SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2119-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JASON D. PRONTNICKI, a/k/a
JASON PROTNICKI,

Defendant-Appellant.

Submitted May 22, 2018 – Decided May 31, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 16-08-0627.

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

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Susan Berkow, Special Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his convictions for first-degree armed robbery, N.J.S.A. 2C:15-1(a)(2); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d). After the appropriate mergers, the judge imposed an aggregate prison term of ten years subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. We affirm.

On appeal, defendant argues:

> POINT I
> THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW BY FAILING TO INSTRUCT THE JURY ON ATTEMPT WHEN ATTEMPTED THEFT WAS THE SOLE BASIS FOR THE ROBBERY. (Not Raised Below).
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> POINT II
> THE COURT'S FAILURE TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF ATTEMPTED THEFT REQUIRES REVERSAL OF THE ROBBERY CONVICTION.
>
> POINT III
> THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE INTERESTS OF JUSTICE REQUIRED A DOWNGRADE.

We begin by addressing defendant's argument in Point I, which he raised for the first time on appeal. When a defendant fails to object to a jury charge at trial, we review for plain error, and "disregard any alleged error 'unless it is of such a nature as to have been clearly capable of producing an unjust result.'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2). Plain error, in the context of a jury charge, is "[l]egal

impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Camacho, 218 N.J. 533, 554 (2014) (alteration in original) (quoting State v. Adams, 194 N.J. 186, 207 (2008)). Such is not the case here.

Of course, in reviewing any claim of error relating to a jury charge, "[t]he charge must be read as a whole in determining whether there was any error," State v. Torres, 183 N.J. 554, 564 (2005), and the effect of any error must be considered "in light 'of the overall strength of the State's case,'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). A defendant's attorney's failure to object to jury instructions not only "gives rise to a presumption that he did not view [the charge] as prejudicial to his client's case," State v. McGraw, 129 N.J. 68, 80 (1992), but is also "considered a waiver to object to the instruction on appeal," State v. Maloney, 216 N.J. 91, 104 (2013). Even so, we consider the argument on the merits.

Undoubtedly, appropriate and proper jury charges are essential to a fair trial. State v. Savage, 172 N.J. 374, 387 (2002). But we reject defendant's contention in Point I that the

judge committed plain error by failing to define "attempt" — as to the robbery charge — when attempted theft was the sole basis for the robbery.

At trial, defense counsel did not challenge whether defendant attempted to commit a theft. Defendant had entered the pharmacy, brandished an iron lug nut wrench, and demanded the cashier give him "[a]ll the drugs." Defendant fled without any drugs after the cashier pressed the pharmacy's panic button. It is patently clear from the evidence adduced at trial that defendant used the weapon in his theft attempt. That is so in part because he originally entered the pharmacy without the weapon, then left but returned with the weapon before demanding the drugs.

Defense counsel remained silent when the judge did not define attempt during the charge — in all likelihood — because he challenged primarily whether defendant had "[t]hreaten[ed] [the cashier] with or purposely put[] [her] in fear of immediate bodily injury," and was "armed with, or use[d] or threaten[ed] the immediate use of a deadly weapon." See N.J.S.A. 2C:15-1 (stating the elements to first-degree robbery). In other words, defense counsel did not contest whether defendant intended to commit a theft. As to intent, defense counsel remarked in his closing statement to the jury that

> you can imagine a more serious situation, where as I said before, someone attempting to strike her, get violent with her, threaten to kill her, threaten to hurt her. No threats whatsoever.
>
> So I'm asking you again to consider that deadly weapon issue, and whether there was, there's a robbery, and armed robbery, whether there was a threat to use immediate force. Obviously this [iron lug nut wrench] held in the air is not pleasant.
>
> [Emphasis added.]

And as to the requirement — for the robbery charge — that a defendant be "in the course of committing a theft," N.J.S.A. 2C:15-1(a), defense counsel told the jury that

> [t]he only possible argument that can be made is in the course of committing a theft, is the statement "give me your drugs." That's it. Give me your drugs. That will be argued, and is satisfactory to in the course of committing a theft. That was it.
>
> [Emphasis added.]

The jury found that defendant — in the course of telling the cashier "give me all the drugs" — armed himself with a weapon or threatened the cashier with the immediate use of a weapon. The video surveillance of the incident showed as much. Under these facts, the failure to define "attempt" was not clearly capable of producing an unjust result.

As for defendant's argument in Point II, the judge correctly denied defendant's request to charge the lesser-included offense

of attempted theft. He concluded essentially that there was no rational basis in the evidence to support a charge. Defendant maintains that he did not speak menacingly to the cashier, vault or approach the cashier counter, or hurt the cashier. He asserts that these facts, as well as him telling the cashier he would not hurt her and defendant not raising the iron lug nut wrench above his head, demonstrate a rational basis to charge attempted theft as a lesser-included offense of robbery.

But it is undisputed that defendant entered the pharmacy brandishing the weapon demanding drugs. And he did so knowing that the cashier was unable to easily escape him standing there with the weapon in his right hand. The cashier was unable to flee because of a wall behind her, and she testified that she was concerned that defendant could jump over the counter, which was a handicapped counter and low to the ground. Again, as the quoted closing-argument statement reflects, defense counsel argued to the jury that defendant did not commit armed robbery and did not threaten to use immediate force. But the video showed that defendant removed the wrench from his sleeve and brandished the wrench while demanding drugs from the cashier.

Although the judge charged second-degree robbery as a lesser-included offense, the jury found defendant guilty of first-degree robbery. After the jury unanimously found defendant guilty of

robbery, the verdict sheet specifically asked the jury to address whether defendant "was armed with or threatened the immediate use of a deadly weapon." And it found — based at least on the video surveillance of the incident, which documented the manner in which defendant used the wrench — that he threatened immediate use of the weapon.

Following the final charge, the jury found that defendant purposely used the deadly weapon to put the cashier in fear of immediate bodily injury. Using the deadly weapon — as the jury found — leaves no doubt that he threatened immediate bodily injury to the cashier. Thus, there exists no evidence supporting a rational basis for charging attempted theft as a lesser-included offense of robbery.

Finally, we see no basis to downgrade the conviction from a first degree to a second degree for sentencing purposes. After carefully considering the record and the briefs, we conclude that defendant's remaining sentencing arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add the following brief remarks.

N.J.S.A. 2C:44-1(f)(2) provides that the court may downgrade an offense to a crime that is one degree lower where the court is clearly convinced that the mitigating factors "substantially outweigh the aggravating factors[,] and where the interest of

justice demands." To downgrade, the court must be clearly convinced that the mitigating factors substantially outweigh the aggravating factors, the interests of justice are compelling, and in addition to the mitigating factors, there is something extra, which points to downgrading the offense. State v. Megargel, 143 N.J. 484, 504-05 (1996).

Here, the judge was not clearly convinced that the mitigating factors substantially outweighed the aggravating factors. He found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk of re-offense); six, N.J.S.A. 2C:44-1(a)(6) (prior criminal record and the seriousness of the offenses); and nine, N.J.S.A. 2C:44-1(a)(9) (need for deterrence). And the judge found mitigating factors eight, N.J.S.A. 2C:44-1(b)(8) ("defendant's conduct was the result of circumstances unlikely to recur"); and nine, N.J.S.A. 2C:44-1(b)(9) (the "character and attitude of the defendant indicate that he is unlikely to commit another offense"). He concluded that the aggravating and mitigating factors were in equipoise.

"Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014). We "may disturb a sentence . . . in only three situations: (1) the trial court failed to follow the sentencing guidelines, (2) the

aggravating and mitigating factors found by the trial court are not supported by the record, or (3) application of the guidelines renders a specific sentence clearly unreasonable." State v. Carey, 168 N.J. 413, 430 (2001). "The test 'is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is rather whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review.'" State v. Roach, 146 N.J. 208, 236 (1996) (quoting State v. Ghertler, 114 N.J. 383, 388 (1989)). Again, in considering the sentence, we ask only if legislative guidelines have been followed, if competent credible evidence supports each finding of fact upon which the sentence was based, and, whether application of the facts to the law is such a clear error of judgment as to shock the judicial conscience. State v. Roth, 95 N.J. 334, 364-65 (1984).

The judge did not find that the interests of justice are compelling. Although he did not downgrade the offense, he sentenced defendant to the lowest possible term in prison for a first-degree crime. And the judge saw nothing extra, which would point to downgrading the offense. We have no reason to second guess the judge's findings or conclusions.

Affirmed.