SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1340-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAY R. GOLDBERG,

Defendant-Appellant.

Submitted September 14, 2016 – Decided May 5, 2017

Before Judges Messano and Espinosa.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 12-06-1338.

Joseph E. Krakora, Public Defender, attorney for appellant (Michele A. Adubato, Designated Counsel, on the brief).

Joseph D. Coronato, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Roberta DiBiase, Senior Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from his convictions for first-degree conspiracy to commit murder, N.J.S.A. 2C:11-3(a), and N.J.S.A.

2C:5-2, (count one); and first-degree attempted murder, N.J.S.A. 2C:11-3(a)(1) and N.J.S.A. 2C:5-1, (count two), and sentence. We affirm.

I.

In 2012, defendant was convicted of murdering his neighbor and partner in a marijuana-growing business.[1] While incarcerated and awaiting sentencing, defendant confided in J.M., another inmate, that he wanted Stephen N. Cucci, the lead prosecutor in his case, killed so he could not attend defendant's sentencing. Defendant believed he would fare better if a new prosecutor had to handle the sentencing.

Defendant asked J.M. if he "could facilitate [Cucci] disappearing," and "help him dispose of [Cucci]." J.M. feigned agreement and the ability to help, making up a story that he had connections to Russian organized crime and knew a hitman named Victor who would be willing to murder Cucci.

Within twenty-four hours of this conversation, J.M. sent a letter to Cucci with the reference line, "Murder For Hire," that stated:

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[1] Defendant was convicted of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a), second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), and multiple drug offenses. This court affirmed his conviction and sentence on appeal, and the Supreme Court denied certification. State v. Goldberg, No. A-1160-12 (App. Div. May 7, 2015), certif. denied, 223 N.J. 282 (2015).

> Jay Goldberg wants to contract me and my pretend Russian mob friends to kill you.
>
> I will ware [sic] a wire and testify. Put a listening device on me and you will hear Jay Goldberg give me details of why he wants you dead, how he will pay for this contract killing and other details the court will find interesting.
>
> My family will be posting my bond soon so act quickly and lets make a deal.

Included with the letter was a note defendant had written and given to J.M. The note read:

> Dear Joe
> May Steven N. Cucci him[self] yesterday!
> Sleep with the fishes ASAP!

After Detective Brian Haggerty of the Ocean County Prosecutor's Office interviewed J.M. and confirmed his willingness to cooperate, the Prosecutor's Office authorized a consensual recording between defendant and J.M., which occurred on May 31, 2012. Defendant expressed his belief that a new prosecutor would be less aggressive and less inclined to put him in prison because Cucci had "a personal vendetta" against him. Anticipating that J.M. would be released on bail, defendant suggested he could go to defendant's house and take a television and whatever else could be sold to raise the money to pay for the killing. J.M. asked defendant to write down the address of the property they were discussing, and also write a note authorizing J.M. and his friend to enter the property. Defendant accordingly wrote a note that

provided his home address and stated: "I Jay Goldberg authorize [J.M.], and assos. [sic] Steve Ketchen[2] to enter the above property in which I Jay Goldberg own."

J.M. sent another letter, dated June 3, 2012, to Cucci, stating he needed to see the detectives "ASAP." J.M. stated defendant "will agree to have an attorney visit from my 'Russian Mafia friend' to confirm the murder for hire sceme [sic]." He also enclosed three hand-drawn "comics mocking [Cucci's] death" defendant had given him.

One of the "comics" portrays defendant's sentencing day, with the judge saying, "It seems Mr. Cucci has vanished and the court does not know why." Beneath that, there appears the writing, "Mr. Goldberg is determined to be Free!" Next to a frowning figure, apparently intended to depict Cucci, is written, "Mr. Cucci is no more forever!"

A second "comic" depicts Cucci up to his neck in what is described as "Plastic barrel with band around it full of acid," with a gun apparently firing bullets at the barrel. This drawing corresponds to a recording in which defendant and J.M. discussed possibly shooting Cucci and putting him in barrel of acid.

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[2] Steve Ketchen was the name of another fictitious person created by J.M. 6T186:17-23.

The third "comic" shows two figures, one labeled Steven N. Cucci, and the other with the name of defense counsel. The attorney is pointing a gun at Cucci, shooting bullets into his chest, again accompanied by expletives. Below that, there is an apparent reference to the proposed contract killing: "The Ruskies win another one! Thank you Victor for everything."

Sergeant Paul Butkoff, a detective with the Monmouth County Prosecutor's Office, was recruited to play "Victor," J.M.'s friend from the Russian mafia, in the continuing investigation. Butkoff was of Russian descent, spoke Russian and had posed undercover as a Russian national "[n]umerous times."

Butkoff posed as defendant's lawyer and met with defendant at the Jail. He wore a concealed digital recording device and met with defendant in an area monitored by video cameras and audio recording equipment. Defendant gave Butkoff a handwritten note he had written to "Victor," which stated:

> To Victor from Jay R. Goldberg
>
> I practice omerta code of silence my whole life.
>
> Dear Victor I want to thank you for coming here today to help me resolve this problem I have.
>
> I will provide you with $6000.00 in the next two weeks and the equity from my home as [J.M.] had explained to you.

> The only other thing I can offer you right now is my devotion and service to your organization for my remaining years. I am (62) years old and very worldly and experienced in many ways.
>
> I have been here for (38) months so far, with (8) mitigating factors in my favor. If I go to any prison in NJ I believe I will be assassinated. Victor, I must get out of this place ASAP, I fear for my life otherwise. Thank you again[.]

Defendant also wrote the following in a notebook Butkoff had brought with him:

> Steven N. Cucci Prosecutor
>
> I think it would be in everyones [sic] favor to make him disappear without a trace and not to appear in court again.

The conversation between Butkoff and defendant included discussions of the ramifications of not going through with the murder after making a commitment and defendant's willingness to leave to "Victor's" discretion the manner of killing:

> [Butkoff]: I . . . just want you to understand . . . [o]nce you commit to this, uh . . .
>
> [Defendant]: You're in, that's it.
>
> [Butkoff]: Exactly and you're in financially because . . .
>
> [Defendant]: Okay.
>
> [Butkoff]: There's going to be problems if payments not going to be made.
>
> [Defendant]: Yeah, I understand that.

[Butkoff]: Okay.

[Defendant]: Meaning my life's in danger. I know that, um.

. . . .

[Defendant]: And uh, you know, I don't know what to say as far as exactly what to do to do it. I would have to leave that up to your discretion.

[Butkoff]: Well, just with this, Mr. Cucci, that's, that's gonna' be basically . . . that's gonna' be a finale for him, correct?

[Defendant]: Yes.

At the end of the meeting, Butkoff advised defendant he "needed to go back to [his] associates to discuss [the matter] further to see whether or not [they] were actually going to do [that] or not," and to "discuss payments." Butkoff and defendant arranged to meet again.

J.M. wrote another letter to Cucci, dated June 7, 2012, that stated:

> I need to see you detectives ASAP. Goldberg needs to place a cellphone call via "Victor" to arrange $15,000.00 payment for murder. Goldberg further wrote a letter to his sister explaining he wants to retain "Victor's firm" to represent Goldberg in the appellate section. Goldberg is requesting $15,000.00 also via letter. I have this letter in my possession. Goldberg needs to contact his present attorney . . . to retrieve his sisters

> [sic] cellphone number and house numbers. A good day for Goldberg to again meet with Victor is Monday, June 11. By then we will have the numbers.

Butkoff met with defendant that day, again wearing a recording device. He asked defendant if he was committed to the plan to kill Cucci. Defendant responded: "Absolutely, positively, 100 percent."

Defendant also discussed getting the payment for Victor from his sister by telling her that he had obtained a new attorney and needed money for his fees. Defendant gave Butkoff a letter he had written to his sister and brother-in-law as confirmation that he could get Victor's payment. In it, defendant stated he had obtained a new attorney and asked to borrow $15,000 to cover the attorney's fee. He also asked his sister to "help [him] ASAP before [his] sentencing date of 6/29/12."

Following this conversation, Detective Haggerty had defendant brought to a holding cell at the jail. After Haggerty introduced himself as a detective with the Ocean County Prosecutor's Office; defendant responded, "You're here to talk about Cucci. Right?"

The evidence at trial included the redacted video and audio recordings, transcripts of defendant's conversation with J.M. on May 31, defendant's conversations with "Victor" on June 6 and June 8 and defendant's letters and drawings.

Defendant testified as the only witness for the defense. He did not deny his ill-will towards Cucci, that he had the conversations with J.M. and "Victor" regarding his plan to have Cucci killed or that he had written the letters and drawn the comics. Nevertheless, he denied he wanted to have Cucci killed.

Defendant testified he "didn't really mean" his incriminating statements; he was "just venting" and it was "all in jest." He claimed J.M. "basically coerced [him] into saying things that [he] didn't really want to say," because "he had a way of getting that out of [him]." Defendant stated that he was "under duress" and "[p]ressure" from J.M.

As for the drawings, defendant testified he drew them "just to pass time," and he was "[j]ust joking around with [J.M.]," "[s]hooting the breeze in jail" and venting. Defendant further described the drawings as "silly" and something made by "a frustrated child."

Regarding his conversations and agreement with Victor, defendant testified it was J.M.'s idea to involve the Russian mob, that J.M. was coercive and convincing, stating: "he began to basically brainwashing [sic] me into saying things I didn't mean." Defendant claimed J.M. had already arranged to have Victor meet with him and J.M. advised that if he did not meet with him, Victor would hurt him and his family. Defendant also stated J.M. told

him "to go along with the program," "act as though [he] want[ed] to do this" and was "serious about it." He testified he "definitely didn't want to do it" but felt "trapped" and "scared" and "ha[d] to go along with [it]."

After the jury convicted defendant, the court merged count one into count two, and sentenced defendant to twenty years' imprisonment, subject to an 85% period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and a five-year period of parole supervision following his release. In addition, the court ordered that defendant's sentence run consecutive to the twenty-year sentence he had received for his 2012 conviction.

Defendant presents the following arguments in his appeal:

> POINT I
>
> IT WAS ERROR TO DENY DEFENDANT'S MOTION TO DISMISS THE INDICTMENT BASED ON THE PRESENTATION OF IMPROPER AND PREJUDICIAL MATERIAL BEFORE THE GRAND JURY.
>
> POINT II
>
> THE TESTIMONY OF LT. BUTKOFF EXPRESSING OPINION ABOUT THE INTENT OF DEFENDANT WAS IMPERMISSIBLE OPINION TESTIMONY WHICH REQUIRES REVERSAL OF DEFENDANT'S CONVICTION. (NOT RAISED BELOW).

POINT III

THE ADMISSION OF N.J.R.E. 404 (b) EVIDENCE REGARDING DEFENDANT'S PRIOR CONVICTION IN OCEAN COUNTY WAS ERROR AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT IV

THE 20 YEAR NERA SENTENCE IMPOSED CONSECUTIVE TO A PRIOR SENTENCE WAS EXCESSIVE AND SHOULD BE MODIFIED AND REDUCED (NOT RAISED BELOW)

We have considered these arguments in light of applicable legal principles and the record, which contains overwhelming evidence of defendant's guilt, and conclude that none have any merit.

II.

In contending the trial judge erred in denying his motion to dismiss the indictment, defendant offers several arguments. Only one of these was presented to the trial court, i.e., that the indictment should be dismissed because the prosecutor advised the grand jury that defendant had been convicted "of crimes for which he could receive a sentence of up to 50 years in prison."

An abuse of discretion standard applies to our review of the trial court's decision denying a defendant's motion to dismiss the indictment. State v. Saavedra, 222 N.J. 39, 55 (2015). "A trial court's exercise of this discretionary power will not be disturbed

on appeal 'unless it has been clearly abused.'" Id. at 55-56 (citation omitted).

The trial judge performed an exacting review of the prosecutor's challenged instruction to the grand jury. Although the Rules of Evidence do not apply to grand jury proceedings, the judge conducted an analysis under N.J.R.E. 404(b) and State v. Cofield, 127 N.J. 328 (1992). The judge concluded the reference to defendant's prior conviction satisfied the pertinent Cofield factors and was "highly probative because . . . it provided for the Grand Jury the reason or motive for [defendant]'s alleged conspiracy to commit murder and attempt to commit murder." The court also found "the evidence was not unduly prejudicial and did not create the risk of undue prejudice" because the prosecutor "properly and in detail provided limiting instructions regarding the appropriate use of the evidence." We discern no abuse of discretion in the denial of defendant's motion on this ground.

On appeal, defendant has culled through the grand jury transcript to raise additional arguments as to why his motion to dismiss the indictment should have been granted. He contends the grand jury process was tainted by testimony Butkoff gave about the following: (1) defendant was pending sentence for a first-degree crime and faced a potential sentence of up to fifty years; (2) a conversation between defendant and J.M. about doing harm to other

people involved in the 2012 murder case; (3) collection of a life insurance policy on defendant's relatives in which defendant was the beneficiary and (4) defendant's election to speak to his attorney after receiving Miranda[3] warnings. These arguments are subject to review for plain error, R. 2:10-2,[4] and merit only limited discussion. R. 2:11-3(e)(2).

Defendant contends this evidence was "extraneous, irrelevant and immaterial to the charges involving Mr. Cucci and accomplished nothing more than creating prejudice against" him. He argues further that the "testimony regarding his refusal to give a statement violated his Fifth Amendment right to remain silent and his right to a fair trial."

We agree the statement that defendant "chose to speak with his attorney before making any further statements" was improper, albeit an isolated statement. The relevance of the conversation regarding possible recovery of life insurance policy proceeds is dubious but, again, the testimony regarding that conversation was brief, consisting of only five questions and answers. The remaining testimony challenged for the first time on appeal

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

[4] In his brief, defendant contends the conversation regarding harm to others was argued at the motion hearing. The transcript does not reflect such argument and defendant has not provided a transcript citation to support that representation.

represents fleeting comments that can legitimately be characterized as relevant to defendant's desire to retaliate against persons involved in his murder case and his motive to keep the lead prosecutor from participating in defendant's sentencing.

"Once the grand jury has acted, an indictment should be disturbed only on the clearest and plainest ground, and only when the indictment is manifestly deficient or palpably defective." State v. Hogan, 144 N.J. 216, 228-29 (1996) (citations omitted). Unless it is shown that the grand jury process itself was unfair, "an indictment will not be dismissed merely because hearsay or highly prejudicial evidence was heard by the grand jury." State v. Scherzer, 301 N.J. Super. 363, 428 (App. Div.), certif. denied, 151 N.J. 466 (1997). Defendant has the burden of proving such unfairness, State v. Francis, 191 N.J. 571, 587 (2007), and failed to meet that burden here.

III.

Defendant next argues he was deprived of a fair trial by testimony elicited from Butkoff during the State's second re-direct examination that constituted improper lay opinion regarding defendant's intent. Because there was no objection to this testimony at trial, this argument is subject to review for plain error. R. 2:10-2.

Lay opinion testimony is governed by N.J.R.E. 701, which permits a lay witness's "testimony in the form of opinions or inferences . . . if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." Such evidence may not be admitted, however, on a matter "as to which the jury is as competent" as the witness "to form a conclusion." State v. McLean, 205 N.J. 438, 459 (2011) (citation omitted). Addressing the first requirement for admissible lay opinion -- that the opinion be rationally based upon perception -- the Second Circuit has stated, "a lay opinion must be the product of reasoning processes familiar to the average person in everyday life." United States v. Garcia, 413 F. 3d 201, 215 (2d Cir. 2005). Police officers are generally limited to providing "an ordinary fact-based recitation" of facts and such testimony may not include any opinion as to what the officer "believed," "thought" or "suspected." McLean, supra, 205 N.J. at 460.

Viewing the challenged testimony within the context of the cross-examinations that preceded it and the wealth of evidence of defendant's guilt, we are satisfied the challenged testimony was not "clearly capable producing an unjust result." R. 2:10-2.

A cornerstone to the defense here was that defendant did not actually reach an agreement with "Victor" for the contract murder. In his summation, defense counsel argued:

> But there's one thing that was for sure during these conversations on June 6th and June 8th with Mr. Butkoff, and that was there would be no action without currency. In other words, nothing would happen to Mr. Cucci until currency was received. . . .
>
> Now, it's for you to determine whether there was an agreement and whether Mr. Goldberg . . . satisfied an agreement and created a meeting of the minds such that there was an agreement or a substantial step in order to kill Mr. Cucci.
>
> [(Emphasis added).]

This defense was pursued through defense counsel's cross-examination of Butkoff, which was designed to show there was no "meeting of the minds" between defendant and "Victor" because any agreement was conditioned upon payment and a payment was never finalized or received.

The issue regarding a "meeting of the minds" between "Victor" and defendant was addressed during the State's first re-direct examination. Butkoff testified he and defendant agreed that he would murder the assistant prosecutor when defendant paid him a down payment of $10,000.

On re-cross-examination, defense counsel again attempted to highlight that a finalized payment was a condition precedent to

the agreement and invited Butkoff to testify regarding defendant's "intention":

> Q. [Y]ou firmly declared to Mr. Goldberg that you wouldn't proceed until you received the money. Correct?
>
> A. That was the last time that I was speaking with him there. And once I received that money, I was going to do that.
>
> Q. Okay. So that was the condition that needed to be met before you would take action. Correct?
>
> A. Correct.
>
> Q. And that condition was you had to receive money?
>
> A. Correct.
>
> Q. And you are saying on June 6th, you're saying you already had an agreement at that point?
>
> A. There was some financial talk, yes. He actually, in his letter that he had wrote, that he provided me, he said he was going to provide me with $5,000.
>
> Q. Did he say where it was coming from?
>
> A. No.
>
> Q. So you needed to go back on June 8th to finalize the terms and conditions of any agreement?
>
> A. Finalize and confirm his intentions on the murdering the [sic] Assistant Prosecutor Cucci, yes, that's correct.

Q. And, again, his intention, your action was conditioned upon you receiving money. Correct?

A. That is correct.

[(Emphasis added).]

The testimony challenged on appeal was provided during the State's second redirect examination and is underlined here:

Q. Now, let's talk about Lt. Butkoff, the undercover detective. You are gathering evidence in an investigation into an attempted murder and a conspiracy to commit murder. Correct?

A. Correct.

Q. Are you looking for money, or are you looking for evidence of an agreement to pay money to kill someone?

A. I'm looking for evidence from Mr. Goldberg that he actually wanted to do this, and there is no doubt in my mind that he wanted to do this.

Q. And did you obtain evidence of his agreement to pay money to kill Mr. Cucci?

A. Absolutely.

This exchange was followed by three more cross-examinations and two more re-direct-examinations.

Even if improper, the admission of Butkoff's testimony did not rise to the level of plain error. See R. 2:10-2; State v. Kemp, 195 N.J. 136, 156-57 (2008) (holding the admission of testimony by police officer that he believed defendant lied in

statement to police was not plain error). As we have noted, his opinion as to whether there was a meeting of the minds was solicited by defense counsel as part of a defense that was carefully crafted to find a possible linchpin that might cause the unraveling of the formidable case against defendant. That evidence included the video and audio recordings of the conversation between defendant and J.M., and the two meetings between defendant and Butkoff, all of which provided incriminating statements defendant did not deny making. In the face of the compelling evidence of defendant's guilt, the fleeting remarks challenged on appeal did not have any capacity to produce an unjust result.

IV.

Prior to trial, the State moved to admit evidence regarding defendant's 2012 conviction as other conduct evidence pursuant to N.J.R.E. 404(b). After performing a Cofield analysis of the proffered evidence, the trial judge granted the motion in part, limiting the admissible evidence to that related to defendant's intent and motive. The court identified the admissible evidence as follows: (1) Cucci was an Assistant Prosecutor for the Ocean County Prosecutor's Office; (2) defendant was indicted in Ocean County for "certain criminal charges"; (3) Cucci was assigned to prosecute the charges against defendant; (4) Cucci was the lead prosecutor in defendant's trial; (5) Cucci "was responsible for

all aspects of [defendant]'s prosecution"; (6) "a jury found [defendant] guilty of certain offenses" on March 16, 2012; (7) defendant was scheduled to be sentenced on June 29, 2012; (8) as the lead prosecutor, Cucci "planned to represent the State at [defendant]'s sentencing"; and (9) "[defendant] was incarcerated in the Ocean County Jail while he awaited sentencing."

Defendant argues that this evidence was not properly admitted pursuant to N.J.R.E. 404(b) because the State was not required to prove motive and already had "sufficient evidence . . . to prove the charges." This argument lacks sufficient merit to warrant discussion, R. 2:11-3(e)(2), beyond the following brief comments.

We review "a trial court's determination on the admissibility of the evidence of other crimes under N.J.R.E. 404(b) "with "great deference," State v. Barden, 195 N.J. 375, 390 (2008), and will only disturb that ruling where there is a clear error of judgment in the balancing of the Cofield factors. State v. Marrero, 148 N.J. 469, 483 (1997).

As the trial judge observed in his analysis of the Cofield factors, the evidence was directly relevant to defendant's motive and intent in light of defendant's denial that he intended to consummate any agreement for Cucci to be murdered. As required by the third Cofield factor, the evidence of the facts deemed admissible by the trial judge was clear and convincing. Applying

the fourth Cofield factor, the judge also determined the evidence was probative of defendant's motive and intent, and its probative value was not outweighed by the potential prejudice because the court would limit the admissible facts.

These findings were well-reasoned, supported by the record, and entitled to our deference.

V.

Finally, defendant challenges his sentence as excessive. This argument merits only limited discussion. R. 2:11-3(e)(2).

The trial judge imposed a twenty-year sentence subject to NERA that was to run consecutive to the twenty-year sentence, also subject to NERA, imposed for defendant's 2012 murder conviction. Defendant does not argue the trial court erred in applying an aggravating factor or failing to find a mitigating factor supported by the record. The trial judge conducted an analysis of the factors identified in State v. Yarbough, 100 N.J. 627, 643-45 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986). Although defendant did not object at trial, he now contends the consecutive sentence was unduly punitive in light of the facts he was sixty-four years old, already serving a twenty-year NERA sentence and the offenses were "interrelated."

A deferential standard applies to our review of sentencing determinations:

> [We] must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.
>
> [State v. Fuentes, 217 N.J. 57, 70 (2014).]

"When a sentencing court properly evaluates the Yarbough factors in light of the record," its decision will ordinarily remain undisturbed on appeal. State v. Miller, 205 N.J. 109, 129 (2011). The trial judge did so here. And, based upon the evidence, the sentence does not shock the judicial conscience. State v. Roth, 95 N.J. 334, 365 (1984). We discern no grounds for disturbing defendant's sentence.

Affirmed.