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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-2020-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONOVAN LITTLE, a/k/a TERRELL GREEN,
DONOVAN TERRELL BROOKLYN, DONOVAN
DAVIS, VICTOR LITTLE,

Defendant-Appellant.

Submitted December 12, 2017 – Decided January 10, 2018

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
14-03-0168.

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

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Christopher W. Hsieh,
Chief Assistant Prosecutor, of counsel and on
the brief).

PER CURIAM

Defendant Donovan Little was convicted of second-degree aggravated assault causing bodily injury while fleeing, N.J.S.A. 2C:12-(1)(b)(6) (Counts One, Two, and Nine); second-degree eluding of a law enforcement officer, N.J.S.A. 2C:29-2(b) (Count Five); third-degree possession of a weapon for unlawful purpose, N.J.S.A. 2C:39-4(d) (Count Six); and fourth-degree obstruction, N.J.S.A. 2C:29-1(a) (Count Seven). The trial court imposed an aggregate prison term of seven years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant appeals both his conviction and sentence. We affirm.

The events leading to defendant's arrest are straightforward. On July 11, 2013, defendant was in Paterson visiting his girlfriend. Around 8:00 p.m., he borrowed his girlfriend's car and drove from her apartment to a nearby deli. As defendant drove to the deli, Officer James DiPiazza noted that the front license plate of the car was dangling. Based upon the condition of the license plate, DiPiazza signaled the car to pull over and defendant complied.

DiPiazza asked defendant for his license, registration, and insurance. Defendant repeatedly refused to comply with the officer's request. After several failed requests for defendant's credentials, DiPiazza requested additional police backup.

Officer Eladio Lugo arrived in a separate marked police car. Lugo advised defendant that requesting a driver to produce a license, registration, and insurance was consistent with police procedure for all motor vehicle stops. Lugo also warned defendant that if he failed to produce the requested documents, he might be arrested for obstructing a government function. Defendant refused to produce his documents. While DiPiazza and Lugo were speaking to defendant, who was still in the vehicle, Tanya Gray, a self-described "nosey" person, stopped her car and began to record the interaction between defendant and the officers.

Officers Miguel Cruz and Felipe Diaz arrived shortly thereafter. DiPiazza, Lugo, and Diaz took a position on the driver's side of the car, and Cruz walked to the passenger's side. Despite the presence of four officers, defendant still declined to produce his documents. Lugo informed defendant that he was under arrest and attempted to open the driver's side door, but it was locked. Cruz unsuccessfully attempted to open the passenger's side door. Lugo warned defendant that if he did not unlock the door, Lugo would use his baton to break the car's window. Defendant refused. Lugo then shattered the driver's side window with his baton. DiPiazza and Lugo reached into the car to try to unlock the door and remove defendant.

Defendant started the car and drove away, dragging Lugo several feet in the process. Cruz, Diaz, and DiPiazza returned to their police cars and pursued defendant. Defendant committed numerous motor vehicle violations while fleeing arrest, including running a red light, disregarding stop signs, and speeding in a residential area. Eventually, defendant's car hit a police vehicle, jumped the curb, and overturned. Defendant exited through the broken driver's side window before he was apprehended. Because defendant suffered injuries incident to his arrest, he was taken to the local hospital.

Sergeant Victor Martinez spoke to defendant at the hospital. Defendant declined to give his name. After several requests by Martinez, defendant provided a false name. Defendant testified at trial that he gave a fake name to the hospital staff, but denied giving it to Martinez. After learning defendant's real name, Martinez informed defendant that he had an outstanding warrant and a suspended license.

Before trial, defendant challenged the admissibility of two warrants issued for him: one for non-payment of child support, resulting in suspension of his driver's license; and a municipal warrant for violating curfew. The judge stated that, if defendant responded that he was unaware of any warrants, the court might

give a limiting instruction reminding the jury that the attorneys' questions were not evidence.

At trial, the prosecution presented testimony from the police officers and Gray, and showed the jury Gray's video of the motor vehicle stop. The prosecutor never raised the warrant issue in her case-in-chief.

After the prosecution rested, outside the presence of the jury, defendant confirmed to the judge that he intended to testify. At that time, the prosecutor told the court she planned to cross-examine defendant on whether he was aware of his outstanding child support warrant at the time of the incident. The judge held that any such inquiry would first have to be made outside the presence of the jury to avoid potentially prejudicing defendant. The judge reasoned that if defendant testified he knew about the warrant, there would be no issue, and the jury could hear the testimony. However, the judge was concerned that if defendant responded he did not know about the warrant, the question might inflame the jury. Defense counsel indicated he would discuss this matter with defendant before testimony began the next day.

On direct examination, defendant testified that he refused to produce his license, registration, and insurance because he did not believe that a dangling license plate was a crime. Defendant stated that when the officers broke the car window, he dropped his

cell phone, bent down to retrieve it, and heard someone yell, "he's reaching." Defendant testified that he drove away because he was afraid of being shot by the officers. In response to a question by his own counsel, defendant denied knowing his license was suspended and that he had a warrant for nonpayment of child support, until he was so informed by Martinez at the hospital. The prosecutor did not cross-examine defendant regarding the child support issue or warrants.

During summation, defense counsel argued that defendant did not know his license had been suspended because of a child support issue when he was stopped by DiPiazza. The prosecutor, in her summation, asked the jury to consider whether it was:

more logical and reasonable that this man knew he had a child support warrant when he was stopped and that his license was suspended because of that child support warrant and that's why he didn't want to get locked up? . . . The State submits that the more logical, the more reasonable conclusion is that he had . . . knowledge of this child support warrant and he knew that his license was suspended

After the jury convicted defendant, the judge considered the aggravating and mitigating factors for sentencing. The judge found aggravating factors three (risk of reoffending) and nine (need for deterrence) applied, while mitigating factor seven (no/minimal/remote criminal history) also applied.

On appeal, defendant raises the following arguments:

POINT I - THE JUDGE'S RULING PERMITTING THE STATE TO QUESTION THE DEFENDANT REGARDING A PRIOR CHILD SUPPORT WARRANT WAS SO PREJUDICIAL AS TO DENY HIM A FAIR TRIAL.

POINT II - THE ASSISTANT PROSECUTOR'S SUMMATION TO THE JURY IMPROPERLY ASKED THE JURORS TO FIND THAT THE DEFENDANT'S VERSION OF THE EVENTS IN QUESTION WAS NOT BELIEVABLE BECAUSE OF CLAIMS NOT SUPPORTED BY FACTS IN THE RECORD (not raised below).

POINT III - THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE LOWER COURT ASCRIBED UNDUE WEIGHT TO AGGRAVATING FACTORS THREE AND NINE AND FAILED TO FIND MITIGATING FACTOR NINE.

We first address defendant's contention that evidence regarding a prior child support warrant was so prejudicial as to warrant a new trial. Where there is no objection to the admission of evidence at trial, we review the issue for plain error. R. 2:10-2.

Defendant argues that he was denied a fair trial because the judge abused his discretion by allowing questions regarding the child support warrant. The prosecutor did not present evidence related to defendant's child support warrant as part of the State's case. Nor did she cross-examine defendant on the warrant. Instead, it was defense counsel who first raised the matter in front of the jury. At no time did defense counsel ask the judge

to question his client about the warrant outside the presence of the jury.

Under these circumstances, we find that the judge did not abuse his discretion by allowing evidence of the child support warrant. The judge repeatedly suggested that such evidence could prejudice defendant if not handled properly. It was the judge who proposed that defendant answer the question outside the presence of the jury to avoid any prejudice. Defendant chose not to take advantage of the judge's suggested method to protect against any potential prejudice and, instead, disclosed the evidence himself during direct examination. In light of the overwhelming evidence of defendant's guilt, we find no plain error.

We next address whether the prosecutor's summation to the jury was improper and warrants reversal of defendant's conviction and a remand for a new trial.

Under the plain error rule, we consider allegations of error not brought to the trial court's attention if the errors have a clear capacity to produce an unjust result. See R. 2:10-2. We generally decline to consider issues that were not presented at trial. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). It is well-settled that "[q]uestions not raised below 'will ordinarily not be considered on appeal.'" State v. Cryan, 320 N.J. Super. 325, 332 (App. Div. 1999) (quoting State v. Bobo, 222

N.J. Super. 30, 33 (App. Div. 1987)). This is especially true "[w]here a defendant fails to object to the challenged statements and thus deprives the trial judge of the opportunity to ameliorate any perceived errors." State v. Feal, 194 N.J. 293, 313 (2008). To constitute plain error under Rule 2:10-2, the error must be "sufficient [to raise] a reasonable doubt as to whether the error led the jury to a result that it otherwise might not have reached." Id. at 312 (alteration in original) (quoting State v. Daniels, 182 N.J. 80, 102 (2004)).

"[P]rosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries." State v. Frost, 158 N.J. 76, 82 (1999). Prosecutors are granted wide latitude to make "fair comment[s]" on the evidence so long as the argument stays within "legitimate inferences" that can be deduced from the evidence. State v. Mayberry, 52 N.J. 413, 437 (1968).

Defendant avers that the prosecutor's summation, wherein she argued that defendant knew about his child support warrant, improperly referenced facts not in evidence as there was no evidence that defendant ever received notice of the warrant or otherwise knew about it. During summation, defendant's attorney summarized defendant's testimony on why he drove away from the vehicle stop, telling the jury:

[Defendant] drops the phone and he – he goes to reach for the phone and then . . . he hears [the officers] say, "he's reaching, he's reaching," and he believes . . . in his mind, he thinks he might be shot.

In her summation, the prosecutor responded to defense counsel's arguments and comments on the evidence, and provided an alternative reason for defendant to flee from the police – he fled because of his outstanding warrant. The prosecutor's comments were neither unfair nor misleading. Her comments suggested a legitimate inference to be drawn by the jury based upon the evidence.

Defendant fails to raise a reasonable doubt as to whether the comment led the jury to reach a result it would not have otherwise reached. See Daniels, 182 N.J. at 102. There was overwhelming evidence of defendant's guilt for the jury to convict defendant in this case. Defendant admitted to fleeing from the officers, disregarding multiple traffic laws, and striking police vehicles. The presence or absence of the prosecutor's comment on defendant's child support warrant and suspended license did not lead the jury to a decision it would not otherwise have reached.

Lastly, we address defendant's argument that the matter be remanded for resentencing because the judge improperly weighted the aggravating factors and failed to consider all mitigating factors.

When reviewing a trial court's sentencing decision, we "may not substitute [our] judgment for that of the trial court." State v. Evers, 175 N.J. 355, 386 (2003) (quoting State v. Johnson, 118 N.J. 10, 15 (1990)). Our review of a sentence includes determining whether the trial court violated the sentencing guidelines, whether the sentence was supported by competent evidence in the record, and whether the sentence was so clearly unreasonable that it "shocks the judicial conscience." State v. Roth, 95 N.J. 334, 363–64 (1984). We are "bound to affirm a sentence, even if [we] would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record." State v. O'Donnell, 117 N.J. 210, 215 (1989).

The judge evaluated the aggravating and mitigating factors presented by both counsel. As to aggravating factor three, the risk that defendant may commit another offense, the judge acknowledged that defendant's prior convictions were remote in time. However, a judge is permitted to consider defendant's prior record in determining whether there is a risk of reoffending. See State v. Thomas, 188 N.J. 137, 153–54 (2006).

The judge also found that aggravating factor nine, the need to deter defendant and others from violating the law, applied. The judge stated that defendant was convicted of attempting to

cause serious bodily injury to police officers. He noted that defendant "showed a total lack of respect for the uniformed officers and an utter contempt of the law at that time." In addition, the judge expressed a need to deter "which is justified by a concern for public safety." The judge found that other motorists and pedestrians were placed at risk by defendant's actions.

The judge considered defendant's arguments as to the application of mitigating factor nine - the character and attitude of the defendant indicate he is unlikely to commit another offense. The judge reviewed eighteen letters and heard from four witnesses attesting to defendant's good character. However, the judge found that the videotaped recording of defendant's actions that night presented a more compelling indication of his character. Consequently, the judge declined to apply mitigating factor nine.

Based upon his assessment of the aggravating and mitigating factors, the judge imposed an aggregate term of seven-years with an eighty-five percent parole ineligibility. The judge's sentence fell within the midpoint of the second-degree sentencing range. We find that the judge properly identified and balanced the aggravating and mitigating factors in this case. His reasons for imposing defendant's sentence are support by competent, credible evidence in the record.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION