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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1978-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC D. CURRY,

Defendant-Appellant.

Submitted December 13, 2016 – Decided April 4, 2017

Before Judges Fisher and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 12-01-0037.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Robert J. Wisse, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals his convictions and sentence for first-degree robbery, criminal restraint, and weapons offenses following a jury trial. Based on our review of the record and applicable

law, we affirm defendant's convictions and remand for resentencing.

I.

The incident giving rise to defendant's criminal charges occurred at a donut store in Clifton and was recorded by the store's video surveillance cameras.[1] In the early morning hours on October 8, 2010, Patricia Falandys was working behind the counter in the front of the store, serving its customers. Meena Panchal was working in the kitchen in the rear of the store. At 4:45 a.m., a man wearing a dark jacket with light-colored sleeves and a baseball cap entered the store, went directly into the bathroom, and exited the bathroom and store less than a minute later. At 4:47 a.m., the same individual reentered the store with a man dressed in a red leather jacket and a "Yankees" baseball cap.

Falandys testified that the two men acted strangely and were asking questions about donuts when another customer entered the store. The two men permitted Falandys to wait on the customer. When the customer exited the store, the man in the red jacket jumped behind the counter and confronted Falandys with an item in his hand, which Falandys said was a knife. Falandys testified he

[1] The surveillance recordings did not include audio.

grasped her shirt, pushed her against a wall, put the knife to her throat and said "give me the money." The man in the dark jacket remained in front of the counter.

Panchal entered the front of the store, saw the man in the red jacket "putting a knife on" Falandys, and attempted to run into the kitchen. The man in the red jacket followed Panchal, grabbed her by her hair, and pulled her back into the front of the store as he held an item in one of his hands. Panchal heard the man in the red jacket say "give me money; open the register."

The man in the red jacket then grabbed Falandys with his left hand and led her back to an area near the cash register, while still holding the item Falandys identified as a knife. Falandys motioned through the store window to a customer who pulled into the parking lot in a car. The man in the red jacket released Falandys from his grasp, and he and the man in the dark jacket fled, running out of the store together without taking anything.

During a police investigation of the incident, a red leather jacket and Yankees cap were found under bushes near the scene. DNA recovered from the jacket and cap was compared to a DNA sample obtained from defendant. The State's DNA expert testified at trial that the DNA from the jacket and cap matched defendant's. Falandys testified the jacket and cap recovered by the police were worn by the individual who brandished the knife and demanded money.

Defendant was arrested in July 2011, and was interrogated by the police. The recording of the interrogation was played for the jury at trial.[2] Defendant initially denied any recollection of the incident, but then recalled "running" and said "[i]t was a stupid mistake."

Defendant was charged in an indictment with first-degree robbery, N.J.S.A. 2C:15-1(a)(1) (count one); two counts of third-degree criminal restraint, N.J.S.A. 2C:13-2(a) (counts two and four); two counts of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2) (counts three and five); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count six); and two counts of third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (counts seven and eight).

At trial, defense counsel did not dispute that defendant was present at the store on October 8, 2010, or that the red leather jacket and Yankees cap belonged to defendant. Instead, counsel argued that neither Falandys nor Panchal identified defendant and there was DNA found on the items from someone other than defendant. Counsel also argued that the evidence did not establish a robbery

[2] The court denied defendant's pre-trial motion to suppress the statements he made during the interrogation. The court's decision is not challenged on appeal.

occurred because nothing was taken from Falandys, Panchal, or the store during the incident.

Defendant was found guilty of all of the charges submitted to the jury.[3] The court sentenced defendant to: a thirteen-year custodial term for first-degree robbery under count one subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2; four-year terms for third-degree criminal restraint under counts two and four; and a fifteen-month term for fourth-degree unlawful possession of a weapon under count six. The court merged the remaining counts for purposes of sentencing and ordered that defendant serve the sentences concurrently.

Defendant appealed and makes the following arguments:

> POINT I
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> [DEFENDANT'S] ROBBERY CONVICTION MUST BE REVERSED BECAUSE ATTEMPTED THEFT WAS THE BASIS FOR ROBBERY, AND THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LAW OF ATTEMPT AS AN ELEMENT OF ROBBERY. (Partially Raised Below).
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> POINT II
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> [DEFENDANT'S] SENTENCE OF THIRTEEN YEARS IN PRISON IS EXCESSIVE.

