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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-1368-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

QUAHEEM JOHNSON, a/k/a
DANTE JOHNSON, a/k/a
DEREK SMITH, a/k/a SCOOPY,

Defendant-Appellant.

Argued March 21, 2017 – Decided July 18, 2017

Before Judges Koblitz, Rothstadt and
Sumners.

On appeal from the Superior Court of New
Jersey, Law Division, Hudson County,
Indictment No. 08-08-1494.

Peter T. Blum, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender,
attorney; Mr. Blum, of counsel and on the
briefs).

Eric P. Knowles, Assistant Prosecutor,
argued the cause for respondent (Esther
Suarez, Hudson County Prosecutor, attorney;
Mr. Knowles, on the brief).

PER CURIAM

In response to an interlocutory appeal filed by the State, we previously affirmed the trial court's order barring the State from "retry[ing] defendant [Quaheem Johnson] on felony murder and murder." State v. Johnson, 436 N.J. Super. 406, 409-10 (App. Div. 2014). We concluded that the improper termination statute, N.J.S.A. 2C:1-9(d), barred defendant's retrial on those charges because the trial court terminated the trial by accepting guilty verdicts on lesser-included offenses when the jury was deadlocked on the greater charged offenses. We remanded for sentencing and the entry of a judgment of conviction. Id. at 426. The trial court sentenced defendant to an aggregate term of thirty years, subject to an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendant now appeals from his conviction, arguing:

POINT I

THE TRIAL COURT IMPROPERLY REPLACED A DELIBERATING JUROR WHEN THE RECORD DID NOT SHOW THAT THE JUROR HAD AN INABILITY TO CONTINUE; THE JUROR WAS NOT ASKED IF SHE COULD CANCEL HER TRIP AND, IN ANY EVENT, THE JUROR COULD RETURN THE NEXT MONDAY. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. I, PARAS. 9, 10.

POINT II

THE TRIAL COURT IMPROPERLY REFUSED TO ACT TO PRESERVE THE INTEGRITY OF THE DELIBERATIONS AFTER A CONFLICT

ERUPTED AMONG THE JURORS AND A JUROR REFUSED TO ENTER THE JURY ROOM BECAUSE OF BULLYING. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. I, PARAS. 9, 10.

POINT III

THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURORS THAT THEY COULD CONSIDER THE LESSER-INCLUDED CHARGES BEFORE DECIDING THE GREATER CHARGES AND THEREBY ENCOURAGED IMPROPER COMPROMISES. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. I, PARAS. 9, 10.

POINT IV

THE TRIAL COURT IMPROPERLY FAILED TO INSTRUCT THE JURORS THAT THEIR PARTIAL VERDICT WOULD BE FINAL AND THEREBY POTENTIALLY DEPRIVED JOHNSON OF A UNANIMOUS VERDICT. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. I, PARAS. 9, 10. (NOT RAISED BELOW).

In our earlier opinion, we set forth the circumstances underlying defendant's indictment and the specific charges made against him. We need not repeat them at length here. Suffice it to say, defendant was charged with various offenses arising from his fatally shooting one victim during the course of two separate robberies of necklaces from his victims, as well as pointing his

weapon at a police officer.¹ Johnson, supra, 436 N.J. Super. at 410-11. Both the gun and chain that police recovered included DNA evidence matching defendant and the victim, respectively and multiple witnesses placed defendant at or near the scene of the fatal shooting and robbery. Defendant's first trial ended in a mistrial. At his second trial, when the jury began to deliver its verdict, its foreperson informed the judge that it had not reached a verdict as to several of the indictment's charges, but did as to lesser-included offenses. The prosecutor did not object to the court taking the verdicts, and defense counsel deferred to the

¹ In our prior opinion, we set forth the contents of the indictment. We stated:

Defendant was charged with murder, N.J.S.A. 2C:11-3(a) (count one); felony murder, N.J.S.A. 2C:11-3(a)(3) (count two); armed robbery, as to [one victim], N.J.S.A. 2C:15-1(b) (count three); unlawful possession of a weapon, N.J.S.A. 2C:58-4, 39-5(b) (count four); possession of a weapon for an unlawful purpose, as to [the one victim], N.J.S.A. 2C:39-4(a) (count five); armed robbery, as to [the other victim], N.J.S.A. 2C:15-1 (count six); possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count seven); aggravated assault, as to [a] police officer . . . , N.J.S.A. 2C:12-1(b)(4) (count eight); resisting arrest, N.J.S.A. 2C:29-2(a) (count nine); and possession of a weapon for an unlawful purpose as to [the police officer], N.J.S.A. 2C:39-4(a) (count ten).

[Id. at 411.]

discretion of the court. As to the charges upon which the jury reached a verdict, the judge accepted the verdict and polled the jurors. As we previously described, the verdict sheet indicated the jury's verdicts as follows:

The verdict sheet reflected the verdict as "deadlocked" for counts one, murder; two, felony murder; three, armed robbery [of the first victim]; five, possession of a weapon for an unlawful purpose [as to the first victim]; eight, aggravated assault [of the police officer]; and ten, possession of a weapon for an unlawful purpose [as to the police officer]. The verdict sheet also reflected that, despite being deadlocked on the greater charged offenses, the jury rendered guilty verdicts as to aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), reckless manslaughter, N.J.S.A. 2C:11-4(b)(1),^[2] and second-degree robbery, N.J.S.A. 2C:15-1(a)(2) [all as to the first victim], which were all uncharged, lesser-included offenses that the verdict sheet instructed should only be considered if the jury found defendant not guilty of the charged offense.

[Id. at 418-19.]

The jury reached a verdict as to the remaining counts, finding defendant guilty of unlawful possession of a weapon as to the first victim, armed robbery and possession of a weapon for an

² Although the verdict sheet contained in the record indicates the jury found defendant guilty of this second-degree offense, N.J.S.A. 2C:11-4(b)(1), the transcript of the jury's return of its verdict makes no mention of this determination. We therefore assume the unsigned copy of the verdict sheet provided by defendant in his appendix is incorrect.

unlawful purpose as to the second victim, and resisting arrest by flight and physical force or violence. Id. at 418.

We turn first to Points III and IV of defendant's arguments, which require that we revisit issues similar to those that guided our consideration of the State's prior appeal. In our opinion, we described how the judge who presided over the trial and properly charged the jury as to its consideration of the charged and uncharged offenses could not preside over jury deliberations because of issues related to Hurricane Sandy. We also described how the second judge, who presided only over jury deliberations, responded to a question from the jury by improperly instructing the jurors that they "may deliberate about the charges in any order you wish to." Id. at 414. The judge did so even though the parties' suggested "that the jury should be re-instructed to make unanimous findings as to the greater, charged offense in each count, before considering an uncharged, lesser-included offense, if appropriate, in accordance with the verdict sheet's instructions." Ibid. We concluded, "there is a substantial likelihood that the verdict was the result of the second judge's erroneous instructions to the jurors about the manner and sequence in which they could consider the uncharged, lesser-included offenses." Id. at 424. We have no cause to alter our conclusion that the judge committed an error by so instructing the jury.

Nevertheless, we discern no harmful error warranting a new trial. R. 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result"). While we recognize that "'[a]ppropriate and proper charges to a jury are essential for a fair trial,' and [that the Supreme Court has] repeatedly held that 'erroneous instructions on material points are presumed to be reversible error,'" State v. Carrero, ___ N.J. ___, ___ (2017)(quoting first State v. Daniels, 224 N.J. 168, 180, (2016) then State v. Nelson, 173 N.J. 417, 446 (2002)), we conclude that the erroneous instruction was not "material" because it did not result in any possible harm to defendant or a violation of his right to a fair trial. If anything, defendant benefited from the court's error by the jury convicting him of aggravated manslaughter rather than murder or felony murder. The only harm identified by defendant was the possibility that, had the jury been properly instructed by the second judge, it might have decided to convict him of a lesser charge than aggravated manslaughter. We find this contention to be based on unfounded speculation and without any merit.

We also find without merit defendant's contention that his conviction should be reversed because the second judge failed to ensure that the jury understood its verdict was final. Initially,

we observe that because defendant did not raise this argument to the trial judge, it is reviewed for plain error. R. 2:10-2. "The test for plain error is whether under the circumstances the error possessed a clear capacity for producing an unjust result, that is, one 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. Czachor, 82 N.J. 392, 402 (1980) (citations and quotation marks omitted). Under the circumstances of this case, we conclude that there was no error.

Here, there was no need for the judge to ensure the jury understood its verdict was final before she accepted it because the jury was not going to continue deliberations about charges for which it had not reached a unanimous verdict. Had the judge not accepted the verdict as to any of the deadlocked charges, while accepting the verdicts on the remainder of the charges, with the intention that the jury would be instructed to continue its deliberations as to the deadlocked charges, such an instruction and assurance would have been required. See State v. Shomo, 129 N.J. 248, 258 (1992) ("When the jury returns an interim partial verdict, the court must ensure that the jury intended its partial verdict to be final by specifically instructing the jury regarding

the verdict's finality.").³ There was no question here, however, that the verdict on all counts, including the deadlocked verdicts, were being accepted as final verdicts without either the court or the jury contemplating further deliberations.

We next address defendant's arguments in Points I and II regarding the judge's management of juror issues. The first issue

³ We previously summarized the facts in Shomo as follows:

Shomo addressed the circumstance where a jury announced its verdict on the first two of four charges under consideration without being instructed on the finality of the partial verdicts. After hearing the partial verdicts, the court gave a modified [Czachor, supra, 82 N.J. at 302] charge and released the jury for the evening. [Shomo, supra, 129 N.J. at 252]. The next day, the judge received several notes. The first asked about guilt by admission and the second relayed that the jury was not going to reach a unanimous verdict on the remaining counts and asked "what is our next step?" Ibid. The judge also received a note from a juror indicating a desire to "change" his vote on the first count. Id. at 253. Our Supreme Court held that before a court receives a partial verdict, it should unambiguously instruct the jury that a partial verdict will be considered final, not subject to reconsideration, even though the jury continues to deliberate on other counts. Id. at 258.

[State v. Diferdinando, 345 N.J. Super. 382, 394 (App. Div. 2001) (emphasis added), certif. denied, 171 N.J. 338 (2002).]

arose from a juror's inability to continue deliberations after the interruption in deliberations caused by Hurricane Sandy. The jury deliberated from October 22 through October 26, 2012. The trial reconvened on Wednesday, November 7, 2012. At that time, juror three did not return. She could have returned on the following Monday. The second judge stated to the parties that her "intention [was] to substitute the alternate for her unless the parties want to proceed with less than [twelve] pursuant to [Rule] 1:8-2."⁴ Defense counsel objected to the substitution and would not stipulate to less than twelve jurors. The judge explained that she understood from the first judge that juror three had a previously planned trip, but everyone believed that, but for the hurricane, the trial would have been completed before the date that she was scheduled to leave. The judge substituted an alternate for the absent juror after considering that there had been only "[a]t best" about two days of deliberations, the delay caused by the hurricane forced the juror to miss the remainder of the trial, and her absence "qualif[ied] as an inability to continue." Defendant moved for a mistrial, which the judge denied. The judge then instructed the jury as follows:

The reason [juror three] was excused was entirely personal to her and it had nothing

⁴ The rule permits the parties to agree that the number of jurors be reduced to any number less than the required twelve jurors.

to do with her views on this case, her relationship with the other members of the jury -- deliberating jury. Please do not speculate on the reason why that juror was excused.

As of this moment, you are a new jury and you must start your deliberations over again. The parties have the right to a verdict . . . reached by [twelve] jurors who have had the full opportunity to deliberate from start to finish.

The alternate juror has no knowledge of any earlier deliberations, therefore the new deliberating jury must start over at the very beginning of deliberations.

Each member of the original deliberating jury must set aside and disregard whatever may have occurred and anything which may have been said in the jury room following [the first judge's] instructions to you.

You must give no weight to any opinion expressed by [j]juror number [three] during deliberations before that juror was excused.

Together as a new jury, you must consider all evidence presented at trial as part of your full and complete deliberations until you've reached your verdict.

Defendant contends the court erred by not questioning juror three prior to determining her ability to continue or asking the juror about the purpose of the trip or the feasibility of cancelling the trip. Defendant also argues that because juror three could rejoin the trial the following Monday, the court should

not have determined that the juror was unable to continue, rather the court should have delayed the trial.

"We traditionally have accorded trial courts deference in exercising control over matters pertaining to the jury." State v. R.D., 169 N.J. 551, 559-60 (2001). Our "review of a trial court's decision to remove and substitute a deliberating juror because of an 'inability to continue,' pursuant to Rule 1:8-2(d)(1)," and its denial of a motion for a mistrial based upon the removal, is deferential, warranting reversal only if "the court has abused its discretion." State v. Musa, 222 N.J. 554, 564-65 (2015); see also State v. Williams, 171 N.J. 151, 156 (2002). Whether the court failed to properly exercise its discretion in handling juror issues depends upon whether the court's actions impaired defendant's right to a fair trial. "A defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial." State v. Brown, 442 N.J. Super. 154, 179 (App. Div. 2015) (quoting State v. Loftin, 191 N.J. 172, 187 (2007)). We discern no impairment of defendant's rights in this case and therefore no abuse of the court's discretion.

The substitution of a juror during deliberations is allowed only as a last resort "[b]ecause juror substitution poses a clear potential for prejudicing the integrity of the jury's deliberative process." State v. Hightower, 146 N.J. 239, 254 (1996); State v.

Valenzuela, 136 N.J. 458, 468-69 (1994). Inasmuch as the essence of jury deliberations is a collective sharing of views, reconstituting a jury in the midst of deliberations "can destroy the mutuality of those deliberations." Williams, supra, 171 N.J. at 163. For that reason, Rule 1:8-2(d)(1) permits the removal and substitution of jurors in criminal trials after deliberations have begun "only in specifically defined circumstances." State v. Jenknins, 182 N.J. 112, 123-24 (2004). Generally, a deliberating juror can be excused only for reasons personal to the individual juror, those that "do[] not pose a threat to the integrity or independence of the deliberative process." Id. at 124. "[O]ur courts have consistently upheld the substitution of an alternate for a juror excused for personal reasons unrelated to the case." State v. Ross, 218 N.J. 130, 147 (2014).

In deciding whether to allow the substitution of a juror, a court should consider multiple factors, including:

the timing of the juror's departure, his or her explanation of the problem prompting the inquiry, and any communications from the jury that may indicate whether deliberations have progressed to the point at which a reconstituted and properly charged jury will be unable to conduct open and mutual deliberations.

[Id. at 149.]

Here, the missing juror's reason for being absent was already known to the court based on information the juror shared when she was selected to serve with the assumption that the trial would be over when the juror had to leave on her planned trip. Nature did not cooperate, curtailing deliberations and forcing the closing of the courthouse due to the hurricane's impact. The juror did not appear for continued service because of her planned trip, a reason personal to her and not arising from the deliberative process. The second judge reviewed the required considerations and properly exercised her discretion by substituting the juror with an alternate. See id. at 136-37.

The next juror issue related to the second judge's handling of a conflict between jurors. After the reconstituted jury began deliberations, an argument arose between juror two and juror eleven. A court officer informed the judge juror eleven "tried to hand [him] a note, [juror two] refused and tried to take the note from her, . . . at which point [juror eleven] said, . . . touch me one more time, don't touch me." The officer told them to "calm down." The jurors went back into the jury room. A half-hour later, juror two approached the officer again and handed him a note. The juror "refuse[d] to go back in the room." The officer stated she said "she [did] not want to be ridiculed anymore."

