SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1769-15T3
A-2126-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANCIS LONGO, a/k/a
FRANK LONGO,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TROY BUNERO,

Defendant-Appellant.

Argued February 27, 2018 – Decided April 2, 2018

Before Judges Reisner, Gilson, and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 14-02-0010.

Paul Faugno argued the cause for appellant Francis Longo (Faugno & Associates, LLC, attorneys; Paul Faugno, on the brief).

Jane M. Personette argued the cause for appellant Troy Bunero (Law Offices of Brian J. Neary, attorneys; Brian J. Neary, of counsel; Jane M. Personette, on the brief).

Arielle E. Katz, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Arielle E. Katz, of counsel and on the briefs).

PER CURIAM

Defendants Francis Longo and Troy Bunero were supervisors in the North Bergen Township Department of Public Works (DPW). The two men were accused of various types of official misconduct, either for personal gain or to further the political agendas of local elected officials. Longo was accused of using DPW resources and employees to make repairs to his personal vehicle. Bunero was accused of using DPW resources and employees to make renovations to his home. Both defendants were accused of directing DPW employees to make repairs to other private property owned by private individuals. Both defendants were accused of working on elections in other municipalities while being paid by North Bergen Township (Township), requiring their subordinates to work on those out-of-town elections, and authorizing the subordinates to be paid for their election work from Township funds. Bunero was also

accused of engaging in election-related work in North Bergen on work time, and falsifying time sheets.

Following a joint trial, a jury convicted both defendants of the following offenses: second-degree conspiracy, N.J.S.A. 2C:5-2; second-degree official misconduct, N.J.S.A. 2C:30-2; second-degree pattern of official misconduct, N.J.S.A. 2C:30-7; third-degree theft by unlawful taking or disposition, N.J.S.A. 2C:20-3(a); and third-degree misapplication of entrusted government property, N.J.S.A. 2C:21-15. Bunero was also convicted of third-degree tampering with public records, N.J.S.A. 2C:28-7, and fourth-degree tampering with records, N.J.S.A. 2C:21-4(a).[1] Each defendant was sentenced to an aggregate term of five years in prison, to be served without parole.

Defendants appeal from their convictions. We have consolidated the appeals for purposes of this opinion, and we affirm the convictions in both appeals.

I

We summarize the most pertinent trial evidence. Between 2006 and 2012, defendants were both employed as supervisors at the DPW. Above them in the DPW hierarchy was DPW Superintendent James

[1] Longo was acquitted of one count of official misconduct pertaining to repairs to Bunero's house.

Wiley.[2] If Wiley was not present, Longo was in charge of the Department, and, if neither Wiley nor Longo were present, Bunero was in charge.

In 2009, Longo kept his personally owned truck parked in the DPW garage. Bunero's brother, who worked at the DPW from 2008 to 2013, testified that he spent three days repairing Longo's truck on work time. He estimated the value of the work he performed was $1500. Another DPW laborer testified that he overheard a conversation between defendants, in which Bunero assured Longo that the truck was going to come out looking "mint" and Longo assured Bunero that he would take care of him after he purchased a new home.

One of Bunero's neighbors testified that in 2010 he saw a DPW truck parked near Bunero's house and observed several DPW employees removing rugs and panels from Bunero's house over the course of two to three days. Believing that something illegal was occurring, he made a complaint to Township officials. Wiley testified that he received a phone call from Town Hall informing him that DPW vehicles had been spotted on Bunero's block. Wiley called Bunero into his office and asked him what was happening. Bunero admitted

[2] Wiley pled guilty to misconduct and testified against defendants pursuant to his plea agreement. During his testimony, Wiley candidly admitted that he had been a corrupt public official who got caught with his "hand in the cookie jar."

to Wiley that he was using DPW vehicles and personnel to perform work on his home. Wiley told Bunero to wrap the project up, because he was risking getting them all in trouble.

Another DPW laborer testified that, during work hours, he went to Bunero's home to renovate the second floor. He testified that defendants ordered him to perform the work. He stated that he did not refuse to work at Bunero's home because he did not want to get in trouble with Wiley. The State also presented testimony that, at Longo's direction, DPW workers performed construction work on the private property of a local deli, on DPW work time. DPW vehicles and tools were used to perform this work.

The State also presented extensive testimony about defendants' involvement in political campaign work, which was performed by defendants and their subordinates on work time. Several DPW workers testified that on Election Day, November 4, 2008, they were ordered to go to Bayonne to pass out literature for a candidate for political office. One of the laborers testified that Election Day was a holiday and DPW workers had the day off, but Longo told him to come in that morning, allegedly because Wiley wanted the workers to take a safety class. However, the laborer and other DPW workers were told to come to work in plainclothes in order to look "presentable."

The laborer further testified that, when he and several other DPW workers arrived at the DPW facility, one of the employees gave them a twenty-minute lecture about how to use a snow plow, after which they were all driven to Bayonne to work on an election campaign. When the DPW workers arrived in Bayonne, Wiley gave defendants campaign literature, which they distributed to the DPW workers. After receiving the literature, the DPW workers were split up into groups and told to go knock on doors and tell the residents to vote. The laborer testified that he was paid four hours of overtime, allegedly for attending the safety class.

DPW laborers also worked on another election on May 12, 2009, in Jersey City, again on work time. Defendants told the workers to go home and change clothes prior to going to Jersey City. The DPW workers drove to Jersey City in Township vehicles and were assigned to pass out literature. The workers were paid for that work by the Township, under the pretext that they had worked through lunch.

The State also presented testimony that, on November 2, 2010, DPW employees worked on another election in Jersey City at Bunero's direction. Again, the workers wore ordinary clothes instead of their DPW work clothing, took Township vehicles to the location, and were responsible for passing out literature. The DPW workers were again paid for this work by the Township. The State presented

evidence that Bunero oversaw the preparation of the time sheets authorizing payment for this work.

A Township resident testified that in April 2011, she was running for political office against the current administration and had been passing out campaign literature throughout North Bergen Township. She filmed Bunero removing her campaign literature from one household's doorknob, returning to his DPW vehicle, and driving away. Wiley testified that he had received information earlier that day that campaign literature for candidates in opposition to the current administration had been placed around the town, and he ordered Bunero to take it down. This was not the first time Wiley asked Bunero to remove campaign literature, and Wiley testified that Bunero never objected to such orders.

Wiley testified that he had a good relationship with Longo and Bunero and denied threatening either of them. He testified that neither man ever objected to any of the orders he gave them. Wiley also testified that Longo was already handling the political work prior to his arrival as superintendent and that Longo educated him on how the work was done. According to Wiley, Longo never complained to him about this work and was happy to do it, because he was earning overtime.

However, one of the DPW laborers who participated in the political activity testified that on one occasion when Wiley asked Bunero to remove campaign literature in North Bergen, Bunero resisted but Wiley verbally "bullied" him into doing it. Several other employees gave similar testimony, that Wiley was a bully, and they believed that challenging him would result either in termination of their employment or assignment to the most undesirable jobs in the DPW. However, there was no evidence that Wiley or anyone else in the Township hierarchy made physical threats against anyone.

The defense rested without presenting any witnesses.

II

In their appeals, both defendants raise issues concerning the defense of duress and the trial court's alleged mishandling of a juror. Defendant Longo also contends, for the first time on appeal, that the official misconduct statute is unconstitutionally vague as applied.

Defendant Longo presents the following points of argument:

> POINT I: THE TERM "UNAUTHORIZED" AS USED IN N.J.S.A. 2C:30-2(A) IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS AS APPLIED TO THE FACTS HEREIN (Not raised below).
>
> POINT II: JUSTICE WOULD DICTATE THAT THE APPELLATE COURT REVIEW THE INTERLOCUTORY ORDER ENTERED BY ANOTHER PANEL WHICH DEPRIVED THE JURY OF HEARING THE DEFENSE OF DURESS.

POINT III: THE TRIAL COURT'S FAILURE TO VOIR DIRE JUROR #10 CONSTITUTED A REVERSIBLE ERROR (Not raised below).

POINT IV: THE TRIAL COURT'S SUA SPONTE INDICATION THAT IT WOULD ALLOW THE DURESS DEFENSE AND THE SUBSEQUENT TIMING OF JUDGE FUENTES'[S] OPINION BARRING SUCH RESULTED IN A MANIFEST INJUSTICE AND A FUNDAMENTAL [U]NFAIRNESS TO THE DEFENDANTS (Not raised below).

Defendant Bunero presents the following points of argument:

I. THE OMISSION OF THE AFFIRMATIVE DEFENSE OF DURESS FROM THE JURY CHARGE RESULTED IN A DUE PROCESS VIOLATION REQUIRING REVERSAL OF DEFENDANT'S CONVICTION.

a. Neither this Court's June 22, 2015 Order on Emergent Motion, nor the June 21, 2016 unpublished Appellate Division Opinion, preclude this issue from being considered on this plenary appeal.

b. The interpretation of "Duress" as requiring actual or threatened physical force is not supported by a plain reading of the statute.

c. The omission of the affirmative defense of duress from the jury charge had the potential to cause the jury to think incorrectly about guilt, thus warranting reversal of Defendant's conviction.

d. Prosecutorial misconduct resulted in a substantial due process violation, compelling the reversal of Mr. Bunero's conviction.

II. POTENTIAL IRREGULAR INFLUENCES UPON THE JURY'S DELIBERATIONS REQUIRE REVERSAL. (NOT RAISED BELOW)

Defendants' duress defense was already addressed twice by other Panels of this court. The issue was decided on the merits in addressing the State's motion for leave to appeal from a trial court order, memorializing that the court would charge the jury on duress. In an opinion authored by Judge Fuentes, the first Panel held that the defense of duress required evidence of force against the defendant's person, and that economic coercion – such as a possible loss of employment – did not constitute duress. State v. Bunero and Longo, No. F-1990-14 (App. Div. June 22, 2015).

A second Panel addressed the issue again, in deciding the State's interlocutory appeal from the trial court's order admitting defendants to bail pending appeal. In that opinion, we disagreed with the trial court's view that the appeal presented a substantial issue, noting that Judge Fuentes's opinion had already definitively decided the duress issue and that it was not subject to re-litigation on direct appeal. State v. Bunero and Longo, No. A-1848-15 (App. Div. June 21, 2016).

In that opinion we also noted earlier case law holding that the potential loss of employment did not constitute duress, and that if an employee believed an employer was ordering him to violate the law, he should quit rather than obey the order. Id.

slip op. at 5 (citing State v. Falco, 60 N.J. 570 (1972)). We further stated that if the trial record, which had not been presented to either Panel, contained evidence of physical threats against defendants, they could re-raise the duress issue on appeal. See L.T. v. F.M., 438 N.J. Super. 76, 88 (App. Div. 2014) (new evidence may warrant reconsideration of a prior holding).

We have now reviewed the entire trial record, and it contains no such evidence. Nor does it contain evidence that might warrant an exploration of the outer limits of the duress defense. This is not a close case. Defendants' duress claims are based exclusively on evidence that if they disobeyed a superior's orders, they might lose their jobs or receive undesirable work assignments. That evidence does not support a duress defense under N.J.S.A. 2C:2-9(a). On this record, we decline to revisit Judge Fuentes's opinion, which constitutes the law of the case. See Lombardi v. Masso, 207 N.J. 517, 539 (2011).

Defendant Longo's argument - that the term "unauthorized" is unconstitutionally vague as applied to his conduct - was not raised in the trial court, and we decline to address it for the first time on appeal. See State v. Robinson, 200 N.J. 1, 19 (2009). However, based on the trial evidence, any DPW supervisor in defendant's situation would have known, "as a matter of common

intelligence, in light of ordinary human experience," that his conduct was unlawful. State v. Lashinsky, 81 N.J. 1, 18 (1979).

Both defendants argue that they were unfairly surprised when the State filed its interlocutory appeal on the duress issue, and that the timing of that appeal prejudiced the defense. We cannot agree. Neither defendant filed the required pre-trial notice that he would present a duress defense. See R. 3:12-1. Moreover, in their opening statements, which offered a window into their trial strategy, the defense attorneys never stated or even suggested a legally cognizable theory of duress.

In addressing the jury, defense counsel made no mention of any physical threats or physical coercion against either defendant. Rather, they told the jury that defendants were merely following orders from their politically-motivated superior, Wiley, in order to avoid losing their jobs. Defense counsel also sought to minimize the seriousness of the charges against defendants, and to portray them as ordinary workers rather than as supervisors. They contended that the prosecution was unfair and politically motivated and that the State's witnesses were biased. They criticized the State for giving Wiley a lenient plea deal in return for his cooperation in prosecuting his low-level subordinates. Nothing in the defense attorneys' opening statements suggested that defendants might have a viable duress defense.

Moreover, there was no trial testimony that defendants were subjected to physical coercion. For example, Wiley's brother-in-law, who was also a DPW laborer, testified that Wiley could be "violent" and "vicious." However, the concrete examples the witness gave were that Wiley cursed at his subordinates, including defendants, and would fire or reassign employees who displeased him.

At oral argument of this appeal, the attorneys advised us that shortly after the trial started, on June 2, 2015, the judge sua sponte raised the duress issue off the record in chambers. Apparently, the attorneys and the judge continued to informally discuss a possible duress charge, off the record, as the trial was proceeding.[3]

The issue was first mentioned on the record on June 16, 2015, after all parties rested. The prosecutor stated that, based on his legal research, economic coercion would not support a duress defense. The judge disagreed, but noted that he had asked the attorneys to submit proposed charge language "two weeks ago," and none of them did so. Thereafter, the State asked the judge to sign an order so that it could move for leave to appeal on the

[3] This information was also set forth in a certification from the prosecutor, which was submitted in opposition to defendants' new trial motions. The certification is in the State's appendix.

duress issue. The motion was filed on June 17, 2015. We granted the motion, stayed the trial, and summarily reversed the trial court's order on June 22, 2015.

Defense counsel presented their summations on June 23, 2015, without first seeking any further relief from the trial court. They did not raise the issue of surprise, request a mistrial, or ask for leave to reopen the evidentiary portion of the trial in order to present testimony from their clients. From the record we have, we infer that the latter course was not an option because their clients could not truthfully testify about any physical threats. To be blunt, nothing presented to us remotely suggests that defendants had a viable duress defense that they refrained from presenting, in reliance on the trial court's sua sponte off-the-record comments about giving a duress charge.

The trial court's mistaken comments raised defendants' hopes for a duress charge - to which they were not entitled - and this court's interlocutory opinion dashed those hopes. However, on this record, we find no unfair surprise or prejudice.[4] Nor did the prosecutor act inappropriately in waiting until it was clear

[4] The defense attorneys' summations were consistent with their opening statements. They argued that their clients were hard-working, low-level employees, who were following orders from their corrupt, bullying supervisor, Wiley; the State's witnesses were not credible on important points; the State's evidence was inadequate; and the prosecution was unfair and misguided.

that the trial court would not change its mind, before asking for an order memorializing the ruling so that the State could file a motion for leave to appeal.

To the extent not specifically addressed here, defendants' arguments concerning the duress issue are without sufficient merit to warrant further discussion. R. 2:11-3(e)(2).

Finally, both defendants contend, for the first time on appeal, that the trial court mishandled a situation in which one of the jurors became upset during the deliberations. We conclude that defendants failed to properly preserve this issue for appeal by making a record that would permit meaningful appellate review. Robinson, 200 N.J. at 18-20. However, even if we consider the issue, we find no plain error. See R. 2:10-2.

Near the end of a day of jury deliberations, on Thursday, June 25, 2015, the judge addressed the jurors, stating:

> [I]t was apparent to me at the last break that there may be, as a consequence of your being confined in that small room for a long time, some high end feelings that perhaps, would make it wise for us at this point to end the deliberations early to give you each time to reconstitute yourselves and prepare for further deliberations. So I am going to end today now. I am going to ask you to please be back on Tuesday morning [June 30] at nine a.m. and at that point, we'll continue deliberations.

After dismissing the jury, the judge remarked to counsel that he thought it was appropriate to give "juror 10" a couple of days to "calm down." None of the attorneys objected or placed on the record what the perceived issue was with juror 10.

The jury returned to continue deliberating on Tuesday morning, June 30.[5] None of the attorneys objected to the jury continuing to deliberate or asked the judge to take any further action. There is no indication on the record that juror 10 was still upset or was unable to continue deliberating. See R. 1:8-2(d)(1). The jury reached a verdict at 9:45 a.m., and a subsequent poll confirmed that the verdict was unanimous.

We review the trial judge's decision for abuse of discretion. See State v. Musa, 222 N.J. 554, 564-65 (2015). And we will not disturb a jury verdict based on speculation. Id. at 558. On this meager record, we find no basis to second-guess the judge's decision that adjourning deliberations over a long weekend was a sufficient response to the situation.

Affirmed.

[5] Apparently, the judge conducted the trial three days a week, Tuesday through Thursday.