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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2370-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANTE C. GRANGER,

Defendant-Appellant.

Argued November 28, 2017 – Decided January 17, 2018

Before Judges Reisner, Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No.
13-07-1839.

Cody T. Mason, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Cody T. Mason, of counsel and on the briefs).

Barbara A. Rosenkrans, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued
the cause for respondent (Robert D. Laurino,
Acting Essex County Prosecutor, attorney;
Barbara A. Rosenkrans, of counsel and on the
brief).

PER CURIAM

Tried by a jury, defendant Dante C. Granger appeals from his conviction for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). The jury acquitted defendant of third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(a). The trial court sentenced defendant to a seven-year term of imprisonment with forty-two months of parole ineligibility, pursuant to the Graves Act, N.J.S.A. 2C:43-6(c).

This appeal followed, with defendant asserting the following arguments warrant reversal:

POINT I

THE PROSECUTOR ENGAGED IN MISCONDUCT REQUIRING REVERSAL OF GRANGER'S CONVICTION WHEN, IN SUMMATION, HE REPEATEDLY STATED THAT THE POLICE DID NOT HAVE A MOTIVE TO LIE, ENCOURAGED THE JURY TO CONDUCT INDEPENDENT RESEARCH ON GRANGER'S ABILITY TO HIDE THE GUN UNDER HIS FOOT, ARGUED PREJUDICIAL FACTS OUTSIDE THE RECORD CONCERNING THE OFFICERS' ABILITY TO PLANT THE GUN, AND CHARACTERIZED THE DEFENSE AS AN UNREASONABLE STORY. (NOT RAISED BELOW)

A. The Prosecutor Engaged in Misconduct Requiring Reversal when He Repeatedly Told the Jury that the Police Had No Motive to Lie.

B. The Prosecutor Improperly Encouraged the Jury to Test Granger's Testimony by Conducting Independent Research Regarding Their Ability to Hide the Gun with Their Feet.

C. The Prosecutor Argued Facts Outside the Record and Inaccurately Suggested

that the Gun Was Previously Involved in a Crime when He Told the Jury that the Police Would Have Had to Remove the Gun from Evidence to Plant It in the Durango.

D. The Prosecutor Unfairly Disparaged the Defense and Granger's Credibility when He Repeatedly Referred to the Defense Theory as an Unreasonable Story.

E. The Prosecutor's Improper Statements Require Reversal of Granger's Conviction Because They Deprived Granger of a Fair Trial and Were Clearly Capable of Influencing the Jury's Verdict, Particularly on the Issue of Credibility.

POINT II

GRANGER'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT APPLIED THE WRONG STANDARD AND ABUSED ITS DISCRETION IN ALLOWING THE STATE TO IMPEACH GRANGER WITH A NEARLY TEN-YEAR-OLD PRIOR CONVICTION THAT WAS NOT RELATED TO CREDIBILITY AND WAS NOT FOLLOWED BY ANY OTHER CONVICTIONS.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO ELICIT TESTIMONY THAT THE GUN WAS LOADED AND TO INTRODUCE BULLETS INTO EVIDENCE WHEN THEY WERE IRRELEVANT TO THE CASE AND HIGHLY PREJUDICIAL TO GRANGER. (NOT RAISED BELOW)

POINT IV

IF THE CONVICTION IS NOT REVERSED, THE MATTER MUST BE REMANDED FOR RESENTENCING BECAUSE THE COURT'S SENTENCING FACTORS WERE INCONSISTENT, UNEXPLAINED, AND UNSUPPORTED BY THE RECORD, AND THE SENTENCE WAS BASED ON THE INCORRECT BELIEF THAT A FORTY-TWO-MONTH PERIOD OF PAROLE INELIGIBILITY WAS REQUIRED.

A. The Sentencing Court Did Not Explain How It Found Two Aggravating Factors that Were Inconsistent with the Mitigating Factor and Were Unsupported by the Record.

B. The Sentencing Court Applied Incorrect Legal Principles and Failed to Exercise Discretion when It Based the Sentence on the Mistaken Belief that a Mandatory Term of Forty-Two Months of Parole Ineligibility Applied.

We have considered these arguments in light of the record and applicable legal standards. Because the prosecutor's summation included improper arguments capable of producing an unjust result, we reverse the convictions and remand for a new trial.

We begin by summarizing the most pertinent testimony and evidence from the trial record. On January 5, 2013, police discovered a handgun in defendant's vehicle after a motor vehicle stop. The police contend they stopped defendant's vehicle because it was traveling at a "high rate of speed." As one of the officers approached defendant's vehicle, he saw defendant "nervously looking through his rear-view mirror and bend over doing something" The detective ordered defendant to stop moving and show his hands, and defendant complied. At this time, another officer viewed the interior of the car with his flashlight and saw defendant's "left foot on top of an item." Further observation

revealed "a silver trigger guard . . . underneath [defendant's] left foot."

Upon making this observation, the officer shouted the police code for a "man with a weapon," and another officer ordered defendant to exit the vehicle. When defendant did not immediately comply, they pulled him from the car and a wrestling match ensued.

In addition to the officers who made the stop and arrest, the State presented expert testimony from an identification officer and a ballistics expert. The identification expert testified he did not recover any fingerprints on the gun, but stated it is common not to find any fingerprints. The ballistics expert identified the gun as a semiautomatic pistol, operable and capable of firing live ammunition; however, testing revealed no connection to any prior reported shootings. The parties further stipulated defendant lacked a permit to carry or purchase a firearm.

Defendant testified to his version of the events, stating he did not see the officer use his flashlight from his passenger side. Instead, he heard the detective scream a police code, and "the next thing [defendant knew his] door was open and the detectives [were] grabbing [him] trying to snatch [him] out of the truck" Defendant denied having the gun on the date of his arrest, and claimed the police did not show him the gun during his arrest; instead, he first learned of their discovery of a gun

after they secured him in the patrol car. Defendant claimed he did not know the gun was in his vehicle, and he would not have driven the vehicle had he known the gun was inside.

I

We first address defendant's argument that the prosecutor made improper statements during summation. "[P]rosecutorial misconduct can be a ground for reversal where the prosecutor's misconduct was so egregious that it deprived the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999) (citing State v. Ramseur, 106 N.J. 123, 322 (1987)). "The prosecution in its summation may suggest legitimate inferences to be drawn from the record, but it commits misconduct when it goes beyond the facts before the jury." State v. Harris, 156 N.J. 122, 194 (1998) (citing State v. Roach, 146 N.J. 208, 219 (1996)). To warrant reversal of a conviction, "the prosecutor's conduct must have been 'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 575 (1999) (quoting Roach, 146 N.J. at 219).

Where defense counsel fails to object to the challenged comments during summation, it "suggests that defense counsel did not believe the remarks were prejudicial at the time they were made." Frost, 158 N.J. at 84 (citing State v. Bauman, 298 N.J.

Super. 176, 207 (App. Div. 1997)). "The failure to object also deprives the court of an opportunity to take curative action." Ibid. Under those circumstances, the comments should be deemed harmless, unless the comments were "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Bakka, 176 N.J. 533, 548 (2003) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)).

Here, defendant contends the prosecutor made repeated inappropriate remarks during summation, depriving him of a fair trial. We agree. Defendant groups the alleged improper remarks into four categories: 1) stating the police had no motive to lie; 2) encouraging the jurors to conduct independent research to test defendant's testimony; 3) stating facts outside of the record; and 4) unfairly disparaging the credibility of the defense.

It is well recognized that prosecutors must not tell a jury "police had no motive to lie." Frost, 158 N.J. at 85 (citing State v. Goode, 278 N.J. Super. 85, 90 (App. Div. 1994)). Nor can prosecutors suggest "police witnesses are believable because of their status as policemen" State v. Staples, 263 N.J. Super. 602, 606 (App. Div. 1993). Here, the prosecutor repeatedly stated the police had no motive to lie, thereby acting improperly.

Also, juries should not be permitted to conduct independent research on the law or the facts of the case. See State v. Morgan, 217 N.J. 1, 14 (2013). Here, the prosecutor encouraged the jurors to conduct their own test regarding covering up the gun with one of their feet, which was also improper.

In addition, "prosecutors should not make inaccurate legal or factual assertions during a trial" State v. Smith, 167 N.J. 158, 178 (2001) (citing Frost, 158 N.J. at 86). Rather, "they must confine their comments to evidence revealed during trial and reasonable inferences to be drawn from that evidence." Ibid. Here, the prosecutor suggested the police would have had to remove the gun from the evidence room in order to plant it in defendant's car. That was an improper comment because the record does not support that inference.

The combination of these multiple improper comments by the prosecutor were clearly capable of unjustly influencing the jury. This case depends mainly on the credibility of the police versus the credibility of defendant, amplifying the impact of these improper comments. Therefore, we reverse defendant's conviction and remand for a new trial.

We note, however, that we discern nothing improper in the prosecutor referring to defendant's "story" as "unreasonable." Of course, prosecutors may not characterize the defense as

"outrageous, remarkable, absolutely preposterous and absolutely outrageous." State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008) (quoting State v. Acker, 265 N.J. Super. 351, 356 (App. Div. 1993)). However, here the use of the words "story" and "unreasonable" did not constitute improper conduct.

II

We next address defendant's argument that the trial judge improperly admitted evidence of defendant's prior conviction. N.J.R.E. 609 governs impeachment by prior conviction. N.J.R.E. 609(a)(1) states: "For the purpose of affecting the credibility of any witness, the witness's conviction of a crime, subject to [N.J.R.E. 403], must be admitted unless excluded by the judge pursuant to Section (b) of this rule." Where the prior conviction is less than ten years old and the criminal defendant chooses to testify, if the prior conviction is similar to the offense charged, "the State may only introduce evidence of the defendant's prior convictions limited to the degree of the crimes, the dates of the convictions, and the sentences imposed, excluding any evidence of the specific crimes of which defendant was convicted" N.J.R.E. 609(a)(2). With limited exception, N.J.R.E. 609(b) presumptively excludes evidence of a prior conviction, if the conviction or defendant's release from confinement was more than ten years before the trial date.

"[T]he decision of whether a prior conviction may be admitted to impeach a witness 'rests within the sound discretion of the trial judge" State v. Harris, 209 N.J. 431, 442 (2012) (quoting State v. Whitehead, 104 N.J. 353, 358 (1986)).¹ "[O]rdinarily evidence of prior convictions should be admitted and the burden of proof to justify exclusion rests on the defendant." Ibid. Our Supreme Court has consistently held "that prior-conviction evidence has probative value for impeachment purposes" State v. T.J.M., 220 N.J. 220, 235 (2015).

Here, defendant's prior conviction, although close, did not exceed the ten-year threshold at the time of trial. Moreover, because the crime was similar to the offense charged, the trial judge properly sanitized the information pursuant to N.J.R.E. 609(a)(2), so the jury only learned the date and degree of the offense. This sanitized conviction is clearly admissible for impeachment purposes. Therefore, we find the trial judge did not abuse his discretion by admitting the date and degree of defendant's prior conviction for impeachment purposes.

¹ In 2014, in the wake of Harris, the Court amended N.J.R.E. 609 to favor the admissibility of prior convictions that are less than ten years old and create a presumption against admissibility of prior convictions that are more than ten years old.

III

We next address defendant's argument that the trial judge improperly permitted the State to introduce evidence and elicit testimony regarding whether the gun recovered from defendant's car was loaded. Defendant did not object to this evidence, but he now argues it was irrelevant and prejudicial. We agree and find it was improper for the trial court to admit evidence that the gun was loaded.

Our review of a trial court's evidentiary ruling "is limited to examining the decision for abuse of discretion." State v. Kuropchak, 221 N.J. 368, 385 (2015) (quoting Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008)). Where the defendant fails to object to the admission of evidence at trial, we review the admission for plain error. R. 2:10-2. Under this standard, we disregard the error "unless it is of such a nature as to have been clearly capable of producing an unjust result" Ibid. "The possibility of an unjust result must be 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Williams, 168 N.J. 323, 336 (2001) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

We recently decided State v. Green, 447 N.J. Super. 317 (App. Div. 2016), where we held evidence of bullet possession was

improper regarding a drug offense. In Green, the defendant was tried for marijuana offenses; he was also charged with possession of bullets, but that charge was dismissed. Id. at 322 n.3. At trial, a police officer briefly mentioned he found bullets in one of the defendant's rooms. Ibid. Reversing on other grounds, we noted in a footnote, "Although improperly elicited by the prosecutor, this testimony was not sufficiently prejudicial by itself to warrant a new trial, but should be avoided in any retrial." Ibid.

Here, several State witnesses testified that the gun was loaded, and the bullets themselves were admitted into evidence. Testimony about the bullets may have supported the credibility of the police; however, the fact that the gun was loaded had no bearing on whether defendant was guilty of the gun possession charge. While the evidence may not have risen to the level of "clearly capable of producing an unjust result," it was significantly prejudicial. R. 2:10-2. Therefore, on retrial, the trial court should not allow evidence regarding whether the gun was loaded.

IV

Finally, defendant argues the sentencing judge did not sufficiently explain the facts supporting the aggravating and mitigating factors and incorrectly applied a mandatory term of

forty-two months of parole ineligibility. For completeness, we address those issues, although we are reversing the conviction. The State concedes the sentencing explanation was insufficient and the trial court applied the incorrect version of the Graves Act. We agree.

Our Supreme Court has emphasized, "[i]n fixing a sentence within the statutory range, a judge must determine whether specific aggravating or mitigating factors are grounded in credible evidence in the record and then weigh those factors." State v. Case, 220 N.J. 49, 54 (2014). The trial court must also explain how it conducted the weighing process. Id. at 65. The Court has also emphasized that "mitigating factors 'supported by credible evidence' are required to 'be part of the deliberative process.'" Case, 220 N.J. at 64 (quoting State v. Dalziel, 182 N.J. 494, 505 (2005)).

More specifically, the Court has held aggravating factors three and nine "involve determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history." State v. Thomas, 188 N.J. 137, 153 (2006). In addition, courts have held mitigating factors eight, nine, and ten "essentially negate" aggravating factor nine, State v. Briggs, 349 N.J. Super. 496, 505 (App. Div. 2002), and aggravating factor three and

mitigating factor nine "overlap," State v. Baylass, 114 N.J. 169, 177 (1989). Also, although courts may find contradictory aggravating and mitigating factors, the findings must be "grounded in competent, credible evidence in the record." See Case, 220 N.J. at 67.

Here, the trial judge found aggravating factors three (risk of reoffending) and nine (need for deterrence). The judge also found mitigating factor nine (character and attitude of defendant indicate he is unlikely to reoffend). At sentencing, the judge briefly reviewed defendant's biographical history and noted he had seven prior arrests and one prior indictable conviction. He then simply stated, "I have considered and find the following factors: aggravating factors three and nine" He found mitigating factor nine and concluded the aggravating factors prevailed.

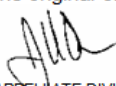
The trial judge failed to explain his basis for finding aggravating factors three and nine, or mitigating factor nine, beyond looking at defendant's criminal history. Furthermore, while it is possible to find contradictory factors, the trial judge failed to explain how he came to the conclusion that both aggravating factor three and mitigating factor nine applied.

In addition, the trial judge applied the incorrect version of the Graves Act. Under the current version of the Graves Act, N.J.S.A. 2C:43-6(c), the minimum term of imprisonment for a person

convicted of unlawful handgun possession "shall be fixed at one-half of the sentence imposed by the court or [forty-two] months, whichever is greater . . . during which the defendant shall be ineligible for parole." However, this version of the statute did not become effective until August 8, 2013. L. 2013, c. 113, § 2. At the time of defendant's January 2013 arrest, the Act set the minimum term of imprisonment "at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater." L. 2007, c. 341, § 5. The sentencing record shows the judge erroneously applied the later version. Should defendant be found guilty on retrial, the court should apply the version of the Graves Act in effect at the time of defendant's arrest in January 2013.

Reversed and remanded for retrial. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION