SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1133-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DWAYNE THORPE,

Defendant-Appellant.

Submitted November 8, 2017 - Decided December 13, 2017

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 13-02-0138.

Joseph E. Krakora, Public Defender, attorney for appellant (Jaime B. Herrera, Assistant Deputy Public Defender, of counsel and on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Marc A. Festa, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the denial of his motion to suppress his videotaped recorded statements. In addition, defendant appeals his conviction on the charge of making a false report. We affirm in part and reverse in part.

Suppression Hearing

On August 18, 2012, I.P.[1], who resided in an apartment in Passaic, went to a relative's apartment in the same building. When I.P. returned to her apartment a few hours later, she found the front door pried open and two men inside. The men were wearing gloves and one was holding her daughter's purse. I.P. backed out of the apartment and started to scream. The men fled and I.P. followed.

An off-duty Passaic police officer, Angel Castrillon, happened to be outside I.P.'s apartment building. Castrillon saw two males running down the street. One of the men held a purse. Castrillon then saw I.P., looking distressed, exit the building. He asked I.P. if she had been robbed and she responded in the affirmative. Castrillon got into his car and pursued the men. Castrillon saw one of the men get into the passenger side of a car, which he followed for several minutes before losing sight of the vehicle. Castrillon telephoned 911 and provided a description

[1] We use the victim's initials to protect her privacy.

of the car and the license plate number. Shortly thereafter, the described vehicle was stopped by on-duty officers in a nearby supermarket parking lot. Defendant was in the car and Castrillon identified the vehicle as the one he was chasing when the men fled I.P.'s apartment building.

An officer brought I.P. to the parking lot. I.P. was advised by the officer that she was about to be shown someone who had been detained, who may or may not be the suspect she encountered leaving her apartment, and that she needed to be certain that the man in the parking lot was the same man in her apartment. I.P. positively identified defendant as one of the men in her apartment.

Defendant was taken to the police station where officers recovered a pair of gloves from defendant's pockets. I.P. also went to the police station where she provided a statement and identified a picture of defendant as one of the men in her apartment.

A few hours after defendant's arrest, he was given his Miranda[2] warnings by Detective-Sergeant Roy Bordamonte. In a recorded interview, Bordamonte asked defendant what happened, and defendant replied that "two of his friends [were] going to pay him $500 to commit a burglary." Defendant told Bordamonte that he

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

gave "Monte Nelson and Gregory Perry a drive to do a burglary." He also stated that Perry called him regarding the burglary.

Defendant told Bordamonte that he parked his car near I.P.'s apartment building and exited the car, but only Perry and Nelson entered the building. According to defendant, Nelson and Perry ran out of the building, and then defendant and Perry drove away. Defendant also told Bordamonte that he noticed his car was being followed, so he let Perry out of the car and continued driving until he was stopped in the supermarket parking lot.

During the recorded interview, Bordamonte had two photographs that he showed to defendant. Defendant identified Perry and Nelson as the men in the photographs. After defendant's recorded statement, he posted bail, was released from jail, and returned home.

The next day, defendant telephoned Detective Marvin Eugene. During this call, defendant stated that he committed the burglary, and asked to recant the statement he had given to Bordamonte regarding Perry's involvement in the burglary. Defendant stated that he and Nelson committed the burglary, and Perry was not present. Eugene instructed defendant to return to the police station if he wanted to recant his statement.

Two days after his initial interview, defendant returned to the police station. Eugene gave defendant additional Miranda

warnings and conducted a second videotaped recorded interview. During the second interview, defendant stated that Nelson asked him for a ride in exchange for money. In this interview, defendant said that he drove Nelson to an apartment building in Passaic and entered the building with Nelson. Defendant also stated that he waited in the hallway while Nelson went into an unlocked apartment. According to defendant, Nelson emerged from the apartment at the same time a woman exited a nearby apartment and began to scream. Defendant further explained that he and Nelson entered his car, but Nelson exited the car because they were being followed.

During the second interview, Eugene asked whether Perry had any involvement in the burglary. Defendant denied that Perry was involved in the burglary. Defendant claimed that he implicated Perry in the first interview because he wanted to make sure he "got a good bargain," and because he had a grudge against Perry.

Trial Testimony

When the matter went to trial, I.P. testified and identified the gloves worn by the man in her apartment. These were the same gloves found in defendant's pockets after his arrest. At trial, I.P. also identified defendant as the man in her apartment.

Bordamonte's trial testimony largely tracked his testimony at the suppression hearing. During cross-examination, Bordamonte stated that he did not conduct a pre-warning interview of defendant

before the first recorded interview. However, Bordamonte admitted that photographs of Nelson and Perry were in the interrogation room before defendant identified the men as being involved in the robbery.

Based on Bordamonte's testimony, the trial judge believed that the police conducted a pre-warning interview with defendant because Bordamonte had pictures of Nelson and Perry before defendant implicated them in the robbery. Consequently, the trial judge decided to instruct the jury regarding the obligation of the police to electronically record interviews. The judge instructed the jury how it could consider the testimony and evidence based upon the police department's failure to electronically record a statement in accordance with Rule 3:17.

The judge also instructed the jury on the law governing the various charges against defendant. The first and second counts of the indictment charged defendant and Nelson with conspiracy to commit burglary and burglary. The third count charged defendant with making a false statement to the police by implicating Perry in the burglary. The judge charged the jury that they could find defendant guilty of conspiracy to commit burglary if he conspired with Nelson and/or Perry to commit the offense. However, the judge also instructed the jury that they could convict defendant of making a false report if the jury found that defendant lied to

the police when he implicated Perry in the burglary. The trial judge did not specify whether the false report charge was as to defendant conspiring with Perry or that Perry actually committed the burglary. The jury found defendant guilty on all three counts.

On appeal, defendant raises the following arguments:

> POINT I - THORPE'S STATEMENTS TO POLICE ON AUGUST 18TH AND 20TH MUST BE SUPPRESSED BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THEY WERE NOT TAINTED BY THE PRODUCT OF AN EARLIER, UNCONSTITUTIONALLY OBTAINED STATEMENT.
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> POINT II - THORPE'S CONVICTION FOR FALSE REPORTS MUST BE REVERSED BECAUSE HE CANNOT BE GUILTY OF MAKING FALSE REPORTS BY IMPLICATING PERRY IN THE BURGLARY AND ALSO GUILTY OF CONSPIRING WITH PERRY TO COMMIT THE BURGLARY. (NOT RAISED BELOW)

In reviewing a motion to suppress evidence, we defer to the factual and credibility findings of the trial court, "so long as those findings are supported by sufficient credible evidence in the record." State v. Handy, 206 N.J. 39, 44 (2011) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). We "must defer to the factual findings of the trial court when that court has made its findings based on the testimonial and documentary evidence presented at an evidentiary hearing or trial." State v. Hubbard, 222 N.J. 249, 269 (2015). We accord deference to the trial court "because the 'findings of the trial judge . . . are substantially

influenced by his opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Reece, 222 N.J. 154, 166 (2015) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)).

Because defendant's second argument regarding the conviction for making a false report was not raised in the trial court, we review it under the plain error rule. We review allegations of error not brought to the trial court's attention if the errors have a clear capacity to produce an unjust result. See R. 2:10-2.

Applying these standards, we first consider defendant's argument that his statements to the police should have been suppressed. According to defendant, because Bordamonte had pictures of Perry and Nelson before defendant mentioned their connection with the burglary, there must have been a pre-warning conversation between defendant and the police, during which defendant identified Perry and Nelson, that was not recorded. Defendant argues that since the prosecution failed to prove beyond a reasonable doubt that this alleged conversation was not obtained in violation of his constitutional rights, all subsequent statements must be suppressed.

If a confession is obtained in violation of a defendant's constitutional rights, any subsequent statements will be excluded

as fruit of the poisonous tree if "they are derived directly from the tainted confession." State v. Johnson, 120 N.J. 263, 286 (1990).

The trial judge found that it was likely that a pre-warning interview took place because the police had pictures of Nelson and Perry in the interrogation room prior to defendant's first recorded statement. However, even assuming a pre-warning interview was conducted, defendant's two recorded interviews were admissible. See State v. Bey, 112 N.J. 45, 71 (1988) (recognizing that suppression of an unwarned statement obtained in violation of Miranda does not necessarily bar subsequent statements that were properly obtained).

Here, the judge viewed defendant's videotaped recorded interviews and found that defendant was read and advised of his right to remain silent, that he willingly confessed to the crime, and that the recordings did not reveal defendant was coerced or threatened into giving the statements. The judge concluded that defendant willingly returned to the police station on August 20, 2012, to recant his first recorded interview and offer a second recorded interview. Significantly, the judge noted that during the second recorded interview, defendant stated he knew his rights and began to sign the waiver form even before the officer finished

reading the form. Thus, the judge concluded that defendant clearly knew and understood his rights prior to the second interview.

On appeal, defendant claims that the two recorded interviews were a continuous event. He claims the second recorded interview would not have been necessary but for the first recorded interview, and that both were elicited after the police obtained pre-warning information related to Nelson and Perry and their participation in the burglary.

Defendant attempts to distinguish his situation from the facts in State v. Faucette, 439 N.J. Super. 241 (App. Div.), certif. denied, 221 N.J. 492 (2015). In Faucette, the defendant was interrogated for seven hours, despite asserting that he did not want to speak with the police. Id. at 251-52. The police eventually released the defendant in the early hours of the morning. Id. at 252. Later that day, the police asked the defendant to come with them to the prosecutor's office. Ibid. The defendant complied and, after being properly Mirandized, confessed. Id. at 252-53. Under those facts, the trial court held that despite the Miranda violations in the first interview, the second interview given by the defendant was voluntary and not fruit of the poisonous tree, and we affirmed that ruling. Id. at 254, 259–67.

The facts in this case are similar to the facts in Faucette. In this case, during the first recorded interview, defendant voluntarily confessed. Defendant was released after his first recorded interview and returned home. A day or two later, without any prompting from the police, defendant contacted the police department and asked if he could give another recorded statement. Before the second recorded interview, defendant was again given Miranda warnings. Under these circumstances, defendant's actions were voluntary and cannot qualify as fruit of the poisonous tree warranting suppression of his statements. We find that there is substantial, credible evidence supporting the judge's denial of the motion to suppress defendant's recorded statements

Additionally, based on defendant's claim that there had to have been a pre-warning interview, he requested the judge give a remedial charge to the jury. While there was no evidence presented by defendant of a pre-warning interview, the judge gave a remedial instruction to the jury regarding the potential failure of the police to record a statement. We find that the remedial charge was appropriate under the circumstances.

We next address defendant's argument that the false report charge to the jury was confusing and contradictory. When a defendant raises error in a jury charge, the charge must be read as a whole. State v. Wilbely, 63 N.J. 420, 422 (1973). Appropriate

jury instructions are essential for a fair trial. State v. Clausell, 121 N.J. 298, 330 (1990). Parties are entitled to a charge which fully, clearly, and as accurately as possible sets forth the fundamental issues. State v. Labrutto, 114 N.J. 187, 204 (1989). "[T]he test is to examine the charge in its entirety, to ascertain whether it is either ambiguous and misleading or fairly sets forth the controlling legal principles relevant to the facts of the case." Ibid. See also State v. Hipplewith, 33 N.J. 300, 317 (1960).

Ordinarily, the failure to object to jury instructions constitutes a waiver of the right to challenge the instruction on appeal. See R. 1:7-2; Ewing v. Burke, 316 N.J. Super. 287, 293 (App. Div. 1998). We reverse only if we find plain error. State v. Chew, 150 N.J. 30, 82 (1997). If the charge has the tendency to confuse or mislead the jury, reversal is warranted. Ewing, supra, 316 N.J. Super. at 293.

For the first time on appeal, defendant contends that the jury instruction on the false report charge was confusing, inherently contradictory, and resulted in an inconsistent verdict. The judge's charge instructed the jury that it could convict defendant of conspiracy to commit burglary if the jury found that defendant conspired with Nelson and/or Perry, but the verdict

sheet did not require the jury to specify with whom defendant conspired. The judge charged the following:

> Here the State alleges that the overt act or acts were as follows: 1) that defendant acted as a lookout for Montey Nelson and/or Gregory Perry; and/or 2) that defendant drove Montey Nelson and/or Gregory Perry to the location in order to commit a burglary. In order to convict, you have to be satisfied beyond a reasonable doubt that the State has proven an overt act by a conspirator in furtherance of the conspiracy.

The judge also instructed the jury on the false report charge. The judge explained that the State alleged that defendant offered false information during his first recorded interview that Perry was involved in the burglary. However, the judge did not advise the jury how it could reconcile the instructions concerning defendant conspiring with Perry to commit the burglary and defendant falsely implicating Perry in the burglary. Defendant alleges that these charges allowed the jury to reach an inconsistent verdict.

We hold that the contradictory jury instructions on the conspiracy charge and false report charge had the clear capacity to confuse the jury. The two jury instructions given by the trial judge were clearly capable of producing an unjust result and constitute plan error requiring reversal of defendant's conviction on the false report charge.

Consequently, we affirm as to the denial of defendant's motion to suppress. However, we reverse defendant's conviction on the false report charge and remand for retrial on that charge. We do not retain jurisdiction.

Affirmed in part, reversed and remanded in part.