FILED, Clerk of the Supreme Court, 18 Aug 2023, **087840**

Supreme Court of New Jersey

DOCKET NO. 087840

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent	:	On Certification Granted from a Final Order of the Superior Court of New
v.	:	Jersey, Appellate Division.
WILLIAM HILL,	:	Sat Below: Hon. Thomas W. Sumners, Jr., C.J.A.D.,
Defendant-Appellant.	:	Hon. Richard J. Geiger, J.A.D., Hon. Ronald Susswein, J.A.D.

BRIEF AND APPENDIX ON BEHALF OF
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August 18, 2023

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PRELIMINARY STATEMENT

The legal process is a truth-seeking endeavor. Courts and attorneys cannot perform that vital function alone; instead, they rely on witnesses coming forward and testifying truthfully. States and courts have therefore long sought to ensure witnesses can safely and confidently share their testimony with the public. They do so, primarily, through witness-tampering statutes, which prohibit interfering with any witness's ability or willingness to testify candidly. The statute at issue here, N.J.S.A. 2C:28-5(a), is precisely such a law. It prevents individuals from knowingly engaging in "conduct" that a reasonable person would believe would cause that witness to, among other things, commit perjury, evade legal process, ignore a summons, or obstruct and delay official proceedings.

Defendant urges this Court to invalidate New Jersey's witness-tampering statute entirely, but he cannot satisfy the significant burden necessary to justify that extraordinary demand. Defendant's facial challenge would fully eliminate the State's protections against a wide range of witness-tampering conduct, and it would also destabilize legions of past convictions. To support such a stark result, defendant must establish that the statute is overbroad—that is, that this witness-tampering provision has both a substantial and a vastly disproportionate number of unconstitutional applications when compared to its permissible applications. But defendant cannot meet that burden, and does not really try to.

Instead, he concedes the law primarily covers unprotected conduct, such as assaulting a witness, and has a plethora of other lawful applications. And he does not attempt to show a wide range of improper prosecutions either.

Indeed, a broad array of witness-tampering prosecutions do not implicate any of defendant's concerns about mens rea. Defendant's central theory is that prosecutions reliant on the "true threats" exception to the First Amendment must show that the defendant acted recklessly under the U.S. Supreme Court's recent decision in Counterman v. Colorado, and that this statute may allow for some prosecutions tied to negligence instead. But the paradigmatic and real-world applications of this statute overwhelmingly involve conduct, rather than speech, and thus do not implicate the First Amendment at all. The plain statutory text focuses on conduct, and prior witness-tampering prosecutions have often turned on actions like assaulting or shooting or bribing a witness, harming her property, or conspicuously lingering around her home. And even when a prosecution does involve speech, the cases are mostly open-and-shut and do not implicate Counterman. Since there is no constitutional right to engage in "speech integral to criminal conduct"—such as telling a robbery victim to hand over her wallet—actions like soliciting perjury, inducing contempt of court, or extorting a witness are also easily proscribable, as are examples involving fraud, without resort to the true-threats doctrine. In short, not only does defendant fail to establish any

range of impermissible prosecutions under this tampering law whatsoever, but he overlooks a vast number of permissible applications that do not implicate Counterman in the first place. This is the very sort of case for which the strong medicine of facial invalidation is unwarranted.

Defendant's remaining arguments do not counsel a different result. Both defendant's First Amendment theory and his renewed vagueness challenge zero in on N.J.S.A. 2C:28-5(a)'s use of a "reasonable person" standard, but finding such a traditional legal term unconstitutional would render huge swaths of state and federal law constitutionally suspect. Defendant also seizes on the fact that this Court previously invalidated a provision in New Jersey's bias-intimidation statute, but the tampering statute has none of the unique features that doomed that one. Finally, defendant's pivot to the facts of his case presents only an as-applied question, and overlooks that his prosecution was based on his conduct—sending a letter to the victim, a stranger, at her home—and not his speech. Had defendant published the same exact words (minus the victim's name and home address) as an open letter, the speech would have been the same, but there would have been no tampering. The First Amendment is not offended at all.

New Jersey's witness-tampering law plays a crucial role in ensuring that legal process is fair and justice can be done. The statute is not unconstitutionally overbroad, and this Court should reject the request to invalidate it.

STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

At around 6:00 a.m. on October 31, 2018, Alessa Zanatta left her home in Harrison to drive to work. (7T147-13 to 149-4). After realizing she had forgotten a sweater, Ms. Zanatta drove home. (7T149-3 to 9; 7T152-15 to 21). She parked in front of her house but left her car running while she ran inside to grab the sweater. (7T152-20 to 153-3; 7T164-6). Moments later, she returned to her car to see defendant, whom she did not know, in the driver's seat of her car. (7T79-22 to 24; 7T81-8; 7T113-2 to 115-21; 7T153-3 to 15; 7T156-20 to 157-6; 7T158-8 to 12; 7T192-23 to 194-6). She ran up to the car, opened the door, "looked [defendant] right in the eye, and said get the hell out of my car." (7T158-18 to 24; accord 7T157-5 to 6; 7T159-16 to 23).

Defendant refused, and instead put the car in reverse. (7T160-1 to 5; 7T165-1 to 7). As the car moved backward, the driver's-side door began closing on Ms. Zanatta, so she jumped inside and on top of the defendant. (7T161-6 to 14). Her hand was on the steering wheel but her feet were hanging outside the door. (7T161-14 to 16, 7T168-5 to 6). Defendant continued driving while Ms. Zanatta tried to remove him from her car by screaming and hitting him, saying, "get out of my car, I won't tell anyone. Just get out of my car." (7T168-7 to 9;

[1] The statements of procedural history and facts are closely related and are therefore presented together for the convenience of the Court.

accord 7T161-16 to 18). Defendant then put the car in drive. (7T162-12 to 13; 7T166-16 to 20; 7T168-13 to 15). He sped down the street, trying to force Ms. Zanatta out of the car by shoving her and swerving into several parked vehicles. (7T162-2 to 9; 7T166-21 to 25; 7T170-19 to 171-7). She unsuccessfully tried to remove the keys from the ignition. (7T171-8 to 12).

Defendant drove with Ms. Zanatta on top of him for four-and-a-half blocks before Ms. Zanatta was able to shift the car into neutral. (7T167-1 to 7; 7T185-10 to 17). Defendant then hit the brakes, pushed Ms. Zanatta aside, jumped out, and ran. (7T185-17 to 186-18). In total, defendant was inside the car with Ms. Zanatta for one to two minutes. (7T188-7 to 13). Ms. Zanatta drove to the police station and reported the crime to the police, providing a description of the carjacker to a detective. (7T189-1 to 24; 7T210-6 to 211-12).

One week later, Ms. Zanatta viewed a photo array at the police station and identified defendant as the carjacker. (7T78-14 to 79-3; 7T81-4 to 8;7T111-2 to 113-4; 7T121-18 to 122-2; 7T219-6 to 19). Defendant was arrested on November 27, 2018 and was initially charged by indictment with first-degree carjacking, N.J.S.A. 2C:15-2(a)(1). (Da7).

Several months later, in April 2019, defendant mailed Ms. Zanatta a letter at her home. (7T195-11 to 197-5). The letter was addressed to Ms. Zanatta by name, and defendant's name was listed in the return address. (7T197-3 to 7).

Although she did not know defendant's name at the time, as she read the letter, Ms. Zanatta realized it was from defendant. (7T197-9 to 18, 7T199-5 to 7). The jury heard a redacted version of the letter at trial:

> Dear Mrs. Zanatta[,]
>
> Now that my missive had [sic] completed its journey throughout the atmosphere and reached its paper destination, I hope and pray it finds its recipient in the very best of health, mentally as well as physically and in high spirits. I know you're feeling inept to be a recipient of a correspondence from an unfamiliar author, but please don't be startled, because I'm coming to you in peace. I don't want or need any more trouble.
>
> Before I proceed, let me cease your curiosity of who I be. I am the guy who has been arrested and charged with carjacking upon you. You may be saying I have the audacity to write to you and you may report it, but I have to get this off my chest. I am not the culprit of the crime. Ms. Zanatta, I have read the reports and watched your videotaped statement, and I am not disputing the ordeal you have endured. I admire your bravery and commend your success for conquering a thief whose intention was to steal your vehicle. You go, girl. (☺).
>
> Anyway, I'm not saying your eyes have deceived you. I believe you've seen the actor, but God has created humankind so close to resemblance, that your eyes will not be able to distinguish the difference without close examination of people at the same time, especially not while in the wake of such commotion you've endured.
>
> Ms. Zanatta, due to a woman giving me the opportunity to live life instead of aborting me, I have the utmost regards for women. Therefore, if it was me

> you accosted, as soon as my eyes perceived my being in a vehicle belonging to a beautiful woman, I would have exited your vehicle with an apology for my evil attempts. However, I am sorry to hear about the ordeal you have endured — you've had to endure, but unfortunately, an innocent man (me) is being held accountable for it.
>
> Ms. Zanatta, I do know what led you — I do not know what led you to selecting my photo from the array, but I place my faith in God. By his will the truth will be revealed and my innocence will be proven, but however, I do know he works in mysterious ways, so I'll leave it in his hands.
>
> Ms. Zanatta, I'm not writing to make you feel sympathy for me. I'm writing as a respectful request to you. If it's me that you're claiming is the actor of this crime without a doubt, then disregard this correspondence. Otherwise, please don't — the truth, if your wrong, or not sure 100 percent.
>
> Ms. Zanatta, I'm not expecting a response from you, but if you decide to respond and want to reply, please inform you of it. Otherwise, you will not hear from me hereafter until the days of trial. But it's time I bring this missive to a close, so take care, remain focused, be strong, and stay out of the way of trouble.
>
> Sincerely,
> Raheem
>
> [7T245-14 to 247-19.]

Ms. Zanatta testified that as she read this, she "kind of relived the whole moment all over again" and "it was terrifying." (7T199-12 to 201-23). She explained that receiving the letter at home made her afraid to testify against

defendant, because she realized he knew where she lived and could return to her house. (7T196-14 to 16, 7T201-17 to 23).

The grand jury returned a superseding indictment adding a charge of third-degree witness tampering, N.J.S.A. 2C:28-5(a). (Da1-2). Trial took place in the fall of 2019, and a jury convicted defendant of first-degree carjacking and third-degree witness tampering. (10T9-23 to 10-6; 10T10-20 to 13-6; Da3 to 4).

The Appellate Division affirmed. State v. Hill, 474 N.J. Super. 366 (App. Div. 2023); Dpa1. The court rejected defendant's facial overbreadth challenge to the witness-tampering law, N.J.S.A. 2C:28-5(a), which it found furthers the State's important interest in "preventing intimidation of, and interference with, potential witnesses or informers in criminal matters" and properly balances "the importance of this exercise of speech against the gravity and probability of harm therefrom." Dpa15 (quoting State v. Crescenzi, 224 N.J. Super. 142, 148 (App. Div. 1988)). The court observed that defendant's challenge did not implicate "speech directed broadly or to an unspecified class of persons," but rather was addressed specifically to "speech directed to victims, witnesses, or informants who are linked to an official proceeding or investigation." (Dpa16). The court added that the "true threats" doctrine is "not at issue" in this case, because "[a] defendant awaiting trial has no First Amendment right to communicate directly with the victim of the alleged violent crime." (Dpa17). "Were it otherwise,"

the court noted, a judge setting conditions of pretrial release "might be foreclosed from imposing a 'no contact' order." Ibid.

The court likewise rejected defendant's void-for-vagueness challenge, holding that the law's "purely objective reasonable-person standard" provides fair notice of what is required to conform to the law and distinguishes it from the "subjective test" imposed by the bias-crime statute invalidated in State v. Pomianek, 221 N.J. 66 (2015). (Dpa22-26). As the court explained, the "witness tampering statute, unlike the invalidated bias intimidation provision, does not require a defendant to know the 'personal experiences' or 'emotional triggers' of the victim and thus does not depend on 'facts beyond the knowledge of the defendant or not readily ascertainable by him [or her].'" (Dpa26) (quoting Pomianek, 221 N.J. at 89). Moreover, the panel reasoned, "the invalidated provision in the bias intimidation statute was unprecedented," whereas the "reasonable person" standard "appears throughout the New Jersey Code of Criminal Justice." (Dpa26); see (Dpa27-28) (collecting examples).

On May 9, 2023, this Court granted certification "limited to whether the witness tampering statute, N.J.S.A. 2C:28-5(a), is unconstitutionally overbroad." State v. Hill, 253 N.J. 595 (2023).

LEGAL ARGUMENT

POINT I

THE WITNESS-TAMPERING STATUTE IS FACIALLY VALID.

The answer to the question on which this Court granted certification—whether N.J.S.A. 2C:28-5(a) is facially unconstitutional under the overbreadth doctrine—is clear: it is not. Defendant largely avoids that question, instead focusing on the specific facts of his case and reprising the theory that the law's "reasonable person" standard renders it unconstitutionally vague. But those arguments fall short, and defendant has failed to meet his high burden to justify facial invalidation of this important statute.

A. Defendant cannot meet his heavy burden to establish overbreadth.

In arguing that the witness-tampering law is unconstitutionally overbroad, defendant faces a demanding test. The overbreadth doctrine—a unique First Amendment doctrine that allows a party to seek facial invalidation of a law even if his own actions could be lawfully punished—dispenses its "strong medicine" only if "the ratio of unlawful-to-lawful applications" is particularly "lopsided." United States v. Hansen, 143 S. Ct. 1932, 1948 (2023); see also id. at 1939. Indeed, the facial invalidation of a statute on overbreadth grounds is appropriate solely where the statute's unconstitutional applications are "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."

United States v. Williams, 553 U.S. 285, 292-93 (2008); see also, e.g., State v. Burkert, 231 N.J. 257, 276 (2017). The purported unconstitutional applications "must be realistic, not fanciful." Hansen, 143 S. Ct. at 1939; see id. at 1946-47 (rejecting overbreadth challenge premised on "a string of hypotheticals"). A defendant, like this one, who fails to demonstrate such a "lopsided" ratio might therefore still be able to claim as-applied relief, but he necessarily cannot prevail on an overbreadth challenge. Id. at 1948. Those rules make it unusual for any court to invalidate an entire statute as overbroad.

Facial invalidation is especially inappropriate where, as here, the statute's language focuses on conduct rather than speech. As the U.S. Supreme Court has explained, an overbreadth challenge will "[r]arely, if ever … succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." Virginia v. Hicks, 539 U.S. 113, 124 (2003); see also United States v. Gonzalez, 905 F.3d 165, 190 n.10 (3d Cir. 2018) (rejecting overbreadth challenge to federal stalking statute on this basis). Because the witness-tampering statute targets "conduct," N.J.S.A. 2C:28-5(a)—and certainly is not "specifically addressed to speech or to conduct necessarily associated with speech," Hicks, 539 U.S. at 124—defendant's burden is overwhelming.

Defendant does not even try to satisfy that burden. To begin, he concedes that the statute does not specifically target speech or expressive conduct, given that it covers scenarios "such as when a defendant assaults a witness," which do not implicate the First Amendment at all. (Dsb34); see, e.g., Texas v. Johnson, 491 U.S. 397, 404 (1989) (explaining that non-expressive conduct falls outside First Amendment's scope). The law includes myriad other well-worn examples, such as destroying a witness's property, see Vincent v. State, 996 A.2d 777, 778 (Del. 2010), conspicuously driving past a witness's house at all hours, see Commonwealth v. Brown, 86 N.E.3d 248, No. 16-P-785, 2017 Mass. App. Unpub. LEXIS 515 at *1 (Mass. App. Ct. May 17, 2017), or "persistently calling [the witness] and hanging up," Counterman v. Colorado, 143 S. Ct. 2106, 2121 (2023) (Sotomayor, J., concurring in part and concurring in judgment).

Indeed, mine-run witness tampering prosecutions do not involve protected expression at all—such as those for murdering, assaulting, or bribing a witness; paying money to ensure a witness is unavailable to testify at trial; or otherwise obstructing a witness's testimony. See, e.g., State v. Adams, No. A-1021-14 (App. Div. Feb. 19, 2019) (slip op. at 1-2) (defendant murdered witness to prevent her from testifying about prior shooting);[2] State v. Johnson, No. A-

[2] The Attorney General cites these unpublished decisions as illustrative examples of real-world conduct, not for their legal analysis. A copy of each decision is appended hereto pursuant to Rule 1:36-3.

6238-09 (App. Div. Mar. 27, 2013) (slip op. at 1, 4-5) (defendant fatally shot eyewitness to a carjacking); State v. Seabrookes, No. A-0506-02 (App. Div. Apr. 24, 2006) (slip op. at 5-6) (defendant paid the bail of witness to a murder and to transport him out-of-state to hide him from authorities, and later arranged to have the witness killed); State v. Conway, 193 N.J. Super. 133, 143-45 (App. Div. 1984) (lawyer charged with participating in scheme to alter arrest report that implicated his client); State v. Deneus, No. A-3698-11 (App. Div. Mar. 24, 2014) (slip op. at 2) (after his arrest for abducting and attempting to have sex with a minor, defendant offered fellow inmate $5,000 to kill the victim and other witnesses); State v. Cornish, No. A-3649-05, (App. Div. Dec. 21, 2006) (slip op. at 1) (defendant offered to pay assault victim to drop the charges).[3] Any of these all-too-common fact patterns can constitute "conduct which a reasonable person would believe would cause a witness or informant to" perjure themselves, withhold information, elude or ignore a summons, or otherwise obstruct the administration of justice, without even implicating speech. N.J.S.A. 2C:28-5(a).

Even conceivable applications that would involve speech are mostly, if not all, easily consistent with free-speech doctrine. For example, "neither the

[3] Witness-tampering prosecutions in other States confirm this reality. See, e.g., Arnold v. State, 68 S.W.3d 93, 95-96 (Tex. App. 2001) (defendant paid witness's travel and living costs to help her evade subpoena to testify at a trial); State v. Sanders, 833 P.2d 452, 454, 457 (Wash. Ct. App. 1992) (defendant paid and arranged for key complaining witness to be out-of-state during trial).

First Amendment nor Article I, Paragraph 6 of our State Constitution prohibits the State from criminalizing … speech that is integral to criminal conduct." Burkert, 231 N.J. at 281; see also Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). Most of the obvious offenses contemplated by the witness-tampering statute—such as soliciting perjury, N.J.S.A. 2C:28-5(a)(1), or inducing someone to ignore a summons to testify or obstruct an investigation, N.J.S.A. 2C:28-5(a)(4), (5), or extorting a witness to withhold information, N.J.S.A. 2C:28-5(a)(2)—involve speech inextricably bound up with unlawful activity. See, e.g., Friend v. Gasparino, 61 F.4th 77, 89 (2d Cir. 2023) (explaining that "speech that helps another person engaged in criminal activity evade detection by law enforcement may be" punished, because such speech facilitates obstruction crimes (citing United States v. Cassiliano, 137 F.3d 742 (2d Cir. 1998); United States v. Arzola, 528 F. App'x 487 (6th Cir. 2013)); accord (Dsb27 n.9) (defendant acknowledging that in such situations, "the speech-integral-to-criminal-conduct exception might apply").

Real-world examples again bear this out. For one, there are a plethora of witness tampering prosecutions relating to speech that was integral to inducing

a witness to commit perjury. See, e.g., United States v. Milk, 66 F.4th 1121, 1129 (8th Cir. 2023) (defendant instructed a co-conspirator to "Follow my lead and stick to the code of silence," "Get that story recanted," and attest that prior statements to law enforcement were "lies" to protect their interests); United States v. Norris, 753 F. Supp. 2d 492, 508 (E.D. Pa. 2010) (defendant agreed to manufacture "false" accounts they "were to parrot when questioned"); State v. Krieger, 285 N.J. Super. 146, 149-50 (App. Div. 1995) (defendant accused of corruption sought to coach witness to falsely claim to "know nothing about" transactions underlying the charges). Other heartland examples likewise involve speech integral to criminal conduct. See State v. Young, No. A-1849-17 (App. Div. Dec. 3, 2018) (slip op. at 4-5) (defendant allegedly drove by witness's house "making hand gestures and calling [witness] a rat" and arranged for a cousin to assault the witness); State v. Pender, No. A-3344-10 (App. Div. Mar. 3, 2014) (slip op. at 9) (while fleeing from police, defendant encountered a young girl sitting in her backyard, "pushed the muzzle of a gun into her neck and told her to be quiet"). Still others would involve the exception for fraud, see United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality op.), such as telling a witness to show up on the wrong day or at the wrong time—to make sure she cannot testify as planned. None of these prosecutions would even implicate Defendant's claims regarding threats cases.

Even tampering prosecutions that turn on the content of speech but are not within a "historically unprotected category of communications," Counterman, 143 S. Ct. at 2114, would not automatically violate the Constitution. Instead, to the extent a particular prosecution restricts "speech based on its communicative content," it would simply need to satisfy strict scrutiny—that is, it would need to be "narrowly tailored to serve compelling state interests." E.g., Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). And even in the residuum of cases where that standard kicks in, safeguarding the legal system's truth-seeking function by prohibiting certain communications to specific witnesses is the rare case that "easily meets the test of weighing the importance of this exercise of speech against the gravity and probability of harm therefrom." State v. Crescenzi, 224 N.J. Super. 142, 148 (App. Div. 1988) (upholding the prior version of witness-tampering statute); see also ibid. ("When the public interest in discovering the truth in official proceedings is balanced against a party's right to speak to a particular witness with the intent of tampering, that party's right is 'minuscule.'" (quoting State of New Hampshire v. Kilgus, 125 N.H. 739, 745 (1984)).

Indeed, provisions that protect the judicial or democratic processes are the paradigmatic examples of speech restrictions that turn on content yet still satisfy strict scrutiny. See, e.g., Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444, 457 (2015) (restrictions on speech by judicial candidates); Burson v. Freeman, 504

U.S. 191, 211 (1992) (restrictions on political solicitation within 100 feet of polling places). That helps explain why even content-based no-contact orders, among other judicial protective orders, are constitutionally permissible—a point to which defendant has no answer. See (Dsb23-24) (suggesting that such orders are permissible only to the extent that they are "content-neutral"); see also In re Sealed Case, __ F.4th __ (D.C. Cir. July 18, 2023) (slip op. at 9); Matter of Subpoena 2018R00776, 947 F.3d 148, 156-58 (3d Cir. 2020).

Meanwhile, the other side of the ledger—that is, the record of applications that violate free-speech rights—is "pretty much blank." Hansen, 143 S. Ct. at 1946. Defendant has made no record here of any real-world applications against protected speech, much less that violate the Constitution. His sole hypothetical example—of a defendant who "might appear on national television and explain that he is innocent of an offense or why the prosecution is unjust," or who does the same in a song or social media post, (Dsb34)—does not fit the elements of the witness-tampering law, since there is no tampering in that hypothetical. In any event, this one speculative application cannot come close to establishing the "lopsided" ratio of unconstitutional-to-constitutional applications necessary to achieve the extreme result (wholesale invalidation of a statute) that he seeks. See Hansen, 143 S. Ct. at 1948. And given the swath of permissible applications laid out in detail above—as well as the fact that the challenged statute itself "is

not specifically addressed to speech or to conduct necessarily associated with speech," Hicks, 539 U.S. at 124—overbreadth is clearly inapplicable.

Defendant relies heavily on Counterman, but the foregoing demonstrates why that reliance is unavailing for his overbreadth challenge. First, Counterman applies only to "true threats"—that is, "serious expressions conveying that a speaker means to commit an act of unlawful violence," 143 S. Ct. at 2114—but threats are just a subset of the myriad permissible applications of the witness-tampering statute, as shown above. Second, many threats would also qualify as speech integral to criminal conduct, such as behavior that qualifies as both threatening and stalking, or threats that induce perjury.[4] The facial validity of the witness-tampering statute does not rise or fall based on the requirements for threats prosecutions.

Nor does the witness-tampering statute's use of a "reasonable person" standard raise any overbreadth problems. As the panel below observed, that formulation is common in criminal law, (Dpa28)—not to mention civil law, to

[4] Though defendant concedes this possibility in part, he incorrectly suggests that the speech-integral-to-criminal-conduct exception "requires an intentional mens rea." (Dsb27 n.9.) But the authorities defendant cites merely note that defendants in those cases in fact acted with purpose, not that purpose is required to apply the speech-integral-to-criminal-conduct exception, and indeed all nine Justices in Counterman implicitly rejected defendant's proposed floor. After all, even the furthest-reaching opinion found that "for stalking that involved threatening statements, a mens rea of recklessness is amply sufficient." 143 S. Ct. at 2120 (Sotomayor, J., concurring in part and concurring in judgment).

which the First Amendment equally applies, e.g., Counterman, 143 S. Ct. at 2115. Indeed, as the panel noted, this Court just over a decade ago "interpreted a substantially similar 'reasonable person' feature in the stalking statute," (Dpa18) (citing State v. Gandhi, 201 N.J. 161 (2010)), reading that law (N.J.S.A. 2C:12-10) "to proscribe a defendant from engaging in a course of repeated stalking conduct that would cause such fear in an objectively reasonable person," 201 N.J. at 170. While Gandhi was a statutory-interpretation case rather than a constitutional challenge, this Court has emphasized the obligation "to construe a challenged statute to avoid constitutional defects if the statute is reasonably susceptible of such construction." State v. Lenihan, 219 N.J. 251, 266 (2014). Yet defendant's theory presupposes that this Court's detailed analysis in Gandhi steered the statute into constitutional invalidation. As the panel below noted for a related point, that is "unlikely, if not inconceivable[.]" (Dpa20).

In short, there is no basis to hold N.J.S.A. 2C:28-5(a) unconstitutionally overbroad. Defendant has not established that it is overbroad at all, and at the very least it is not substantially overbroad relative to its legitimate sweep. And his core free-speech challenge to the facts of his specific conviction is plainly "not the stuff of overbreadth," but rather a classic as-applied challenge. See Hansen, 143 S. Ct. at 1948. To strike New Jersey's witness-tampering statute

from the books—and destabilize past witness-tampering convictions—would flip the overbreadth doctrine on its head, "throw[ing] out too much of the good based on a speculative shot at the bad." Ibid. As to the question on which this Court granted certification, defendant's challenge must fail.

B. The witness-tampering statute is not unconstitutionally vague.

Because this Court granted certification limited to the question of First Amendment overbreadth, it need not reach defendant's argument that the statute is void-for-vagueness. See (Dsb35-37). But if this Court does reach defendant's argument on this score, it should likewise reject it.

In urging this Court to invalidate the entire witness-tampering statute as unconstitutionally vague, defendant faces another monumental burden. He must show that it either "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. 703, 732 (2000); accord Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). And he must show that it is impermissibly vague not just in some applications, but "in all its applications." State v. Cameron, 100 N.J. 586, 594 (1985).

The witness-tampering statute easily passes these tests. No person of ordinary intelligence is confused that it is illegal to, e.g., assault or intimidate a

witness into perjuring themselves or ignoring a subpoena. And while defendant focuses on the statute's use of a reasonable-person standard, that argument runs into a wall of precedent. After all, the reasonable-person standard is a mainstay of both civil and criminal law, see, e.g., (Dpa28) (collecting statutes), and to call it unconstitutionally vague in this context would render vast swaths of the state and federal codes unconstitutional. After all, the reasonable-person standard in fact guards against vagueness, because it provides an objective yardstick to help individuals understand a statute's scope and ensure that idiosyncratic reactions do not drive liability. See, e.g., Rappaport v. Nichols, 31 N.J. 188, 201 (1959). That helps explain why other "statutes that employ the term 'unreasonable' have survived constitutional challenges based upon vagueness time and time again." Empire State Rest. & Tavern Ass'n, Inc. v. New York State, 360 F. Supp. 2d 454, 463 (N.D.N.Y. 2005) (collecting cases); see also, e.g., United States v. Ragen, 314 U.S. 513, 523 (1942) ("The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."). New Jersey's witness-tampering statute is as valid as the panoply of other laws employing similar standards.

Nothing about State v. Pomianek, 221 N.J. 66 (2015), is in tension with this result. Pomianek considered a challenge to of N.J.S.A. 2C:16-1(a)(3), a

unique provision that rendered a person guilty of bias intimidation "if the victim 'reasonably believed' that the defendant committed the offense on account of the victim's race" or other protected characteristic. 221 N.J. at 69. The problem, this Court explained, was that liability turned on "the victim's perception of the accused's motivation for committing the offense." Id. at 82. And, as this Court reasoned, any particular individual victim's "reasonable belief" about whether she was subjected to bias would likely depend on her "personal experiences, cultural or religious upbringing and heritage," of which the defendant "may be wholly unaware." Id. at 89. Thus, guilt might often "depend on facts beyond the knowledge of the defendant or not readily ascertainable by him"—factors specific to that victim. Ibid.

By contrast, liability under the witness-tampering statute does not depend on any specific person's perception or personal experiences. Instead, just as the panel below explained, "the witness tampering statute uses a purely objective test that relies on the 'objective perspective of the fact-finder.'" (Dpa24) (quoting Gandhi, 201 N.J. at 180). Thus, this statute—unlike the statute in Pomianek—"does not require a defendant to know the 'personal experiences' or 'emotional triggers' of the victim and thus does not depend on 'facts beyond the knowledge of the defendant or not readily ascertainable by him [or her].'" (Dpa26) (quoting Pomianek, 221 N.J. at 89). The witness-tampering statute thus

lacks the feature that doomed the bias-intimidation statute in Pomianek. If the Court considers the vagueness question, it should affirm in light of this distinction.

C. Defendant's fact-specific arguments do not change the analysis.

Defendant's argument, as discussed above, is properly understood as an as-applied challenge to his specific conviction rather than a facial challenge to the overall statute on overbreadth concerns. But even assessed in that way, the facts of his specific case do not reveal any constitutional infirmity either.

To begin, defendant's premise—that his tampering conviction rises and falls based on the constitutional rule for true threats, (Dsb14-23)—is mistaken. As noted, true threats are "serious expressions conveying that a speaker means to commit an act of unlawful violence." Counterman, 143 S. Ct. at 2114. Yet defendant was not charged with charged with threatening the victim; he was prosecuted for personally sending her, a stranger, a letter addressed to her by name at her home address. That is, the problem was not the specific wording in his letter. Rather, the problem was that he engaged in a course of conduct that specifically showed the victim (1) he knew her name, (2) knew where she lived, (3) was willing to engage with her directly, (4) all without using his attorney, the State, the courts, or even the media as an intermediary—similar to calling

someone's home phone or conspicuously walking past their house repeatedly. Cf. Baker v. State, 22 P.3d 493, 497 (Alaska Ct. App. 2001).

That is certainly a course of conduct that society has a strong interest in prohibiting. After all, as explained above, there is an "important governmental interest of preventing intimidation of, and interference with, potential witnesses or informers in criminal matters," Crescenzi, 224 N.J. Super. at 148, and the fact that the home is supposed to be "a place of refuge for a victim," State v. Ramirez, 252 N.J. 277, 311 (2022), means such direct contact to a victim that establishes knowledge of her address is especially concerning. See also State v. Byrd, 198 N.J. 319, 340-41 (2009) (acknowledging witness intimidation as a "nationwide pandemic" and discussing its pernicious effects in New Jersey). Consequently, while the letter certainly did have threatening elements, e.g., Da29-30 (being sent to victim's home address, using victim's given name, and ending "stay out of the way of trouble"), and moreover had the effect of occasioning fear, (7T196-14 to -16, 201-17 to -23), what made it proscribable was the underlying conduct rather than direct speech. Cf. Counterman, 143 S. Ct. at 2121 (Sotomayor, J., concurring in part and concurring in the judgment) (in an opinion that went even further than the majority, still acknowledging that cases of "repeated, unwanted, direct contact … raise[] fewer First Amendment concerns").

Taking the conduct out of the equation helps crystallize this point. After all, had defendant used the same words (minus the victim's name and address) to plead his innocence in open court, through his attorney, or via an open letter in a newspaper, there would have been no conceivable tampering prosecution. His speech, in other words, was not what generated criminal liability. And while speech (threatening or not) was intertwined with the criminalized conduct, that does not immunize such conduct from being legally proscribed, much the same way that incorporating speech into stalking, bribery, or extortion does not. E.g., Hansen, 143 S. Ct. at 1947 ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (quoting Giboney, 336 U.S. at 502)); see also United States v. Gonzalez, 905 F.3d 165, 183 (3d Cir. 2018) (rejecting as-applied challenge to federal stalking statute); Burkert, 231 N.J. at 282 (noting that "a robber's command that a victim turn over money is unprotected speech because the expressive activity is integral to the commission of a crime"). In other words, nothing about the validity of defendant's own conviction turns on Counterman or State v. Fair, 469 N.J. Super. 538 (App. Div. 2021), and that conviction did not violate the First Amendment or Article I, paragraph six of the New Jersey Constitution.

POINT II

DEFENDANT FURTHER ERRS IN THE REMEDIES IT DEMANDS.

Even if this Court were to disagree with any of the above, the proper remedy is simple: requiring future tampering prosecutions that turn on speech (rather than conduct) to charge a mens rea of at least recklessness. This Court should, however, reject defendant's invitations to invalidate the statute in full or to rewrite the statute to impose a knowledge mens rea for all elements.

As this Court has consistently observed, the proper response to a potential constitutional infirmity in a state statute is to construe or narrow the statute to preserve as much as the text and the legislative intent will permit. E.g., In re Request to Release Certain Pretrial Detainees, 245 N.J. 218, 234 (2021); Burkert, 231 N.J. at 283; State v. Natale, 184 N.J. 458, 485 (2005). This Court has accordingly "implied additional provisions 'to rescue statutes from being invalidated' on constitutional grounds," State v. Comer, 249 N.J. 359, 402 (2022) (quoting Callen v. Sherman's, Inc., 92 N.J. 114, 134 (1983)), and crafted as-applied remedies where there was "no doubt the Legislature would want the law to survive," id. at 381; see also Whirlpool Props., Inc. v. Director, Div. of Taxation, 208 N.J. 141, 151 (2011) (courts are "duty-bound to give to a statute a construction that will support its constitutionality.").

Those principles confirm that even if this Court perceives a constitutional issue in N.J.S.A. 2C:28-5(a)'s reasonable-person standard, notwithstanding the analysis above, the proper course is not to strike the statute. After all, the results of facial constitutional invalidation would be dramatic—in addition to making witness-tampering at least temporarily legal in New Jersey, doing so would also call into question numerous prior convictions, including many convictions for undisputedly proscribable conduct (such as assaulting or extorting a witness). And the Legislature itself has made clear it wants the prohibition on tampering to be "applied as broadly as possible." Sen. Judiciary Comm. Statement to A. 1598 4 (L. 2008, c. 81). In short, there can be "no doubt the Legislature would want the law to survive." See Comer, 249 N.J. at 381.

Nor would broader invalidation be necessary to cure defendant's alleged harm. To the extent that the Counterman holding applies to the materially distinct witness-tampering context, its application can be easily accomplished. After all, as already explained above, most cases would be untouched; any constitutional issue would apply only to applications involving threatening speech. See supra at 12-17. This Court would therefore simply need to hold that, to be constitutional, witness-tampering convictions that hinge on threatening speech must expressly charge recklessness. N.J.S.A. 2C:2-2(b)(3); accord Counterman, 143 S. Ct. at 2117 (explaining recklessness generally refers

to the conscious disregard of a "substantial and unjustifiable risk," and in this context means proof a defendant was "aware 'that others could regard his statements as' threatening violence" yet "deliver[ed] them anyway" (citation omitted)). That approach would allow the statute to survive while making clear to the State that, in that small subset of true-threats cases, recklessness is the constitutional floor.

Defendant's rule—rewriting N.J.S.A. 2C:28-5(a) to require knowledge as to all elements of the offense, and in all cases—is unsustainable. As an initial matter, it bears no connection to the constitutional infirmity he posits: while he argues that some tampering prosecutions fail under Counterman, his solution would to require a higher mens rea of knowledge than the majority in that case. See (Dsb1-2, 28-29).[5] Moreover, defendant would apply that rule to all witness-tampering prosecutions, not just prosecutions involving speech and threats, even though he concedes many tampering cases raise no such issue—because they are

[5] This Court will address whether Article I, Paragraph Six, of the New Jersey Constitution requires a higher mens rea for threats prosecutions in State v. Fair. See 252 N.J. 243 (2022). For the reasons given in his amicus brief in that case, the Attorney General believes that the Counterman majority struck the proper balance. The consequences of defendant's approach here is particularly striking: its approach would make it harder to prosecute tampering conduct that strikes at the integrity of the judicial process, and there is particularly little value in these kinds of direct communications at witnesses and informants. See Crescenzi, 224 N.J. Super. at 148 ("When the public interest in discovering the truth in official proceedings is balanced against a party's right to speak to a particular witness with the intent of tampering, that party's right is 'minuscule.'").

"based on a defendant's non-expressive conduct rather than speech," (Dsb34), or do not implicate true-threats doctrine at all, (Dsb27 n.9). That ignores legislative intent to apply as much of this statute as possible, and undermines Counterman itself, which held that recklessness strikes the proper balance between providing "enough breathing space for protected speech[] without sacrificing too many of the benefits of enforcing laws against true threats." 143 S. Ct. at 2119.

Defendant's suggestion is also inconsistent with the statute's text and this Court's precedent interpreting it. The relevant portion of the witness-tampering statute applies to any defendant who "knowingly engages in conduct which a reasonable person would believe would cause a witness" to take one of five enumerated actions (such as perjury). N.J.S.A. 2C:28-5(a). Defendant argues this Court should read the word "knowingly" to apply not only to the defendant's conduct, but also to "the results"—that is, that a defendant should be guilty only if it can be proven that he knows to a practical certainty that a witness will, for example, perjure himself. Yet as this Court explained via detailed grammatical analysis in assessing the equivalent anti-stalking statute in Gandhi, the structure of the text makes clear that "knowingly" modifies only "engages in conduct," not the results that follow. 201 N.J. at 179. After all, "the proximity of" the adverb "'knowingly' to the verb 'engages' emphasizes the relationship" between

the two. Ibid. By contrast, "the clause emphasized by defendant"—i.e., the one with the reasonable-person requirement—"is remote from the key modifying adverb[]." Ibid. Still more, the reasonable-person clause "describes not how a defendant engages in the conduct, but rather the type of conduct for which a defendant may be punished." Id. at 180. And finally, both dependent clauses feature "the interjection of the reasonable-person standard," which further "belies any intent" to impose "a subjective standard of knowing or purposeful intent." Ibid. In short, there is no squaring defendant's proposed construction with the words our Legislature wrote.

Nor do any of defendant's other rationales justify his knowledge-across-the-board construction. Though he primarily relies on Title 2C's gap-filler provision, N.J.S.A. 2C:2-2(c)(1), see (Dsb31-32), that provision is inapposite. The gap-filler provision has nothing to say about what construction is proper to save a statute from asserted constitutional infirmity; it is simply a tool to resolve statutory interpretation disputes that arise where a statute itself fails to expressly "distinguish[] among the material elements" as to the mental state required. N.J.S.A. 2C:2-2(c)(1); see State v. Munafo, 222 N.J. 480, 488-89 (2015). But in any event, that provision is inapplicable on its own terms, as there is no gap to fill: the witness-tampering law does "distinguish[] among the material elements" of the offense, N.J.S.A. 2C:2-2(c)(1), expressly adding a "reasonable

person" standard for the results element. N.J.S.A. 2C:28-5(a). Said another way, the statute makes the legislative intent clear, and the legislative intent was to prohibit tampering broadly—not limited to instances in which a defendant can say with certainty that his witness-tampering conduct will succeed.

In short, even if this Court finds N.J.S.A. 2C:28-5(a) constitutionally infirm in some applications, the appropriate remedy would not be to engraft a categorical knowledge element at odds with the Legislature's intent. Rather, a better course would be simply to make clear that witness-tampering prosecutions that hinge on threatening speech must allege at least recklessness.

CONCLUSION

This Court should confirm that N.J.S.A. 2C:28-5(a) is facially valid.

Respectfully submitted,

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DATED: August 18, 2023

2019 WL 660984
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Mario J. ADAMS, Defendant-Appellant.
State of New Jersey, Plaintiff-Respondent,
v.
Rafael J. Olmo, a/k/a Ricky Olmo, Defendant-Appellant.

DOCKET NOS. A-1021-14T2, A-1343-14T2
|
Submitted October 30, 2017
|
Decided February 19, 2019

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 13-10-2864.

Attorneys and Law Firms

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Appellant Rafael J. Olmo filed a pro se supplemental brief.

Before Judges Sabatino, Ostrer and Whipple.

Opinion

The opinion of the court was delivered by

OSTRER, J.A.D.

***1** Deanna Downs was shot to death to prevent her from testifying against defendant Rafael Olmo regarding a shooting she observed a year earlier. Another witness to the prior shooting, Benjamin Falcon, was threatened not to testify. The State alleged that Olmo orchestrated the murder of Downs and the witness tampering, and defendant Mario Adams was the hired gun. A jury convicted Olmo of the first-degree charges of: murder, N.J.S.A. 2C:11-3(a)(1); procurement of murder, N.J.S.A. 2C:11-3(a)(1) and (2), and N.J.S.A. 2C:11-3(b)(4)(e); murder for the purposes of escaping detection, apprehension, trial, punishment or commitment for another crime, N.J.S.A. 2C:11-3(a)(1) and (2), and N.J.S.A. 2C:11-3(b)(4)(f); and conspiracy to commit murder, N.J.S.A. 2C:5-2. He was also convicted of second-degree witness tampering, N.J.S.A. 2C:28-5(a) (one count for Downs and one for Falcon); and second-degree conspiracy to commit witness tampering, N.J.S.A. 2C:5-2.

Although the jury was apparently unpersuaded that Adams was the shooter of Downs, it was convinced he was involved in the murder and witness tampering. The jury convicted him of first-degree conspiracy to commit Downs's murder; two counts of second-degree witness tampering of Downs and Falcon; and second-degree conspiracy to commit witness tampering. The jury acquitted Adams of the other first-degree murder charges – murder as consideration for the receipt of money, N.J.S.A. 2C:11-3(a)(1) and (2), and N.J.S.A. 2C:11-3(b)(4)(d); and murder for the purpose of escaping detection, apprehension, trial, punishment or commitment for another crime committed by Rafael Olmo, N.J.S.A. 2C:11-3(a)(1) and (2), and N.J.S.A. 2C:11-3(b)(4)(f). The jury also acquitted Adams of second-degree possession of a firearm, N.J.S.A. 2C:39-4(a); and second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b).

After merger, the court sentenced Olmo to an aggregate term of life imprisonment without parole on the murder, and a consecutive ten-year term with a five-year period of parole ineligibility, on tampering with a witness, Falcon. The court sentenced Adams to an aggregate term of twenty-two years, consisting of a term of fifteen years for conspiring to murder Downs, concurrent with seven years for witness tampering of Downs, but consecutive to seven years for witness tampering of Falcon. The conspiracy to murder sentence was subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendants raise multiple issues in these back-to-back appeals challenging their convictions, none of which we find meritorious. We focus on three issues: the denial of Adams's motion to sever his trial from Olmo's; the decision to permit a police witness to testify as both an expert and investigating officer; and the decision to replace a juror after

jury deliberations had begun. Both defendants raise the latter two points. We also reject defendants' respective challenges to their sentences, although we remand for correction of Adams's judgment of conviction. [1]

[1] The sentence was delivered orally. However, the judgment of conviction states that the sentences for the three counts after merger should run consecutively. The State concedes that the judge's oral sentence controls, see State v. Abril, 444 N.J. Super. 553, 564 (App. Div. 2016), and the judgment of conviction should be corrected to match the sentence that was given orally.

I.

***2** Following a shooting near her Egg Harbor City apartment complex in October 2009, Downs provided a statement to police that she saw Olmo running from the scene with a handgun. Falcon also provided a statement incriminating Olmo. Olmo was indicted and, by September 2010, received discovery disclosing Downs's and Falcon's cooperation.

Multiple witnesses testified that Olmo wanted Downs and Falcon silenced. Rashid Hamilton testified that, during the course of three conversations, Olmo said he wanted a male and a female witness killed; he offered $ 20,000 for the female's murder; and had a person, Dontay Matthews, keep an eye on the female. Olmo was going to supply the gun for the murder. Hamilton testified that Marcus Vega was present for two of the conversations. Marcus Vega generally confirmed Hamilton's testimony. Hamilton and Vega both said they rebuffed Olmo's offer.

Matthews gave multiple, inconsistent statements to police. Although he initially denied any involvement in the murder, he ultimately entered into a plea agreement, admitting to his role. He testified that on September 30, 2010, he met Olmo who told him he wanted Downs dead to silence her, and that Adams would perform the killing. Matthews said that Olmo offered him money to watch Downs, who lived in the same apartment complex as Matthews and bought drugs from him on a daily basis. Olmo gave Matthews a cell phone to communicate with him and Adams. Matthews was supposed to call when he knew Downs was alone.

On October 16, 2010, at around 11:30 p.m., Matthews saw Downs step outside her apartment for a smoke. He called Adams and Olmo to alert them. Minutes later, Downs was shot in the head at close range. Matthews asserted he was in his apartment at the time, which his girlfriend, Tamika Daniels, corroborated. She testified that after the shooting, Matthews left the apartment, saying he was going to get a beer.

The next day, Adams made large cash purchases at an electronics store, including a sixty-five-inch television. Also, following the murder, Adams reportedly made self-incriminating statements. Matthews testified that Adams explained the murder, saying money was "the root of all evil," and Downs was a "snitch" who "had to go." He also testified that Adams said, a few days after the shooting, "I'm out here for murder one and ... [they] don't have a clue who did that shit."

Vega cooperated with police in return for leniency in other cases against him. Vega told police that he was confident he could get Olmo to talk about the Downs murder. Police set up a controlled purchase of drugs by Vega, and equipped him with a video-recording device. Although the conversation initially pertained to drug dealing, Vega eventually brought up the murder. The conversation was filled with street slang, jargon, and nicknames. Vega interpreted Olmo's statements, as did a police witness, Detective James Scoppa, who testified as an expert, over a defense objection.

In the recording, which we discuss at greater length below, Olmo acknowledged Downs's murder, according to Vega. Scoppa explained that Olmo thought that Hamilton was too hesitant about taking on the job. According to Vega and Scoppa, Olmo admitted he paid someone else $ 25,000 for killing Downs.

As for Falcon, Olmo stated without jargon or slang, "If [he] love his family he better not" testify. He said he would make Falcon "feel regret for every fucking day that [he] gotta wake up and know somebody in you[r] mother fucking shit got touched if you mother fucking wanna run your mouth." Olmo conjured up various scenarios for Falcon to avoid testifying, including leaving the area, but said he would retaliate if he cooperated. Olmo also discussed the intimidating effect of Downs's murder.

***3** Falcon testified that his friend, George Rodriguez, told him that Olmo would pay him $ 20,000 not to testify; but if he persisted, both he and his son would be killed. Rodriguez essentially confirmed that account.

Falcon also testified that Adams and another man later approached him in a parking lot, and asked him if he knew what happened to people who testified in court. Falcon said he told Adams he would not testify, but he did not accept the $ 20,000. Falcon said he thought that if he did, he would be dead the next day.

In support of the State's case against Adams, a cellular telephone expert testified that calls between Matthews and Adams indicated that Adams was home in Hammonton early in the evening on the date of Downs's murder. Later, Adams was in the area of Downs's apartment complex between 10:00 and 10:30 p.m., and then back in the Hammonton area after midnight. A police witness testified, based on cellphone records, that there were multiple communications among Matthews, Adams and Olmo in early October, and between October 15 and 17, 2010. However, the witness admitted he found no evidence of a call from Matthews to either Olmo or Adams shortly before the murder. Although Olmo did call Matthews at 9:52 p.m., and Adams called Matthews twice at around 10:15 p.m.

In a recorded statement to police, Adams denied any involvement in Downs's murder. He admitted that Olmo spoke to him about witnesses in his case, but denied that Olmo ever discussed killing Downs, or paying someone to watch her. Adams stated that the night of the murder, he played video games with a cousin and later picked up Matthews, who told him, "I handled that business," though Adams did not know Matthews was referring to the murder. Adams said that after he learned Downs had been shot, he decided to go home. He also said that Matthews admitted, a few days later, that "he got some money from – whatever ... [$]2,600."

Olmo testified in his own defense, denying that he meant any ill-will toward Downs. He said that he, Rodriguez and Falcon were all involved in selling drugs in 2009. Regarding the 2009 incident, Olmo said that he and Falcon were outside the apartment complex hanging out and selling drugs. Olmo said he was unarmed. Two masked figures shot at him, striking him in the shoulder. Someone behind him returned fire. Olmo said he thought it was Falcon. Olmo also asserted that Falcon drove Olmo from the scene; Falcon's sister tended to his wound; and Falcon's cousin later drove Olmo within a few blocks of a Philadelphia hospital. Questioned by Philadelphia police, he gave a false name, but police identified him and arrested him on an outstanding warrant. He was later charged with various weapons offenses and extradited to New Jersey, where he was released on bail. Olmo said he later learned that Shawn Travis and Sandy Thomas were the two men who shot at him. Both were shot themselves, Thomas fatally.

Olmo was indicted in August 2010. He said he received the discovery, which disclosed Downs's and Falcon's statements, months before the fatal shooting of Downs. Olmo said Falcon "was lying on me" and Downs "must have mistaken me for Falcon." He said he told Falcon that if he testified against him, Olmo would say what really happened, implicating Falcon and his family members. But, he denied paying or offering to pay anyone to threaten Falcon, or to shoot Downs.

***4** Olmo also gave his own interpretation of his recorded conversation with Vega, insisting it mainly pertained to drug dealing. He claimed that he gave up drug dealing after he was shot in the shoulder, but Vega persuaded him to get back into it. Olmo claimed he paid $ 25,000 to buy a kilo of drugs from George Rodriguez, which he robbed from a female drug dealer. The repeated references in conversation with Vega about the "hit" of "old girl" and "bitch," pertained not to Downs's murder, but the robbery of the drug dealer. He claimed he used the word "bird" to refer to a kilo of cocaine. "Work" also meant drugs.

Olmo admitted that he and Vega were discussing Falcon's testimony when he said "if [he] love his family he better not," but Olmo explained that only meant that he would disclose Falcon's true involvement in the 2009 incident.

In response to Olmo's testimony, the State played his statement to police about the 2009 incident, which he gave while he was in jail in Philadelphia. After a Miranda[2] hearing, the court found it was knowingly and voluntarily given. Although Olmo spoke in third person, in answers that were often disjointed, the State suggested he referred to himself when he said a man was shot in the arm, but returned fire in self-defense. If true, that would have contradicted his prior trial testimony that he was unarmed.

2 Miranda v. Arizona, 384 U.S. 436 (1966).

Over a defense objection, the State also played a videotape of Downs's contrary statement to police about the 2009 incident. On the night of the 2009 incident, she saw Olmo with a pistol from a distance of forty or fifty feet. She had a clear look at his face because he looked in her direction while he was under the street's lighting. Downs stated she had seen Olmo around the complex multiple times.

Olmo's sole supporting witness was Victor Martinez. Martinez testified that Rodriguez – whom he had not seen in several years – admitted to him in December 2013 that Falcon paid him to make a false statement against Olmo.

Adams also denied any involvement in Downs's murder. He admitted he was friends with Olmo, and sometimes bought marijuana from Matthews and smoked it with him. He testified that on the night of the murder, he visited a friend in Egg Harbor City, played video games, then returned home. While checking his mail, a young man told him there was a shooting in Egg Harbor City. In order to find out if he knew the victim, he called Matthews at 12:06 a.m. and Olmo at 12:07 a.m. Matthews told him that someone was shot.

He also wanted to know if Matthews had marijuana to sell. Matthews said he did, so Adams drove to meet him. When he saw police cars in the area, Adams asked Matthews "what the fuck was going on." Although he already knew someone was shot, Adams maintained he was not aware the shooting occurred at Matthews's apartment complex. Matthews replied that "somebody got shot" and he "handled that shit." Adams testified he thought Matthews was referring to the marijuana that he had obtained. Only after he arrived at a nearby Wawa did Adams learn, from a woman he knew, that Downs was the shooting victim. Upon receiving that news, Adams decided to drop Matthews off at the apartment and return home. Adams denied telling Matthews that he killed Downs, that money was the root of all evil, and Downs was a snitch. He said he made his electronics purchase the day after the murder with cash from the sale of personal jewelry he won by gambling.

In its cross-examination, the State elicited several inconsistencies or variations between Adams's prior statement to police and his testimony about his whereabouts the night Downs was killed; his interactions with Matthews that night; and how he was able to afford his recent television purchase. On cross-examination, Adams admitted he "fabricated" answers to police about his knowledge of whether Downs was a witness against Olmo. The State also highlighted evidence that Adams made multiple phone calls and texts to Matthews and Olmo in the days leading up to and following Downs's murder.

***5** Adams called as a defense witness someone who claimed to see a man matching the description of an associate of Olmo, running from Downs's shooting. Justin Williams testified that he was at Downs's housing complex shortly before midnight, to purchase marijuana. He heard a gunshot, ducked behind a fence, and saw a light-skinned Hispanic male with a gun standing over a female body, and a brown-skinned man standing beside him. Both men ran in separate directions, the Hispanic man passing by Williams. Williams said the Hispanic man was over six feet tall, had a close-cut beard and corn rows in his hair. Williams said that he knew Adams from the Hammonton area and he was sure that neither of the men he saw was Adams.

Adams also called various family members and his girlfriend to corroborate his movements the night of the murder; his possession of jewelry; and his sale of some of it. Adams's girlfriend confirmed that Adams was a drug dealer.

In the course of deliberations, the judge excused a juror who professed the inability to continue, and replaced him with an alternate. During deliberations, the jury heard a playback of the recorded conversation between Vega and Olmo. The jury's verdict followed three days of deliberations.

II.

Both defendants contend the court erred in excusing the juror, and in allowing Detective Scoppa to testify as an expert in interpreting the recorded conversation between Olmo and Vega. [3] Adams argues that the trial court erred by not severing his trial from Olmo's. [4]

[3] In Point I of his brief, Adams argues: "THE DISMISSAL OF JUROR 14 DURING DELIBERATIONS DENIED DEFENDANT HIS RIGHT TO A FAIR TRIAL." Olmo argues, as Point 8 of his brief, "The trial court erred in removing a deliberating juror from the panel after deliberations had begun, and in denying defendant's motion for a new trial on this ground." As for the expert, Adams argues, as Point IV, "THE ADMISSION OF THE TESTIMONY OF DETECTIVE SCOPPA AS EXPERT TESTIMONY WAS ERROR." Olmo argues, "The trial court erred in admitting expert testimony of James Scoppa to 'interpret' phrases in a recorded conversation between defendant and a State witness." In a pro se brief, Olmo adds, as his POINT I: "THE TRIAL COURT'S ADMISSIBILITY

> RULING REGARDING INTERPRETATION OR MEANING BEHIND DEFENDANT'S RECORDED CONVERSATION BASED UPON DETECTI[VE] SCO[P]PA'S SO-CALLED EXPERT OPINION, WAS IMPROPERLY MADE IN THE ABSTRACT AND IMPERMISSIBLY DEPRIVED DEFENDANT[']S RIGHT TO A FAIR TRIAL, U.S. CONST. AMENDS VI, XIV; N.J. CONST. (1947) ART. I, PARA. [ ].” He adds, as his POINT II, “IN THE ABSENCE OF REQUISITE PROCEDURAL NORMS DETECTIVE SCO[P]PA'S ANALYSIS OR COMMENTARY REGARDING LANGUAGE CONTAINED IN DEFENDANT'S RECORDED CONVERSATION AMOUNTED TO NOTHING MORE THAN HEARSAY AND/OR MERE ‘NET OPINION.’ ”

4 He argues in Point III of his brief, “IT WAS ERROR FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTION FOR SEVERANCE FROM A JOINT TRIAL.”

As for their remaining points on appeal, Adams argues:

POINT II

THE DEFENDANT'S STATEMENT TO POLICE SHOULD NOT HAVE BEEN ADMITTED BECAUSE THE CUSTODIAL INTERROGATION BY THE POLICE VIOLATED DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

....

POINT V

THE PROSECUTOR'S CROSS-EXAMINATION OF CHARACTER WITNESS, TREVONE ASHLEY CHANCE, WAS IMPROPER, GROSSLY PREJUDICIAL AND DEPRIVED DEFENDANT OF A FAIR TRIAL. (Not raised below).

POINT VI

THE RECORD IS DEVOID OF SUFFICIENT PROOFS TO PROVE THE TWO SECOND DEGREE WITNESS TAMPERING CHARGES BEYOND A REASONABLE DOUBT.

POINT VII

DENIAL OF THE DEFENDANT'S MOTION FOR NEW TRIAL WAS ERROR.

POINT VIII

THE CONSECUTIVE SENTENCES IMPOSED UPON DEFENDANT WERE EXCESSIVE AND SHOULD BE MODIFIED AND REDUCED. (Not raised below).

POINT IX

THE AGGREGATE ERRORS DENIED DEFENDANT A FAIR TRIAL. (Not raised below).

***6** Olmo argues:

Point 1

The trial court erred by permitting the prosecution to change its theory of liability at the end of trial, in its accomplice liability and related murder charges given to the jury during the final charge, and in subsequently denying defendant's motion for a new trial on this ground of error (partially raised below).

Point 2

The trial court erred in permitting a statement of Deanna Downs given to the prosecution in the 2009 shooting incident to be admitted into evidence at trial below.

Point 3

The trial court erred in permitting hearsay testimony that Deanna Downs was “afraid” of the defendant.

Point 4

The trial court erred in piercing the attorney-client privilege of defendant's attorney representing defendant in the 2009 shooting case and ordering him to testify at trial below.

Point 5

The trial court erred in admitting statements by defendant, made to interrogators during questioning of the 2009 shooting incident, to be admitted at trial below.

....

Point 7

The trial court permitted improper and unfairly prejudicial other wrongs evidence before the jury.

....

Point 9

Defendant's sentence is improper and excessive.

Olmo, in his pro se brief, adds the following point:

POINT III

THE CUMULATIVE IMPACT OF THE ERRORS DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL.

III.

We turn first to both defendants' argument that the court erred in allowing a detective to testify as an expert and interpret the meaning of the recorded statements between Vega and Olmo. Olmo asserts that Scoppa exceeded the permissible bounds of expert opinion by relying on his private conversations with Vega as well as his own knowledge of the case. He further argues that Scoppa failed to articulate a basis for his opinion and failed to satisfy the indicia of reliability set forth in State v. Kelly, 97 N.J. 178, 208 (1984). For his part, Adams contends that the jury needed no expert assistance to understand the Olmo-Vega conversation, and that Scoppa's testimony usurped the province of the jury by encompassing the ultimate issue of guilt.

We shall not disturb the trial court's determinations that Detective Scoppa, based on his years as an undercover officer, was an expert in street slang, and that expert testimony would help the jury understand some of the jargon and slang Vega and Olmo used. See State v. Zola, 112 N.J. 384, 414 (1988) (stating "the necessity for, or propriety of, the administration of expert testimony and the competence of such testimony" are within the trial court's discretion); State v. Hyman, 451 N.J. Super. 429, 446-47 (App. Div. 2017) (holding that expert testimony may assist a juror's understanding of "drug slang and code words"). Nor are we convinced that Scoppa usurped the function of the jury by opining as to the ultimate issue of guilt.

***7** However, the court permitted Scoppa to offer opinions that exceeded the scope of his expertise, or the jury's need for assistance. The court also failed to carefully distinguish between Scoppa's testimony as an expert, and as an investigator.

In Hyman, we held that a trial judge must "guard against opinions that stray from interpreting drug code words, and pertain to the meaning of conversations in general and the interpretation of 'ambiguous statements that were patently not drug code.' " Id. at 447 (quoting State v. Dukagjini, 326 F.3d 45, 55 (2d Cir. 2003)). Also, an expert should not offer opinions as to words that have already entered the popular vernacular. Id. at 446.

Although there is no blanket bar to a lead investigator serving as an expert, it presents "a delicate situation that requires the trial court to carefully weigh the testimony and determine whether it may be unduly prejudicial." Id. at 454 (quoting State v. Torres, 183 N.J. 183, 580 (2005)). A witness does not testify as an expert when he relies on the facts he has learned in the investigation instead of his specialized experience and training. Id. at 449, 454. Undue credibility is given to an interpretation that is characterized as an expert opinion, but which rests on the investigator's knowledge of the details of his investigation. United States v. Albertelli, 687 F.3d 439, 446 (1st Cir. 2012). "Calling such testimony 'expert opinion' would ... increase the risk of reliance on information not properly before the jury as data on which 'experts in the particular field would reasonably rely,' Fed. R. Evid. 703, even though the 'field' is merely the facts of the case." Ibid. When a trial court allows a lead investigator to testify as an expert, it should give a limiting instruction to inform the jury that it may reject the expert's opinion and the version of facts consistent with it. Hyman, 451 N.J. Super. at 455.

We have no quarrel with Scoppa's definition of certain terms. For example, in the course of his interpretation, he explained that "stack" means $ 1000, so "twenty stacks" meant $ 20,000; "bounce" means to "get away"; "dip" means to leave an area; "bird" is a woman, though Scoppa said it can be used to refer to drugs; "slept on it" referred to missing an opportunity; an "Old Boy" is a general reference to a man; "Papi" is a Hispanic male; and "hit," "rocked"[5] and "touched" are all ways of saying "killed." However, Detective Scoppa's testimony crossed multiple boundaries.

5 The trial transcript of the recording reported the word as "rot."

He defined terms that needed no explanation. For instance, a jury presumably is aware that "hit" may mean "kill." Scoppa defined understandable phrases such as, "right then and there," and "he can't hurt me," and translated portions of the conversation that could be easily understood by an average juror, once the slang was defined. Scoppa also did not confine his testimony to the meaning of spoken words.

Scoppa said that his translation was based not only on his knowledge of slang, but "the ins and outs of the investigation ... all the details from this case," including what Vega told him. He used his knowledge of the investigation to identify people who were referred to only by pronouns, nicknames, or oblique descriptions. He relied on his knowledge of the investigation, not his expertise in street slang, in opining that "old girl," "bitch" and "bird" as used throughout the conversation referred to Downs; "Papi" referred to Falcon; and "that shit happened" referred to the killing of Downs.

***8** Nonetheless, we are convinced that any error associated with the admission of Scoppa's opinion testimony was harmless. See State v. Lazo, 209 N.J. 9, 26 (2012) (holding that in order to reverse conviction because of evidentiary error, there must be a real prospect that the error gave rise to an unjust result); Hyman, 451 N.J. Super. at 457-59 (concluding that a trial court's error in permitting investigator to offer opinion about meaning of drug slang without being qualified as an expert was harmless).

Particularly with respect to Adams, the admission of Scoppa's testimony was not harmful because Adams was never mentioned in the conversation between Vega and Olmo. The parties so stipulated. Furthermore, Scoppa confirmed that Adams was not mentioned. If anything, the absence of any mention of Adams during the extensive discussion of Downs's murder and the intimidation of Falcon supported Adams's defense that he was not involved in the murder and witness tampering.

We also conclude any error was harmless to Olmo. To the extent Scoppa unnecessarily explained language that was already clear to the jury, he did not advance the State's case. In other respects, Scoppa's testimony that relied on his knowledge as an investigative detective – as opposed to an expert in street slang – addressed uncontested issues, such as the persons referenced by nicknames. For example, Olmo agreed with Scoppa that he and Vega were discussing the intimidating effect of Downs's killing on Falcon's willingness to testify when Vega stated, "[E]nd of the day if another witness got their mother fucking face blown the fuck off, right, what makes you think he gonna feel comfortable on saying anything if you couldn't even protect that other witness," and Olmo stated, "Exactly." Olmo also confirmed Scoppa's testimony that "Shid" was Rashid Hamilton, and "Tay" was Dontay Williams.

Regarding more obscure statements, Scoppa's interpretation was cumulative of Vega's testimony. Vega and Scoppa agreed that Olmo was the "Old Boy" who gave the "green light" to killing Downs. They also agreed when Olmo said, "I already set the meeting up for them ... I needed it done right then and there ...." he meant that he had hired a hitman, because he needed Downs killed.

Scoppa confirmed Vega's testimony that he was referring to Hamilton's reluctance to kill Downs when Vega said on the recording, "I told that nigger that shit was easy, that shit was right there in the apartments .... That shit, all you gotta do is hop the mother fucking fence, hit Old Girl ... hit that bitch and bounce," and Olmo replied, "His thing when he kill (inaudible) was – he kept saying, man, I might not get out of there. Don't wanna hear that."

Vega and Scoppa agreed about the meaning of another key exchange in which Vega asked Olmo if he was willing to pay the same price to kill Falcon as he did to kill Downs. Olmo responded, "With the Papi? Yeah Papi same price." Then Olmo disclosed that he "paid a little more" for Downs's killing "because I had to make sure ... I told the nigger already, yo, boom, boom, get the bitch I give you a little extra. I was like extra five, I gave him twenty-five to get the last one."

Also, any prejudice associated with Scoppa exceeding the proper scope of expert testimony was reduced by Olmo's decision to offer his own interpretation. However, Olmo's explanations were often evasive, rambling, or inconsistent. We note two examples. Although Olmo insisted the foregoing exchange about "hit[ting] that bitch" pertained to the alleged robbery of the female drug dealer, he failed to explain his use of the word "kill." Instead, he denied saying the word. Second, to explain his mention of his scheduled appearance in court immediately after he discussed killing and silencing Downs – or robbing a female drug dealer, as he contended – Olmo first said he was just "changing in conversation." Prompted by his attorney, he then said equivocally, "I guess I was talking about money. I was trying to rack up as much

money as I could go possibly take the five year sentence that I was facing. So I guess I was just letting him know."

***9** In addition, the evidence of Olmo's guilt was very strong. Vega and Hamilton both testified that Olmo offered them $ 20,000 to kill Downs. Matthews testified that Olmo paid him to watch Downs and told him that Adams was going to kill her. Rodriguez testified that Olmo was willing to kill Falcon to silence him. Circumstantial evidence, including the proximity in time between the release of discovery and Downs's murder, also pointed to Olmo's guilt.

In concluding the evidentiary error was harmless, we note that the jury heard the recorded conversation multiple times during the trial, and had it replayed during deliberations. The jury did not ask for a re-reading of Scoppa's testimony. We are confident that the jury reached its own conclusions about the recording, based on what it heard, in light of the other evidence in the case.

IV.

We next consider the trial court's removal and replacement of a deliberating juror. On the afternoon of March 12, 2014, the jury began deliberations, conferring for less than two hours. Before proceedings began the next morning, Juror 14, one of two African-Americans on the jury,[6] sent the court a note stating:

> Unexpectedly, this case has brought me to a very personal place, and as much as I can try, the personal place has an enormous grip. This is not the time, nor the place for personal matters. I am persuaded that it would be best that the alternate juror be utilized for best interest of the case going forward.

6 A third African-American was excused and replaced by an alternate before summations to attend a professional conference.

The court brought Juror 14 out and asked him, outside the presence of other jurors, to expound on what he had written. He was hesitant to speak in defendants' presence, but added:

> [I]t's just my personal perception of things. And, um, in this country, I found that the pendulum of justice doesn't lean towards a minority, and this case took me to a very personal place. And when you live in this type of country, for even a man like me with reasonable education and so forth. I come back from Wall Street, can't find a job. It's – it's just difficult. You – there's a lot of stuff I can't say, I really can't say. But I just – I don't think, in all fairness, this system – and this is my truth – that this system leans towards the favor of any black man, whether they're guilty or not guilty. It just doesn't matter. I just think people – I – I – I just – I don't think the system is fair, and that's my – that's my truth right there.[7]

7 The juror's statement was interspersed with brief acknowledgements from the judge, such as "I see" and "Um-hum."

After a brief unrecorded sidebar discussion between the court and the attorneys regarding the matter,[8] Juror 14 added:

> It's the same shit going on. The only difference between this world and this world[9] is this one has much more education, has more resources .... And wear suits, all of them are thugs in suits.

8 It was plainly inappropriate to conduct the side-bar conference off the record. See State v. Singletary,

80 N.J. 55, 73 (1979); State v. Green, 129 N.J. Super. 157, 166 (App. Div. 1974); R. 1:2-2.

9 We suspect that the juror was referring to defendants, and then to the attorneys and other professionals in the courtroom. But, the record is unclear.

The court adjourned to consider the matter, after counsel set forth their positions in writing.[10] When the judge returned to hear argument, both defense counsel suggested that something in deliberations may have provoked Juror 14's expression of concern. The prosecutor asserted that Juror 14's statements would have supplied grounds for excusing him for cause, if made during jury selection, but Adams's attorney disagreed, provided the juror said he could be fair in this case.

10 Although the court preserved the submissions as court exhibits, they are not included in the record before us.

***10** The court declined to further probe into what caused Juror 14 to speak up, to avoid intruding into ongoing deliberations. The judge decided to excuse Juror 14 and replace him with an alternate juror. After theorizing that the juror was "less than candid" during jury selection, the judge summarized the juror's statements and concluded:

> I think they suggest, pretty transparently, an – an incapacity on his part, at this time, to consider the evidence as it has gone in and to follow the law unimpeded by the strong racial resentments of which he did not previously disclose to us. Um, now that the time, uh, for making decisions has arrived, I infer that he feels impelled to tell us that he just can't abide by his oath, and I think to press him further at this point would imprudently intrude on the ongoing deliberative process of the entire jury.
>
> ....
>
> A juror has to be, uh, able to review evidence dispassionately through the light of reason. Uh, any doubt about a juror's ability to be fair, uh, I think the case law tells us should be resolved in favor of removing him from the panel. Uh, I find that, uh, to his everlasting credit, uh, [Juror 14] has told us today that he simply can't be fair. Uh, so for those reasons, uh, I'm going to excuse him and we'll replace him with the remaining alternate.

In rejecting the suggestion that racial cross-currents within the jury may have prompted Juror 14's statement, the judge noted that the remaining African-American juror had not communicated any concern to the court.

After the verdict, the court denied Olmo's motion for a new trial based on the juror's removal, reiterating its reasons for excusing him.[11] In denying Adams's motion for a new trial, the court rejected counsel's theory that Juror 14's statement was prompted by something in the jury room.

11 The court also rejected the argument that the jury had deliberated too long to permit a substitution, noting that the jury had deliberated less than two hours before the substitution, and deliberated for three days after it. Defendants do not renew that argument on appeal.

We review, for an abuse of discretion, a trial court's decision under Rule 1:8-2(d)(1) to remove and replace a deliberating juror "because of illness or other inability to continue." State v. Musa, 222 N.J. 554, 564-65 (2015). To protect the right to fair jury trial, our Supreme Court has restricted "inability to continue" to matters that are personal to the juror, and unrelated to his or her interaction with other jurors. State v. Jenkins, 182 N.J. 112, 124-25 (2004); see also State v. Williams, 171 N.J. 151, 163 (2002).

A court may not discharge a juror because he or she disagrees with other jurors. In State v. Valenzuela, 136 N.J. 458, 464, 471-73 (1994), the trial court erred in removing a juror after she stated that fellow jurors were "ganging up" on her, they had a "different opinion" of the case, they were communicating to her that she was a "hindrance," and the jury complained to the judge that she was "very confused." See also State v. Paige, 256 N.J. Super. 362, 380-81 (App. Div. 1992) (stating that the trial court cannot replace a "disgruntled" juror "whose position is at odds with the rest of the jury").

However, a court may excuse a juror whose "emotional condition renders him or her unable to render a fair verdict." Williams, 171 N.J. at 164. For example, a trial court appropriately discharged a juror who complained she pictured her son as the defendant, and reported she was nervous, had a headache, "want[ed] to spit up," was "too emotional," and could not render a fair and just decision. State v. Trent, 157 N.J. Super. 231, 235-36 (App. Div. 1978), rev'd on other grounds, 79 N.J. 251 (1979). In Jenkins, a juror had children the defendant's age. She said, "I just can't make a decision to put him in jail." 182 N.J. at 119. Although she said she was

not "the emotional type," and stated in voir dire that she could be fair, she realized that, emotionally, she could not decide the case on the facts. Id. at 120-21. The Court held that the trial court appropriately discharged her. Id. at 127-28.

> ***11** A juror who would decide a case based solely on a defendant's race violates her oath. A juror who would decide a case based solely on a personal identification or revulsion with a defendant, without regard to the evidence, also violates her oath. A juror, as in this case, who announces that she cannot obey her oath, follow the law, and render fair and impartial justice cannot remain on the jury .... [A] juror who expressly states that she cannot be impartial or that she is controlled by an irrepressible bias, and therefore will not be controlled by the law, is unable to continue as a juror for purposes of Rule 1:8-2(d)(1), and must be removed from a jury.
>
> [Id. at 128.]

The record must "adequately establish[ ]" the juror's inability to continue. Valenzuela, 136 N.J. at 472-73. At the same time, in ascertaining the reason why a juror wants to be excused, a court must avoid improperly intruding into the jury's deliberations. Musa, 222 N.J. at 569 (noting that the "questioning was limited to assessing circumstances personal to the jurors and not delving into the deliberative process"). The trial judge must assess the juror's demeanor and interpret the juror's statement in context. See Williams, 171 N.J. at 169. The trial judge is in the best position to assess the juror's "stress and concern." Id. at 170. The Court has not required that a trial judge always question other jurors, to corroborate the reasons given by the juror who wants to be excused. Not only is such questioning of each deliberating juror time-consuming, it also may alarm jurors or cause them to speculate about another juror's departure.

Applying these principles, we discern no error in the trial court's discharge of Juror 14. He expressly stated that his inability to continue was "personal," explaining the case brought him to a "personal place" with "an enormous grip" and it was "not the time, nor the place for personal matters." He added that it was his "personal perception of things" that the justice system "doesn't lean towards a minority" and the economic system is also unfair.

The judge was in the best position to assess Juror 14's sincerity, and the depth of his emotion, in ascertaining whether he was unable to continue. The court was not obliged to question other jurors about Juror 14. The juror did not hint that his comments originated from a disagreement with other jurors about the facts of the case, which may have warranted clarification.

Juror 14's comments seem more akin to those of the jurors in Trent and Jenkins, than in Valenzuela. The juror's personal view of racial justice and equality prompted him to request being excused. Although he did not say so explicitly, it is clear that he believed that his "personal place" prevented him from fairly deciding the case based on the facts and the law as the court instructed. The judge appropriately exercised his discretion, on this record, to excuse him, and reached that decision in a proper manner.

V.

We turn to Adams's argument that the trial court erred in denying his motion to sever his trial from Olmo's. He claims the substantial evidence at trial that pertained only to Olmo, including his involvement in the 2009 incident, and his recorded conversation with Vega, denied him a fair trial. We are unpersuaded.

The court denied three severance motions by Adams. The first was based on Olmo's prolonged unavailability for trial, which led to a delay for Adams. The court held that Adams had not shown the delay prejudiced his ability to present a defense. In support of the second motion, filed several months later, Adams argued that evidence of the 2009 incident, in which he was uninvolved, would be inadmissible against him and highly prejudicial. Shortly afterward, he sought severance on the grounds that admission of the Olmo-Vega conversation, which did not involve him, would be unduly prejudicial to his defense. Denying the second and third motions together, the court reasoned that some reference to the 2009 incident was unavoidable in order to make both defendants' motives clear. Regarding the Olmo-Vega conversation, the court stated that "[t]his is a murder case, and killing, and a certain amount of chatter about it, uh, is part of the landscape whether Mr. Adams is severed or not." The court concluded that the conversation was not unduly prejudicial to Adams.

***12** Rule 3:7-7 allows two or more defendants to be tried jointly "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Indeed, "[w]hen the crimes charged arise from the same series of acts, and when much of the same evidence is needed to prosecute

each defendant, a joint trial is preferable." State v. Brown, 118 N.J. 595, 605 (1990); see also State v. Robinson, 253 N.J. Super. 346, 364 (App. Div. 1992) (noting the general preference for trying co-defendants jointly). "Joint trials foster an efficient judicial system, and spare witnesses and victims the inconvenience and trauma of testifying about the same events two or more times." State v. Sanchez, 143 N.J. 273, 282 (1996) (citations omitted).

Nevertheless, "the interest in judicial economy cannot override a defendant's right to a fair trial." Ibid. "If, for any reason, it appears that a defendant or the State is prejudiced by the joint trial, the trial court may sever." State v. Weaver, 219 N.J. 131, 148 (2014) (citing R. 3:15-2(b)). "When considering a motion to sever, a court must balance the potential prejudice to a defendant against the interest in judicial economy." State v. Brown, 170 N.J. 138, 160 (2001). The decision to sever is within the trial court's discretion, and will not be reversed unless it constitutes an abuse of that discretion. Weaver, 219 N.J. at 149.

Generally, "separate trials are necessary when [the] co-defendants' defenses are 'antagonistic and mutually exclusive or irreconcilable.' " Brown, 170 N.J. at 160 (quoting Brown, 118 N.J. at 605-06). However, "the potential for prejudice inherent in the mere fact of joinder does not of itself encompass a sufficient threat to compel a separate trial." State v. Scioscia, 200 N.J. Super. 28, 42 (App. Div. 1985). "The danger by association that inheres in all joint trials is not in itself sufficient to justify a severance ...." Brown, 118 N.J. at 605. "A severance should not be granted 'merely because it would offer defendant[s] a better chance of acquittal.' " Scioscia, 200 N.J. Super. at 42-43 (quoting State v. Morales, 138 N.J. Super. 225, 231 (App. Div. 1975) (alteration in original)). Courts have specifically held that severance was not warranted where the only basis for the motion was that some evidence would be admissible as to only one co-defendant, State v. Mayberry, 52 N.J. 413, 421 (1968), or where the evidence against one defendant was stronger than that against the other, State v. Laws, 50 N.J. 159, 175-76 (1967).

Here, Olmo's and Adams's defenses were not antagonistic, mutually exclusive or irreconcilable. Indeed, they both asserted defenses that they did not kill Downs, they had no reason to kill her, and although they did not know who killed her, Matthews had the motive and opportunity to do so. Thus, the most compelling reason recognized by courts to support a severance was not present.

Adams's argument on this point is that the highly prejudicial evidence admitted against Olmo created the potential for the jury to find him guilty by association. Yet, courts have repeatedly held that the danger by association that inheres in joint trials, without more, does not justify a severance. Brown, 118 N.J. at 605. Indeed, joint trials may allow for a more accurate assessment of relative culpability that can sometimes operate to a defendant's benefit. Sanchez, 143 N.J. at 282. For instance, a piece of evidence in Adams's favor was the complete absence of any mention of him in the lengthy conversation between Vega and Olmo about the murder of Downs and the intimidation of Falcon. The verdict returned in this matter clearly showed that the jury believed Adams to be the less culpable of the two.

VI.

***13** Olmo's remaining points do not warrant extended discussion. We discern no merit to Olmo's argument that in order to find him guilty as an accomplice to the murder, the trial court was obliged to instruct the jury that Olmo was an accomplice specifically of Adams, as opposed to "another person." Simply put, the jury was not obliged to identify the trigger-man in order to conclude that Olmo was guilty of soliciting that person to kill Downs. See State v. Norman, 151 N.J. 5, 32 (1997) (holding that the jury was not required to identify the shooter in order to find the defendant guilty as an accomplice).

The court also did not err in admitting Downs's 2009 statement – released to Olmo in discovery – that she observed Olmo flee her apartment complex holding a gun after a shooting. The State offered the statement to rebut Olmo's testimony that Downs must have been mistaken, and he meant her no ill will. The court admitted the statement under the forfeiture-by-wrongdoing doctrine as set forth in State v. Byrd, 198 N.J. 319, 340 (2009); see also N.J.R.E. 804(b)(9). The court held a hearing under N.J.R.E. 104 and heard testimony from the police officer who took Downs's statement. Based on that testimony and the evidence already presented at trial, the court was satisfied by a preponderance of the evidence that Olmo's wrongdoing was intended to, and did, procure Downs's unavailability; and Downs's statement bore an indicia of reliability. See Byrd, 198 N.J. at 352. Furthermore, the admission of Downs's statement does not offend the confrontation clause. Id. at 339; State v. Rinker, 446 N.J. Super. 347, 360-61 (App. Div. 2016). It matters

not that Olmo's initial intention was to prevent Downs from testifying in a prosecution pertaining to the 2009 incident, as opposed to a trial for Downs's murder. The critical fact is that Olmo engaged in wrongdoing that made Downs unavailable to provide in court the statement she made previously.

Although Downs's mother stated before the jury that her daughter was afraid of Olmo, defense counsel swiftly objected, and the court delivered a curative instruction, directing the jury not to consider the statement. We presume the jury followed the court's instruction. State v. Loftin, 146 N.J. 295, 390 (1996). In any event, the fleeting remark was inconsequential in the context of the evidence of Olmo's guilt, and provides no basis to disturb the jury's verdict.

Also, the court did not, as Olmo contends, pierce his attorney-client privilege when it compelled his attorney in the case related to the 2009 incident to testify about when he received and then transmitted discovery, disclosing Downs's and Falcon's cooperation, to Olmo. The information simply did not constitute a communication protected by the privilege because it did not concern legal advice. See Hedden v. Kean Univ., 434 N.J. Super. 1, 10 (App. Div. 2013).

Olmo also contends the court erred in admitting into evidence his custodial statement to police regarding the 2009 incident. He argues that his Miranda rights were violated. Given our deferential review of the trial court's findings, see State v. Hubbard, 222 N.J. 249, 262-68 (2015), we shall not disturb the trial court's determination that defendant received the appropriate Miranda warnings; and, despite the length of his incarceration and the lack of food, Olmo was competent, his will was not overborne, and he was not under the influence of narcotics.[12] Although he initially declined to answer questions before obtaining a lawyer, Olmo persisted in engaging the officers, who explained that they could not discuss the case unless Olmo waived his right to remain silent, which Olmo did. The officers did not violate Olmo's rights in clarifying Olmo's intentions. See State v. Diaz-Bridges, 208 N.J. 544, 569 (2012) (stating that officers may inquire "to clarify the suspect's intent" when "confronted with an ambiguous invocation").

12 We note that the trial judge relied in part on his assessment of Olmo's demeanor as reflected in the videotape of his interrogation. As the record on appeal does not include that recording, we have no basis to question that aspect of the court's findings. See State v. Cordero, 438 N.J. Super. 472, 489 (App. Div. 2014) (noting that failure to provide video evidence impeded appellate court's review of the trial court's fact finding).

***14** We discern no merit in Olmo's argument that the court erred in allowing the State to refer to the 2009 incident. To reduce the potential prejudice to Olmo, the court prohibited the State from eliciting details about the incident (although Olmo opened the door to such details by discussing the incident in depth in his own testimony). The court properly applied the Cofield factors, see State v. Cofield, 127 N.J. 328, 338 (1992), in concluding that the evidence was relevant to the motive for committing the murder and witness tampering, and its probative value was not outweighed by its apparent prejudice.

Finally, we reject Olmo's contention that his sentence was improper and excessive. We note at the outset that the court was compelled to impose a sentence of life imprisonment without parole for Downs's murder. See N.J.S.A. 2C:11-3(b)(4). Thus, Olmo's sentencing argument applies only to the consecutive ten-year sentence for witness tampering.

In support of its sentence, the court found aggravating factors one, N.J.S.A. 2C:44-1(a)(1) ("nature and circumstances of the offense, and the role of the actor"); two, N.J.S.A. 2C:44-1(a)(2) ("gravity and seriousness of the harm inflicted on the victim" including the offender's knowledge of victim's incapacity to resist); three, N.J.S.A. 2C:44-1(a)(3) (risk of reoffending); six, N.J.S.A. 2C:44-1(a)(6) (prior record); and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter). Those factors substantially outweighed any mitigating factors.

We are satisfied that in applying the sentencing guidelines, the judge gave adequate reasons to support the sentence, the sentence is not manifestly excessive or unduly punitive, and it does not constitute an abuse of discretion. See State v. Fuentes, 217 N.J. 57 (2014); State v. Cassady, 198 N.J. 165 (2009); State v. Roth, 95 N.J. 334 (1984). Inasmuch as there were two distinct victims – Downs and Falcon – we discern no error in the imposition of consecutive sentences. See State v. Yarbough, 100 N.J. 627, 643 (1985). The fact that Olmo did not personally shoot Downs did not preclude the court from finding aggravating factors one and two. The court found those factors based on the "cold-blooded" and "calculated" execution of Downs. The court noted that the harm was not only to Downs but to the "body politic" as it involved "payback for [Downs's] temerity in cooperating with law enforcement."

Olmo's remaining points lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

VII.

Adams's remaining points also do not warrant extended discussion. As did Olmo, Adams contends his Miranda rights were violated, because he initially stated that he did not want to speak to police. However, he persisted in asking the police about the matter, including asking the officer to ask him some questions. The officer explained that he could not do so unless Adams changed his answer on the Miranda form, which he did. The trial court did not err in concluding that there was no Miranda violation. The police honored Adams's request to remain silent, while clarifying, in response to Adams's voluntary inquiries, whether he wanted to waive that right. See Diaz-Bridges, 208 N.J. at 569.

Adams also challenges the sufficiency of the proofs. Relying on his acquittal for murder and weapon offenses, he contends there was insufficient evidence remaining that he witness-tampered Downs. He also argues there was insufficient evidence that he threatened Falcon with force, so as to raise the witness tampering to a second-degree offense. N.J.S.A. 2C:28-5(a). He also contends the court should have granted his motion for a new trial in part on the basis that the convictions were inconsistent with his acquittal of murder and weapons offenses.

***15** We are unpersuaded. As our system tolerates inconsistent verdicts, the trial court appropriately determined that there was sufficient evidence to support the jury's guilty verdicts, notwithstanding its acquittals. See State v. Muhammad, 182 N.J. 551, 578 (2005) (stating that "[i]n reviewing a jury finding, we do not attempt to reconcile the counts on which the jury returned a verdict of guilty and not guilty"). Although the jury was not convinced that Adams was the trigger-man, there was sufficient proof to conclude that he was part of the conspiracy to kill her and to prevent her from testifying against Olmo. Witnesses implicated him in the conspiracy; Adams engaged in numerous communications with Matthews and Olmo before and after the murder; and he made large purchases after the murder. He travelled to the scene shortly after the murder. There was also sufficient evidence for the jury to find that Adams threatened Falcon with force, including Falcon's trial testimony.

Turning to Adams's sentence, we have already noted that the judgment of conviction must be corrected to conform with the court's oral sentence. The judge stated that the seven-year term for witness tampering of Downs was to run concurrently with the fifteen-year term for conspiracy to murder her. We find no error in the court's imposition of a consecutive term for witness tampering of Falcon, as it involved a different victim. See Yarbough, 100 N.J. at 643.

The court adequately supported its finding of aggravating factors one, N.J.S.A. 2C:44-1(a)(1) ("nature and circumstances of the offense and the role of the actor"); two, N.J.S.A. 2C:44-1(a)(2) ("gravity and seriousness of the harm inflicted on the victim," including the offender's knowledge of victim's incapacity to resist); three, N.J.S.A. 2C:44-1(a)(3) (risk of reoffending); and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter). The court found that those aggravating factors outweighed non-existent mitigating factors.

Adams asked the court to find mitigating factors seven, N.J.S.A. 2C:44-1(b)(7) (defendant has no prior criminal record, or has a substantial period of law-abiding behavior); eight, N.J.S.A. 2C:44-1(b)(8) (defendant's behavior resulted from circumstances unlikely to recur); nine, N.J.S.A. 2C:44-1(b)(9) (the character and attitude of the defendant indicate that he is unlikely to commit another offense); and ten, N.J.S.A. 2C:44-1(b)(10) (amenability to probationary treatment). Although the court did not expressly address those factors, its rejection was implicit. See State v. Bienek, 200 N.J. 601, 609 (2010) (stating that a trial court need not explicitly reject each mitigating factor that a defendant argues, if its reasons for the sentence reveal the court's consideration of those factors).

The court acknowledged in its decision that defendant did not have a prior criminal record. The court noted that Adams disputed the correctness of his presentence report, which noted prior disorderly persons convictions. The court concluded, contrary to mitigating factors eight and nine, that defendant posed a risk of reoffending. Mitigating factor ten is inapplicable when a defendant has been convicted of a crime with a presumption of imprisonment, as Adams was. State v. Sene, 443 N.J. Super. 134, 144-45 (App. Div. 2015).

We also reject Adams's argument that factors one and two "should not be relied upon in a single gunshot murder case." As the judge appropriately found, the conspiracy to murder involved the "cold-blooded" killing of a mother just steps

from the front door of her home, her two young children, and her mother. The victim was totally defenseless.

Adams's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

In sum, the convictions and sentences of both defendants are affirmed. In Adams's case, No. A-1021-14, we remand solely to correct the judgment of conviction, with the State's consent.

All Citations

Not Reported in Atl. Rptr., 2019 WL 660984

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2006 WL 3740994
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Appellant,
v.
Rashaad CORNISH, Defendant-Respondent.

Submitted Nov. 28, 2006.
|
Decided Dec. 21, 2006.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, No. 05-06-00559.

Attorneys and Law Firms

Ronald J. Casella, Cumberland County Prosecutor, attorney for appellant (Christina E. Foglio, Assistant Prosecutor, of counsel and on the brief).

Yvonne Smith Segars, Public Defender, attorney for respondent (Jorge C. Godoy, Deputy Public Defender, on the brief; Barbara Ann Johnson-Stokes, Assistant Deputy Public Defender, of counsel and on the brief).

Before Judges COBURN and AXELRAD.

Opinion

PER CURIAM.

***1** The Cumberland County Prosecutor rejected defendant's application for admission to the pretrial intervention program ("PTI"), *N.J.S.A.* 2C:43-12; *R.* 3:28, despite the PTI director's approval of the application. Defendant moved before the trial court for admission over the prosecutor's rejection. His motion was granted, an order was entered on February 3, 2006, and the State appeals. We reverse because the trial court erred in finding that the prosecutor's decision was an abuse of his discretion.

On June 22, 2005, defendant, Rashaad Cornish, then age twenty-one, was indicted for third degree witness tampering, *N.J.S .A.* 2C:28-5(a)(2). The indictment arose from an incident that occurred on March 3, 2005. Defendant's girlfriend was fired on that date, and defendant responded later in the day by coming to her place of employment accompanied by a friend and striking her employer in the face with sufficient force to cause him to bleed. The employer filed an assault charge, and defendant responded to that by offering the employer $100 to drop the charges against him. The employer refused, and defendant left after asking the employer to "think about it." The offer of the bribe was the basis for the indictment. Defendant was found guilty of simple assault.

Before the indictment, defendant had an eight year history of juvenile offenses and adult disorderly persons offenses. In 1999, he was adjudicated delinquent for fighting, *N.J.S.A.* 2C:33-2(a), resisting arrest, *N.J.S.A.* 2C:29-2(a), possession of a weapon, *N.J.S.A.* 2C:39-5(d), and terroristic threats, *N.J.S.A.* 2C:12-3, and he was placed on probation. Later in 1999, he was adjudicated delinquent for harassment, *N.J.S.A.* 2C:33-4(a), and his probation was extended for six months. In 2000, he was found guilty of violating a municipal residential curfew; in 2002 he was found guilty of disorderly conduct in violation of a municipal ordinance; in 2004 he was found guilty of receiving stolen property, a disorderly persons offense, *N.J.S.A.* 2C:20-7(a); and in early 2005 he was found guilty of tumultuous behavior under a municipal ordinance. On August 30, 2005, some five months after the assault on his girlfriend's employer, defendant was charged with obstructing the administration of law, *N.J.S.A.* 2C:29-1(a), and in December 2005, he was found guilty of that charge in municipal court.

In response to defendant's application for pretrial intervention in the bribery case, the prosecutor wrote as follows:

> The defendant in this matter has been indicted on one charge of witness tampering, a third degree charge. He has made application to enter into the Pre-Trial Intervention Program. In my opinion the defendant should be denied entry into P.T.I.
>
> The charges have their genesis in another matter. This defendant was arrested on March 3, 2005 for simple assault in Millville (he was eventually found guilty of these charges on May 5, 2005.) On April 28, 2005, it was alleged that he offered to pay the complaining witness in the Millville assault case $100.00 to drop the charges. He was thereafter charged with witness tampering.
>
> ***2** The defendant at 21 years of age, is a young man. He has however been getting in trouble since he was 13

> years old. He has almost constantly been in trouble. As a juvenile, he had a 1997 charge of fighting dismissed; in 1998 a charge of hindering apprehension and harassment were dismissed; in 1999 he was adjudicated a delinquent for fighting, possession of a weapon, resisting arrest, and terroristic threats, later in 1999 he had a charge of fighting dismissed, but was adjudicated a delinquent for harassment. In addition, he has not been a stranger to our municipal courts. In 2000 he was found guilty of violating a curfew in Millville, in 2002 he was guilty of disorderly conduct; in 2004 he was found guilty of receiving stolen property; in 2005 he was guilty of placing a person in fear of their life and safety; also in 2005 he was found guilty of assault (previously mentioned in the history of this charge). Since his arrest in this matter, he has been arrested for obstructing administration of law.
>
> 2C:43-12(2) indicates that P.T.I. is a proper alternative to prosecution for those defendants for whom it can serve as a sufficient sanction to deter criminal conduct. This young man's history indicates that he has not been sufficiently deterred by prior encounters with the criminal justice system. A clear pattern has developed which leads to the conclusion that the defendant wishes to pursue a criminal career. In this case, it is alleged that he offered a witness $100.00 to drop a complaint against him. It appears that he has adopted a criminal mind set.
>
> It is my opinion that the services that can be rendered to this defendant in a P.T.I. program will not be beneficial. Based upon his past behavior, I believe the only way to deter him from future criminal justice activity is to prosecute him for his crime. This defendant should be denied entry into P.T.I.

The trial judge described the case as presenting a "close call." He also conceded that the prosecutor had considered defendant's amenability to rehabilitation, but asserts that the prosecutor mischaracterized prior conduct of defendant as criminal. However, the prosecutor's letter belies that assertion. The judge seems to have relied on his sense that "the scope and level of [defendant's] record is not that egregious." The judge then referred to defendant's participation in an anger management program, while conceding that the participation probably resulted from his own prompting during prior proceedings in this case.

A trial judge's scope of review of a prosecutor's decision denying PTI is quite narrow, *State v. Leonardis,* 73 *N.J.* 360, 381 (1977), and the defendant has the burden of proving an abuse of discretion. *Ibid.* In other words, defendant must prove that the prosecutor failed to consider relevant factors, based the decision on inappropriate factors, or made a clear error in judgment. *State v. Warriner,* 322 *N.J.Super.* 401, 409 (App.Div.1999). The judge did not find that the prosecutor failed to consider relevant factors or that he considered irrelevant factors. Rather, he largely disagreed with the prosecutor's assessment of the extent and seriousness of defendant's prior criminal record. That disagreement does not demonstrate that the prosecutor abused his discretion, particularly when, as here, the offense charged in the indictment, witness tampering, strikes at the heart of the judicial system. Judicial review of prosecutors' decisions on PTI admission is not intended to deal with the close case, which, as noted, was the judge's own description of this case, but with decisions that are clearly and demonstrably unjust. This was not such a decision.

***3** Reversed and remanded for further proceedings.

All Citations

Not Reported in A.2d, 2006 WL 3740994

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2014 WL 1125365
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Pierre A. DENEUS, a/k/a HARRY
JEAN–PIERRE, Defendant–Appellant.

A-3698-11T2
|
Submitted Dec. 9, 2013.
|
Decided March 24, 2014.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 10–06–1382.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Amira R. Scurato, Assistant Deputy Public Defender, of counsel and on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent (Frank J. Ducoat, Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges KENNEDY and GUADAGNO.

Opinion

PER CURIAM.

***1** Following a jury trial, defendant was found guilty of second-degree kidnapping, *N.J.S.A.* 2C:13–1b(1), (a lesser included offense under count one of the indictment); second-degree luring, *N.J.S.A.* 2C:13–6, (count two); third-degree promoting prostitution, *N.J.S.A.* 2C:34–1b(7), (count seven); third-degree endangering the welfare of a child, *N.J.S.A.* 2C:24–4a, (count eight); first-degree conspiracy to commit murder, *N.J.S.A.* 2C:5–2 and 2C:11–3a(1), –3a(2), (count nine); second-degree witness tampering, *N.J.S.A.* 2C:28–5, (count ten); two counts of third-degree witness tampering, *N.J.S.A.* 2C:28–5, (lesser included offenses under counts eleven and twelve); and second-degree hindering apprehension or prosecution, *N.J.S.A.* 2C:29–3b(3), (count thirteen).

The trial judge sentenced defendant to an aggregate term of twenty-six years' incarceration, with a fifteen-year period of parole ineligibility, pursuant to the No Early Release Act (NERA), *N.J.S.A.* 2C:43–7.2. After appropriately merging count two into count one, the judge sentenced defendant to five years' incarceration for second-degree kidnapping, subject to NERA (count one); three years' incarceration for third-degree promoting prostitution (count seven) and three years' incarceration for third-degree endangering the welfare of a child (count eight), concurrent with counts one and seven; ten years' incarceration for first-degree conspiracy to commit murder subject to NERA (count nine), consecutive to counts one, seven, and eight and consecutive to count thirteen; five years' incarceration for second-degree witness tampering (count ten), consecutive to all counts; three years' incarceration on each count of third-degree witness tampering (counts eleven and twelve) consecutive to all other counts; and five years' incarceration for second-degree hindering (count thirteen), concurrent with count nine.

Defendant raises the following arguments on appeal:

I. EXTENSIVE TESTIMONY THAT THE DEFENDANT AND HIS BROTHERS WERE MAJOR DRUG DEALERS AND GANG MEMBERS WAS COMPLETELY IRRELEVANT, AND THEREFORE INADMISSIBLE UNDER *N.J. COURT RULE* 404(b). ADMISSION OF THE TESTIMONY VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL. (*U.S. CONST.*, AMENDS. V, VI, AND XIV; *N.J. CONST.*, ART. I, PARS. 1, 9, AND 10) (Partially Raised Below).

II. SINCE THE STATE ADVANCED DIFFERENT THEORIES OF CULPABILITY FOR KIDNAPPING BASED ON DIFFERENT ACTS, THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURORS THAT TO CONVICT THEY HAD TO UNANIMOUSLY AGREE AS TO WHICH SPECIFIC CRIMINAL ACTS WERE COMMITTED. THE ABSENCE OF A UNANIMITY INSTRUCTION VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL. (*U.S. CONST.*, AMENDS. V, VI, AND XIV; *N.J. CONST.*, ART. I, PARS. 1, 9, AND 10) (Not Raised Below).

III. THE DEFENDANT'S TAMPERING CONVICTIONS (A) SHOULD HAVE MERGED AND (B) WERE NOT REQUIRED TO BE SERVED CONSECUTIVELY AND (C) HAD NO PROOFS BY WHICH A SECOND DEGREE ENHANCEMENT COULD BE FOUND (Not Raised Below).

***2** *IV.* THE VERDICTS WERE SHARPLY AGAINST THE WEIGHT OF THE EVIDENCE, NECESSITATING REVERSAL.

Having considered these arguments in light of the record and applicable legal principles, we affirm defendant's conviction, but we remand for resentencing.

I.

We discern the facts from the record. The State alleged that on May 30, 2008, defendant abducted a thirteen year-old girl on the street, drove her to a house, offered her money for sex, and then attempted to have sex with her. Defendant was arrested shortly thereafter and incarcerated at Essex County Jail. In November 2009, while defendant was incarcerated and awaiting trial, the State learned defendant had offered a fellow detainee $5000 to kill several witnesses, including the thirteen year-old girl, N.W., her mother, and defendant's roommate, Julienne. Additional charges therefore were brought against defendant.

At defendant's trial, the State called as witnesses Irvington Police Detective Jerry Alston, N.W., Captain Quovella Spruill and Detective John Foti of the Essex County Prosecutor's Office, B.T., former inmate at the Essex County Jail, and Domenick Pomponio, an investigator with the internal affairs bureau of the Essex County Jail. Defendant testified on his own behalf, and called as witnesses his brother, Levelt, and his friend, Abraham.

A. Kidnapping Related Charges

On the morning of May 30, 2008, sometime after 8:30 a.m., thirteen-year-old N.W. took a bus from her home in Newark, intending to travel to her school in Irvington. N.W. got off the bus on Myrtle Avenue and 18th Avenue in Irvington and began walking down Myrtle Avenue when a man, later identified as defendant, grabbed her wrist and forced her into a car. Defendant then entered the driver's seat and began driving.

Defendant asked N.W. her name and she gave him a fake name, "Nicole." Defendant then slipped a piece of paper into N.W.'s jacket pocket, and continued driving. N.W. attempted to escape but the passenger side door handle was broken. A few minutes later, defendant stopped in front of a house, and pulled N.W. from the car. N.W. tried, unsuccessfully, to get away from the man.

According to N.W., defendant

> took her up the step to the house and then [they] went in the house and [she] sat on a chair or he made [her] sit on a chair and he closed the door. And then he was telling [her] that he wanted to have sex with [her] and [she] was scared and [ ] [said] no. And then he kept telling [her][ ] he wanted to have sex with [her] And then that's when [she] [said] no and then ... he tried to take off [her] clothes and he ripped [her] leggings, and that's when he tried to take off [her] jacket but [she] pulled it tighter.

Defendant then stood in front of her, "unzipped his pants[,]" took his penis out, began "moving his hand up and down on it[,]" and told her that he wanted to have sex with her. At some point defendant offered her fifty dollars to have sex with her, which she rejected.

***3** Thereafter, a "lady opened the door and [N.W.] ran" from the house. N.W. headed to her father's house, but encountered her grandmother and went, instead, to her grandmother's home. Once inside, N.W. told her grandmother and her mother what occurred, and N.W.'s mother called the police.

Captain Spruill interviewed N.W., who provided the officer with the paper defendant slipped in her pocket, as well as the clothing she was wearing. On the paper was the name "Pierre" and a phone number.

Later that day, Spruill drove N.W. past the house and N.W. identified the car parked in front of the house as defendant's

car, and Spruill noted the car's license plate number. Spruill later determined that the car was registered to defendant's roommate.

Further, Spruill asked N.W. to participate in a recorded phone call with defendant using the phone number defendant provided. Spruill advised N.W. to talk to the man about what happened earlier that day, and ask him if he still wanted her to come over. N.W. called "Pierre's" number and asked him if he still wanted to have sex. The man responded that he wanted to have sex with her, and told her he would give her fifty dollars. A recording of the "consensual intercept" was played for the jury.

As part of her investigation, Spruill subpoenaed the phone company to provide the subscriber information associated with the number defendant gave to N.W. Spruill received the address of the subscriber, as well as the subscriber's billing name, Harry John Pierre.

On June 3, 2008, Spruill continued her investigation by driving back to defendant's house in search of the car N.W. had described. Spruill testified that a car was parked outside of the house matching the description of the car described by N.W.

Spruill then knocked on the door of the house, and a black male, later identified as defendant, opened the door. Defendant stated that he lived there and identified himself as Pierre Deneus. [1] Spruill asked Pierre what his phone number was, and he gave her the same number that N.W. provided. Spruill testified that the inside of the house appeared to match the description given by the victim. Another detective on the scene called the Irvington Police Department, and learned that defendant had an open traffic warrant. Defendant was arrested and taken to the Irvington Police Department.

1 Defendant later told Spruill that his name used to be Harry John Pierre.

B. Conspiracy and Witness Charges

After defendant's arrest on June 3, 2008, he was incarcerated at the Essex County Jail, where he was housed in the same "pod" as fellow inmate, B.T. B.T. had been arrested on May 29, 2009, for possession of a firearm and he met defendant while incarcerated. According to B.T., he and defendant went to court together one day and defendant started telling him about his case. B.T. testified that defendant asked him to kill someone named Julienne and "some other people[.]" B.T. believed defendant approached him because B.T.'s cousin was the "Godfather of the Bloods[.]" B.T. stated that defendant offered him $5000, and would pay B.T. half up front, and half when the job was done. B.T. at first demurred.

***4** Defendant approached him a second time, and B.T. again refused. Later, B.T. overheard defendant telling another detainee how he wanted to kill a young girl. Upon hearing that a young girl was a target, B.T. said he became upset and told defendant that he "already got somebody on it." B.T. testified he did this to "stall" defendant so that he could warn the girl's family.

Thereafter, defendant explained that he wanted B.T. to kill a fourteen year-old girl, her mother, and defendant's roommate. Defendant told B.T. "someone named Abraham and [defendant's] brother, Levelt" would "give [B.T.] the money and the gun." B.T. then went to the officer's desk on his prison floor and told the officer he needed to speak to someone because "some guy" was going to "kill the child."

On November 19, 2009, Detective Foti met with B.T. and asked B.T. to wear a concealed recording device and speak with defendant. The "wire" was set up approximately two days later.

B.T. returned to his pod at the jail and asked defendant if he wanted him to "hurt them[,]" and defendant replied "no, it was better if they're dead." Defendant gave B.T. a piece of paper with the address and phone numbers for N.W. and Julienne. Defendant also gave B.T. the phone number of Levelt and Abraham. [2] According to B.T., defendant told him "anything you need Abraham will provide you with[.]" However, B.T. and defendant never discussed money or a gun during the recorded conversation.

2 The paper was introduced at the trial, and B.T. testified that some of the information was written in B.T.'s handwriting because he copied the information defendant provided him.

B.T. provided Foti with the paper containing the names of the persons defendant asked B.T. to "shoot or kill." B.T. reported that defendant also gave him the number for Abraham, who would provide money and a gun. B.T. called Abraham at the request of defendant, and Abraham told him Levelt was going to pay B.T. Abraham gave him Levelt's telephone number. [3]

B.T. also asked Abraham about "the pistol," and Abraham replied "huh[,] ... what pistol."

3 B.T. attempted to call Levelt, but was unsuccessful in reaching him.

After the call, Foti contacted Abraham, but Abraham claimed to have no knowledge of an arranged murder. Foti asked Abraham about the call with B.T., and Abraham replied that their discussion pertained to money for a lawyer and bail.

On November 25, 2009, Officer Pomponio searched defendant's cell and recovered a piece of paper under his mattress with the addresses and phone numbers for Julienne and N.W. It also listed the victim's mother's name and Abraham's name and cell phone number. On the back of the paper there was the name Keith and a phone number.

At trial, Levelt testified that he never spoke with defendant about supplying anyone with a gun or money. He explained that while defendant was in custody, the only money he gave defendant was put in his inmate account for food. Levelt further stated that he never heard of a person named B.T.

Abraham, defendant's friend since 1992, testified that he did not remember being contacted by anyone named B.T., but he did recall a person calling him on defendant's behalf. He explained that the person who called him was asking about money and a gun, but Abraham told the caller that he had no idea what he was talking about, and he threatened to call the police if the person called again. Abraham testified that defendant never told him to provide anyone with a gun, and that he believed the caller had been inquiring about bail money for defendant.

***5** Defendant testified that on May 30, 2008, he was on 18th Avenue in Irvington, checking his car, when a girl walked over to his car and put her head down on the trunk. She told defendant that her mother was seriously ill in the hospital and that she would like to visit her, but had no one to take her there, and no money for transportation. Defendant offered her ten dollars, which the girl accepted, but defendant realized that he did not have money with him. According to defendant, the girl asked if she could go with him to his house to get the money.

Defendant testified that he drove the girl to his house on Munn Avenue, where he lived with his friend, Julienne. When they arrived at his house, defendant asked the girl to wait outside while he looked for the money, but the girl entered the house. Defendant told the girl he could not find money, but she refused to leave the house without it, so defendant wrote his name and number down and told her to call if she still had an emergency. Defendant stated that the girl left his house as Julienne's girlfriend came home.

Later, a girl named Nicole called defendant asking for fifty dollars. According to defendant, the girl never gave her name, but he recognized "Nicole's" voice as the girl he had met earlier that day. Defendant testified that he told the girl "the deal wasn't $50, I have no appointment ... for $50." Defendant remembered the girl asking about sex, but he testified that he had "no appointment for sex or $50[,]" that he "had an appointment for $10 for an emergency if she called for [him] to give her the $10."

Defendant testified that he met B.T. at the Essex County Jail. Defendant stated that he spoke with B.T. in the holding cell after his attorney told him to contact Julienne, and B.T. offered to help him get Julienne to meet with his attorney. According to defendant, B.T. told him that Julienne wanted to kill defendant. Defendant admitted that upon hearing Julienne wanted to kill him, he became interested in killing Julienne. Defendant believed that Julienne set him up with N.W. Defendant admitted that during the recorded conversation, he said "kill him," referring to Julienne, but it was only because B.T. was pressuring him, and knew people who "did that."

Later, defendant spoke with B.T. and told him that he changed his mind, he should not have agreed to have Julienne killed, and asked B .T. to destroy the paper. Defendant stated that he gave B.T. the names and addresses of N.W. and her mother so that B.T. could have Julienne ask them to speak with defendant's attorney. He testified he never told Abraham or Levelt to supply a gun or money to B.T., and that his conversation with B.T. only pertained to having Julienne and Abraham see his attorney.

Following two days of deliberation, the jury returned its verdict, finding defendant guilty, as noted earlier.

This appeal followed.

II.

We shall address defendant's arguments on appeal in the order in which they are presented in the briefs.

A.

***6** Defendant initially argues that testimony provided by B.T. that "defendant and his brothers were major drug dealers and gang members" was "completely irrelevant" and deprived him of a fair trial. However, the statements defendant now argues deprived him of a fair trial were mostly elicited during cross-examination of B.T. by defendant's counsel.

For example, while being cross-examined about his efforts to "get[ ] out of jail" B.T. stated, "... these Haitians ... supply all of Newark, Irvington, East Orange with drugs." In response to further questions, B.T. explained "they moved me because people like that are going to have you killed." Defense counsel stated later he wanted to show that B.T. "was going to do anything to get out of jail."

Also, while being examined about his recorded conversation with Abraham in which getting a weapon was not mentioned, B.T. stated, "You don't talk about weapons over the phone.... These people are from the street. They're drug dealers." When asked why he never asked defendant during a recorded conversation about getting a weapon, B.T. said, "I didn't want to get him ... nervous ... and then go out and hire somebody else to do it ... because one of those little gang members can make one phone call from inside the jail and have that child killed."

Further, defense counsel followed up with questions about B.T.'s reference to "D" (the defendant) as a "notorious drug dealer" and B.T. responded by stating "they sell drugs ... Him, his brothers." Defense counsel then reminded B.T. he had testified earlier he never knew defendant before meeting him at the jail; and B.T. stated, "I knew Abraham. I know his brother, Levelt." The prosecutor, on re-direct, thereafter brought out that B.T. told the State "they run a big drug ring" and he was "afraid for [his] life." Defense counsel later called Detective Foti who testified he had no discussions with B.T. about defendant being a major drug dealer.

It is evident that much of this testimony had been elicited to discredit B.T. First, B.T. testified that defendant approached him because of B.T.'s own self-proclaimed gang connections. It was therefore improbable that defendant would have had to do that if, as B.T. claimed, he were actually a "gang member" himself. Also, B.T. was directly contradicted by Foti who said that B.T. never mentioned any gang or drug activity by defendant or his family. Both Abraham and Levelt testified about their legitimate employment. Finally, the State did not bring the subject up initially; rather, B.T. brought the issue to the fore during cross-examination, and as noted, defense counsel then turned B.T.'s testimony against him in an effort to discredit him.

Because this testimony was not the subject of objection by the defense, we examine these arguments under the plain error standard. Under that standard, a conviction will be reversed if the error was "clearly capable of producing an unjust result." *R.* 2:10–2. "Reversal of defendant's conviction is required only if there was error sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." *State v. Atwater,* 400 *N.J.Super.* 319, 336 (App.Div.2008) (alteration in original) (internal quotation marks omitted). *See also State v. Daniels,* 182 *N.J.* 80, 95 (2004). *Cf. State v. Sharpless,* 314 *N.J.Super.* 440, 456 (App.Div.) (holding that defendant waived any potential objection by not objecting to a detective's testimony at trial), *certif. denied,* 157 *N.J.* 542 (1998), *overruled on other grounds* by *State v. Richards,* 351 *N.J.Super.* 289, 303 (App.Div.2002).

***7** Guided by this standard, we do not find plain error. Not only was the testimony unexpected initially, and given in response to cross-examination, *see State v. Yough,* 208 *N.J.* 385, 388 (2011)(recognizing that the "testimony of witnesses may not always be predictable"), but thereafter a strategic decision was made by counsel to exploit the inconsistencies and improbabilities in B.T.'s testimony. Such strategic decisions will not ordinarily provide a predicate for overturning a verdict. Trial strategy is clearly within the discretion of competent trial counsel. *State v. Coruzzi,* 189 *N.J.Super.* 273, 321 (App.Div.), *certif. denied,* 94 *N.J.* 531 (1983). A reviewing court must grant substantial deference to the discretion of counsel in determining how to conduct trial. *See State v. Arthur,* 184 *N.J.* 307, 321 (2005). This heightened deference given to strategic decisions is only overcome when the defendant shows that the decision was based upon a lack of preparation for trial. *Id.* at 322–23. Defendant does not make this argument.

Further, given the strength of the State's proofs at trial, we perceive no basis on which to conclude that this sporadic testimony would have led the jury to reach a verdict it might not otherwise have reached. The proofs here were substantial.

Consequently, we reject defendant's arguments on this issue.

B.

Defendant argues that the State presented "two different ways" the jury could convict him of kidnapping: asportation and confinement. He avers the judge erred in not charging the jury that they must be unanimous as to the specific basis for finding defendant guilty of kidnapping. Defendant did not object to the charge at the time of trial and raises this argument for the first time on appeal.

Defendant was charged with kidnapping pursuant to *N.J.S.A.* 2C:13–1b(1), which provides that: "[a] person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period, with any of the following purposes: (1) To facilitate commission of any crime or flight thereafter[.]" Kidnapping is a crime of the first-degree, unless "the actor releases the victim unharmed and in a safe place prior to apprehension," in which case, it is a crime of the second-degree. *N.J.S.A.* 2C:13–1c.

The trial judge instructed the jury as to the kidnapping charge as follows:

> In order for you to find the defendant guilty of kidnapping as charged in Count 1, the State is required to prove each of the following two elements to you beyond a reasonable doubt: the first element, the defendant unlawfully removed [N.W.] a substantial distance from the vicinity where she was found or, there's two theories under this count, the defendant unlawfully confined [N.W.] for a substantial period. Either one of those theories.
>
> And, ... a second element, that the removal was for the purpose to facilitate the commission of a crime.

***8** Except for the reference to the "two theories," the charge given by the trial judge was consistent with the Model Charge. *See Model Jury Charge (Criminal),* Kidnapping (*N.J.S.A.* 2C:13–1b(1) to (3)) (rev.4/16/12).

During the jury's deliberation, the jurors requested "another re-reading of Count 1 and the Count's definition of kidnapping and the elements of kidnapping." The trial judge asked counsel if there was any issue with her re-reading the whole charge to the jury and the defendant made no objection.

The trial judge instructed the jury a second time as to the two elements of kidnapping and that they must find the following elements beyond a reasonable doubt: "one, that the defendant unlawfully removed [N.W.] a substantial distance from the vicinity where she was found or unlawfully confined [N.W.] for a substantial period. That's one. It can be one or the other." Following jury instructions, the judge gave a general unanimity instruction to the jury, where she instructed that their verdict must be unanimous, and explained that all twelve jurors must agree on whether defendant is guilty or not for every charge.

Defendant never objected to the jury charge on kidnapping, and did not request that the judge provide the jury with a specific unanimity charge. Consequently, the trial judge had no opportunity to consider defendant's argument raised on appeal. Defendant asserts that even though he did not request a specific unanimity instruction, the trial judge's failure to instruct was plain error. The issue, therefore, is whether the trial judge's failure to give a specific unanimity instruction *sua sponte* was clearly capable of producing an unjust result. *State v. Frisby,* 174 *N.J.* 583, 598 (2002)(citing *R.* 2:10–2); *State v. Parker,* 124 *N.J.* 628, 638 (1991).

Our Constitution requires a unanimous jury verdict in criminal cases. *N.J. Const.,* art. I, para. 9; *R.* 1:8–9. In addition, proper jury instructions are essential to a fair trial. *State v. Green,* 86 *N.J.* 281, 287 (1981); *State v. Afanador,* 151 *N.J.* 41, 51 (1997). The court must give the jury "a comprehensive explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." *Green, supra,* 86 *N.J.* at 287–88. The jury charge should include instruction on all "essential and fundamental issues and those dealing with substantially material points." *Id.* at 290. In assessing the propriety of the jury charge, we examine the entire charge to see whether it was ambiguous or misleading or whether it misinformed the jury of the law. *State v. R.B.,* 183 *N.J.* 308, 324 (2005); *State v. Hipplewith,* 33 *N.J.* 300, 317 (1960).

A general unanimity instruction is usually sufficient to protect defendant's right to a unanimous verdict. *Parker, supra,* 124 *N.J.* at 638. Our Supreme Court has held that a specific unanimity requirement is necessary only "in cases where there is a danger of a fragmented verdict" and that, in such cases, "the trial court must upon request offer a specific unanimity instruction ." *Id.* at 637 (citations omitted). This circumstance can arise where the facts are "exceptionally complex" or where there is a variance between the indictment

and the trial proofs. *Id.* at 636. Moreover, "[a]lthough such a charge should be granted on request, in the absence of a specific request, the failure so to charge does not necessarily constitute reversible error." *Id.* at 637. The "core question" in such cases is whether the "instructions as a whole posed a genuine risk that the jury would be confused." *Id.* at 638.

***9** We do not find a genuine risk of jury confusion in this case. The question for the jury here was whether defendant forced N.W. into his car, and thereafter forced her to enter his home, or whether N.W. went along voluntarily. There were no entirely distinct factual scenarios presented by the State for the jury to consider, and therefore the danger of a fragmented verdict here was not even reasonably debatable. Defendant's reliance on *Frisby,* does not warrant a different conclusion. There, the State advanced two very distinct theories against defendant on an endangering the welfare of a child charge, each requiring different acts and different evidence. Consequently, we find defendant's arguments on this issue unpersuasive.

C.

Defendant argues, and the State concedes, that the trial judge erred when she stated she was required as a matter of law to impose consecutive sentences on the witness tampering charges in counts ten, eleven and twelve. The State further concedes that a remand is necessary to consider whether these counts, together with the hindering charge in count thirteen, merge with the conspiracy to commit murder conviction. We agree and remand to the trial court for resentencing and consideration of the issue of merger.

Defendant further argues that in the event the trial judge does not merge the second-degree witness tampering with the conspiracy to commit murder conviction, there was nonetheless insufficient evidence that defendant employed "force" or threatened the "use of force" to support that charge. Defendant contends that the only "threat of force" herein was the factual predicate of the conspiracy to commit murder charge. Because this issue is integral to the merger issue that we have directed the trial court to consider on remand, we likewise remand this issue to the trial court.

D.

Defendant argues that his convictions were against the weight of the evidence. This argument is without sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(2).

Affirmed, except that we remand for re-sentencing on counts ten, eleven, twelve and thirteen, and for consideration of defendant's arguments as to the sufficiency of the evidence supporting defendant's conviction for second-degree witness tampering on count ten. We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2014 WL 1125365

End of Document

2013 WL 1222843
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Ahmad J. JOHNSON, Defendant–Appellant.

A-6238-09T1
|
Argued March 20, 2013.
|
Decided March 27, 2013.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 06–10–1770.

Attorneys and Law Firms

Michael Confusione argued the cause for appellant (Hegge & Confusione, L.L.C., attorneys; Mr. Confusione, of counsel and on the brief).

Jennifer E. Kmieciak, Deputy Attorney General, argued the cause for respondent (Jeffrey S. Chiesa, Attorney General, attorney; Ms. Kmieciak, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges SAPP–PETERSON, HAAS and HAPPAS.

Opinion

PER CURIAM.

***1** Tried before a jury on a twelve-count indictment, defendant Ahmad Johnson was convicted of first-degree carjacking, *N.J.S.A.* 2C:15–2 (count one); three counts of second-degree possession of a weapon for an unlawful purpose, *N.J.S.A.* 2C:39–4a (counts two, six and ten); and three counts of third-degree unlawful possession of a weapon, *N.J.S.A.* 2C:39–5b (counts three, seven and eleven). Defendant was also convicted of the first-degree attempted murder of Lawrence Herring, *N.J.S.A.* 2C:5–1 and *N.J.S.A.* 2C:11–3 (count four); the first-degree murder of Piotr Raczek, *N.J.S.A.* 2C:11–3a(1) and *N.J.S.A.* 2C:3a(2) (count nine); and second-degree witness tampering regarding Raczek, *N.J.S.A.* 2C:28–5a (count twelve). The jury did not reach count five, which charged defendant with the second-degree aggravated assault, serious bodily injury of Herring, *N.J.S.A.* 2C:12–1b(1), because this was a lesser-included offense of the attempted murder charge under count four. Count eight of the indictment, which charged defendant with witness tampering concerning Herring, was dismissed by the State prior to trial.

At sentencing, the trial judge merged count two into count one and sentenced defendant on count one to thirty years in prison, subject to the provisions of the No Early Release Act ("NERA"), *N.J.S.A.* 2C:43–7.2, and to a concurrent five-year term, subject to a three-year period of parole ineligibility on count three. The judge merged counts five [1] and six into count four and sentenced defendant on count four to a consecutive twenty-year term, subject to NERA, with a five-year period of parole supervision upon his release, and to a concurrent five-year term, subject to three years of parole ineligibility on count seven. The judge merged counts ten and twelve into count nine, and sentenced defendant to life in prison, without eligibility for parole, on count nine, and to a concurrent five-year term, with a three-year period of parole ineligibility on count eleven. The sentence on count nine was to run consecutive to the sentences imposed on counts one, three, four and seven. The judge also ordered defendant to pay mandatory fines and penalties.

[1] As already noted, the jury did not reach count five of the indictment. Therefore, as discussed at the conclusion of this opinion, the judgment of conviction entered in this case will need to be corrected to reflect the jury's disposition of this charge.

On appeal, defendant has raised the following contentions:

POINT I

ADMISSION OF HEARSAY VIOLATED THE RULES OF EVIDENCE AND DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT THE WITNESS AGAINST HIM (*U.S. Const.* Amends. VI, XIV; *N.J. CONST .*, (1947), Art. I, ¶¶ 1, 9, 10) (PLAIN ERROR).

POINT II

ADMISSION OF MR. RACZEK'S OUT–OF–COURT IDENTIFICATION VIOLATED DEFENDANT'S DUE

PROCESS RIGHTS BECAUSE THE IDENTIFICATION PROCEDURE WAS IMPERMISSIBLY SUGGESTIVE AND RESULTED IN AN UNRELIABLE IDENTIFICATION (*U.S. CONST.* AMENDS. V, VI, XIV; *N.J. Const.* ART. 1 ¶¶ 1, 9, 10) (PLAIN ERROR).

POINT III

THE JUDGE'S INSTRUCTIONS REGARDING THE OUT–OF–COURT IDENTIFICATION PROCEDURE WERE INSUFFICIENT BECAUSE THEY FOCUSED ON IRRELEVANT FACTORS AND FAILED TO FOCUS THE JURY ON FACTORS CRITICAL TO THE RELIABILITY OF THE IDENTIFICATION EVIDENCE (PLAIN ERROR).

***2** *POINT IV*

DEFENDANT'S RIGHT TO CONFRONT THE PRIMARY STATE WITNESS AND THE STATE'S VERSION OF EVENTS WAS INFRINGED AT TRIAL BELOW, AND THE JURY INSTRUCTIONS DID NOT ADVISE THE JURY HOW TO PROPERLY EVALUATE THE STATE'S WITNESS'S TESTIMONY, DEPRIVING DEFENDANT OF A FAIR TRIAL.

POINT V

THE TRIAL COURT'S RESPONSE TO THE JURY DURING DELIBERATIONS, ABOUT THE NATURE OF A GRAND JURY INDICTMENT AND RESULTING PRE–ARRAIGNMENT CONFERENCE, DILUTED THE STATE'S BURDEN OF PROOF AT TRIAL AND DEPRIVED DEFENDANT OF A FAIR DELIBERATION PROCESS BY THE JURY (PLAIN ERROR).

POINT VI

THE TRIAL COURT ABUSED ITS SENTENCING DISCRETION BY IMPOSING THREE MAXIMUM PRISON TERMS.

Defendant filed a supplemental brief on his own behalf and has raised the following contentions:

Point I

The Trial Court's Response to the Jury's Question about the Pre–Arraignment Conference, Given the Unique Circumstances of this Case, Deprived Defendant of Due Process and a Fair Trial. (Not Raised Below).

Point II

The Trial Court's Failure to Provide the jury with a Limiting Instruction on the Use of Evidence of Defendant's Request to "Push up on" a State's Witness Deprived Defendant of Due Process and a Fair Trial. (Not Raised Below).

Point III

Juror # 10's Failure to Disclose During Jury Selection that He knew a Fact Witness Deprived Defendant of a Fair Trial. (Not Raised Below).

Point IV

Trial counsel was Ineffective with Respect to his Handling of Juror # 10's Failure to Disclose Material Information During Jury Selection. (Not Raised Below).

After reviewing the record in light of the contentions advanced on appeal, we affirm defendant's convictions and sentence, and remand only for the correction of the judgment of conviction.

I.

The State developed the following proofs at trial. On March 3, 2005, at approximately 8:00 p.m., Officer Eric Infantes of the Jersey City Police Department saw Piotr Raczek waving him down as he drove down the street. Officer Infantes testified Raczek was hysterical and "moving around constantly just trying to tell us what happened." Raczek told Infantes he had just parked his car, a blue Subaru WRX STI model, [2] when he was approached by two men. One of the men pointed a pistol at Raczek and ordered him to turn over his car keys and walk away. One of the men told Raczek that, if he turned around, he would be shot. The men then drove away in Raczek's car.

2 Raczek's friend, Erik Wildermann described the vehicle as a "rally car," meaning it was "a very fast car, it has a lot of horsepower."

Raczek described the man with the gun as "a Black male, dark skinned, approximately five-ten, 16, 17 years of age," with "a very narrow face" and "big cheek bones." The man was dressed in a black jacket and black pants and wore a black knit cap with red stripes on it. Raczek gave a similar description for the second assailant. Detective Keith Armstrong took Raczek to the police station and showed him some photos

from the department's juvenile files. However, Raczek was unable to identify either suspect from the photos he was shown.

***3** On March 5, 2005, two days after the carjacking, Lawrence Herring and his wife, Karen Walker–Herring, arrived at their home in Newark and noticed a blue car parked across the street from their house. Herring testified he recognized the car as one that he believed had been following him over the past "couple of days." As the couple brought their groceries into their house, the car drove away.

Later that evening, Herring picked up his friend, John Umstead, in his Ford Explorer and, as he drove around Newark, Herring noticed the same car. Herring pulled over and the car pulled next to him. Herring rolled down his window and he was shot multiple times in the face, back and shoulder. Umstead moved into the driver's seat and drove Herring to the hospital. At trial, both Herring and Walker–Herring identified Raczek's vehicle as the car they each observed that day.

Walker–Herring was notified of the shooting and she and the couple's daughter, who was home from college, went to the hospital. Defendant had formerly dated the Herrings' daughter. Herring objected to this relationship and testified he had an argument with defendant on the telephone in which he told defendant he could no longer see his daughter. As Walker–Herring was driving to the hospital, her daughter received a telephone call from defendant and, about an hour later, defendant arrived at the hospital. Walker–Herring testified that when a doctor came to speak to the family, defendant asked him whether Herring would be able to remember the shooting.

About two or three days after the shooting, Walker–Herring noticed the same blue car following her. She drove to the Irvington Police Department and gave police the license plate number of the car. The plate came back as belonging to Raczek's stolen vehicle. Detective John La Bella of the Newark Police Department obtained a photo of Raczek's car and showed it to Herring at the hospital. Herring identified it as the one involved in the shooting.

On March 9, 2005, the Newark police advised Detective Armstrong of this. Detective La Bella assembled a photo array of six suspects, including a photo of defendant, and gave it to Detective Armstrong. On March 10, Detective Armstrong picked up Raczek and brought him to the station to review the photos. He testified he gave Raczek written instructions "on how the array is conducted, what it consist[s] of" and had Raczek sign the form to indicate he had read and understood it.

Detective Armstrong showed the photos to Raczek one at a time. The detective testified that Raczek looked at the first four photos and said "no" to each one. When Raczek got to the fifth photo, however, the detective testified Raczek "actually became teary eyed. He actually paused. He stopped for a minute." The detective then showed him the sixth photo and Raczek said "no" to that one. After he regained his composure, Raczek asked to see the photos again. When he reviewed the fifth photo, Raczek said "that's him. Again, he became teary eyed, nervous, a little shaky." Detective Armstrong testified Raczek said he was "sure" of his identification. Raczek signed and dated the photo he had selected. Defendant was the individual in the fifth photo.

***4** Detective La Bella testified that Raczek's car was thereafter recovered in Irvington, about two or three blocks from defendant's residence. The car was placed in the Irvington impound lot. Herring and Walker–Herring were taken to the lot to see the vehicle. Herring testified it was the car that was involved in the shooting and Walker–Herring again confirmed it was the car that had been following her.

Defendant was arrested on the carjacking charge, but was released on bail. On July 27, 2005, he was indicted on the carjacking charge. A pre-arraignment conference was held on August 30, 2005. One day later, on August 31, Raczek was murdered.

Henry Rivera testified he had been "hanging out" with defendant during the Summer of 2005 and saw him "basically" every day. Defendant told Rivera he had committed the carjacking with another individual known as "L." Defendant also admitted he had used Raczek's car when he shot Herring. "L" was with defendant at the time of the shooting. According to Rivera, defendant was "stressing" about the pending carjacking case and was worried it would lead to him being charged for the Herring shooting.

On August 31, defendant picked up Rivera in defendant's dark green Lumina, which had tinted windows. Defendant told Rivera that he "was going to try to persuade [Raczek] not to come to [c]ourt, rob him." Defendant further explained "[h]e was going to try to bribe him, holla at him, see if he could take some money, try to intimidate him[.]"

Around 10 p.m. that night, Allison DeRobertis, who lived on Raczek's street, testified she saw a green car with tinted windows circling the block. Wildermann, who lived on the same street, saw the vehicle stop on the street. Two men got out and asked him if they could park by a fire hydrant. Wildermann told the men they would probably get a ticket if they parked there. Wildermann went back into his house and saw the men walking back to the car.

Rivera testified that defendant drove around looking for parking and then stopped again on Raczek's street. Defendant got out of the car and Rivera saw he was carrying a gun. While Rivera was sitting in the car, defendant called him twice on his cell phone. The second time, defendant told Rivera he had seen Raczek.

Defendant's phone records were admitted in evidence and showed that he had made two calls, one at 10:49 p.m. and the other at 10:52 p.m. to a cell phone subscribed to by Rivera's wife.[3] Detective Kevin Wilder of the Hudson County Prosecutor's Office testified both phone calls were made within one mile of a cell tower located 500 feet from where Raczek was found shot.

3 Two cell phones were covered by this subscription plan. Rivera testified he and his wife each used one of the phones and that the calls were made by defendant to the phone he used.

After the second call, Rivera testified that he heard gun shots. Defendant then jumped into the car and drove off. DeRobertis testified that after hearing gunshots, she again saw the green car driving down the street.

Defendant drove Rivera back to Newark so defendant could "[s]witch cars" at "his mom's house." Defendant wanted to "double back" to Jersey City "[t]o make sure Piotr was down." Defendant's cell phone records revealed that his cell phone moved from Jersey City to Newark between 10:52 p.m. and 11:08 p.m. After switching cars, Rivera testified defendant drove to a female friend's house and "[d]umped the gun on her[.] Defendant and Rivera then drove back to Jersey City. Defendant's cell phone records revealed a call was placed at 11:59 p.m. using a cell tower near Journal Square in Jersey City. When defendant and Rivera got near Raczek's house, they saw the police activity there and defendant drove Rivera to Rivera's home in Bloomfield.

***5** At approximately 10:54 p.m., Officer Maria Ruocco of the Jersey City Police Department responded to a call "for shots fired[.]" She testified she found Raczek "lying on his side in a fetal position" in front of his house. She could not detect a pulse. Dr. Lyla Perez subsequently performed an autopsy and testified Raczek had been shot six times in the chest and torso.

Detective Wilder also responded to the scene immediately following Raczek's shooting. However, when he learned defendant had been indicted, the preceding day, for hijacking Raczek's car, he along with other officers proceeded to defendant's home in Irvington. The officers found a dark green Lumina with tinted windows parked in the driveway. Defendant was at the home and told Detective Wilder he had been home since 10:00 p.m. the previous evening. Defendant voluntarily gave the detective his cell phone number and consented to a vehicle search. No evidence was found during the search. Defendant was not arrested at that time.

According to Detective Wilder, defendant later gave two statements to the police. On September 19, 2005, he again told the detective he had been had been home on the night of the shooting. On September 29, he told the detective he had loaned his cell phone "out to somebody whom he doesn't remember and got it back" about 10:00 p.m. on the evening of the shooting.

Defendant was subsequently arrested. On February 13, 2007, he sent a letter from jail to a friend, Rasheen Smalls. The letter was recovered by the Internal Revenue Service as part of an unrelated investigation and then turned over to the Hudson County Prosecutor's Office. By this time, Rivera had already agreed to testify against defendant at trial.

In the letter, which Rivera read at trial, defendant told Smalls that Rivera "threw him under the bus for no reason." Defendant asked Smalls to tell a mutual friend, Abdul Meyers, "to holla at this man [indicating Rivera] and tell him to fix what he fucked up." Smalls was also instructed to "[t]ell him under no circumstances can he get on the stand." Defendant also asked Smalls and others "to push up on him and don't let him finish me please."

Defendant testified at trial. He denied carjacking Raczek's car or shooting Herring. He claimed he had a good relationship with Herring. Defendant also denied murdering Raczek. Instead, he implicated Rivera in that crime. Defendant testified he loaned his car and cell phone to Rivera around

8:00 p.m. the night of Raczek's death. At approximately 11:00 p.m., Rivera returned the car, but not the cell phone. Defendant testified Rivera returned with his cell phone at 3:00 a.m. and told defendant he "hollered at the old boy for [him]." When defendant asked Rivera what he was talking about, Rivera said Raczek "wasn't coming to Court. You don't got nothing to worry about." Defendant stated he never provided this information to the police in any of his statements because he was "being a good friend" to Rivera.

II.

***6** Because Raczek had been murdered prior to trial, he was obviously not available to testify. The State called Officer Infantes to testify about the statements made by Raczek immediately after the carjacking and Detective Armstrong to testify about Raczek's subsequent identification of defendant as the perpetrator. Defendant did not object to this testimony. For the first time on appeal, defendant contends the trial judge's admission of Raczek's statements was an abuse of discretion resulting in plain error which not only violated the hearsay rules, but also defendant's constitutional right to confront witnesses against him. We disagree.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c); *see also* State v. Savage, 172 N.J. 374, 402 (2002). Hearsay is generally inadmissible because it is "untrustworthy and unreliable[.]" State v. White, 158 N.J. 230, 238 (1999). Some hearsay, however, is admissible, because "exceptions are created out of necessity and are justified on the ground that 'the circumstances under which the statements were made provide strong indicia of reliability.' " *Id.* at 238 (quoting State v. Phelps, 96 N.J. 500, 508 (1984)).

The Confrontation Clause contained in the Sixth Amendment, which applies to the states by way of the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" The Supreme Court of the United States has held that the Confrontation Clause bars the admission of "[t]estimonial statements of witnesses absent from trial" except "where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369, 158 L. Ed.2d 177, 197 (2004).

We review the admission of evidence employing an abuse of discretion standard. Here, Raczek was unavailable to testify at trial, but defendant had not had a prior opportunity to cross-examine him. Therefore, the testimony of the officers concerning what Raczek had told them was hearsay and subject to timely objection.

However, defendant raised no objection to this testimony at trial. We review arguments raised for the first time on appeal under a "plain error standard." Under that standard, a conviction will be reversed only if the error was "clearly capable of producing an unjust result." *R.* 2:10–2; *see also* State v. Macon, 57 N.J. 325, 337 (1971). Errors in admitting evidence, including those brought to the trial judge's attention, are not grounds for reversal if deemed harmless. Macon, supra, 57 N.J. at 337–38. This is true even if the errors are of a constitutional dimension. *Id.* at 338. Trial errors may be found harmless when evidence of guilt is overwhelming. State v. Gillispie, 208 N.J. 59, 93 (2011).

***7** That is clearly the case here. The State presented overwhelming evidence that defendant murdered Raczek to make him unavailable as a witness on the carjacking charge. Rivera testified that defendant confided in him that he had carjacked Raczek's vehicle and that he needed to take steps to ensure Raczek would not testify against him on that charge. The day after defendant's pre-arraignment, Rivera accompanied defendant as he drove to Raczek's home. Rivera saw Raczek get out of the car carrying a gun. He then received two telephone calls from defendant indicating he saw Raczek. Rivera heard the shots and was with defendant as he drove away from the scene. Raczek's neighbors saw defendant's car on the street and defendant's own phone records confirmed that the calls were made. Defendant later sent a letter to a friend from jail stating that Rivera needed to be silenced before he could testify.

Under these circumstances, where there was overwhelming evidence demonstrating defendant's guilt, independent of Raczek's identification of him, we perceive no plain error in the admission of the officers' testimony. Given the strength of the other evidence presented, this testimony was not "clearly capable of producing an unjust result." Macon, supra, 57 N.J. at 337. Therefore, we reject defendant's contention.

Moreover, effective July 1, 2011, N.J.R.E. 804(b)(9) now clearly permits the admission of an out-of-court statement by a witness who is unavailable if the defendant engaged in wrongdoing to prevent that witness from testifying. The

Supreme Court found that this new rule of evidence should be adopted in *State v. Byrd,* 198 *N.J.* 319, 349–350 (2009). The Court noted that a forfeiture-by-wrongdoing exception to the hearsay rule reflects long-standing legal and equitable principles that were well recognized at the time of the offenses involved in the present case. *Id.* at 334–49. In her concurrence in *Byrd,* Justice LaVecchia, citing extensively to the common law's long-standing recognition of the forfeiture-by-wrongdoing doctrine, believed that enactment of the hearsay exception need not precede a court's exercise of its inherent equitable powers to address "a defendant's wrongdoing that undermines the judicial system." *Id.* at 358, 369–70 (LaVecchia, J., concurring).

While we agree with Justice LaVecchia's analysis, we do not here rule that *N.J.R.E.* 804(b)(9), which was not effective at the time of trial, can be applied in this case. However, in the event of a retrial, it is clear that the *Rule* would apply. *State v. Rose,* 425 *N.J.Super.* 463, 473 (App.Div.2012) (holding that *N.J.R.E.* 804(b)(9) can be applied by a trial court even though the charges involved in the trial arose prior to the *Rule's* effective date).

Given the overwhelming nature of the State's proofs that defendant murdered Raczek for the specific purpose of preventing him from testifying, it cannot seriously be questioned that, if there were a retrial, the State would be able to demonstrate, by a preponderance of the evidence at a *Rule 104* hearing, that defendant engaged in "wrongful conduct directly or indirectly," which caused Raczek's unavailability and that the officers' testimony concerning Raczek's statements was reliable. *Byrd, supra,* 198 *N.J.* at 351–52. In these circumstances, where a retrial would obviously lead to the admission of this same evidence, we cannot say it was plain error to allow the officers' testimony concerning Raczek's statements in this case. *See State v. Torres,* 313 *N.J.Super.* 129, 155–59 (App.Div.), *certif. denied,* 156 *N.J.* 425 (1998) (holding that a court may consider whether the decision on admissibility of evidence on a retrial would be any different in determining whether it was plain error to admit the evidence in the first trial).

***8** Defendant also argues that Detective Wilder should not have been permitted to testify about a conversation he had with a woman who defendant identified as his girlfriend. The following colloquy occurred at trial:

> [Prosecutor]: Did you take time to review [defendant's] statement after you returned to the Homicide Squad?
>
> [Wilder]: Yes, I did.
>
> [Prosecutor]: What action, if any, did you take to confirm or refute his version of events?
>
> [Wilder]: He mentioned a girlfriend he met with on the evening of August 31st.
>
> [Prosecutor]: Did you locate her?
>
> [Wilder]: Yes. He identified her during the statement as Sabrina [Bailey] from East Orange. We located Sabrina Bailey in Newark.
>
> [Prosecutor]: Without saying specifically what she said, did she confirm his version of events that he was with her?
>
> [Defense counsel]: Objection, your Honor.
>
> THE COURT: Overruled.
>
> [Wilder]: No, she did not.

Defendant now contends, relying upon *State v. Bankston,* 63 *N.J.* 263 (1973), he was denied a fair trial as a result of Detective Wilder's testimony because this testimony "suggested that the investigating detective possessed information from defendant's girlfriend that implicated defendant in the crimes." We disagree.

In *Bankston,* our Supreme Court confirmed that the hearsay rule is not violated when a police officer explains that he approached a suspect or went to a crime scene based "upon information received," because such testimony explains his subsequent conduct and shows that the officer was not acting in an arbitrary manner. *Id.* at 268; *accord State v. Luna,* 193 *N.J.* 202, 217 (2007). However, the *Bankston* Court cautioned that both the hearsay rule and a defendant's Sixth Amendment right to be confronted by the witnesses against him or her are violated if the officer becomes more specific and repeats what another person told the officer linking the defendant to a crime. *Bankston, supra,* 63 *N.J.* at 268–69.

According to the Court, "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." *Id.* at 271. *See also State v. Branch,* 182 *N.J.* 338, 352 (2005) (holding the phrase "based on information received" may be used by police officers to explain their actions, but only if necessary to rebut a suggestion that they

acted arbitrarily and where use of that phrase does not create an inference that the defendant was implicated in a crime by some unknown person). Nonetheless, erroneous admission of such testimony is not automatic grounds for reversal, but may be assessed under the harmless error standard. *Bankston, supra,* 63 *N.J.* at 272–73.

Contrary to defendant's contention, Detective Wilder's testimony did not lead to the inescapable conclusion that Bailey had specifically advised that defendant was involved in criminal activity. Rather, the detective's brief testimony merely indicated the police had followed up on defendant's statement as part of their investigation.

***9** More importantly, even if the judge erred in overruling defendant's objection, defense counsel went on to ask the detective a number of questions about Bailey on cross-examination, including specific questions about whether Bailey was able to corroborate defendant's account that he was with her on the night of the murder. The following colloquy occurred during cross-examination:

> [Defense Counsel]: Now, regarding Sabrina Bailey, you did go to her residence, correct?
>
> [Wilder]: No. I did not.
>
> [Defense Counsel]: Mr. Hart went to her residence, Calvin Hart?
>
> [Detective]: I believe he spoke with her, yes.
>
> [Defense Counsel]: And in fact, Ms. Bailey neither confirmed nor denied whether or not [defendant] was there on August 31, correct?
>
> [Wilder]: She recalled a different date.
>
> [Defense Counsel]: But she said she wasn't sure, isn't that correct?
>
> [Wilder]: Correct.
>
> [Defense Counsel]: She said, in fact, she works long hours and her days run together, isn't that so?
>
> [Wilder]: Yes.
>
> [Defense Counsel]: So, when—as a result of speaking with her, it is pretty much inconclusive, correct?
>
> [Wilder]: Yes.
>
> [Defense Counsel]: Because she really didn't remember, correct?
>
> [Wilder]: Correct.

Thus, whatever prejudice was caused to defendant by the State's very limited questioning of Wilder on this topic was more than ameliorated by defense counsel's pointed cross-examination, which elicited that Bailey was not sure whether defendant was with her that evening. Therefore, any error in admitting Wilder's testimony was harmless.

III.

Defendant next argues, again for the first time on appeal, that the identification procedure used by Detective Armstrong during Raczek's examination of the photo array was "impermissibly suggestive." He also asserts the judge's instructions to the jury "regarding the out-of-court identification procedure were insufficient" because they did not comply with the requirements recently established by our Supreme Court in *State v. Henderson,* 208 *N.J.* 208 (2011). We reject both contentions.

The two-step analysis for determining the admissibility of eyewitness identification set forth in *Manson v. Brathwaite,* 432 *U.S.* 98, 97 *S.Ct.* 2243, 53 *L. Ed.*2d 140 (1977), was adopted in New Jersey in *State v. Madison,* 109 *N.J.* 223 (1988).

> [A] court must first decide whether the procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." In carrying out the second part of the analysis, the court will focus on the reliability of the identification. If the court finds that the identification is reliable despite the impermissibly suggestive nature of the procedure, the identification may be admitted into evidence.
>
> [*Id.* at 232 (citations omitted).]

***10** As the Court noted, "reliability is the linchpin in determining the admissibility of identification testimony[.]" *Ibid.* (quoting *Manson, supra,* 432 *U.S.* at 114, 97 *S.Ct.* at 2253, 53 *L. Ed.*2d at 154).

Defendant did not challenge the identification procedure used by Detective Armstrong before or during the trial. Although under the plain error rule we will consider allegations of *error* not brought to the trial court's attention that have a clear capacity to produce an unjust result, *Macon, supra,* 57 *N.J.* at 337–39, we generally decline to consider *issues* that were not presented at trial. *Neider v. Royal Indem. Ins. Co.* 62 *N.J.* 229, 234 (1973). "Because the issue [of the alleged suggestibility of the identification procedure] never was raised before the trial court, because its factual antecedents never were subjected to the rigors of an adversary hearing, and because its legal propriety never was ruled on by the trial court, the issue was not properly preserved for appellate review." *State v. Robinson,* 200 *N.J.* 1, 18–19 (2009). However, even if we consider that issue here, we perceive nothing in the record to suggest the identification procedure used by Detective Armstrong was in any way suggestive. The detective did not select the six photos that were included in the photo array. The array consisted of the "faces of black males with similar features" and each man had dreadlocks. Prior to showing the photos to Raczek one at a time, Detective Armstrong provided him with written instructions on how the array would be conducted. Raczek was informed that the person who committed the crime may or may not be in the group of photos; certain aspects of appearances, such as hairstyles and facial hair, are easily changed; and the detective would not provide any feedback on Raczek's selection because he did not know the identity of the suspect.

After examining each photo, Raczek made a positive, indeed visceral, identification of defendant as the person who had carjacked his vehicle. There is simply nothing in the procedure that was used to support defendant's contention that it was suggestive or unreliable.

Defendant nevertheless argues the procedure must have been suggestive because Raczek did not identify defendant as the result of examining photos immediately after the carjacking. However, defendant's photo was not shown to Raczek on the day of the carjacking. The fact he did not select a suspect from one of the photos shown to him on that date, therefore, bolsters his subsequent identification of defendant.

Raczek told Detective Armstrong the person who took his car was wearing all black, including a black jacket. Defendant complains that he was the only person in the photo array who was depicted wearing a black "hoodie." However, he did not demonstrate at trial that there was anything suggestive about the clothing he wore in the photograph that would have made Raczek's identification unreliable.

***11** Finally, there is no basis for defendant's contention that Detective Armstrong did not properly document the results of the identification procedure. The detective had Raczek sign and date the photo he selected as the suspect. He followed up by completing a Supplementary Investigation Report, which detailed the identification procedure.

Defendant's related contention, that the judge erred by not instructing the jury in accordance with the new identification procedures recently developed by our Supreme Court in *Henderson* also lacks merit. On August 24, 2011, the Supreme Court revised the rules governing out-of-court identification in *Henderson, supra,* 208 *N.J.* at 218–20. However, the Court specifically held that these "revised principles ... will apply purely prospectively." *Id.* at 302. Thus, the Henderson procedures do not apply here because defendant was tried over a year before Henderson was decided and the decision is not retroactive.

Here, the trial judge followed the Model Jury Charge for "Identification: In–Court and Out–of–Court Identifications" (2007), which were the model instructions in effect at the time of defendant's trial. Defendant raised no objection to the judge's instructions at trial and, therefore, the plain error standard again applies. *R.* 2:10–2. Because the judge's instructions on identification were in strict accord with the Model Jury Charge, we perceive no error, much less plain error, in the "[a]ppropriate and proper charge [ ]" provided to the jury on this issue. *State v. Green,* 86 *N.J.* 281, 287 (1981).

IV.

Defendant asserts the trial judge erred by denying his request to cross-examine Rivera about his prior and unrelated arrests or to introduce information concerning these arrests through other State witnesses. We disagree.

During defense counsel's cross-examination of Rivera, the following exchange occurred:

> [Defense Counsel]: So your decision at a later date to call [the police] and give them information was to make sure that you weren't going to get charged, correct?
>
> [Rivera]: Yes.

> [Defense Counsel]: And in fact, when you did speak to [the police] on March 3rd, you said you wanted immunity from prosecution?
>
> [Rivera]: Yes.
>
> [Defense Counsel]: Because you didn't want to get charged with a homicide?
>
> [Rivera]: Because just being with somebody you can get charged.
>
> [Defense Counsel]: And you know what it is like to be charged with a homicide don't you?

At that point, the prosecutor's objection was sustained by the judge. Defense counsel conceded Rivera had not been convicted of any prior homicide. Indeed, one of the arrests to which defense counsel wanted to refer concerned a matter where Rivera had been acquitted of the charge after a trial. After sustaining the prosecutor's objection, the judge gave the jury a curative instruction to disregard defense counsel's question.

Later, defense counsel attempted to ask Detective Stambuli whether he was aware from his meetings with Rivera that he had been recently arrested. The judge conducted a *Rule* 104 hearing which established that Rivera had been cooperating with the Drug Enforcement Agency (DEA) in an ongoing investigation that was not related to the present matter. The judge ruled defense counsel could ask the detective whether he was aware of Rivera's cooperation with the DEA, but prohibited him from asking whether Rivera had been arrested.

***12** Contrary to defendant's contentions, the judge's rulings were entirely proper. *N.J.R.E.* 609 permits impeachment of a witness' credibility with evidence of "the witness' *conviction* of a crime[.]" (Emphasis added). Thus, the witness's prior *arrests* may not be used for this purpose. *State v. Jenkins*, 299 *N.J.Super.* 61, 72 (App.Div.1997) (noting *N.J.R.E.* 609 "applies only to criminal convictions."). In addition, defendant provided no evidence that any of Rivera's arrests were in any way related to the events involved in this case. Thus, the judge did not abuse his discretion in prohibiting defense counsel from pursuing this line of questioning.

In addition, defendant was permitted to introduce evidence of Rivera's prior *convictions* in an attempt to impeach him. Defendant complains the judge "only" instructed the jury that "[t]his evidence may only be used in determining the credibility or believability of" this witness. For the first time on appeal, defendant argues the judge should have also given the jury the Model Jury Charge for "Testimony of a Cooperating Co–Defendant or Witness" (2006), based upon his allegation Rivera was only testifying against him in the hope of getting favorable treatment for himself. We disagree.

Generally, a defendant has a right, upon request, to a specific cautionary instruction that a witness' testimony must " 'be carefully scrutinized and assessed in the context of this specific interest in the proceeding.' " *State v. Begyn*, 34 *N.J.* 35, 54 (1961) (citation omitted). However, the charge carries "risks for the defendant because phrasing is difficult to avoid conveying to the jury an impression that the court is suggesting his guilt solely because the witnesses have admitted theirs and implicated him ." *Id.* at 55. Thus, the Supreme Court has held that it is "[c]ertainly ... not error, let alone plain error, for a trial judge to fail to give this cautionary comment where it has not been requested." *State v. Artis*, 57 *N.J.* 24, 33 (1970).

Here, defense counsel did not request a cooperating witness instruction and, therefore, the judge did not err in failing to provide such an instruction to the jury. In addition, the judge instructed the jury it could consider, in determining a witness' credibility, whether the witness had an "interest in the outcome of the trial," as well as any "possible bias" in favor of the side for whom the witness testified[.]" Therefore, we reject defendant's argument on this point.

V.

Defendant next argues that the trial judge improperly responded to one of the questions the jury posed during its deliberations. The jury asked, "what's a pre-[a]rraignment?" The judge then explained the pre-arraignment process to the jury and placed it in context by also explaining the process leading up to the pre-arraignment conference. The judge instructed the jury as follows:

> [L]et me give you a little context.
>
> ***13** When the police arrest and charge an individual with an offense, they fill out a complaint, they sign that complaint. That complaint in and of itself under our Constitution is insufficient to institute a prosecution for any crime that carries a term of imprisonment more [than] one year.

If the crime that they're charging you with carries a potential sentence of more than one year, you have a[c]onstitutional [r]ight as a citizen of this State to have the matter presented to the Grand Jury before you can be prosecuted for that offense.

The Grand Jury serves as a buffer between the citizens of this State and the law enforcement mechanism of the State. *The law enforcement officers are required to present evidence to the Grand Jury to establish two things, by a standard of probable cause which is far different than proof beyond a reasonable doubt as I have explained to you.* They must establish two things in the Grand Jury.

First, that the crime was committed.

Second, that there is probable cause to believe that the [d]efendant is the one who committed it, the person they charged.

If they can't do that, if the Grand Jurors are not satisfied that there's probable cause to believe one of both of those things exist, then they refuse to return an indictment. If they refuse to return an indictment, the case is over. It's done. There is no charge any longer against that citizen.

On the other hand, if they are satisfied the State [has] presented evidence that convinced them it [has] probable cause to believe a crime was committed and the Defendant is the one who committed it, they return an indictment. That's a formal charging document.

The first time in our system as it is structured today, the first time a defendant is actually given a copy of that indictment, which he has a constitutional right to, is at what we call a [p[re-[a]rraignment Conference.

Prior to his appearing before a judge, there is a required court proceeding that he must attend. If he fails to attend, a warrant is issued for his arrest. He gets put in jail. It is mandatory. You have to be there.

You're given a copy of the [i]ndictment, along with what we call [d]iscovery ... It's basically this is the evidence we have. Here's the formal charging document. We also find out some ministerial things, are you represented by a lawyer.

If so, what's his or her name, okay. You now have to formally acknowledge receipt of the complaint, of the [d]iscovery, things like that. We try to get all the preliminaries out of the way because the actual first step before a judge is called the [a]rraignment.

So, the pre-Arraignment comes first. You get all your materials. We get things out of the way. We explain certain programs the [c]ourt runs and things like that to a defendant that would otherwise take up a lot of time before the Judge. So, he gets all of that in advance of the [a]rraignment, okay.

Then, at the [a]rraignment, that is the first formal proceeding before a court, but right from the return of the [i]ndictment, the case is scheduled for disposition. There are a lot of preliminary matters that take place before we actually get together in a sitting like this, pick a jury and have a trial. It is all part of that same process.

***14** Does that explain it to you, ma'am? Everybody understand what it means.

Jurors: Yes.

The Court: It is just a preliminary proceeding. It is required. It is mandatory, okay.

[(Emphasis added).]

Even though defendant did not object to the judge's instruction at trial, defendant argues "the judge's response to the jury unfairly prejudiced defendant because it elevated the grand jury's return of the indictment in a manner that tended to lessen the State's burden of proof at trial." We disagree.

We perceive no error, much less plain error, in the judge's response to the jury. The information he provided, that an indictment is issued on probable cause, rather than proof beyond a reasonable doubt, was correct and in no way "lessen[ed] the State's burden of proof at trial." In his main charge, which was given to the jury earlier in the day, the judge also specifically told the jury that

> [t]he [i]ndictment is not evidence of the [d]efendant's guilt on the charges. An indictment is a step in the procedure to bring the matter before the [c]ourt and jury for the jury's ultimate determination as to whether the [d]efendant is guilty or not guilty of the charges stated in it.
>
> ....
>
> The [d]efendant on trial is presumed to be innocent and unless each and every essential element of an offense charged is proved beyond a reasonable doubt, the [d]efendant must be found not guilty of that charge.

> The burden of proving each element of the charges beyond a reasonable doubt rests upon the State and that burden never shifts to the [d]efendant. The [d]efendant in a criminal case has no obligation or duty to provide or to prove ... his innocence or to offer any proof relating to his innocence.

We will presume the jury adhered to the judge's clear, accurate response to the jury's question and all of his other instructions throughout the trial. *State v. Muhammad,* 145 *N.J.* 23, 52 (1996). We therefore reject defendant's contention on this point.

VI.

Defendant also contends he was denied the effective assistance of counsel and points to six instances of alleged deficient attorney performance that supposedly prejudiced the outcome of his trial. Because such claims involve allegations and evidence that lie outside the trial record, they are better suited for post-conviction review, to which we defer, and therefore decline to entertain them on this direct appeal. *State v. Preciose,* 129 *N.J.* 451, 460 (1992).

VII.

The arguments raised in defendant's supplemental brief largely parrot the points raised by his appellate counsel. Defendant's supplemental contentions are clearly without merit and do not warrant further discussion. *R.* 2:11–3(e)(2).

VIII.

Defendant argues the judge erred in denying his request for an adjournment of his sentencing. Defense counsel advised the judge he had been "able to communicate with the [d]efendant" prior to the sentencing. However, defense counsel told the judge his client was "in a virtually catatonic state" and counsel had not been able to talk to him that day. This argument lacks merit.

***15** "[A] motion for an adjournment is addressed to the discretion of the court, and its denial will not lead to reversal unless it appears from the record that the defendant suffered manifest wrong or injury." *State v. Hayes,* 205 *N.J.* 522, 537 (2011) (citation omitted). Here, the sentencing had been adjourned once before because defendant claimed he was ill. To ensure defendant was able to attend and participate in the sentencing proceeding on the next scheduled date, the judge arranged for defendant to be examined by medical staff that morning at the jail and he was "medically cleared for sentencing." The judge therefore concluded defendant's "behavior here is feigned" and there was "no reason whatsoever to delay his sentence[.]" Under these circumstances, we perceive no abuse of discretion in the judge's reasoned decision to deny defendant's second adjournment request.

Defendant next argues his sentence was excessive. In performing our review of a sentence, we avoid substituting our judgment for the judgment of the trial court. *State v. O'Donnell,* 117 *N.J.* 210, 215 (1989); *State v. Roth,* 95 *N.J.* 234, 365 (1984). We are satisfied the sentencing judge made findings of fact concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record, applied the correct sentencing guidelines enunciated in the Code, and the application of the factors to the law, including the judge's fully-supported decision to impose consecutive sentences, do not constitute such clear error of judgment as to shock our judicial conscience. *O'Donnell, supra,* 117 *N.J.* at 215–16; *State v. Jarbath,* 114 *N.J.* 394, 401 (1989). Accordingly, we discern no basis to second-guess the sentence.

Finally, defendant argues he was not convicted of either count five (aggravated assault, serious bodily injury) or count six (possession of a weapon for an unlawful purpose) and the judgment of conviction should be corrected to reflect this. Defendant improperly raises this contention in a footnote and, therefore, we are not required to consider it. *See Almog v. ITAS,* 298 *N.J.Super.* 145, 155 (App.Div.1997), *appeal dismissed,* 152 *N.J.* 361 (1998) (in which the court refused to consider issues so raised).

However, we do believe the judgment of conviction should be corrected to clearly indicate that defendant was not convicted of aggravated assault, serious bodily injury, of Lawrence Herring, as charged in count five of the indictment. This offense, although charged in the indictment, was essentially a lesser-included offense of count four, the attempted murder of Herring. Thus, question four of the verdict sheet, which asked the jury to determine whether defendant was guilty or not guilty of attempted murder, instructed the jury not to answer question five, dealing with the aggravated assault charge set

forth in count five, if it found defendant guilty of attempted murder. Thus, the jury made no determination as to count five of the indictment. [4]

[4] The State agrees "[t]he jury did not reach count five, charging aggravated assault of Lawrence Herring, because it found defendant guilty of the attempted murder of Herring."

***16** Nevertheless, the judgment of conviction incorrectly lists count five as one of the "final charges" and states it merged into defendant's conviction for attempted murder under count four. A remand is therefore necessary to accurately reflect the jury's disposition of this charge.

We reject defendant's contention that he was not convicted of count six, which charged him with possessing a weapon for an unlawful purpose in connection with the attempted murder of Herring. Defendant apparently fails to recognize that the numbers of the questions on the verdict sheet do not correspond to the numbers for the charges listed in the indictment. Question six on the verdict sheet concerned a lesser-included aggravated assault, bodily injury with a deadly weapon, charge that was not included in the indictment. Thus, when the jury found defendant guilty of Herring's attempted murder, it properly skipped this question.

Contrary to defendant's contention, the verdict sheet clearly indicates the jury found him guilty of possessing a weapon for an unlawful purpose as charged in count six and the judgment of conviction accurately reflects that this count merged into the attempted murder conviction. Therefore, no correction is necessary concerning count six.

Affirmed in part and remanded only to correct the judgment of conviction.

All Citations

Not Reported in A.3d, 2013 WL 1222843

End of Document

2014 WL 813888
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Andrew T. PENDER a/k/a Drew Pender, Defendant–Appellant.

A-3344-10T4
|
Submitted Jan. 7, 2014.
|
Decided March 3, 2014.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 09–01–0018.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Jay L. Wilensky, Assistant Deputy Public Defender, of counsel and on the brief).

Jennifer Webb–McRae, Cumberland County Prosecutor, attorney for respondent (Matthew M. Bingham, Assistant Prosecutor, of counsel and on the brief).

Before Judges REISNER, ALVAREZ and CARROLL.

Opinion

PER CURIAM.

***1** A jury convicted defendant Andrew T. Pender of murder, *N.J.S.A.* 2C:11–3(a)(1), attempted passion/provocation manslaughter, *N.J.S.A.* 2C:11–4(b)(2) and *N.J.S.A.* 2C:5–1, two counts of possession of a weapon for an unlawful purpose, *N.J.S.A.* 2C:39–4(a), witness tampering, *N.J.S.A.* 2C:28–5(a)(2), unlawful possession of a handgun, *N.J.S.A.* 2C:39–5(b), hindering prosecution, *N.J.S.A.* 2C:29–3(b)(3), and aggravated assault, *N.J.S.A.* 2C:12–1(b)(4). The court sentenced defendant on the murder conviction to a term of sixty years, subject to the No Early Release Act (NERA), *N.J.S.A.* 2C:43–7.2, and imposed a consecutive term of eight years, half without parole, for witness tampering. All other sentences were concurrent.

Defendant appeals from the conviction and from the aggregate sixty-eight year sentence, raising the following points of argument.

POINT I

BECAUSE THE QUESTIONING OFFICERS FAILED TO HONOR DEFENDANT'S REQUEST TO END THE QUESTIONING, THE BULK OF HIS STATEMENT, TAKEN AFTER HIS REQUEST, MUST BE SUPPRESSED. *U.S. CONST.,* AMENDS. V, XIV; *N.J. CONST.* (1947), ART. 1, PAR. 10.

POINT II

THE DEFENDANT'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE TRIAL COURT'S DENIAL OF COUNSEL'S REQUEST THAT THE DEFENDANT BE EXAMINED FOR COMPETENCY. *U.S. CONST.,* AMEND. XIV; *N.J. CONST.* (1947), ART. 1, PAR. 10.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S REPEATED MOTIONS FOR A MISTRIAL.

POINT IV

THE PROSECUTION'S PEREMPTORY STRIKE OF THREE AFRICAN–AMERICAN JURORS VIOLATED DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY. *U.S. CONST.,* AMENDS. VI, XIV; *N.J. CONST.* (1947), ART. 1, PARS. 5, 9, 10.

POINT V

THE TRIAL COURT IMPOSED AN EXCESSIVE SENTENCE, NECESSITATING REDUCTION.

A. The Length Of the Sentence Is Excessive.

B. The Trial Court Erred in Imposing A Consecutive Sentence For Witness Tampering.

Having reviewed the record, we find no merit in any of those contentions. We affirm the conviction and the sentence. We remand for the limited purpose of correcting a typographical

error on page one of the August 19, 2010 judgment of conviction (JOC), which should state that defendant's "Total Custodial Term" is sixty-eight years rather than sixty years.

I

In light of the issues raised on this appeal, we will briefly summarize the trial record here, and will discuss the record in more detail when we address defendant's legal contentions. Through eyewitness and expert testimony, the State presented unrebutted evidence of the following events. After getting into a fistfight with Dareem Collins over a debt defendant owed Collins, defendant told Collins's girlfriend, Tonya Garron, that he was going to kill her parents.[1] Apparently, the threat was motivated by defendant's belief that Garron had told Collins where to find him. After leaving the restaurant where he worked, and where the fight had occurred, defendant went to Garron's home in Millville. There, he encountered her father, Charles Jones, and shot Jones to death in front of several witnesses.

1 The "parents" were actually Garron's mother, Loretta McGaha, and Charles Jones, the man with whom she had lived for over a decade. However, Garron and everyone in her family referred to Jones as her father and we will do the same.

***2** Fearing that defendant would carry out his threat, or might already have done so, Garron, Collins, and two of their friends drove to her house. They heard a gunshot as they arrived, and they drove off to summon the police. As they stopped at an intersection, they saw defendant walking in the direction of their car. He spotted them as well and tried to shoot at the car, but the gun would not fire. Garron drove through a red light to escape a further assault. As the police arrived and defendant was fleeing the scene, he encountered a thirteen-year-old girl whom he threatened with the gun and told to be quiet.

Defendant was arrested less than an hour after the shooting. The arresting officer saw a gun in defendant's hand as he approached, and saw defendant throw it away. After subduing defendant, the officer found the gun on the ground. The bullet recovered from Jones's body matched that gun. Defendant was given his *Miranda*[2] warnings, waived his right to counsel, and made a confession. The entire police interview with defendant, beginning with the administration of the *Miranda* warnings, was recorded on videotape.[3]

2 *Miranda v. Arizona*, 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L. Ed.*2d 694 (1966).

3 Defendant was taken to the Bridgeton police station for questioning, because the Millville police station did not have video equipment.

II

We begin our legal discussion by addressing the suppression issue. Defendant filed a motion to suppress the confession, which the trial court denied after a *N.J.R.E.* 104 hearing. Two police officers testified at the hearing. Defense counsel questioned both of them concerning a remark defendant made about seventeen minutes after he began giving his statement. That remark must be understood in the context in which it occurred.

During the first approximately seventeen minutes of his statement, defendant admitted shooting Jones and tried to explain that he did so because he was upset that Collins, whom defendant called "D," had come to his workplace and threatened him. Following up on that explanation, Detective Henry asked defendant to tell him more about his reaction to "D." In response, defendant stated that he knew he was going to the county jail and explained that if he had time to think about it, he could remember more about his thought process at the time. Henry responded that defendant did not need to talk about that issue and redirected the questioning to whether defendant intended to hurt anyone. We quote the exchange in full below.

> Det. Henry: And like you're talking about. And what you're saying, each time you keep bringing this up, it's about him. About "D." That shows that it's in your head about this guy. You understand what I mean? That he's doing this.
>
> Andrew Pender: (indiscernable) I don't really want. I don't know what's going on, that's why I just need, like alright, I'm going to County, I probably tell you all, can bring me back if I have some time to think about it, so that I can recollect.
>
> Det. Henry (indiscernable) Don't talk about certain things, that's fine. You know what I mean. All, but what's important to know is, did you mean to hurt somebody tonight? Did you mean for this to happen?
>
> ***3** Andrew Pender: Not him, no.

> Det. Henry: What was your intentions then? What did you want to happen?
>
> Andrew Pender: For people to just leave me alone, just take my word, if I say I'm not playing no more, I'm not playing no more, man. I don't play no more, you know what I mean. I handled my business, I work six days a week, man.
>
> Det. Henry: Did Bunky [Jones] go ahead and have anything on him or do something to you?
>
> Andrew Pender: Nah, he just happened to be, (indiscernible), man, I feel sorry for him, but you can't bring him back, but.

From that point, the interview continued for more than an hour, during which defendant did not request a break or give any indication that he wanted to stop talking to the detectives. At the suppression hearing, Detectives Patitucci and Henry both testified that they did not understand defendant to be asserting his right to remain silent. According to Patitucci, although defendant was visibly upset, he believed defendant meant that "he didn't know what was going on at the time when he was walking around with his handgun in his hand[ ] when the incident took place" and "needed some time to think ... [and] focus." According to Henry, he believed defendant "want[ed] to recollect certain things that happened" and Henry wanted defendant "to see if he could ... [describe] the things that he remembered."

At the suppression hearing, defendant testified that his statement meant that he wanted to be taken to the county jail and he wanted the questioning to cease. He testified that he continued giving his statement because he thought that if he stopped talking, the detectives "w[ere] going to beat [him] up." He testified that when he was arrested, the arresting officer, Romanik, kicked him in the face and bruised his lip, and this caused him to fear that other officers would beat him if he was uncooperative. However, on cross-examination, defendant conceded that Romanik was not present at the interrogation, and he had no reason to fear any law enforcement official other than Romanik.

In a written opinion, Judge Richard J. Geiger found defendant's testimony to be completely incredible, for reasons he explained in detail. On the other hand, he credited the police witnesses' version of the relevant events. The judge believed their testimony that the police refrained from any questioning until after they read defendant his *Miranda* rights, and, based on viewing the video, he found that they conducted the questioning in a completely non-threatening, non-coercive manner. Judge Geiger found that the detectives told defendant repeatedly that he could "stop talking at any time" and could " 'pick and choose' which questions he wanted to answer." The judge further found that defendant "never asked for the questioning to stop."

The judge credited Patitucci's and Henry's testimony that they did not construe defendant's statement about going to the county jail as an assertion of his right to remain silent. Nor did the judge "perceive how any reasonable police officer could have so construed that statement." Judge Geiger reasoned that:

> ***4** [Defendant] did not expressly state that the questioning should end or that he did not want to answer any more questions. He did not even ask for a break in the questioning. He did not refuse to continue the questioning or to answer subsequent questions about the case. This did not constitute an invocation of his right to remain silent or to terminate questioning. Instead, his comment appears at most to indicate that he may be able to recollect more details later.

Judge Geiger found this situation analogous to *State v. Bey (Bey II)*, 112 *N.J.* 123, 138–39 (1988), in which the defendant asked for some time to "lie down and think about" prior events. In *Bey,* the Court found that the defendant's statement was not an assertion of the right to remain silent. In denying the suppression motion, Judge Geiger concluded:

> The record simply does not support the conclusion that defendant intended to cut off questioning and remain silent. Therefore, the detectives were not required to stop the questioning or to re-advise defendant of his *Miranda* rights.

In reviewing a trial court's decision on a motion to suppress, we defer to the judge's factual findings so long as they are supported by sufficient credible evidence in the record. *State v. Elders,* 192 *N.J.* 224, 243–44 (2007). While we retain discretion to make our own evaluation of videotaped evidence, we owe particular deference to factual findings and credibility determinations that are based on the judge's observation of witness testimony at the suppression hearing. *See State v. Diaz–Bridges,* 208 *N.J.* 544, 565–66 (2012). On the other hand, our review of a trial judge's legal conclusions is always de novo. *State v. Handy,* 206 *N.J.* 39, 44–45 (2011).

Once a suspect in custody unambiguously invokes the right to counsel, the interrogation must cease. *State v. Wessells,* 209 *N.J.* 395, 402 (2012). On the other hand, if a suspect makes an ambiguous statement, the police may ask further questions designed only to clarify the statement. As the Court has explained:

> [T]he inquiry begins with whether the suspect invoked his or her right to remain silent. If that invocation is clear and unambiguous, we have required that it be scrupulously honored. If, however, the invocation is equivocal or ambiguous, leaving the investigating officer "reasonably unsure whether the suspect was asserting that right," we have not required that the interrogation immediately cease, but have instead permitted officers to clarify the otherwise ambiguous words or acts.
>
> As it relates to the invocation of the right to remain silent, both the words used and the suspect's actions or behaviors form part of the inquiry into whether the investigating officer should have reasonably believed that the right was being asserted. As a result, the court's inquiry necessarily demands a fact-sensitive analysis to discern from the totality of the circumstances whether the officer could have reasonably concluded that the right had been invoked.
>
> ***5** [*Diaz–Bridges, supra,* 208 *N.J.* at 564–65 (citations omitted).]

However, taken in context, a suspect's pause, request for a brief rest, or request for time to recollect thoughts, will not necessarily qualify as an ambiguous assertion of *Miranda* rights. *Id.* at 566–67. Nor will the fact that a suspect is temporarily overcome by emotion at the "enormity" of his crime. *Id.* at 568–69.

> We have considered whether defendants invoked the right to silence in a variety of contexts, and have established principles that can be summarized without great detail. A suspect who repeatedly responded to questions by saying "I can't talk about it" and who engaged in a persistent pattern of refusal to answer was not "obligat[ed] to state his position more clearly" in order to invoke the right to silence. A suspect who told the investigator "I don't believe that I want to make a statement at this time" sufficiently invoked the right to silence that the failure to honor the request required suppression.
>
> On the other hand, we deemed a suspect's statement that he wanted an opportunity to "lie down and think about it" before responding, although arguably far less ambiguous a reference to the right to remain silent, to be simply a request for some time and not an assertion that police terminate questioning through the invocation of the right to remain silent. *Bey II, supra,* 112 *N .J.* at 136–37 ("law enforcement officials ... are not obligated to accept any words or conduct, no matter how ambiguous, as a conclusive indication that a suspect desires to terminate questioning"). Similarly, as our Appellate Division has concluded, a suspect who refused eleven separate times to sign a form waiving his rights, which refusal he explained in terms of his desire not to make a statement, has made the desire to invoke the right to silence sufficiently plain that it must be honored. *State v. Burno–Taylor,* 400 *N.J.Super.* 581, 604 (App.Div.2008).
>
> [*Id.* at 566–67 (additional citations omitted).]

Against the backdrop of those legal principles, we find no error in Judge Geiger's decision. First, we will not second-guess his finding that defendant's hearing testimony was not credible and, thus, we reject defendant's claim that the police assaulted or intimidated him. We also discount defendant's after-the-fact assertion that his statement about going to the county jail was intended as a request that the questioning cease.

Having reviewed the record, we agree with Judge Geiger that defendant's statement, viewed objectively, was not an ambiguous request to stop the interview, and no reasonable police officer would have construed it that way. Rather, as in *Bey II,* the statement simply conveyed that if defendant had more time to think about the particular issue the detectives were asking him about, he might be able to remember more. *See Bey II, supra,* 112 *N.J.* at 138. Therefore, instead of pressing him on that point, the detectives reasonably switched to a different topic. There was no *Miranda* violation, and we affirm the denial of the suppression motion.

III

***6** Next, we address defendant's claim that the prosecutor improperly used peremptory challenges to excuse three African–American jurors. *See* State v. Gilmore, 103 N.J. 508, 522 (1986). Defendant is African–American. On the second day of jury selection, the trial judge[4] sua sponte raised a *Gilmore* issue after the prosecutor had used three of seven challenges to excuse African–American jurors. After the judge raised the issue, defense counsel made a formal motion on the record, and the judge required the prosecutor to set forth his reasons for excusing the three jurors. *See Gilmore, supra,* 103 N.J. at 537–38.

4 The case was not tried before the judge who heard the suppression motion.

The prosecutor explained that the first juror, N.T., stated that she knew one of the defense witnesses. He explained that the second juror, T.J., knew another one of the defense witnesses and was currently serving as that witness's youth pastor. T.J. also had a brother who had a criminal conviction, and had previously served on a child abuse case in which the jury deadlocked. The prosecutor stated that all of those factors, taken together, led him to excuse the juror. The prosecutor further noted that he had also excused non-minority jurors "because of their familiarity with a witness."[5]

5 The defense attorney did not contradict the prosecutor's statement, and the record appears to support his contention. For example, the prosecutor excused juror P.S.M., who also knew one of the trial witnesses. Defendant does not claim that this juror was African–American.

Finally, the prosecutor stated that he excused juror S.T.-S., because during voir dire, she revealed that she was a close friend of a state police sergeant named Brian Lloyd. The prosecutor explained that he had spent three and one-half years prosecuting Lloyd for misconduct, theft and fraud. The prosecutor stated that the sergeant was "no fan of mine" and he was concerned that the juror might "have a specific prejudice against me for prosecuting a close friend of [hers]."

Defense counsel did not object to the prosecutor's explanations, or offer any rebuttal, and the trial judge concluded that the prosecutor had provided valid reasons for excusing the three jurors. He therefore found that any prima facie inference of discrimination had been rebutted and he denied the *Gilmore* motion.

We review the trial judge's ruling for abuse of discretion. *State v. Osorio,* 199 N.J. 486, 509 (2009). We find none. We approve the judge's action in sua sponte raising the *Gilmore* issue. *Hitchman v. Nagy,* 382 N.J.Super. 433, 444 (App.Div.), *certif. denied,* 186 N.J. 600 (2006). However, once the prosecutor provided a legitimate, non-discriminatory explanation for excusing each juror, and the defense provided no rebuttal, we cannot fault the trial judge's decision to deny the motion.

We note that "the court made no finding as to the racial composition of the jury either at the time defendant[ ] objected to the prosecutor's alleged discriminatory use of [his] peremptory challenges or when jury selection was completed." *State v. Clark,* 316 N.J.Super. 462, 475 (App.Div.1998). We agree with defendant that the court should have taken that step. *Ibid.* However, defendant did not raise the issue of the jury composition at the time of the motion or at the end of jury selection, and hence, the defense did not properly preserve a record for our review on that issue. On the record presented to us, we affirm the denial of the *Gilmore* motion.

IV

***7** We next address defendant's two related points concerning his disruptive conduct during the trial. Defendant contends that the judge should have adjourned the trial to permit his attorney to arrange for a competency examination. He also argues that the judge should have declared a mistrial based on defendant's various disruptive outbursts during the trial.

These are the most pertinent facts. On the third day of the trial, defendant asked the judge for permission to release his attorney and represent himself. The judge denied the motion because it was untimely and granting it was likely to result in delay and disruption of the trial. Defendant was obviously dissatisfied with that ruling and, thereafter, engaged in conduct the judge reasonably found was designed to disrupt the trial.

For example, defendant repeatedly interrupted his attorney and the judge, argued with the judge over evidentiary rulings,

and interjected comments about the proceedings in front of the jury. On the first day of testimony, he appeared in court wearing a handkerchief on his head, and when the judge directed him to remove it, defendant slipped the kerchief down around his neck and twisted it as if strangling himself. He then refused the judge's direction to give the handkerchief to the sheriff's officer. As a result, the judge ordered the sheriff's officer to remove defendant from the courtroom.

The next day, defendant appeared in court with a three-foot rope around his neck, which he refused to remove despite the judge's direction. Again, he was removed from the courtroom. On another occasion, defendant appeared to be deliberately attempting to draw the jury's attention to the fact that his feet were shackled, despite the court's appropriate efforts to conceal the shackles from the jurors. [6]

6 There is no claim that the shackling was inappropriate. Outside the jury's presence, the prosecutor placed on the record that, while in jail awaiting this trial, defendant was accused of stabbing another inmate. Nor does defendant challenge the judge's several decisions to exclude him from the courtroom based on his disruptive behavior.

Defendant's pattern of disruptive and disrespectful behavior was repeated on several court days. Each time, the judge displayed extraordinary patience in attempting, firmly but fairly, to convince defendant to behave with appropriate decorum. Each time defendant was removed from the courtroom, the judge arranged for him to be provided with a recording of the proceedings to listen to in the jail, so defendant could assist his attorney in his defense. Each time, the judge also gave the jury a cautionary instruction to disregard defendant's absence and base their verdict only on the evidence presented in the courtroom.

Further, the judge did not exclude defendant for longer than absolutely necessary. When defendant was removed from the courtroom in the morning, the judge arranged for him to be brought back into the courtroom for the afternoon session. Finally, when defendant interrupted the prosecutor's summation and made remarks to the jury about an absent witness, after the judge had denied defense counsel's *Clawans* [7] motion, the judge ordered that defendant be excluded from the courtroom for the remainder of the trial.

7 *State v. Clawans*, 38 *N.J.* 162 (1962).

On the fifth day of the trial, defendant's attorney asked the judge to adjourn the trial while he arranged to have a competency evaluation. The judge responded that nothing he observed led him to believe that defendant was not competent to stand trial. Rather, the judge found that defendant's comments indicated that he understood very well what was going on, including the defense theory of the case, and was trying to force the judge to conduct the proceedings in the way defendant thought appropriate. The judge declined to adjourn the trial, and declined to allow defendant to control the trial.

***8** However, the judge repeatedly told defense counsel that he was welcome to arrange for a competency examination during a court break or after court hours. Although the trial lasted three weeks, with breaks of several days between some of the trial dates, the record does not reflect that defense counsel ever arranged for defendant to be examined or attempted to do so. Nor does the record presented to us contain any expert report or other legally competent evidence that defendant suffered from a mental illness during his trial. [8]

8 The Pre-sentence report (PSR) contains a passing reference to defendant having been diagnosed as bi-polar several years before the trial occurred. However, the report does not mention whether that information came from defendant or from another source. The PSR contains no supporting documentation for that diagnosis. When defense counsel first asked for time to obtain a competency evaluation, he admitted that an earlier psychiatric examination noted insufficient evidence "to rule in or rule out" whether defendant was feigning symptoms of mental illness. The issue of alleged mental illness was not mentioned at the sentencing hearing.

"[A] defendant tried or convicted while incompetent to stand trial has been deprived of his due process right to a fair trial. Consequently, a court must hold a competency hearing where the evidence raises a bona fide doubt as to a defendant's competence." *State v. M.J.K.*, 369 *N.J.Super.* 532, 547 (App.Div.) (citations omitted), *appeal dismissed,* 187 *N.J.* 74 (2004). The standard for competence has been defined by statute:

> b. A person shall be considered mentally competent to stand trial on criminal charges if the proofs shall establish:

(1) That the defendant has the mental capacity to appreciate his presence in relation to time, place and things; and

(2) That his elementary mental processes are such that he comprehends:

(a) That he is in a court of justice charged with a criminal offense;

(b) That there is a judge on the bench;

(c) That there is a prosecutor present who will try to convict him of a criminal charge;

(d) That he has a lawyer who will undertake to defend him against that charge;

(e) That he will be expected to tell to the best of his mental ability the facts surrounding him at the time and place where the alleged violation was committed if he chooses to testify and understands the right not to testify;

(f) That there is or may be a jury present to pass upon evidence adduced as to guilt or innocence of such charge or, that if he should choose to enter into plea negotiations or to plead guilty, that he comprehend the consequences of a guilty plea and that he be able to knowingly, intelligently, and voluntarily waive those rights which are waived upon such entry of a guilty plea; and

(g) That he has the ability to participate in an adequate presentation of his defense.

[*N.J.S.A.* 2C:4–4b.]

Our review of the trial judge's decision on a competency issue is " 'highly deferential.' " *M.J.K., supra,* 369 *N.J.Super.* at 548 (quoting *State v. Moya,* 329 *N.J.Super.* 499, 506 (App .Div.), *certif. denied,* 165 *N.J.* 529 (2000)). After reviewing the entire trial transcript, we arrive at the same conclusions the trial judge reached in denying the application for a competency hearing. Obviously dissatisfied with the denial of his self-representation motion, and facing the near-absolute certainty of a conviction, defendant was determined to disrupt the trial. On this record, we find no basis to second-guess the judge's decision that a competency evaluation was not required.

***9** Defendant's related point concerning a mistrial is equally meritless. We will not overturn the trial judge's denial of a mistrial motion "absent an abuse of discretion that results in a manifest injustice." *State v. Harvey,* 151 *N.J.* 117, 205 (1997), *cert. denied sub nom., Harvey v. New Jersey,* 528 *U.S.* 1085, 120 *S.Ct.* 811, 145 *L. Ed.*2d 683 (2000); *State v. Montgomery,* 427 *N.J.Super.* 403, 406–07 (App.Div.2012), *certif. denied,* 213 *N.J.* 387 (2013). On this record, we find no abuse of discretion and no miscarriage of justice.

At several points during the trial, after defendant had engaged in an in-court outburst, his attorney moved for a mistrial. Those motions were pro forma, with little or no explanation, and they were properly denied. However, as noted, after every incident, the judge appropriately instructed the jury to disregard defendant's comments and, where applicable, his absence from the trial. While the judge did not question the jurors as to their ability to follow his instruction, we presume that they did so. *See State v. Martini,* 187 *N.J.* 469, 477 (2006), *cert. denied,* 549 *U.S.* 1223, 127 *S.Ct.* 1285, 167 *L. Ed.*2d 104 (2007).

"[A] defendant cannot engage in courtroom misconduct and then expect to be rewarded with a mistrial or new trial for his or her egregious behavior where the trial judge took appropriate cautionary measures to ensure a fair trial." *Montgomery, supra,* 427 *N.J.Super.* at 404. Defendant was not entitled to a mistrial based on his own disruptive conduct. *Id.* at 410. Further, given the overwhelming evidence against him, we could not conclude that the verdict represented a miscarriage of justice.[9] Accordingly, we affirm defendant's conviction.

9 The jury was clearly not unfairly inflamed against defendant, because they found him not guilty of attempted murder for trying to shoot at the car carrying Garron and Collins. Instead they found that was a crime of "passion," apparently due to the prior fight with Collins, and convicted defendant of attempted passion/provocation manslaughter.

V

Finally, defendant argues that the sixty-year NERA sentence was excessive and that the sentence for witness tampering should have been concurrent rather than consecutive. Those arguments are without sufficient merit to warrant discussion in a written opinion, *R.* 2:11–3(e)(2), and we affirm substantially for the reasons stated by the trial judge at the sentencing hearing on August 11, 2010. We add the following comments.

Apparently angry at Garron and Collins, defendant shot and killed Garron's father—an unarmed, innocent victim—while Garron's mother watched in horror. We agree with the trial judge that the senseless brutality of the crime was an aggravating factor which the court could properly consider under *N.J.S.A.* 2C:44–1a(1) (whether the crime was "committed in an especially heinous, cruel, or depraved manner"). *See* State v. Bowens, 108 *N.J.* 622, 639 (1987).

Nor can we disagree with the judge's decision to impose a consecutive sentence for witness tampering. While fleeing from the police, defendant encountered a thirteen-year-old girl sitting in her back yard, pushed the muzzle of a gun into her neck and told her to be quiet. This was a separate crime from the murder, with a separate victim, and a consecutive sentence was warranted. *See* State v. Roach, 146 *N.J.* 208, 230, *cert. denied,* 519 *U.S* . 1021, 117 *S.Ct.* 540, 136 *L. Ed.*2d 424 (1996); *State v.. Yarbough,* 100 *N.J.* 627, 643–44 (1985), *cert. denied,* 475 *U.S.* 1014, 106 *S.Ct.* 1193, 89 *L. Ed.*2d 309 (1986).

***10** We affirm the conviction and the sentence. We remand for the limited purpose of correcting a typographical error in the JOC.

All Citations

Not Reported in A.3d, 2014 WL 813888

End of Document

2006 WL 1060502
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Eugene SEABROOKES, Defendant-Appellant.

Submitted Nov. 28, 2005.
|
Decided April 24, 2006.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 4358-10-97. [1]

1 The indictment number is taken from the indictment itself. The judgment of conviction, orders on motions and other documents list differing variations of this number.

Attorneys and Law Firms

Yvonne Smith Segars, Public Defender, attorney for appellant (Cynthia McCulloch DiLeo, Designated Counsel, on the brief).

Paula T. Dow, Essex County Prosecutor, attorney for respondent (Lucille M. Rosano, Special Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges CUFF, PARRILLO and GILROY.

Opinion

PER CURIAM.

***1** Defendant and several others were named in a thirty-two count indictment. The indictment concerned the 1994 murder of Anthony Lewis and the 1997 murder of Shawn Taylor. The State's theory of the case was that Shawn Taylor witnessed the 1994 murder of Anthony Lewis and identified defendant and Alkabir Sorey as the men directly involved. In turn, defendant and Sorey killed Shawn Taylor to prevent him from testifying against them. Therefore, defendant and co-defendants Alkabir Sorey, Damon Wise and Chris Jackson were charged with (1) second degree conspiracy to commit murder, contrary to *N.J.S.A.* 2C:5-2 and 2C:11-3 (count one); (2) first degree attempted murder of Shawn Taylor, contrary to *N.J.S.A.* 2C:11-3 and 2C:5-1 (count two); (3) second degree aggravated assault of Shawn Taylor, contrary to *N.J.S.A.* 2C:12-1b(1) (count three); (4) second degree aggravated assault of Marvin Freeman, contrary to *N.J.S.A.* 2C:12-1b(1) (count four); (5) second degree aggravated assault of Anthony Freeman a/k/a Anthony Parker, contrary to *N.J.S .A.* 2C:12-1b(1) (count five); (6) murder of Anthony Lewis, contrary to *N.J.S.A.* 2C:11-3a(1) and (2) (count six); (7) second degree aggravated assault of Leondra Alston, contrary to *N.J.S.A.* 2C:12-1b(1) (count seven); (8) second degree aggravated assault of Anthony Ford, contrary to *N.J.S.A.* 2C:12-1b(1) (count eight); (9) second degree aggravated assault of Dwayne Murril, contrary to *N.J.S.A.* 2C:12-1b(1) (count nine); (10) third degree unlawful possession of a .40 caliber handgun, contrary to *N.J.S.A.* 2C:39-5b (count ten); (11) second degree possession of a handgun for an unlawful purpose, contrary to *N.J.S.A.* 2C:39-4a (count eleven); (12) third degree unlawful possession of a handgun without a permit, contrary to *N.J.S.A.* 2C:39-5b (count twelve); (13) second degree possession of a handgun for an unlawful purpose, contrary to *N.J.S.A.* 2C:39-4a (count thirteen); (14) fourth degree unlawful possession of hollow point bullets, contrary to *N.J.S.A.* 2C:39-3f (count fourteen).

In addition, counts eighteen through twenty-one involved charges from defendant's and others' efforts to keep Taylor from testifying against defendant in connection with Lewis's murder. Defendant, Sorey and Sheila Goodman were charged with third degree conspiracy to commit witness tampering, contrary to *N.J.S.A.* 2C:5-2 and 2C:28-5 (count eighteen), and third degree witness tampering, contrary to *N.J.S.A.* 2C:28-5 (count nineteen). Count twenty charged defendant and Sorey with third degree hindering prosecution, contrary to *N.J.S.A.* 2C:29-3b(3). Finally, count twenty-one charged Goodman with third degree witness tampering, in violation of *N.J.S.A.* 2C:29-3a.

Counts twenty-two through twenty-eight arose out of Taylor's murder on January 2, 1997. Defendant, Sorey, Goodman and Kimmy Wilkins were charged with second degree conspiracy to commit murder, in violation of *N.J.S.A.* 2C:5-2 and 2C:11-3 (count twenty-two). Count twenty-three accused Sorey of the purposeful and knowing murder of Taylor, in violation of *N.J.S.A.* 2C:11-3a. Count twenty-four

accused defendant, Goodman and Kimmy Wilkins of Taylor's purposeful and knowing murder as accomplices, in violation of *N.J.S.A.* 2C:11-3a. Counts twenty-five through twenty-eight accused defendant, Sorey, Goodman and Wilkins with several weapons and other violations, as follows: third degree unlawful possession of a shotgun, contrary to *N.J.S.A.* 2C:39-5c(1) (count twenty-five); second degree possession of a shotgun for an unlawful purpose, contrary to *N.J.S.A.* 2C:39-4a (count twenty-six); third degree unlawful possession of a sawed-off shotgun, in violation of *N.J.S.A.* 2C:39-3b (count twenty-seven); and fourth degree retaliation against a witness, contrary to *N.J.S.A.* 2C:28-5b (count twenty-eight).

***2** Finally, counts twenty-nine through thirty-two accused defendant and Antoine Gray of several witness tampering violations, as follows: second degree conspiracy to commit witness tampering, contrary to *N.J.S.A.* 2C:5-2 and 2C:28-5 (count twenty-nine); second degree witness tampering, contrary to *N.J.S.A.* 2C:28-5 (count thirty); third degree terroristic threats, contrary to *N.J.S.A.* 2C:12-3 (count thirty-one); and second degree witness tampering, contrary to *N.J.S.A.* 2C:28-5 (count thirty-two). Counts twenty-nine, thirty, thirty-one and thirty-two were dismissed on January 18, 2002.

Judge Lester ruled that defendant and co-defendants Wise and Sorey would be tried separately,[2] but ordered that charges from the murder of Lewis and Taylor be tried together because the offenses were directly connected and part of a common plan. She also denied defendant's motion to dismiss the indictment on speedy trial grounds.

2 Several co-defendants, including Sheila Goodman entered guilty pleas in accordance with plea bargains or were granted immunity, such as Kimmy Wilkins. Christopher Jackson entered a cooperation agreement with the State and the charges against him were dismissed.

A jury found defendant guilty of second degree conspiracy to commit murder (count one), first degree attempted murder of Taylor (count two), second degree aggravated assault of Taylor count three), murder of Lewis (count six), third degree unlawful possession of a .40 caliber handgun (count ten), second degree possession of a handgun for an unlawful purpose (count eleven), fourth degree unlawful possession of hollow point bullets (count fourteen), third degree conspiracy to commit witness tampering (count eighteen), third degree witness tampering (count nineteen), third degree hindering prosecution (count twenty), second degree conspiracy to commit murder (count twenty-two), purposeful and knowing murder of Taylor as accomplices (count twenty-four), third degree unlawful possession of a shotgun (count twenty-five), second degree possession of a shotgun for an unlawful purpose (count twenty-six), and third degree unlawful possession of a sawed-off shotgun (count twenty-seven).

At sentencing, after merger of relevant counts, the judge imposed a life term of imprisonment with thirty years of parole ineligibility on count six, the murder of Lewis, and a consecutive life term with thirty years of parole ineligibility on count twenty-four, the murder of Taylor. Defendant was sentenced to a concurrent twenty-year term with ten years parole ineligibility on count two, conspiracy to commit murder; concurrent terms of five years imprisonment with two and one-half years of parole ineligibility on counts ten, nineteen, twenty-five, and twenty-seven; and a concurrent term of eighteen months with nine months of parole ineligibility on count fourteen.

On appeal, defendant raises the following arguments:

POINT I

THE ADMISSION AT TRIAL OF IDENTIFICATION OF THE DEFENDANT BY A DECEASED WITNESS CREATED A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION. THE TRIAL COURT THEREFORE ERRED IN ALLOWING THE PRE-TRIAL IDENTIFICATION OF THE DEFENDANT BY THE DECEASED WITNESS SHAWN TAYLOR, AS THE DEFENDANT WAS DENIED AN OPPORTUNITY TO CONFRONT MR. TAYLOR'S CREDIBILITY AND RELIABILITY. THUS, THE IN-COURT TESTIMONY RELATED TO SHAWN TAYLOR'S PRE-TRIAL PHOTO IDENTIFICATION OF THE DEFENDANT THUS VIOLATED HIS RIGHT TO DUE PROCESS OF LAW.

***3** *POINT II*

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUNDS THAT THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL. (RAISED BELOW).

POINT III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SEPARATE TRIALS FOR EACH OF THE TWO MURDERS WITH WHICH HE WAS CHARGED. (RAISED BELOW).

POINT IV

THE PROSECUTOR'S COMMENTS IN HIS OPENING AND CLOSING ARGUMENTS TO THE JURY, WHICH PROVED TO BE FALSE, DENIED DEFENDANT A FAIR TRIAL PURSUANT TO U.S. CONST. AMENDS. V, XIV AND THE NEW JERSEY CONST. (1947), ART.PAR.1.

POINT V

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE AGAINST THE DEFENDANT FOR THE MURDERS OF ANTHONY LEWIS AND SHAWN TAYLOR. THE MOTION FOR A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED PURSUANT TO *R.* 3:18-2. (RAISED BELOW).

POINT VI

THE SENTENCE IMPOSED ON THE DEFENDANT IS SO EXCESSIVE AS TO CONSTITUTE AN ABUSE OF DISCRETION.

POINT VII

DEFENDANT'S CONVICTION SHOULD BE REVERSED BECAUSE OF THE CUMULATIVE EFFECTS OF THE ERRORS WHICH OCCURRED DURING HIS TRIAL.

In a supplemental pro se brief, defendant raises the following arguments:

POINT I

THE PROSECUTOR COMMITTED CLEAR MISCONDUCT BY NOT PRESENTING EXCULPATORY INFORMATION TO THE 1997 GRAND JURY THAT MARVIN FREEMAN WAS NOT ABLE TO IDENTIFY DEFENDANT 38-MONTHS EARLIER.

POINT II

THE TRIAL COURT'S RULINGS ON IDENTIFICATION WERE AN ABUSE OF LEGAL DISCRETION AND A DENIAL OF DUE PROCESS BECAUSE THERE NEVER WAS ANY IDENTIFICATION OF THE INDIVIDUALS ON THE DIRT BIKE THAT FIRED THE SHOTS THAT KILLED ANTHONY LEWIS. U.S. CONST. AMEND. XIV.

POINT III

DEFENDANT WAS DENIED DUE PROCESS BECAUSE THE MECHANISM BY WHICH IT WAS TO BE DETERMINED WHETHER AN IDENTIFICATION, IF FACT, WAS MADE WAS DEFECTIVE AN IN VIOLATION OF U.S. CONST. AMEND. XIV.

POINT IV

THE TRIAL COURT ABUSED ITS LEGAL DISCRETION BY RULING THE IDENTIFICATION PROCEDURES WERE NOT SUGGESTIVE THEREBY DENYING DEFENDANT DUE PROCESS IN VIOLATION OF U.S. CONST. AMEND. XIV.

POINT V

THE ADMISSION OF UNRELIABLE IDENTIFICATION TESTIMONY BASED ON HEARSAY VIOLATED THE DEFENDANT'S FUNDAMENTAL DUE PROCESS RIGHT TO A FAIR TRIAL. U.S. CONST. AMEND. XIV.

POINT VI

THE PROSECUTOR COMMITTED FLAGRANT ACTS OF MISCONDUCT BY FALSIFYING AN IDENTIFICATION AND THEN PRESENTING FALSE, PERJURED AND/OR MISLEADING TESTIMONY BEFORE THE GRAND JURY AND AT TRIAL.

On August 20, 1994, police officers, including Lieutenant Bradley, discovered a Cadillac which appeared to have struck the concrete barrier of the bridge on North 11th Street at 7th Avenue in Newark. They found Anthony Lewis's body slumped in the vehicle, with bullet wounds to the head, back and left arm. Lewis died from a gunshot wound to the brain. Police recovered nine .40 millimeter shell casings at the scene and some bullets that had lodged in a nearby house.

***4** Christopher Jackson testified that just before the shooting, he and a friend, known as Black, were proceeding down William Street in Newark with the intention of borrowing some money from defendant, a good friend. Jackson spotted defendant and defendant's close friend, Alkabir Sorey, and asked defendant for money. While defendant was reaching for the money, defendant said that he and Sorey were having a dispute with some guys in a blue Cadillac, who were trying to "get" Sorey. After Jackson and Black left, they saw a blue Cadillac in the area. They returned to the spot where they had encountered defendant with the intention of warning defendant that the Cadillac was still in the area. No one was there. As they were driving through the area, they saw a Cadillac that appeared to have crashed on the bridge near 7th Avenue. As Jackson was pulling over toward the crowd near the scene, he overheard defendant say "you see my work, you see my work."

After Bradley returned to the police station from the crime scene and was in the process of storing evidence, he was informed that Taylor and Taylor's cousin, Marvin Freeman, had witnessed Lewis's murder. Bradley interviewed Taylor, who identified the shooters as defendant and Sorey. Bradley assembled a photographic array which included a photo of defendant, and another which included a photo of Sorey. Taylor selected defendant's photograph from one array, and Sorey's photograph from the other array. Based on this information, Bradley secured arrest warrants for defendant and Sorey who were believed to reside at 215 North Ninth Street in Newark. Defendant was arrested two days later.

On November 10, 1994, Detective Frank recovered a gun during a search of Sorey's residence at 215 North Ninth Street. A ballistics expert testified that all of the casings and the bullets recovered at the scene of Lewis's murder were fired from the recovered handgun.

Defendant and Sorey were indicted for Lewis's murder on January 4, 1995. Assistant Prosecutor DeMarco testified that jury selection began on October 1, 1996, and continued through October 2, following which Judge Fast conducted a *Wade*[3] hearing. At that hearing, Bradley described the procedures he used in putting together a photographic array, and said that Taylor selected defendant's photograph. The defense called Taylor as a witness. He testified that while police did not prompt him to select defendant's photograph, he now believed that he could not be sure that defendant was one of the people who murdered Lewis. He also testified that in addition to the photo arrays, he was shown a picture of a man wearing a "red hoody" because the person involved in the shooting wore a "red hoody." He identified the person depicted in the photo based on his garment.

3 *United States v. Wade,* 388 *U.S.* 218, 87 *S.Ct.* 1926, 18 *L. Ed.*2d 1149 (1967).

DeMarco testified that on the Friday preceding jury selection, he met with Taylor late in the afternoon. DeMarco started to review Taylor's statement with him. He described Taylor as cooperative but very upset. In fact, Taylor was crying throughout most of the interview. After the interview, Taylor took DeMarco to the scene of Lewis's murder, and reviewed what had occurred.

***5** During that weekend, Taylor was arrested and incarcerated at the Essex County Jail. Before DeMarco could talk to him at the jail, someone posted Taylor's bail. At the commencement of the *Wade* hearing on October 2, DeMarco was unable to locate Taylor, and was surprised to discover that he had been brought to the hearing by one of the defense attorneys and that Taylor intended to testify for the defense.

Before the jury was sworn, DeMarco announced that Taylor had not appeared in court. Detectives from the homicide squad, with the help of the FBI, were unable to locate Taylor. Therefore, on November 6, 1996, the trial judge dismissed the indictment without prejudice.

Defendant secured Taylor's release from jail prior to the October 2, 1996, *Wade* hearing. He gave Angela Jordan, the mother of one of his children, $750 to post Taylor's bail. At defendant's request, Sheila Goodman transported Taylor from Williamsport, Pennsylvania, to her apartment in Bloomfield, and then to Wilmington, North Carolina, for the purpose of hiding him from the authorities. Taylor stayed at Jeanette Goodman's[4] house, and worked in a clothing store owned by defendant called Mad Flavors. The store was originally in the name of Sheila Goodman's mother, and later in the name of Jeanette Goodman. On at least one occasion, Taylor's girlfriend and his child visited him in North Carolina. Jeanette Goodman testified that it did not appear as if Taylor was afraid of defendant when he was living in North Carolina and working at defendant's store.

4 Jeanette Goodman was the mother of two of defendant's children and the sister of Sheila.

Defendant told several trial witnesses that Taylor was the only witness to a prior killing of which defendant was accused. Defendant told Kimmy Wilkins, a former girlfriend, that Taylor was a witness to a murder, that Taylor was making too many phone calls and that Wilkins should keep close to him. Defendant later told Wilkins that "he was going to get Oatmeal[5] clipped." John Barnes, a friend who stayed with defendant and Taylor in North Carolina and who drove Taylor and defendant back to New Jersey just before Taylor's murder, testified that defendant told him that Taylor was a witness against him in a homicide case, and that the "feds" were calling the Mad Flavors store looking for Taylor. This appeared to bother defendant. Michael Williams testified that defendant and Sorey were friends, that defendant said that he and his friends helped each other out, and that defendant would get the names of witnesses from his lawyer so that he could go after those witnesses. Finally, defendant told Jeanette Goodman that Taylor was the only witness against him in a murder case.

[5] Taylor was also known as "Oatmeal."

In December 1996, defendant told Sheila Goodman that he was tired of watching his back and tired of watching Taylor. She agreed to defendant's request to allow Taylor to stay at her apartment in Bloomfield. Toward the end of December 1996, Barnes, defendant, Taylor and another individual drove back to New Jersey from North Carolina in defendant's SUV. Shortly thereafter, Sheila Goodman drove Taylor to Williamsport, Pennsylvania to pick up his girlfriend and son and brought them back to her apartment on 17 Dodd Street in Bloomfield. While defendant was in New Jersey, he visited the home of Kimmy Wilkins. Stacy Lassiter, who was staying with Wilkins, overheard defendant state that he did not think anyone there would see Oatmeal again because defendant intended to kill him.

***6** Barnes and defendant returned to North Carolina. On the day of Taylor's murder, January 2, 1997, defendant had arranged by phone with both Wilkins and Sheila Goodman to transport Taylor and his girlfriend to Sheila Goodman's apartment. Throughout the day, defendant made several calls from the store in North Carolina to Goodman's apartment. Wilkins, Sheila Goodman, Taylor and Taylor's girlfriend were present that afternoon. Defendant called Wilkins and asked her to take Taylor to the "Chinese store" at the corner of Dodd and Prospect. Defendant said that Wilkins would not get hurt, and asked whether she trusted defendant, to which she responded affirmatively. Defendant added that they were "going to take care of Oatmeal."

Sheila Goodman saw Wilkins leave with Taylor to go to the "Chinese store" around ten o'clock that evening. Wilkins testified that when she and Taylor arrived at the "Chinese store," they discovered it was closed. As they began to return to Sheila Goodman's apartment, Wilkins saw an individual come out of an alley and lift a weapon. Taylor started running, the gunman chased after him, Taylor screamed and then Wilkins heard a gunshot. Wilkins could not identify the shooter. Later that evening, Sheila Goodman learned that Taylor had been murdered.

The chase was witnessed by Alfred Mulhearn, a cab driver. He had just dropped off a fare and was traveling through Bloomfield on his way to pick up a fare. Mulhearn saw the gunman knock Taylor to the ground and shoot him with a shotgun. The shooter then ran toward East Orange. The shooter made no attempt to remove anything from Taylor's pockets.

William Smith lived at 23 Dodd Street in Bloomfield. He overheard Taylor say "he is going to kill me" followed by the gunman chasing Taylor. Smith later viewed a photo array, from which he tentatively identified Sorey as the gunman. Smith also testified that he thought the person being chased was a woman due to the high pitch of the victim's voice. In addition, Smith made an in-court identification of defendant as the person who shot Taylor. It was undisputed, however, that defendant was in North Carolina at the time Taylor was shot. Taylor died of a shotgun wound to the right lower back.

We commence our discussion with a consideration of all issues other than the out-of-court identification by Taylor and the assertion that the prosecutor's office withheld relevant information about co-defendant Sorey's participation or non-participation in either murder.

Based on our review of the record in light of the arguments presented by defendant and the State, the arguments presented by defendant that he was deprived of a speedy trial, that the trial of the Lewis and Taylor murders should have been severed, that his motion for a judgment of acquittal should have been granted, and that the imposition of consecutive life terms of imprisonment is excessive are without sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(2). We are also satisfied that the various issues presented by defendant in his pro se brief, other than the issues concerning

Taylor's identification of defendant as involved in Lewis's death, are also without sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(2). We turn now to the identification issues presented by counsel and defendant pro se.

***7** Prior to trial, Judge Lester ruled that Taylor's 1996 testimony in a *Wade* hearing conducted in anticipation of defendant's initial trial for the murder of Lewis would be admissible at trial. She barred admission of a statement that Taylor had given to police.

In the course of the State's case, the prosecutor elicited through Lt. Irving Bradley, and over the objection of defendant, that Shawn Taylor identified defendant as one of the persons involved in the murder of Lewis. Specifically, Bradley testified that Taylor arrived at the precinct and informed Bradley that he had information about the death of Lewis. During the interview, Taylor informed Bradley that defendant, known to Taylor as Habib, and Alkabir Sorey were responsible for Lewis's death. Once Taylor revealed the names, Bradley left the interview, procured some photographs, and compiled two six-photo arrays. One included a photo of Habib, the other of Sorey.

Bradley then testified that he presented Taylor the photo array containing the photo of Habib. Taylor was not informed that Bradley believed that it contained the photo of Habib. Taylor told Bradley that photo number 4 was the man he knew as Habib. Photo number 4 was a picture of defendant.

Next, Bradley showed Taylor the photo array containing the photo of Sorey, again without informing Taylor that he believed that it contained the photo of co-defendant Sorey. In short order, Taylor identified a photo and signed his name on the back. The photo depicted co-defendant Sorey.

In the course of Assistant Prosecutor DeMarco's testimony, Taylor's testimony at the October 1996 *Wade* hearing was read to the jury. Given the context of its admission, it is clear that it served two purposes. First, the prior testimony served to identify defendant as one of the persons involved in Lewis's 1994 killing, and second, it served as evidence of defendant's tampering with a witness.

On appeal, appellate counsel and defendant pro se argue that Taylor's out-of-court identification was unduly suggestive. They also contend that the Taylor out-of-court identification should have been disregarded because the prosecutor learned after the trial that Sorey was not involved in Lewis's death. Both appellate counsel and defendant pro se suggest a *Brady* [6] violation. Defendant pro se also argues that Taylor's out-of-court identification was unreliable because Taylor had a dispute with Sorey earlier in the evening.

6 *Brady v. Maryland,* 373 *U.S.* 83, 83 *S.Ct.* 1194, 10 *L. Ed.*2d 215 (1963).

Defendant pro se also contends that the judge who presided at the 1996 *Wade* hearing erred when he barred defendant's attorney from questioning Taylor about the type of bikes involved in Lewis's murder. Finally, defendant pro se argues that the Taylor out-of-court identification was the strongest evidence of his guilt; therefore, its admission violated his right to a fair trial.

Taylor's 1994 out-of-court identifications of defendant and Sorey were the subject of a *Wade* hearing on October 2, 1996, the eve of defendant's and Sorey's trial for the January 1995 murder of Lewis. Judge Fast held that the identification procedure was not unduly suggestive and denied defendant's motion to exclude the out-of-court photo array identification. He found that defendants had not met their burden of showing that the identification procedure was impermissibly suggestive. He considered the procedure as "consistent with all cases permitting out-of-court identification." Moreover, he found that there was no substantial likelihood of misidentification because Taylor was one of the victims of the criminal activity, he knew the assailants, and he identified them without hesitation. When defendant and Sorey were indicted in 1997 for the murders of Lewis and Taylor, the State used the out-of-court identification by Taylor in their 2002 trial.

***8** Initially, we will address the contention that the identification procedure was unduly suggestive. Although an out-of-court identification is hearsay, such a statement is a recognized exception to the hearsay rule of exclusion. *N.J.R.E.* 803(a)(3). An out-of-court identification may be excluded, however, if the procedure was unduly suggestive and it contributed to a substantial likelihood of misidentification. *Neil v. Biggers,* 409 *U.S.* 188, 196-99, 93 *S.Ct.* 375, 380-82, 34 *L. Ed.*2d 401, 409-11 (1972); *State v. Madison,* 109 *N.J.* 223, 232-33 (1988).

A court must first decide whether the out-of-court identification procedure utilized by law enforcement authorities was in fact impermissibly suggestive. *Neil, supra,*

409 *U.S.* at 196-99, 93 *S.Ct.* at 380-82, 34 *L. Ed.*2d at 409-11; *Simmons v. United States,* 390 *U.S.* 377, 384, 88 *S.Ct.* 967, 971, 19 *L. Ed.*2d 1247, 1253 (1968); *State v. Long,* 119 *N.J.* 439, 493 (1990); *Madison, supra,* 109 *N.J.* at 232. "[T]he defendant bears the burden by a preponderance of the evidence to establish that the identification procedure was suggestive so as to result in a substantial likelihood of misidentification. *State v. Cook,* 330 *N.J.Super.* 395, 417 (App.Div.) (quoting *State v. Hurd,* 86 *N.J.* 525, 548 (1981)), *certif. denied,* 165 *N.J.* 486 (2000). If there is a finding that the pretrial identification procedure was impermissibly suggestive, the burden shifts to the State to prove by clear and convincing evidence that the identification had a source independent of the police-conducted identification procedure. *Madison, supra,* 109 *N.J.* at 245. The court must decide whether the objectionable procedure resulted in a substantial likelihood of misidentification. *Neil, supra,* 409 *U.S.* at 198, 93 *S.Ct.* at 381, 34 *L. Ed.*2d at 410; *State v. Lutz,* 165 *N.J.Super.* 278, 289 (App.Div.1979).

The testimony at the *Wade* hearing established that Bradley showed Taylor unexceptional photo arrays, one containing defendant's photograph and the other a picture of Sorey. There was no evidence that defendant's photograph differed in any substantial way from the photographs of others in the array. Taylor did not dispute Bradley's testimony that the pictures in both arrays were of individuals of similar age, sex, race and facial hair. Defendant's assigned counsel does not argue that the array or the circumstances surrounding Taylor's identification were suggestive in any way. The array does not appear to differ in any material way from the array upheld in *State v. Galiano,* 349 *N.J.Super.* 157, 162 (App.Div.2002), *certif. denied,* 178 *N.J.* 375 (2003), which also involved six photographs of persons of similar age, race, gender and features.

Defendant argues, however, that Bradley showed Taylor a single photo of defendant wearing a red hooded sweatshirt. The record of Taylor's testimony on this subject is equivocal at best. Taylor testified that he was shown two separate photo arrays; one with defendant's photo, the other with Sorey's. He also testified that defendant was wearing a red hooded sweatshirt with the hood resting on the back of defendant's head at the time of the killing. At one point it seemed that Taylor testified that he was shown a separate picture of defendant wearing a red hooded sweatshirt. Yet, on cross-examination, the following exchange occurred:

> ***9** Q. Were you indicating that you were shown a photo of a person in a red hoody or that the person who was involved in the incidents had a red hoody on?
>
> A. The person that was involved in it had a red hoody.

At best, the testimony by Taylor contained inconsistencies. It was the function of the judge conducting the hearing to resolve the discrepancies, evaluate the credibility of the witnesses and determine the ultimate issues. Our review of the record of the *Wade* hearing reveals that the findings of lack of suggestibility and unlikelihood of misidentification are well-supported by the record. [7]

[7] We are also satisfied that the admission of Taylor's out-of-court identification testimony raises no constitutional issues. In *Crawford v. Washington,* 541 *U.S.* 36, 124 *S. Ct* . 1354, 158 *L. Ed.*2d 177 (2004), the Court held the use at trial of an out-of-court statement containing "testimonial" hearsay by an unavailable witness was barred by the Confrontation Clause of the Sixth Amendment to the United States Constitution. The Court held, however, that if the statement had certain indicia of reliability, such as given in a prior judicial proceeding while the unavailable declarant was under oath and subject to cross-examination, the statement would be admissible. *Id.* at 54, 124 *S.Ct.* at 1365-66, 158 *L. Ed.*2d at 194. That is certainly the situation in this case because Taylor's testimony was procured during a *Wade* hearing while he was under oath and subject to cross-examination.

Defendant also argues the prosecutor was guilty of misconduct by presenting a theory of the case that defendant and Sorey were guilty of the murder of Taylor at a time when the prosecutor had reason to believe that Sorey was not involved in the murders of Lewis or Taylor. The State responds that the prosecutor's comments were wholly supported by the evidence and that defendant failed to object to these comments during or at the conclusion of the prosecutor's summation and suggests that we should review this error in accordance with the plain error standard.

Defendant's argument is supported by a dismissal of indictment recommendation submitted to the trial judge by the assistant prosecutor who tried the State's case against defendant and was scheduled to present the State's case against Sorey. In his undated memorandum, the assistant

prosecutor related that Smith, the Dodd Street resident, identified Sorey within ten days of the shooting as the person who pursued Taylor, and repeated the identification during his direct examination. However, during cross-examination, Smith identified defendant as the pursuer. The prosecutor then stated that "the office has received information from sources still attached to the case, that it may have been someone other than Alkabir Sorey who was the real killer of Shawn Taylor on January 2, 1997."

Then, the assistant prosecutor turned to the 1994 murder of Anthony Lewis. He stated that

> As far as the initial murder of Anthony Lewis on August 20, 1994, it has come to light that although Eugene Seabrookes was one of the individuals responsible for the death, Alkabir Sorey may not have been with him. Through proffer sessions, during the investigation of both murders Damen Wise and his attorney gave this office a debriefing of the events of August 20, 1994. The material gained from Damen Wise is not admissible against him but provided exculpatory information for Alkabir Sorey. Mr. Wise indicated that he was on the motorcycle the night Anthony Lewis was killed and that Eugene Seabrookes was the shooter.

As a result of the recommendation, Judge Lester dismissed the 1997 indictment against Sorey on September 6, 2002.

We decline to treat this alleged error by the plain error standard because the information that would have formed the basis for a timely objection was unknown to defense counsel at the time of trial. The issue also comes before us without the benefit of a motion for a new trial. Nevertheless, the information is so troubling that we remand to the trial court to allow a determination as to when the State procured the information that undercut the theory of its prosecution of defendant.

***10** This determination cannot be made on the record before us, although the record suggests that the information concerning Damon Wise was known to someone in the prosecutor's office during this trial. The memorandum penned by the assistant prosecutor is undated but was approved by his supervisor on June 26, 2002, a mere seven days after the return of the verdict. It appears that the prosecutor approved dismissal of the indictment against Sorey on July 12, 2002, fourteen days before Judge Lester imposed sentence. This sequence strongly suggests that during the trial someone in the prosecutor's office was in possession of the information imparted by Wise. If so, defense counsel was entitled to know that the State's theory of the case was without factual support.

The State contends that the Wise information is of no consequence to the defense of either murder because, according to Wise, defendant shot Lewis and arranged for the murder of Taylor. That may be, but a jury may have found it relevant that Taylor identified, without any hesitation, defendant and Sorey as the men involved in the shooting of Lewis. If he was mistaken about Sorey, a jury may wonder whether he was mistaken about his identification of defendant. In addition, although the State's evidence concerning the Taylor murder was compelling, it was built around the extraordinarily close friendship between defendant and Sorey and the suspect identification by Smith. A jury may have convicted defendant of conspiracy to murder but may have hesitated to convict on the murder charge absent evidence of the identity of the shooter as an ally of defendant. Furthermore, Kimmy Wilkins testified that defendant was upset when he learned that Taylor and his girlfriend had left the apartment to visit friends in Newark. He expressed concern that someone may harm him. To be sure, defendant's concern may have been feigned and he may have simply been concerned that the police would find Taylor. On the other hand, the jury may have interpreted the concern as genuine and found that defendant may have intended to kill Taylor and had taken substantial steps to arrange for that event to occur but that someone else intervened before defendant's scheme came to fruition. Thus, the information is not without an impact on this verdict. For these reasons, therefore, we remand for a hearing on when the prosecutor's office learned of the information obtained from Wise.

We request the judge to make appropriate findings of fact. If the trial judge conducts the hearing and finds that the information was known by the prosecutor's office before the verdict was returned, we ask her to also assess the impact of this information on the verdict in light of her intimate knowledge of the record and her feel for the case. We request that the hearing be conducted expeditiously and the requisite

findings of fact and conclusions of law be forwarded to us by June 20, 2006.

The matter is remanded for further proceedings in accordance with this opinion. Jurisdiction is retained.

All Citations

Not Reported in A.2d, 2006 WL 1060502

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2018 WL 6272933
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Tifani K. YOUNG, a/k/a Tifani K.
Young, Jr., Defendant-Appellant.

DOCKET NO. A-1849-17T2
|
Submitted October 22, 2018
|
Decided December 3, 2018

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 16-09-0970.

Attorneys and Law Firms

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

Gurbir S. Grewal, Attorney General, attorney for respondent (Arielle E. Katz, Deputy Attorney General, of counsel and on the brief).

Before Judges Fasciale, Gooden Brown and Rose.

Opinion

PER CURIAM

***1** Tried by a jury, defendant Tifani K. Young was found guilty of first-degree robbery, N.J.S.A. 2C:15-1(a)(2) (count one); second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:15-1(a)(2) (count two); first-degree witness tampering to cause false testimony, N.J.S.A. 2C:28-5(a)(1) (count seven); first-degree witness tampering to withhold testimony, N.J.S.A. 2C:28-5(a)(2) (count eight); and first-degree witness tampering to obstruct official proceedings, N.J.S.A. 2C:28-5(a)(5) (count nine). At sentencing, the trial court merged count two with count one, and counts eight and nine with count seven. The court imposed a ten-year custodial term on count one, with an eighty-five percent parole ineligibility period mandated by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, plus a consecutive fifteen-year term on count seven, N.J.S.A. 2C:28-5(e), for an aggregate twenty-five year sentence.

In his brief on appeal, defendant raises the following points for our consideration:

POINT I

THE VIDEO WAS HIGHLY INFLAMMATORY N.J.R.E. 404(b) EVIDENCE OF BAD ACTS UNCONNECTED TO THE ROBBERY, WAS HIGHLY PREJUDICIAL WITH LITTLE PROBATIVE VALUE, IN VIOLATION OF N.J.R.E. 403, AND WAS INADMISSIBLE AS INTRINSIC EVIDENCE.

POINT II

[D.H.]'S[1] TESTIMONY THAT [DEFENDANT] RECORDED TWITTER MESSAGES THAT APPEARED TO THREATEN [D.H.] FOR HITTING HIS COUSIN WAS INADMISSIBLE EVIDENCE PURSUANT TO N.J.R.E. 404(b). [(Not raised below)][2]

POINT III

THE JUDGE FAILED TO QUALIFY VAN FOSSEN AS AN EXPERT WITNESS DESPITE TESTIMONY THAT WAS BEYOND THE KEN OF THE AVERAGE JUROR, AND PERMITTED HIM TO TESTIFY IMPROPERLY AS A LAY WITNESS. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. 1, PARS. 1, 9, 10.

(Not raised below)

POINT IV

THE [TWENTY] FIVE-YEAR AGGREGATE SENTENCE WAS MANIFESTLY EXCESSIVE.

Having reviewed these arguments in light of the applicable deferential standards of appellate review, we affirm defendant's conviction and sentence.

1 We use initials to protect the privacy of the victim.

2 Before the trial court, defendant argued that his Twitter messages should have been excluded from evidence because they were not authenticated, not because they were other-crime evidence pursuant to N.J.R.E. 404(b).

I.

The State's proofs at trial demonstrated that defendant agreed with co-defendants Kevon Carter and Tayron Brown[3] to rob D.H. at gunpoint. Although he did not participate in the robbery, defendant supplied the handgun that was used in the robbery and was observed in the area of the scene shortly after the crime was committed. Following the robbery, defendant threatened D.H.

3 Carter and Brown pled guilty prior to defendant's trial and are not parties to this appeal.

The evidence adduced at trial, which is pertinent to this appeal, was aptly summarized by the trial court during sentencing:

> On July 7, 2015, [D.H.], who had previously been convicted of a drug offense, was employed at a gas station. He closed the gas station at 12:30 a.m. and was walking to his apartment when confronted by K[e]von Carter and Tayron Brown, both of whom had previous arrests. [D.H.] knew both of them. Carter and Brown display[ed] a small chrome-plated handgun and demand[ed] money from [D.H.].
>
> ***2** They told [D.H.] to return to the gas station and open the safe where the night's receipts were stored. Informed by [D.H.] that the safe could not be opened, they directed [D.H.] to his family's home where they would continue the robbery. Someone in the family home alerted the police. The police arrived and Carter and Brown fled, discarding the gun in their flight.
>
> At the same time, ... defendant ... had been in cell phone contact with Carter and Brown and was parked in a car only a block away from the [victim's] family home. The police found Carter hiding in a pile of trash in possession of a cell phone. The gun was recovered the next morning during a daylight search. The cell phone revealed that Carter had been in touch with [defendant] throughout the night.
>
> Initially [D.H.] was uncooperative and refused to implicate Brown, who had escaped. But his reluctance began to wane when he was accosted one night in Dempster's Bar by someone who knew he would be a potential witness against Carter, who was ... defendant's cousin. Thereafter, [D.H.] received repetitive intimidating threats from ... defendant who sought to discourage his testimony in the case against Carter.
>
> Defendant sent [D.H.] a message, ... ["]you popped my cousin at Dempster's,["] .... A clear indication that the assault on [D.H.] at Dempster's was related to potential testimony against Carter.
>
> Because of defendant's threats, [D.H.] became more cooperative to law enforcement and said that he believed ... defendant was involved in the robbery. Nonetheless, the threats were so persuasive that [D.H.] sought to recant at time of trial.
>
> A detective searching the Internet discovered a video in which Carter and ... defendant are seen displaying a small chrome, silver handgun while appearing to be ingesting marijuana and flashing gang signs [(Twitter video)]. The threats to [D.H.] were real and were designed to subvert the judicial process. Defendant frequently drove past [D.H.]'s residence making hand gestures and calling [D.H.] a rat. In other social media messages [Twitter messages] he wrote,
>
> > [ ]Ima fuck ya dad up when I see em.[ ]
> >
> > [ ]I want my fade bra WYA.[ ]
> >
> > [ ]You lucky ya snitch ass was in front of the courthouse Ima kill you.[ ]
>
> On another occasion, defendant threatened [D.H.] when the two crossed paths in the courthouse.

II.

A.

With this factual backdrop in mind, we consider defendant's first contention that the trial court erred in admitting the Twitter video, which was posted on Carter's Twitter account page less than two months before the present crime was committed. Defendant claims the Twitter video should have been excluded as other-crimes evidence pursuant to N.J.R.E. 404(b) because the handgun depicted in that video was not intrinsic evidence of the robbery. He further contends "[t]he video was inflammatory evidence of bad acts that had no probative value as evidence of [his] participation in the robbery ...." We disagree.

"The threshold determination under Rule 404(b) is whether the evidence relates to 'other crimes,' and thus is subject to continued analysis under Rule 404(b), or whether it is evidence intrinsic to the charged crime, and thus need only satisfy the evidence rules relating to relevancy, most importantly Rule 403." State v. Rose, 206 N.J. 141, 179 (2011). An uncharged offense is intrinsic evidence if: (1) "it 'directly proves' the charged offense[,]" or (2) the uncharged act was " 'performed contemporaneously with the charged crime' " and it " 'facilitate[d] the commission of the charged crime.' " Id. at 180 (citation omitted).

***3** Pursuant to N.J.R.E. 404(b), evidence of other crimes or bad acts is generally not admissible, unless used for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute." In State v. Cofield, 127 N.J. 328 (1992), our Supreme Court set forth a four-pronged test (Cofield test) that governs the admission of such evidence:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [Id. at 338 (citation omitted); see also State v. Carlucci, 217 N.J. 129, 140-41 (2014) (reaffirming the Cofield test).]

We apply an abuse of discretion standard to the evidentiary rulings of other-crime evidence. State v. Castagna, 400 N.J. Super. 164, 182 (App. Div. 2008). Under that standard, we defer to the trial court "in recognition that the admissibility of extrinsic evidence of other crimes or wrongs is best determined by the trial judge[,] ... who is therefore in the best position to weigh the [evidence's] probative value versus potential prejudice ...." Id. at 182-83. There must be a "clear error of judgment" to overturn the trial court's determination. Rose, 206 N.J. at 158 (citation omitted). However, if the trial court fails to engage in a proper N.J.R.E. 404(b) analysis, our review is plenary. Ibid.

Here, when the State moved to introduce the Twitter video at trial, the trial court conducted an N.J.R.E. 104 hearing, viewed the video, and determined it was "relevant and necessary" for the jury's consideration.[4] The handgun displayed in defendant's hands in the video was intrinsic evidence of the armed robbery, and "probative of ... defendant's ability, intent or opportunity to commit a robbery." We agree.

4 Apparently, the court admitted the video with the sound redacted because the background rap lyrics could be considered offensive by the jury.

Relevant here, use of a firearm during a robbery elevates the grading of the offense from second to first degree. N.J.S.A. 2C:15-1(b). Further, the video depicts defendant with Carter, thereby dispelling defendant's statement to police that he did not know Carter. Thus, the Twitter video contains evidence that "is clearly relevant to material facts at issue in the determination of defendant's guilt on the charged offenses." State v. Brockington, 439 N.J. Super. 311, 333 (App. Div. 2015).

Viewed in that context, the Twitter video was properly admitted as intrinsic evidence of the armed robbery. Because we find the Twitter video depicted intrinsic evidence, we need not consider its admissibility under N.J.R.E. 404(b), although we nonetheless do so for the sake of completeness.

With respect to defendant's N.J.R.E. 404(b) argument, we recognize the court did not expressly address the four Cofield factors. Notwithstanding, based on our independent review of the record, the evidence is also admissible under the traditional analysis set forth in Cofield, 127 N.J. at 338, especially where, as here, defendant primarily challenges the fourth Cofield factor.

As for the first factor, the evidence was relevant to a material issue, i.e., use of the weapon during commission of the robbery and defendant's knowledge of Carter. The second factor applied because the handgun depicted in the video was strikingly similar to that used in the robbery. Those similarities were described by the lead detective at trial as: "the shape, what appeared to be the same logo on the side [of the weapon, i.e.], Raven Arms logo, the wooden handle, [and] the chrome slide[.]" The third factor was met because, as the court remarked, "it was shocking ... just how clear that gun was."

***4** Lastly, the probative value was not outweighed by its apparent prejudice. The court recognized the evidence was

"harmful to ... defendant's case[,]" but reasonably concluded its prejudice was outweighed by its probative effect. We concur and reject defendant's argument that the court should have admitted screenshots of the video as a less prejudicial means of establishing the same point. The screenshots are not adequate substitutes for the entire video because, as the State demonstrated, the screenshots "do not depict a portion of the video where the entire gun can be seen in frame, including the Raven Arms logo on the side." See State v. Stevens, 115 N.J. 289, 303 (1989) ("In weighing the probative worth of other-crime evidence, a court should consider not only its relevance but whether its proffered use in the case can adequately be served by other evidence.").

Moreover, the trial court properly instructed the jury on the limited use of other-crime evidence here. Cofield, 127 N.J. at 340-41. Specifically, the court used the model jury charge for N.J.R.E. 404(b) evidence, as tailored to the facts of this case. Thus, the jury was instructed they could not use the Twitter video as propensity evidence. Rather, the court informed the jury that the video recording was admitted "only to help [them] decide whether ... defendant supplied the gun in the alleged robbery and whether he conspired to commit robbery." The court then instructed the jury that they "may consider the video for no other purpose." We assume the jury followed the court's instructions. State v. Martini, 187 N.J. 469, 477 (2006).

B.

We next consider defendant's newly-minted argument that the court should have precluded his Twitter messages pursuant to N.J.R.E. 404(b) through the plain error lens. R. 2:10-2. For the first time on appeal, defendant claims the Twitter messages received by D.H. during his interview with police relate to an incident with defendant's cousin, and not to the armed robbery of D.H. In essence, defendant contends D.H. struck his cousin at Dempster's Bar, and the Twitter messages are in response to D.H.'s alleged assault of defendant's cousin.

Defendant's arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only the following brief remarks.

In ruling that the Twitter messages did not "violate[ ] any of the authentication rules including [N.J.R.E.] 901, [and N.J.R.E.] 902," the court properly observed the messages were sent in close temporal proximity to D.H.'s interview with police. Moreover, the court correctly concluded the Twitter messages were intrinsic to the witness tampering charges. There is sufficient credible evidence in the record to support that determination. Conversely, the record is devoid of any evidence that the Twitter messages related to D.H.'s purported assault of defendant's cousin.

C.

Turning to defendant's next argument, also raised for the first time on appeal, we consider whether the court erroneously permitted the lead detective to interpret certain slang phrases and social media acronyms contained in defendant's Twitter messages. Although defendant did not object to that testimony during trial, on appeal he argues it was inadmissible lay opinion testimony. See N.J.R.E. 701. We conclude there was no error, let alone plain error.

The opinions of non-expert witnesses are admissible if they are "(a) ... rationally based on the perception of the witness and (b) will assist [the jury] in understanding the witness' testimony or in determining a fact in issue." Ibid. The detective testified he was familiar with slang terms, including "strap," and "WYA." He then explained that, "Strap is a street term for a gun[ ]"; and "WYA" meant "Where you at[?]"

The detective's knowledge regarding those terms was based on his experience as a police officer and his personal knowledge. Specifically, the detective testified he was familiar with street slang as a result of his employment. Further, he was familiar with social media slang because he consulted social media platforms as part of his employment and in his personal life. Thus, the detective's testimony satisfied the criteria of N.J.R.E. 701, and we find no abuse of discretion in the trial court's decision to admit the testimony.

***5** Indeed, we previously have held that a knowledgeable police officer can give testimony about street or gang terminology. State v. Johnson, 309 N.J. Super. 237, 263 (App. Div. 1998) (recognizing the lay opinion of a police officer regarding street slang was admissible because it assisted the jury in determining the meaning and context of the defendant's conversation); cf. State v. Hyman, 451 N.J. Super. 429, 448-49 (App. Div. 2017), certif. denied, 232 N.J. 301 (2018) (requiring expert testimony where the detective's knowledge of code words was based on his investigation of the matter at hand, and not based on his personal knowledge).

Furthermore, we find no plain error in the admission of the detective's testimony. That testimony was not of the nature to have been "clearly capable of producing an unjust result." See R. 2:10-2; see also State v. Singleton, 211 N.J. 157, 182 (2012).

III.

Defendant's final argument asserting the court imposed an excessive and unfair sentence upon him requires little comment. He contends the court failed to find mitigating factor seven, N.J.S.A. 2C:44-1(b)(7) (lack of prior record), and that the court provided insufficient reasons for imposing a sentence greater than the minimum ten-year term for witness tampering.

Sentencing determinations are reviewed on appeal with a highly deferential standard. State v. Fuentes, 217 N.J. 57, 70 (2014).

> The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'
>
> [Ibid. (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Once the trial court has balanced the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b), it "may impose a term within the permissible range for the offense." State v. Bieniek, 200 N.J. 601, 608 (2010); see also State v. Case, 220 N.J. 49, 65 (2014) (instructing that appellate courts may not substitute their judgment for that of the sentencing court, provided that the "aggravating and mitigating factors are identified [and] supported by competent, credible evidence in the record").

In its sentencing analysis, the court found aggravating factor three, N.J.S.A. 2C:44-1(a)(3) (risk of committing another offense), and nine, N.J.S.A. 2C:44-1(a)(9) (the need for deterrence). The court found mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11) (imprisonment would cause hardship on defendant's family). In addition, the judgment of conviction reflects that the court consented to "a reduction of the primary parole eligibility date pursuant to N.J.S.A. 30:4-123.67." [5]

5 That statute permits inmates to enter into agreements with the Department of Corrections that provide for "individual programs of education, training, or other activity which shall result in a specified reduction of ... the inmate's primary parole eligibility date ... upon such successful completion of the program." N.J.S.A. 30:4-123.67(a).

We are satisfied the trial court appropriately applied those sentencing factors, and provided sufficient explanation for the facts supporting each factor. The court also explained that it considered the other mitigating factors, [6] including those argued for by defense counsel, but did not believe those mitigating factors were applicable here.

6 The court stated it found "aggravating factors one and seven through ten do not apply." (emphasis added). Based on our review of the record, we believe the court misstated, and meant "mitigating factors." Specifically, defendant argued that mitigating factors one, seven through ten, and nine applied while the State argued aggravating factors three, five and nine applied.

***6** We simply note that we reject defendant's contention that mitigating factor seven, N.J.S.A. 2C:44-1(b)(7) (lack of "prior delinquency or criminal activity") applies here. Although defendant was twenty-two when he was sentenced, the present offense was not his first arrest, and he was adjudicated delinquent on a theft offense shortly after his seventeenth birthday. N.J.S.A. 2C:20-3; see also State v. Torres, 313 N.J. Super. 129, 162 (App. Div. 1998) (rejecting mitigating factor seven where defendant had two prior juvenile arrests and no convictions).

We also reject defendant's argument that the court improperly sentenced defendant at the middle of the sentencing range on the witness tampering conviction because that sentence was required to run consecutively to the armed robbery conviction. Defendant cites no authority for that contention. Moreover, we find no error in the imposition of the armed robbery sentence at the lowest end of the first-degree range, while the witness tampering sentence was imposed at the middle of the same range. The court astutely recognized that the armed robbery conviction was subject to NERA, whereas

the witness tampering conviction was not. See Case, 220 N.J. at 64-65 ("[W]hen the aggravating factors preponderate, sentences will tend toward the higher end of the range.").

In sum, the trial court properly identified and weighed the applicable aggravating and mitigating factors. We perceive no abuse of discretion in the sentence imposed, which does not shock our judicial conscience. Roth, 95 N.J. at 365.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2018 WL 6272933

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