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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-0704-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALIREZA FASSIHI, a/k/a  
RAZA, ALIREZA S. FASSIHI,  
ALIRZEZA FASSIHI, ALIREZA  
SHIRAZI FASSIHI, ALI FASSIHI,  
and ALI REZA,

Defendant-Appellant.

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Submitted January 10, 2018 – Decided March 22, 2018

Before Judges Koblitz and Manahan.

On appeal from Superior Court of New Jersey,  
Law Division, Camden County, Indictment No.  
15-04-1209.

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

Mary Eva Colalillo, Camden County Prosecutor,  
attorney for respondent (Nancy P. Scharff,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Defendant Alireza Fassihi appeals from his conviction after a trial by jury on two counts of possession of a weapon with the purpose to use it unlawfully against the person of another, N.J.S.A. 2C:39-4(d) and N.J.S.A. 2C:39-5(d). On appeal, defendant argues he was denied his right to a fair trial based upon the prosecutor's improper cross-examination relating to his silence at the time of his arrest. Defendant also argues that the judge failed to instruct the jury on self-defense. We reverse.

We derive the following facts from the trial record. On January 23, 2015, defendant drove Stephanie Monzo, a friend, to the local Walmart. Monzo entered the store while defendant remained in the car. As Monzo shopped, three Walmart asset protection associates approached her based upon a suspicion of shoplifting. One of the associates requested that she "come into their office," but Monzo did not comply. One associate then advised Monzo to return the merchandise to the shelf. She refused, and instead threw the merchandise onto the ground while threatening to call police. Monzo then called defendant but was only able to say "these guys are gripping me up," prior to ending the call.

As an associate attempted to contain Monzo and diffuse the situation, defendant entered the store and began to intervene, despite having been advised to back away. When defendant took hold of Monzo in an attempt to leave the store, another associate

interceded. A physical altercation ensued. Defendant then reached into his pocket and took out a knife. Due to store protocol, once a weapon is exposed, an associate must disengage in order to neutralize a hostile environment. Defendant and Monzo "pretty quickly" exited the store and departed in defendant's vehicle.

After defendant and Monzo left the store, a customer of Walmart, who observed the altercation, called the police and gave a description of defendant's vehicle. Defendant was detained by the police a short distance away in the parking lot of a gas station. Subsequently, defendant was arrested.

A Camden County indictment charged defendant with third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2)(count one); two third-degree possession of a weapon for unlawful purpose, N.J.S.A. 2C:39-4(d) (counts two and four); and fourth-degree unlawful possession of a weapon for unlawful purpose, N.J.S.A. 2C:39-5(d).

The trial began on June 21, 2016. Prior to trial, the State moved to dismiss counts one and four of the indictment. Those counts were dismissed and counts two and three were re-numbered as counts one and two, respectfully.<sup>1</sup>

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<sup>1</sup> We refer to the counts in their original form as designated on the judgment of conviction.

During the trial, defendant testified regarding the events that occurred which resulted in his arrest and indictment.<sup>2</sup> In pertinent part, defendant testified that when he entered the store, he saw Monzo being restrained by "two guys in plain clothes" and thought "they were trying to rob her and me." Defendant acknowledged that he exhibited the knife in his possession to get the person with whom he was physically involved "off of" him. Defendant further testified that after he and Monzo left the store, they walked to his car and that, upon starting his car, he observed a woman "trying to take my license plate down," which caused him to be "confused." According to defendant, as they were driving from the scene, Monzo admitted that she was shoplifting. Defendant also testified that upon Monzo's admission, he pulled his vehicle into the gas station where he was later arrested at gunpoint. Defendant stated that, prior to the arrest, he was experiencing "so many different emotions," including anger at Monzo for stealing.

During the cross-examination of defendant, the prosecutor engaged in the following line of questioning:

Q. So you never called the police regarding that you or she was trying to be robbed [sic] by these two individuals, correct?

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<sup>2</sup> We recite the substance of defendant's direct testimony to place the cross examination in context.

A. Right, that's correct.

Q. You didn't shout to the other customers to call the police because you thought you were being robbed, all right. You left the store, you never called the police and said "we were just almost robbed" or anything like that?

A. No.

Q. In fact, you did see a police officer later that night and you didn't report that to him, right?

A. No, I never saw a police officer later that night. Where did you get that from?

Q. You were stopped by a police officer later that night in the parking lot, correct?

A. Yeah, it was after the fact, after everything had already happened.

Q. After the fact, but you didn't report to him that a crime had been committed or that you thought that a crime had been committed -

A. Yeah, it was after, [Monzo] had told me in the car -

Q. - or there's two people back there -

A. - that she was shoplifting so then I was aware of what happened.

Q. You didn't report to him that a crime had been committed back at the Walmart?

A. I'm sorry?

Q. You didn't report to them that a crime had almost been committed back at Walmart, correct? You never told them we almost were robbed by two individuals back at Walmart?

A. No.

There was no timely objection to the line of questioning by defense counsel. However, during the charge conference, defense counsel objected to the questions on the basis of defendant's "Fifth Amendment privilege." In response to the objection, the judge ruled that the privilege was not implicated.

I mean, as I see it, it doesn't run to any argument that his Fifth Amendment privilege not to testify was implicated. He testified that he effectively was being robbed or thought he was being robbed. The inquiry is well, if you thought you were being robbed, why didn't you call the police, not why didn't you tell the police about this or make a statement to the police after the fact. None of that was — you know, nothing about this charge was raised.

And I think frankly it's fair cross-examination.

The judge then addressed whether a curative charge was necessary:

Well, I don't see it's necessary for me to give any curative charge. Frankly[] if I give a curative charge, I think it would highlight it and perhaps[,] you know, be to Mr. Fassihi's detriment if I started talking about the fact that he was arrested or in custody — because clearly he was in custody. The officer testified he had the gun and he was being arrested. The cross-examination really didn't dwell on after you were arrested further statements. When the police was there probably was an appropriate question — but I don't think it raises to the level where I have to give a curative instruction because I

think it just highlights against points that the prosecutor was trying to make in the failure to make a call.

The jury found defendant guilty on both counts. On July 29, 2016, defendant was sentenced to a four-year term in state prison on count two with a concurrent eighteen-month term of imprisonment on count three. The appropriate fines and penalties were imposed. Defendant appealed.

On appeal, defendant argues:

POINT I

THE PROSECUTION'S HIGHLY IMPROPER CROSS-EXAMINATION OF DEFENDANT ABOUT HIS POST-ARREST SILENCE [SIC], OBJECTED TO BELOW, REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS. U.S. CONST. AMEND. V, XIV []; N.J. CONST. ART. I, [] ¶ 1.

POINT II

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE LAW OF SELF-DEFENSE, AS REQUESTED BELOW BY DEFENSE COUNSEL, REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS. U.S. CONST. AMEND. XIV []; N.J. CONST. ART. I, [] ¶ 1, 10.

The scope of our review is de novo as it involves purely questions of law and the application of law to the facts of the case. State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div. 2004); see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the

law and the legal consequences that flow from established facts are not entitled to any special deference.").

Generally, the scope of cross-examination is a matter addressed to the trial judge's discretion. State v. Murray, 240 N.J. Super. 378, 394 (App. Div. 1990); see also State v. Silva, 131 N.J. 438, 444 (1993). "Although counsel is customarily given considerable latitude in the cross-examination of witnesses, that latitude is subject to limits reasonably imposed by the trial court in the exercise of its sound discretion." State v. Spencer, 319 N.J. Super. 284, 302 (App. Div. 1999) (citing State v. Rose, 112 N.J. 454, 499 (1988)). "It is well-established that the scope of cross-examination is a matter for the control of the trial court and an appellate court will not interfere with such control unless clear error and prejudice are shown." Murray, 240 N.J. Super. at 394 (citations omitted).

A defendant has a constitutional right to remain silent. U.S. Const. amend. V; State v. Brown, 190 N.J. 144, 153 (2007). On the other hand, federal courts generally permit the use of pre-arrest silence to impeach a defendant. Jenkins v. Anderson, 447 U.S. 231, 238-39 (1980). However, the Jenkins Court invited state courts to formulate their own "evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial." Id. at 240. Generally speaking, "our state-law



privilege against self-incrimination is, if anything, more protective than the [F]ifth [A]mendment." State v. Strong, 110 N.J. 583, 595 (1988) (citations omitted).

New Jersey does not have a state constitutional equivalent to the Fifth Amendment. Rather, our "privilege against self-incrimination . . . is deeply rooted in this State's common law and codified in both statute and an evidence rule." State v. Muhammad, 182 N.J. 551, 567 (2005). N.J.S.A. 2A:84A-19 and its correlated evidence rule, N.J.R.E. 503, provide that "every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate . . . ."

Initially, the Court described this privilege expansively.

[I]t should certainly follow that a defendant is under no obligation to volunteer to the authorities at the first opportunity the exculpatory story he later tells at his trial and cannot be penalized directly or indirectly if he does not. While the situation in Ripa<sup>3</sup> was that of the State offering evidence of a refusal to answer as substantive proof of guilty [sic] on its own case, we think the result should be no different when it is presented by way of attempted impeachment of a defendant's exculpatory testimony through cross-examination, and we so hold as a matter of state law. The privilege of silence is

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<sup>3</sup> State v. Ripa, 45 N.J. 199 (1965).

substantially eroded and reliance upon it unjustifiably penalized in either situation.

[State v. Deatore, 70 N.J. 100, 115-16 (1976).]

The question in Deatore was whether,

if a defendant . . . testifies exculpatory at trial and had not told that story, but remained silent, at or near the time of his arrest, his silence and failure to volunteer then, whether or not he was questioned, may properly be brought to the attention of the jury on cross-examination in order to permit the inference that the exculpatory testimony is therefore untrue.

[Id. at 108.]

The Court rejected the argument and determined "that such cross-examination of a defendant is improper." Id. at 109. The Court also rejected the federal distinction between silence before and silence after Miranda<sup>4</sup> warnings as meaningless because "[t]he right to remain silent existed long before Miranda; that decision, for present purposes, required only that a defendant be reminded of it so that he could make an appropriate choice before any interrogation." Id. at 117 n.10.

In Muhammad, 182 N.J. at 558, the Court reaffirmed "that a suspect's silence while in custody, under interrogation, or 'at or near' the time of his arrest cannot be used against him in a

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<sup>4</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

criminal trial." In that case, Muhammed did not testify at trial, but counsel offered an exculpatory version of the events surrounding the crime in question. Id. at 562. With respect to the prosecutor's arguments to the jury, the Court drew a sharp distinction between pointing out the significant inconsistency between the officers' testimony respecting the defendant's statements at police headquarters and asking "the jury to reject the consent defense because defendant remained silent when he had the opportunity to present it to the police." Id. at 566 (footnote omitted).

The Muhammad Court noted that federal courts permit the use of silence prior to Miranda warnings, but reasoned that under New Jersey law, "[b]arring the use of silence 'at or near' the time of arrest avoids the often murky inquiry into pinpointing the precise moment a suspect is placed in custody or under arrest." Id. at 568-69. The Court found that the facts before it "f[ell] squarely within the ambit of Deatore, and [State v. Lyle, 73 N.J. 403 (1977)]." Id. at 572.

Those references in which the prosecutor drew inferences of guilt from defendant's silence were patent violations of Deatore, and Lyle. Defendant was not obliged to give the police the exculpatory story his attorney presented at trial, and the State was not permitted to use his silence to convict him. Because we conclude that the prosecutor's violation of defendant's state law privilege against self-

incrimination was "clearly capable of producing an unjust result," we are constrained to reverse defendant's conviction.

[Id. at 573-74 (footnote omitted) (citations omitted).]

The State may cross-examine a defendant on the differences between freely given post-Miranda statements and the testimony given at trial. State v. Kucinski, 227 N.J. 603, 624 (2017); see also State v. Elkwisni, 190 N.J. 169, 178-79 (2007); State v. Tucker, 190 N.J. 183, 189-90 (2007). In Elkwisni, the Court held that it was improper, however, for the State to comment on a defendant's silence at the time they are placed under arrest. Elkwisni, 190 N.J. at 181. Notwithstanding, the Court found that the brief questioning was "harmless and could not have affected the outcome of the case." Ibid. The Court held that in the future "the trial court should, at a minimum, instruct the jury that such evidence should be limited to assessing defendant's credibility and that it may not be used in determining whether defendant is guilty or not guilty." Id. at 182.

Concerning the line of questioning, we are satisfied that the prosecutor's questions inquiring why defendant failed to seek the assistance of others or to call the police while in the Walmart did not implicate his Fifth Amendment privilege. To the contrary, the prosecutor's questions relating to why defendant did not report

the perceived "robbery" to the police who arrested him did implicate the privilege and clearly transgressed Elkwisni.

Similar to the circumstances the Court faced in Elkwisni, we too could find the brief improper line of inquiry and defendant's responses constituted harmless error. We do not reach that result as we conclude that the failure to provide the "minimum" limiting charge addressed in Elkwisni was also erroneous. The jury was not instructed that defendant's responses to the prosecutor's cross-examination questioning his pre-arrest silence should be limited to assessing defendant's credibility and should not be used to determine whether defendant was guilty or not guilty. In the absence of that required instruction, our confidence is undermined that the jury "justly reached" the verdict. See State v. Winter, 96 N.J. 640, 647 (1984).

Because we hold that the failure to provide the limiting instruction warrants reversal of defendant's convictions, we do not address defendant's argument relating to the failure to instruct the jury on a separate self-defense charge.

Reversed and remanded.

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

  
CLERK OF THE APPELLATE DIVISION