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Although it is posted on the internet, this opinion is binding only on the
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-0857-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEROME WILLIAMS, a/k/a
JEROME K. WILLIAMS,

Defendant-Appellant.

Submitted March 29, 2017 – Decided April 21, 2017

Before Judges Accurso and Lisa.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
14-06-0687.

Joseph E. Krakora, Public Defender, attorney
for appellant (Kevin G. Byrnes, Designated
Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Susan Berkow, Special
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant was charged in a two-count indictment with third-degree possession with intent to distribute cocaine, N.J.S.A. 2C:35-5a(1), and N.J.S.A. 2C:35-5b(3) (Count 1), and third-degree possession of cocaine, N.J.S.A. 2C:35-10a(1) (Count 2). The jury found defendant guilty of possession of cocaine and not guilty of possession with intent to distribute cocaine. Defendant filed a post-trial motion for acquittal or a new trial. The motion was denied, and defendant was sentenced to five years imprisonment. Defendant argues on appeal:

POINT I

THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT'S INSTRUCTION THAT THE CO-DEFENDANT'S STATEMENT (EXONERATING HERSELF AND IMPLICATING THE DEFENDANT) IS SUFFICIENT ALONE TO PROVE THE STATE'S CASE BEYOND A REASONABLE DOUBT WAS ERRONEOUS AND PREJUDICIAL. (Not Raised Below)

POINT II

THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

POINT III

THE SENTENCE IS EXCESSIVE.

We reject these arguments and affirm.

On March 22, 2014, East Brunswick Police Officer Jason Fama, while on patrol, observed a vehicle with a male driver and female passenger. Fama ran a computer search of the vehicle and learned

that the registered owner, Theresa Foxx, had a suspended driver's license and was the subject of an active warrant for \$250 in unpaid parking tickets. As part of the computer search results, a photograph was displayed on Fama's screen which revealed that Foxx was the passenger in the car.

Fama effected an uneventful stop of the motor vehicle. Defendant, Jerome Williams, was the driver. As Fama approached the vehicle, he noted that the two occupants were speaking to each other. He requested the production of defendant's driver's license and the vehicle registration. Foxx handed documents pertaining to the vehicle to defendant, who handed them over to Fama. Defendant said he did not have a valid driver's license. However, he indicated that he did have a New Jersey identification card, which Foxx handed to him and which he gave to Fama. Dispatch then confirmed to Fama that defendant's driver's license was suspended. Because Foxx was going to be arrested, Fama requested back-up, and another officer soon arrived at the scene.

Fama advised Foxx that she was being placed under arrest and searched her incident to arrest. While doing so, he asked her if she had anything on her person that she shouldn't have. She responded there was something in her jacket pocket, but that defendant had placed it there. When asked what it was, Foxx responded somewhat ambiguously. She first described it as "yay,"

a street name for cocaine, and then said she knew it was something she was not supposed to have but did not know exactly what it was. Fama seized from the right pocket of the jacket Foxx was wearing a plastic baggie containing forty-four individual baggies of what was later confirmed to be crack cocaine. Both individuals were arrested. Defendant had on his person \$440 in cash, consisting of thirty-two ten dollar bills and six twenty dollar bills. Foxx was cooperative and provided a recorded statement to the police, in which she reiterated that defendant placed the drugs in her pocket.

Both individuals were charged with possession of cocaine and possession with intent to distribute cocaine. Both were subjects of the indictment referred to above. During the pendency of the case, Foxx was admitted to the pretrial intervention (PTI) program. She agreed to testify truthfully against defendant as a condition of PTI.

Foxx and defendant had lived together in a romantic relationship for seven years. They had a child together about six months before this criminal episode. At the time of the trial in July 2015, their relationship was still ongoing and they were still living together.

At trial, Fama testified and described the events that occurred at the time of the motor vehicle stop and arrest. Foxx

testified and gave the following account of the circumstances leading up to the stop and arrest. She was employed at that time at a retail store. Defendant drove her to work and dropped her off at about noon. Before going into the store, Foxx removed her jacket and left it on the back seat of the car. This was her regular practice because the store contained no secure lockers in which employees could hang their coats or leave other large personal items. When she left her jacket in the car, there was nothing in the pockets.

Defendant picked her up at work at about 5:30 p.m. She put her jacket on and rode in the front passenger seat. They made two uneventful stops before they were pulled over by Fama. When they were pulled over, defendant said to Foxx, "Something must be going on." When Foxx inquired, "What?" defendant said, "Well, he -- he got another cop," referring to the back-up officer who had arrived. Defendant then said to Foxx, "I put something in your jacket." Foxx replied, "What do you want me to do? There's nothing I can do. There's a cop watching me." Foxx was asked at trial what she told Fama when he asked her if there was anything in her pockets that shouldn't be there. She said she responded, "Yeah." When Fama asked what it was, she said she told him it was "dope," and when he asked what kind of dope, she said "crack." When Fama

asked her how the drugs got there, she said, "Jerome put them there."

Foxx continued her testimony by telling the jury about her PTI admission. She explained that she agreed to cooperate because "[she] had to clear [her] name" and that she was able to resolve the charges against her through PTI. She provided truthful information to the police and prosecutor and agreed to testify truthfully at trial.

The State also produced a police witness who qualified as an expert in drug distribution activities. He opined that facts and circumstances such as existed in this case would be indicative of intent to distribute the drugs. As we have stated, the jury found defendant not guilty of that charge. Defendant did not testify and called no witnesses.

At the charge conference, defense counsel requested that the court instruct the jury in accordance with the model charge pertaining to the testimony of a cooperating co-defendant or witness. See Model Jury Charge (Criminal), "Testimony of a Cooperating Co-Defendant or Witness" (2006). The judge gave the charge as part of his final jury instructions. He followed the model charge, tailored to the evidence in the case. Specifically, he charged as follows:

Theresa Foxx, who was indicted for the crimes the defendant is on trial for, has testified on behalf of the State. Theresa Foxx, who was indicted for the crimes that the defendant is on trial for, has been admitted into Pre-Trial Intervention, PTI, on those charges, namely possession of controlled dangerous substance with intent to distribute and possession of a controlled dangerous substance, and has testified on behalf of the State.

Evidence of Theresa Foxx's admission into PTI may be used only in determining the credibility or believability of that witness's testimony. You may consider such evidence, along with all the other factors that I mentioned previously in determining the credibility of a witness. However, you may not use Theresa Foxx's admission into PTI as evidence that this defendant is guilty of the crimes that he is charged with.

The law requires that the testimony of such a witness be given careful scrutiny. In weighing her testimony, therefore, you may consider whether she has a special interest in the outcome of the case and whether her testimony was influenced by the hope or expectation of any favorable treatment or reward or by any feelings of revenge or reprisal. If you believe this witness to be credible and worthy of belief, you have a right to convict the defendant on her testimony alone, provided, of course, that upon a consideration of the whole case, you are satisfied beyond a reasonable doubt of the defendant's guilt.

The judge also gave the model charge, tailored to the evidence in the case, dealing with statements of a defendant, with respect to the statement Foxx said defendant made to her in the car that he had put something in her pocket. See Model Jury Charge

(Criminal), "Statements of Defendant" (2010). The judge rejected defense counsel's request to charge "mere presence."

Subsequent to trial, defendant moved for a judgment of acquittal or, alternatively, a new trial. In denying the motion, the judge was satisfied there was no error in the jury instructions given. Nor was it error to refuse to charge mere presence in the factual circumstances of this case. The judge reasoned that possession of the drugs was not attributed to defendant because he was present in a vehicle where the drugs were found to be hidden. Instead, possession was attributed to him based upon the testimony that he in fact placed the drugs surreptitiously in Foxx's jacket pocket. The key issue for the jury to decide was Foxx's credibility. The judge noted that defense counsel "vigorously" and "effectively" cross-examined Foxx, pointing out inconsistencies in her statements and her motivation to inculcate defendant in order to exonerate herself and be admitted into PTI. The judge also noted that extensive portions of the opening and closing statements of both counsel dealt with Foxx's credibility.

The judge concluded that the jury, in conducting its fact-finding function, was in a position to assess Foxx's credibility. In doing so, the jurors obviously believed her version of the events – namely, that defendant surreptitiously placed the drugs in her jacket pocket and this was unbeknownst to her until the

time of the stop. The judge therefore concluded that the verdict was supported by sufficient credible evidence in the record and did not constitute a miscarriage of justice under the law and denied the motion.

In his first point of argument, defendant contends that the trial court erred by giving the instruction on the testimony of a cooperating co-defendant or witness. This charge was first developed in accordance with the holding in State v. Begyn, 34 N.J. 35, 54-56 (1961). Since then, our Supreme Court has on various occasions reiterated the continuing efficacy of the charge and the principles it expresses. Most recently, the Court did so in State v. Adams, 194 N.J. 186, 206-09 (2008).

Defendant does not argue that the judge did not correctly follow the model charge. He argues that the model charge needs an "overhaul" because it instructs the jury that a defendant can be convicted on the testimony of a cooperating co-defendant or witness alone. According to defendant, such testimony contains inherent contradictions and is, by its nature, very unreliable.

Defendant's argument is patently without merit. First of all, we note that this charge generally should not be given unless specifically requested by the defendant. Begyn, supra, 34 N.J. at 54-56. In this case, defendant did request the charge. Further, to preserve a question for review relating to jury

instructions, a defendant must advise the trial court of the specific charge sought and the grounds therefor. R. 1:7-2; R. 1:8-7(b). That was not done in this case. We are therefore asked to review and reverse a trial court based on an asserted error that was invited, where the issue under review was not properly preserved for appeal.

On the merits, the model charge is a correct statement of the law. It does not simply tell jurors that they can convict based on the cooperating witness' statement alone. Jurors are instructed that they should consider that testimony together with all other factors upon which the court has instructed them regarding assessment of the credibility of a witness. Jurors are told that the law requires that the testimony of a cooperating witness be given careful scrutiny, that they should consider whether the witness has a special interest in the outcome of the case and whether that testimony is influenced by the hope or expectation of favorable treatment or by any feelings of revenge or reprisal. Finally, jurors are told that if they find that testimony credible and worthy of belief, they can convict on that testimony alone, "provided, of course, that upon a consideration of the whole case, [the jury is] satisfied beyond a reasonable doubt of the defendant's guilt."

Because there was no objection to the charge at trial, we are guided by the plain error standard, under which it must be shown that an error was "clearly capable of producing an unjust result." R. 2:10-2. Not any possibility of an unjust result will suffice, but, in the context of a jury trial, the possibility must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971). In the context of a jury charge, plain error is

legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.

[State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970).]

There was no error here, let alone plain error. Jurors, in the performance of their essential fact finding function, analyze the credibility of witnesses. They are instructed on the general principles that should guide their assessment. With respect to particular types of evidence, proper instructions provide specific guidance as to how that kind of evidence should be evaluated. That was done here in the clearest terms. It is presumed that jurors follow the instructions they are given, State v. Nelson, 155 N.J.

487, 526 (1998), cert. denied, 525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 2d 788 (1999), and we have no reason to suspect otherwise in this case.

In Point II, defendant argues that the court erred in denying his motion for acquittal or a new trial. We do not agree. The question a trial court must answer when evaluating a judgment of acquittal is

whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

[State v. Reyes, 50 N.J. 454, 459 (1967).]

If that question is answered in the affirmative, the court is bound to deny the motion. State v. Franklin, 52 N.J. 386, 406 (1968). It is clear to us, as it was to the trial judge, that viewing the evidence most favorably to the State, there was no basis to interfere with the jury's finding of guilt beyond a reasonable doubt.

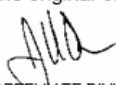
Finally, in Point III, defendant argues that his sentence is excessive. Defendant was eligible for extended term sentencing as a persistent offender. See N.J.S.A. 2C:43-7 and N.J.S.A. 2C:44-

3(a). The State moved for such sentencing and the judge denied the motion.

The judge found the applicability of aggravating factors (3) the risk that defendant would commit another offense, (6) the extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted, and (9) the need for deterring the defendant and others from violating the law. See N.J.S.A. 2C:44-1a(3), (6), and (9). The judge found no mitigating factors to apply. The judge's findings regarding aggravating and mitigating factors were based on competent and credible evidence in the record, the trial court correctly applied the sentencing guidelines in the Code of Criminal Justice, and the sentence imposed was not excessive or unduly punitive. State v. O'Donnell, 117 N.J. 210 (1989); State v. Gertler, 114 N.J. 383 (1989); State v. Roth, 95 N.J. 334 (1984).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION