SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0114-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARC KIRKLAND,

Defendant-Appellant.

Submitted March 21, 2017 – Decided April 4, 2017

Before Judges Fasciale and Sapp-Peterson.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 13-08-0432.

Joseph E. Krakora, Public Defender, attorney for appellant (Monique Moyse, Designated Counsel, on the brief).

Michael H. Robertson, Somerset County Prosecutor, attorney for respondent (James L. McConnell, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his conviction for first-degree armed robbery, N.J.S.A. 2C:15-1. We affirm.

Defendant, who had been wearing a ski mask and gloves and carrying a gray object in one of his hands, walked into a bank and announced "this is a robbery, give me all your money, I have a bomb." Defendant pulled two pillowcases out of his back pocket, gave one to one bank teller, walked over to another teller, put the gray object on the counter, repeated he had a bomb, and gave the second teller the other pillowcase. He ordered the tellers to place their money into the pillowcases, which they did, including a large amount of paper currency and coins. Defendant then grabbed the pillowcases from the bank tellers and left the building. Several witnesses observed defendant immediately before he entered the bank, while he was in the bank, and as he left the bank carrying the stolen money. One individual followed defendant and, after defendant removed his ski mask, got a clear view of his face, vehicle, and license plate number.

The police arrived at the bank and interviewed the individual who had followed defendant after defendant left the bank. That person gave the police a description of defendant's face and the vehicle defendant had been driving, including its license plate number. After the officers ran the plate number, they learned that the license plate number was associated with the vehicle registered to defendant and observed by the witness. Other officers took statements from various individuals who had

witnessed defendant rob the bank, including three bank tellers. One of the officers then viewed footage from the bank's surveillance camera.

The police continued their investigation of the bank robbery. They learned that surveillance cameras from other nearby businesses recorded defendant in the immediate vicinity of the bank before he entered the building. The police suspected defendant had committed the robbery and arrived at his last known address. They noticed an envelope stuck behind defendant's front screen door. Inside the envelope was a letter addressed to his landlord, who had previously evicted defendant for non-payment of rent. In his letter to the landlord, defendant stated "I have your money."

The police learned that defendant was using the stolen money to buy alcohol at a nearby restaurant over the next few days following the bank robbery. The bartender at the restaurant described defendant as "very anxious" and obsessed with getting the local newspaper. The individual who followed defendant and had the clear view of defendant's face after defendant had removed the mask, identified defendant from a photographic array. The police then arrested defendant at the restaurant, seized $352 in cash from his person, and searched his vehicle where they found a pillowcase containing $5705 in paper currency and two $10 rolls

of quarters, a $10 roll of quarters on the floor of the front passenger side, and a box of latex-free rubber-type gloves.

A judge and jury tried the case for five days. The jury found defendant guilty of first-degree robbery. The judge sentenced defendant to fifteen years in prison subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and ordered restitution in the amount of $479.

On appeal, defendant argues the following points:

> POINT I
> THE TRIAL COURT'S OMITTED AND ERRONEOUS JURY CHARGES ON DEFENDANT'S STATEMENTS AND ROBBERY DEPRIVED MR. KIRKLAND OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL. [(U.S. Const. Amends. V, VI, and XIV; N.J. Const. Art. I, ¶ 1, 9, and 10).] (Partially Raised Below).
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> POINT II
> THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A MANIFESTLY EXCESSIVE SENTENCE AND FAILING TO HOLD A RESTITUTION HEARING.

After considering the record and the briefs, we conclude that defendant's arguments are "without sufficient merit to warrant discussion in a written opinion[.]" R. 2:11-3(e)(2). We add the following remarks.

Defendant contends that the judge's failure to instruct the jury to cautiously evaluate defendant's oral statements in accordance with State v. Kociolek, 23 N.J. 400 (1957) constituted plain error. It is undisputed that defense counsel did not request

the charge. Such an omission, however, did not constitute plain error.

In Kociolek, the Court held that when a defendant's oral statements have been introduced against him, the trial court must instruct the jury that it should "receive, weigh and consider such evidence with caution, in view of the generally recognized risk of inaccuracy and error in communication and recollection of verbal utterances and misconstruction by the hearer." Id. at 421. The Kociolek charge should be given whether or not specifically requested by a defendant, but the failure to give this charge is not plain error per se. State v. Jordan, 147 N.J. 409, 428 (1997) (holding it would be "a rare case where failure to give a Kociolek charge alone is sufficient to constitute reversible error"). This is not that rare case.

Although defendant here made no request for a Kociolek instruction, the court gave a general comprehensive instruction to the jury regarding witness credibility at the outset, as well as at the close of trial. Specifically, the judge told the jurors in part that they are permitted to consider a witness's "ability to reason, observe, recollect and relate," and that they may choose to "accept all of [the testimony], a portion of it, or none of it." That, together with the extensive summations in which counsel thoroughly addressed inconsistencies in the witnesses' testimony,

satisfies us that the failure to give the charge was not capable of producing an unjust result.

We reject defendant's argument that the judge gave a flawed jury charge on robbery. Defense counsel did not object to the jury charge even though defendant had the obligation "to challenge instructions at the time of trial." State v. Morais, 359 N.J. Super. 123, 134 (App. Div.) (citing R. 1:7-2), certif. denied, 177 N.J. 572 (2003). Failure to object creates a "presum[ption] that the instructions were adequate." Id. at 134-35. Thus, we review this claim under the plain error standard. R. 2:10-2.

It is undisputed that "[a]ppropriate and proper charges to a jury are essential for a fair trial." State v. Green, 86 N.J. 281, 287 (1981). The trial judge must guarantee that jurors receive accurate instructions on the law as it pertains to the facts and issues of each case. Id. at 287-88. The charge must be read as a whole to determine whether there was any error. State v. Adams, 194 N.J. 186, 207 (2008). Looking at the jury charge as a whole, we see no error, let alone plain error.

The judge followed the Model Jury Charge on robbery. Contrary to defendant's contention, the judge instructed the jury more than once that its verdict had to be unanimous. And the verdict was in fact unanimous. There is no credible suggestion that the jury

struggled in arriving at its verdict, or was otherwise unable to understand and follow the instructions.

Defendant contends that the judge imposed an excessive sentence. He argues the judge failed to find additional mitigating factors and erred by ordering restitution without conducting an ability-to-pay hearing.

Our review of sentencing determinations is limited. State v. Roth, 95 N.J. 334, 364-65 (1984). We will not ordinarily disturb a sentence imposed which is not manifestly excessive or unduly punitive, does not constitute an abuse of discretion, and does not shock the judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16, 220 (1989). In sentencing, the trial court "first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." State v. Case, 220 N.J. 49, 64 (2014). The court must then "determine which factors are supported by a preponderance of [the] evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." O'Donnell, supra, 117 N.J. at 215. We are "bound to affirm a sentence, even if [we] would have arrived at a different result, as long as the trial court properly identifie[d] and balance[d] aggravating and mitigating factors that [were] supported by competent credible evidence in the record." Ibid.

Here, the judge found aggravating factors N.J.S.A. 2C:44-1(a)(1), (3), (6), and (9) outweighed mitigating factors N.J.S.A. 2C:44-1(b)(6) and (7). In reaching these findings, the judge noted that defendant threatened the bank tellers and customers during the robbery; defendant had three prior indictable convictions for burglary and amended larceny, and at least one conviction for disorderly persons shoplifting; and defendant had previously violated terms of his probationary sentences.

There is no reason to second-guess the trial court's application of the sentencing factors, nor any reason to conclude that the sentence "shocks the judicial conscience." Roth, supra, 95 N.J. at 364; see also State v. Bieniek, 200 N.J. 601, 612 (2010) (reiterating that appellate courts must accord deference to trial judges in sentencing decisions). Although defendant argues that additional mitigating factors were warranted, such is not born out by this record.

As to the ability-to-pay hearing, defendant did not challenge the amount of the restitution or request an ability-to-pay hearing. Defendant never claimed that he was unable to pay the restitution amount of $479.

Affirmed.