SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4860-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALSAMIR T. BROWN,

Defendant-Appellant.

Submitted May 24, 2017 – Decided December 4, 2017

Before Judges Fuentes, Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 13-03-0592.

Joseph E. Krakora, Public Defender, attorney for appellant (Richard Sparaco, Designated Counsel, on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Kayla E. Rowe, Special Deputy Attorney General/Acting Assistant Prosecutor, on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

Following a four-day jury trial, defendant Alsamir Brown was convicted of second-degree unlawful possession of a weapon, namely, an assault firearm, N.J.S.A. 2C:39-5(f); fourth-degree unlawful possession of a defaced firearm, N.J.S.A. 2C:39-3(d); and fourth-degree unlawful possession of a large capacity ammunition magazine, N.J.S.A. 2C:39-3(j). He was sentenced to an aggregate term of nine years with a four-and-one-half-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c). The charges stemmed from two police officers observing defendant throw a machine gun into the trunk of a car before driving away. In a subsequent motor vehicle stop, defendant opened the trunk, revealing the gun in plain view.[1]

On appeal, defendant raises the following contentions:

> POINT I — DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL BECAUSE OF THE OFFICERS' TESTIMONY THAT DEFENDANT "APPEARED" TO HAVE A MACHINE GUN IN HIS HAND, THEREBY GIVING THE JURY THE OFFICERS' LAY OPINIONS OR BELIEFS ON THE ULTIMATE ISSUE. (NOT RAISED BELOW).
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> POINT II - DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL WHEN THE JURY HEARD BAD CHARACTER EVIDENCE, SPECIFICALLY DEFENDANT'S IMPLIED INCARCERATION PRIOR TO TRIAL.
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> POINT III - THE SENTENCE OF NINE YEARS WAS EXCESSIVE.

[1] The trial court denied defendant's suppression motion on May 20, 2014.

After considering the arguments presented, in light of the record and applicable law, we affirm.

At trial, the State called Lieutenant Chris Gialanella and Detective James Cosgrove, both longtime veterans of the Newark Police Department. They testified that at about 9:15 p.m. on August 21, 2012, they and Detective Richard Weber were patrolling a crime-ridden residential area of Newark's south ward in an unmarked police car. At one point, they observed an unoccupied black sedan on Huntington Terrace. The sedan was parked "haphazardly[,]" "almost in the middle of the street[,]" with its trunk open, and its trunk light and tail lights illuminated. The area was also "very well lit[,]" with street lights and porch lights.

Cosgrove was driving and Gialanella was seated in the front passenger seat. From this vantage point, they observed a man, later identified as defendant, exit "the driveway of an abandoned building[]" carrying what appeared "to be a machine gun in his hand." When he reached the black sedan, defendant tossed the weapon into the trunk, closed the trunk, hurried into the front driver's seat, and sped off.

Gialanella described the weapon as "a machine gun" based on his "training and experience[,]" having conducted hundreds of investigations involving firearms. He testified the weapon had

"an extended magazine" to "hold the bullets[,]" which was "not normal for a gun that size." Due to the extended magazine, the firearm was readily apparent to him "sticking out from behind [defendant's] [waist] area." Cosgrove, who had also conducted "hundreds" of investigations involving firearms, described the firearm as "a MAC-10 assault weapon" because of "the outline of the weapon[.]" Cosgrove also observed "the extended magazine sticking out behind [defendant] and the barrel facing the ground." Prior to that night, Cosgrove had observed a MAC-10 "probably [forty] or [fifty]" times.[2]

After defendant pulled away, the officers conducted a motor vehicle stop. Defendant exited his vehicle and, as he approached the officers, blurted out "I was going fast, I have to take a shit[.]" After Weber conducted a pat down of defendant with negative results, he asked defendant to produce his driving credentials. Instead, defendant reached into his vehicle and "pressed the trunk release button[,]" opening the trunk of the car. Gialanella, who by then was standing near the trunk of the vehicle, "observed the same item that [he] saw in [defendant's] hand previously . . . in the trunk in plain view." Gialanella

[2] Weber testified that from the rear passenger compartment of the car where he was seated, his view was obstructed. As a result, he did not observe defendant carrying a firearm or place it in the trunk of the vehicle.

immediately alerted the other officers, and Weber placed defendant under arrest without incident.

Before turning the firearm over to the crime scene detective who responded to the scene, Gialanella secured the firearm by removing one live round from the chamber and seventeen live rounds from the magazine. Subsequent examination of the firearm by the crime scene detective confirmed that it was a "MAC-10" and that "[t]he serial number was obliterated[,]" rendering it a defaced firearm. See N.J.S.A. 2C:39-1(b). However, no trace or fingerprint evidence was recovered from the weapon. A firearms ballistics expert testified that the firearm was classified as a "semi-automatic" "assault weapon" with "a high capacity magazine[]" and "full metal jacket" ammunition. After testing, he determined that the firearm "was operable[.]"

The parties stipulated that defendant did not have a permit to carry a firearm at any time. The parties also stipulated that the following recorded telephone conversation occurred between defendant and an unidentified person on March 8, 2014:[3]

> OPERATOR: You have a prepaid call from --
>
> [DEFENDANT]: Samir.

[3] The trial court granted in part and denied in part the State's pre-trial motion to admit defendant's statements. The court's ruling allowed the introduction into evidence of these excerpts from defendant's March 8, 2014 conversation.

> OPERATOR: To accept this call press one. To refuse this call, hang up.
>
> [DEFENDANT]: What's going, little Bro?
>
> UNIDENTIFIED MALE VOICE: What's going is good.
>
> [DEFENDANT]: I go to court Monday and we'll see what they talk about but they sending my discovery to my strap.[4] They ain't even got no fingerprints and nothing on my shit.
>
> UNIDENTIFIED MALE VOICE: They don't?
>
> [DEFENDANT]: I don't know. It's just they don't got it. They said they put it in and that little chemical shit or whatever and it came back insufficient like. They ain't got no fingerprints on my shit. So I'm thinking about taking my shit all the way, fuck it.

At the close of the State's case, the court denied defendant's motion for a judgment of acquittal, Rule 3:18-1, and submitted the case to the jury. Following the guilty verdict, defendant was sentenced on June 1, 2015, to nine years of imprisonment with a four-and-one-half-year period of parole ineligibility on the unlawful possession of an assault firearm conviction, a concurrent eighteen-month term with an eighteen-month period of parole ineligibility on the unlawful possession of a defaced firearm conviction, and a concurrent eighteen-month term on the unlawful possession of a large capacity ammunition magazine conviction. A

[4] The parties stipulated that the term "strapped is frequently used to refer to a firearm."

memorializing judgment of conviction was entered on June 16, 2015, and this appeal followed.

Defendant argues, for the first time on appeal, that the testimony of Gialanella and Cosgrove "concerning their belief that the defendant was carrying a machine gun" was impermissible lay opinion that "was unfairly prejudicial . . . because it allowed the jury to hear the police officers' opinions on the ultimate" issue of defendant's guilt. According to defendant, "the trial court had an independent duty" to instruct the jury "that they were the sole arbiters of whether or not the defendant" possessed "an assault firearm."

Because defendant did not raise an objection before the trial court, we review his argument under the "plain error" standard, which mandates reversal only for errors "of such a nature as to have been clearly capable of producing an unjust result[.]" R. 2:10-2; State v. Maloney, 216 N.J. 91, 104 (2013). The test is whether the possibility of injustice 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. Macon, 57 N.J. 325, 336 (1971).

Lay opinion testimony is governed by N.J.R.E. 701, which permits a lay witness' "testimony in the form of opinions or inferences . . . 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." Thus, N.J.R.E. 701 imposes two important limitations on lay witness testimony. First, the testimony must be based on the perceptions of the witness, that is, "the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." State v. McLean, 205 N.J. 438, 457 (2011). The second limitation is that lay witness testimony must "assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Id. at 458.

A lay witness is not permitted to offer an opinion "on a matter 'not within [the witness'] direct ken . . . and as to which the jury is as competent as [the witness] to form a conclusion[.]'" Id. at 459 (quoting Brindley v. Firemen's Ins. Co., 35 N.J. Super. 1, 8 (App. Div. 1955). The McLean Court stressed that lay opinions may not "intrude on the province of the jury by offering, in the guise of opinions, views on the meaning of facts that the jury is fully able to sort out . . . [or] express a view on the ultimate question of guilt or innocence." Id. at 461.

Here, because the officers provided permissible lay opinion testimony, there was no error, much less plain error. The officers' testimony, based upon their observations of defendant carrying a firearm, which they recognized from their training and

experience as a machine gun, did not exceed the bounds outlined for lay opinion testimony in McLean, supra, and did not express a view on the ultimate question of guilt or innocence. Rather, their opinions explained their testimony, were based on their perceptions, were within their "direct ken" and were on a matter "as to which the jury" was not as competent to form a conclusion.

Next, defendant argues that the court erred in admitting the "portion of the recording" of the prepaid telephone call, which clearly indicated that "defendant was incarcerated prior to trial." According to defendant, admission of the call violated N.J.R.E. 404(b) and N.J.R.E. 403 and denied defendant his "right to a fair trial." We disagree. The court correctly determined that the reference to the call being prepaid was not "indicative of incarceration or that it's made from the jail" because "[t]here are numerous ways to make prepaid calls." We accord a trial judge's evidentiary ruling "substantial deference," State v. Morton, 155 N.J. 383, 453 (1998), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001), and will reverse only when the trial judge's ruling was "so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982). Applying this standard, we see no abuse of discretion.

Finally, defendant argues that his sentence was excessive because, despite having "only one prior indictable conviction for

eluding police[,] . . . [t]he court found that [a]ggravating [f]actors [three], [six] and [nine] applied[]" with "no mitigating factors," and sentenced "defendant towards the upper end of the [second-degree] range[.]" "Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). We will

> affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
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> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Here, in finding aggravating factors three, six and nine, N.J.S.A. 2C:44-1a(3), (6), and (9), the court noted that defendant was "[twenty-six] years of age," a "high school" graduate, and "unmarried with one child." The court pointed out that defendant had "eight prior arrests and one prior indictable conviction in May of 2009 for eluding[,]" for which he received a prison sentence. Defendant also had two cases pending trial, a drug possession case and an aggravated assault case. The court found no mitigating factors and, in the absence of any mitigating factors, concluded "that the aggravating factors preponderate[d]."

The sentence was two years above the mid-range, accounting for the substantial and significant weight given the applicable aggravating factors and reflecting the absence of any mitigating factors. See Fuentes, supra, 217 N.J. at 73 ("[R]eason suggests that when the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range.") (quoting State v. Natale, 184 N.J. 458, 488 (2005)).

We do not "'substitute [our] assessment of aggravating and mitigating factors' for the trial court's judgment." Miller, supra, 205 N.J. at 127 (quoting State v. Bieniek, 200 N.J. 601, 608 (2010)). We acknowledge, however, that one prior indictable conviction may not support a finding of aggravating factor six. Nevertheless, despite this error, we conclude the factual findings by the judge sufficiently support the sentence imposed, obviating the need for a remand. We are satisfied that the excision of aggravating factor six would not alter the term.

Affirmed.