SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0738-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RONALD BYRD,

Defendant-Appellant.

Submitted January 8, 2018 – Decided May 21, 2018

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Salem County, Indictment No. 14-02-0106.

Joseph E. Krakora, Public Defender, attorney for appellant (Alicia J. Hubbard, Assistant Deputy Public Defender, of counsel and on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent (Jenny M. Hsu, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Ronald Byrd appeals from a July 23, 2015 amended judgment of conviction for aggravated assault, possession of a

weapon for an unlawful purpose, and tampering with evidence. For the reasons that follow, we affirm.

I.

We discern the following relevant facts from the trial record. Defendant Ronald Byrd, Joseph Schools, and William Corbin have been friends for over thirty years. On September 24, 2013, defendant went to Schools' basement to drink with Schools and Corbin. Eventually, they ran out of alcohol and decided to make a trip to the liquor store; Corbin drove defendant's car because he was the most sober. After stopping at defendant's house to pick up some money, they traveled to the liquor store and a deli to pick up sandwiches for Schools' wife. Defendant paid for the alcohol and the sandwiches.

After arriving back at Schools' home, Corbin asked defendant to give him $20 for driving. Corbin insisted they had agreed earlier in the day, defendant testified that he never agreed to pay Corbin to drive his car because Corbin was consuming the alcohol that defendant purchased, and Schools stated that the first mention of the $20 was after the men had returned. Defendant eventually took out a $20 bill from his wallet and began to burn it to show Corbin that the argument was about principles and not about money, but Schools snatched it before it was destroyed.

After Schools told the two men to take the argument outside, defendant went up the stairs and into the backyard, and Schools and Corbin followed. Corbin testified defendant was looking at him in a menacing fashion, but both sides admitted that Corbin struck first and pushed defendant out of his way. Defendant then charged at Corbin, and Corbin reacted by punching him in the jaw. The two men then began to "tussle" in Schools' backyard. Defendant, on the other hand, testified that Corbin punched him in the back of the head at the top of the stairs. Schools' testimony on this subject more closely mirrored defendant's version of the events.

The fight was not an even match: Corbin was six feet two inches tall and weighed about 260 pounds, while defendant was five feet nine inches tall and weighed only 160 pounds. Corbin used this advantage to gain a better position by being on top of defendant for the majority of the fight, and defendant testified Corbin ignored his pleas to "let [him] up," and that Corbin was killing him. Schools, who was attempting to break up the fight, testified that he did not hear defendant make any pleas for help.

During the fight, defendant removed a three-inch blade from his pocket and began to "poke" Corbin. He was unsure how many times he "poked" Corbin, but he "did it until [Corbin] got off of me." Defendant testified that the knife was necessary to get

Corbin off him, and that once Corbin got off of him, he did not use the knife anymore. While Corbin did not feel the blade at first due to adrenaline, he fell to the ground shortly after. Schools helped Corbin back downstairs to the basement, but it was not until Corbin sat down that they realized he had been stabbed.

Defendant testified Corbin told him to "just get out of here." However, Corbin testified he did not tell defendant to leave, and that if that request was made, it was made by Schools. Schools testified he asked defendant to take Corbin to the hospital, but defendant refused. Regardless, defendant left the scene before the police arrived. Corbin had a total of four stab wounds, but was able to make a full recovery.

A Salem County Grand Jury returned an indictment against defendant for: attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3; second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree aggravated assault N.J.S.A. 2C:12-1(b)(2); fourth-degree aggravated assault N.J.S.A. 2C:12-1(b)(3); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); and fourth-degree tampering with physical evidence, N.J.S.A. 2C:28-6. After a jury trial, defendant was acquitted of the attempted murder charge but found guilty of all remaining counts.

On May 22, 2015, the court denied defendant's motion to set aside the verdict as against the weight of the evidence. That

same day during sentencing, the judge found that aggravating factors three, six, and nine, and mitigating factors four, seven, and ten applied. After finding that the third-degree and fourth-degree aggravated assault charges and the unlawful weapon charge merged into the second-degree aggravated assault charge, the judge sentenced defendant to a six-year term of imprisonment with an eighty-five percent period of parole ineligibility and a three-year period of parole supervision. The court also imposed a 364-day term to be served concurrently for the tampering with evidence charge.

This appeal followed, and defendant raises the following arguments:

> POINT I: THE TRIAL COURT ERRED TO THE DEFENDANT'S PREJUDICE BY FAILING TO PROVIDE THE JURY WITH THE ENTIRE MODEL INSTRUCTION ABOUT HOW TO CONSIDER UNRECORDED STATEMENTS ALLEGEDLY MADE BY THE DEFENDANT.
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> POINT II: THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY THAT [DEFENDANT]'S DEPARTURE FROM THE SCENE COULD BE USED TO SHOW CONSCIOUSNESS OF GUILT.
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> POINT III: THE COURT FAILED TO PROPERLY CONSIDER THE AGGRAVATING AND MITIGATING FACTORS AND IMPOSED [AN] EXCESSIVE PERIOD OF PAROLE INELIGIBILITY.

II.

Defendant argues the trial court erred by failing to provide the jury with the proper instructions regarding how to consider

unrecorded statements, commonly known as Kociolek[1] and Hampton[2] instructions. Because this argument was not raised below, we consider it under a plain error standard of review and will reverse only if the error was "clearly capable of producing an unjust result." R. 2:10-2; State v. Macon, 57 N.J. 325, 337 (1971).

Since clear and correct jury charges are essential to a fair trial, erroneous jury charges in criminal cases are ordinarily presumed to constitute plain error and are almost invariably regarded as "poor candidates for rehabilitation under the harmless error philosophy." State v. Simon, 79 N.J. 191, 206 (1979). Nevertheless, an error in the charge that is clearly harmless and could not have affected the jury's deliberations will not warrant reversal. State v. Docaj, 407 N.J. Super. 352, 369-71 (App. Div. 2009).

In Kociolek, our Supreme Court held it was error for the trial judge to refuse to give an instruction regarding potential problems with verbal admissions made by the accused. 23 N.J. at 421. The instruction sought was that "the jury should receive, weigh and consider such evidence with caution, in view of the generally recognized risk of inaccuracy and error in communication

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[1] State v. Kociolek, 23 N.J. 400 (1957).

[2] State v. Hampton, 61 N.J. 250 (1972).

and recollection of verbal utterances and misconstruction by the hearer." Ibid. The Court stated there "are inherent weaknesses in this character of testimony: faulty memory, the danger of error in understanding and repetition." Ibid.

Later, in Hampton, the Supreme Court considered whether the trial court erred in its charge to the jury on the voluntariness of defendant's confession and in refusing to charge as requested on the subject. 61 N.J. at 255. The Court held that if a trial court decides to admit a defendant's statement into evidence, the jurors must be instructed that they should decide whether, in light of all the surrounding circumstances, the statement is true. Id. at 272. If they find the confession untrue, the jury must treat it as inadmissible and "disregard it for purposes of discharging their function as fact finders on the ultimate issue of guilt or innocence." Ibid.[3]

Here, during closing arguments, the State argued:

> [Defendant] knows he's stabbed Mr. Corbin, because Schools told him to take him to the hospital; and, he says, no. And, he leaves. Does that seem like the reasonable actions of a man who was just before defending his life?

[3] This holding was codified in 1992 as N.J.R.E. 104(c), which provides: "If the judge admits the statement the jury shall not be informed of the finding that the statement is admissible but shall be instructed to disregard the statement if it finds that it is not credible."

The trial judge did not give either a Hampton or Kociolek charge. Furthermore, defendant did not ask for either charge, nor did he object to their absence. However, a criminal defendant does not need to request a Hampton or Kociolek charge in order to preserve the right to them. State v. Harris, 156 N.J. 122, 183 (1998). The Hampton charge is required "[w]hether requested or not, whenever a defendant's oral or written statements, admissions, or confessions are introduced into evidence." State v. Jordan, 147 N.J. 409, 425 (1997). Similarly, "the Kociolek charge should be given whether requested or not." Id. at 428.

However, if the charges are not requested, the trial court's failure to give them is not per se reversible error. Id. at 425. Rather, the omission of these charges requires reversal "only when, in the context of the entire case, the omission is 'clearly capable of producing an unjust result.'" Ibid. (citing R. 2:10-2).

Defendant argues that the jury's analysis of the situation would likely have been different if a Hampton charge had been provided, telling the jury there was a risk that the witness misunderstood or failed to accurately recall the content of defendant's statement, or that the statement was not even made. We disagree.

As a preliminary matter, "Hampton requires a trial court to specifically instruct a jury to consider the credibility of a defendant's statement only if it was elicited in the 'physical and psychological environment' of police interrogation." State v. Baldwin, 296 N.J. Super. 391, 398 (App. Div. 1997). "Thus, such a special cautionary instruction is not required when a defendant has allegedly made a voluntary inculpatory statement to a non-police witness without being subjected to any form of physical or psychological pressure." Ibid. The statement made here, refusing to take Corbin to the hospital, was not made while in police custody. Thus, pursuant to Baldwin, a Hampton charge was not required at all.

Considering the statement under the asserted necessity of a Kociolek charge, there is no "reported case in which a failure to include [the Kociolek] principles within a trial court's final charge has been held plain error." Id. at 400 (citation omitted); State v. Kennedy, 135 N.J. Super. 513, 522 (App. Div. 1975) ("upon request, instructions to the jury should be given to consider and weigh such evidence with caution. . . ."); State v. Travers, 70 N.J. Super. 32, 38 (App. Div. 1961) (failure to give the Kociolek charge sua sponte was not plain error in light of the overall case). As previously stated, defendant did not request such an instruction.

In light of the facts, the admission of the statement was not plain error, as defendant's alleged refusal to take Corbin to the hospital was not crucial to the State's case. Defendant admitted to the stabbing, claiming self-defense because he was worried for his life. Therefore, the crucial question was whether the jury believed defendant's assertion of self-defense. Finally, defense counsel pointed out in closing arguments that the testimony about the statement should not be believed. Based on the foregoing, the failure to include a Hampton charge was not clearly capable of producing an unjust result, and does not warrant reversal under the plain error standard.

III.

Defendant also contends that the trial court improperly instructed the jury that they could infer from his departure from the scene that defendant was conscious of his guilt. Specifically, defendant argues the instruction was error because no one offered testimony that defendant left the scene as a result of a fear that he would be arrested or charged with a crime.

When charging the jury, the judge stated:

> The question of whether [defendant] fled after the commission of the crime is another question of fact for you to determine. Mere departure from a place where a crime has been committed does not constitute flight. If you find that [defendant], fearing that an accusation or arrest would be made against him

> on the charge involved in the Indictment, took refuge in flight, for the purpose of evading the accusation or arrest on that charge, then you may consider such flight in connection with all of the other evidence in the case, as an indication or proof of consciousness of guilt.
>
> [emphasis added.]

"Flight from the scene of a crime, depending on the circumstances, may be evidential of consciousness of guilt, provided the flight pertains to the crime charged." State v. Randolph, 228 N.J. 566, 594 (2017) (citation omitted). "A jury may infer that a defendant fled from the scene of a crime by finding that he departed with an intent to avoid apprehension for that crime." State v. Wilson, 57 N.J. 39, 49 (1970).

The test used to determine the admissibility of flight evidence is N.J.R.E. 403(a). Randolph, 228 N.J. at 595. The court should ask whether the probative value of flight evidence is "substantially outweighed by the risk of . . . undue prejudice, confusion of ideas, or misleading the jury," and whether a carefully crafted limiting instruction could ameliorate any potential prejudice. Ibid; N.J.R.E. 403(a).

Here, the court did not engage in the required N.J.R.E. 403 balancing test. However, a carefully crafted limiting instruction can ameliorate any potential prejudice of a flight charge. Randolph, 228 N.J. at 595. The court held a charge conference on

the first day of trial, where the State proposed a flight charge and limiting instruction, and defense counsel responded, "[y]eah, I think it's appropriate." After both parties rested, the court held a second charge conference, and again both parties indicated their satisfaction with the charges and instructions. The result was a carefully crafted limiting instruction to be given to the jury along with the offending charge. Specifically, the limiting instruction read:

> Flight may only be considered as evidence of consciousness of guilt if you should determine that [defendant]'s purpose in leaving was to evade accusation or arrest for the offenses charged in the Indictment.
>
> There's been some testimony in the case from which you may infer that [defendant] fled shortly after the alleged commission of the crime. The defense has suggested the following explanation. [Defendant] testified that Mr. Corbin told him to leave.
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> If you find [defendant]'s explanation credible, you should not draw any inference of [defendant]'s consciousness of guilt from his departure. . . .

No objections were made to these instructions when given to the jury. Under Rule 1:7-2, when a party failed to object to a jury charge at the time of trial, a showing of plain error must be made on appeal. State v. Belliard, 415 N.J. Super. 51, 66 (App. Div. 2010); Docaj, 407 N.J. Super. at 362. Under the plain error standard of review, we will reverse only if the error was

"clearly capable of producing an unjust result." R. 2:10-2; Macon, 57 N.J. at 337.

"An adequate jury instruction would require the jury first to find that there was a departure, and then to find a motive for the departure, such as an attempt to avoid arrest or prosecution, that would turn the departure into flight." State v. Mann, 132 N.J. 410, 421 (1993) (citation omitted). To satisfy these objectives, the Supreme Court quoted with approval the New Jersey Supreme Court Committee's flight charge. Id. at 420-21. Here, the instruction employed by the trial court followed this quoted charge almost verbatim.

Flight evidence does not need to unequivocally support an inference of the defendant's guilt, but must be "intrinsically indicative of a consciousness of guilt." Randolph, 228 N.J. at 595 (citations omitted). Schools testified he specifically asked defendant to take Corbin to the hospital after the fight and that defendant refused this request and left the scene. Although defendant testified that he left at Corbin's request, Corbin denied ever making such a request. The responding officer confirmed that defendant was not at the scene when EMS arrived. Thus, the jury was not "left to speculate," but rather was presented with evidence that supported a reasonable inference that defendant fled with an

intent to avoid apprehension for stabbing Corbin. Randolph, 228 N.J. at 595; Wilson, 57 N.J. at 49.

There was sufficient testimony to "reasonably justify an inference that [flight] was done with a consciousness of guilt." State v. Ingram, 196 N.J. 23, 46 (2008) (citations omitted). As such, we cannot say the use of the jury charge and instructions on flight were "clearly capable of producing an unjust result," such that the omission of an N.J.R.E. 403 balancing test would warrant reversal.

Any additional arguments introduced by defendant regarding sentencing are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.