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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-4274-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DENISEA DESENA-PHELPS, a/k/a DENISEA
DESENA, DENISEA PHELPS, DENISEA SPELMAN,

Defendant-Appellant.

Submitted February 14, 2017 - Decided March 23, 2017

Before Judges Koblitz, Rothstadt and Summers.

On appeal from the Superior Court of New
Jersey, Law Division, Monmouth County,
Indictment No. 11-02-0412.

Joseph E. Krakora, Public Defender, attorney
for appellant (Frank M. Gennaro, Designated
Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Monica do
Outeiro, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

A jury convicted defendant of second-degree theft by
deception, N.J.S.A. 2C:20-4, for misappropriating \$110,937.68 from

her employer, a law firm owned by Douglas Hanna, over the course of two and one-half years when she worked as the firm's bookkeeper. The trial judge sentenced defendant, who had no prior indictable convictions, to five years in prison. We now reverse the conviction and remand for a new trial because during the State's cross-examination of the victim, the Assistant Prosecutor read aloud the firm's accountant's report, including the conclusion that financial irregularities were due to defendant's "fraudulent activity."

Hanna, a personal injury attorney, hired defendant as a bookkeeper for his firm in June 2004. According to Hanna, defendant was paid approximately \$52,000 a year. Defendant was responsible for paying the firm's bills, writing checks, making bank deposits, managing the firm's business and trust accounts and preparing the payroll with ADP. Defendant was a signatory for both the business and trust accounts and was authorized to use Hanna's signature stamp for checks.

Both defendant and the firm's accountant had access to the firm's Quickbooks system. Hanna testified that he didn't know how to use the Quickbooks system. Hanna admitted that he "was not very good at office detail stuff" and that he did not monitor defendant's activities with the trust account "closely enough."

Hanna fired defendant in June 2008 because of a dispute over the use of a Sunoco gas card. According to Hanna, within a few days of defendant's departure from the firm, the new bookkeeper, Linda Meyer, discovered problems with the firm's accounts. While "reconciling" the firm's Superior Court filings, Meyer saw a \$2,000 payment, in the form of a check, made out to the Superior Court on Quickbooks that was not reflected on the Superior Court statement. Meyer then looked at the firm's TD Bank online account and saw that the check, dated June 13, 2008, was made out to cash using Hannah's signature stamp. Defendant had endorsed the check. Meyer confirmed that the Superior Court never received the check. Meyer then found similar discrepancies with other checks that had been cashed by defendant.

Hanna reported the theft to the Monmouth County Prosecutor's Office and to the firm's insurance company, Travelers Insurance Company (Travelers). Hanna's Travelers policy covered employee theft and had a limit of \$75,000. Travelers reviewed the firm's accounting records from January 2007 to June 2008. It stopped the review after uncovering a \$75,000 loss. Hanna then received \$75,000 in settlement of his claim.

Hanna hired certified public accountant Charles Heuser to review all of the firm's records from January 2006 to June 2008. Heuser was not qualified as an expert witness and therefore

testified as a lay witness. Heuser's review of the firm's business account uncovered "a substantial amount of entries recorded in QuickBooks [that] did not agree with the actual checks that were prepared and processed by the bank." Heuser found that a great number of the checks were signed by defendant or stamped with Hanna's signature.

Heuser also reviewed the firm's trust account and discovered that it improperly contained a "miscellaneous" account. Heuser observed improper transfers of money from the trust miscellaneous account to the business account. He testified to "a lot of activity where there would be checks drawn on the trust account charged to this miscellaneous account" and then transferred to the firm's business account. He also testified that defendant endorsed seventy-five percent of the checks that came out of the trust account.

Heuser issued a preliminary report of the money he found misappropriated from the firm between 2006 and 2008. The report calculated a total amount of theft "in the area of \$135,000."

Monmouth County Prosecutor's Detective Edward Finlay investigated the theft allegations. Finlay reviewed defendant's personal bank records and discovered a significant amount of money transferred from the firm's business account to defendant's

personal account and then to defendant's husband's personal bank account.

Teri Blesch, a financial analyst for the Monmouth County Prosecutor's Office, performed an analysis revealing a theft of \$110,937.68. Blesch testified that defendant often received duplicate paychecks for the same amount, one check generated electronically by ADP and the other written out at the office. Both checks were "either written on the same day or within a few days." One of the duplicate checks would be entered in QuickBooks for salary and benefits and the other for "interest expense or client cost."

According to Hanna, he never authorized defendant to transfer money earmarked for clients from the trust account to the business account and he never authorized defendant to take money in excess of her salary from the firm.

Defendant claimed that the firm was in dire financial straits and that all of her actions were with Hanna's knowledge or at his direction to keep the struggling firm afloat and to conceal the firm's financial troubles. Defendant also testified that some of the money she deposited into her account was her legitimate compensation. Defendant testified that Hanna "knew every penny that walked in and out of [the firm]."

Defendant raises the following issues on appeal:

POINT ONE: DEFENDANT WAS PREJUDICED BY THE TRIAL COURT'S ADMISSION OF IMPROPER LAY OPINION TESTIMONY ON THE ULTIMATE FACTUAL ISSUE. (NOT RAISED BELOW.)

POINT TWO: DEFICIENT JURY INSTRUCTIONS AND AN INADEQUATE VERDICT SHEET LED THE JURY TO AN UNJUST RESULT. (NOT RAISED BELOW.)

POINT THREE: DEFENDANT WAS PREJUDICED BY THE TRIAL COURT'S REFUSAL TO PROVIDE THE JURY THE "FALSE IN ONE FALSE IN ALL" INSTRUCTION.

POINT FOUR: THE COMMENTS OF THE PROSECUTOR DURING HER SUMMATION CONSTITUTED PROSECUTORIAL MISCONDUCT. (PARTIALLY RAISED BELOW.)

POINT FIVE: THE TRIAL COURT'S ENTRY OF A CIVIL JUDGMENT IN FAVOR OF TRAVELER'S INSURANCE COMPANY IN LIEU OF RESTITUTION WAS AN ILLEGAL SENTENCE.

We review an error not raised at the trial court under the plain error standard. R. 2:10-2. Plain error is "error possessing a clear capacity to bring about an unjust result and which substantially prejudiced the defendant's fundamental right to have the jury fairly evaluate the merits of his [or her] defense." State v. Timmendequas, 161 N.J. 515, 576-77 (1999) (quoting State v. Irving, 114 N.J. 427, 444 (1989)), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). A reversal based on plain error requires us to find that the error likely led to an unjust result that 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. Williams, 168 N.J. 323, 336 (2001) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

Defendant argues in Point I that the State committed plain error when the assistant prosecutor read to the jury portions of Heuser's report that constituted inadmissible lay opinion testimony on the ultimate issue, whether defendant was guilty of theft by deception.

During attorney Hanna's testimony on cross-examination, and before the accountant, Heuser's, testimony, defense counsel used Heuser's preliminary report for the sole purpose of refreshing Hanna's recollection of the poor financial condition of the firm from 2006 to 2008. On re-direct, the State read into the record unrelated portions of the Heuser report:

PROSECUTOR: I'm going to read it and you let me know that I'm reading it correctly. Okay?

HANNA: Okay.

PROSECUTOR: Mr. Heuser found that the trust account was maintained at Commerce Bank. The office manager, a nonattorney -- by office manager he's referring to the defendant -- had unrestricted access to the account. It appears she signed the majority of trust account checks and authorized the majority of trust transfers during the period under review. Did I read that correctly?

HANNA: Yes, you did.

PROSECUTOR: He also indicates at the bottom: It should be noted -- and this is after talking about the irregularities in the trust account

-- it should be noted that the office manager appears to have been responsible for the reconciliation of all accounts. Is that what he found?

HANNA: Yes.

PROSECUTOR: And then turning to his conclusion: It is obvious the extent of the irregularities that exist in the attorney business and trust accounts are material and the direct result of fraudulent activity of the office manager and a lack [of] implementation of the most basic and internal controls by the owner. Did I read that correctly?

HANNA: Yes.

PROSECUTOR: He also indicates: In all likelihood the trust transfers -- which you talked about on cross -- orchestrated by the office manager allowed her to misappropriate additional amounts from the business account. Did I read that correctly?

HANNA: Yes.

[(Emphasis added).]

Defense counsel did not object at trial. Defendant now argues that Heuser's statements were improper because it was beyond the scope of admissible lay opinion and "it usurped the province of the jury, by expressing the witness' opinion as to Defendant's guilt."

The State responds that admission of Heuser's conclusions put the financial standing of the firm into proper perspective, and was appropriate pursuant to the doctrine of completeness. Under

the rule of completeness, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously." N.J.R.E. 106. The reading of a second writing or statement is permissible "where 'it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding.'" Alves v. Rosenberg, 400 N.J. Super. 553, 562 (App. Div. 2008) (quoting State v. Lozada, 257 N.J. Super. 260, 272 (App. Div.), certif. denied, 130 N.J. 595 (1992)). The remaining portion must "relate[] to the same subject matter and concern[] the specific matter opened up." State v. James, 144 N.J. 538, 554 (1996) (citation omitted). "The object of the rule is to permit the trier of facts to have laid before it all that was said at the same time upon the same subject matter." State v. Gomez, 246 N.J. Super. 209, 217 (App. Div. 1991).

Under N.J.R.E. 701, which governs lay opinion testimony, "If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining


a fact in issue." Neither expert nor lay opinion testimony may be used to express a view on the ultimate question of guilt or innocence. State v. McLean, 205 N.J. 438, 463 (2011) (reversing the defendant's possession with intent to distribute convictions because a testifying police officer, who observed the defendant hand an item to an individual in exchange for money, expressed the opinion that a drug transaction had occurred).

Here, defense counsel used Heuser's report to refresh Hanna's recollection about the financial status of the firm at the time of the report. Hanna's testimony was limited to Heuser's valuation of the firm's assets and liabilities. The portion of the report that the prosecution read into evidence on re-direct was not about the firm's assets and liabilities, but was about Heuser's conclusions as to the cause of the irregularities in the firm's accounts. The prosecutor's reading of this portion of the report was not proper under the completeness rule. Furthermore, and most importantly, the testimony that defendant engaged in "fraudulent activity" and "misappropriate[d] additional amounts from the business account" was lay opinion testimony that pronounced defendant guilty. The testimony "was impermissible both because it was an expression of a belief in defendant's guilt and because it presumed to give an opinion on matters that were not beyond the understanding of the jury." McLean, supra, 205 N.J. at 463.

"[A]ny finding of plain error depends on an evaluation of the overall strength of the State's case." State v. Chapland, 187 N.J. 275, 289 (2006). In this case, the only issue for the jury to decide was whether defendant fraudulently stole the money. Although a lay witness, Heuser was an accountant with twenty years experience. As in McLean, where the police officer's lay opinion could have carried weight with the jury, Heuser's opinion evidence possessed a clear capacity to bring about an unjust result.

Reversed.

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


CLERK OF THE APPELLATE DIVISION