SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4790-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHIRLENE FOAT-LEITH,

Defendant-Appellant.

Submitted January 31, 2017 – Decided April 26, 2017

Before Judges Messano and Suter.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 14-03-0260.

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

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

PER CURIAM

Defendant Shirlene Foat-Leith was convicted by a jury of third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1); third-

degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3); third-degree possession of heroin with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-7; third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1); third-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3); and third-degree possession of cocaine with intent to distribute within 1,000 feet of a school property, N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-7. After appropriate mergers, the judge granted the State's motion for a mandatory extended term pursuant to N.J.S.A. 2C:43-6(f), and imposed two concurrent ten-year terms of imprisonment with five-years of parole ineligibility.

Defendant raises the following issues on appeal:

> POINT I
>
> THE TRIAL COURT'S FAILURE TO CONDUCT A SANDS/BRUNSON[1] HEARING BEFORE TRIAL AND ITS ERRONEOUS DECISION TO SANITIZE DEFENDANT'S SIMILAR CONVICTIONS BUT NOT HER DISSIMILAR ONE DEPRIVED DEFENDANT OF A FAIR TRIAL. (Not raised below).
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> POINT II
>
> THE DRUG EXPERT'S TESTIMONY, INCLUDING HIS RESPONSE TO THE HYPOTHETICAL, WAS IMPROPER

[1] State v. Sands, 76 N.J. 127 (1978); State v. Brunson, 132 N.J. 377 (1993).

BECAUSE IT DID NOT ASSIST THE JURY AND THE RISK OF UNDUE PREJUDICE FAR OUTWEIGHED ANY PROBATIVE VALUE. (Partially raised below).

POINT III

A MAXIMUM EXTENDED-TERM SENTENCE IS MANIFESTLY EXCESSIVE IN THIS CASE.

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

I.

The testimony at trial revealed that members of the Middlesex County Prosecutor's Office Narcotics Task Force (NTF) were surveilling a location in New Brunswick. Defendant, co-defendant, Leonard Denson, and another woman, Tonya Denson, were standing in front of a house located within 1000 feet of a school.[2] Lieutenant Steven Weitz observed defendant remove a plastic bag from her handbag and place it on a retaining wall. Based on the way defendant handled the bag, Weitz believed it contained some type of can.

Weitz radioed other officers to approach the group. Leonard Denson fled on foot, and Weitz saw defendant take the plastic bag and throw it on the lawn. When Weitz arrived on scene, he told

[2] Before defendant's trial, Leonard Denson pled guilty to the single count in the indictment charging him with fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2). Tonya Denson is Leonard Denson's sister, however, she was not arrested by police.

New Brunswick Police Detective Dean Dakin, who was standing near defendant, to retrieve the plastic bag. Inside the bag was a "stash can" with a top that screwed on and off. Dakin found six bags of cocaine and 180 packs of heroin, packaged into three "bricks" of fifty packs each wrapped in magazine paper, along with thirty loose packs at the bottom of the can. Police arrested defendant and found $701 dollars in varying denominations in her handbag.

The State called Daniel Muntone, an agent in the Prosecutor's Office who had previously served as deputy commander of the NTF, as an expert witness in street level narcotics distribution, packaging and sales. We discuss that testimony in detail below. Additionally, the State's expert forensic chemist testified the substances recovered were heroin and cocaine.

In a pre-trial memorandum, the State announced its intention to introduce defendant's prior convictions if she elected to testify at trial.[3] See N.J.R.E. 609 (permitting impeachment in certain circumstances through introduction of prior criminal convictions). The judge then handling the case indicated his intention to hold a Sands/Brunson hearing prior to defendant making

[3] Defendant had earlier testified at a pre-trial evidentiary hearing on her motion to suppress.

her decision, preliminarily indicating he would not permit the introduction of any conviction more than ten-years old.

After the State rested, the trial judge, who was not the pre-trial judge, ruled the State could introduce three prior convictions for impeachment purposes if defendant elected to testify: a 2001 conviction for third-degree theft; a 2002 conviction for possession of CDS with intent to distribute within 1,000 feet of a school; and a 2006 conviction for third-degree possession of CDS and fourth-degree child neglect. The judge further ruled that the 2002 and 2006 convictions would be "sanitized," but not the 2001 theft conviction. Defendant elected not to testify and called no witnesses.

II.

A.

Defendant argues the judge committed reversible error by not conducting the Sands/Brunson hearing before trial and further erred by not requiring sanitization of all three convictions. Defendant never sought a hearing before trial, nor did she object to the judge's ruling regarding sanitization. As a result, we review for plain error. See R. 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . .").

Defendant cites no published decision that compels the court to conduct the Sands/Brunson hearing before trial, although we may agree that is the better course. The Court has recognized "[i]n practice, the trial court makes its determination at a hearing held before trial or, if at trial, out of the presence of the jury." State v. Whitehead, 104 N.J. 353, 358 (1986) (emphasis added). Certainly in this case, where there was ample opportunity for defendant to request a ruling before trial began, the court's decision to conduct the hearing after the State rested was not plain error.

N.J.R.E. 609(a) provides:

> (1) For the purpose of affecting the credibility of any witness, the witness's conviction of a crime, subject to Rule 403, must be admitted unless excluded by the judge pursuant to Section (b) of this rule.
>
> (2) Such conviction may be proved by examination, production of the record thereof, or by other competent evidence, except in a criminal case, when the defendant is the witness, and
>
> > (i) the prior conviction is the same or similar to one of the offenses charged, or
> >
> > (ii) the court determines that admitting the nature of the offense poses a risk of undue prejudice to a defendant,
> >
> > the State may only introduce evidence of the defendant's prior

> convictions limited to the degree of the crimes, the dates of the convictions, and the sentences imposed, excluding any evidence of the specific crimes of which defendant was convicted, unless the defendant waives any objection to the non-sanitized form of the evidence.

With limited exception, subsection (b) of the Rule presumptively excludes evidence of a prior conviction, if the conviction or defendant's release from confinement was more than ten years before the trial date. N.J.R.E. 609(b).

Admission of a defendant's prior criminal conviction "rests within the sound discretion of the trial judge." State v. Harris, 209 N.J. 431, 442 (2012) (citation omitted). "[W]hen the State introduces a prior conviction that is the same as or similar to the offense charged, the court should prevent the jury from hearing the specifics of the prior offense." State v. Hamilton, 193 N.J. 255, 257 (2008) (citing Brunson, supra, 132 N.J. at 391).

> When a defendant has multiple prior convictions, some of which are similar to the charged offense and some of which are dissimilar, the State may introduce evidence only of the date and degree of crime of all of the defendant's prior convictions, but cannot specify the nature of the offenses. Alternatively, the State may introduce without limitation evidence of only the dissimilar convictions.
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> [Brunson, supra, 132 N.J. at 394.]

All convictions must be sanitized "to avoid the speculation that inevitably would occur" if only the convictions for similar crimes were sanitized. Id. at 393.

We agree with defendant that the judge erred when he ruled the State could use defendant's unsanitized theft conviction for impeachment purposes if she testified, but we disagree that the ruling was plain error. In light of the fact that trial counsel posed no objection, it is inconceivable that the ruling influenced defendant's election not to testify, or otherwise had the clear capacity to produce an unjust result. R. 2:10-2; State v. Macon, 57 N.J. 325, 335-37 (1971).

B.

After being qualified as an expert, Agent Muntone testified extensively regarding various aspects of street level drug trafficking, before the prosecutor posed "a few hypotheticals."

> Q: The police come upon a man sitting on a park bench in the City of New Brunswick. They have occasion to search that person and find three small bags of cocaine and nothing else.
>
> Given that hypothetical could you draw any conclusions as to whether that cocaine was possessed for personal use or with intent to distribute?
>
> A: Three bags of coke by itself with nothing else, I have to -- now, I'm not saying it couldn't be. But based on the factors that were given to me, I'd have to say it was possessed for personal use.

Q: And [on] what facts do you base that opinion?

A: Just the amount and lack of anything else. You know, I don't know if we got into serving sizes or doses units.

. . . [A] good barometer for us is one to two bags of each would be a serving size or a dosage unit.

So, you know, if somebody had three bags on them, that could be for personal use.

Q: Okay. Let's say during the search of this man, in addition to three small bags of cocaine, the police also recovered five decks of heroin, and $20 in cash and nothing else.

Given that hypothetical, can you draw any conclusion as to whether that cocaine and heroin was possessed for personal use or with intent to distribute?

. . . .

A: [T]he various drugs, and the monies are all factors that go into my opinion.

However, the lack of the amount and the lack -- I still think -- we're getting closer, but I'd still say -- I'd have to err and say that it was possessed for personal use at that point.

Q: Seeing the man sitting on a park bench and police search him. They find five bags of cocaine and 75 decks of heroin which are packaged, 50 decks wraps [sic] together, ten rubber banded together, and five loose decks, and nothing else.

> Given that hypothetical, could you draw a conclusion as to personal use for possession with intent to distribute?
>
> . . . .
>
> A: Boy, that's a tough one. . . .
>
> I might say possession with the intent there just for the volume of the heroin and how it's packaged.
>
> It's really close. . . . But I . . . might go possession with intent on that.
>
> Q: Okay, The same man on the park bench, let's say the police search him, and they find 170 decks of heroin, and nothing else . . . .
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> A: [W]hen I give my opinion, the first and foremost of one of the factors is the amount of the drug.
>
> In my opinion from sneaking a peak when involved in the drug trade, users as well as drug distributors, . . . nobody . . . would have 170 decks of heroin for their personal use.
>
> So, that alone would be possessed with intent to distribute.

Defense counsel did not object during this colloquy.

When the prosecutor added the hypothetical person's possession of "cash in various denominations" to the last question, defense counsel objected. Curiously, she argued the expert could only render an opinion "as to the intent and not . . . as to the possession." At side bar, the judge clarified that the prosecutor was constrained to "build a hypothetical based on facts in

evidence," "not what someone on a park bench that doesn't exist in a town, that doesn't exist is doing, because it has no relevance to this." The prosecutor then asked:

> Q: [A]ssume that police come upon a man standing around on a New Brunswick City street in front of a home. And he, on his person . . . has 170 decks of heroin, and . . . $600 in cash in various denominations. And the heroin is inside a Coke bottle that screws on and off.[4]
>
> . . . .
>
> Given that hypothetical, would you draw any conclusion as to whether the heroin was possessed for personal use or with intent to distribute?
>
> A: I would say possessed with the intent to distribute.

When the prosecutor began another hypothetical involving a "man . . . standing with a backpack," defense counsel again objected, resulting in another sidebar. The judge admonished the prosecutor, stating she must limit the hypothetical question to the facts of the case. He demonstrated by example: "Assume for the purposes of my question the police observe a woman with a handbag standing by a retaining wall." The judge told the prosecutor to "track [the facts] a little bit more closely."

[4] At this point, the judge overruled defense counsel's objection.

The prosecutor then posed a hypothetical question to Muntone that closely tracked the evidence in the case. The judge overruled defense counsel's objections without discussion. Muntone opined at the conclusion of the hypothetical: "I would say [the heroin and cocaine] were possessed with the intent to distribute."

Defendant argues Muntone's testimony went to the ultimate issue of intent and should have been excluded, and the prejudicial effect of the testimony far outweighed any probative value. After defendant's brief was filed, the Court decided State v. Simms, 224 N.J. 393 (2016), and State v. Cain, 224 N.J. 410 (2016), both of which, she contends, support her argument that Muntone's testimony requires reversal.

The State counters that the testimony was proper and that the Court specifically held Simms and Cain would have only prospective application. It also contends that defense counsel never objected to the testimony regarding intent. The State also argues any error was harmless, noting the focus of the defense at trial was that Denton possessed the "stash" can, discarded it and ran when police approached.

We cannot overstate the problems associated with the use of expert testimony by prosecutors in routine drug prosecutions, nor need we repeat those concerns here, because the Court so capably explained the history of the issue in Cain, supra, 224 N.J. at

421-26. In Cain, the Court reiterated that expert testimony in drug prosecutions is permitted

> to help jurors understand the indicia of a distribution operation, such as how drug traffickers package and process drugs for distribution. Experts can shed light on the significance of the quantities and concentrations of drugs, the value of drugs, the use of identifiable logos on drug packaging, and the function of drug paraphernalia, e.g., scales, baggies, and cutting agents. Experts may also provide insight into the roles played by individuals in street-level drug transactions, and into the various machinations used by drug dealers to thwart detection . . . .
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> [Id. at 426 (citations omitted).]

However, the Court made equally clear

> an expert is no better qualified than a juror to determine the defendant's state of mind after the expert has given testimony on the peculiar characteristics of drug distribution that are beyond the juror's common understanding. In drug cases, such ultimate-issue testimony may be viewed as an expert's quasi-pronouncement of guilt that intrudes on the exclusive domain of the jury as factfinder and may result in impermissible bolstering of fact witnesses. The prejudice and potential confusion caused by such testimony substantially outweighs any probative value it may possess.
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> . . . .
>
> . . . Going forward, in drug cases, an expert witness may not opine on the defendant's state of mind. Whether a defendant possessed a controlled dangerous substance with the intent to distribute is an

> ultimate issue of fact to be decided by the jury.
>
> [Id. at 427-29.]

In light of this clear guidance, some of the expert testimony in this case was improper, because Muntone expressed his opinion on the ultimate issue in the case, i.e., whether defendant possessed the cocaine and heroin with the intent to distribute them.

We reject the State's contention that the Court intended Cain to apply purely prospectively. We adopt the sound reasoning our late colleague, Judge Carol E. Higbee, expressed in State v. Green, 447 N.J. Super. 317, 328 (App. Div. 2016), and, absent express guidance to the contrary, we give Cain's holding pipeline retroactivity. The only remaining question is whether the improper opinion testimony in this case requires reversal of defendant's convictions.

Initially, we agree with the State that defense counsel's objections never focused on Muntone's opinion regarding defendant's intent. However, in several instances, the judge simply overruled the objection without hearing its basis. As a result, we do not review this issue under the plain error standard.

Rather, we must consider whether the evidentiary error was harmless. "An evidentiary error will not be found 'harmless' if there is a reasonable doubt as to whether the error contributed

to the verdict." State v. J.R., 227 N.J. 393, 417 (2017) (citing State v. McLaughlin, 205 N.J. 185, 211-12 (2011)). "The prospect that the error gave rise to an unjust result 'must be real [and] sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'" Ibid. (quoting State v. Lazo, 209 N.J. 9, 26 (2012) (alterations in original)).

In J.R., after concluding the expert's testimony regarding Child Sexual Abuse Accommodation Syndrome exceeded proper limits, the Court reviewed the jury instructions provided by the trial court, as well as other evidence in the case that corroborated the child sexual assault victim's version of events. Id. at 418. It considered whether in light of this, the expert's "brief venture beyond the bounds of proper [expert] testimony changed the result of [the] defendant's trial," before concluding the error did not require a new trial. Id. at 420.

In this case, Muntone provided extensive testimony that was admissible under the standards outlined in Cain. He explained, for example, how street level distributors packaged and branded heroin, how individual packages were bundled together and how the narcotics were "stashed" to avoid detection. He explained how the amount of individual packages signified the likelihood of their sale. At the end of the case, the judge provided the jury with

the standard model charge regarding expert testimony, including a reminder that the jury alone was to determine whether the State had proven defendant's guilt beyond a reasonable doubt.

Unlike the corroborating evidence in J.R., however, the State relied exclusively upon Weitz's uncorroborated eyewitness testimony to establish that defendant possessed the CDS. Indeed, whether defendant possessed the can, or whether Denson did before fleeing, was the focus of the entire case, not whether the drugs found in the can were intended for sale or distribution. In her opening statement, defense counsel focused the jurors' attention on Weitz's anticipated testimony, telling them "the State's case rises and falls on the entire testimony of Lieutenant Weitz." Counsel told the jury defendant "never had that can." She argued that an innocent person, like defendant, had no reason to run, but Denson fled the scene. During cross-examination, defense counsel stressed Weitz's inability to see everything Denson did, because his body sometimes shielded the officer's view. During cross-examination of Dakin, the officer admitted that he never saw the bag in defendant's hand and only picked it up because Weitz ordered him to do so. In her summation, counsel reiterated that the State's case rested solely on Weitz's testimony. In short, possession of the can was the sole contested issue in the case.

Under these circumstances, we cannot conclude any error in admitting portions of Muntone's testimony "led the jury to a verdict it otherwise might not have reached." Id. at 417.

C.

Defendant had two prior school zone convictions, which made her eligible for a mandatory extended term with a minimum period of parole ineligibility.[5] N.J.S.A. 2C:43-6(f). She also had several other indictable convictions. The judge found aggravating sentencing factors three, six and nine. N.J.S.A. 2C:44-1(a)(3) (risk of re-offense); (a)(6) (extent of prior record and seriousness of current offense); (a)(9) (need to deter). He found no mitigating sentencing factors. N.J.S.A. 2C:44-1(b). The judge imposed the maximum sentence on each school-zone conviction, i.e., ten years with a five-year period of parole ineligibility, but ordered the sentences served concurrently.

Defendant argues that the judge focused on her past criminal history and not the "gravity of the offense." She contends her crimes were committed at night, when the nearby school was not in session and no schoolchildren were present. Defendant argues the imposition of the maximum sentence was manifestly excessive. We disagree and affirm the sentence.

[5] The prosecutor noted that the prior cases involved proximity to the same school.

In State v. Thomas, 188 N.J. 137, 150 (2006), the Court made clear that "when a prosecuting attorney makes application under N.J.S.A. 2C:43-6(f), the sole determination for the sentencing court is to confirm that the defendant has the predicate prior convictions to qualify for enhanced sentencing." Defendant does not question that the judge was required to impose a mandatory extended term with a minimum period of parole ineligibility equal to one-third to one-half of the term, whichever was greater. N.J.S.A. 2C:43-6(f). The judge was also required to fix the term "within the extended-term range based on aggravating and mitigating factors found to be present." Thomas, supra, 188 N.J. at 154.

"Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). We assess whether the aggravating and mitigating factors "were based upon competent credible evidence in the record." State v. Miller, 205 N.J. 109, 127 (2011) (quoting State v. Bieniek, 200 N.J. 601, 608 (2010)). We do not "'substitute [our] assessment of aggravating and mitigating factors' for the trial court's judgment." Ibid. (quoting Bieniek, supra, 200 N.J. at 608). When the judge has followed the sentencing guidelines, and his findings of

aggravating and mitigating factors are supported by the record, we will only reverse if the sentence "shocks the judicial conscience" in light of the particular facts of the case. State v. Roth, 95 N.J. 334, 364 (1984); accord State v. Cassady, 198 N.J. 165, 183-84 (2009).

In this case, the judge followed the guidelines, he appropriately found aggravating sentencing factors and no mitigating factors, and we find no basis to disturb the exercise of the judge's broad sentencing discretion.

Affirmed.