SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2501-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHNSLER ERTILIEN,

Defendant-Appellant.

Submitted June 6, 2017 – Decided June 27, 2017

Before Judges Reisner and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-08-1962.

Michael I. Okechuku, attorney for appellant.

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Kayla Elizabeth Rowe, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Johnsler Ertilien appeals from his conviction for second-degree conspiracy to commit robbery, N.J.S.A. 2C:15-1 and N.J.S.A. 2C:5-2, first-degree employing a juvenile in the

commission of a crime, N.J.S.A. 2C:24-9, and the disorderly persons offense of knowingly receiving stolen property, N.J.S.A. 2C:20-7(a). He was sentenced to six years in prison subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, for conspiracy to commit robbery, a concurrent term of eleven years in prison for employing a juvenile, and a concurrent term of two months for the disorderly persons offense.[1]

On this appeal, defendant raises the following arguments:

> POINT I. THE COURT SHOULD HAVE ENTERED A JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE; ALTERNATIVELY, THE COURT SHOULD HAVE FOUND DEFENDANT NOT GUILTY AT THE END OF THE ENTIRE CASE AS THE STATE FAILED TO PROVE THAT DEFENDANT COMMITTED THE ACTS OF CONSPIRACY TO COMMIT ROBBERY, EMPLOYING A JUVENILE TO COMMIT ROBBERY AND RECEIVING STOLEN PROPERTY (Raised below)
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> A. DEFENDANT WAS ENTITLED TO A JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE, AS THE EVIDENCE TO SUPPORT A CONVICTION WAS SO SCANTY AND UNRELIABLE AS TO VIOLATE DEFENDANT'S DUE PROCESS.
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> B. THE STATE WAS REQUIRED TO ESTABLISH EVIDENCE DEMONSTRATING ALL THE ELEMENTS OF CONSPIRACY TO COMMIT ROBBERY IN ORDER TO SURVIVE

[1] The concurrent two month sentence, imposed on the record at the sentencing hearing, was not memorialized in the JOC, perhaps because defendant had already served more than two months in jail pre-trial.

DEFENDANT'S MOTION FOR ACQUITTAL ON THAT COUNT.

C. THE STATE WAS REQUIRED TO ESTABLISH EVIDENCE DEMONSTRATING ALL THE ELEMENTS OF EMPLOYING A JUVENILE TO COMMIT ROBBERY IN ORDER TO SURVIVE DEFENDANT'S MOTION FOR ACQUITTAL ON THAT COUNT.

D. THE STATE WAS REQUIRED TO ESTABLISH BEYOND A REASONABLE DOUBT EVIDENCE DEMONSTRATING ALL THE ELEMENTS OF RECEIVING STOLEN PROPERTY IN ORDER TO SURVIVE DEFENDANT'S MOTION FOR ACQUITTAL ON THAT COUNT.

E. UPON DETERMINING THAT THE EVIDENCE WAS INSUFFICIENT TO WARRANT A CONVICTION, DEFENDANT SHOULD BE ACQUITTED OF ALL CHARGES.

POINT II. DEFENDANT'S REJECTION OF A PLEA OFFER OF A "GUILTY PLEA WITH A MAXIMUM TERM OF THREE YEARS WITH 85 PERCENT PAROLE INELIGIBILITY" IS INADEQUATE TO INFORM DEFENDANT OF THE CHARGES OFFERED AND CONSTITUTES AN ABDICATION OF THE COURT'S ULTIMATE SENTENCING AUTHORITY UNDER N.J.S.A. 2C:43-6 and 2C:44-1 (Partially Raised below)

A. A PLEA OFFER OF A SECOND DEGREE CHARGE THAT WAS COUCHED AS AN OFFER OF A THIRD DEGREE CHARGE IS CONFUSING AND INADEQUATE TO APPRISE THE DEFENDANT OF THE PLEA OFFER THAT WAS MADE.

B. THE PLEA OFFER IS [A] SUBTERFUGE FOR THE IMPOSITION OF [A] PAROLE INELIGIBILITY PERIOD FOR A CHARGE THAT IS NEITHER A FIRST DEGREE OFFENSE NOR A SECOND DEGREE OFFENSE,

IN VIOLATION OF N.J.S.A. 2C:43-7.2(a).

C. THE TRIAL COURT'S WHOLESALE ADOPTION OF THE PROSECUTOR'S PLEA OFFER THAT IMPOSES A MANDATORY MINIMUM TERM CONSTITUTES AN ABDICATION OF THE COURT'S INHERENT DISCRETIONARY SENTENCING POWERS AND AMOUNTS TO AN ABUSE OF JUDICIAL DISCRETION.

D. THE PLEA OFFER RENDERED INEFFECTIVE ANY ADVICE TO THE DEFENDANT OF THE IMMIGRATION CONSEQUENCES OF SUCH A PLEA, WHERE DEFENDANT WAS ENTITLED TO A PRESUMPTION AGAINST INCARCERATION AS A FIRST TIME OFFENDER UNDER N.J.S.A. 2C:44-1, AS TO MAKE ITS REJECTION INVOLUNTARY.

POINT III. THE TRIAL COURT ERRED IN FINDING [THE] SECOND DEGREE CONSPIRACY VERDICT AS A BASIS FOR GRADING COUNT 3, EMPLOYING A JUVENILE IN COMMISSION OF A CRIME, AS A FIRST-DEGREE OFFENSE, PURSUANT TO N.J.S.A. 2C:24-9(d), AND IN IMPOSING THE NERA PAROLE DISQUALIFIER, PURSUANT TO N.J.S.A. 2C:43-7 (Partially Raised below).

A. THE COURT'S DETERMINATION THAT THE SECOND DEGREE CONSPIRACY VERDICT WAS AN UNDERLYING OFFENSE FOR GRADATION TO A FIRST DEGREE OFFENSE UNDER N.J.S.A. 2C:24-9(b) WAS ARBITRARY AND NOT SUPPORTED BY THE RECORD.

B. WHERE THE SECOND DEGREE CONSPIRACY VERDICT DID NOT SPECIFY WHETHER DEFENDANT INFLICTED SERIOUS BODILY INJURY, THE TRIAL COURT ERRED BY IMPOSING THE NERA PAROLE

DISQUALIFIER, PURSUANT TO N.J.S.A. 2C:43-7.2(c).

C. DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

POINT IV. UNDER THE FACTS OF THIS CASE, THE "SHOW-UP" PROCEDURE BY WHICH THE VICTIM IDENTIFIED THE DEFENDANT AS ONE OF HIS ATTACKERS IN THIS CASE WAS IMPERMISSIBLY SUGGESTIVE, AS TO VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS TO CONFRONTATION AND DUE PROCESS. (Not raised Below).

Because the State failed to introduce evidence of the alleged "juvenile" accomplice's age, we reverse defendant's conviction for employing a juvenile in the commission of a crime, and we vacate the eleven-year sentence imposed for that conviction. We affirm the robbery conspiracy conviction and the six-year NERA term imposed for that conviction, as well as the conviction and sentence on the disorderly persons offense. We remand this matter to the trial court for the limited purpose of entering an amended judgment of conviction (JOC) consistent with this opinion.

I

For purposes of the appellate issues raised, the trial evidence can be summarized as follows. According to the victim, two assailants, one short and one tall, attacked him from behind, and knocked him down. The victim testified that the shorter

individual punched and kicked him, and then took his wallet and cell phone.

The robbers fled the scene but were detained a few blocks away, after two police officers, patrolling in their vehicle, spotted them running across a busy street in the middle of traffic. The officers stopped the two individuals to warn them that their irresponsible jaywalking had nearly gotten them killed. After getting out of their patrol car, the officers saw one of them, later identified as defendant, place an object under the patrol car. An officer retrieved the object, saw it was a cell phone, and placed it on the trunk of the car.

Moments later, the victim, who had run after the robbers, appeared on the scene and spontaneously exclaimed to the police that the two people standing near their patrol car had just stolen his cell phone and wallet. The victim told the police that he was certain those two were the robbers. After asking the victim for his cell phone number, one of the officers called that number from his own cell phone, and the cell phone previously placed on the car trunk began ringing. Defendant, the taller of the two suspects, was arrested along with the shorter subject. On being searched, the shorter individual was found to have several cell phones in his pockets.

Based on that evidence, the jury acquitted defendant of robbery, but convicted him of the other charges previously noted.

II

After reviewing the record, we agree that the State failed to present evidence to establish that the shorter individual involved in the robbery was, in fact, a "juvenile." The pertinent statute provides that "any person who is at least 18 years of age who knowingly uses, solicits, directs, hires, employs or conspires with a person who is in fact 17 years of age or younger to commit a criminal offense is guilty of a crime." N.J.S.A. 2C:24-9 (emphasis added). Thus, the individual's age is an element of the crime, which the State must prove. See State v. Lassiter, 348 N.J. Super. 152, 160-161 (App. Div. 2002) (where a participant's age is an element of an offense, the State must prove that element); State v. Collins, 262 N.J. Super. 230, 235 (App. Div. 1993) ("[W]ithout proof that the person whom the actor engaged in the criminal offense [of employing a juvenile in distributing drugs] is seventeen years old or younger, there is no violation of this statute.").

In this case, the State did not introduce the individual's birth certificate, or any other legally competent evidence from which the jury could conclude that he was under the age of eighteen. As the trial judge and both attorneys acknowledged, a

police officer's testimony referring to that individual as "the juvenile" was insufficient to meet the State's proof burden. In fact, the prosecutor candidly admitted that the lack of proof was an oversight, and defense counsel understandably refused the prosecutor's belated request that he stipulate to the individual's age. Because there was no evidence to support a material element of the charge, the conviction on that count was a clear miscarriage of justice and must be reversed. R. 2:10-1; Lassiter, supra, 348 N.J. Super. at 160-61.

III

To the extent that defendant's arguments concerning his rejection of a pre-trial plea offer, or concerning the lack of a Wade[2] hearing, raise claims of ineffective assistance of counsel, we decline to consider such issues without prejudice to his right to file a petition for post-conviction relief. State v. Preciose, 129 N.J. 451, 460 (1992); State v. Sparano, 249 N.J. Super. 411, 419 (App. Div. 1991).

Defendant's remaining arguments are without sufficient merit to warrant discussion beyond the following brief comments. R. 2:11-3(e)(2).

[2] United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

Viewing the State's evidence in light of the applicable legal standard, State v. Reyes, 50 N.J. 454, 459 (1967), the trial court properly denied defendant's motion for a directed verdict of acquittal on the charges of conspiracy to commit robbery and receiving stolen goods. Defendant did not move for a new trial, but even if we consider his arguments, the verdict as to those two offenses was not against the weight of the evidence. See R. 2:10-1.

Contrary to defendant's identification argument, raised for the first time on appeal, there was no "show-up" identification procedure in this case. In fact, the police did not initiate any identification procedures at all, because as soon as the victim arrived, he immediately and spontaneously pointed out defendant and his companion as the robbers. Consequently, we find no plain error. R. 2:10-2. Defendant's remaining identification arguments go to the weight of the evidence. There was sufficient evidence of defendant's identity to submit the issue to the jury. Reyes, supra, 50 N.J. at 459.

Contrary to defendant's sentencing argument, NERA applies to a conviction for "conspiracy to commit" any of the listed crimes, including robbery. N.J.S.A. 2C:43-7.2(d), -7.2(d)(9).

In summary, we reverse the conviction for employing a juvenile to commit a crime and vacate the sentence imposed on that

conviction. We affirm the remaining convictions and sentences imposed. We remand for the limited purpose of entering an amended JOC consistent with this opinion.

Affirmed in part, reversed in part, and remanded solely to amend the JOC. We do not retain jurisdiction.