SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4142-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PANAGIOTI N. SOURIS,

Defendant-Appellant.

Submitted December 6, 2016 – Decided June 8, 2017

Before Judges Koblitz and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 13-10-1908.

Joseph E. Krakora, Public Defender, attorney for appellant (Solmaz F. Firoz, Assistant Deputy Public Defender, of counsel and on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Keri-Leigh Schaefer, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant Panagioti Souris was found guilty of six third-degree crimes: possession of a controlled dangerous substance, specifically heroin, N.J.S.A. 2C:35-10(a)(1) (count one); possession of heroin with intent to distribute, N.J.S.A. 2C:35-5(b)(3) (count two); distribution of heroin, N.J.S.A. 2C:35-5(b)(3) (count three); possession of heroin, N.J.S.A. 2C:35-10(a)(1) (count four); possession of heroin with intent to distribute, N.J.S.A. 2C:35-5(b)(3) (count five); and distribution of heroin, N.J.S.A. 2C:35-5(b)(3) (count six).[1] At sentencing, after merger of counts one and two into count three, defendant was sentenced to a five-year prison term. The judge then merged counts four and five into count six, and sentenced defendant to a concurrent five-year prison term.

On appeal, defendant raises the following points:

> POINT I
>
> THE STATE'S IMPROPER BOLSTERING OF ITS POLICE OFFICER WITNESS DURING SUMMATION CONSITUTED MISCONDUCT THAT DEPRIVED DEFENDANT OF A FAIR TRIAL.
>
> POINT II
>
> THIS CASE SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCING COURT DID NOT CONSIDER MITIGATING FACTORS SUPPORTED BY THE RECORD AND BECAUSE DEFENDANT'S SENTENCE IS EXCESSIVE.

[1] Counts one, two and three occurred on May 2, 2013, while counts four, five and six occurred on May 7, 2013.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

I.

We discern the following facts from the trial record relevant to this appeal. Neptune Township Police Officer Nicholas Taylor, who was temporarily assigned as a detective in the Monmouth County's Narcotic Strike Force, testified that at approximately 4:17 p.m. on May 2, 2013, he called and arranged an undercover "narcotic buy" to purchase a "brick of heroin"[2] from a person he knew as "Pete," later identified as defendant. According to Taylor, he was told to meet defendant at a condominium complex in Marlboro Township, where Narcotic Strike Officers would subsequently set up surveillance before Taylor drove to the complex's parking lot. Taylor testified that after he parked and notified defendant by phone that "[he] was here[,]" defendant exited his residence, and entered Taylor's vehicle from the front passenger's side. Taylor further testified that defendant sold him a brand of heroin called, "HBO," for $300, followed by a brief conversation about future drug transactions. After driving a "safe distance away[,]" Taylor stated that he called the surveilling officers to report that he had completed a drug buy.

[2] A brick of heroin consist of fifty glassine folds of heroin.

On May 7, at around noon, Taylor and defendant texted each other arranging another purchase of heroin. Taylor testified that he called defendant upon arrival at his townhouse, and defendant told Taylor to "come inside, the door was unlocked." Taylor entered the residence, and followed defendant into a room that had the brick of heroin on a table. According to Taylor, after defendant told him this was a different brand of heroin, "Body Bag," than the last time, defendant "picked [the heroin] up, he broke it open, removed all the thin individual bundles, showed them to me, and eventually handed them to me" at which point, Taylor paid defendant $300 then left in a few minutes. Each transaction with defendant took about five minutes.

The testimony of Strike Force members, Officers Joe Leon and Anthony Valentino, and Detective Michelangelo Bonnano, corroborated Taylor's testimony. Leon testified that on May 2, after arriving fifteen minutes prior to Taylor to ensure visibility of the drug transaction, he witnessed from approximately twenty-five to thirty yards away, "a white male," exit the condominium, then enter Taylor's vehicle for five minutes and return to his residence. Valentino testified that on May 7, he provided onsite surveillance, where he had a clear observation of Taylor entering defendant's townhouse, and exiting after a few minutes. Bonanno, as supervisor of the Strike Force, provided brief testimony

corroborating the location and officers involved in the undercover narcotic buys from defendant.

Defendant, the only defense witness, presented a completely different story. He testified that on May 2, his roommate, a construction worker, called him "around noon that day . . . because he had left something that was needed at the jobsite[,]" but defendant was unable to take the item to the jobsite. According to defendant, his roommate called again sometime later that day, and asked defendant, "[if] it [was] okay if [he had] a [co-] worker come to the house and pick it up?" His roommate also commented that "[t]hey're going to pick up what they're going to pick up, and they're going to leave money for it." Defendant testified that he agreed with the request.

Defendant explained that shortly thereafter, he received a call from an individual, whom he later identified as Taylor, who introduced himself as "a friend of [his roommate]" who was supposed to pick up the jobsite item. Defendant recounted that after he gave Taylor his address and received a call as to Taylor's arrival, he went into his roommate's room to retrieve the jobsite item. Defendant testified that the item "looked like a rectangular box . . . wrapped in some type of paper[,]" but defendant "had never recognized anything like that before," as he "wasn't a frequenter of [his roommate's] room[.]" Defendant subsequently went to

Taylor, who was in his car parked outside, gave him the unopened item, received cash in exchange, and conversed about the weather briefly before he exited the vehicle. Defendant claimed that he did not tell Taylor to call him again, and when he went back into the townhouse, he put the money on the kitchen counter.

As for May 7, defendant testified that his roommate called at approximately 9:00 a.m. explaining, "that he had forgotten some of his material for work" at their residence, and asked if defendant could drop it off at his worksite. Defendant replied that he could not, but he would be home for a short while if someone could pick up the materials. His roommate said he would call him back to let him know if someone could come by. After the roommate called back, the same person who came by the first time, Taylor, called defendant and stated he would be stopping by. Taylor called when he arrived outside the townhouse. Defendant told Taylor to come inside while he went to get the package from his roommate's bedroom. Defendant stated that when he grabbed the package, the paper packaging was "cracked" revealing the contents, but he did not look inside the package as he placed it on the dining room table. After Taylor entered, they engaged in conversation about the weather. Taylor then grabbed the package, looked into its cracked opening, placed money on the dining room table, and left.

During closing arguments, counsel focused on the credibility of Taylor and defendant due to their conflicting testimony. Defendant attacked Taylor's credibility, contending he did not show his phone records documenting the calls and text messages that were exchanged between them. Defendant also highlighted Taylor's inexperience in conducting undercover narcotic investigations, as evidenced by his lack of familiarity with the term, "brick of heroin." In addition, defendant argued that Taylor's five-minute transactions with defendant were contrary to the quick contacts involved with drug sales, and demonstrated that defendant did not know he was conveying drugs to Taylor.

The prosecutor argued to the jury that "in order to find [defendant's] story credible you have to say that [Taylor] is lying, that [with] ten years of experience, hundreds of investigations, [Taylor] is for some reason lying to you. . . . Is he more credible, or is the defendant more credible?" After summarizing the testimony of defendant and Taylor, the prosecutor questioned whose account seemed to be reasonable, stating, "[Taylor] was straightforward about his investigation[,]" emphasizing Taylor's demeanor on the stand. After the prosecutor commented that one of the surveilling officers was not lying, defense counsel objected. She argued that in commenting on the testimony of defendant and Taylor, the prosecutor was bolstering

Taylor's credibility because he "characterized in comparing the two testimonies that one of them has to be lying, and in fact the first time [the prosecutor] did it he said this officer with ten years [of] experience."

The judge overruled defendant's objection reasoning that the State did not assert that Taylor had no motive to lie, and that referencing his experience with drug transactions was not improper bolstering as the State may rely on his experience and training to recall the details of his interaction with defendant.

After defendant was found guilty, he filed a motion for a new trial and the State filed a motion for a discretionary extended term under N.J.S.A. 2C:44-3(a). On April 10, 2015, the judge denied both motions and sentenced defendant. The judge did not find any mitigating factors, but applied aggravating factors three, six, and nine. N.J.S.A 2C:44-1(a)(3) (risk to commit another offense); -1(a)(6) (prior record and seriousness of offense); -1(a)(9) (need for deterrence). The judge explained that defendant's extensive prior criminal history of three New Jersey convictions, as well as three out-of-state convictions, was indicative that he presented a risk of committing another offense, and therefore, needed to be deterred from violating the law. This appeal ensued.

II.

We first consider defendant's contention in Point I that, based upon State v. Frost, 158 N.J. 76 (1999), and State v. Murphy, 412 N.J. Super. 553 (App. Div. 2010), the prosecutor's closing statement prejudiced defendant's right to a fair trial by attacking defendant's credibility while strengthening Taylor's testimony. In particular, defendant argues that, because credibility was the critical issue at trial, the prosecutor's statements that Taylor had no reason to lie and was more credible than defendant because of his ten years in law enforcement were improper. We disagree.

Prosecutors are required to act in accord with fundamental principles of fairness. State v. Wakefield, 190 N.J. 397, 436 (2007), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008). The job of a prosecutor is "peculiar"; prosecutors are tasked not to win, but to see that "'justice shall be done.'" Ibid. (quoting Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935)). While prosecutors may strike hard blows in presenting their case, they may not strike "foul ones." Ibid. And if a prosecutor crosses the line from zealous enforcement of the law into foul play, a reviewing court will reverse a conviction. Id. at 437 (quoting State v. Siciliano, 21 N.J. 249, 262 (1956)).

The question of whether alleged misconduct has prejudiced a defendant sufficient to reverse a conviction is whether on the whole the conduct was "'so egregious as to deprive defendant of a fair trial.'" Ibid. (quoting State v. Papasavvas, 163 N.J. 565, 625 (2000)). A defendant must establish two separate prongs to justify reversing a conviction based on prosecutorial misconduct: (1) the prosecutor's conduct must be "'clearly and unmistakably improper'" and (2) it "'must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his [or her] defense.'" Id. at 438 (quoting Papasavvas, supra, 163 N.J. at 625).

Prosecutors may "make vigorous and forceful closing arguments to juries . . . and may remark on the credibility of a defense witness' testimony." State v. Lazo, 209 N.J. 9, 29 (2012) (internal quotation marks and citations omitted). "Consistent with their obligation to seek justice, prosecutors may not advance improper arguments. They cannot cast unjustified aspersions on defense counsel or the defense . . . ." Ibid.

As a general principle, it is improper for a prosecutor to convey his or her personal opinion to a jury. State v. Michaels, 264 N.J. Super. 579, 640 (App. Div. 1993), aff'd, 136 N.J. 299 (1994). When a prosecutor injects his own personal opinion as to the credibility of a witness, this may constitute prosecutorial

error. See State v. Farrell, 61 N.J. 99, 105 (1972). Such bolstering can be considered particularly inappropriate when the witness is a law enforcement officer. State v. Hawk, 327 N.J. Super. 276, 285 (App. Div. 2000). The State may not assert that a law enforcement officer witness is inherently credible based solely upon his status. State v. Jones, 104 N.J. Super. 57, 65 (App. Div. 1968), certif. denied, 53 N.J. 354 (1969); see also Frost, supra, 158 N.J. at 86. A prosecutor may not vouch for a police officer's credibility by stating he or she would not lie because of the magnitude of the charges, Frost, supra, 158 N.J. at 85, or because he or she had no motive to lie, State v. R.B., 183 N.J. 308, 331-32 (2005), or because he or she would face severe consequences if not truthful. State v. West, 145 N.J. Super. 226, 233-34 (App. Div. 1976), certif. denied, 73 N.J. 67 (1977).

On the other hand, "a prosecutor is permitted to respond to an argument raised by the defense so long as it does not constitute a foray beyond the evidence adduced at trial." State v. Munoz, 340 N.J. Super. 204, 216 (App. Div.), certif. denied sub nom. State v. Pantoja, 169 N.J. 610 (2001). The court must consider the nature of the defense remarks that provoke the prosecutor's response. Ibid. In certain circumstances, "'[a] prosecutor's otherwise prejudicial arguments may be deemed harmless if made in

response to defense arguments." State v. McGuire, 419 N.J. Super. 88, 145 (App. Div.), certif. denied, 208 N.J. 335 (2011).

Applying these principles, we decline to reverse defendant's conviction based on the prosecutor's comments, particularly given the nature of defense counsel's closing remarks. The prosecutor did not suggest that the jury should believe Taylor because he was a police officer. The prosecutor's reference to Taylor's experience was in direct response to defendant's contention that Taylor's investigative techniques demonstrated he lacked experience in investigating drug crimes, and Taylor's failure to present telephone records to prove his communication with defendant made his testimony unconvincing. Moreover, the prosecutor did not tell the jury to accept Taylor's testimony because he was a law enforcement officer, nor did he suggest that Taylor had no motive to lie.

Next, we address defendant's contention in Point II that the judge did not consider mitigating factors that defendant's conduct neither caused or threatened serious harm, and that he did not contemplate that his conduct would cause or threaten serious harm. N.J.S.A. 2C:44-1(b)(1) and (2). In particular, defendant claims that his drug offense conviction did not involve weapons nor violence. Further, defendant argues that his five-year sentence, which is at the top of the range for third-degree offenses, was

excessive because it was not supported by aggravating factors cited by the judge. Defendant contends that his lack of any violent criminal history demonstrates that there is no risk that he would commit another offense nor is there a need to deter him from doing so.

We begin by noting that review of a criminal sentence is limited; a reviewing court must decide "whether there is a 'clear showing of abuse of discretion.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)). Under this standard, a criminal sentence must be affirmed unless "(1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" Ibid. (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). If a sentencing court properly identifies and balances the factors and their existence is supported by sufficient credible evidence in the record, this court will affirm the sentence. See State v. Carey, 168 N.J. 413, 426-27 (2001); State v. Megargel, 143 N.J. 484, 493-94 (1996).

Here, we are not persuaded that the court erred in sentencing defendant. In accord with the record, the judge appropriately weighed the aggravating and mitigating factors. We find support

for the aggravating factors that were applied, and no basis for the mitigating factors asserted by defendant. We have held that "[d]istribution of cocaine can be readily perceived to constitute conduct which causes and threatens serious harm." State v. Tarver, 272 N.J. Super. 414, 435 (App. Div. 1994). This is equally true for distribution of heroin. The sentence does not shock our judicial conscience. Defendant was eligible for an extended term, which the court did not impose. Therefore, we shall not second-guess and disturb the trial court's findings. See State v. Bieniek, 200 N.J. 601, 608-09 (2010); State v. O'Donnell, 117 N.J. 210, 215-16 (1989).

Affirmed.