

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3589-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ADRIAN JOHNSON, a/k/a
ADRIN JOHNSON,

Defendant-Appellant.

Submitted March 28, 2017 – Decided April 7, 2017

Before Judges Fasciale and Sapp-Peterson.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment Nos.
11-04-0336 and 12-01-0044.

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

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Tom Dominic Osadnik,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant appeals from his convictions for second-degree
unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); third-

degree receiving stolen property, N.J.S.A. 2C:20-7 and N.J.S.A. 2C:20-2(b)(2)(b); and third-degree eluding, N.J.S.A. 2C:29-2(b). We affirm.

A grand jury indicted and charged defendant with second-degree unlawful possession of a weapon without a permit, N.J.S.A. 2C:39-5(b). The jury trial pertained solely to that charge. The other convictions from which defendant appeals resulted from violations of probation.

We adduce the following facts from the evidence at the trial. An individual (the 9-1-1 caller) and four people (her company) were sitting on her porch. The 9-1-1 caller testified that while they were sitting on her porch four other men sat on top of her car. At the time, there was a block party with over fifty people outside across the street.

The 9-1-1 caller asked the four men to remove themselves from her car, and three of the men complied. The fourth man, a dark-skinned male, was wearing a white t-shirt and khaki pants. This individual removed himself from her car after several minutes, and then walked up her driveway, toward her company, waved a gun at them and threatened them.

Upon seeing the gun, the 9-1-1 caller and her company ran inside the house. She testified that after she and her company ran inside, the fourth man went across the street to the block

party. It was at this point that the 9-1-1 caller called the police.

The 9-1-1 caller testified that the man who had threatened her, and his friends, walked away from her once they heard sirens. The 9-1-1 caller claimed the person who waved the gun at her and her company was named Taheem Taylor, who is also known as Coppo. Coppo is now deceased.

The 9-1-1 caller testified that she later saw Coppo, the man that waved the gun at her, at a liquor store. Upon seeing him, she left the store. She did not tell the police she saw Coppo at the store.

Officer Rodriguez had a different account of the night. He testified that he and Officer Furmen responded to a call about a black male wearing a white t-shirt and khaki shorts, who was waving a dark handgun near a school. Officer Rodriguez testified that once he was dispatched, he got to the school within seconds and approached without lights or sirens. He stated that as he approached the school, he observed a man matching the description in front of the school. He testified that he and his partner got out of the vehicle and approached the man. He then saw the man pull out a chrome handgun from his waistband and discard it. Officer Rodriguez testified that the man went under his white shirt, grabbed the gun, and dropped it and then proceeded to walk

away slowly. Officer Rodriguez advised his partner of his observation and secured the weapon while his partner arrested the suspect.

At trial, the prosecutor stated in summation:

[Defendant] is plain and simple charged with possessing a gun without a permit. So, he could be a completely different person than the person that [the 9-1-1 caller] called about. Or perhaps he is the person [the 9-1-1 caller] called about, but for some reason she now is not telling the truth.

Now, you might say, well, why in the world would she not be telling the truth? Well, I submit she may have given you that answer [in] the last part of her testimony when she testified, because the last question I asked her was: "does it make you nervous to think that the person you called the police on knows where you live and knows who you are?" And she said "yes." She testified the first time she got involved in this trial, in this matter, after she called 9-1-1, that one time on the man [waving] the gun, was within the past week or so when a Detective Bill from [defendant's attorney's] office contacted her. Is it possible that [] she realized that her 9-1-1 call for information did not just stay with the police department but that it was provided to the Prosecutor's Office and to the defense? Is it possible that she's now nervous thinking, oh, no, the person I called 9-1-1 on got arrested, but now he knows I'm the person who is the reason he got arrested. He knows my name. He knows where I live. She still lives in the same place that she lived in in August of 2011.

So, maybe she's scared. And it's not to say [defendant] is not giving her reason to be scared, but I'm just saying in her mind she

could be scared, like, ut oh, now the lawyer's office for the guy that I got arrested for a gun is calling me in and wants me to testify for him. Is it possible that she thinks it's in her own best interest to come in and try to undo the damage she did -

The prosecutor also stated:

[Officer Rodriguez] said he didn't know the defendant. He said the defendant complied. Nobody is saying the defendant was giving the police a difficult time. So, he wasn't out to get him because he didn't know him. He's not saying, oh, I want to get that guy because he's a troublemaker. He didn't know him. And [defendant] complied with the police when they arrested him. So, there is no axe to grind here between the officer and [defendant]. He's a trained observer. He is a trained observer. He even taught at the Police Academy practicals. He said, you learn to -- you act out different scenarios when you're in the Police Academy learning where to put your eyes, to watch somebody's hands, to do this, to do that. Just like in any profession you have certain training for what you do, that's what police do. They're trained observers. They learn whether to watch for the hands, whether to watch for certain movements. He's a trained observer and he saw what the defendant did with his hands. He reached into his waistband and tried to discretely toss the small-sized gun.

The jury found defendant guilty of the weapons charge. The court sentenced defendant to a five-year prison term with a three-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6.

At the time of defendant's arrest on the weapons charge, defendant was on probation for third-degree receiving stolen property, N.J.S.A. 2C:20-7(a) and N.J.S.A. 2C:20-2(b)(2)(b); and third-degree eluding, N.J.S.A. 2C:29-2(b). The court terminated defendant's probation and sentenced him to a three-year prison term on each charge concurrent to defendant's weapons conviction.

On appeal, defendant argues:

- I. THE PROSECUTOR'S SUMMATION IMPERMISSIBLY UNDERMINED THE KEY DEFENSE WITNESS, BOLSTERED THE STATE'S SOLE WITNESS, AND IMPLIED THAT THE DEFENDANT WAS DANGEROUS. THIS ARGUMENT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION. (PARTIALLY RAISED BELOW)[.]

[A.] The Prosecutor's Argument In Summation That The 9-1-1 Caller Gave Exculpatory Testimony Due To Fear Of Retribution By The Defendant Was Baseless, Inappropriate, And Prejudicial.

[B.] The Prosecutor's Argument In Summation, Which Implied That The Officer's Version Of Events Was More Credible Because He Has Superior Powers Of Observation, Was Factually Untrue, Inappropriately Bolstered The Officer's Credibility, And Was Prejudicial.

[C.] These Improper Arguments, Both Individually And Together, Deprived The Defendant Of A Fair Trial And Necessitate Reversal Of His Conviction.

We view prosecutorial misconduct under the harmless error standard. State v. R.B., 183 N.J. 308, 330 (2005). To determine whether a prosecutor's improper comments in summation warrant reversal, we assess whether the impropriety was "so egregious that it deprived the defendant of a fair trial." State v. Jackson, 211 N.J. 394, 409 (2012) (quoting State v. Frost, 158 N.J. 76, 83 (1999)). In making this assessment, we "consider[] 'the tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred.'" Ibid. (quoting State v. Timmendeguas, 161 N.J. 515, 575 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001)).

The prosecution's duty to achieve justice does not forbid a prosecutor from presenting the State's case in a "vigorous and forceful" manner. R.B., supra, 183 N.J. at 332 (quoting Frost, supra, 158 N.J. at 82-84). "Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." Ibid. (quoting Frost, supra, 158 N.J. at 82-84); see also State v. Mayberry, 52 N.J. 413, 437, (1968), cert. denied, 393 U.S. 1043, 89 S. Ct. 673, 21 L. Ed. 2d 593 (1969) ("So long as he stays within the evidence and the legitimate inferences therefrom the Prosecutor is entitled to wide latitude in his summation."). "Thus, '[t]o justify reversal, the prosecutor's conduct must have

been clearly and unmistakably improper, and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense.'" State v. Wakefield, 190 N.J. 397, 438 (2007) (alteration in original) (quoting State v. Papasavvas (I), 163 N.J. 565, 625 (2000)), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008).

The prosecutor's statements about the 9-1-1 caller were not so egregious that it deprived defendant of a fair trial. At trial, the prosecutor without objection asked the 9-1-1 caller:

Q: So in other words you don't necessarily feel safe if somebody that you called the police on knows your name and where you -- where you live?

A: At that point of the --

Q: Yes, or no, ma'am?

A: No.

In summation, the prosecutor used this testimony to explain why the 9-1-1 caller would have a motive to lie. The prosecutor did not misstate the evidence and it was a fair comment for the prosecutor to use it in her summation. Furthermore, the court also provided a curative instruction to the jury. The judge stated:

[t]here was an objection raised during the State's summation, as well, and I want to address it as follows by informing you that there is nothing improper regarding the

defense attorney's investigator, or in that sense, counsel contacting any potential witness in a case. In this case it was [the 9-1-1 caller]. Any notion that there may have been that there was something improper about that contact should not be held by you. The State has clarified that it did not in any way, shape or form intend to impugn the character or the actions of defense counsel or his investigator. So, the points made were not for that purpose.

We conclude the entire summation was "reasonably related to the scope of the evidence presented"; therefore, the prosecutor did not deprive defendant of a fair trial. Timmendequas, supra, 161 N.J. at 587.

We also reject defendant's argument raised for the first time that the prosecutor's summation impermissibly bolstered Officer Rodriguez's credibility and was prejudicial.

When an issue is not raised below, "defendant must show that the error was 'clearly capable of producing an unjust result.'" State v. Chavies, 345 N.J. Super. 254, 265 (App. Div. 2001) (quoting R. 2:10-2). The error 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." Ibid. (quoting State v. Macon, 57 N.J. 325, 336 (1971)). We see no error here.

The prosecutor's remarks in summation were not unmistakably improper. During the trial, the prosecutor asked Officer Rodriguez about his training. The exchange was as follows:

Q: What are you taught in the police academy in terms of -- how do you learn how to make observations as a police officer? Is there anything you learn in the police academy?

A: Yeah. There's different thing[s] we do, practicals.

Q: And what's a practical?

A: Like, we'll do -- sometimes we do two months of practicals in academy. Once two months practicals, like, facilities. Like you go over scenarios. A person with a weapon, and how they conceal them. You try to identify the bulges in the pockets, or, you know, the waistband, small of their backs. And we go over [a] hands-on technique when you approach a suspect with a handgun, possibly having a handgun. You want to try to watch for the hands, because that's the most important thing, you know. You hesitate, or you don't watch their hands, you end up dead. So we try to identify the hands or hand movements. And there [were] a lot of different things.

Q: Okay. So -- so in other words, I think what you're saying [] in terms of practicals, so you're at the police academy, and maybe some of the instructors at the police academy might be acting out roles where they're actually, you know, pretending to be somebody who's committing a crime. And you, as a student in the police academy have to pay attention to the situation and learn what to look for, and where to watch and all that kind of thing?

A: Yes, ma'am.

Q: Okay.

[A]: Even -- even as -- in the academy I participated in practicals. And [] I'm also

an instructor. I've done scenarios with a crew.

Q: Oh. So you -- you're an instructor at the police --

A: Yes, ma'am.

Q: -- academy?

A: I've done -- I've done practicals with [the] academy -- a couple of academy classes.

The prosecutor's summation did not bolster Officer Rodriguez's credibility. The summation stated that Officer Rodriguez taught at the Police Academy and was a "trained-observer," which were both the subject of his testimony. Although "it is 'obviously improper' to imply that police testimony should be accepted, 'not because of its believability but because the witnesses were policemen[,]" the prosecutor did not imply that Officer Rodriguez's testimony should be accepted because he is an officer. State v. Staples, 263 N.J. Super. 602, 606 (App. Div. 1993) (quoting State v. Jones, 104 N.J. Super. 57, 65 (App. Div. 1968), certif. denied, 53 N.J. 354 (1969)). Instead, the prosecutor referred to the officer's testimony about his training.

Moreover, the defendant did not object to the prosecutor's comments about Officer Rodriguez at trial. "Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial." Timmendequas, supra, 161 N.J. at 576

(citation omitted). "Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made" and it "also deprives the court of the opportunity to take curative action." Ibid. (citations omitted). Therefore, the prosecutor's summation remarks about Officer Rodriguez were not "so egregious that it deprived the defendant of a fair trial."

Affirmed.

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



CLERK OF THE APPELLATE DIVISION