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This opinion shall not "constitute precedent or be binding upon any court."
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-1058-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KENYION E. STEVENS,

Defendant-Appellant.

Submitted November 3, 2016 - Decided March 1, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
10-09-1692.

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

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Paul H.
Heinzel, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Kenyion E. Stevens appeals from a September 17,
2014 judgment of conviction and order for commitment, sentencing

him to six years in prison for second-degree eluding, N.J.S.A. 2C:29-2(b) (count one) and the disorderly persons offense of resisting arrest, N.J.S.A. 2C:29-2(a)(1) (a lesser included offense to the charge in count six). During the pendency of this appeal, defendant was released from custody. On appeal, defendant seeks reversal of the convictions, challenging the jury instructions as plain error. More specifically, he argues:

POINT I.

THE JURY INSTRUCTIONS INCORRECTLY FAILED TO SPECIFY THAT FOR THERE TO BE A CONVICTION FOR SECOND-DEGREE ELUDING, THE JURY WOULD HAVE TO UNANIMOUSLY AGREE ON THE VICTIM OF THAT CRIME, I.E., THE "PERSON" FOR WHOM THE DEFENDANT'S CONDUCT CREATED A "RISK OF DEATH OR INJURY."
(Not Raised Below)

POINT II.

THE JURY INSTRUCTION ON ELUDING FAILED TO TELL THE JURY HOW THE CHARGED BURDEN OF PROOF PERTAINED TO ANSWERING THE "YES/NO" QUESTION THAT WAS POSED: "DO YOU FIND THAT DEFENDANT KENYION STEVENS, IN THE FLIGHT OR ATTEMPT TO FLEE, CRATED A RISK OF DEATH OR INJURY TO ANY PERSON?" (Not Raised Below)

We are not persuaded and affirm.

I.

The undisputed facts underlying defendant's convictions are taken from the trial record. On St. Patrick's Day, March 17, 2010, Officers Kamil Warriach and Gabriel Carrasquillo, members of the Asbury Park Police Department Street Crimes Unit, were

patrolling in an unmarked Chevrolet Blazer at 8:47 p.m. While stopped at the intersection of Emory Street and Sewall Avenue, a vehicle passed the officers, who, despite the darkness, observed the driver not wearing a seatbelt. Effecting a motor vehicle stop, Officer Warriach approached the driver's side. Officer Carrasquillo remained in the patrol vehicle because, as evidenced by the brake lights, the driver had not placed the car in park. Officer Warriach recognized the driver as defendant, who was alone in his vehicle. Officer Warriach noted the car remained in gear and requested defendant place the car in park and produce his credentials. Defendant was "very agitated," appeared to look for his documents, ignored the instruction to place the car in park, and instead drove off "abruptly at a high rate of speed." For more than one minute, a vehicle chase ensued.

Defendant sped east on Sewall Avenue. He turned right onto Grand Avenue and, after a series of right turns onto other streets, returned to Sewall Avenue. The dispatch audiotape recorded Officer Warriach's comment on the chase as it occurred, described defendant as driving "reckless[ly]," as he ignored stop signs, turned right without stopping at red traffic signals, and traveled at a speeds estimated from fifty to eighty miles per hour, where the posted limit was twenty-five miles per hour. Officer Warriach described the area where the pursuit took place as "residential with several

schools and kindergartens and just neighborhoods" with "pedestrians walking," and vehicular traffic, some of which stopped suddenly to avoid a collision as defendant ignored the traffic signs and signals.¹

Two Asbury Park police officers, driving west on Sewall Avenue, responded to Officer Warriach's call for assistance and blocked defendant's path. Defendant stopped his vehicle, then ignored orders to exit. Ultimately, he was physically removed from his vehicle and taken into custody.

In 2013, defendant was tried by a jury, which ended in a mistrial. Defendant was retried in June 2014. The jury convicted defendant of eluding and resisting arrest, but acquitted him of the remaining charges. This appeal ensued.

At trial, defendant did not object to the jury instructions he now attacks on appeal. See R. 1:7-2 (requiring objection to jury charge when issued). Therefore, the plain error standard, set forth in Rule 2:10-2, guides our review of these issues. See also State v. Wakefield, 190 N.J. 397, 473 (2007) ("[T]he failure to object to a jury instruction requires review under the plain

¹ During the chase defendant was observed throwing an object from his car. Following defendant's arrest, police returned to the area and retrieved a round plastic bag confirmed to contain 97.47 grams of cocaine. At trial, the jury acquitted defendant of the drug charges.

error standard.") (citing State v. Bunch, 180 N.J. 534, 543 (2004)).

Plain error is that which is "clearly capable of producing an unjust result." R. 2:10-2. In respect of a late claim of error in a jury instruction, "plain error requires demonstration of '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. Chapland, 187 N.J. 275, 289 (2006) (quoting 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)).

[State v. Singleton, 211 N.J. 157, 182-83 (2012).]

"If the defendant does not object to the charge at the time it was given, there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case." Id. at 182.

Defendant first asserts, the judge erred because "the jury was never told . . . it had to unanimously find that a particular person was the victim" as an element of second-degree eluding. We reject this claim.

The eluding statute under which defendant was charged, provides:

Any person, while operating a motor vehicle . . . who knowingly flees or attempts to elude any police or law enforcement officer after having received any signal from such officer

to bring the vehicle or vessel to a full stop commits a crime of the third degree; except that, a person is guilty of a crime of the second degree if the flight or attempt to elude creates a risk of death or injury to any person.

[N.J.S.A. 2C:29-2(b).]

The statute also contains "a permissive inference that the flight or attempt to elude creates a risk of death or injury to any person," if the perpetrator's conduct involves a violation of motor vehicle laws, that is "chapter 4 of Title 39." Ibid.

When charging, a judge must instruct the jury regarding the motor vehicle offenses a defendant violated, to allow the jury to evaluate whether the statutes were violated. State v. Dorko, 298 N.J. Super. 54, 59 n.1 (App. Div.), certif. denied, 150 N.J. 28 (1997). "Under the proper jury instructions, the State, in reliance on the permissive inference, was not obligated to prove affirmatively that there was 'any person' who was placed at risk of death or injury in order to establish that defendant was guilty of second-degree eluding." State v. Wallace, 158 N.J. 552, 559 (1999).

"[T]he Legislature intended to protect all persons by the eluding statute, including the police officers occupying the chasing vehicle and any persons in the eluding vehicle, as well as any people who could potentially be exposed to injury or death

along the chase route." Wallace, supra, 158 N.J. at 560. This includes the pursuing officers and even the defendant. Bunch, supra, 180 N.J. at 543.

Further, the inference may be rebutted. Dorko, supra, 298 N.J. Super. at 59 n.1.

If the statutory inference cannot be made, then the State would be required to prove affirmatively that there was at least one person put at risk within the zone of danger created by defendant's conduct, because the statute clearly requires that defendant be shown to have "create[d] a risk of death or injury to any person." N.J.S.A. 2C:29-2(b). The statutory inference is provided to avoid the necessity for such proof, but, as noted, the court must give the jury proper guidance to invoke the inference.

[Id. at 60-61.]

In this matter, Officer Warriach testified he approached defendant's vehicle and instructed him to place the car in park. Defendant refused and drove off at a high rate of speed. In the ensuing car chase, defendant failed to stop at posted stop signs; did not stop at two intersections at a red traffic signal; and significantly exceeded the posted twenty-five-miles per hour speed limit. Officer Warriach described other vehicles, which were required to suddenly stop or swerve to avoid collision with defendant's vehicle because he ignored motor vehicle laws.

Judge Ronald Lee Reisner included Model Jury Charge (Criminal) 2C:29-2b "Eluding an Officer" (November 2004), when charging the jury. He also stated:

The State must prove beyond a reasonable doubt: Seven, that the flight or attempt to elude created a risk of death or injury to any person In order for you to find this element, you must determine that there was at least one person put at risk by the defendant's conduct, which could include himself, any person along the chase route, or any police officer in a chasing vehicle.

You may infer risk of death or injury to any person if the defendant's conduct in fleeing or in attempting to elude the officer involved a violation of the motor vehicle laws in this state.

Thereafter, Judge Reisner delineated each traffic law defendant allegedly violated, including speeding, failure to stop at an intersection controlled by a stop sign, failure to stop at an intersection controlled by a red traffic signal, and reckless driving. The judge instructed the jury it must determine whether the evidence proved defendant violated these traffic laws, and, if so, the inference may be applied. However, he noted the jury was free to "accept or reject any inference" in its review of the facts and circumstances.

Defendant's reliance on State v. Frisby, 174 N.J. 583 (2002) is misplaced. In Frisby, the Supreme Court held where the State presented multiple theories as to the defendant's guilt, the jury

must unanimously agree as to one theory to support the defendant's conviction. Id. at 600. The holding resulted because "the allegations in this case were 'contradictory,' 'conceptually distinct,' and not even 'marginally related' to each other, thus requiring a specific unanimity instruction." Such a circumstance is not present here, where the State offered one theory of defendant's guilt: the jury was asked to unanimously find defendant's actions in eluding police and violating the motor vehicle laws "create[d] a risk of death or injury" to any person. N.J.S.A. 2C:29-2(b). We reject defendant's contrary argument as lacking merit. R. 2:11-3(e)(2).

Defendant's second point suggests the verdict sheet improperly explained the burden of proof regarding whether defendant created a risk of death or injury to any person, as required by N.J.S.A. 2C:29-2(b). Defendant concedes the jury was properly instructed that in order to convict defendant, they would have to find, beyond a reasonable doubt, his flight caused a risk of death or injury to any person. However, he maintains the jury was not told an affirmative response to the jury question -- "Do you find that defendant . . . in the flight or in the attempt to flee, created a risk of death or injury to any person?" -- equated to a guilty finding. We find this argument unavailing.

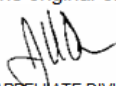
A verdict sheet is intended for recordation of the jury's verdict and is not designed to supplement oral jury instructions. Although a verdict sheet should list all elements of each offense, or no elements of any offense, our inquiry focuses on whether the jury understood the elements as instructed by the judge, and was not misled by the verdict sheet. Where we conclude that the oral instructions of a court were sufficient to convey an understanding of the elements to the jury, and where we also find that the verdict sheet was not misleading, any error in the verdict sheet can be regarded as harmless.

[State v. Gandhi 201 N.J. 161, 196-97 (2010) (citations omitted).]

The jury was given the jury sheet properly tethered to the applicable law. The charge included provisions clearly stating the burden of proof, the criminal offenses, and the underlying traffic violations. We find no error.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION