SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5571-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY SMITH,

Defendant-Appellant.

Submitted September 11, 2017 - Decided September 28, 2017

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-04-0943.

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

Robert D. Laurino, Acting Essex County Prosecutor, attorney for respondent (Camila Garces, Special Deputy Attorney General/ Acting Assistant Prosecutor, on the brief).

PER CURIAM

A jury convicted defendant Anthony Smith of two counts of third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10a(1); one count of third-degree possession with

intent to distribute, N.J.S.A. 2C:35-5a(1); one count of third-degree possession with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7a; two counts of second-degree possession of a firearm in the course of committing a drug offense within 1000 feet of school property, N.J.S.A. 2C:39-4.1(a); and the lesser-included disorderly persons offense of resisting arrest, N.J.S.A. 2C:29-2a(1). The jury acquitted him of another distribution count, a 1000 foot offense, maintaining a fortified structure to distribute drugs and third-degree resisting arrest.

Defendant raises two issues on appeal:

> POINT I
>
> THE TRIAL COURT'S INSTRUCTIONS TO THE JURY FOLLOWING ITS ANNOUNCEMENT THAT IT WAS DEADLOCKED WERE INAPPROPRIATE AND COERCIVE, AND REQUIRE A REMAND FOR A NEW TRIAL.
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> POINT II
>
> THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO CALL A NARCOTICS EXPERT TO TESTIFY AS TO STREET-LEVEL NARCOTICS DISTRIBUTION WHEN THE DISPUTED FACTS OF THE CASE WERE STRAIGHTFORWARD AND EXPERT TESTIMONY WAS NOT REQUIRED.

We are not persuaded by either argument.

This was a short trial. Although the court had advised the jury in voir dire that trial testimony would consume six days, the case was tried in two days. The facts were simple.

Defendant was arrested by officers who had been surveilling his apartment in order to execute a search warrant. When defendant emerged to speak to two people who had arrived in a black truck, the officers moved in. Defendant tried to run back inside, dropping a bundle of heroin in his haste. The officers managed to arrest defendant after a struggle in his foyer, during which both were bitten by defendant's pitbull. Police found over $1800 in defendant's pockets. More drugs, currency and two loaded revolvers were recovered from defendant's apartment.

The State presented the testimony of the two officers who arrested defendant, a ballistics expert, defendant's landlord and Michael Bettin, an investigative aide from the prosecutor's office who testified as an expert on street-level drug distribution. Bettin explained hand-to-hand transactions, stashes and stash locations, including fortified stashes, heroin packaging, how heroin is consumed and the practice of "re-upping," the purchase of a large quantity of stamped and pre-packaged heroin from a supplier for resale.

The defense conceded defendant was a heroin addict and that he also used Xanax, which he crushed and mixed with heroin. Defendant claims that because the officers did not testify to seeing or interrupting a hand-to-hand transaction, or that defendant accessed a stash or even that he appeared to be

exchanging a large sum of money for heroin from a supplier, Bettin's testimony was unnecessary and highly prejudicial. Specifically, defendant claims that without Bettin's testimony, the State's witnesses did not "strongly support[]" the State's theories that defendant was either selling drugs to the occupants of the black truck or using the more than $1800 he was carrying to "re-up" his stash.

It is well established that expert testimony on the use and distribution of unlawful drugs is permissible to assist jurors in understanding subjects within the specialized knowledge of the expert and beyond the ken of an average layperson. State v. Odom, 116 N.J. 65, 80-81 (1989). Our Supreme Court has instructed that trial judges are gatekeepers here, insuring that only expert testimony of value in assisting a "jury's understanding of facts and their significance" and "not unduly prejudicial" is admitted. State v. Nesbitt, 185 N.J. 504, 515 (2006).

Having reviewed the trial transcripts, we are satisfied Judge Peter V. Ryan conscientiously discharged his gatekeeping role. The judge raised with counsel whether an expert should be permitted to testify given the evidence. He conducted an extended discussion on the record, during which he carefully reviewed the facts and reasoning of the controlling cases.

After hearing the arguments of counsel, the judge permitted limited expert testimony and prohibited the use of hypothetical questions.

The State hewed to the judge's direction to "make sure" the expert was "specific" and refrained from posing hypotheticals. The expert defined terms and explained characteristics of the drug trade that in his experience distinguished it from the purchase of drugs for personal use. As circumscribed, the evidence was relevant, probative and certainly could have assisted the jury in determining whether defendant possessed heroin and Xanax in a fortified structure with the intent to distribute it, or was simply a husband and father with a drug problem and a pet pitbull. We do not find its probative value was substantially outweighed by the risk of undue prejudice. See State v. Cain, 224 N.J. 410, 421 (2016) (reviewing the Court's pronouncements on the appropriate use of expert testimony in drug cases and limiting hypotheticals to prohibit encroachment on the jury's role as the trier of fact).

We turn to defendant's issue with the jury instructions. At 3:30 p.m., after having deliberated for two hours and fifty minutes, the jury submitted a note to the judge, which stated

"We cannot move ahead. Can't come to a decision." Instead of delivering a Czachor[1] charge, the judge told the jury:

> Ladies and Gentlemen, this wasn't a long case and it wasn't a complicated case either. The facts are the facts.
>
> Everybody has a responsibility here. I have the responsibility to make sure the law is given to you appropriately and . . . decide questions on the law.
>
> [The prosecutors have] a duty to prosecute a case; [defense counsel] has a responsibility to defend the case. You have the responsibility of . . . resolving this case.
>
> You've been out a total of three hours. Woefully insufficient. I'm going to give you all the time in the world, and tomorrow is another day. We're going to bring you back in tomorrow to deliberate also. All right?
>
> I can't let you go home until we get this case resolved one way or another.
>
> Again, I appreciate your patience and your cooperation . . . let's just see what happens, all right? You're tired, let's continue to deliberate and then we'll leave you go at 4:00, and bring you back tomorrow.

Out of earshot of the jury, defense counsel immediately objected to the court's failure to deliver a Czachor charge and to the judge's remark that the case had to be "resolved one way or another." The judge responded that it was "too early" to

[1] State v. Czachor, 82 N.J. 392, 405 n.4 (1980).

give a Czachor charge and that it was the jury's responsibility to decide the case. The judge apologized to counsel if he had communicated that "inartfully." At 4:00 p.m., the judge released the jury saying:

> Again, I, I want to impart to you this. It is a very, very short time you have been deliberating. We're going to give you all the time in the world to decide this case. All right?
>
> So don't think about this case tonight at all. Come back tomorrow fresh . . . .

After deliberating for two hours the following day, the jury returned its verdict convicting defendant on six counts of the indictment, acquitting him of three others, including maintaining a fortified structure, and finding him guilty of the lesser included disorderly persons offense of resisting arrest.

We agree with defendant that the court was correct to direct the jury to continue its deliberations, see State v. Figueroa, 190 N.J. 219, 235 (2007), but its comment about not letting the jury go home until the case was resolved was improper and should not have been made. We do not, however, agree the remark, in context, was "coercive," or deprived defendant of a fair trial.

As we have noted, this was a very short trial. At the time the court made the remark to which defendant objects, it had

only the day before delivered, in the words of the model charge, the instruction to the jury on further deliberations to be given in the event of deadlock, the Czachor charge. See Model Jury Charges (Criminal), "Judge's Instructions on Further Jury Deliberations" (2013). Although the remark was no doubt inartful, as the court conceded, it was obviously not intended to be taken literally and cannot be considered prejudicial error in light of the court's otherwise careful and correct instructions to the jury. Judged in context, it presents none of the concerns that impelled us to reverse the verdict in State v. Adim, 410 N.J. Super. 410, 430 (App. Div. 2009) (concluding combined impact of coercive and intrusive components of trial court's supplemental instruction required reversal of verdict).

In his brief, defendant notes the judgment of conviction erroneously states he was convicted of third-degree resisting arrest instead of the lesser-included disorderly persons offense, N.J.S.A. 2C:29-2a(1). We further note the judgment also appears to erroneously state the total custodial term to be five years instead of the ten years imposed. Accordingly, a limited remand for correction of the judgment is required. See State v. Rivers, 252 N.J. Super. 142, 147 n.1 (App. Div. 1991) (noting in the event of a discrepancy between the court's oral pronouncement of sentence and the sentence described in the

judgment of conviction, the sentencing transcript controls and a corrective judgment is to be entered).

Defendant's conviction is affirmed. The matter is remanded for correction of the judgment of conviction. We do not retain jurisdiction.