SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1648-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HANIEF J. JACKSON, a/k/a
CARLOS LANGSTON,

Defendant-Appellant.

Submitted April 24, 2017 – Decided May 2, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-11-3411.

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Claudia Joy Demitro, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

On July 22, 2013, defendant Hanief Jackson was arrested and charged by summons with possession of cocaine, and possession of

cocaine with intent to distribute it. The police also issued a ticket to defendant for "hindering apprehension."[1]

On November 26, 2013, a Camden County grand jury returned a three-count indictment, charging defendant with third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of cocaine with the intent to distribute it, N.J.S.A. 2C:35-5(a)(1) (count two); and fourth-degree resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2) (count three).

On March 11, 2014, a municipal court judge accepted defendant's guilty plea to the "hindering apprehension" charge, and ordered defendant to pay a $750 fine.[2]

Prior to trial, a trial judge incorrectly dismissed counts one and two of the indictment without prejudice after defendant asserted he had pled guilty to those two charges in municipal court. Thereafter, defendant filed a motion to dismiss count

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[1] Defendant did not include the summons or ticket in his appellate appendix and it does not appear that either document was presented to the trial court.

[2] As we will discuss in further detail in Section II of this opinion, it is not clear from the record what the "hindering apprehension" charge entailed. The State asserts that the police charged defendant in the ticket with hindering apprehension by giving them a false name at the time of the arrest. On the other hand, defendant asserts that the hindering charge involved resisting arrest by flight, the same offense charged in the later November 26, 2013 indictment.

three of the indictment on double jeopardy grounds based upon his assertion that the "hindering apprehension" charge to which he pled guilty in municipal court was the same as the resisting arrest by flight charge embodied in count three. In response, the State moved to reinstate counts one and two of the indictment. Following oral argument on August 13, 2014, the judge granted the State's motion to reinstate counts one and two,[3] and denied defendant's motion to dismiss count three of the indictment on double jeopardy grounds.

At the conclusion of the trial,[4] the jury found defendant guilty of possession of cocaine (count one), and resisting arrest by flight (count three). The jury acquitted defendant of count two.

At sentencing, the trial judge granted the State's motion for an extended sentence under N.J.S.A. 2C:44-3(a). The judge sentenced defendant to six years in prison, with a three-year period of parole ineligibility, on count one, and to a consecutive eighteen-month term on count three. The judge subsequently denied

[3] On appeal, defendant does not challenge the judge's decision to reinstate counts one and two of the indictment.

[4] A different judge presided over the trial and subsequent sentencing.

defendant's motion to reduce or otherwise modify his sentence. This appeal followed.

On appeal, defendant raises the following contentions:

> POINT ONE
>
> DEFENDANT'S PROSECUTION FOR RESISTING ARREST WAS BARRED BY THE DOCTRINE OF DOUBLE JEOPARDY.
>
> POINT TWO
>
> THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR A MISTRIAL WAS ERROR WHICH DENIED DEFENDANT A FAIR TRIAL.
>
> POINT THREE
>
> THE TRIAL COURT DENIED DEFENDANT A FAIR TRIAL BY UNDULY RESTRICTING DEFENDANT'S ABILITY TO PRESENT A DEFENSE.
>
> POINT FOUR
>
> THE TRIAL COURT'S . . . INSTRUCTION TO THE JURY ON THE DOCTRINE OF FLIGHT WAS PLAIN ERROR.
>
> POINT FIVE
>
> THE TRIAL COURT'S IMPOSITION[] OF AN EXTENDED TERM OF IMPRISONMENT AND CONSECUTIVE SENTENCES WERE ABUSES OF DISCRETION WHICH RESULTED IN AN EXCESSIVE SENTENCE.

After reviewing the record in light of the contentions advanced on appeal, we reverse defendant's conviction on count three, resisting arrest by flight, and vacate his sentence on that count because the judge incorrectly charged the jury concerning this offense. However, we reject defendant's contentions

concerning count one, and affirm defendant's conviction and sentence for possession of cocaine under count one.

I.

We derive the following facts from the evidence produced at trial. At approximately 7:20 p.m. on July 22, 2013, Officer Ryan Dubiel and Officer Nicholas Austin were on patrol in a marked police car in an area known for drug activity and weapons offenses. As they drove, the officers observed a man, later identified as defendant, standing near the sidewalk. The officers saw defendant hand a woman two small items in exchange for money. When defendant saw the patrol car, he began to walk away quickly.

Believing they had witnessed a narcotics transaction, the officers stopped the car and Officer Dubiel got out. The officer yelled to defendant, "Police. Stop." Defendant ran away and the two officers called for backup and gave chase.

The officers followed defendant to an apartment complex and briefly lost sight of him. By that time, a number of other officers had arrived at the scene. One of these officers, Sergeant Gabriel Rodriguez, saw defendant open the door to an apartment and toss some "yellow small objects" on the ground behind the door.

Defendant then came back out of the apartment. As he did so, Officers Dubiel and Austin were waiting for him and they ordered defendant to get on the ground. Defendant complied and the

officers arrested him. As they did so, a woman in the doorway of the apartment screamed, and waved her arms to get the officers' attention. The woman pointed behind the apartment door and Sergeant Rodriquez recovered six small yellow baggies containing a white rock-like substance. Laboratory analysis confirmed that the six baggies contained cocaine with a gross weight of 1.122 grams.

Defendant did not testify at the trial. However, he called Detective Timothy Sheetz as a witness and questioned him about the investigation the detective conducted into the offenses. Defendant also called the owner of the apartment complex and asked him about the placement of surveillance cameras in the area.

II.

We begin by addressing defendant's contentions concerning his conviction for resisting arrest for flight. In Point Four, defendant asserts that the trial judge incorrectly gave a general charge on flight on count three, even though that count specifically charged defendant with resisting arrest by flight. We agree.

It is well settled that "[a]ppropriate and proper charges are essential for a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (alteration in original) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Jury instructions must give a

"comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Id. at 159 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "[I]n reviewing any claim of error relating to a jury charge, the 'charge must be read as a whole in determining whether there was any error[.]'" State v. Gonzalez, 444 N.J. Super. 62, 70-71 (App. Div.) (quoting State v. Torres, 183 N.J. 554, 564 (2005)), certif. denied, 226 N.J. 209 (2016). If, like here, defense counsel did not object to the jury charge at trial, the plain error standard applies. State v. Singleton, 211 N.J. 157, 182-83 (2012).

Under that standard, we reverse only if the error was "clearly capable of producing an unjust result," id. at 182 (quoting R. 2:10-2), and consider the totality of the circumstances when making this determination. State v. Marshall, 123 N.J. 1, 145 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993). However, the Supreme Court has repeatedly cautioned that in a criminal trial, "erroneous jury charges presumptively constitute reversible error . . . and are poor candidates for rehabilitation under the harmless error philosophy." Singleton, supra, 211 N.J. at 196 (citations omitted).

Applying these standards, we are satisfied that the trial judge's general instruction on flight clearly had the capacity to

confuse the jury in its consideration of the specific resisting arrest by flight offense in count three. Flight from custody or the scene of a crime, if carried out with the purpose of avoiding apprehension, prosecution, or arrest, is generally admissible to draw an inference of guilt. State v. Mann, 132 N.J. 410, 418-19 (1993). However, although evidence of flight may be admissible, "[t]he potential for prejudice to the defendant and the marginal probative value of evidence of flight" requires the court to carefully consider the manner in which such evidence is presented to a jury. Id. at 420.

Here, the trial judge instructed the jury as follows on the evidentiary value of a defendant's flight after the commission of an offense:

> There[] has been some testimony in the case [from] which you may infer that the defendant fled shortly after the alleged commission of the crime. The question of whether the defendant fled after the commission of the crime is another question of fact for your determination. Mere departure from a place where a crime has been committed does not constitute flight.
>
> If you find that the defendant, fearing that an accusation or arrest would be made against him on the charge involved in the indictment, took refuge in flight for the purpose of evading the accusation/arrest on that charge, then you may consider such flight in connection with all the other evidence in the case, as an indication or proof of consciousness of guilt.

> Flight may only be considered as evidence of consciousness of guilt if you should determine that the defendant's purpose in leaving was to evade accusation or arrest for the offense charged in the indictment.

Although this instruction followed the relevant model charge on flight,[5] the trial judge failed to specify the offenses to which the jury could apply it. This omission was an error, which was clearly capable of producing an unjust result. R. 2:10-2.

This is so because the flight charge is only applicable to a flight from the scene, which occurs after the commission of an offense for which the defendant is charged. In this case, the offenses submitted to the jury for disposition included possession of cocaine, possession of cocaine with the intent to distribute it, and resisting arrest by flight. The judge properly presented the jury with the flight charge concerning the narcotics offenses, which were the only two offenses that allegedly occurred before defendant's flight from the scene of their commission.

However, the flight charge was clearly not applicable to the separate and distinct charge of resisting arrest by flight under N.J.S.A. 2C:29-2(a)(2). Because the judge did not instruct the jury that the flight instruction only applied to the narcotics offenses, the jury could have inappropriately considered evidence

[5] Model Jury Charges (Criminal), "Flight" (2010).

of flight as tending to prove that defendant acted knowingly in his alleged attempt to resist arrest by flight. In view of this plain error in presenting the question of flight to the jury, we are constrained to reverse defendant's conviction under count three for resisting arrest by flight. Mann, supra, 132 N.J. at 420. Therefore, we also vacate defendant's sentence for this offense.

Based on this ruling, we need only briefly address defendant's alternate argument in Point One of his brief that the first trial judge erred in denying his motion to dismiss the resisting arrest charge on double jeopardy grounds after he pled to "hindering apprehension" in the municipal court. For the reasons that follow, we conclude that the record presented by the parties to the trial judge was insufficient to permit meaningful review of the motion.

The parties did not provide the trial judge with a copy of the ticket defendant received for "hindering apprehension." Thus, the conduct that formed the basis of this charge is not set forth in the record. This information is also not contained in the municipal court transcript that defendant included in his appendix. As noted above, defendant asserts that the hindering charge was based upon his alleged attempt to flee apprehension. On the other hand, the State contends that the police issued

defendant the ticket solely because he gave them a false name when he was arrested.

The factual basis for the plea that the municipal court judge accepted from defendant does nothing to shed light on the exact nature of the offense to which defendant was pleading. When asked to explain "what happened" on the evening of the offense, defendant merely stated, "I was out there doing what I was doing, selling drugs. And they ran down on me." Thus, defendant did not admit to attempting to flee the police or to giving them a false name. Although both parties have represented to us that the charge to which defendant pled was a disorderly persons offense, this fact is also not clear from the record.

This information was critical to a proper double jeopardy analysis by the trial judge. See State v. Miles, 443 N.J. Super. 212, 220-21 (App. Div. 2015) (noting that the primary issues involved in reviewing a double jeopardy claim are whether the second prosecution is for the same offense involved in the first; whether the two offenses have the same elements; and whether the same evidence would support a conviction on both offenses), certif. granted, 225 N.J. 339 (2016).[6] Yet, the parties did not provide

[6] The issue before the Supreme Court on certification in Miles is whether the "same evidence test" continues to apply in New Jersey for defendants facing successive prosecutions. The Court heard oral argument in Miles on January 14, 2017.

this information to the judge. In addition, the judge did not have the benefit of our analysis of the double jeopardy issue in Miles, which was issued after his decision, or any further guidance the Supreme Court may provide at the conclusion of its review in that case.

Under these unique circumstances, we vacate the trial judge's August 13, 2014 order denying defendant's motion to dismiss count three of the indictment, charging him with resisting arrest by flight. If the State proceeds to re-try defendant on this charge, he may renew his double jeopardy argument before the trial court upon a properly-developed record. Should defendant file a new motion, the trial judge may also conduct an evidentiary hearing to assist in determining, among other things, the exact charge involved in the ticket defendant received at the time of his arrest on July 22, 2013.

III.

Defendant's remaining contentions concern his conviction for possession of cocaine. In Point Two of his brief, defendant argues that the trial judge erred in denying his motion for a mistrial. We disagree.

During his testimony on direct examination, Officer Dubiel stated that after defendant's arrest, a woman at the apartment began yelling at the officers to alert them to the location of the

cocaine. When the prosecutor asked Officer Dubiel what the woman told the officers, the trial judge sustained defense counsel's hearsay objection to the question and explained the basis for his ruling to the jury. The judge also instructed Officer Dubiel "not to make any statements concerning what [he] heard with particular regard to the [woman] in the doorway." Officer Dubiel made no further references to the woman during his testimony on direct examination.

On cross-examination, however, defense counsel asked Officer Dubiel a number of questions about his interaction with the woman at the apartment. The following colloquy occurred:

> Defense Counsel: Now, when you were on scene, I know that the prosecutor asked you about a female who was there. Did you take a formal statement from that young lady?
>
> Officer Dubiel: No, I did not.
>
> . . .
>
> Officer Dubiel: I'm not allowed to talk about what the female said because that's hearsay.
>
> Defense Counsel: . . . You did kind of talk about that in your report.
>
> Officer Dubiel: Yes, I did.
>
> Defense Counsel: Okay. So sometimes you're allowed to talk about it and sometimes you're not?
>
> Officer Dubiel: Your objection was sustained. I'm not allowed to talk about what she said.

Defense Counsel: You're allowed to note what's in there?

Officer Dubiel: Yes. I can put what she said. She didn't wish to provide me with too many details on the information which is pretty common in Camden.

Defense Counsel: Did you take a statement?

Officer Dubiel: We spoke with her, but I did not take a statement.

Defense Counsel: Did you take a formal statement from her?

Officer Dubiel: I did not take a formal statement from her.

Defense Counsel: Do you know [if] anyone took a formal statement from her?

Officer Dubiel: I don't believe anybody took a formal statement.

Defense Counsel: An eyewitness on the scene that you're mentioning here, but no one bothered to take a formal statement, correct?

Officer Dubiel: She did not wish to give a formal statement because—

Defense Counsel: Did you ask?

Officer Dubiel: —she said she was afraid of being shot.

Defense counsel immediately asked that Officer Dubiel's final comment be stricken from the record and he moved for a mistrial. After hearing argument on the issue, the trial judge denied

defendant's motion for a mistrial, but promptly gave the jury the following strong curative instruction:

> Ladies and gentlemen, there was some testimony by Officer Dubiel concerning statements made by a—described as a female, I think previously described as a female in the doorway. I'm going to request that you disregard anything that was testified to as any statements made by that witness.
>
> There is no evidence of any weapons in this case. There's no evidence of any threats. We don't anticipate that there will be any. So this is what we call a curative instruction. Occasionally things enter in to a trial and of course as human beings and as smart[,] educated people[,] the law understands that you can be told to disregard the last statement or disregard something you've heard and not consider it as part of the proofs.
>
> And I'm asking you in this instance to do just that[,] to disregard the last statement and disregard anything with regard to any statements made by that female and to not consider that as part of your fact-finding duties here.

The decision whether to grant a mistrial is "peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting." State v. Hogan, 297 N.J. Super. 7, 15 (App. Div.) (quoting State v. Winter, 96 N.J. 640, 647 (1984)), certif. denied, 149 N.J. 142 (1997). Therefore, we will not disturb a trial court's ruling

unless there is an abuse of discretion. State v. Harvey, 151 N.J. 117, 205 (1997).

Applying these principles, we conclude that the judge properly addressed the issue. The officer's comment concerning the woman's statement to him was fleeting and made in response to defense counsel's persistent questioning. The judge immediately sustained defense counsel's objection and issued a forceful and comprehensive curative instruction to the jury to disregard the officer's comment that we presume the jury followed. State v. Smith, 212 N.J. 365, 409 (2012) (citing State v. Loftin, 146 N.J. 295, 309 (1996)), cert. denied, ___ N.J. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013). Under these circumstances, we discern no abuse of discretion in the denial of defendant's motion for a mistrial.

IV.

In Point Three of his brief, defendant argues that the trial judge erred by precluding him from introducing evidence through his direct examination of Detective Sheetz of "third-party guilt." This argument lacks merit.

Prior to trial, an investigator employed by the defense reported to defense counsel that another individual, who had a criminal record, had also been in the apartment where the drugs were found by the police. However, defense counsel did not call

this investigator as a witness at trial, and there was nothing in the record to support the investigator's claim that anyone other than defendant had been in the apartment.

Nevertheless, during his questioning of Detective Sheets, defense counsel asked if the detective had investigated whether the individual identified by the investigator had been in the apartment at the time of the incident. The detective testified that he had not done so. Defense counsel then asked the trial judge at sidebar whether he could ask the detective whether that individual had a criminal record. The judge denied this request, but defense counsel was permitted to ask Detective Sheetz whether he had conducted a "background check" concerning the individual. The detective replied that he could not recall doing so.

On appeal, defendant asserts that the judge should have permitted him to argue that the third-party identified by his investigator had a criminal record and was actually the source of the cocaine found in the apartment. Under the circumstances presented here, this contention plainly lacks merit.

We review a judge's ruling on admission of evidence of third-party guilt for abuse of discretion. State v. Cotto, 182 N.J. 316, 333 (2005). The trial court must provide criminal defendants the opportunity to present a complete defense including that someone else committed the crime charged. Id. at 332. Such a

defense includes the right to introduce evidence of third-party guilt if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case. Ibid. This requires the defendant to offer evidence that "creates the possibility of reasonable doubt" by demonstrating some link between the third party and the victim. Id. at 333. Because this is a fact-sensitive inquiry, the court has broad discretion to admit or preclude such evidence. Ibid.

It is not enough to prove some hostile event and leave its connection to the crime charged to mere conjecture. State v. Sturdivant, 31 N.J. 165, 179 (1959), cert. denied, 362 U.S. 956, 80 S. Ct. 873, 4 L. Ed. 2d 873 (1960). "There must be some link between the evidence and the victim or the crime." State v. Koedatich, 112 N.J. 225, 301 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 813, 102 L. Ed. 2d 803 (1989).

Here, no individual was specifically identified on the record through competent evidence as the third party, and there was no link whatsoever between this individual and the cocaine found in the apartment after Sergeant Rodriguez saw defendant throwing it behind the door. Thus, defendant's argument was nothing more than mere conjecture, and it would not have assisted the jury in reaching a just verdict. Ibid. Because there was no competent

evidence of third-party guilt adduced at trial, the judge did not improperly restrict defendant's ability to present such a defense.

V.

Finally, in Point Five of his brief, defendant argues that his sentence for possession of cocaine was excessive. We disagree.

Trial judges have broad sentencing discretion as long as the sentence is based on competent credible evidence and fits within the statutory framework. State v. Dalziel, 182 N.J. 494, 500 (2005). Judges must identify and consider "any relevant aggravating and mitigating factors" that "are called to the court's attention[,]" and "explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Blackmon, 202 N.J. 283, 297 (2010)). "Appellate review of sentencing is deferential," and we therefore avoid substituting our judgment for the judgment of the trial court. Id. at 65; State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 365 (1984).

We are satisfied the judge made findings of fact concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record, and applied the correct sentencing guidelines enunciated in the Code, including the imposition of an extended term under N.J.S.A. 2C:44-3(a).

Case, supra, 220 N.J. at 65; O'Donnell, supra, 117 N.J. at 215-16. Accordingly, we discern no basis to second-guess the sentence.

In sum, we affirm defendant's conviction and sentence under count one, third-degree possession of cocaine. We reverse defendant's conviction under count three for fourth-degree resisting arrest by flight, and vacate his sentence on this conviction. We also vacate the August 13, 2014 order denying defendant's motion to dismiss count three on double jeopardy grounds, without prejudice to defendant's right to renew this motion should the State seek to re-try him on this offense.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.