SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1872-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HASSAN E. BEY,

Defendant-Appellant.

Submitted April 25, 2017 - Decided June 8, 2017

Before Judges Reisner and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 14-07-1246.

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

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

PER CURIAM

Defendant Hassan E. Bey appeals from his conviction by a jury for second-degree possession of a firearm by a convicted person.

N.J.S.A. 2C:39-7(b). He also appeals from the sentence of ten years, half to be served without parole.[1]

On this appeal, defendant presents the following points of argument:

> POINT I
>
> THE OFFICER'S TESTIMONY THAT DEFENDANT "POSSESSED" A GUN WAS INAPPROPRIATE ULTIMATE-ISSUE TESTIMONY, UNHELPFUL TO THE JURY, AND HIGHLY PREJUDICIAL. ITS ADMISSION NECESSITATES REVERSAL OF DEFENDANT'S CONVICTION. (Not Raised Below)
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> POINT II
>
> THE FAILURE TO INSTRUCT THE JURY THAT IT COULD NOT CONSIDER THAT DEFENDANT HAD COMMITTED A PREDICATE OFFENSE AS EVIDENCE OF HIS PROPENSITY TO COMMIT CRIMES OR OF HIS BAD CHARACTER VIOLATED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL AND NECESSITATES REVERSAL OF HIS CONVICTION. (Not Raised Below)
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> POINT III
>
> THE FAILURE TO ISSUE ANY INSTRUCTION ON IDENTIFICATION NECESSITATES REVERSAL OF DEFENDANT'S CONVICTION. (Not Raised Below)
>
> POINT IV
>
> THE TRIAL JUDGE ERRED IN TELLING THE JURORS THEY COULD NOT USE A LACK OF EVIDENCE IN REACHING THEIR VERDICT.

[1] After his conviction on the weapons charge, defendant pled guilty to possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1), for which he received a three-year sentence concurrent to that imposed on the weapons conviction. However, defendant is not appealing from the CDS conviction or sentence.

POINT V

DEFENDANT'S SENTENCE OF TEN YEARS WITH A FIVE-YEAR PAROLE DISQUALIFIER IS MANIFESTLY EXCESSIVE.

After reviewing the record, we find no plain error or other basis to disturb the verdict. Nor do we find any abuse of discretion or other error in the sentence. Accordingly, we affirm.

I

In light of the legal issues raised, the pertinent trial evidence can be summarized as follows. At about 2:10 a.m., Officer Kilroy and his partner were driving on patrol in an area of Jersey City near Rutgers Avenue. The officers heard a booming gunshot, which sounded like it came from a large caliber weapon, and they drove in the direction of the sound. As they approached Rutgers Avenue, the driver of a black Audi parked on the street began "frantically" sounding the car horn as though trying to warn someone. Officer Kilroy then spotted three men walking quickly down the avenue. The men began walking faster when they saw the police car.

According to Kilroy, the first man wore a red jacket and the second man wore a black jacket.[2] The third man wore dark clothing.

[2] Due to an agreement between the State and the defense, reached before the trial started, Officer Kilroy did not testify that he already knew defendant. The defense asked that the State refrain

Kilroy testified that the first two men were both walking as though they were "holding something in their hand[s]." As the men turned to look at the police car, Kilroy saw that two of the men were each holding "a black metallic object in their hand" which he believed was "a long gun." As the officers continued to drive along the street, Kilroy saw the man in the red jacket crouch down and "discard the item in his hand" under "a blue Dodge Neon." He also saw the man in the black jacket discard a gun under a nearby tan car.[3] In the courtroom, Kilroy identified defendant as the man in the red jacket who discarded the gun under the blue car.

After the men discarded the guns, Kilroy and his partner attempted to arrest them. The men fled, but were arrested after a brief chase. As Kilroy was chasing defendant, a back-up officer, who had been called to the scene, was able to cut off defendant's

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from presenting that testimony to avoid possibly giving the jury the impression that Kilroy had previously arrested defendant. For that reason, at the request of the defense, the prosecutor had Kilroy identify defendant and his companions by the color of their clothing.

[3] During his direct testimony, Kilroy explained that in his police report and his Grand Jury testimony, he mistakenly referred to defendant having placed a shotgun under the tan car and the other man having placed a gun under the blue car. He also explained that he recently realized the mistake when he compared the report with the crime scene photos and noticed that his report referred to defendant having placed a shotgun under a car parked at a specific address on Rutgers Avenue. The photos showed that the blue car was parked at that address.

escape route and arrest him. According to Kilroy, he had defendant in his sight the entire time until he was apprehended.

Once defendant and the co-defendant in the black jacket were under arrest, Kilroy and his partner went back to search for the guns. They found the two shotguns under the Blue Neon and the tan car. The State also presented testimony from Officer Egan, who physically removed the two shotguns from under the cars. A third police witness confirmed that the guns were operable.

The defense rested without presenting any evidence or witnesses.

II

Addressing defendant's first point, we find no error in Officer Kilroy's testimony, given without objection, that defendant "possessed" the shotgun. Unlike State v. McLean, 205 N.J. 438 (2011), this is not a case where the jury was being asked to infer from circumstantial evidence that defendant committed a crime, for example, by inferring that defendant was selling drugs because an officer saw defendant hand an individual two small objects and receive cash in return. Id. at 463. In that context, it would be inappropriate for a police officer to give his opinion "that the transaction he or she saw was a narcotics sale." Id. at 461.

In this case, Kilroy's testimony did not impermissibly offer an opinion as to an inference that the jury should have been left to draw from the evidence. The officer testified that he personally observed defendant walking down Rutgers Avenue carrying a long gun, and saw him discard the gun under the blue Neon. In that context, it was not inappropriate to use the word "possessed." State v. Cain, 224 N.J. 410 (2016), is not on point here. In that case, a police witness improperly gave an opinion as to the defendant's state of mind, by testifying that he "possessed" drugs "with intent" to distribute them to others. Id. at 420. Here, Kilroy was not using the term "possessed" as a legal term of art, and he did not refer to defendant's intent; he was simply describing what he saw defendant carrying. In his reply brief, defendant contends that the words "held" or "carried" would have been better terms. On this record, the argument is without sufficient merit to warrant discussion. R. 2:11-3(e)(2).

II

Next, defendant argues that the trial court failed to give the jury a limiting instruction concerning the predicate offense. We review this claim for plain error, because no objection was raised at trial. R. 1:7-2; R. 2:10-2. We agree with defendant that the trial court should have given the limiting instruction,

but in the context of this case we find no plain error. See State v. Macon, 57 N.J. 325, 337-38 (1971).

Among the several sections of the Model Charge on possession of a weapon by a convicted person, is a paragraph instructing the jury as to the limited use for which they may consider evidence that defendant committed a predicate offense:

> **[Charge in case which is based upon defendant's prior conviction]**
>
> Normally evidence [of defendant's prior conviction(s)] or [of the predicate offense(s)] is not permitted under our rules of evidence. This is because our rules specifically exclude evidence that a defendant has committed prior crimes when it is offered only to show that he/she has a disposition or tendency to do wrong and therefore must be guilty of the present offense. However, our rules do permit evidence of prior crimes when the evidence is used for some other purpose.
>
> In this case, the evidence has been introduced for the specific purpose of establishing an element of the present offense. You may not use this evidence to decide that defendant has a tendency to commit crimes or that he/she is a bad person. That is, you may not decide that, just because the defendant has committed [a] prior crime[s], he/she must be guilty of the present crime[s]. The evidence produced by the State concerning [a] prior conviction[s] is to be considered in determining whether the State has established its burden of proof beyond a reasonable doubt.
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> [Model Charge (Criminal), Certain Persons Not to Have Any Firearms, N.J.S.A. 2C:39-7(b)(1).]

That type of limiting instruction is not unique to this weapons possession charge. It derives from the recognition of the prejudice that may result whenever a jury learns that a defendant has previously committed a crime. See State v. Cofield, 127 N.J. 328, 340-41 (1992); N.J.R.E. 404(b) (evidence of a defendant's prior crimes or bad acts may not be introduced as evidence of the defendant's propensity to commit crimes). There is no exception to that rule where a defendant stipulates that he committed a predicate offense for purposes of N.J.S.A. 2C:39-7(b), and the Model Charge contains no such exception. In fact, the limiting instruction portion of the Model Charge follows directly after the section setting forth the charge to be used where a defendant stipulates to the predicate offense.[4]

In State v. Brown, 180 N.J. 572, 582 (2004), the Court held that a prosecution under N.J.S.A. 2C:39-7(b) need not be bifurcated

[4] We note, however, that the Model Charge as to both N.J.S.A. 2C:39-7(a) and -7(b) may be confusing to judges and attorneys in the way it is organized. In particular, after the paragraph on "Joint Possession," an instruction appears to "**[Choose the appropriate next paragraph from the following three]**" relating to methods of proving a prior conviction. However, there are actually four paragraphs after this instruction, with the limiting instruction appearing as the third paragraph. Moreover, there is no "**[OR]**" preceding the fourth paragraph, which states the third alternative charge concerning proof of a prior conviction. Additionally, as this opinion makes clear, the limiting paragraph must be read to the jury regardless of whether a defendant stipulates to the predicate offense.

into a trial on whether a defendant possessed a weapon, followed by a trial on whether the defendant had a prior conviction. Instead, "the elements of an offense should be tried in a unitary trial in which prejudice is minimized by appropriate curative jury instructions." State v. Brown, supra, 180 N.J. at 582. The Court emphasized that "an appropriate limiting instruction" must be "given to reduce the risk of undue prejudice tainting the jury's work." Id. at 584.

Although we agree with defendant that it was error to omit the limiting instruction, we do not find that the omission of the charge had the clear capacity to produce an unjust result. R. 2:10-2. In light of the overwhelming evidence of defendant's guilt, it is unlikely that the instruction would have made a difference to the jury's verdict. See Macon, supra, 57 N.J. at 337-38.

III

Defendant's next two points are without merit and warrant little or no discussion. Defendant did not request an identification charge, and thus we review the issue for plain error. See R. 1:7-2; R. 2:10-2. We find no error, much less plain error, in the trial court's failure to sua sponte give the charge, because there was no issue as to defendant's identity or his presence at the scene. See State v. Cotto, 182 N.J. 316, 325-

26 (2005). Although the jury was not told that Office Kilroy knew defendant, the circumstances the jury did hear made misidentification highly unlikely. The witness was a trained police officer, who saw a man wearing a red jacket carrying a gun and saw him discard the gun. The same man with the red jacket was arrested shortly thereafter, not far from the scene, and the gun was found under the car. The chances of misidentification were minimal.

We find no error in the judge's response to the jury's questions about evidence that was not presented to them. This point is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

IV

Finally, we find no error in the sentence. In light of defendant's extensive criminal record, which included a prior weapons offense, we find no abuse of discretion or other error in the court imposing a ten-year term. See State v. Case, 220 N.J. 49, 64 (2014). The five years of parole ineligibility was mandatory for this conviction. See N.J.S.A. 2C:39-7(b)(1). The court also rejected the State's request to impose a consecutive term for a third-degree drug charge, for which defendant was sentenced at the same time. Instead, the court imposed the minimum three-year term and made it concurrent to the ten-year sentence.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION