SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0675-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL E. MITCHELL,

Defendant-Appellant.

Submitted September 27, 2016 – Decided May 4, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 12-08-0576.

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

Michael H. Robertson, Acting Somerset County Prosecutor, attorney for respondent (James L. McConnell, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In this appeal from a first-degree robbery conviction, N.J.S.A. 2C:15-1, defendant Michael E. Mitchell contends the judge

should have instructed the jury about principles pertaining to eyewitness identification, to assist it in reviewing video recordings in evidence; and the verdict was against the weight of the evidence. Defendant also challenges his twenty-five-year extended term sentence on the ground that it exceeded the maximum term set forth in the pretrial memorandum; and he seeks additional jail credits. We affirm defendant's conviction, but remand for resentencing.

I.

The State's case rested primarily on the testimony of two witnesses: the manager of the Radio Shack store in Franklin Township that was robbed; and Emendo E. Bowers, defendant's accomplice in the robbery.

The manager testified that shortly after he opened the store on October 20, 2011, Bowers and defendant entered and inquired about cell phones. No one else was in the store. Soon thereafter, Bowers displayed a handgun and defendant demanded to see the safe. The manager said there was no safe, but offered the men high-end electronics products kept in a locked "cage" in the rear of the store. Bowers handed the gun to defendant and retrieved shopping bags. After the manager loaded the bags with laptops and other products, the three returned to the front of the store, where Bowers and defendant demanded cash from the register and other

items on display. They then fled, after defendant directed the manager to return to the rear of the store and count to 100. After counting to about thirty, the manager safely returned to the front of the store, locked the door, and called the police. He spotted defendants head toward a red hatchback, a "Toyota Matrix maybe."

The manager said that as the robbery unfolded, he was scared and afraid he would be killed. He described the men as African-American, around twenty-five years old, and between five feet ten inches, and six feet tall. One wore a black and white hoodie, the other a brown or solid colored one. The manager could not identify defendant because the men wore large sunglasses and the hoods obscured their faces. The Radio Shack store did not have its own video surveillance, and no fingerprints or other identifying evidence was found at the scene.

Bowers and defendant were arrested in Middlesex County on unrelated charges in January 2012. Bowers eventually admitted to police that he participated in the Radio Shack robbery. After a prolonged interrogation, Bowers implicated defendant. He did so only after he first contended, and then recanted, that three other men, including defendant's brother, committed the robbery with him.

Bowers testified at trial that defendant's girlfriend drove him and defendant to the shopping center in a red hatchback. They

first browsed in the K-Mart store at the shopping center, before entering the Radio Shack store. Bowers identified himself and defendant on video surveillance taken inside the K-Mart and in front of a jewelry store, located between the K-Mart and the Radio Shack. The video depicted two African-American men, one in a gray hoodie, who Bowers identified as himself, and another in a black and white hoodie, who Bowers identified as defendant.

Bowers generally corroborated the manager's testimony, although he downplayed his role and differed as to some details. He denied that he possessed a handgun and claimed that the firearm defendant possessed was a pellet gun. Cross-examination highlighted the inconsistencies in Bower's statement to police, including his incrimination of others and his motive to provide favorable testimony in return for leniency.

A woman, who claimed to have been defendant's girlfriend in October 2011, testified that defendant often borrowed her red Matrix, although she could not be sure whether he did so on the day of the robbery. Cross-examination elicited her prior statement to police that she owned a Toyota Corolla, not a Matrix, in 2011.

Defendant did not testify or present other witnesses. The defense theory was that Bowers was a liar, who was out to save himself. In summation, defense counsel also argued that the video recordings did not clearly depict defendant and could well have

depicted any of the other three men Bowers previously claimed committed the robbery, including defendant's brother. By contrast, the prosecutor highlighted video excerpts during her summation, urging the jury to find they depicted defendant.

During its deliberations, the jury twice reviewed the K-Mart video. They found defendant guilty of robbery, as charged in the single-count indictment, specifically finding that defendant was armed. After granting the State's motion for an extended term, the court sentenced defendant to a twenty-five year term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

On appeal, defendant raises the following arguments for our consideration:

> POINT I
>
> THE ROBBERY CONVICTION MUST BE VACATED BECAUSE THE STATE FAILED TO PROVE AN ELEMENT OF THE OFFENSE — THAT [DEFENDANT] USED FORCE AGAINST THE VICTIM. (Not Raised Below).
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> POINT II
>
> IN LIGHT OF THE PROSECUTOR'S SUMMATION, IN WHICH SHE URGED JURORS TO MAKE AN IDENTIFICATION OF [DEFENDANT] AS A PERPETRATOR OF THE ROBBERY BY COMPARING HIM TO A PERSON IN A SURVEILLANCE VIDEOTAPE, THE JUDGE COMMITTED PLAIN ERROR IN FAILING TO PROVIDE JURORS WITH AN IDENTIFICATION INSTRUCTION. (Partially Raised Below).

POINT III

THE COURT ABUSED ITS DISCRETION IN IMPOSING AN EXTENDED TERM [BECAUSE] THE PRE-TRIAL MEMORANDUM INFORMED THE DEFENDANT THAT HE WAS NOT ELIGIBLE FOR SUCH A TERM. ALSO, THE DEFENDANT IS ENTITLED TO ADDITIONAL JAIL CREDITS BECAUSE THEY SHOULD RUN FROM THE DATE OF HIS ARREST AND NOT FROM THE FILING OF CHARGES.

A. The Imposition of the Extended Term Was Improper.

B. The Court Failed to Award Proper Jail Credits.

II.

In defendant's first point, he essentially contends the verdict was against the weight of the evidence. He argues the indictment alleged that defendant committed robbery by force, N.J.S.A. 2C:15-1(a)(1), meaning, "in the course of committing a theft, he . . . use[d] force upon another . . . ."[1] The judge instructed the jury that "'[f]orce' means . . . physical power or strength . . . against a victim . . . ." Yet, the record was barren of any direct evidence that Bowers or defendant used physical force against the manager. See State v. Smalls, 310 N.J. Super. 285, 291 (App. Div. 1998) (reversing conviction of robbery by force where there was no evidence of "struggle, no shoving,

[1] N.J.S.A. 2C:15-1(a)(1) also provides a person commits "robbery if, in the course of committing a theft, he . . . [i]nflicts bodily injury . . . ."

pushing and no wrestling"). No one asked the manager if physical force was used, and he did not volunteer it was. Bowers affirmed he "never touched the guy[.]"

Rather, as defendant concedes, the State's proofs were congruent with robbery by threat, N.J.S.A. 2C:15-1(a)(2), that is, "in the course of committing a theft, he . . . [t]hreaten[ed] another with or purposely puts him in fear of immediate bodily injury . . . ." Both Bowers and the manager stated the gun was displayed; the manager, whose credibility was unchallenged, testified it was pointed at him and scared him "out of [his] wits."

However, the State neither charged, nor was the jury instructed on robbery by threat. The judge did explain, with respect to grading the crime, that the indictment alleged defendant was "armed with, used or threatened the immediate use of a deadly weapon[,]" which would make the robbery a first-degree crime, N.J.S.A. 2C:15-1(b). But, for reasons not apparent from the record, the verdict sheet asked the jury only whether defendant was "armed with a deadly weapon or a device" that looked like one. The jury was not expressly asked whether defendant threatened the victim with the deadly weapon.

Inasmuch as defendant makes this argument for the first time on appeal, it is barred by Rule 2:10-1, which states "the issue of whether a jury verdict was against the weight of the evidence

shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court."[2] We recognize we may nonetheless address such an argument if the interests of justice so demand. See State v. Soto, 340 N.J. Super. 47, 73 (App. Div.), certif. denied, 170 N.J. 209 (2001); State v. Smith, 262 N.J. Super. 487, 511-12 (App. Div.), certif. denied, 134 N.J. 476 (1993). However, no such compelling circumstances exist in this case, because the jury's verdict reflects that the State proved the elements of first-degree robbery by threat.

If, for argument's sake, the jury found no circumstantial evidence that physical force was used, then logically, it must have found non-physical force was used. In other words, the jury would have understood "force" according to one of its common meanings, to compel through pressure or coercion. See Black's Law Dictionary 760 (10th ed. 2014).[3] Accepting that understanding of

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[2] As we discuss below, defendant did move for a new trial, but on grounds other than whether the evidence supported a finding that force was used.

[3] Such an interpretation may have been fostered by the juxtaposition in the jury charge of the definition of force and the grading element:

> "Force" means an amount of physical power or strength used against a victim and not simply against the victim's property. The force need not entail pain or bodily harm and need not leave any mark. Nevertheless, the

"force," there was sufficient evidence, as noted above, for the jury to find defendant "[t]hreaten[ed] [the victim] with or purposely put[] him in fear of immediate bodily injury" by forcing him to cooperate with defendant. See N.J.S.A. 2C:15-1(a)(2).

Even if defendant had made a new trial motion and the trial court denied it, we would not disturb the trial court's decision "unless it clearly appear[ed] that there was a miscarriage of justice under the law." R. 2:10-1. However, there is no miscarriage of law if the "trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present." Smith, supra, 262 N.J. Super. at 512 (quoting State v. Carter, 91 N.J. 86, 96 (1982)). Here, there was ample evidence for the jury to find the essential elements of first-degree robbery, albeit robbery by threat under N.J.S.A. 2C:15-1(a)(2).

> force must be greater than that necessary merely to snatch the object from the victim's grasp or the victim's person, and the force must be directed against the victim, not merely the victim's property.
>
> In this case it is alleged that the defendant was armed with, used or threatened the immediate use of a deadly weapon while in the course of committing the robbery. In order for you to determine the answer to this question, you must understand the meaning of the term "deadly weapon."

Defendant misplaces reliance on Smalls, supra. In that case, we considered whether there was sufficient evidence to submit robbery by threat to the jury where the evidence was insufficient to establish use of physical force. 310 N.J. Super. at 291-92. Unlike in this case, the court found there was insufficient evidence of a requisite threat. Id. at 291.

Nor are we persuaded that defendant was denied sufficient notice of the charge, so that he could prepare an adequate defense. Having been charged with using force upon the manager while "armed with or threatening the immediate use of a deadly weapon," defendant could not plausibly contend surprise if he were expressly charged with "[t]hreaten[ing] another with or purposely put[ting] him in fear of immediate bodily injury . . . ." See N.J.S.A. 2C:15-1(a)(2). That is a consequence of threatening the immediate use of a deadly weapon.[4] In any event, the defense in this case

[4] Under the circumstances of this case, had the State requested to amend the charge at the close of its case, the trial court would have been justified in granting it. The Court has observed that, under appropriate circumstances, the principle that an "indictment . . . must identify and explain the criminal offense so that the accused may prepare an adequate defense" is not rigidly applied; rather, it is "sufficiently flexible to permit a defendant to be found guilty of an offense not charged in the indictment." State v. Branch, 155 N.J. 317, 324 (1998). In State v. Dixon, 125 N.J. 223, 256-57 (1991), the Court held that a trial court was permitted to instruct a jury that it could convict the defendant of aggravated criminal sexual contact based on the presence of a deadly weapon, where the indictment charged the defendant with

did not focus on the absence of force, or a claim there was no robbery. The defense theory was that the State failed to prove defendant's participation.

For his second point, defendant contends the court should have crafted a novel jury charge to assist the jury in examining the video surveillance recordings in evidence. Defense counsel did not request the instruction during the charge conference. Rather, he made it after deliberations began, during a colloquy regarding where and how the jury would review the recordings.

In the course of opposing the jury's request to use a computer in the jury room to view the recordings, defense counsel stated: "If I had thought it was an identification case, I would have asked for Henderson[5]-type instructions for the jury, and I think that what they're going through now would require Henderson-type instructions so that they would know what factors would be important in making an identification." Defense counsel added

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aggravated criminal sexual contact based on commission of a robbery. The Court observed that "the indictment fairly apprised [the] defendant of the charge . . . and the pretrial discovery revealed that the State's theory was based on either possession of the weapon or the robbery, giving sufficient notice to [the] defendant to defend against the charge . . . ." Id. at 258; see also State v. Talley, 94 N.J. 385, 393-94 (1983).

[5] State v. Henderson, 208 N.J. 208 (2011).

that the jury "shouldn't be going through the process of making an identification, period."

Without directly responding to the suggestion of a mid-deliberations instruction, the judge rejected the argument that the jury should not review the video to ascertain whether defendant was depicted on it. The judge said, "The disk is in evidence. They're allowed to see it. . . . Those images are in evidence."

After the verdict, defendant moved for a new trial, previewing the argument he asserts on appeal, that the court was obliged to deliver an instruction on "[t]he typical identification issue that Henderson talks about." The court denied the motion, reasoning that the instruction regarding assessment of eyewitness identifications addressed variables — such as memory, lighting, and fear — that were not relevant to the jury's consideration of evidence.

Following Henderson, our criminal model jury charge instructs jurors that eyewitness identifications are prone to error, and to consider variables that may impact the accuracy of an eyewitness's perceptions and memory. See Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (Eff. Sept. 4, 2012) (Identification Charge). Specifically, the judge instructs the jury to consider the witness's attentiveness and opportunity to view the person, including: the witness's stress,

the duration of observations, focus on weapons, distance, lighting, intoxication, and disguises or changed appearance. Id. at 3-5. The jury is also instructed about the potential impact of the witness's prior description of the person identified, the witness's confidence and accuracy, the time that elapsed between the event and the identification, cross-racial effects, and the impact of other's opinions. Id. at 5.

These factors have little to do with a jury's examination of a recording in evidence, to determine whether it depicts the defendant. Memory — a key focus of Henderson — is not in issue. See Henderson, supra, 208 N.J. at 245-76. Nor is the need to promote greater jury understanding about how memory works. Id. at 273-74. The jury reviewing a recording in evidence is not under stress; distracted by weapons; or hampered by shortness of time, distance, and poor lighting. Indeed, the model jury charge distinguishes between an eyewitness identification, which depends on memory and other variables, and review of a recording. "Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened." Identification Charge, supra, at 2; see also Henderson, supra, 208 N.J. at 245 ("Research contained in the record has refuted the notion that memory is like a video

recording, and that a witness need only replay the tape to remember what happened.").

In other contexts, the Court has been reluctant to apply the principles governing identifications beyond eyewitness identifications of people. See State v. Delgado, 188 N.J. 48, 66 (2006) (declining "defendant's invitation to extend to inanimate objects, such as cars, the carefully crafted due process protections applicable to identification procedures of persons"). Absent authority from our Court, we decline to do so here.

Of course, the video recording's clarity was affected by the distance from which it was recorded, the degree of resolution, and the angle of sight. Conceivably, the person depicted next to Bowers in the video was not defendant, but was his brother, or another person whom Bowers initially incriminated. The judge, in her discretion, may have specifically instructed the jury about factors that could affect its determination as to whether the person depicted in the recording resembled defendant. Nonetheless, the jury was capable of assessing the evidence without a special instruction. We therefore conclude the omission of such an instruction was not "clearly capable of producing an unjust result . . . ." R. 2:10-2.

Finally, we consider defendant's argument that imposition of an extended term was improper. Defendant concedes he was eligible

for an extended term as a persistent offender under N.J.S.A. 2C:44-3(a), based on a prior New Jersey conviction and a 2004 Pennsylvania misdemeanor conviction, which would be deemed comparable to a fourth-degree crime under N.J.S.A. 2C:44-4(c). However, he contends the State was barred from seeking an extended term because the pretrial memorandum, which the prosecutor signed, advised defendant that his maximum jail term was twenty years and he did not qualify for an extended term. See R. 3:9-1(f) (stating that at a pretrial conference the prosecutor shall address "the sentencing exposure for the offenses charged, if convicted" and a pretrial memorandum shall be prepared and signed). Defendant argues he may have accepted the State's plea offer of fourteen years, had he been made aware of his extended term exposure.

We agree the State was barred from seeking a greater term than it disclosed in the pretrial memorandum. "[A]n extended term cannot be imposed unless the defendant is specifically apprised at the time of the plea of the potential number of years to which he is exposed." See State v. Cartier, 210 N.J. Super. 379, 381 (App. Div. 1986). "No matter which way the defendant ultimately chooses to plead, he should know the risk he faces." State v. Martin, 110 N.J. 10, 19 (1988) (vacating sentence and remanding for hearing on mandatory extended term under Graves Act); see also Lankford v. Idaho, 500 U.S. 110, 127, 111 S. Ct. 1723, 1733, 114

L. Ed. 2d 173, 188-89 (1991) (holding that due process of law was denied by the imposition of a death sentence when neither the defendant nor his counsel had notice of the possibility that such a sentence might be imposed).

We therefore remand for resentencing within the standard ten to twenty-year range for a first-degree robbery. This resolution appears to be "the best accommodation of pragmatic necessity and essential fairness." State v. Kovack, 91 N.J. 476, 486 (1982) (internal quotation marks and citation omitted). Inasmuch as the extended term is discretionary, enforcing the State's position at the pretrial conference does no violence to a legislative mandate.

We also note the trial court imposed a sentence below the midpoint of the extended term range of ten years to life. See State v. Pierce, 188 N.J. 155, 168 (2006); Id. at 179 (Albin, J., dissenting in part and concurring in part); N.J.S.A. 2C:43-7(a)(2). We leave it to the court to determine, based on its application of the sentencing factors, the appropriate sentence for defendant within the regular range.

Finally, for the court's guidance, we reject defendant's contention that he was entitled to additional jail credits. He seeks credit between January 12, 2012, when he was arrested on Middlesex County charges, and July 5, 2012, when he was formally arrested for the Radio Shack robbery. Simply put, jail credits

are awarded for the period of time "between arrest and the imposition of sentence." R. 3:21-8. We discern no authority in the Rule or in State v. Hernandez, 208 N.J. 24 (2011), for the proposition that defendant is entitled to credit for time before he was arrested.

The conviction is affirmed. The sentence is vacated, and the matter remanded for resentencing.