert his privilege. Moreover, defendant has not established the letter affected the outcome of the trial. Dr. Glass testified that while he considered the letter, he concluded that it meant defendant was aware of cases where people were acquitted because of insanity. There was no error in the PCR court finding a

lack of ineffective assistance regarding the disclosure of the letter. See Strickland, 466 U.S. at 687-88.

F.

Defendant's next allegation of ineffective counsel arose out of counsel's questioning of one of the State's police witnesses, Wade. Counsel asked Wade, "You tell the jury—you want to tell them, you know what the why is. You tell the jury what's the why here?" Wade responded, "The why is the fact that he set her up in business[,] several businesses. He was in love with her and then she dropped him and he wanted his money." Counsel then asked whether defendant would "get his money" or "get [Selvaggio] back as a girlfriend" by killing her, and Wade said, "No, sir."

Defendant asserts this exchange allowed the prosecutor to have the following colloquy with Wade regarding defendant's behavior after officers told him Selvaggio was dead:

> [THE STATE]: How did you interpret the crying?
>
> [WADE]: Remorse.
>
> [THE STATE]: Why do you attribute it to remorse?
>
> [WADE]: Because in my experience many times during interviews when you talk to people about something as heinous as this, one of their reactions is crying. And an innocent person or someone is not going to cry—he's

> going to want to get out of the interview. Mr. Burris is crying because he's remorseful for what happened.
>
> . . . .
>
> [THE STATE]: [Y]ou were asked about the statements he made to, [j]ust shoot me. You know, [t]ake me out back and put me out of my misery, that sort of stuff?
>
> [WADE]: Yes, sir.
>
> [THE STATE]: Did you interpret that as being an indication of some mental illness that required taking him to crisis intervention?
>
> [WADE]: No, sir, I took that as an admission of guilt.

Defendant asserts it was "incompetence" for counsel to "give [Wade] the opportunity to declare that defendant killed [Selvaggio] over money," and that Wade's testimony on re-direct examination was an improper comment regarding defendant's guilt.

The PCR court disagreed, finding the testimony counsel elicited from Wade "was not an opinion of guilt, but rather an opinion of motive," and that Wade's opinion was "supported by his observations while investigating [the] case." The court found Wade stated defendant "had made an admission of guilt, not that [defendant] was in fact guilty." Even if it was counsel's error, the court reasoned defendant had admitted at the outset of trial that he had shot Selvaggio,

therefore counsel's actions were "inconsequential and would not have affected the outcome of the trial."

In order to preserve the integrity and neutrality of jury deliberations, both prosecutors and defense attorneys must "avoid inadvertently encouraging a jury prematurely to think of a defendant as guilty," such as by "expressing an opinion of defendant's guilt." State v. Hightower, 120 N.J. 378, 427-28 (1990) (Handler, J., concurring in part and dissenting in part). Testimony by a police officer that "expresses an opinion of [the] defendant's guilt" is also "disapprove[d]." State v. Frisby, 174 N.J. 583, 594 (2002).

Counsel did not ineffectively represent defendant by asking Wade what he thought defendant's motive for the shooting was. Counsel did not ask the officer whether he thought defendant was guilty. The questions counsel asked about motive were strategically calculated to allow him to then question defendant's supposed motive for murder; after Wade said defendant likely shot Selvaggio because he "wanted his money," counsel immediately pointed out that defendant would never be repaid if he killed her. Furthermore, in response to the prosecutor's later questions, Wade did not say that defendant "was guilty," he said that he, personally, interpreted defendant's crying as an admission of guilt. That comment is innocuous since it was undisputed that defendant killed

Selvaggio; the question before the jury was whether he did so in a purposeful or knowing manner. Wade's testimony in this context had no potentially prejudicial effect.

G.

Finally, defendant contends his appellate counsel was ineffective by failing to raise the issue of the prosecutor's "derogatory" statements about the defense experts and their fees on direct appeal.

The PCR court found that appellate counsel's certification was not sufficient to find deficient performance, and that because the prosecutor's remarks were not prejudicial, failure to attack them on appeal was not ineffective assistance.

"The right to effective assistance includes the right to effective assistance of appellate counsel on direct appeal." State v. O'Neill, 219 N.J. 598, 610 (2014). The Strickland standard applies to claims regarding appellate counsel's performance. State v. Morrison, 215 N.J. Super. 540, 546 (App. Div. 1987). Appellate counsel does not have an obligation to "advance every argument, regardless of merit, urged by the appellant," Evitts v. Lucey, 469 U.S. 387, 394 (1985) (emphasis in original), but "should bring to the court's attention controlling law that will vindicate her client's cause." O'Neill, 219 N.J. at 612.

Failure to do so constitutes ineffective assistance if there is a "reasonable probability" that the outcome of the appeal would have been different. Id. at 616-17. In other words, in order to prove ineffectiveness, a defendant must prove that his or her underlying claim to relief is meritorious. Morrison, 215 N.J. Super. at 547-51.

As discussed above, the prosecutor's remarks in summation did not rise to the level of misconduct warranting reversal or a new trial but were instead fair comments on the evidence and appropriate responses to defense counsel's closing argument. Therefore, appellate counsel's failure to raise the issue of prosecutorial misconduct on direct appeal did not constitute constitutionally deficient assistance under Strickland, 466 U.S. at 687-88, as asserting this issue would not have altered the outcome of the matter.

Affirmed.