SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4273-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARC SUTTON,

Defendant-Appellant.

Submitted October 6, 2016 – Decided April 10, 2017

Before Judges Alvarez and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 05-10-1399 and 05-12-1543.

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

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Joie Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Marc Sutton absconded after his trial began but before the jury returned its verdict of guilty on October 18, 2007. As a result, he was not sentenced until February 25, 2014.

Defendant appeals and we affirm, but vacate the sentence and remand for a resentencing hearing.

The jury convicted defendant of all the counts in Indictment No. 05-10-1399: three charges of third-degree theft by unlawful taking, N.J.S.A. 2C:20-3 (counts one to three); two counts of third-degree unlawful possession of a weapon (handguns), N.J.S.A. 2C:39-5(b) and 2C:58-4 (counts four and five); and one count of third-degree unlawful possession of a weapon (rifle), N.J.S.A. 2C:39-5(c)(1) and 2C:58-3 (count six). Following the bifurcated trial, defendant was convicted on Indictment No. 05-12-1543 of three counts of second-degree certain persons not to possess (Ruger forty-five caliber handgun, Smith & Wesson forty-four caliber handgun, and Mossberg shotgun), N.J.S.A. 2C:39-7(b).

On Indictment No. 05-10-1399, defendant was sentenced to concurrent four-year terms on the theft offenses, and to concurrent five-year terms on the unlawful possession of a weapon charges. The sentences were to be served concurrent to each other and the sentence on the first two certain persons convictions.

The judge sentenced defendant on Indictment No. 05-12-1543 to concurrent seven-year terms, subject to five years of parole ineligibility on counts one and two. However, the sentence on count three, also a seven-year term with five years of parole ineligibility, was to be served consecutive to the first two counts

of the indictment. Thus, defendant's aggregate sentence was fourteen years subject to ten years of parole ineligibility.

The sentencing judge,[1] who had not presided over defendant's trial, found no factors in mitigation, and found aggravating factors three, N.J.S.A. 2C:44-1(a)(3), six, N.J.S.A. 2C:44-1(a)(6), and nine, N.J.S.A. 2C:44-1(a)(9), based on defendant's prior convictions. His criminal history included a disorderly persons shoplifting, N.J.S.A. 2C:20-11(b)(1), a disorderly persons assault, N.J.S.A. 2C:12-1(a)(1), a second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1), and a third-degree possession of a weapon, a sawed-off shotgun, N.J.S.A. 2C:39-3(b). Defendant was on parole when the offense at issue occurred.

The incident which resulted in the convictions took place while defendant was working as a truck driver. Defendant's childhood friend, an employee of the company for which defendant worked and the person who had been influential in hiring defendant,

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[1] The trial judge was sitting in the Family Part when defendant was sentenced seven years after the trial. The preferred practice is for the trial judge to sentence a criminal defendant when practically feasible. See State v. Abrams, 256 N.J. Super. 390, 404 (App. Div.) (remanding matter back to "the sentencing judge who presided over the trial and who is presumably more sensitive to the nuances of the case . . . ."), certif. denied, 130 N.J. 395 (1992); State v. Whitaker, 79 N.J. 503, 505 (1979) (noting "[t]he judge who had presided over the trial of defendant for some five days, had observed all witnesses and had heard and recorded the jury's verdict convicting the defendant of various offenses, then faced the responsibility of imposing sentence.").

was transferred to Las Vegas. Through happenstance, the friend's belongings were packed on pallets in the back of a truck defendant was driving, along with other pallets containing the company's regular cargo. The friend's belongings included the two handguns and shotgun identified in the indictments, which the friend lawfully purchased and possessed in New Jersey. The company's shipping manager, James Taylor, opened the pallet containing the box which held the guns and rearranged the contents so as to better fit the pallet. Taylor denied having any knowledge of the contents of the box. Pursuant to the company's standard practice, the pallet was then re-shrink-wrapped, secured with a steel band, and labeled with a packing slip. It was loaded onto defendant's truck along with other goods.

When the shipment arrived in Las Vegas, the pallet containing the guns had been opened——it was neither shrink-wrapped nor secured by a steel band——and the weapons were missing. When asked about the missing firearms, defendant denied any knowledge as to their disappearance. The friend contacted police in New Jersey and was eventually directed to Detective Peter Piro of the Monroe Police Department.

Piro went to the business location and saw video footage of the truck arriving at its first connection point. He could see that the pallet in question did not have a packing slip. When he

later returned to the business premises, the video could not be located and the person who had found it no longer worked there.

When Piro met with defendant on July 14, 2005, he initially denied any involvement. After being Mirandized[2] and told about the video Piro had seen, defendant admitted taking the guns. He said that Taylor had teased him about driving a load that included guns because he was a convicted person. He claimed that this placed him in a quandary because he knew since he was on parole, he was not supposed to have anything to do with guns. When he testified at trial, Taylor, in addition to denying knowing anything about the contents of the packages, also denied saying anything to defendant about him transporting guns.

Defendant told Piro that he stopped the truck at a highway exit, called an acquaintance named "T.D.," removed the shrink wrap and bands from the pallet, and gave T.D. the weapons. Defendant later retrieved them from T.D. and gave the two handguns to another acquaintance, Kenny Davis. Defendant's statement was not recorded or reduced to writing.

Defendant delivered the rifle to Piro a day or two after the initial interview. After about three weeks of allegedly attempting

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

to talk Davis into returning the handguns, defendant stopped returning the officer's calls. Defendant was then charged.

In February 2006, the Ruger was located on Davis's person during a routine traffic stop. The Smith & Wesson has never been located.

During closing argument, defendant's attorney referred to defendant's explanation for taking the weapons as motivated by his status as a convicted person. The attorney said:

> Now, there has been some indication, through the testimony in this case, that [defendant] had a criminal record. I don't know if that was [defendant's friend] and Mr. Taylor or [defendant's friend] and Detective Piro. But you heard about it. And that is something I would like you to factor in, when you try to determine what happened, and why it happened.

The prosecutor in turn referred to this defense theory in his summation:

> [T]wo wrongs don't make a right. I submit to you, and as the testimony establishes, there is no violation of the law [on the part of Taylor].
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> But, more importantly, think about it very logically. If there, in fact, was -- okay -- they violated the law, so, I can steal, and distribute the guns, on the streets of Plainfield. Somehow there seems to be a disconnect in this particular case. There is a disconnect in that scenario. Things spiraled out of control for the defendant. One mess up and back to prison. He didn't tell you that. Or he did that out of fear for his safety. He said, isn't it true, my client

> told you that T.D. went in the back of the van?
>
> Members of the jury, that's not what this case is about. Members of the jury, there is no evidence, as to any fear for safety or anything. Those are efforts, to decide this case, on something other than the evidence. And you folks took an oath to decide this case on the evidence. What comes from the witness stand, and nothing else. And you took an oath, not to base this case on speculation, conjecture, or anything like that. This defendant, from day one, knew that he was going to steal these items.
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> But the long and the short of it is, this whole parole status thing, think about it. [The company] is located at Exit 8-A. And I asked him, isn't there a Holiday Inn, or something there. What else is there in that area? It's a big, industrial complex. Just throw them away. More importantly, before you even get into the car, don't get in. But, once you get in, throw them away.
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> Because there is no concern between Exit 8-A and Exit 9. No concern. No body of water that you can throw them in. No garbage can that you can throw them in. From Exit 9 to Exit 10, no concern. No garbage can. No body of water. No phone calls. Do you call anybody. No. From Exit 10 to Exit 11. From your own common sense, the proximity between Plainfield and Woodbridge, and the location to meet at.

No objections were made by either attorney to the other's summation.

Pursuant to defendant's request, the judge instructed the jury regarding his constitutional right to remain silent:

> [I]n this particular matter, the defendant elected not to testify at trial. It is his constitutional right to remain silent. And you must not consider, for any purpose, or in any manner, in arriving at your verdict, the fact that the defendant did not testify. That fact should not enter into your deliberations or discussions in any manner, at any time. The defendant is entitled to have the jury consider all the evidence presented at trial. He is presumed innocent, even if he chooses not to testify.

This instruction tracks Model Jury Charge (Criminal), "Defendant's Election Not to Testify" (2009).

In sentencing defendant seven years after the trial, the second judge stated:

> And I want to make this clear. These were three separate weapons and while it did occur at the same time, it is so clear to the court how different danger was represented by taking and distributing out to others these weapons because one of them is still out there. And I don't know if that one has or will be used for a future shooting, death, something terrible. One was on — as the prosecutor said, found on a person at some time. One was retrieved at the time.
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> So it's very clear to this court that these are separate and distinct in terms of the — of the potential violence that is inherent to guns out there in the wrong hands, at the wrong time, with the wrong people. And this case is a perfect example of that. The defendant, if his motivation is as he said, used the worst judgment in the world in this case as a convicted felon to give an acquaintance of his these guns to do with as he would. And while he may have retrieved one, the two remained out there and of great concern to the [c]ourt.

> And it is appropriate in conformity with the Yarbough[3] Court that everything not be concurrent in this case. I didn't give everything else consecutive, but it seemed appropriate to this [c]ourt with regard to the certain persons because that's the particularly — almost the worst of all the charges here because this defendant [was] on parole, knowing what the requirements were and what the consequences were to him shows actions that could have led to such terrible consequences. And there are no free crimes, as Yarbough says. And as I said, [d]efendant is being sentenced pursuant to the Graves Act, as well as [N.J.S.A. 2C:39-7] which has to do with the certain persons where there is a mandatory five-year period of parole ineligibility.

Now on appeal, defendant raises the following points for our consideration:

> POINT I
> THE PROSECUTOR'S REMARKS REGARDING DEFENDANT'S SILENCE WERE IMPROPER AND PREJUDICIAL, NECESSITATING REVERSAL. U.S. CONST., AMEND. V, VI, XIV; N.J. CONST. [], ART. 1, [¶] 1, 9, 10 (Not Raised Below).
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> POINT II
> THE TRIAL COURT ERRED IN IMPOSING A CONSECUTIVE SENTENCE, WHICH WAS OTHERWISE EXCESSIVE, AND WHICH REQUIRES REDUCTION.

I.

A defendant has a right not to testify in his own trial. U.S. Const. amend X; State v. Bogus, 223 N.J. Super. 409, 421 (App.

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[3] State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

Div.), certif. denied, 111 N.J. 567 (1988). When a defendant elects not to testify, courts caution

> against comments by prosecutors which may adversely affect an accused's Fifth Amendment rights. A prosecutor should not either in subtle or obvious fashion draw attention to a defendant's failure to testify. Remarks which 'skirt the edges' of impermissible comment are neither desirable nor worth the risk of reversal of what may be a well-deserved conviction.
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> [State v. Engel, 249 N.J. Super. 336, 382 (App. Div.) (emphasis added) (quoting State v. Dent, 51 N.J. 428, 442 (1968)), certif. denied, 130 N.J. 393 (1991).]

However, "[t]he prosecutor's misconduct must be viewed in the context of a protracted trial." Ibid. (citing State v. Ramseur, 106 N.J. 123, 323 (1987)). Reversal is warranted when, viewing the summation as a whole, "the prosecutor's errant remark was so egregious as to deny defendant[] a fair trial." Ibid.

In making this determination, we consider such factors as "whether defense counsel made a timely and proper objection, whether the remark was withdrawn promptly, and whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. If no objection is made, the remarks usually will not be deemed prejudicial." Ramseur, supra, 106 N.J. at 322-23 (internal citation omitted).

Where the appellant fails to object to an alleged error or omission, we review the action for plain error. R. 2:10-2. "[C]ourts are generally reluctant 'to reverse on the grounds of plain error when no objection to a charge has been made.'" State v. Marrero, 148 N.J. 469, 496 (1997) (quoting State v. Weeks, 107 N.J. 396, 410 (1987)). Therefore, "the error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached." State v. R.K., 220 N.J. 444, 456 (2015).

Defendant contends that the prosecutor's comments regarding his failure to explain his reason for taking the guns were improper. We agree. It was error for the prosecutor to have said that "one messup and back to prison. He didn't tell you that. Or he did that out of fear for his safety . . . there is no evidence, as to any fear for safety or anything."

Defendant urges us to hold that the error is so grievous as to warrant shifting the burden to the State to demonstrate the error was harmless beyond a reasonable doubt pursuant to Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 711 (1967). See State v. W.B., 205 N.J. 588, 614 n.12 (2011). Regardless of whether we employ a traditional plain error analysis, or apply the higher Chapman standard, the prosecutor's

inappropriate remarks did not prejudice defendant's right to a fair trial.

The improper comments, which were themselves somewhat confusing, were the State's response to defendant's closing argument that he removed the weapons from the truck because he was afraid of being found in possession of them. See State v. Johnson, 287 N.J. Super. 247, 266 (App. Div.) (stating "[a] prosecutor may respond to an issue or argument raised by defense counsel" in summation), certif. denied, 144 N.J. 587 (1996). Given that those statements were the justification defendant gave for the theft, and were presumably inextricably bound up with his confession, it was not possible for the issue of defendant's parole status and prior criminal history to be avoided during the trial. Defense counsel, therefore, as a matter of strategy, had to arrive at some means of using that ordinarily inadmissible and damaging information in a positive way, in order to justify defendant's behavior and present a defense to the jury, albeit a weak one. Counsel had no choice but to discuss defendant's confession, and attempt to make the best of his rather puzzling explanation for taking the guns to begin with. The argument opened the door for the prosecutor to respond, although the manner in which he responded was unnecessary.

The prosecutor could have merely pointed out that defendant had many other ways of avoiding the potential risks to his parole status from transporting the weapons. The prosecutor did not need to comment on defendant's failure to explain his fears to the jury.

Nonetheless, we are satisfied that the comments were not plain error. We have no doubt, regardless of the prosecutor's improper comments, that the jury would have reached the same conclusion without them. The State's case was overwhelming, including defendant's confession and the fact that the person to whom defendant gave the handguns was later found in possession of one of them. Defendant even returned the shotgun himself.

With regard to defendant's claim that his counsel was ineffective for failing to object to the State's comments, we generally do not entertain ineffective assistance of counsel claims on direct appeal. See State v. McDonald, 211 N.J. 4, 30 (2012). If the argument is renewed, it should be by way of a post-conviction relief petition. See R. 3:33-1 to -2.

II.

Finally, defendant contends that the sentencing judge erred by imposing consecutive sentences on one of the certain persons not to possess convictions. We agree.

Although each weapon was capable of harm to the public, and one handgun was never recovered at all, the circumstances involved one criminal episode with a singular objective and one victim—defendant's friend. See Yarbough, supra, 100 N.J. at 643-44 ("[w]hether or not . . . the crimes and their objectives were predominantly independent of each other . . . [and] any of the crimes involved multiple victims" are factors to consider in sentencing).

Ordinarily, we afford sentencing courts great discretion. See State v. Case, 220 N.J. 49, 65 (2014). However, in this case, the consecutive sentences clearly violate the Yarbough principles and are therefore an abuse of discretion. Yarbough, supra, 100 N.J. at 643-45. Piecemeal consideration of the facts resulting in a fourteen-year sentence with ten years of parole ineligibility was unwarranted. We therefore vacate the sentence and remand for a new hearing.

Affirmed in part, reversed in part, and remanded for resentencing.