SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5762-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RYAN T. MARTIN,

Defendant-Appellant.

Submitted March 21, 2017 – Decided April 7, 2017

Before Judges Koblitz and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 13-12-1214.

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

Sean F. Dalton, Gloucester County Prosecutor, attorney for respondent (Vanessa I. Craveiro, Assistant Prosecutor, on the brief).

PER CURIAM

A jury convicted defendant Ryan T. Martin of third-degree forgery by uttering counterfeit money, N.J.S.A. 2C:21-1(a)(3), and third-degree forgery by altering money, N.J.S.A. 2C:21-1(a)(1), for changing smaller denomination currency to larger bills and passing those bills. Defendant was sentenced to concurrent four-year prison terms. Defendant appeals from the conviction. We affirm.

On September 1, 2011, defendant attempted to make a purchase at a McDonald's drive-through window with two counterfeit $20 bills. When the police arrived at the scene, they observed defendant in the driver's seat and M.L. in the passenger's seat of a car containing $370 of counterfeit bills.

Defendant admitted to the police that M.L. made counterfeit bills in a hotel room by modifying $1 and $5 bills so that they looked like $20, $50 or $100 bills and passed them off as the larger currency throughout the town. He admitted driving M.L. to pass the counterfeit bills six or seven times. Defendant also gave the police a detailed description of the manufacturing scheme, but denied participating in the actual altering of the bills, claiming that M.L. alone changed the denominations on the bills. The police found manufacturing equipment and a counterfeit $20 bill in the hotel room defendant revealed to them. Without objection, the police officer, while testifying as to the objects

seen in a photograph of the hotel room, said he saw a bag of OxyContin pills.

Defendant raises the following issues on appeal:

> POINT I: THE TRIAL COURT'S FAILURE TO ANSWER IN THE NEGATIVE THE JURY'S QUESTION REGARDING WHETHER DEFENDANT'S KNOWLEDGE THAT ALTERING WAS TAKING PLACE ALONE MADE HIM GUILTY OF ALTERING DENIED DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW ON COUNT TWO OF THE INDICTMENT.
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> POINT II: TESTIMONY REGARDING THE PRESENCE OF OXYCOTIN IN THE MOTEL ROOM THAT WAS SEARCHED SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE BECAUSE IT WAS IRRELEVANT AND POSED A TREMENDOUS RISK OF UNDUE PREJUDICE. (Not Raised Below)

The jury asked two questions. In response to the first question, with consent of both parties, the judge provided a copy of the complete jury charge for the jury. The second question was: "If the Defendant knew that the altering was taking place, does that make him guilty of altering?" Defense counsel initially suggested the judge respond "No." After extensive discussion among counsel and the judge, the judge responded by sending a note asking if the jury wished to be re-charged as to the count of forgery by altering. Defense counsel did not voice an objection to this procedure, responding "That's it" when the judge asked "Anything else?" The jury responded to the judge's note in the negative.

Defendant now argues that defendant's conviction on count two, forgery by altering, must be reversed because the trial court failed to instruct the jury that mere knowledge of the counterfeiting operation set up in the hotel room did not make defendant guilty of altering unless he actively participated in modifying the currency.

Defendant further argues that despite his trial attorney's failure to request it, the trial judge should have sua sponte given a "mere presence" instruction. Defendant argues that the mere presence language that is found in the charge on accomplice liability incorporates defense counsel's argument in response to the jury question by stating "mere presence at or near the scene does not make one a participant in the crime, nor does the failure of a spectator to interfere make him/her a participant. . . . It is, however, a circumstance to be considered. . . ." Model Jury Charge (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6) Accomplice" (1995). Defendant argues that, although defendant was charged as a principal and not as an accomplice, State v. Randolph permits the "mere presence" instruction to be given to a defendant charged as a principal, when "the circumstances call for it." 441 N.J. Super. 533 (App. Div. 2015), certif. granted, 224 N.J. 529 (2016)

In response, the State contends that the trial court's written instructions on the elements of both forgery crimes, which included the requisite state of mind for both charges, cleared any confusion the jury might have had. The State also argues that defendant's admission coupled with his connection to the counterfeit bills made for a strong case that defendant was a principal and not an accomplice, and therefore the trial court's failure to give the unrequested "mere presence" instruction did not constitute plain error.

"Clear and correct jury instructions are essential for a fair trial." Randolph, supra, 441 N.J. Super. at 558 (quoting State v. Brown, 138 N.J. 481, 522 (1994)). "'[E]rroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). However, "[n]o party is entitled to have the jury charged in his or her own words; all that is necessary is that the charge as a whole be accurate." State v. Jordan, 147 N.J. 409, 422 (1997).

Because defense counsel did not request a "mere presence" charge, we analyze this claim under the plain error doctrine. 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 (2001).

The plain error analysis of an erroneous jury charge mandates that the reviewing court examine the charge as a whole to determine its overall effect. State v. McKinney, 223 N.J. 475, 494 (2015). "The standard for assessing the soundness of a jury instruction is 'how and in what sense, under the evidence before them, and the circumstances of the trial, would ordinary . . . jurors understand the instructions as a whole.'" State v. Savage, 172 N.J. 374, 387-88 (2002) (quoting Crego v. Carp, 295 N.J. Super. 565, 573 (App. Div. 1996), certif. denied, 149 N.J. 34 (1997)).

Under N.J.S.A. 2C:21-1(a)(1), a person is guilty of forgery by altering "if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor: (1) Alters or changes any writing of another without his authorization."

The judge charged the jury about purpose and knowledge in connection with the altering charge in substantial conformity with the forgery jury charge, Model Jury Charge (Criminal), "Forgery" (2010):

> The second element that the State must prove beyond a reasonable doubt is that the Defendant acted with the purpose to defraud

> or injure, or with knowledge that the [d]efendant is facilitating a fraud or injury.
>
> . . . .
>
> A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that it [sic] his conduct is of that nature or that such circumstances exist, or he is aware of a high probability of their existence.
>
> A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. Knowing, with knowledge or equivalent terms have the same meaning.
>
> . . . .
>
> [P]urposely or knowingly are states of mind and they cannot be seen and can only be determined by inferences from conduct, words or acts.
>
> Therefore, it is not necessary that witnesses be produced by the State to testify that a Defendant said that he purposely or knowingly did something. His purpose or knowledge may be gathered from his acts and his conduct.
>
> And from the -- all he said and did at a particular time and place, and from all the surrounding circumstances in the testimony.

The jury asked its question before it received a written copy of the charge. After receiving the written charge, the jury declined to hear another reading of the charge, did not ask any further questions, and reached a verdict shortly thereafter.

Reversal based on plain error requires us to find that the error 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)). "[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). The State's case was overwhelming. Defendant was driving the car when he attempted to utter forged currency. Other forged currency was found in the car defendant was driving, and the necessary equipment to alter the bills was found in a hotel room he revealed to the police. The fact that another person accompanied defendant was not exculpatory. The evidence did not support defendant's role as that of a spectator or innocent bystander.

In his second point defendant argues, also as plain error, that one mention of a bag of OxyContin in defendant's hotel room was so prejudicial as to deprive him of a fair trial. The pills were not linked specifically to defendant as opposed to M.L., nor was evidence introduced that the prescription pain-killer was illegally obtained. While evidence of the pills was not relevant to the charges, in light of the strength of the State's case, it was not so prejudicial as to raise a reasonable doubt as to the validity of the jury's verdict. "A defendant is entitled to a fair trial but not a perfect one." State v. Wakefield, 190 N.J.

397, 537 (2007) (citing State v. R.B., 183 N.J. 308, 333-34 (2005)).

Affirmed.