SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2271-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RHYMAN M. HICKS, JR., a/k/a RHYMAN M. HICKS, 2ND, RHYME M. HICKS, and DARNELL C. WILLIAMS,

Defendant-Appellant,

and

AARON C. RITMAN and JAIMELYN HANS,

Defendants.

Argued September 18, 2017 – Decided February 15, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 14-08-0872.

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

Nicole Handy, Assistant Prosecutor, argued the cause for respondent (Scott A. Coffina, Burlington County Prosecutor, attorney; Nicole Handy, of counsel and on the brief).

PER CURIAM

Defendant Rhyman M. Hicks appeals his conviction for various drug offenses, arguing the court erred by permitting expert testimony concerning his guilt. Having reviewed the record in light of the applicable law, we agree and reverse.

I.

Defendant[1] was charged in an indictment with two counts of third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1) (counts one and six); third-degree possession of a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count two); third-degree possession of a controlled dangerous substance with intent to distribute on or within 1000 feet of school property, N.J.S.A. 2C:35-7 (count three); second-degree possession of a controlled dangerous substance with intent to distribute on or within 500 feet of a public facility, N.J.S.A. 2C:35-7.1 (count four); third-degree manufacturing of a controlled

[1] Co-defendants Aaron C. Ritman and Jaimelyn Hans were charged in the first eight counts of the indictment. Hans's charges were resolved by her admission into the pre-trial intervention program. The record does not show the disposition of the charges against Ritman. The trial here was only on the charges against defendant.

dangerous substance, N.J.S.A. 2C: 35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count five); two counts of fourth-degree possession of prohibited weapons and devices, N.J.S.A. 2C:39-3(e) (counts seven and eight); and fourth-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(a) (count nine).

At trial, Jaimelyn Hans testified she contacted defendant in February 2014, asked if he had any crack cocaine, and he said he did. She went to the house defendant shared with his mother, was brought to defendant's bedroom where defendant's friend Ritman was present, and bought a "dime bag of crack cocaine" from defendant. Hans smoked the crack cocaine and saw defendant smoking crack cocaine as well. Hans stayed in defendant's bedroom watching television for a few hours until police arrived, came into the bedroom, and arrested Hans, defendant and Ritman.

Burlington City police officers Christopher J. Walsh and William Ruskowski were among the officers who participated in the arrests and searched defendant's home.[2] They testified the following items were found in defendant's bedroom: two glass pipes, razor blades, a glass vial containing a light-colored residue, a grinder, a measuring cup, forty-six plastic baggies containing white powder, two tins of sterno, numerous empty plastic bags,

[2] The search was conducted pursuant to a search warrant that was issued prior to the officers' initial arrival at defendant's home.

baking soda, a digital scale, a jar containing a hardened white substance, a dagger and a police baton. A representative from the Burlington County Forensic Science Laboratory testified the white powder in the baggies was cocaine, weighing 2.76 grams in total.

The State also presented Burlington County Prosecutor's Office detective sergeant David Burr, who was qualified "as an expert in the pricing, purchasing, sale, distribution and use of a controlled dangerous substance." During his direct testimony, Burr offered opinions based on a hypothetical question.

> THE PROSECUTOR: Detective Burr, I'm going to ask you or present you with a hypothetical situation. Based on that hypothetical I'm going to ask you whether the drugs from the hypothetical were intended for personal use or for distribution, okay. The hypothetical is as follows:
>
> The police conduct a search of a home. In that home they locate two plastic bags containing a total of 46 small Ziploc style packets of crack cocaine. The total weight of that cocaine is, assume . . . is 2.76 grams. Also located is a number of empty plastic baggies, similar size and style, larger empty bag with trace amounts of cocaine, digital scale, baking soda, measuring cups, a jar containing hardened cocaine, sternos and razors.
>
> Sir, based upon your training and experience and the hypothetical I just presented you with, do you have an opinion as to whether the narcotics were possessed for personal use or with intent to distribute?

BURR: In my opinion based upon my training and experience I would say that that clearly shows to me that it's for possession with intent to distribute, not just simple possession.

DEFENSE COUNSEL: [] Objection. May I approach?

COURT: Yes.

The following exchange took place during the sidebar conference:

DEFENSE COUNSEL: Your Honor, under State v. McLean[3] the officer can't parrot the language from the statute. I'm not trying to split hairs here but he regurgitated the language of the statute. I think there needs to be some sort of correction or at least a caution moving forward.

COURT: It's a close call.

. . . .

COURT: [] The court will direct the prosecutor to avoid the use of the statutory language. Because in its present form it almost sounds as if it's an opinion as to the guilt in this case and that's not the witness'[s] function.

On the other hand, I don't know how else you state the circumstance whether it was possessed for personal use or for distribution.

. . . .

DEFENSE COUNSEL: [] I don't have an objection if [the prosecutor] is leading his witness through this and, you know, I'm not trying to tell him what to do, but possession with

[3] State v. McLean, 205 N.J. 438 (2011).

> intent to distribute is the language in the statute . . . .
>
> COURT: [The prosecutor] agrees with you.
>
> DEFENSE COUNSEL: I don't think we need to rehash that, but moving forward if there's any []
>
> THE PROSECUTOR: That's fine.

The court did not direct that the jury disregard Burr's prior response to the hypothetical, and the prosecutor did not rephrase the hypothetical. Instead, the prosecutor asked Burr additional questions about the hypothetical:

> THE PROSECUTOR: Sir, I'm going to redirect you to the hypothetical situation I just posed to you. Again, I'm going to ask you whether it is your opinion that in that hypothetical the drugs were for use or for sale or to give to others[?]

The court overruled defendant's objection to the question. Burr then testified:

> BURR: It's . . . in my opinion based upon . . . your hypothetical, it's for distribution to others.

The prosecutor asked Burr additional questions based on the hypothetical. Burr opined that the person involved in the sale of the crack cocaine was also a "user." He also testified that based on the hypothetical, the individuals involved were manufacturing cocaine, and the sternos referenced in the

hypothetical "showed . . . the person was converting powder cocaine into crack cocaine before selling it and/or using it."

The jury found defendant guilty on eight of the nine counts charged in the indictment.[4] The court imposed an aggregate eight-year custodial term, with a four-year period of parole ineligibility. This appeal followed.

Defendant presents the following argument for our consideration:

> BECAUSE THE STATE'S EXPERT TESTIFIED ON THE ULTIMATE ISSUE OF DEFENDANT'S STATE OF MIND IN A DRUG DISTRIBUTION CASE AND THE PROSECUTOR POSED A HYPOTHETICAL QUESTION DESIGNED TO ELICIT AN OPINION THAT THE DEFENDANT POSSESSED DRUGS WITH THE INTENT TO DISTRIBUTE, THE JURY'S EXCLUSIVE DOMAIN AS FACTFINDER WAS INVADED AND THE STATE'S FACT EVIDENCE WAS IMPROPERLY BOLSTERED.

II.

Defendant contends Burr's responses to the hypothetical questions offered opinions about defendant's state of mind which the court prohibited in State v. Cain, 224 N.J. 410, 429 (2016), and Burr's testimony the person in the hypothetical possessed crack cocaine with intent to distribute and was engaged in manufacturing crack cocaine constituted impermissible

[4] The jury acquitted defendant of count six, third-degree possession of a controlled dangerous substance, buprenorphine, N.J.S.A. 2C: 35-10(a)(1).

pronouncements of defendant's guilt, State v. Simms, 224 N.J. 393, 406 (2016). The State does not dispute the challenged hypothetical questions and responses violate the holdings in Cain and Simms, but contends the Court's decisions in those cases should not be applied retroactively and the hypothetical questions were proper under the law at the time of trial.

We find no merit to the State's contention we should not apply the principles in Cain and Simms here. Another panel of this court has held the decisions should be given pipeline retroactivity to cases, like this one, pending on appeal when they were decided. See State v. Green, 447 N.J. Super. 317, 328 (App. Div. 2016); see also State v. Hyman, 451 N.J. Super. 429, 446 (App. Div. 2017) (applying the Cain principles in a case that was "on appeal when Cain was decided").

The State argues we should reject the panel's determination in Green because application of Cain and Simms will result in a retrial of a case conducted in accordance with the law extant at the time of trial. We reject the contention for the same reason it was rejected in Green: "There will be no unfair prejudice to the State in reversing cases pending appeal that involve improper hypothetical questions. We routinely remand cases for new trials where error has prevented defendants from receiving a fair trial."

447 N.J. Super. at 328. We therefore apply, as we must, the holdings in Cain and Simms here.

In Cain, the Court rejected the procedure, which it previously approved in State v. Odom, 116 N.J. 65, 80-81 (1989), that permitted an expert to testify about a defendant's state of mind in an intent-to-distribute drug case. 224 N.J. at 429. The Court found improper a hypothetical that "recited nearly every detail of the case . . . and call[ed] for the expert to give an opinion whether the drugs recovered were possessed with the intent to distribute . . . ." Id. at 431. The Court found the hypothetical "allow[ed] the prosecutor to package his entire case in a single question and elicit affirmation of defendant's guilt from an expert." Ibid. The Court noted that the use of the term "individual" in the hypothetical constituted a "thinly veiled guise that serves no purpose and fails to dissipate any potential prejudice" to the defendant. Ibid.

The Court held that "in drug cases, an expert witness may not opine on the defendant's state of mind. Whether a defendant possessed a controlled dangerous substance with the intent to distribute is an ultimate issue of fact to be decided by the jury." Id. at 429 (emphasis in original). The Court also cautioned that hypotheticals should not be used in drug cases "[w]hen the evidence is straightforward and the facts are not in dispute . . . ." Ibid.

In Simms, the Court similarly determined the State's use of a "lengthy hypothetical question posed to the drug expert [that] include[d] the assumed fact that the detective actually observed defendant hand a buyer drugs for cash," violated the principles set forth in Cain. 224 N.J. at 396. The Court also determined the expert's testimony regarding defendant's involvement in a conspiracy impermissibly mimicked the statutory language. Id. at 406.

Applying these principles, we are convinced Burr's testimony in response to the hypothetical was improper. The hypothetical provided a brief but detailed and comprehensive summary of all of the drug-related evidence found in defendant's bedroom. In his initial response to the hypothetical, Burr offered an impermissible opinion on defendant's state of mind and mimicked the statutory language, stating that the drugs were "for possession with intent to distribute, not just simple possession." Defense counsel objected, and the court acknowledged the testimony "almost sound[ed] as if it's an opinion as to [defendant's] guilt," but the court neither sustained the objection nor instructed the jury to disregard the testimony.[5]

[5] Of course, the trial court did not have the benefit of the Court's decisions in Cain and Simms. However, because the decisions apply retroactively, we need not determine if the court's ruling was proper under the law extant at the time of trial.

Instead, the State's next question essentially repeated the improper inquiry. The prosecutor asked if the drugs described in the hypothetical "were for use or for sale or distribution to give it to others." After overruling defendant's objection to the question, Burr offered an impermissible opinion as to defendant's state of mind, which was an ultimate issue for the jury, stating the drugs were "for distribution to others." See Cain, 224 N.J. at 429. Burr offered similarly impermissible testimony that the individual in the hypothetical was not only a drug seller, but was a user as well. "An expert, who advises the jury that the defendant possessed drugs with intent to distribute is, in essence, telling the jury that the State has proven all of elements of the crime[,] . . . [and] has announced his own verdict, whether or not he uses the word 'guilty.'" Id. at 427 (quoting State v. Summers, 176 N.J. 306, 323 (2003) (Albin, J., dissenting)).

The State's questions and Burr's responses were not limited to the possession with intent to distribute charge. Defendant was also charged with third-degree manufacturing of a controlled dangerous substance, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3). In response to the prosecutor's questions, Burr offered an opinion mimicking the language of those statutes. Burr testified the person in the hypothetical was "manufacturing cocaine" and converting powder cocaine into crack cocaine. In

doing so, Burr provided an impermissible "opinion about defendant's guilt." Ibid.

We are convinced, and the State does not dispute, that the questions posed to Burr and his responses are impermissible under the Court's holdings in Cain and Simms. In our review of the admission of the testimony, we disregard "[a]ny error or omission . . . unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. To require reversal, there must "be 'some degree of possibility that [the error] led to an unjust [verdict]. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'"[6] State v. R.B., 183 N.J. 308, 330 (2005) (second and fourth alterations in original) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)).

In Cain, the Court concluded an expert's impermissible testimony about the defendant's state of mind on the possession

[6] We review Burr's testimony concerning whether the drugs were possessed with intent to distribute for harmless error because defendant objected to the testimony at trial. See, e.g., State v. Pillar, 359 N.J. Super. 249, 290 (App. Div. 2003) (reviewing testimony that was admitted without objection for harmless error). We review Burr's testimony that the person in the hypothetical was a user and manufacturer of crack cocaine for plain error. See Cain, 224 N.J. at 432-33 (reviewing testimony that was presented without objection for plain error). In any event, the standard for establishing harmless and plain error is identical under R. 2:10-2. State v. Macon, 57 N.J. 325, 337-38 (App. Div. 1971).

with intent charge "had the capacity to infect all of the charges and [was] 'clearly capable of producing an unjust result.'" 224 N.J. at 432-33. In Simms, the Court found plain error where in the defendant's trial on a charge of conspiracy to distribute a controlled dangerous substance, the State's expert offered an opinion that "mimick[ed] the statutory language of conspiracy and . . . conclud[ed] defendant conspired to distribute" the controlled dangerous substance. 224 N.J. at 406. The Court stated the testimony constituted an impermissible "pronouncement of guilt." Ibid.

In Green, 447 N.J. Super. at 319, the defendant was charged with possession of marijuana with intent to distribute. At trial, the State called a narcotics expert and asked a lengthy hypothetical question detailing all of the evidence found in the defendant's home. Id. at 324. The State asked the expert to conclude whether the defendant possessed the marijuana for personal use or with intent to distribute. Ibid. We held the expert's testimony constituted plain error requiring reversal because "the question of whether [the defendant] had 'intent to distribute' was based solely on circumstantial evidence . . . ." Id. at 329.

Consideration of whether admission of evidence is clearly capable of producing an unjust result "depends on an evaluation

of the overall strength of the State's case." State v. Nero, 195 N.J. 397, 407 (2008) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). Here, there was direct evidence defendant possessed the crack cocaine with the intent to distribute. Hans testified she contacted defendant, asked if he had any crack cocaine to sell, and he said he did. She went to his home and purchased crack cocaine from him a few hours before the police arrived. This evidence established defendant possessed the crack cocaine with intent to distribute independently of Burr's impermissible testimony. We therefore are not convinced admission of Burr's testimony, standing alone, "raises a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." R.B., 183 N.J. at 330; see also State v. Sowell, 213 N.J. 89, 107-08 (2013) (affirming conviction given strength of evidence against defendant despite admission of improper expert testimony).

Burr, however, also offered an impermissible expert opinion on the manufacturing charge, testifying that the person in the hypothetical was a manufacturer of crack cocaine and converted powder cocaine into crack cocaine. Other than Burr's impermissible opinion testimony, there was no other direct evidence that defendant manufactured crack cocaine. Thus, we are persuaded that for the jury to have convicted defendant of manufacturing, it

reasonably must have relied on Burr's expertise and impermissible testimony. Admission of the testimony was clearly capable of producing an unjust result. R. 2:10-2.

We are also convinced admission of Burr's testimony concerning the manufacturing charge requires reversal of his conviction on all of the charges. Permitting Burr to impermissibly declare that defendant was a manufacturer of crack cocaine had the capacity to infect the jury's consideration of the other offenses for which he was charged, and improperly buttressed the State's contention defendant committed the offenses. We also cannot ignore that the cumulative effect of Burr's three separate declarations of defendant's guilt, as a drug user, manufacturer and possessor with intent to distribute, was clearly capable of producing an unjust result on each of the charges for which defendant was convicted.

Reversed.