SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2447-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PETER E. LITTLE, a/k/a LITTLE PETER, and LITTLE PETE,

Defendant-Appellant.

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Submitted April 10, 2018 – Decided May 22, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Indictment No. 15-11-0902.

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

Jeffrey H. Sutherland, Cape May County Prosecutor, attorney for respondent (Gretchen A. Pickering, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Peter E. Little appeals from his conviction for third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1) (two counts) and third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1), -5(b)(3) (one count), arguing:

> POINT I
>
> NO EXCEPTION TO THE WARRANT REQUIREMENT JUSTIFIED THE STATIONHOUSE SEARCH OF THE BAG, WHICH DEFENDANT WAS PREVENTED FROM GIVING TO HIS FRIEND BEFORE HE WAS ARRESTED ON MUNICIPAL WARRANTS AND TAKEN TO THE POLICE STATION.
>
> A. THE INVENTORY OF DEFENDANT'S BAG DID NOT MEET THE STANDARD FOR A VALID INVENTORY SEARCH, AND WAS CONDUCTED AS PRETEXT FOR AN INDISCRIMINATE SEARCH.
>
> B. THE INVENTORY OF DEFENDANT'S BAG WAS NOT VALID AS A SEARCH INCIDENT TO ARREST.
>
> POINT II
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.
>
> POINT III
>
> THE DRUG EXPERT'S TESTIMONY ON THE ULTIMATE ISSUE OF INTENT VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL, AND WAS CLEARLY CAPABLE OF PRODUCING AN UNJUST RESULT.
>
> POINT IV
>
> IMPROPER COMMENTS MADE BY THE PROSECUTOR IN SUMMATION EXCEEDED THE BOUNDS OF PROPRIETY AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT V

[THE] TRIAL COURT DID NOT ADEQUATELY EXPLAIN ITS DECISION TO IMPOSE THE MAXIMUM EXTENDED BASE TERM AND MAXIMUM PERIOD OF PAROLE INELIGIBILITY.

We agree the admission of the expert's testimony, compounded by the assistant prosecutor's comments thereon during summation, warrant reversal and a remand for a new trial.

I

As Wildwood police officers John Dadura[1] and Andrew Kolimaga approached defendant with the intent to arrest him on two warrants,[2] defendant attempted to hand a black plastic bag he was carrying to a man with whom he had been walking. An on-the-scene pat-down search revealed a tin foil pipe in the right-side pocket of defendant's pants. En route to the police station, defendant initiated a conversation with the officers and admitted to having "dope" in his bag. Kolimaga searched the bag at the station, finding heroin, Suboxone, suspected cocaine, and other items.

Although the trial judge upheld the search of the bag as an inventory search following defendant's lawful arrest, defendant's

[1] Dadura is also referred to as Dedora in parts of the record.

[2] Kolimaga testified he did not know details about defendant's warrants but stated he later learned "the warrant was for failure to appear."

current arguments that it was neither a valid search incident to arrest nor a valid inventory search were not made to the judge. Defendant challenged the search only as the product of an unlawful arrest. His counsel explained:

> With respect to the suppression component, the defense isn't taking issue necessarily with whether an inventory search is good incident to a lawful arrest. I think that that is, as [the assistant prosecutor] put it, well settled. Our issue is whether or not the officer at the time of the arrest had a good-faith basis to make the arrest and whether that arrest is lawful as a result.

We will not consider the propriety of the arrest because that issue was not included in defendant's appellate brief, State v. Amboy Nat'l Bank Account No. XXX-XXXX-2, 447 N.J. Super. 142, 148 n.1 (App. Div.), certif. denied, 228 N.J. 249 (2016); we also decline to consider defendant's arguments raised for the first time on appeal concerning the propriety of the bag search, State v. Robinson, 200 N.J. 1, 20 (2009). The State has the burden of proving that such searches and seizures are "justified by one of the '"well-delineated exceptions" to the warrant requirement.'" State v. Shaw, 213 N.J. 398, 409 (2012) (quoting State v. Frankel, 179 N.J. 586, 598 (2004)). Defendant's limited argument to the motion judge prevented the State from fully developing the warrant exceptions now the subject of defendant's arguments.

II

Defendant's admission to the officers that he possessed "dope," made while en route to the stationhouse, and prior to the administration of Miranda[3] warnings, was — as the judge found — captured on the patrol car's MVR.[4] The conversation appears in an uncertified transcript provided by the parties[5]:

> [DEFENDANT]: Please sir, isn't it, shit man, please sir.
>
> OFFICER ONE: (Inaudible)
>
> OFFICER TWO: Yeah.
>
> OFFICER ONE: Can you see what it's for?
>
> OFFICER TWO: No
>
> [DEFENDANT]: Is it something small? What if I, I get in trouble for with the stuff I have on me, I'm ain't gonna lie, it's not mine, I just picked it up for someone, just doing a favor.
>
> OFFICER TWO: (Inaudible)
>
> [DEFENDANT]: Huh?
>
> OFFICER ONE: (Inaudible) I'm sorry what you say Peter?

[3] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[4] MVR is an acronym for mobile video recording.

[5] Both parties quoted portions of the recoding in their merits briefs. We were not provided with the MVR.

[DEFENDANT]: I have stuff in that bag is not mine but I

OFFICER ONE: Oh what is it?

[DEFENDANT]: It's a, it's dope.

OFFICER ONE: Alright.

[DEFENDANT]: Am I gonna get another charge and be stuck here?

OFFICER ONE: We'll deal with that when we get out, I gotta see what you got.

OFFICER ONE: Alright.

[DEFENDANT]: It's a couple of bags of dope and.

OFFICER ONE: It looks like failure to appear warrant.

[DEFENDANT]: Oh please all this for that. Please is there anyway.

OFFICER ONE: (Inaudible) The dispatch is running

OFFICER TWO: The dispatch is running. They executed the warrant.

OFFICER ONE: Okay 10-4

[DEFENDANT]: Please sir can you just at least throw that, it's not even mine, I just I was being stupid I tried to help somebody out.

OFFICER ONE: Once we get back to the station, I'll see what's in there we'll, we'll do what we can.

[DEFENDANT]: I understand, please.

OFFICER ONE: (Inaudible)

[DEFENDANT]: I'll help you out whatever I you got to do bro, It's not a, It's not a problem, I just got jammed up, I did somebody a favor. I'm sorry I must drive yous crazy. It means I'm going to County right.

OFFICER ONE: Eight-five-three back door available? Thank you

[DEFENDANT]: Will I be able to pay the warrant myself?

OFFICER ONE: Ah is it payable?

OFFICER TWO: ah this is just an NCI

OFFICER ONE: I don't know yet, we don't have the full details of it.

[DEFENDANT]: Please, can you's please work with me, like I said I, I don't care what I have to do, I'm tryna stay out of trouble.

OFFICER ONE: We'll see, we'll let you make a separate call to see if you can get the bail for it.

[DEFENDANT]: Is it expensive though.

OFFICER ONE: Ah I don't know.

[DEFENDANT]: Please I beg you, like I said, I'm tryna stay out of trouble.

OFFICER ONE: Yeah once we get in I'll print out all the paperwork I'll see what's going on.

[DEFENDANT]: Please!

OFFICER ONE: What's going on?

The trial judge found the statement was volunteered by defendant in a probable attempt to "mitigate any further police involvement," and the officers "had perhaps what I would call half

an ear as to what [defendant] was actually saying in the back [of the patrol car]. . . . This was not an . . . interrogation by Officer Kolimaga or Officer [Dadura]." The judge concluded Miranda warnings were not required "because it was not an interrogation."

When reviewing a trial judge denial of a motion to suppress a defendant's statements, we must "engage in a 'searching and critical' review of the record." State v. Hreha, 217 N.J. 368, 381-82 (2014) (quoting State v. Pickles, 46 N.J. 542, 577 (1966)). We defer to findings supported by sufficient credible evidence in the record, particularly when they are grounded in the judge's feel of the case and ability to assess the witnesses' demeanor and credibility. Robinson, 200 N.J. at 15; State v. Elders, 192 N.J. 224, 243-44 (2007). This standard of review applies even when the motion judge's "factfindings [are] based solely on video or documentary evidence," such as recordings of custodial interrogations by the police. State v. S.S., 229 N.J. 360, 379 (2017). We will not reverse a motion judge's findings of fact based on his or her review of a recording of a custodial interrogation unless the findings are clearly erroneous or mistaken. Id. at 381. We review issues of law de novo. Id. at 380; Shaw, 213 N.J. at 411.

We agree with the trial judge that defendant initiated the conversation with the officers. Contrary to defendant's

contention, Kolimaga's question — "Oh what is it?" — was not, in the context of the exchange, one that he should have known to be "reasonably likely to elicit an incriminating response" so as to render it the "functional equivalent" of an interrogation. See Rhode Island v. Innis, 446 U.S. 291, 301 (1980); State v. Mallozzi, 246 N.J. Super. 509, 514-16 (App. Div. 1991); State v. Ward, 240 N.J. Super. 412, 417-19 (App. Div. 1990).

The record supports the judge's finding that the officers were not paying full attention to defendant when he first spoke; they were engaged in an unrelated matter and did not address defendant — who had yet to even mention the bag — until Kolimaga[6] asked defendant, "I'm sorry[,] what [did] you say Peter?" That question effectively began the conversation; so the first statement made by defendant and heard by the officers was, "I have stuff in that bag [that] is not mine but I." Defendant did not — to that point — clearly say that he had anything incriminating in the bag. His claim that the contents were not his, when considered with his prior attempt to hand the bag to the man he was with prior to his arrest, does not present a circumstance where Kolimaga's question was reasonably likely to elicit an incriminating response as that given by defendant — "it's dope."

[6] We surmise Kolimaga is identified as Officer One in the transcript because that officer asked, "Oh what is it?"

Tellingly, the officers never asked defendant another question about the bag or its contents.

The judge correctly denied the motion to suppress defendant's statement as it was not the product of police interrogation.

III

The State's expert in narcotics investigation and distribution testified on direct examination, without objection:

> Q. . . . . Did you have a chance to watch the MVR recording in this case?
>
> A. Yes.
>
> Q. And did you have a chance to review either the statements made on the recording or review the transcript that had the statements of [defendant] on that recording?
>
> A. Yes.
>
> Q. One, both?
>
> A. I actually watched the video.
>
> Q. In the video, the MVR, [defendant] indicates that the drugs were not his; do you recall that?
>
> A. Yes.
>
> Q. And that he is doing a favor for a friend, and he just got caught doing that?
>
> A. Yes.
>
> Q. Did you make any interpretations from those statements with regard to his — potentially the possession of drugs or possession with the intent to distribute the drugs?

> A. Yes. I mean, from that statement, it sounds like he had the drugs with the intent to go distribute them to somebody.
>
> Q. In your experience during the course of your investigation, have you seen essentially, people who are drug users who also sell drugs?
>
> A. Yes.
>
> Q. Have you seen people who are what's called drug couriers?
>
> A. Yes.
>
> Q. Could you tell the jury what a drug courier would be?
>
> A. Drug courier is somebody that would help facilitate the distribution of drugs by, essentially, taking a large amount of drugs from a drug dealer to deliver it to another area or another person and give that to them and collect the money for them.

We review defendant's contention that the expert's testimony denied him due process rights and a fair trial under the plain error standard and will reverse only "if the error is 'clearly capable of producing an unjust result.'" State v. Rose, 206 N.J. 141, 157 (2011) (quoting R. 2:10-2).

We have grave doubts whether the expert's testimony interpreting defendant's statement is even within the realm of his expertise. In any event, contrary to the State's argument that the expert's interpretation of defendant's statement just "[a]rguably . . . treads upon the prohibition" in State v. Cain, that type of testimony plainly contravened our Supreme Court's

prohibition against the State's use of expert testimony as evidence of a defendant's state of mind. 224 N.J. 410, 429 (2016). The Court explained:

> [A]n expert is no better qualified than a juror to determine the defendant's state of mind after the expert has given testimony on the peculiar characteristics of drug distribution that are beyond the juror's common understanding. In drug cases, such ultimate-issue testimony may be viewed as an expert's quasi-pronouncement of guilt that intrudes on the exclusive domain of the jury as factfinder and may result in impermissible bolstering of fact witnesses. The prejudice and potential confusion caused by such testimony substantially outweighs any probative value it may possess.
>
> [Id. at 427-28.]

"Whether [a] defendant [has] the requisite state of mind to commit the offense — the intent to distribute — [is] an ultimate issue of fact to be decided by the jury." Id. at 420. The expert's statement, "it sounds like he had the drugs with the intent to go distribute them to somebody," was directly contrary to the prohibition on testimony about a defendant's intent to distribute, the ultimate issue in this case.

The expert's testimony was not isolated. The prosecutor, in his summation, highlighted the expert's segue from interpreting defendant's words to his testimony about drug couriers:

> You also have intent. And the problem with intent is, they don't -- I don't have the

> powers to see into people's minds. I can't tell what you're thinking. Okay. Nor should I, and legally they don't let me try that stuff either, but you have to gain, you have to figure out intent by different ways. And you do it every day in your own lives. You take all the facts, you take the words that people say, you look at their actions, you look at how they interact with others, and then you make decisions based upon that, right?
>
> Well that's the -- I'm going to ask you to use those same powers here as you do every day. Let's look at the -- the words he says. Okay. Did [defendant] possess those drugs with purpose of putting them in his body?
>
> Well, that day -- the day that he gets caught by the police, he tells them right away -- first thing -- drugs aren't mine. He says it a couple times. Says I'm doing a friend a favor and from the context of the conversation -- you heard [the expert] say -- he's seen it; he looked at it. It appears to him to be a situation where it's a drug courier. He's delivering drugs for the purpose of delivering from one location to another, a transfer.

Although there was no objection, the statement was "clearly capable of producing an unjust result," R. 2:10-2, particularly in light of the defendant's trial strategy to admit possession and challenge only intent to distribute, making defendant's intent the

only trial issue.[7] As the Cain Court held, "expert testimony coming from a law enforcement officer claiming to have superior knowledge and experience likely will have a profound influence on the deliberations of the jury." 224 N.J. at 427; see also State v. Reeds, 197 N.J. 280, 300 (2009) (concluding the expert's "ultimate-issue testimony usurped the jury's singular role in the determination of defendant's guilt and irredeemably tainted the remaining trial proofs").

IV

Defendant also argues that a portion of the prosecutor's summation — to which no objection was raised — deprived defendant of a fair trial. Commenting on defendant's strategy to concede possession and deny the intent to distribute, the prosecutor said:

> [Defense counsel,] at the very beginning of the case and, kind of, also at the end, kind of, gives you what I'm going to call some sort of concession. She says that, hey, listen, we're -- we're conceding possession

[7] Defense counsel in summation admitted defendant possessed the bag containing heroin but pointed to evidence of defendant's possession for use: empty bags containing residue; defendant's possession of Suboxone — prescribed for opiate addiction; and that defendant "would be the worst drug dealer ever" as he was

> roaming around the streets of Wildwood with a black plastic bag, [walking] with a cop's [(Dadura's)] brother, just roaming around the streets with [sixty-five] bags of heroin, no money in his pocket, no cell phone, [and the heroin] in rice with men's clothing stacked on top of it.

with regard[] to Count I and Count II. You know, clearly my guy is in possession, and the theory there is, I guess, some sort of take a little bit of responsibility perhaps. But I want you to look at it this way. She didn't really concede anything that wasn't already taken. The evidence in this case was already extremely overwhelming that [defendant] on September 19th, 2015, was in possession of those drugs. You weren't going to find him not guilty with regard to that, so they've given up very little on that.

But there's a strategy there. The strategy is, hey, listen, we'll take a little bit of responsibility. Maybe the jury won't worry about Count III, but that's the trick here. That's what they don't want you to pay attention to. They want you to take the easy road and not consider Count III, but Count III is the most important [c]ount. It's the count in which I'm going to ask you to hold [defendant] responsible for his actions. The actions of being involved in the business of distributing heroin, a very dangerous drug on our streets. It's a schedule 1 drug, as you heard from [the expert]. The most serious scheduled drug you can have.

. . . .

Now, of course it's very dangerous and sometimes people overdose on it, but that doesn't take away from the fact that it's extremely profitable and that's why people do it.

In this case, it -- I think -- I'm just going to ask you, when you think about that concession, I want you to think about it also as an opportunity to attempt to avoid responsibility, that responsibility for being a drug dealer.

In evaluating whether prosecutorial misconduct requires reversal, we determine whether the conduct "was so egregious that it deprived the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999). In other words, "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 State v. Hightower, 120 N.J. 378, 411 (1990); State v. Williams, 113 N.J. 393, 452 (1988)). Prejudice to the defendant is measured by considering "whether defense counsel made a timely and proper objection, whether the remark was withdrawn promptly, and whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." State v. Ramseur, 106 N.J. 123, 322-23 (1987).

Usually, if no objection is made during summation, the remarks will not be considered prejudicial. Id. at 323. That is, if the defendant did not raise the issue of the prosecutor's remarks at trial, this court reviews the objection under a "plain error" standard. R. 2:10-2. A corollary to this rule is that the failure to object can be interpreted to mean defense counsel did not consider the error to be significant in the context of the trial. State v. Macon, 57 N.J. 325, 333 (1971); see also State v. Ingram,

196 N.J. 23, 42 (2008). In particularly troubling circumstances, however, the prosecutor's comments may rise to the level of plain error, regardless of whether the defense objects. See, e.g., State v. Goode, 278 N.J. Super. 85, 90 (App. Div. 1994) (observing where, among other things, the prosecutor improperly and persistently reiterated a theme "that the jurors, through their participation in this matter, could alleviate in some manner the narcotics problem threatening our society"); State v. Sherman, 230 N.J. Super. 10, 19 (App. Div. 1988) (noting that the prosecutor's improper remarks during summation "converted the proceedings from a trial of issues by which a fact-finder may weigh evidence fairly into a vehicle for exacting personal revenge upon defense counsel").

Prosecutors are afforded wide latitude in presenting summations. State v. DiFrisco, 137 N.J. 434, 474 (1994). Yet, "while a prosecutor must advocate a position vigorously, there are boundaries to such conduct." State v. Hawk, 327 N.J. Super. 276, 281 (App. Div. 2000). A prosecutor is obligated "not to obtain convictions, but to see that justice is done." Ramseur, 106 N.J. at 320. Further, it is as much the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." State v. Farrell, 61 N.J. 99, 105 (1972) (quoting Berger v. United

States, 295 U.S. 78, 88 (1935)). The prosecutor must ensure the comments in summation "are reasonably related to the scope of the evidence presented." Timmendequas, 161 N.J. at 587.

The prosecutor's comments about trial strategy and the other comments – about the dangerousness of heroin – had "the capacity to anger and arouse the jury," State v. Marshall, 123 N.J. 1, 161 (1991), and were improper. However, the prosecutor's improper comments were not repeated throughout summation; defendant only identifies one segment of the transcript, which takes up two-pages. Counsel's failure to object further evidences that the impropriety of the comments were minor in the context of the entire summation. Alone, these comments would not be plain error and would not require a new trial; but viewed in conjunction with the expert's testimony and the prosecutor's comments thereon, we deem the comments on defendant's trial strategy plain error.

V

Inasmuch as we are constrained to reverse and remand for a new trial or further proceedings prior thereto, we need not address defendant's sentencing arguments.

Reversed and remanded.