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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1270-23**

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JUSTIN GARCIA, a/k/a
EAZE GARCIA,

Defendant-Respondent.

Submitted May 7, 2024 – Decided May 29, 2024

Before Judges Natali and Haas.

On appeal from the Superior Court of New Jersey, Law
Division, Hudson County, Indictment No. 17-01-0055.

Esther Suarez, Hudson County Prosecutor, attorney for
appellant (Stephanie Davis Elson, Assistant Prosecutor,
on the brief).

Peter R. Willis, Esq., LLP, attorney for respondent
(Peter R. Willis, on the brief).

PER CURIAM

By leave granted, the State of New Jersey appeals a Law Division order which granted defendant Justin Garcia's petition for post-conviction relief (PCR), vacated his convictions, and ordered a new trial. We affirm, substantially for the reasons set forth in Judge Jeffrey R. Jablonski's well-reasoned oral opinion.

I.

We recite only those portions of the record necessary to place our decision in context and refer the reader to the factual findings contained in Judge Jablonski's decision. In addition, a more detailed explication of the facts is addressed in our unpublished decision affirming defendant's arrest, convictions, and sentence. See State v. Garcia, No. A-5820-17 (App. Div. July 9, 2020), certif. denied, 245 N.J. 360 (2021).

Defendant was charged by way of indictment with first-degree murder of his friend Javon Murray, N.J.S.A. 2C:11-3(a)(2), second-degree unlawful possession of weapon, N.J.S.A. 2C:39-5(b), second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a(1), and second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7b(1). Following a bifurcated jury trial, defendant was convicted of the murder and weapons offenses for the execution-style shooting death of Murray; thereafter, the same

jury convicted defendant of certain persons not to have weapons. After denying defendant's motion for a new trial and the State's motion for a discretionary extended term, the trial court ordered the appropriate merger, ran all remaining counts concurrently, and sentenced defendant to an aggregate term of life imprisonment. Pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, defendant must serve nearly sixty-four years in prison before he is eligible for parole.

As we detailed in our unpublished opinion, during the multi-day jury trial, the State presented the testimony of ten witnesses and introduced in evidence more than one hundred exhibits. See Garcia, slip op. at 1-2. But no one witnessed the shooting; the weapon was not recovered; and no projectiles or shell casings were found at the scene.

Instead, the evidence against defendant was largely circumstantial: surveillance video footage and defendant's cell phone records captured his actions during the minutes leading up to the shooting; cell tower information tracked defendant's activity – and inactivity – in the hours that followed. Further, a mutual friend of defendant and Murray, nineteen-year-old N.C.

(Nancy),¹ heard the gunshot, saw defendant run away from the scene, and saw another man pick up the gun. Defendant did not testify at trial and his counsel called no witnesses.

Sometime between 2:40 and 2:44 a.m. on July 21, 2016, Murray was shot from behind by a single bullet. Jersey City police detectives assigned to a nearby precinct heard the gunshot and within minutes were dispatched to the scene on Clinton Avenue. By the time they arrived, Murray had died; he was still clutching money in his hand. Police found two cell phones and a small bottle of alcohol in Murray's pocket, arguably ruling out robbery as a motive for the shooting. One of the responding detectives testified the windshield of a blue Ford Expedition next to Murray's body was struck by a bullet at an upward angle. According to the medical examiner, a single bullet entered Murray's neck below his left ear; traveled at a slight upward angle.

Around the time of the shooting, a few young adults – including Nancy and her friend R.C. (Rachel) – were in the area, as was K.B. (Kevin), a sanitation worker. Police took statements from Rachel, Kevin, Nancy, and G.S. (Greg), an

¹ As in our previous opinion, we find the witnesses' safety outweighs the Judiciary's commitment to transparency and use initials to protect their privacy and pseudonyms for ease of reference.

acquaintance of defendant and Murray.² In her statement, Rachel stated she was in a vehicle with Nancy and other individuals across the street from the shooting. She explained she was next to Nancy, did not see the shooting, and initially thought the gunshot was a noise from the nearby garbage truck. She stated she "pulled [Nancy]" into the car after hearing the garbage truck driver say someone was shot. Rachel stated the vehicle began to drive away but Nancy told the driver to stop when she saw the victim. Rachel also told the police she saw defendant was wearing jeans a white shirt the night of the shooting.

In his statement to police, Kevin stated he saw "three guys . . . [o]ne had a white t-shirt with dreads. One had a red sweat hood on and there's another one with a black t-shirt and like a gold, black and gold [m]ohawk." He explained the individual in the red hoodie had a fade hairstyle. He told police while reaching to pick up garbage, he heard a "pow" and his ears started ringing. He also stated he saw a "cloud of smoke" and when he "looked over" the "white shirt was white but it was like pink now," as the individual in the white shirt had been shot. Kevin said he then jumped on the back of the truck and saw the individual in the red sweatshirt pass the gun to the individual in black, and the

² Nancy's statement to police is not included in the record and we discuss it, infra, in the context of her trial testimony.

individual in red ran toward the truck. Kevin also stated when he looked up and saw the smoke, he also saw the "the guy with red give the guy the gun with black on. And he wrapped it up in a white and black plastic bag."

When asked to provide police with a "second to second" description of events following his hearing the gunshot, Kevin stated he "actually froze at first," and "then when the driver hit the horn I jus[t] [] snapped back" and ran towards the garbage truck. He told police as he was getting on the truck, he saw the individual in a red hoodie run toward the truck. Acknowledging he did not see the shooting, Kevin told police he believed the shooter was the individual with a fade wearing a red hoodie. Throughout his statement, Kevin maintained the individual in red passed a gun to the individual in black.

In his statement to police, Greg stated on the night of July 20th into the 21st, he was drinking with defendant and Murray. Greg explained defendant's mood was "normal," the two did not have an argument, and that they departed separately.

At trial, Nancy testified she ran into Murray on Clinton Avenue around 11:30 p.m. on July 20, and they spoke for a few minutes about "the usual stuff" friends discuss. Sometime later, defendant approached Nancy and told her to contact Murray and "ask him where he was." Nancy did not comply with

defendant's "persistent" demands and walked away when another friend met up with her, and the two then walked to a fast-food restaurant.

About twenty minutes later, Nancy and her friend returned to Clinton Avenue. Nancy entered Rachel's home while her friend remained outside. As Nancy was entering the home, she "saw a person in all black, [a] short person[] going through the alleyway between the house [sic]." A few minutes later, Nancy joined Rachel and other friends in the vehicle parked across the street from Rachel's house.

At trial, Nancy testified that the group was "just talking and everything and then after a while [they] heard the shot." Nancy did not see the shooting; when she heard the gunshot, she turned and saw Murray fall to the ground. Nancy then saw the "same person, same height . . . run . . . through the alley again" and "[d]rop the gun." Nancy observed another man pick up the gun and hand it to a third man before leaving; both men were taller than the gunman. Nancy stayed behind to check on Murray while the vehicle drove away. Realizing "something was wrong," Nancy reentered Rachel's home.

During her trial testimony, Nancy acknowledged she initially told police the shooter was "short with dreads" and "had a white shirt with blue pants on," which differed from her trial testimony, but was consistent with the surveillance

footage shown to the jury. Nancy selected defendant's photograph from an array during her interview and identified defendant in court as the shooter.

Defense counsel questioned Nancy about her prior statements to police, some of which were inconsistent with her trial testimony. As one example, on cross-examination Nancy said she saw Murray enter a white van with several other unidentified people before the shooting. But Nancy told police she saw Murray enter a white van with Jared, her former boyfriend. Nancy also told police she did not go to the fast-food restaurant with her friend, but stayed behind with Rachel. On redirect examination, Nancy stated she did not immediately disclose all details to the detectives because she was "scared" and "didn't know what to do."

Hudson County Prosecutor's Office detectives obtained surveillance footage from several businesses and residences near the scene of the shooting, which were played for the jury at trial without narration. One surveillance video depicts a man matching Nancy's description of defendant – a male with dreadlocks wearing a white shirt, blue pants, and a baseball cap – entering a liquor store near the crime scene a few hours before the shooting.

Another surveillance video shows a similarly dressed man, without a baseball cap, crouching down near a car on Clinton Avenue and placing an

object in the waistband of his pants about forty minutes before the shooting. The same man appears in a third video with another man, believed to be Murray, walking on Clinton Avenue shortly before the shooting. None of the videos depicted the murder; apparently footage had been erased from one of the videos before it was turned over to police.

At trial, defendant's trial strategy focused on impeaching the credibility of Nancy and poking holes in the State's circumstantial evidence that tied him to the shooting. During summation, defense counsel argued, "[Nancy] never said that she saw [defendant] fire a gun." Counsel then noted the State will ask the jury "to draw certain inferences from certain facts that [Nancy] did say and try to bring [it] to a conclusion saying that [defendant] must have been the one that did this." In seeking to discredit Nancy, defense counsel cited portions of her testimony that differed from her prior statements to police. For example, counsel argued: "[c]learly, she lied" when Nancy said she did not know the occupants of the white van. He also cast doubt on Nancy's statement that she saw defendant drop the gun and another man pick it up and hand it to a third man. Counsel said Nancy "seemed to be very nervous" when she testified, arguing people "get nervous because they're not supposed to be lying" And,

defense counsel also suggested someone else, including the driver of the car Nancy was in, could have killed Murray.

As noted, the jury found defendant guilty on all charges. Defendant appealed his conviction and sentence and we affirmed and remanded only to correct the judgment of conviction to remove the fines assessed on the merged conviction, see Garcia, slip op. at 3. The Supreme Court denied defendant's petition for certification. Garcia, 245 N.J. at 360.

Defendant filed a timely pro-se petition for PCR with an accompanying certification, later amended and supplemented with a brief filed by appointed counsel. In sum, defendant alleged his counsel was constitutionally ineffective for: 1) not fully investigating and calling lay and expert witnesses, 2) failing to provide defendant with the State's evidence prior to the eve of trial, 3) not communicating a State-offered plea agreement to defendant, and 4) failing to allow defendant to assist in his own defense.

Judge Jablonski conducted an evidentiary hearing and determined defendant's trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984) and granted defendant's petition.³ At that hearing, defendant,

³ To establish ineffective assistance of counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland, 466 U.S. at 687, by

his trial counsel, Greg, Rachel, and Kevin all testified. Defendant's PCR counsel maintained his trial counsel was constitutionally ineffective because he failed to call Kevin, Rachel, and Greg as witnesses despite possessing their statements to police and subpoenaing them. He also argued his trial counsel failed to request a limiting instruction with respect to Nancy's testimony that defendant was the shooter.

Defendant testified after his trial counsel was assigned from the Public Defender's Office, he wrote to him: 1) regarding trial strategy; 2) informing him Kevin should be called as a witness, 3) advising counsel he should obtain surveillance video from the scene, and 4) instructing him to retain an investigator to "find those two sanitation workers." Defendant stated his counsel neither replied to his letters nor informed him the witnesses would not be called at trial, and he was unaware of his counsel's reasoning behind the decision not to call any witnesses. Consistent with his PCR petition, defendant also explained he did not have an opportunity to read the statements of Kevin, Greg, and Rachel prior to trial, although he viewed their video-taped statements.

demonstrating that: 1) counsel's performance was deficient, and 2) the deficient performance actually prejudiced the accused's defense. The Strickland test has been adopted for application under our State constitution. See State v. Fritz, 105 N.J. 42, 58 (1987).

For his part, defendant's trial counsel testified at the time of defendant's trial, he was a solo practitioner with approximately twenty-six years of experience who had handled approximately 2,500 criminal matters and about fifty jury trials. Counsel further explained he was also a "pool attorney" with the Public Defender's Office.

Counsel further testified although he could not recall specifically the facts of defendant's case, consistent with his practice in other matters, he generally called fact and character witnesses when he believed the witness will testify to something "relevant to the defense you want to try to present," and when he thinks "that person is somebody who a jury may find credible and believe them." Defendant's trial counsel also acknowledged a criminal defendant is "absolutely" entitled to a "vigorous" and "complete" defense and he agreed his investigator served subpoenas on potential witnesses including Kevin, Rachel, and Greg. Counsel also explained while he would typically interview a witness prior to issuing a subpoena, he had no recollection of interviewing Kevin but was "sure" he read Kevin's statement to police, although he could not specifically recall reading it.

With these reservations noted, defendant's trial counsel acknowledged he would have been aware if Kevin's statement contradicted Nancy's testimony.

The following colloquy then occurred:

[PCR Counsel]: And if there were contradictions a vigorous defense would have called [Kevin] to come in and dispute the identification made by [Nancy] for the State. You would agree with that?

[Trial Counsel]: Yes.

...

[PCR Counsel]: Okay. And a witness gives direct testimony opposite to the State's main witness, [Nancy], you would call that witness; correct?

[Trial Counsel]: Yes.

...

[PCR Counsel]: Could you give the Judge the reason why you didn't call [Kevin] who was under subpoena, and on March the 1st, 2017, you told your investigator, "Drop the subpoena, we're not calling him." Tell the Judge why.

[Trial Counsel]: No recollection.

[PCR Counsel]: You have no recollection why a critical important witness who disputes the State's identification of the shooter, why you didn't call him?

[Trial Counsel]: Right.

[PCR Counsel]: Well, he was under subpoena.

[Trial Counsel]: Right.

[PCR Counsel]: Who made the decision not to call him?

[Trial Counsel]: Well, I would have made -- any decisions about whether to call witnesses would have been made by me together with my client.

[PCR Counsel]: Your client asserts in his certification that you never told him that you weren't calling the four witnesses under subpoena. He says you never talked to him about it.

[Trial Counsel]: I can't -- I can't dispute that because I don't remember. I'm just -- I'm just --

[PCR Counsel]: Okay.

[Trial Counsel]: -- basing it on what I -- what I would assume I would have done.

[PCR Counsel]: Okay. But you can't dispute it; correct?

[Trial Counsel]: Correct. Correct.

Kevin also testified and stated in July of 2016 he worked for the Jersey City Sanitation Department and, on the night of the murder, was collecting garbage on Clinton Avenue. Presented with a transcript of his statement to police, Kevin confirmed the shooting took place near his garbage truck and he

was able to see critical events related to Murray's murder because he was three feet away and the lights on his truck illuminated the area.

Kevin explained in addition to seeing the victim, he saw "a light skinned guy[,] kind of short, [with] like a low haircut," as well as "a taller guy, real, real dark, with a black and gold fade," and after the shot, he saw the sneakers of the victim. He also stated the shorter individual had "a little fade" haircut, was hearing a "red hoodie," and "passed a bag with a gun in it" to the individual with a mohawk dressed in all black.

More specifically, Kevin explained he saw the victim "standing by himself," and two other men, "a dark[-]skinned guy" and "a guy with a red hoodie." As Kevin bent down to pick-up trash bags, heard the gunshot and saw the victim's shoes on the ground. Kevin stated he then saw the individual with a fade wearing the red hoodie give the gun in a plastic bag to the individual with a mohawk wearing black. Kevin explained after seeing the victim's sneakers he "ran and jumped back on the garbage truck." Kevin testified defendant was not the individual in the red hoodie.

On cross-examination, Kevin stated he did not see smoke after he heard the gunshot, contrary to his police statement in which he described seeing a "a cloud of smoke." Kevin clarified he did see "[a] little smoke from a gunshot,"

but it did not impede his vision. Kevin also explained he did not see the victim get shot but did see "the man that had the gun." Kevin acknowledged he was convicted in 1996 in municipal conviction for providing law enforcement with a false report, and in 1999 for unsworn falsification to authority.

Rachel testified there was car blocking her view of the scene, and she was not able to see what occurred until after she heard "a bang." She also stated Nancy was next to her and had the same obstructed view. Presented with her statement to police, Rachel also stated Nancy was on the phone at the time of the shooting and that she "grabbed [Nancy] and kind of pulled her into the car." Rachel also confirmed she told police defendant was wearing a white t-shirt and blue jeans at the time of the shooting.

Greg testified he knew defendant for "[a] long time," and was drinking with defendant and the Murray on the night of July 20th into 21st. Greg explained their interaction that night was friendly, and the defendant and Murray left at separate times. Greg also stated he was never contacted to be a witness by either defendant's counsel or any investigator.

In his oral opinion, Judge Jablonski court found defendant's trial counsel testified "quite credibly" as he "answered every question" asked of him "respectfully and in absolute conformity with the professionalism that we

require attorneys to testify to." Addressing his decision to not call Kevin and Rachel as witnesses, the court stated it was "certainly concerned with what the decision[-]making process was" as their testimony was "diametrically opposed" to Nancy's.

Significantly, the judge also found, counsel did not "fill those gaps" in explaining why he did not call Kevin and Rachel. With respect to both witnesses, the court stated, "[w]e're not talking about a witness, particularly [Kevin], who is just another witness to be called. We're not, similarly, talking about [Rachel], another witness who was not just another witness to be called to counter one for one."

Instead, as to Kevin, Judge Jablonski noted he stated, "on a number of occasions," the individual who transferred the gun was "taller" and "wearing a red hoodie," which "does not meet [defendant's description]" and is "diametrically opposed to the trial testimony" of Nancy. The court also noted Kevin's statement to police was given prior to trial, and in that statement, an individual other than defendant was identified as possessing the murder weapon.

The judge also cogently explained, "[t]his is a circumstantial case," and while potentially powerful, "circumstantial evidence can also be criticized with the calling of witnesses that would allow, at least, the jury to make and consider

a different approach to what happened that night." Here, however, because Kevin did not testify, the court found the jury was "deprived of that opportunity to hear that there was an alternative individual."

Addressing defendant's third-party guilt defense, the court also observed testimony revealed there were "at least two other individuals" present at the scene, one with a fade wearing a red hoodie and one with a black and gold mohawk dressed in all black. The court explained "[h]airstyles are crucial in this matter," and while defendant had dreadlocks both at the time of the shooting and of the PCR hearing, Kevin testified the individual who had the gun had a fade and passed it to the individual with a mohawk.

The court also determined there was an "inherent discrepancy" with testimony regarding what defendant was wearing the night of the murder as he was first "characterized as wearing all black and then there was a reference made to wearing blue shorts and [t]-shirt." The court stated while "[t]his is not a case that has been presented to me where I am able to say clearly, one way or another, what it is that happened that night," it was "quite clear . . . the jury did not hear all of the facts."

As to trial counsel's decision not to call Kevin and Rachel, the court stated, "I don't know why[,] and I have not been convinced as to the reasons why these

decisions were made." The court also noted "this is not an issue of . . . not being called for a witness to witness," but rather an issue of "the substantive content [that] should have been submitted to the jury for its consideration as to whether this very circumstantial case would have resulted" in the jury finding defendant guilty. The court accordingly granted defendant's PCR application, vacated defendant's convictions, and order a new trial. As noted, we granted the State's motion for leave and accelerated the appeal.

II.

Before us, the State's challenges to the judge's order can be summarized as quarrels with the court's factual findings and characterization of the evidence. Specifically, the State asserts Rachel "cannot be considered a beneficial contradictory witness" given her reluctance to appear and because her recollection had to be refreshed multiple times. The State also notes the court characterized her statement as "problematic" because she was on the phone at the time and not an eyewitness to the shooting.

With respect to Kevin's testimony, the State contends the trial court erred in characterizing his testimony as "diametrically opposed" to Nancy's. Rather, the State argues Kevin's observations corroborate those of Nancy. On this point the State argues both Kevin and Nancy observed two males remove a gun from

the scene. The State maintains Kevin did not see the third individual Nancy claimed to see drop the gun due to "the timing of his observations." Specifically, prior to the gunshot, Kevin was picking up garbage bags and after the shot "froze." He then ran to the garbage truck and "[o]nly then did he turn back and see the male in the red hoodie hand the gun to the male in the black shirt." As such, the State argues Kevin's observations began after Nancy's. The State also argues Nancy acknowledged the difference between her police statement and trial testimony with respect to her description of defendant's clothing at the time of the shooting and the jury was aware of that discrepancy.

Our review of a PCR claim after a court has held an evidentiary hearing "is necessarily deferential to [the] court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420.

When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that they are entitled to the requested relief. Nash, 212 N.J. at 541; State v. Preciose, 129 N.J. 451, 459 (1992). As noted, to establish a prima facie claim of ineffective assistance of counsel, the

defendant is obligated to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced their right to a fair trial. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. Under the first prong of this test, the defendant must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687.

Under the second prong, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. That is, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Further, because prejudice is not presumed, Fritz, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

Kevin's testimony, at his core, directly addressed whether a third party murdered Murray. That is no minor issue as it is well-settled that a defendant has "a constitutional right to introduce probative evidence tending to establish third party guilt." State v. Timmendequas, 161 N.J. 515, 620 (1999). To be admissible, such evidence must have "a rational tendency to engender a

reasonable doubt with respect to an essential feature of the State's case.'" State v. Loftin, 146 N.J. 295, 345 (1996) (quoting State v. Sturdivant, 31 N.J. 165, 179 (1959)). However, the defendant need not show "a probability of a third-party['s] guilt," but only "proof capable of raising a reasonable doubt on the issue of [the] defendant's guilt." State v. Millett, 272 N.J. Super. 68, 100 (App. Div. 1994) (citing State v. Koedatich, 112 N.J. 225, 299 (1988)).

In most criminal trials, choosing which witnesses to call is considered "one of the most difficult strategic decisions that any trial attorney must confront." State v. Arthur, 184 N.J. 307, 320 (2005). Counsel

must consider what testimony a witness can be expected to give, whether the witness's testimony will be subject to effective impeachment by prior inconsistent statements or other means, whether the witness is likely to contradict the testimony of other witnesses the attorney intends to present and thereby undermine their credibility, whether the trier of fact is likely to find the witness credible, and a variety of other tangible and intangible factors.

[Id. at 320-21.]

It is precisely for this reason that we have stated our review of a defense attorney's decisions on this issue "should be 'highly deferential.'" Id. at 321 (quoting Strickland, 466 U.S. at 689). This is particularly so where counsel chooses not to call a witness after an investigation into the above factors,

including speaking to the witness and reviewing any previous statements made by the witness to police and others. See id. at 322-23 (holding that counsel's decision not to call a third-party guilt witness was a reasonable strategic choice because it was based on research and upon the fact that the witness may have recanted his earlier statements to avoid implicating himself).

Indeed, counsel cannot be found ineffective if the evidence an uncalled witness may have provided "would probably have been inadmissible in any event," would have undermined the defense strategy, or would likely be considered not credible due to being contradicted by a great deal of other evidence. State v. Coruzzi, 189 N.J. Super. 273, 321-23 (App. Div. 1983) (noting defense counsel met with witnesses prior to trial and became "thoroughly familiar with the testimony that they could have offered," rendering his choice not to call them a "conscious strategic decision" that could not support an allegation of ineffective assistance).

Applying these legal principles to the record, we are satisfied the court's factual findings warrant our deference and the court's legal conclusions are unassailable. With respect to Strickland's performance prong, the court found defendant's trial counsel subpoenaed Kevin, Rachel, and Greg, who all provided police statements, and based on his testimony, were presumably interviewed.

Counsel, however, did not call any witnesses at trial and offered no reasons, strategic or otherwise, for failing to do so. While trial strategy is left to the sound discretion of the attorney, see Coruzzi, 189 N.J. Super. at 321, nothing in the record supports the conclusion counsel's failure to call any witness, let alone potentially exculpatory witnesses, was based on any trial strategy.

Here, as noted, defendant's trial counsel offered no substantive reason for failing to call any witness at trial, including Kevin, despite subpoenaing him and while in possession of his statement to police, given almost a year prior to defendant's conviction, which supported defendant's third-party guilt defense. Specifically, Kevin's statement indicates an individual other than defendant was in possession of a gun immediately following the shooting. The decision not to call Kevin was clearly not made after an adequate investigation nor based on anything in his background such as his prior criminal convictions, and neither defendant's trial counsel nor the State contended otherwise. We also agree with Judge Jablonski that Kevin's testimony could have altered the trial outcome, and defendant was therefore clearly prejudiced by counsel's deficient performance in failing to call Kevin without any basis.

As noted, the State's primary contention on appeal is that the judge mischaracterized Kevin's testimony as "diametrically opposed" to Nancy's and

argues Kevin's testimony actually corroborates Nancy's due to the temporal difference in their observations. We are unpersuaded by this argument.

Nancy testified she saw an individual dressed in black in the alley, and later heard a gunshot and observed the same individual from the alley drop a gun and flee the scene. She identified this individual as defendant who she described as short with dreadlocks. Nancy also stated another individual picked up the gun and passed it to a third individual.

Consistent with his statement to police after the shooting, Kevin testified before the PCR court that while he was bending down to pick up bags of garbage, three feet from where the shooting occurred, he heard a "pop," looked up and saw smoke from a gunshot, and observed an individual in a red hoodie with a fade haircut pass a gun to an individual dressed in black with a mohawk. Neither individual's description matched defendant who, at the time of the shooting, had dreadlocks. Indeed, Kevin stated defendant was not the individual in the red hoodie and did not mention a third individual dressed in black running in the alley.

At bottom, Kevin and Nancy provided different accounts of the immediate aftermath of a shooting. Based on the record before us, we agree with Judge Jablonski it was "quite clear . . . the jury did not hear all of the facts." Even if

we were to agree with the State that Kevin's and Nancy's accounts were not "diametrically opposed," it cannot be seriously disputed the accounts are materially different from one another such that the decision not to call Kevin, on this record, constituted prejudicial ineffective assistance of counsel under Strickland entitling defendant to a new trial.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION