SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2057-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTIAN ORTEGA REY, a/k/a CHRISTIAN REY, CHRISTIAN ORTEGA,

Defendant-Appellant.

Submitted October 17, 2017 – Decided December 19, 2017

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 11-04-0607.

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

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Joie Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Christian Ortega Rey appeals from his conviction for the following offenses: three counts of second-degree and third-degree conspiracy, N.J.S.A 2C:5-2; one count of second-degree robbery, N.J.S.A. 2C:15-1; one count of second-degree burglary, N.J.S.A. 2C:18-2; two counts of third-degree burglary, N.J.S.A. 2C:18-2; two counts of third-degree theft by unlawful taking, N.J.S.A 2C:20-3(a); one count of second-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a); and one count of second-degree kidnapping, N.J.S.A. 2C:13-1(b). He also appeals the aggregate sentence imposed, consisting of twenty-two years in prison, eight and one-half years of which must be served without parole.

Defendant presents the following arguments on appeal:

> POINT I: THE JURY'S LEGAL QUESTION DURING DELIBERATION, ALLEGEDLY ABOUT "CONSPIRACY," IN FACT INDICATED A POTENTIAL MISUNDERSTANDING OF BOTH CONSPIRACY AND ACCOMPLICE LIABILITY — PARTICULARLY THE NOTION OF "MERE PRESENCE" — SO FUNDAMENTAL THAT THE ANSWER THAT THE JUDGE PROVIDED TO THE QUESTION WAS UNDULY DEFICIENT AND DID NOT "CLEAR THE CONFUSION" "WITH CONCRETE ACCURACY," AS THE CASE LAW DEMANDS. (NOT RAISED BELOW)
>
> POINT II: THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE.

After reviewing the record, we find no error — plain or otherwise — in the judge's instruction to the jury, and we find

no abuse of discretion or other error in the sentence. Accordingly, we affirm the conviction and the sentence.

I

Defendant, together with co-defendants Alveiro Bravo, and Juan M. Aponte-Ortiz were tried on charges arising from burglaries at five houses on the following streets – Vallata Place, Tingley Lane, Inman Avenue, Schanck Drive, and McKinley Avenue.[1] Because they were acquitted of the Schanck Drive and McKinley Avenue burglaries, we will focus on the other three incidents.

During the Tingley Lane burglary, one of the residents, P.S., arrived home to find the sliding glass door in the kitchen was broken. She testified that an intruder suddenly grabbed her from behind and pushed her toward the kitchen table. Then another intruder emerged from a hallway. The two burglars tightly bound her hands and feet, blindfolded her, and demanded that she give them her jewelry. The victim described one burglar as being between twenty-one and twenty-five years old, with light brown skin, and between five feet, three inches and five feet, five inches tall. She described the other man as being taller with a

[1] For purposes of this opinion, a more specific geographic description is unnecessary and is omitted to protect the victims' privacy. We use the victims' initials for the same reason.

"long face." However, she was not able to identify any of the defendants at the trial.

P.S.'s son arrived home soon after the burglary, and she called out to him to stay outside and call 911. Upon arriving, the police found her still lying on the kitchen floor, tied up, and blindfolded. A police witness described her as shaking, scared and crying. The police found a gray t-shirt lying across the bottom of the broken glass sliding door. The t-shirt had a small red stain "that appeared to be blood." DNA testing later confirmed that defendant was the source of the blood found on the t-shirt.

Another victim, B.C., arrived home during the Vallata Place burglary, but he did not see the intruders. B.C. heard what he described as glass or china breaking, and found blood on the kitchen floor. He testified that he was terrified, thinking that the intruders might have killed his family. When the police arrived, they found a broken glass sliding door in the kitchen, and a broken second story window. They found blood in the bathroom near the broken window, on the stairs near the sliding glass door, and on the kitchen floor. DNA testing later revealed that defendant was the source of the blood on the kitchen floor, and his DNA profile matched that of the blood sample taken from the stairs.

The Inman Avenue burglary, which occurred on December 7, 2010, was captured by the home's outside security cameras. Video from the cameras showed a silver car pulling into the driveway, and three individuals then using a ladder to climb to the second story of the house. The video also captured one of the individuals moving one of the cameras as he stood on the ladder.

On December 10, 2010, the police stopped a silver Acura[2] and arrested the occupants. Bravo, who also owned the car, was driving, and defendant and Aponte-Ortiz were his passengers. Using the security video footage, the police were able to identify Aponte-Ortiz as the burglar who climbed the ladder and moved one of the surveillance cameras. Each suspect was carrying a cell phone when arrested. Information obtained through a communications data warrant revealed phone calls between Bravo's phone and defendant's phone on December 7, 2010, and revealed that the phones were using cell towers located near Inman Avenue.

Thus, there was DNA evidence establishing defendant's presence during the Tingley Lane and Vallata Place burglaries, and video footage showing Aponte-Ortiz participating in the Inman Avenue burglary. There was more limited evidence against Bravo.

---

[2] The prosecutor showed the jury a still photo of the silver car, taken from the video, and a photo of the Acura. In denying a defense motion to dismiss at the close of the State's evidence, the trial judge noted that the two cars were "identical."

II

Defendant's jury instruction issue is raised for the first time on appeal and, therefore, our standard of review is plain error. State v. Williams, 168 N.J. 323, 335 (2001). Under the plain error doctrine, "defendant not only must demonstrate that the instruction was flawed, but also that in the circumstances presented 'the error possessed a clear capacity for producing an unjust result.'" Id. at 336 (quoting State v. Melvin, 65 N.J. 1, 18 (1974)); R. 2:10-2. "The possibility of an unjust result must be 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Williams, 168 N.J. at 336 (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

The jury instruction issue arose in this context. After a day of deliberations, the jury sent the judge the following question:

> [C]an a person be found guilty of conspiracy if common sense leads the jury to believe beyond a reasonable doubt that another party participated in the committing of the crime, but evidence only leads to the inference, rather than definitive proof, that the second party was there?

The judge construed the question as a request for further instruction on the concept of circumstantial evidence. The prosecutor and Bravo's attorney both suggested that the judge re-

instruct the jury with the model charge on circumstantial evidence. All of the attorneys agreed with the judge's suggestion that he re-charge the jury on reasonable doubt as well. In response to the judge's question, none of the defense attorneys objected or suggested any additional instruction.

Accordingly, the judge instructed the jury that:

> The standard of proof in a criminal case is not definitive proof, it's proof beyond a reasonable doubt, so I think I need to talk to you about proof beyond a reasonable doubt again. I also need to talk to you about circumstantial evidence and direct evidence. You have this law in the charge that I gave you, but I will read it to you so that hopefully it's more clear.

The judge then read them the model charges on direct and circumstantial evidence, and on the State's burden of proof beyond a reasonable doubt. He also assured the jury that they could ask more questions if those instructions did not suffice to answer their inquiry:

> Now, I've responded to your question with this answer and this is our interpretation of what you're asking for. If, for some reason, we've misinterpreted your question and you were looking for something else you have to please rephrase the question and send it back to me and we'll try to respond accordingly. All right?

For the first time on appeal, defendant argues that, in addition to re-instructing the jury on circumstantial evidence,

the judge should have re-charged them on conspiracy and accomplice liability. In the context of this record, we cannot agree. First, in light of the evidence, it is most likely that the jury's question concerned Bravo, because he was the only defendant as to whom there was no direct evidence of his presence at any of the crime scenes. Second, the question, as phrased, and as all the attorneys and the judge understood it, expressed concern about whether the State could prove its case with circumstantial evidence. The judge's response was reasonably calculated to answer the question the jury asked. Moreover, the judge assured the jurors that if the instructions he had just given were insufficient to address their question, they were free to submit another question.

Although the judge had thoroughly instructed the jury as to conspiracy and accomplice liability, their question may have signaled a misconception that, to prove conspiracy against a defendant, the State needed to prove that he was personally present at the scene of the burglary. However, even if the jury had that misunderstanding, it could only have benefitted defendant, by requiring the State to produce more evidence than was actually needed to obtain a conviction for conspiracy. Consequently, even if the judge should have re-charged the jury on conspiracy, the error would not have had the clear capacity to produce an unjust

result. R. 2:10-2. Lastly, nothing in the question suggests a misunderstanding of the concept of accomplice liability. The argument warrants no further discussion. R. 2:11-3(e)(2).

III

Finally, we address defendant's contention that, in arriving at a sentence, the trial court should have considered, as mitigating factors, that his "conduct neither caused nor threatened serious harm," N.J.S.A. 2C:44-1(b)(1), and he "did not contemplate that his conduct would cause or threaten serious harm." N.J.S.A. 2C:44-1(b)(2). Defense counsel did not argue those factors at the sentencing hearing, and the record does not support them. Defendant and his co-defendant terrorized the victim in the Tingley Lane burglary, tightly binding her hands and feet behind her back, blindfolding her, and demanding that she give them her jewelry. See State v. Cassady, 198 N.J. 165, 183 (2009). The victim in the Vallata Place burglary was terrified, believing that the intruders had killed his family. In addition, defendant and his co-defendants stole jewelry and gold worth tens of thousands of dollars from the victims in the Tingley Lane and Vallata Place burglaries.

We find nothing excessive in the aggregate sentence of ten years, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, for the second-degree kidnapping and second-degree robbery

convictions associated with the Tingley lane incident. As defendant concedes, the trial court appropriately imposed that term consecutive to the seven-year flat term for second-degree theft at Vallata Place, and five years flat for the third-degree burglary on Inman Avenue. Overall, we find no basis to second-guess the trial court's imposition of the aggregate term of twenty-two years with eight and one-half years of parole ineligibility. See State v. Case, 220 N.J. 49, 65 (2014).

Affirmed.