SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3390-11T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY K. COLE, a/k/a ANTHONY K. DAVIS-COLE,

Defendant-Appellant.

Argued May 20, 2015 – Decided June 22, 2015
Remanded by Supreme Court June 27, 2017
Reargued October 30, 2017 – Decided March 5, 2018

Before Judges O'Connor and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 10-04-0566.

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

Joie D. Piderit, Assistant Prosecutor, argued the cause for respondent (Andrew C. Carey, Middlesex County Prosecutor, attorney; Joie D. Piderit, of counsel and on the brief).

PER CURIAM

This matter returns to this court on a remand from the Supreme Court, directing we address any remaining issues that were not decided in our unpublished opinion from June 2015. See State v. Cole, 229 N.J. 430 (2017), rev.'g and remanding No. A-3390-11 (App. Div. June 22, 2015) (slip op.). We incorporate by reference the factual and procedural history of this case as set forth in detail in the Supreme Court's opinion, see 229 N.J. at 438-42.

To place the remaining issues in context, we provide a brief summary of the evidence and the procedural background. Defendant Anthony K. Cole was convicted by a jury of first-degree attempted murder, N.J.S.A. 2C:11-3(a)(1) and 2C:5-1; third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); third-degree hindering apprehension, N.J.S.A. 2C:29-3(b); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and fourth-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(a).

The salient evidence adduced at trial was as follows. David Donatelli was working one evening in a local park when someone suddenly brushed up against his shoulder. Simultaneously, Donatelli felt as though his neck had been whipped. When his neck began to bleed, he realized he had been

slashed with a sharp object. He laid down on the ground and subsequently went into shock. His co-employees summoned medical assistance and he was transported to a hospital. He underwent emergency surgery to close a six to eight inch laceration on the side of his neck.

The following day, the police found two matching gloves on a path near the area where Donatelli had been attacked. One glove was in a bush and the other was suspended from a tree thirteen feet above the ground. DNA testing revealed defendant's skin cells[1] were in both and Donatelli's blood was on one of the gloves.

Defendant was arrested and, after waiving his rights under Miranda v. Arizona, 384 U.S. 436 (1966), he was interviewed by two police officers. Defendant admitted being in the park the night of the incident but denied any involvement in the attack or being in the area where Donatelli had been attacked. Defendant denied he owned the gloves found in the park.

Defendant claimed he left the park after getting a call from his mother, with whom he lived, requesting he return home to cut up boxes for recycling. Records of defendant's and his

[1] Defendant's DNA profile was stored in the State's DNA database.

mother's cellphone usage the day of the incident did not reveal any cellphone calls between him and his mother.

Defendant was sentenced to a twenty-six and a half year term of imprisonment, subject to an eighty-five percent period of parole ineligibility in accordance with the No Early Release Act (N.E.R.A), N.J.S.A. 2C:43-7.2(a). Specifically, the court ordered defendant serve a twenty-year term for attempted murder; a consecutive five-year term for hindering apprehension; a consecutive eighteen-month term for certain persons not to have weapons; and, after merging the count for unlawful possession of a weapon into that for possession of a weapon for an unlawful purpose, a concurrent five-year term for the latter conviction.

Defendant appealed from his convictions and sentence, arguing the following four points:

> POINT I – THE ADMISSION, OVER OBJECTION, OF THE NON-INTERVIEW PORTION OF DEFENDANT'S VIDEOTAPED STATEMENT DEPRIVED HIM OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.
>
> POINT II – MISCONDUCT BY THE PROSECUTOR DURING BOTH HIS OPENING STATEMENT AND HIS SUMMATION RESULTED IN THE DENIAL OF DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL. (Not Raised Below).
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> POINT III – THE CONVICTION FOR HINDERING APPREHENSION MUST BE VACATED BECAUSE THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THAT OFFENSE.

> POINT IV – THE SENTENCE IMPOSED WAS MANIFESTLLY EXCESSIVE; THE COURT MISAPPLIED AGGRAVATING FACTORS AND IMPROPERLY IMPOSED TWO CONSECUTIVE TERMS.

Finding merit in Point I, we reversed the judgment of conviction and remanded this matter for a new trial. Cole, No. A-3390-11 (slip op. at 1). However, the Supreme Court reversed our judgment and remanded the matter back to us to decide any remaining issues. Cole, 229 N.J. at 461. We now address those issues, which defendant argues in Points II, III, and IV.

We first address defendant's contention the State failed to prove an essential element of hindering apprehension, N.J.S.A. 2C:29-3(b), warranting the conviction of this offense be reversed.

N.J.S.A. 2C:29-3(b) states in pertinent part:

> (b) A person commits an offense if, with purpose to hinder his own detention, apprehension, investigation, prosecution, conviction or punishment for an offense . . . he:
>
> > (1) Suppresses, by way of concealment or destruction, any evidence of the crime . . . which might aid in his discovery or apprehension or in the lodging of a charge against him[.]

Defendant argues the State's proofs failed to show that the act of discarding the gloves after the attack upon Donatelli constituted the concealment of evidence. He maintains the

gloves were neither concealed nor destroyed, but merely "shed" close to the scene of the crime. He claims the fact the police were able to find the gloves is proof the gloves had not been concealed.

We are satisfied the proofs could lead a reasonable jury to infer defendant attempted to conceal evidence of the attempted murder when he threw the gloves into a wooded area of the park. Because Donatelli's blood was on one of the gloves, defendant discarded the gloves after attacking him. A jury could infer defendant removed the gloves in an attempt to separate himself from any evidence of the crime and, thus, he discarded one glove in a bush and the other some thirteen feet above the ground in a tree.

Further, the fact the police were able to find the gloves does not mean they were not concealed. If that interpretation were accepted, no evidence that is discovered by the police could ever be deemed to have been concealed. In short, the State satisfied its burden of presenting evidence from which inferences could be drawn by a reasonable jury supporting a finding defendant was guilty of this particular offense beyond a reasonable doubt. State v. Kittrell, 145 N.J. 112, 130 (1996).

Defendant next contends the assistant prosecutor made statements during his opening and closing arguments that violated defendant's right to receive a fair trial. Defendant did not object to any of these statements during the trial.

"When, as here, the defendant does not object to the prosecutor's statement, that statement does not warrant reversal of the conviction unless it is 'of such a nature as to have been clearly capable of producing an unjust result.'" State v. Gorthy, 226 N.J. 516, 540 (2016) (citing R. 2:10-2).

Here, we have examined the statements in light of the controlling law. We further note the Supreme Court observed that the State presented overwhelming evidence of defendant's guilt. Cole, 229 N.J. at 456. Given such evidence and the governing precedents, we are satisfied none of the prosecutor's statements was clearly capable of producing an unjust result.

We turn to defendant's arguments about his sentence. First, he contends the court misapplied aggravating factors two, N.J.S.A. 2C:44-1(a)(2), and three, N.J.S.A. 2C:44-1(a)(3). Second, he argues the court did not have a basis to impose the consecutive sentences. Third, he claims the sentence was excessive. We address each argument in turn.

N.J.S.A. 2C:44-1(a)(2) sets forth the second aggravating factor:

> The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance[.]
>
> [Ibid.]

The trial court found the victim had been substantially incapable of exercising normal physical resistance at the time of the attack. The court reasoned that because defendant suddenly attacked the victim from behind without warning, the victim was unable to defend himself. Defendant argues, without elaboration, that the victim was not made vulnerable by the circumstances.

Aggravating factor two "does not limit 'vulnerability' to age or other physical disabilities of the victim." State v. O'Donnell, 117 N.J. 210, 218 (1989). This factor "focuses on the setting of the offense itself with particular attention to any factors that rendered the victim vulnerable or incapable of resistance at the time of the crime." State v. Lawless, 214 N.J. 594, 611 (2013) (citation omitted). In one instance, we upheld a finding that a gas station attendant who worked alone

at night was "particularly vulnerable." State v. Faucette, 439 N.J. Super. 241, 272 (App. Div. 2015).

In light of the fact defendant suddenly ambushed the victim from behind, we cannot say the court erred when it determined the victim was substantially incapable of exercising normal physical resistance. By the time the victim realized defendant was behind him, defendant had slashed his neck; the method of attack made it impossible for the victim to defend himself.

The court also determined aggravating factor three applied, the risk the defendant will commit another offense. See N.J.S.A. 2C:44-1(a)(3). The court based its finding on the fact defendant failed to take responsibility for his actions. In addition, the court placed some but "not a lot of weight" upon defendant's one previous conviction, which was for aggravated sexual assault.

Defendant argues when a party charged with a crime elects to go to trial and is convicted, a sentencing court cannot place any weight upon a defendant's failure to express remorse post-conviction. We find it unnecessary to address this factor. Even if the court erred in placing any weight upon this factor, the error was harmless. State v. Gallagher, 286 N.J. Super. 1, 21 (App. Div. 1995).

In addition to finding aggravating factor two, the court found aggravating factors one, N.J.S.A. 2C:44-1(a)(1)(the nature and circumstances of the offense, including whether it was committed in an especially heinous, cruel, or depraved manner), and nine, N.J.S.A. 2C:44-1(a)(9)(the need to deter). The court found no mitigating factors. Under these circumstances, the finding of aggravating factors one, two, and nine provided sufficient justification for imposing a term of imprisonment.

Defendant next contends the court erred when it ordered the sentence imposed for hindering apprehension run consecutively to that imposed for attempted murder. During the sentencing hearing, the court stated a consecutive sentence was warranted because the two offenses were separate and distinct. The court did not provide any other reason.

In State v. Yarbough, 100 N.J. 627 (1985), the Court identified the relevant criteria for determining when consecutive, as opposed to concurrent, sentences should be imposed. Id. at 639-40. A sentencing court is to consider the factual content of the crimes, including whether: (1) the crimes and their objectives were predominantly independent of each other; (2) the crimes involved separate acts of violence or threats of violence; (3) the crimes were committed at different times or separate places, rather than being committed so closely

in time and place as to indicate a single period of aberrant behavior; (4) any of the crimes involved multiple victims; and (5) the convictions for which the sentences were imposed were numerous. Id. at 644. These five factors are to be applied qualitatively, not quantitatively.

Here, the court did not address all of the above factors before it ordered the sentence for hindering apprehension be served consecutively to that imposed for attempted murder. Accordingly, we remand this matter for resentencing for the court to determine whether, after applying the Yarbough factors, the sentence for hindering apprehension should be concurrent or consecutive.

Defendant notes the court ordered the sentence for the certain persons conviction be served consecutively because the court believed a consecutive sentence was mandatory under "our statutory directive." Defendant correctly points out there is no statute that requires a sentence imposed for the conviction of this offense be served consecutively to another. See State v. Lopez, 417 N.J. Super. 34, 37, n.2 (App. Div. 2010) (finding there is no statutory mandate the court impose a consecutive sentence for a certain persons conviction). Thus, we also remand for the resentencing of this conviction. In light of our

disposition, we need not address defendant's final argument his sentence was excessive.

Affirmed in part and remanded in part. We do not retain jurisdiction.