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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0435-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FREDERICO BRUNO, a/k/a
FREDRICOT BRUNO,

Defendant-Appellant.

Argued November 14, 2017 – Decided November 29, 2017

Before Judges Fisher, Fasciale and Summers.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
13-02-0400.

Stephen P. Hunter, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Mr. Hunter, of counsel and on the brief).

Kerry J. Salkin, Assistant Prosecutor, argued
the cause for respondent (Esther Suarez,
Hudson County Prosecutor, attorney; Ms.
Salkin, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

After a two-week jury trial involving the death of a three-month-old child and a brutal attack of two adult victims, defendant appeals from his convictions for aggravated manslaughter, felony murder, burglary, attempted murder, aggravated assault, weapons offenses, witness tampering, injured victim endangerment, and child endangerment. We affirm.

Defendant dated an individual (the girlfriend) and they had a child (the child). The girlfriend, the child, and a friend (the friend) lived together in an apartment. Defendant broke into the apartment, brandished a meat cleaver, and slashed the friend's face and arms. Defendant then brandished a knife and forced the girlfriend into a bedroom, where he tried to remove the child from her arms. She blacked out, and defendant resumed beating the friend and stabbing her with the knife.

A recording from a surveillance camera showed the girlfriend falling out of the bedroom window and hitting the ground. A witness testified that she saw defendant standing over the girlfriend hitting her on the ground with a metal chair. When the police arrived, they found the girlfriend and the child on the ground. The child died in the emergency room.

A grand jury indicted defendant with first-degree murder (the child), N.J.S.A. 2C:11-3(a)(1) and (a)(2) (Count One); first-degree felony murder (the child), N.J.S.A. 2C:11-3(a)(3) (Count

Two); second-degree burglary, N.J.S.A. 2C:18-2 (Count Three); first-degree attempted murder (the girlfriend and the friend), N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (Counts Four and Five); second-degree aggravated assault (the girlfriend and the friend), N.J.S.A. 2C:12-1(b)(1) (Counts Six and Seven); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (Counts Eight, Ten and Twelve); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (Counts Nine, Eleven and Thirteen); second-degree witness tampering, N.J.S.A. 2C:28-5(a) (Count Fourteen); third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2 (Counts Fifteen, Sixteen and Seventeen); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (Count Eighteen); and fourth-degree obstructing the administration of justice, N.J.S.A. 2C:29-1 (Count Nineteen).

On Count One, the jury found defendant guilty of first-degree aggravated manslaughter of the child. The jury then found him guilty on Counts Two through Eighteen. The judge imposed an aggregate prison term of 113 years with seventy-six and one-half years without parole eligibility.¹

¹ The judge merged Counts One and Three into Two and sentenced defendant to fifty years in prison subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The judge merged Counts Six, Ten, Eleven, Twelve, and Thirteen into Count Four and imposed a prison term of twenty years subject to NERA, consecutive to Counts Two

On appeal, defendant argues:

POINT I

THE REQUESTED SPECIFIC UNANIMITY INSTRUCTION SHOULD HAVE BEEN GIVEN BECAUSE THE STATE'S ALTERNATIVE TH[E]ORIES WERE NOT CONCEPTUALLY SIMILAR, BUT RATHER WERE CONTRADICTORY, RELYING ON DIFFERENT ACTS AND DIFFERENT EVIDENCE, THUS REASONABLY GIVING RISE TO THE DANGER OF A FRAGMENTED VERDICT. U.S. Const. [a]mend. XIV; N.J. Const. [a]rt. I, ¶ 9.

POINT II

IT IS CRUEL AND UNUSUAL PUNISHMENT THAT A FELONY MURDER CONVICTION LEADS TO A GREATER SENTENCE THAN AGGRAVATED MANSLAUGHTER BECAUSE IT IS GROSSLY DISPROPORTIONATE AND IT SERVES NO LEGITIMATE PENOLOGICAL OBJECTIVE TO PUNISH A NEGLIGENT HOMICIDE MORE SEVERELY THAN A RECKLESS HOMICIDE. U.S. Const. [a]mend VIII; N.J. Const. [a]rt. I, ¶ 12 (Not Raised Below).

POINT III

THE JUDGE FAILED TO ADDRESS THE REAL-TIME CONSEQUENCES OF THIS SENTENCE, WHICH ARE THE MOST SEVERE POSSIBLE UNDER THE LAW: LIFE

and Fifteen. The judge merged Counts Seven, Eight, and Nine into Count Five and imposed a twenty-year prison term subject to NERA, consecutive to Counts Two, Four, Five, Fourteen, Fifteen, and Sixteen. On Count Fourteen, the judge sentenced defendant to seven years in prison, consecutive to Counts Two, Four, Fifteen, and Sixteen. (On Count Fourteen, the judgment of conviction (JOC) and sentencing transcript conflict. The JOC refers to Count Fourteen as Count Seven, and fails to include Count Eighteen as a consecutive sentence. In the sentencing transcript, the judge properly referred to defendant's conviction on Count Fourteen, and he included Count Eighteen as part of the consecutive sentence.) On Count Fifteen, defendant received a five-year prison term, consecutive to Count Two. On Count Seventeen, the judge imposed a four-year prison term, consecutive to Counts Two, Four, Five, Fourteen, Fifteen, and Sixteen. And on Count Eighteen, the judge imposed a ten-year prison term, concurrent to Counts Two, Four, Five, Fourteen, Fifteen, Sixteen, and Seventeen.

IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE; THE OVERALL SENTENCE WAS EXCESSIVE. U.S. Const. [a]mend. VIII; N.J. Const. [a]rt. I, ¶¶ 1, 12.

In defendant's pro se supplemental brief, he raises one additional argument, which we have renumbered:

POINT [IV]
THE COURT ERRED FOR NOT EXCLUDING JUROR [NUMBER EIGHT] . . . AFTER SHE OBSERVED THE DEFENDANT HANDCUFFED[,] WHICH VIOLATED DEFENDANT[']S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

We reject defendant's assertion that a special unanimity instruction was required in this case. To be sure, a jury verdict must be unanimous to convict a defendant of a crime. State v. Parker, 124 N.J. 628, 633 (1991), cert. denied, 503 U.S. 939, 112 S. Ct. 1483, 117 L. Ed. 2d 625 (1992); see also R. 1:8-9. "[T]he unanimous jury requirement impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." Parker, supra, 124 N.J. at 633 (quoting United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)).

The consensus of a jury requires "substantial agreement as to just what a defendant did." State v. Frisby, 174 N.J. 583, 596 (2002) (quoting Gipson, supra, 553 F.2d at 457). In most instances, a general unanimity instruction will suffice without any special additional instructions. Id. at 597. Such a special instruction may only be necessary in situations where:

(1) a single crime could be proven by different theories supported by different evidence, and there is a reasonable likelihood that all jurors will not unanimously agree that the defendant's guilt was proven by the same theory; (2) the underlying facts are very complex; (3) the allegations of one count are either contradictory or marginally related to each other; (4) the indictment and proof at trial varies; or (5) there is strong evidence of jury confusion.

[State v. Cagno, 211 N.J. 488, 517 (2012) (citing Frisby, supra, 174 N.J. at 597), cert. denied, 568 U.S. 1104, 133 S. Ct. 877, 184 L. Ed. 2d 687 (2013).]

As the Court explained in Parker, when a series of alleged criminal acts committed by a defendant involves acts that are "conceptually similar," no special jury instruction on unanimity is required to segregate those acts. Parker, supra, 124 N.J. at 639.

Defendant argues the trial judge erred by denying his request for specific unanimity instructions to the jury. He contends that the State presented two theories for the murder of the child: defendant physically forced the girlfriend out of the window while she was holding the child; or his actions inside the apartment made her fear for her own life and the child's life, and therefore she jumped out of the window while holding the child. Defendant maintains that these theories are dissimilar factually thereby warranting the specific instruction.

The judge rejected defendant's request for the specific unanimity jury charge by considering the State's theories and the applicable law. In rejecting the request and applying Parker, the judge found that

[t]he State's theory . . . as to why [the girlfriend] and [the child] went out [of] the window has consistently been focused on the conduct of the defendant in the apartment. Specifically, that it was defendant's direct physical conduct based on his assault of [the girlfriend] and the [friend] which caused [the girlfriend] to go out [of] the window.

Here, defendant is alleged to have been in the process of assaulting [the girlfriend] when she exited the apartment window with [the child] in her arms. Both of the State's theories rely on its evidence that [the child's] death was a result of defendant's assault in the apartment.

. . . .

The State's two theories . . . are based on defendant's conduct within the apartment. Although jurors may disagree as to how [the girlfriend] went out [of] the window, all the jurors would still be unanimous in that [the girlfriend] exited the window as a direct consequence of defendant's conduct[,] which must be established beyond a reasonable doubt.

Therefore, I do not find that a special interrogatory is required, and that I will instruct the jurors that they may find the defendant guilty provided [that] the State proves causation beyond a reasonable doubt. Specifically, the jury will be instructed that [it] may find either that [the girlfriend] went out of the window as a result of the physical contact of [defendant] or as a result

of her exiting to escape the assault that was occurring.

Thus, as the judge correctly found, under either theory, defendant's physical conduct toward the girlfriend forced her out of the window. Similar to the Court's decision in Parker, "[b]ecause the acts alleged were conceptually similar, there was no reason to give a specific unanimity charge." Parker, supra, 124 N.J. at 639. "[T]here was no genuine possibility of jury confusion about its responsibility" to unanimously find defendant's conduct inside the apartment caused the girlfriend to exit the window. Id. at 642.

Defendant contends for the first time that his prison sentence for felony murder amounts to cruel and unusual punishment. Defendant equates felony murder with a crime of negligent homicide. Defendant argues therefore that his sentence for felony murder is grossly disproportionate and serves no legitimate penological objective.

N.J.S.A. 2C:11-3(b)(1) requires the imposition of a minimum period of thirty years of parole ineligibility for a felony murder conviction. We have previously held that this minimum sentence does not violate the Federal or State constitutions. State v. Johnson, 206 N.J. Super. 341, 349 (App. Div. 1985), certif. denied, 104 N.J. 382 (1986).

It is firmly settled that the broad power to declare what shall constitute criminal conduct and to fix both the maximum and minimum terms of imprisonment for such conduct has been committed by the people of this State to the legislative, rather than to the judicial branch of government. State v. Hampton, 61 N.J. 250, 273 (1972). See also State v. Smith, 58 N.J. 202, 211 (1971). The fact that our Legislature has provided a more severe punishment for criminal acts than the courts approve is no grounds for judicial interference, unless a constitutional or other prohibition against such punishment has been violated. In making this determination, our Supreme Court in State v. Hampton, supra, expressed the view that "courts consider whether the nature of the criticized punishment is such as to shock the general conscience and to violate principles of fundamental fairness; whether comparison shows the punishment to be grossly disproportionate to the offense, and whether the punishment goes beyond what is necessary to accomplish any legitimate penal aim." 61 N.J. at 273-[]74. Thus, "[a]bsent such a showing[,] the judiciary must respect the legislative will." Id. at 274.

[Johnson, supra, 206 N.J. Super. at 343 (second alteration in original).]

Felony murder is an absolute liability crime because a defendant need not have contemplated or intended the victim's death. State v. Martin, 119 N.J. 2, 20 (1990); see also State v. McClain, 263 N.J. Super. 488, 491 (App. Div.), certif. denied, 134 N.J. 477 (1993); State v. Darby, 200 N.J. Super. 327, 331 (App. Div. 1984), certif. denied, 101 N.J. 226 (1985). The only mental state required for felony murder is the specific mental culpability

required to commit one of the particular underlying felonies specified in N.J.S.A. 2C:11-3(a)(3). See Darby, supra, 200 N.J. Super. at 331. Thus, any comparison to the sentences imposed for a felony murder conviction and what defendant has labeled as "negligent homicide" is misplaced.

We reject defendant's contention that the judge failed to address the "real-time" consequences of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, component to his sentence. Defendant argues that his sentence is otherwise excessive. We conclude that defendant's sentencing arguments are "without sufficient merit to warrant discussion in a written opinion." R. 2:11-3(e)(2). We add the following brief remarks.

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 does not shock the judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16 (1989). In sentencing, the judge "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 judge must then "determine which factors are supported by a preponderance of [the] evidence, balance the relevant factors, and explain how [he or she] 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.

In reviewing a sentence subject to NERA, "we must . . . be mindful of the real-time consequences of NERA and the role that it customarily plays in the fashioning of an appropriate sentence." State v. Marinez, 370 N.J. Super. 49, 58 (App. Div.), certif. denied, 182 N.J. 142 (2004). In order to do that, the reviewing court must "consider the judge's evaluation of the aggravating and mitigating factors in that light." Ibid. During defendant's sentencing, the judge gave a detailed analysis of the aggravating and mitigating factors, how they applied to each count, and the facts that supported his decision.

Consequently, 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).

Finally, defendant argues the judge erred by failing to remove juror number eight, who inadvertently saw defendant enter a room

in handcuffs. Defendant contends that he therefore received an unfair trial.

Under the Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution "the right of a defendant to be tried by an impartial jury is of exceptional significance." State v. Williams, 93 N.J. 39, 60 (1983). The securing and preservation of an impartial jury goes to the very essence of a fair trial. See Sheppard v. Maxwell, 384 U.S. 333, 362-63, 86 S. Ct. 1507, 1522, 16 L. Ed. 2d 600, 620 (1966). It is well established "that a defendant is entitled to a jury that is free of outside influences and will decide the case according to the evidence and arguments presented in court in the course of the criminal trial itself." Williams, supra, 93 N.J. at 60.

Where it appears that outside influences may have influenced jurors, "the trial judge must take action to assure that the jurors have not become prejudiced as a result of facts which 'could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge.'" State v. Bisaccia, 319 N.J. Super. 1, 12 (App. Div. 1999) (quoting State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div.), certif. denied, 151 N.J. 466 (1997)). The test is not whether the irregularity actually influenced the jurors but "whether it had

the capacity of doing so." Panko v. Flintkote Co., 7 N.J. 55, 61 (1951). "[W]here . . . there is the possibility of actual juror taint or exposure to extraneous influences (including jury misconduct and comments made to jurors by outside sources), the judge must voir dire that juror and, in appropriate circumstances, the remaining jurors." Bisaccia, supra, 319 N.J. Super. at 13 (citation omitted). In Scherzer, supra, 301 N.J. Super. at 487-88 (citation omitted), we summarized the trial judge's obligation stating:

The thrust of the New Jersey and federal cases on mid-trial allegations of jury misconduct is that the trial judge must make a probing inquiry into the possible prejudice caused by any jury irregularity, relying on his or her own objective evaluation of the potential for prejudice rather than on the jurors' subjective evaluation of their own impartiality. Although the trial judge has discretion in the way to investigate allegations of jury misconduct, an adequate inquiry on the record is necessary for the purposes of appellate review.

The record reveals that the judge engaged in proper inquiries when faced with apparent juror taint, and in his sound discretion determined that there was not any prejudice. Taking into account "[a] decision on the potential bias of a prospective juror is addressed to the sound discretion of the trial judge," State v. Carroll, 256 N.J. Super. 575, 599 (App. Div.), certif. denied, 130 N.J. 18 (1992); see also State v. Singletary, 80 N.J. 55, 62-63

(1979), the judge did not abuse his discretion by allowing the trial to proceed without removing the juror.

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

Affirmed.

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



CLERK OF THE APPELLATE DIVISION