[3] At the State's request, the two counts of aggravated assault (counts three and five), and the possession of a weapon charge (count eight), were not submitted to the jury and were dismissed at sentencing.

II.

We first turn our attention to defendant's argument that the judge committed reversible error by failing to define the elements of criminal attempt under N.J.S.A. 2C:5-1(a) while instructing the jury concerning the elements of robbery. Defendant contends a charge on criminal attempt was required because there was no evidence that a theft occurred during the incident. See State v. Dehart, 430 N.J. Super. 117, 120 (App. Div. 2013) (finding an instruction on attempted theft is generally required where there is no evidence any objects of value were taken during the course of an alleged robbery).

During the charge conference with the court, counsel requested an instruction on attempt as part of the charge on robbery, and the judge said it would be included. The final jury charge, however, omitted an instruction on the elements of attempt in the charge on the elements of robbery. Copies of the final jury charge were provided to counsel prior to the court's oral instructions to the jury but counsel did not object to the court's instructions before or after the final charge was given to the jury.

Because there was no objection to the final jury charge, we review the court's instructions for plain error. State v. McKinney, 223 N.J. 475, 494 (2015); State v. Docaj, 407 N.J. Super.

352, 362 (App. Div.), certif. denied, 200 N.J. 370 (2009); R. 2:10-2. An error does not warrant reversal unless it was "clearly capable of producing an unjust result." McKinney, supra, 223 N.J. at 494 (quoting R. 2:10-2). Our Supreme Court has established the standard for determining if an error in a jury instruction constitutes plain error:

> [i]n the context of jury instructions, plain error is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result."
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> [Ibid. (quoting State v. Camacho, 218 N.J. 533, 554 (2014).]

"Appropriate and proper charges to a jury are essential to a fair trial," State v. Green, 86 N.J. 281, 287 (1981), and "'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." McKinney, supra, 223 N.J. at 495 (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). However, we do "not look at portions of the charge alleged to be erroneous in isolation; rather, 'the charge should be examined as a whole to determine its overall effect.'" Id. at 494 (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

The court properly instructed the jury that the elements of robbery included a use of force or threat to use force during the

course of committing a theft, and explained that "an act is considered to be [] in the course of committing a theft [] if it occurs in an attempt to commit the theft, during the commission of the theft itself, or in the immediate flight after the commission – after the attempt of commission of the theft."[4] N.J.S.A. 2C:15-1(a); Model Jury Charge (Criminal), "Robbery in the First Degree" (2012). The judge, however, did not instruct the jury on attempt under N.J.S.A. 2C:5-1(a) during his charge on the elements of robbery.[5]

The State contends the court's error was not clearly capable of producing an unjust result because the court provided the instructions on attempt under N.J.S.A. 2C:5-1(a) in two other instances during the jury charge. More specifically, the State argues, and the record shows, that the court instructed the jury on the elements of attempt under N.J.S.A. 2C:15-1(a) during its charge on aggravated assault and again during its charge on a

[4] It was unnecessary for the court to instruct the jury that a robbery can also be committed by inflicting bodily injury during the course of committing a theft, N.J.S.A. 2C:15-1(a)(1), because there was no evidence the victims suffered bodily injury.

[5] The comments accompanying the Model Jury Charge (Criminal), "Robbery in the First Degree" (2012), recommend that the elements of attempt under N.J.S.A. 2C:5-1(a) be included in the robbery charge where the alleged robbery occurs during an attempted theft. We endorse that practice and find only that, under the circumstances extant here, the court's failure to define attempt during the robbery charge was not reversible error.

lesser included offense of simple assault. Defendant does not dispute that the court correctly defined the elements of attempt on those two occasions during the jury charge, but argues the court's failure to include an instruction on attempt during the robbery charge constituted reversible error. We disagree.

Where the State contends an error in a jury instruction "is harmless because the trial judge correctly instructed the jury in other components of the charge, '[t]he test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law.'" McKinney, supra, 223 N.J. at 496 (alteration in original) (quoting State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997), certif. denied, 153 N.J. 49 (1998)). "[T]he key to finding harmless error in such cases is the isolated nature of the transgression and the fact that a correct definition of the law on the same charge is found elsewhere in the court's instructions." Ibid. (quoting Jackmon, supra, 305 N.J. Super. at 299).

In McKinney, the Court contrasted a case where an erroneous instruction required reversal with one where it did not. As an example of the former, the Court cited our decision in Jackmon, where we reversed a conviction based on a trial court instruction that defendant could be convicted of criminal attempt if he acted purposely or knowingly. Ibid. (discussing Jackmon, supra, 305 N.J.

Super. at 298). The charge in Jackmon was erroneous because a conviction for criminal attempt required that the State prove defendant acted "purposely," not "knowingly." Jackmon, supra, 305 N.J. Super. at 298. We concluded that although the court "at one point" instructed that only a "purposeful state of mind" was required to prove attempt and the verdict sheet referred only to "purpose," the jury had been erroneously instructed that defendant could be convicted of attempted murder if it were proven he acted "purposely or knowingly," and we could "not be assured that the jury ignored the reference to 'knowing' in favor of only 'purposeful.'" Id. at 300.

The Court in McKinney contrasted Jackmon with our decision in State v. Smith, 322 N.J. Super. 385 (App. Div.), certif. denied, 162 N.J. 489 (1999). See McKinney, supra, 223 N.J. at 496-97. In Smith, we found a trial court's failure to instruct the jury on the elements of attempt during its charge on robbery did not constitute reversible error when the jury instruction was "considered in the context of the entire charge." Smith, supra, 322 N.J. Super. at 400. We observed that the judge "fully and accurately instructed the jury on the elements of attempt" while explaining the law relating to another offense, and concluded that based on the overwhelming evidence establishing defendant's guilt and the inclusion of a proper instruction on attempt elsewhere in

the charge, "the failure to define attempt in the robbery charge did not prejudice defendant's rights." Id. at 399-400.

Unlike in Jackmon, there is no claim here that the court provided an inaccurate instruction concerning the elements of any of the offenses. Jackmon, supra, 305 N.J. Super. at 284-85. The court correctly defined the elements of robbery, but omitted an instruction on the elements of attempt. Like in Smith, however, the court fully and accurately defined the elements of attempt during other parts of the final jury charge. See Smith, supra, 322 N.J. Super. at 399.

Moreover, the evidence of defendant's guilt was overwhelming. In his statement to the police, defendant acknowledged being at the donut store, running from it, and that he made a "big mistake." At trial, counsel conceded defendant was at the donut store and that the red jacket and cap belonged to defendant. The evidence showed the jacket and cap were found under bushes near the crime scene, and Falandys testified they were worn by the perpetrator with the knife.

We are therefore convinced that under the circumstances presented, and viewing the final jury charge as a whole, the jury was adequately instructed on the elements of criminal attempt. The court's failure to include the instruction on attempt during its charge on the elements of robbery was not clearly capable of

producing an unjust result. R. 2:10-2; Smith, supra, 322 N.J. Super. at 398-400.

Defendant argues a reversal of his conviction is required under our decisions in State v. Gonzalez, 318 N.J. Super. 527 (App. Div.), certif. denied, 161 N.J. 148 (1999), and State v. Dehart, 430 N.J. Super. 108 (App. Div. 2013). In Gonzalez, we reversed a conviction for robbery and felony murder because there was no evidence of a completed theft and the court failed to instruct the jury on the elements of attempted theft under the robbery charge. Gonzalez, supra, 318 N.J. Super. at 533-36. In Smith, however, we distinguished Gonzalez, noting that in Gonzalez, "there was no definition of attempt anywhere in the charge." Smith, supra, 322 N.J. Super. at 399 (distinguishing Gonzalez, supra, 318 N.J. Super. at 536). For the same reason, we find Gonzalez inapplicable here. Consistent with our obligation to consider the jury instructions as a whole, we cannot ignore that unlike in Gonzalez, the court here instructed the jury concerning the elements of attempt twice during its jury charge. Gonzalez, supra, 318 N.J. Super. at 536.

In Dehart, we reversed a conviction for reasons identical to those in Gonzalez. Dehart, supra, 430 N.J. Super. at 120. The defendant was charged with a robbery that was alleged to have been committed by a threat of force during an attempted theft. Id. at

116-17. The court did not instruct the jury on attempt during its charge on robbery or at any other time during its final instructions. Id. at 118. Consistent with our holding in Gonzalez, we found plain error because the jury instructions did not define the elements of criminal attempt that were essential to the jury's determination of defendant's guilt on the robbery charge. Id. at 120.

The circumstances presented here are different than those in Gonzalez and Dehart. Here, the court instructed the jury on two separate occasions concerning the elements of criminal attempt, and defendant argues only that the court's failure to include the attempt charge during its instructions on robbery constitutes plain error. This is the same contention we rejected under nearly identical circumstances in Smith. Smith, supra, 322 N.J. Super. at 399. We discern no basis for a different result here.

Defendant also claims the thirteen-year sentence imposed by the court was excessive because it was the result of an erroneous weighing of the aggravating and mitigating factors under N.J.S.A. 2C:44-1. More particularly, he argues the court erred by placing "heavy" weight on aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), the need to deter the defendant and others, and by focusing on the harm to the victims in its assessment of the factor.

We review a "trial court's 'sentencing determination under a deferential [abuse of discretion] standard of review,'" State v. Grate, 220 N.J. 317, 337 (2015) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)), and may "not substitute [our] judgment for the judgment of the sentencing court." Lawless, supra, 214 N.J. at 606. We must affirm a 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."
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> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

In sentencing defendant, the court found the following aggravating factors: three, N.J.S.A. 2C:44-1(a)(3), the risk defendant will commit another offense; six, N.J.S.A. 2C:44-1(a)(6), the extent and seriousness of defendant's prior record; and nine, N.J.S.A. 2C:44-1(a)(9), the need to deter defendant and others from violating the law. The court also found mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11), the imposition of a custodial term will cause a substantial hardship on defendant's dependents. We are satisfied the court's findings of aggravating

factors three and six and mitigating factor eleven, and the weight assigned to each, are supported by the record.

We therefore consider only defendant's claim the judge erred in finding aggravating factor nine and weighing it "very heavily." The judge explained his findings as follows:

> And certainly [aggravating factor] nine applies very heavily because we focus too much on the defendant and not enough on the victim. These poor women they — this shouldn't happen to anyone let alone older women who are just trying to make a . . . meaningful salary to them in a very dangerous situation, working the midnight shift at a [donut store]. So, [] nine appl[ies].

A sentencing court's finding of aggravating factor nine requires a "'qualitative assessment' of the risk of recidivism" and "'involve[s] determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history.'" Fuentes, supra, 217 N.J. at 78 (quoting State v. Thomas, 188 N.J. 137, 153 (2006)). The court must consider the sentence's "general deterrent effect on the public [and] its personal deterrent effect on the defendant." Id. at 79 (quoting State v. Jarbath, 114 N.J. 394, 405 (1989)). It is well established that "general deterrence unrelated to specific deterrence has relatively insignificant penal value." Jarbarth, supra, 114 N.J. at 405.

The court's finding of aggravating factor nine did not include any judgment about defendant or evaluation of defendant based on his history, was untethered to any assessment of the need for specific or general deterrence, and lacked justification based on deterrence for the heavy weight the court placed on the factor. Fuentes, supra, 217 N.J. at 78-79. We are therefore constrained to vacate the sentence imposed and remand the matter resentencing. See, e.g., State v. Case, 220 N.J. 49, 68-69 (2013) (finding remand for resentencing required where sentencing court failed to provide adequate explanation supporting weight given to aggravating factor nine).

In remanding for resentencing, we do not express an opinion on whether the court should again find aggravating factor nine and if it does, the weight the court should place on the factor. We also do not express an opinion on the length of the sentence imposed, which is below the mid-range for a sentence for a first-degree crime, or suggest what sentence should be imposed upon resentencing. On remand, we require only that the court reconsider its determination as to aggravating factor nine, make appropriate findings supporting its determination, and resentence defendant based on its weighing of the aggravating and mitigating factors.

Defendant's convictions are affirmed and his sentence is vacated. We remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION