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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-3613-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROCCO C. AGRESTA,

Defendant-Appellant.

Submitted January 31, 2017 – Decided February 16, 2017

Before Judges Yannotti and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Indictment
No. 13-12-1201.

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

Sean F. Dalton, Gloucester County Prosecutor,
attorney for respondent (Joseph H. Enos, Jr.,
Senior Assistant Prosecutor, of counsel and
on the brief; Monica Bullock, Legal Intern,
on the brief).

PER CURIAM

Defendant Rocco C. Agresta was tried before a jury and found guilty of third-degree theft by failure to make the required disposition of money contrary to N.J.S.A. 2C:20-9. The trial court sentenced defendant to four years of probation, conditioned upon his serving ninety days in the county jail. He appeals from the judgment of conviction dated February 1, 2016.

I.

We briefly summarize the evidence presented at trial. In January 2013, B.K. saw an advertisement for cabinets and a countertop on Craigslist, which he thought might be appropriate for his kitchen.¹ The advertisement did not mention labor or installation, and it did not describe defendant as a contractor. B.K. thought if he purchased the items for sale he would be getting a good deal, because they were worth far more than the \$2400 selling price. B.K. also knew he would not be able to obtain a refund for anything purchased on Craigslist.

B.K. contacted defendant by email, and arranged to visit defendant's home to look at the merchandise. B.K. liked the cabinets and what he could see of the countertop. B.K. was, however, concerned that the cabinetry would not fit in his kitchen. Defendant represented that he was a "general contractor" who was

¹ We refer to the witness by his initials, in order to protect his privacy.

in the business of "flipping houses." B.K. executed a contract with an entity called Aggressive Contractors. Defendant signed the agreement on behalf of that company. Defendant previously owned the company, but at the time of trial, Aggressive Contractors was no longer in business.

The contract provided that in addition to the \$2400 price for the cabinets and countertop, a separate fee would be charged for installation. B.K. paid defendant \$2400. He testified that defendant advised him that another contractor would be performing the work. The contractor provided B.K. with a proposal, which required payment of \$3000 for the installation work. B.K. said he was not comfortable giving \$3000 to someone with whom he had not spoken.

Thereafter, B.K. attempted to resolve the matter with defendant. He contacted him by text messages and email. Defendant eventually agreed to repay B.K. \$2000 by May 3, 2013. Defendant did not pay the agreed-upon refund by that date, and he did not respond to B.K.'s text message regarding the refund.

On June 7, 2013, defendant called B.K. and said he did not have the money to pay him, and he had sold the cabinets/countertop to someone else. B.K. then attempted to have defendant pay him in installments, even in amounts as low as ten dollars. Ultimately,

defendant did not provide B.K. with either the cabinets/countertop or the \$2400 he had paid for them.

Defendant testified that Aggressive Contractors was dissolved before his dealings with B.K. He stated that he does not install cabinets and never has. He possesses licenses to sell real estate and insurance. In 2013, he put an ad on Craigslist to sell cabinets and the countertop he had initially purchased for himself. He admitted that he entered into the contract with B.K., but said it was "kind of like an estimate/contract for installation of the cabinets," which a contractor would install. He denied he represented to B.K. that he was a general contractor.

Defendant told B.K. that if he paid the full asking price of \$2400, he would oversee the job. According to defendant, the contract stated that \$2400 was due by February 1, 2013, with the balance due on completion of the work. Thereafter, defendant and the contractor went to B.K.'s house, and the contractor took measurements.

On February 26, 2013, defendant sent B.K. an email stating that he would require a \$2500 deposit for labor, and a deposit of \$500 for materials, which he could pay directly to the contractor. According to defendant, the total estimate was \$4922, which included state taxes.

Defendant testified that he told B.K. he could retrieve the cabinets, which were in his garage. He also told B.K. he would deliver the cabinets to his home, but B.K. would have to pay him \$200 to rent a truck and another \$75 to pay someone to help him with the delivery. B.K. did not retrieve the cabinets and did not agree to pay the additional cost for delivery. After six months, defendant sold the cabinets and countertop to someone else.

Defendant admitted that after he sold the cabinets and countertop, he told B.K. he would give him his money, but he did not have the money at that time. Defendant said that he was unemployed and "[t]hings were tight." He admitted that the money he received from B.K. and other sales had been used to pay his bills. He said he told B.K. that as soon as he obtained the money, he would pay him. Defendant acknowledged he never paid B.K. the \$2400 that B.K. paid for the cabinets/countertop.

The jury found defendant guilty of theft by illegal retention of an amount that exceeds \$500. As stated previously, the trial judge sentenced defendant to four years of probation, conditioned upon his serving ninety days in the county jail. The judge ordered restitution in the amount of \$2400, to be paid at a rate of \$50 per month. The judge also imposed appropriate fees and penalties. The judge entered a judgment of conviction dated February 1, 2016. This appeal followed.

On appeal, defendant raises the following argument:

DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW WAS VIOLATED WHEN THE TRIAL JUDGE REPRIMANDED DEFENSE COUNSEL IN FRONT OF THE JURY DURING HIS SUMMATION. (Partially raised below).

II.

As noted, defendant contends that the trial judge erred by reprimanding his attorney in front of the jury as counsel was making his closing argument. Defendant contends the judge's reprimand denied him his right to a fair trial.

The record discloses that, at the outset of defense counsel's summation, he stated as follows:

[DEFENSE COUNSEL]: This is a criminal case. The State of New Jersey is trying to convict Mr. Agresta. Trying to make him a convicted felon. And because it is a criminal case and because he has pled not guilty, he has the right to a jury trial.

. . . .

And you notice that the defense goes first in closing arguments. That's because the State does have the burden of proof, they're allowed to go second. The State of New Jersey, with all its resources, is going against Rocco Agresta.

. . . .

This is not [B.K.], against Rocco Agresta. This is the State of New Jersey versus Rocco Agresta.

God help the criminal justice system if every Craigslist dispute ends up in Criminal

Court. This is a Criminal Court. Again, they're trying to make him a convicted felon, a criminal.

THE COURT: I have to stop you there. Those comments about possible punishment or those issues are not to be considered by the jury at all. So what you're saying as far as being a convicted felon is not something that's appropriate for the jury to consider.

[DEFENSE COUNSEL]: You're not to consider what the penalties will be, not at all, and I'm not . . . trying to infer that you should. I'm just trying to lay the groundwork of where we are, what kind of court we're in.

Defense counsel went on to argue that what had occurred in this case was merely an "unfortunate misunderstanding" and that defendant had not wronged the would-be purchaser in a "criminal way." He acknowledged that the "case would come down to" an assessment of defendant's and B.K.'s credibility.

While the jury was deliberating, the trial judge engaged in the following colloquy with defense counsel:

THE COURT: I wanted to address my comments during your closing.

I normally don't interrupt but there's limitations on what . . . defense counsel can say during summations and the seven that I have, one of them is you should not comment on possible punishment.

It was sort of iffy when you're saying he was going to be convicted of a felony. You said it once. I let it go.

When you said it the second time, I thought it was absolutely necessary for me to tell [the jurors], you can't take that into consideration. I thought you overstepped that process and I apologize, but I think I had to do it; okay?

[DEFENSE COUNSEL]: Understood.

THE COURT: You didn't say, well, you can't put him in jail or anything like that. That would have been a lot worse. But I thought when you said it the second time, I probably should say something.

Contrary to defendant's assertion that this issue was partially raised below, he argues for the first time on appeal that the trial court's reprimand of defense counsel before the jury was unwarranted and denied him a fair trial. According to defendant, there was nothing wrong with defense counsel's argument that the State was improperly "trying to convert a civil dispute into a criminal prosecution."

In defendant's view, the trial judge's subsequent colloquy with defense counsel reflected his realization that he "might have acted precipitously." Defendant insists that the judge's admonition was improper and had the capacity to prejudice his defense, which centered on what he claims were inconsistencies in B.K.'s testimony. We do not agree.

It is clear that the import of defense counsel's remarks was that defendant should not be convicted because he would then be a

convicted felon, a punishment that was not justified in this case. As the trial judge recognized, this was an improper attempt to interject considerations into the jury's deliberations that had nothing to do with the jury's role, which was to decide whether the State had proven, beyond a reasonable doubt, that defendant committed the charged offense.

The trial judge properly intervened to ensure that the jury decided the case based on the evidence "free from the taint of extraneous considerations and influences." Panko v. Flintkote Co., 7 N.J. 55, 61 (1951); see also State v. Weiler, 211 N.J. Super. 602, 609-10 (App. Div.) (noting that jurors must be obedient to a court's charge to decide the case based on the evidence, without irrelevant considerations and influences), certif. denied, 107 N.J. 37 (1986). Here, the trial judge could have spoken to defense counsel at side bar; however, the judge would nevertheless have been required to instruct the jury to disregard counsel's remarks.

Furthermore, the judge's subsequent comments to defense counsel did not reflect the judge's acknowledgement that he had acted "precipitously." The judge merely explained why he had interrupted counsel. Moreover, the judge's instruction to the jury regarding counsel's remarks did not relate to and did not have the capacity to prejudice the jury's ultimate decision in this case.

Therefore, we reject defendant's argument that the judge acted improperly by interrupting defense counsel during his summation, and his contention that the judge's remarks denied him of his right to 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