SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2822-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KARRIEM A. DAVIS,

Defendant-Appellant.

Argued October 31, 2017 – Decided December 7, 2017

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 12-12-1814 and 14-06-0751.

Molly O'Donnell Meng argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. O'Donnell Meng, Assistant Deputy Public Defender, of counsel and on the brief).

Patrick F. Galdieri, II argued the cause for respondent (Andrew C. Carey, Middlesex County Prosecutor, attorney; Mr. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Karriem A. Davis appeals from two separate criminal convictions. In May 2014, a jury convicted defendant of third-degree conspiracy to commit burglary, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:18-2. Defendant attended most of his three-day trial, but failed to appear on the afternoon of the last day. Consequently, defendant was indicted for third-degree bail jumping, N.J.S.A. 2C:29-7, to which he pled guilty in January 2016.

Defendant was sentenced on both convictions on January 8, 2016. On his conviction for conspiracy, defendant was sentenced to five years in prison. On his conviction for bail jumping, defendant was sentenced to a consecutive term of three years in prison.

Defendant appeals his convictions arguing that (1) the trial court erred in failing to charge the lesser included offenses of conspiracy to commit trespass, conspiracy to commit criminal mischief, and criminal mischief as a substantive offense; and (2) the bail jumping charge was improperly indicted as a third-degree offense rather than a fourth-degree offense. Given the evidence presented at defendant's trial, the trial court should have charged the jury with the lesser included offense of criminal mischief as an accomplice. Consequently, we vacate the conviction for criminal conspiracy and remand for a new trial. Furthermore, a review of defendant's guilty plea to bail jumping shows that defendant only

pled guilty to facts establishing a fourth-degree crime. Accordingly, we vacate that conviction and remand for further proceedings.

I.

The evidence at trial established that in August 2012, defendant, together with co-defendant William Lyons, drove a car into a parking lot next to a Crate & Barrel warehouse. Video surveillance showed Lyons get out of the car, take a pair of bolt cutters from the trunk, and walk into the Crate & Barrel lot. Defendant remained in the car. Lyons proceeded to cut the padlocks of two freight trailers, enter the trailers, and remove a rug pad from one of the trailers.

A security guard watched this take place and called 911. Lyons returned to the car and when the police arrived, he threw the rug pad out of the car window. Before defendant and Lyons could leave, the police stopped the car and ordered them out of the vehicle. During that process, the police observed a red plastic tag and brass bolt locks on the floor of the passenger side of the car. Thereafter, defendant consented to a search of the car, and the police found bolt cutters in the trunk. The police also recovered the rug pad.

Prior to defendant's trial, Lyons pled guilty and agreed to testify against defendant. At trial, Lyons testified that Davis

was driving him home when they saw the Crate & Barrel trailers. They cased the area for security, did not observe any surveillance cameras, and formed a plan to break open the trailers. In that regard, Lyons testified that the plan was to see what was in the trailers and, depending on what was found, he and defendant might decide to come back and steal the trailers. Lyons's specific testimony was as follows:

> PROSECUTOR: Okay. When you first pulled into the Crate and Barrel property, did you and Mr. Davis have any discussions about what you intended to do?
>
> LYONS: Yes.
>
> PROSECUTOR: What was that discussion?
>
> LYONS: We're going to see what was in it, and if it was something good, we would come back and take the trailer.
>
> PROSECUTOR: Do you remember, specifically, what - - did Mr. Davis say anything?
>
> LYONS: Yes.
>
> PROSECUTOR: What did he say?
>
> LYONS: Well, it was like a routine. You know, I would get out and check the trailer . . . [a]nd then, after I come back, tell him what's in it. And once I tell him what's in it, you know, we'll decide if we going to come back and get the trailer or not.
>
> PROSECUTOR: And you mentioned that he popped the trunk for you.

LYONS: Yes.

. . . .

PROSECUTOR: Okay. How did you know the bolt cutters were in the trunk?

LYONS: He put them in there.

The judge conferred with counsel regarding lesser included offenses on several occasions. On the last day of trial, the judge pointed out that there were no viable lesser included conspiracy offenses because conspiracy to commit trespass or conspiracy to commit criminal mischief would involve disorderly persons offenses. Thus, the judge reasoned that the conspiracy statute required a conspiracy to commit a crime.

At the close of the evidence, the trial judge also observed that had defendant been charged with burglary as an accomplice, he would have been entitled to the lesser-included charge as a disorderly persons offense. The judge then stated that he did not plan to instruct the jury on any lesser-included offenses. The State and defense counsel did not object, and neither requested any lesser included charges. Following instructions and deliberation, the jury convicted defendant of conspiracy to commit burglary.

As previously noted, defendant failed to appear on the afternoon of the last day of his trial. Thereafter, he was

indicted for third-degree bail jumping. Approximately a year and a half later, defendant was arrested in Georgia, waived extradition, and was returned to New Jersey. With the assistance of counsel, defendant negotiated an agreement to plead guilty to third-degree bail jumping, and the State agreed to recommend a sentence of three years in prison, consecutive to his sentence on the conviction for conspiracy to commit burglary.

In pleading guilty, defendant testified that he was at his trial up until the afternoon of the last day. There was a break in the proceeding, and he admitted that following the break he did not return to trial. He acknowledged that he knew he was required to return, but that he failed to do so.

The same day that defendant pled guilty to third-degree bail jumping, he was sentenced on both convictions. The court sentenced defendant to five years in prison for his conspiracy to commit burglary conviction, and a consecutive term of three years in prison for his bail jumping conviction. Defendant now appeals both convictions.

II.

On appeal, defendant presents the following arguments:

> POINT I – THE TRIAL COURT ERRED BY FAILING TO CHARGE LESSER-INCLUDED OFFENSES THAT WERE CLEARLY INDICATED BY THE RECORD. (Ruling at 4T:3-4 to 18)

A. The Trial Court Erred In Failing To Charge The Lesser-Included Offenses Of Conspiracy To Commit Trespass And Conspiracy To Commit Criminal Mischief

B. The Trial Court Erred In Failing To Charge The Jury On The Substantive Offense Of Criminal Mischief As A Lesser-Included Offense

POINT II — THE CRIME OF BAIL JUMPING TO WHICH DAVIS PLEADED GUILTY WAS IMPROPERLY GRADED AS A THIRD-DEGREE OFFENSE, RATHER THAN A FOURTH-DEGREE OFFENSE. THEREFORE, A REMAND IS REQUIRED FOR THE TRIAL COURT TO CORRECT THE GRADING OF THE BAIL JUMPING OFFENSE AND RESENTENCE DAVIS WITHIN THE FOURTH-DEGREE SENTENCING RANGE. (Not raised below)

Having reviewed the record, we are constrained to vacate the conviction for conspiracy to commit burglary and remand for a new trial because the trial court failed to give an instruction on the lesser included offense of criminal mischief as an accomplice. We also vacate the bail jumping conviction and remand for further proceedings because defendant's plea allocution only established fourth-degree bail jumping. We first address the lesser included offenses and then analyze the bail jumping charge.

A. The Lesser Included Offenses

Defendant argues that the trial judge erred by failing to charge the jury on the lesser included offenses of conspiracy to commit trespass, conspiracy to commit criminal mischief, and criminal mischief as a substantive offense. Defendant did not request any of these charges at trial and, therefore, we review

defendant's contentions for plain error. R. 2:10-2. Under that standard, the error must be "clearly capable of producing an unjust result[.]" Ibid. Thus, a conviction will only be reversed if the error at trial is sufficient to raise a "reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached." State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting State v. Jenkins, 178 N.J. 374, 361 (2004)).

Jury charges are critical in guiding deliberations in criminal trials. Consequently, improper instructions on material issues are presumed to constitute reversible error even when defendant fails to object at trial. Jenkins, supra, 178 N.J. at 361. Moreover, "a defendant is entitled to a charge on a lesser included offense supported by the evidence." State v. Short, 131 N.J. 47, 51 (1993). Thus, a trial judge "has an independent obligation to instruct on lesser-included charges when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense." Jenkins, supra, 178 N.J. at 361.

A trial judge is not obligated to "meticulously sift through the entire record in every [] trial to see if some combination of facts and inferences might rationally sustain a [lesser included] charge." Funderburg, supra, 225 N.J. at 70 (quoting State v. Choice, 98 N.J. 295, 299 (1985)). When, however, the evidence at

trial indicates that a jury could convict on a lesser included charge, such a charge must be given. Jenkins, supra, 178 N.J. at 361. Our Supreme Court has explained the rationale for this rule:

> When a defendant is charged with a serious crime, jurors may find the defendant not guilty of that crime but guilty of some other less serious crime. Jurors often will convict a defendant only of a lesser crime, notwithstanding the possibility that he or she may have committed the greater crime, because their belief that he or she committed the lesser crime may create a reasonable doubt concerning the commission of the greater crime . . . . Unless a jury is told that it can convict the defendant of lesser included offenses, it may be tempted to find defendant guilty of a crime he or she did not commit simply because it prefers to convict on some crime rather than no crime at all.
>
> [Short, supra, 131 N.J. at 52, 54.]

Indeed, we have held that charging lesser included offenses "permits a jury to return a verdict that conforms to the evidence and relieves the pressure to return an all-or-nothing verdict." State v. Clarke, 198 N.J. Super. 219, 224 (App. Div. 1985). In Clarke, attempted criminal trespass could not be charged as a lesser included offense of attempted burglary because it was not an offense under the Criminal Code. Given the circumstances of that case, however, we found that criminal mischief should have been charged as a lesser included offense instead. Id. at 225-26. Thus, we reasoned:

> [C]ommitting criminal mischief by breaking a window to gain entry into a structure is a fact that can be used to prove trespass. It is therefore a lesser offense included in trespass which in turn is included in burglary. Here it serves to take the place of the unavailable offense of attempted criminal trespass. In the circumstances of this case, criminal mischief is a lesser offense included within attempted burglary and, having support in the evidence, should have been charged . . . .
>
> [Ibid.]

We also explained that there was a "clear necessity" to charge the jury with a lesser included offense, particularly "because of the inchoate nature of the crime charged and the absence of direct evidence that [] defendant[] intended to steal." Id. at 226.

Here, defendant was entitled to a charge on the lesser included offense of criminal mischief as an accomplice. There are three elements to criminal mischief: (1) defendant damaged tangible property; (2) the tangible property belonged to another person; and (3) defendant acted purposely or knowingly when he damaged the property. Model Jury Charge (Criminal), "Criminal Mischief – Purposeful or Knowing Damage to Tangible Property" (2005). A person is an accomplice of another person in the commission of an offense, if, with the purpose of facilitating the commission of the offense, he agrees to aid the other person in

planning or committing the offense. Model Jury Charge (Criminal), "Liability for Another's Conduct" (1995).

At defendant's trial, Lyons testified that he and defendant discussed breaking open the trailers to see what was inside. Specifically, Lyons testified that the plan was for Lyons to take bolt cutters, cut the locks on the trailers, see what was inside, and then he and Davis would discuss whether they would come back later to steal the trailers. Lyons did not specifically testify that there was a plan for Lyons to steal anything before further discussions with defendant. As it turned out, Lyons in fact did enter the trailer and take a rug pad. Thus, the jury could have considered convicting defendant of a conspiracy to commit burglary. If, however, the jury believed Lyons's testimony, they also could have considered convicting defendant of the lesser included charge of criminal mischief as an accomplice.

The facts establishing the elements of criminal mischief as an accomplice were readily apparent in the evidence at defendant's trial. Lyons was the key witness for the State. His testimony clearly discussed a plan to cut the bolts on the trailers and see what was inside the trailers. The trial judge appropriately considered lesser included charges, but narrowed the focus to conspiracy. Indeed, the judge astutely recognized that had defendant been charged as an accomplice to burglary, a lesser

included charge of criminal mischief would have been given. In light of that discussion, and given the facts presented at trial, it was readily apparent that the charge of criminal mischief as an accomplice should have been given. In that regard, the trial judge was not assisted by either the prosecutor or defense counsel, because they also failed to point out such a charge.

The trial judge correctly decided not to charge the jury with conspiracy to commit trespass or conspiracy to commit criminal mischief. A person is guilty of conspiracy if he or she agrees with another person or persons to commit a crime. N.J.S.A. 2C:5-2(a)(2). A disorderly persons offense is not a "crime." Therefore, a person does not commit a violation of the Criminal Code if he or she conspires with another person to commit a disorderly persons offense.

Defendant incorrectly argues that even though he cannot be convicted of such an offense, he was entitled to a jury charge nonetheless. In making that argument, defendant cites to and relies on the Supreme Court's decision in State v. Short, supra, 131 N.J. at 51. In Short, the Supreme Court held that when evidence would support a conviction of a lesser included offense, but the statute of limitations has run on the lesser included offense, the lesser included offense must still be charged. The Supreme Court's holding in Short does not apply here. Defendant

could never have been indicted or charged with conspiracy to commit a disorderly persons offense. Thus, in contrast to the situation in Short, the statute of limitations had not run; rather, the charge could never have been made.

In summary, we reverse defendant's conviction for conspiracy to commit burglary and remand for a new trial with the direction that the jury be instructed on the lesser included offense of criminal mischief as an accomplice.

B. Bail Jumping

Defendant contends that the bail jumping charge was improperly graded as a third-degree offense, rather than a fourth-degree offense. In support of that argument, defendant asserts that the indictment alleged the elements of fourth-degree bail jumping. Defendant also argues that he provided a factual basis at the plea hearing for fourth-degree bail jumping.

Bail jumping is a fourth-degree offense when a person fails to appear in court, without a lawful excuse, in connection with a charge of a crime or disposition of such a charge. N.J.S.A. 2C:29-7. In that regard, the statute states, in relevant part:

> A person set at liberty by court order, with or without bail, or who has been issued a summons, upon condition that he will subsequently appear at a specified time and place in connection with any offense or any violation of law punishable by a period of incarceration, commits an offense if, without

> lawful excuse, he fails to appear at that time and place. . . . The offense constitutes a crime of the fourth degree where the required appearance was otherwise to answer to a charge of crime or for the disposition of such charge.

Bail jumping is a third-degree crime when a person fails to appear in connection with a crime of the third or higher degree and the person took flight or went into hiding. N.J.S.A. 2C:29-7. Specifically, the statute states in relevant part:

> The offense constitutes a crime of the third degree where the required appearance was to answer to a charge of a crime of the third degree or greater, or for disposition of any such charge and the actor took flight or went into hiding to avoid apprehension, trial or punishment.

We have previously held that to establish third-degree bail jumping, the State must prove that defendant took flight or went into hiding to avoid an appearance to answer for a charge of a crime of the third-degree or greater. State v. Smith, 253 N.J. Super. 145, 147-48 (App. Div. 1992).

Here, defendant was indicted for third-degree bail jumping. The indictment does not expressly charge defendant with flight or hiding. Defendant, however, never challenged the indictment by moving for its dismissal. Instead, he negotiated an agreement to plead to third-degree bail jumping.

At his plea, however, defendant only admitted facts that constituted fourth-degree bail jumping. Specifically, defendant admitted that he left the trial before its conclusion knowing that he was not permitted to do so and knowing that he was required to return for the conclusion of the trial. Those facts satisfy a conviction for fourth-degree bail jumping. Defendant did not admit to any facts that constitute flight or hiding. Consequentially, we are constrained to vacate the conviction and sentence for third-degree bail jumping.

Defendant contends that we should remand the matter with the direction that he be sentenced for a fourth-degree bail jumping conviction. We reject that argument. Instead, we remand for further proceedings. The State can amend the indictment and prosecute defendant for third-degree bail jumping, or the matter can proceed as a fourth-degree charge.

Reversed and remanded. We do not retain jurisdiction.