The judge had juror two brought into the courtroom, where she asked her about the note and why she did not want to continue deliberating. Juror two stated it was because "[t]hey're shouting, they're yelling." The judge explained that things sometimes "become heated" during deliberations. The judge stated she would bring the jury into the courtroom and explain that "everyone must be respectful to each other." In the meantime, juror two offered to return to the jury room. The judge read the contents of the note, which contained on one side a comment by juror eleven and on the other a comment by juror two. The side written by juror eleven stated, "[j]uror [two] is refusing to listen to the opinions of the other jurors and is making up facts to reach her conclusions."⁵

The judge then brought out juror eleven, who stated juror two was being unreasonable, was not considering the opinions of others, was refusing to participate, and was "mak[ing] up stuff." Juror eleven stated that "I think that we've all agreed that we should take a break and come back and cool off and start over in the morning." Defense counsel requested a modified Czachor/Allen

⁵ The side of the note written by juror two stated "[t]here is a problem with the jurors, they are ready to stop . . . ," at which point the sentence stops.

charge.⁶ The judge stated she would not give the charge at that time because it had not been "formally requested of [her]." She stated the conflict was between "two jurors individually about issues they were having personally," therefore "I'm not going to give the modified [Czachor/Allen charge], but perhaps a break is in order." The judge noted juror two "actually said she would return . . . to the jury room." Defense counsel moved for a mistrial, which was denied.

The judge brought out the jury and stated,

I . . . understand that things may be getting somewhat heated in the jury room and -- and these things happen in many cases. We understand that.

We of course -- that's why I think this might be a good time to break for the day and come back fresh tomorrow

The next day, the jurors did not bring up the matter again and continued their deliberations without incident.⁷

⁶ Czachor, supra, 82 N.J. at 405 n.4 sets forth supplemental trial instructions used in response to a jury deadlock, modifying Allen v. U.S., 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 2d 528 (1896). The charge provides "an admonition to guard against reaching an agreement that may do 'violence to individual judgment,'" which serves as "a metaphor for what we now refer to as 'bullying.'" State v. Dorsainvil, 435 N.J. Super. 449, 482 (App. Div. 2014) (quoting Czachor, supra, 82 N.J. at 405 n.4).

⁷ In our previous opinion, although the issue was not raised in the State's interlocutory appeal, we observed that

Defendant asserts "the record rais[es] the specter of bullying that could improperly influence the jurors" and contends that "the court should have instructed the jurors on their duty to deliberate," by giving a modified Czachor/Allen charge, which is the charge "most applicable to a bullying situation like the one in the present case." He argues this error warrants a new trial. We disagree.

Jury deliberations often become heated, and jurors may place all sorts of pressures on each other in the course of deliberations. See State v. Young, 181 N.J. Super. 463, 468 (App. Div. 1981), certif. denied, 91 N.J. 222 (1982). It is not the court's role to inquire into their deliberations, absent evidence

[a]lthough not an issue before us, we note that the judge did not question the other jurors about whether the feuding jurors' dispute impacted their deliberations, or give any instructions to the jury about the dispute or take any further action to guarantee the integrity of the deliberations or the safety of the jurors. See [Dorsainvil, supra, 435 N.J. Super. at 487] ("When violence intrudes into the deliberative process in any form and to any degree, a trial judge must take immediate action to investigate what occurred, not only to determine whether a defendant's right to a fair and impartial trial has been compromised, but also to ensure the safety and security of all involved").

[Johnson, supra, 436 N.J. Super. at 415 n.9.]

of impropriety. While "[a] physical altercation between two or more deliberating jurors constitutes an irreparable breakdown in the civility and decorum expected to dominate the deliberative process," Dorsainvil, supra, 435 N.J. Super. at 482, there is simply no comparison between jurors exchanging caustic comments and jurors engaging in physical violence in the jury room.

Here, there was no evidence that the jurors' dispute resulted in "[a] jury verdict tainted by such an inherently coercive and chaotic environment[, rising to the level of] an affront to any notion of civilized justice[, thereby preventing it from] stand[ing] as a matter of law." Ibid. There were no reports of physical violence by either juror and, after the break suggested by one of the subject jurors and ordered by the judge, the jurors continued to deliberate for an additional day before it announced its verdict. While, as we previously observed, it would have been better for the judge to question each of the other jurors to ensure there was no problem, the two jurors evidently put aside their differences and participated with the other jurors without further incident. Moreover, here again, defendant has not demonstrated that any alleged conflict between the two jurors prejudiced him, causing an unjust result. To the contrary, as already discussed, defendant was not convicted of the more serious charges he was facing.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION