SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2837-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDRES CARTER,

Defendant-Appellant.

Submitted February 13, 2018 – Decided March 6, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 16-05-1391.

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

Gurbir S. Grewal, Attorney General, attorney for respondent (Arielle E. Katz, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Edres Carter appeals his conviction and sentence on drug possession and distribution charges. Based on our review

of the record in light of applicable legal principles, we affirm defendant's convictions and sentence but remand for merger of certain offenses.

I.

The most pertinent trial evidence and procedural history can be briefly summarized as follows. On May 5, 2016, defendant was arrested in Camden after two detectives in an unmarked car witnessed him selling drugs to an unidentified white male. The detectives were parked outside a Camden home, waiting for a suspect in the house to exit when they observed the drug sale. The detectives watched defendant enter an alleyway near the house and remove some small items from a bag hidden behind the downspout of the residence's gutter. Defendant then walked back to the white male and handed him the items in exchange for cash, which defendant put in his right front pocket. Defendant was arrested and searched. The police found $100 and a bag of heroin in defendant's pocket, and bags of cocaine and heroin were recovered from the alleyway where defendant was previously observed.

A jury convicted defendant of third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1) (Count One); third-degree possession with intent to distribute heroin, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (Count Two); third-degree possession with intent to distribute heroin within 1000 feet of a

school, N.J.S.A. 2C:35-7(a) (Count Three); third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (Count Five); third-degree possession with intent to distribute cocaine, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (Count Six); and third-degree possession with intent to distribute cocaine within 1000 feet of a school, N.J.S.A. 2C:35-7(a) (Count Seven). Defendant was found not guilty of second-degree possession of heroin within 500 feet of a public housing facility, public park, or public building, N.J.S.A. 2C:35-7.1(a) (Count Four); and second-degree possession of cocaine within 500 feet of a public housing facility, public park, or public building, N.J.S.A. 2C:35-7.1(a) (Count Eight).

At sentencing, the trial judge merged the convictions for Counts One and Five into the convictions for Counts Two and Six. The judge then imposed an eight-year extended term prison sentence on Count Three with a four-year period of parole ineligibility. Concurrent four-year prison terms with two years of parole ineligibility were imposed on Counts Two, Six, and Seven.

Defendant appeals, raising the following issues for our consideration:

> POINT I
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> [DURING] SUMMATION, THE ASSISTANT PROSECUTOR: (1) URGED THE JURORS NOT TO ALLOW DEFENSE COUNSEL'S ARGUMENT ABOUT A LACK OF FINGERPRINT EVIDENCE TO "MISLEAD" THEM, THEREBY IMPROPERLY IMPUGNING DEFENSE COUNSEL FOR DOING HIS JOB,

AND (2) MISINFORMED THE JURY AS TO THE LAW; IN BOTH INSTANCES, THE JUDGE IMPROPERLY OVERRULED DEFENSE COUNSEL'S OBJECTIONS

POINT II

MERGER SHOULD HAVE BEEN ORDERED; MOREOVER, THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE

II.

We turn first to defendant's contention that the prosecutor exceeded the bounds of proper advocacy during summation by improperly impugning defense counsel and misinforming the jury as to the law. In considering this issue, we note that "[p]rosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. Frost, 158 N.J. 76, 82 (1999). Prosecutors "are duty-bound to confine their comments to facts revealed during the trial and reasonable inferences to be drawn from that evidence." Id. at 85. "In determining whether prosecutorial misconduct is prejudicial and denied defendant a fair trial, [courts] consider 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) (citing State v. Bogen, 13 N.J. 137 (1953)).

Prompt and effective instructions have the ability to neutralize prejudice engendered by an inappropriate comment or piece of testimony. State v. Wakefield, 190 N.J. 397, 440 (2007). Whether or not a curative instruction can eliminate the danger of such an error "focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached." State v. Winter, 96 N.J. 640, 647 (1984).

When making a closing argument, a prosecutor may not "make inaccurate legal or factual assertions[.]" Frost, 158 N.J. at 85. Also, "a prosecutor is not permitted to cast unjustified aspersions on defense counsel or the defense." Id. at 86. However, "prosecutors are permitted to respond to an issue or argument raised by defense counsel." State v. Johnson, 287 N.J. Super. 247 (App. Div. 1996). Prosecutorial "misconduct does not warrant reversal unless it is 'so egregious that it deprived the defendant of a fair trial.'" State v. Jackson, 211 N.J. 394, 409 (2012) (quoting Frost, 158 N.J. at 83).

In his summation, defendant's attorney argued that the State's failure to test the bags of drugs recovered from the alleyway for fingerprints, demonstrated the State "was utterly lacking . . . any effort to conduct a thorough and complete investigation." In her summation that followed, the prosecutor addressed the lack of fingerprint evidence as follows:

> What would fingerprints change in this case? What would that change? Would that change what Detective[s] Pineiro and Martinez saw?
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> Remember, they saw the defendant going to the white plastic bag in the alley. Never lost sight of him. They saw him pick it up, they saw him take items out of it. They saw him put it back down . . . this isn't a burglary where an unknown individual broke into a house, and they took items out of that house. The police respond after the fact, everybody's gone, and they're looking for fingerprints because they want to know who did it. They want to find the perpetrator. But . . . that's not this case. In this case, he was standing right there. They saw him with their own two eyes. Please don't let that mislead you.
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> [(Emphasis added).]

Defendant contends the prosecutor's comment, "[p]lease don't let that mislead you," impugned defense counsel merely for doing his job. The judge overruled defense counsel's objection, reasoning the prosecutor was not arguing that defense counsel had misled the jury, but rather was warning the jury to "factually not be misled."

As noted, a prosecutor is afforded wide latitude in presenting summations and is entitled to respond to arguments the defense has made. Here, we share the trial judge's view that the State was urging the jury not to be factually misled by the lack of fingerprint evidence in light of the officers' testimony that they personally observed defendant engage in a hand-to-hand drug

transaction. Moreover, the prosecutor's comment came in response to defense counsel's argument that the investigation was incomplete. "A prosecutor's otherwise prejudicial arguments may be deemed harmless if made in response to defense arguments." State v. McGuire, 419 N.J. Super. 88, 145 (App. Div. 2011). Accordingly, we conclude that the challenged remark does not warrant reversal of defendant's convictions.

A.

Defendant next contends the prosecutor misinformed the jury as to the law by stating in her summation that a school need not be operational to convict him of a school zone offense. We do not find this argument persuasive.

In State v. White, 360 N.J. Super. 406, 410-11 (App. Div. 2003), the issue was whether the Lakewood Community Center was used for school purposes and hence fell within the ambit of the school zone statute, N.J.S.A. 2C:35-7. The State presented evidence that the community center was used for an after-school "homework club;" roughly one hundred elementary and middle school students congregated there between 3:00 p.m. and 5:00 p.m. on school days; and the board of education leased the property from the township. Id. at 409, 412. We framed the issue as whether "an objectively reasonable person could know that the school property was used regularly, consistently, and actually for school

purposes." Id. at 412 (quoting State v. Ivory, 124 N.J. 582, 592 (1991)). Ultimately, we concluded "the use of the center created an issue that the jury was required to resolve." Ibid.

"In most cases, like that of a school itself, use 'for school purposes' will be self-evident." State v. Thomas, 132 N.J. 247, 259 (1992) (quoting Ivory, 124 N.J. at 591-92). The Court in Thomas noted:

> the evidence produced concerning [the] [s]chool was unambiguous and uncontroverted. The "1000 [foot] drug free zone map" offered by the State depicted school property labeled . . . and [the arresting] [d]etective . . . who had been a member of the Newark Police Department for nine years, testified that that property was the [s]chool. Based on the drug-free zone map and [the detective's] uncontradicted testimony that defendant's offense had been committed within 1,000 feet of [the] [s]chool, we concur in the conclusion reached by the Appellate Division majority that "as a matter of common experience, a school is used for school purposes. The inferred fact, use of property for school purposes, reasonably flows from the fact already established, the existence of a school."
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> [Ibid. (quoting State v. Thomas, 256 N.J. Super. 563, 569-70 (App. Div. 1992)).]

In the present case, the State presented a map showing the Bonsall School lies within 1000 feet of where defendant was arrested. Detective Pineiro, who has been a Camden police officer for nineteen years, testified to the location of the school on the

map and that the school was open and operational. Here, as in White, where the property is a school,

> [n]o evidence presented at trial suggested that the [s]chool had ceased to be operational, nor is the State obligated to disprove every contingency to sustain its burden. It need produce evidence sufficient for a jury to conclude beyond a reasonable doubt only that the [s]chool was used for school purposes.
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> [Id. at 259-60.]

Ultimately, it was the jury's function to weigh the credibility of the State's evidence regarding whether the school was still in operation. During her charge to the jury, the trial judge made clear it was the State's burden to prove beyond a reasonable doubt the various elements of the school zone charge. The jury was told the State must prove that the act occurred within 1000 feet of school property, which "means . . . property which is used for school purposes." The judge also instructed the jury that "[a]rguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence[,]" and "[a]ny comments by counsel are not controlling." Juries are expected to follow the judge's instructions. State v. Miller, 205 N.J. 109, 126 (2011).

III.

Finally, we address defendant's sentencing arguments. Our review of sentencing determinations is governed by a highly deferential standard. State v. Fuentes, 217 N.J. 57, 70 (2014).

> The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
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> [Ibid. (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)) (alteration in original).]

Once the trial court has balanced the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and -1(b), it "may impose a term within the permissible range for the offense." State v. Bieniek, 200 N.J. 601, 608 (2010); see also State v. Case, 220 N.J. 49, 65 (2014) (instructing that appellate courts may not substitute their judgment for that of the sentencing court, provided that the "aggravating and mitigating factors are identified [and] supported by competent, credible evidence in the record").

In sentencing defendant, the court found the following three aggravating factors: the risk of re-offense (factor three), N.J.S.A. 2C:44-1(a)(3); the extent of defendant's prior criminal

record and the severity of those offenses (factor six), N.J.S.A. 2C:44-1(a)(6); and the need for deterrence (factor nine), N.J.S.A. 2C:44-1(a)(9). The court found no mitigating factors.

The court appropriately pointed out several important considerations bearing on its sentencing analysis. First, the court noted that defendant had both a juvenile and criminal history. The court further noted that defendant "has been convicted of the exact same offenses two times prior to the within offense[s]"; had violated probation; and "served periods of incarceration[] with parole ineligibility" that failed to deter him from committing the present offenses. Further, defendant's prior drug convictions support the application of the mandatory extended-term sentence pursuant to N.J.S.A. 2C:43-6(f) and N.J.S.A. 2C:43-7(c). In sum, the sentence imposed was manifestly appropriate and by no means shocks our judicial conscience.

The State does, however, concede that a limited remand is required for the purpose of merging defendant's convictions for possession with intent to distribute with the school zone offenses. Specifically, the State agrees that Count Two, third-degree possession with intent to distribute heroin, should merge with Count Three, third-degree possession with intent to distribute heroin within 1000 feet of a school. Count Six, third-degree possession with intent to distribute cocaine, should similarly

merge with Count Seven, third-degree possession with intent to distribute cocaine within 1000 feet of a school. We therefore remand for merger of those offenses consistent with this opinion.

Affirmed, but remanded for entry of an amended judgment of conviction reflecting the proper merger of offenses. We do not retain jurisdiction.