SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3409-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OSCAR CHAN,

Defendant-Appellant.

Argued January 30, 2018 – Decided April 5, 2018

Before Judges Yannotti, Leone and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 13-03-0389.

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

Brett A. Berman, Assistant Prosecutor, argued the cause for respondent (Angelo J. Onofri, Mercer County Prosecutor, attorney; Brett A. Berman, of counsel and on the brief).

PER CURIAM

Defendant was tried before a jury and found guilty of second-degree aggravated assault and fourth-degree unlawful possession of a weapon. He appeals from the judgment of conviction (JOC) dated February 2, 2016. We affirm.

I.

A Mercer County grand jury charged defendant with second-degree aggravated assault upon a man named Perez, N.J.S.A. 2C:12-1(b)(1) (count one); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count two); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count three). Thereafter, the State filed a motion to bar defendant from questioning Perez about his immigration status at trial. The court conducted an N.J.R.E. 104 hearing and granted the State's motion.

At the trial, Perez testified that on November 17, 2012, he and defendant were housemates. Perez said that on that date, he and defendant were involved in an argument in their shared kitchen, and defendant accused Perez of stealing from him. Perez testified that defendant said "you will see," left the kitchen, returned with a knife, and "just stabbed me." Perez said he tried to defend himself, but defendant "kept thrusting the knife at" him.

J.H. was defendant's wife at the time of the incident.[1] She waived her spousal privilege and testified she was present during the altercation. J.H. said she and defendant had been in a bedroom and defendant was drunk. She explained that defendant had his music turned up "very loud" and Perez told "him to lower it down." J.H. stated that defendant "got mad" and "left the bedroom with a knife or a blade."

J.H. testified that defendant walked into the kitchen with the weapon and she saw "everything that he was doing." She explained that "[w]hen [defendant] went to the kitchen with the knife," he "stabbed [Perez] like five [times] in the back." She pointed to her chest, indicating that Perez was also stabbed in his chest.

J.H. further testified that Perez never had control of the knife. She said that after defendant stabbed him, Perez ran out of the house and "knocked very hard on the door of [his] next-door neighbor." The neighbor helped Perez by tying a towel around his shoulder before Perez passed out.

Officer Robert Arnwine of the Trenton Police Department responded to the report of a stabbing at defendant's residence. Arnwine testified that when he arrived at defendant's home, he saw

[1] We use initials to protect J.H.'s privacy.

defendant with no shirt on. He was "bleeding very heavily from both his hands" and walked towards the officer. Arnwine believed defendant was intoxicated and had difficulty speaking with him because defendant "only spoke broken English." The neighbor approached Arnwine and told him "there was another man [who] had been stabbed, [and] he was in the back of the house[.]"

Arnwine walked to the back of the house where he saw Perez, who was "bleeding from the back of his head, the chest area, and his left arm." Arnwine said defendant was "bleeding very bad" and his shirt was "soaked with blood." Arnwine testified that Perez "appeared to be intoxicated" and he could "smell alcohol on him," but Perez also was calm. Perez told Arnwine, "Oscar stabbed me."

Dr. Michael Kelly, who treated Perez, testified that Perez lost enough blood to require a blood transfusion. He said Perez sustained five injuries: three in his chest, one in his neck, and one in his shoulder.

Defendant testified that Perez banged on the door to defendant's bedroom and complained about the loud volume of the music. According to defendant, Perez was drunk, "very serious," and "upset." Defendant refused to lower the volume of the music. Perez got more angry, cursed, and told defendant there was "a good way or a bad way" to deal with the situation. Defendant thought

they were going to have a fist fight, but Perez pulled out a knife and came at defendant.

Defendant said he and Perez struggled over the knife, and pushed back and forth on it in the hallway. He claimed he did not intend to injure Perez, and he acted to save his own life. Defendant asserted that he never had control over the knife and did not know what happened to it.

Dr. Thomas Papa treated defendant. He stated that defendant had a wound to his right hand, which required stitches, and lacerations on his left hand. Dr. Zhongxue Hua, an expert in forensic pathology, testified that defendant's injuries were defensive in nature.

The jury found defendant guilty on count one (aggravated assault) and count three (unlawful possession of a weapon), but not guilty on count two (possession of a weapon for an unlawful purpose). The judge sentenced defendant on January 28, 2016.

On count one, the judge imposed a seven-year custodial term and ordered defendant to serve eighty-five percent of the sentence before being eligible for parole, pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. On count three, the judge sentenced defendant to a flat eighteen-month custodial term, to run concurrently with the sentence on count one. The judge filed a JOC dated February 2, 2016. This appeal followed.

On appeal, defendant raises the following arguments:

POINT I

THE TRIAL JUDGE IMPROPERLY BARRED THE DEFENSE FROM INTRODUCING EVIDENCE REGARDING THE ALLEGED VICTIM'S PRETRIAL UNDERSTANDING THAT IF HE WERE DEEMED TO BE A CRIME VICTIM, HE COULD OVERCOME HIS STATUS AS AN UNDOCUMENTED IMMIGRANT AND RECEIVE A VISA TO ALLOW HIM TO STAY IN THIS COUNTRY LEGALLY; WITNESS BIAS IS ALWAYS A RELEVANT TOPIC.

POINT II

THE JURY INSTRUCTION ON SELF-DEFENSE WAS NOT INCORPORATED INTO THE INDIVIDUAL AGGRAVATED-ASSAULT COUNT AGAINST DEFENDANT, THEREBY ALLOWING THE JURY TO CONVICT BASED UPON THE SIMPLE ELEMENTS OF AGGRAVATED ASSAULT WITHOUT EVER CONSIDERING THE APPLICABILITY OF SELF-DEFENSE TO THE CASE; INDEED, THE INSTRUCTION ON AGGRAVATED ASSAULT IMPROPERLY REQUIRED THE JURY TO CONVICT IF JURORS MERELY FOUND THE ORDINARY ELEMENTS OF AGGRAVATED ASSAULT WITH NO CONSIDERATION OF SELF-DEFENSE. (NOT RAISED BELOW).

POINT III

FOR TWO REASONS, THE JURY SHOULD HAVE BEEN INSTRUCTED THAT, UNDER THE FACTS OF THIS CASE, A SELF-PROTECTIVE PURPOSE FOR POSSESSING THE WEAPON WAS A DEFENSE TO THE CHARGE OF UNLAWFULLY POSSESSING IT. FIRST, PRIOR NEW JERSEY PRECEDENT TO THE CONTRARY HAS BEEN FUNCTIONALLY OVERRULED BY THE U.S. SUPREME COURT'S SECOND-AMENDMENT-BASED DECISION IN CAETANO V. MASSACHUSETTS, [__ U.S. __, 136 S. CT. 1027 (2016)] AND, SECOND, EVEN UNDER EXISTING PRECEDENT, NEW JERSEY CASE LAW REQUIRES SUCH AN INSTRUCTION WHEN THE PROOFS SHOW THE DEFENDANT MAY HAVE ARMED HIMSELF SUDDENLY IN RESPONSE TO A THREAT. (NOT RAISED BELOW).

II.

We turn first to defendant's contention that the judge erred by precluding him from questioning Perez regarding Perez's immigration status. Defendant contends he wanted to establish that Perez was an undocumented alien who understood he could obtain a "U visa"[2] to remain in the United States if he were deemed to be a victim of a crime.

"[R]elevant evidence may be excluded if its probative value is substantially outweighed by the risk of . . . prejudice . . . ." N.J.R.E. 403(a). "Damaging evidence usually is very prejudicial, but the real question is whether the risk of undue prejudice was too high." State v. Morton, 155 N.J. 383, 454 (1998) (citing State v. Bowens, 219 N.J. Super. 290, 296-97 (App. Div. 1987)).

Whether the probative value of the evidence is outweighed by the potential prejudice is a decision left to the discretion of the trial judge. State v. Carter, 91 N.J. 86, 106 (1982). "In performing the weighing process envisioned by N.J.R.E. 403, the trial judge's discretion is a broad one." State v. Swint, 328 N.J.

[2] "U visas allow noncitizen victims of certain crimes who have suffered 'substantial physical or mental abuse,' and who are likely to be helpful in investigating the crime, to remain in the United States as lawful temporary residents." Sunday v. AG U.S., 832 F.3d 211, 213 (3d Cir. 2016) (citing 8 U.S.C. § 1101(a)(15)(U)).

Super. 236, 253 (App. Div. 2000) (citing State v. Sands, 76 N.J. 127, 144 (1978)). On appeal, the decision of the trial court must be affirmed unless it can be shown that the court palpably abused its discretion. Carter, 91 N.J. at 106.

Evidence may be excluded pursuant to N.J.R.E. 403 if its probative value "is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issue[s]." State v. Thompson, 59 N.J. 396, 421 (1971).

At the N.J.R.E. 104 hearing, Perez testified that he had been living undocumented in the United States since 1990. He stated that in December 2012, about one month after the stabbing, his brother told him he might be able to obtain a visa and remain in the United States if he was deemed to be a crime victim. Perez's brother advised him to discuss this with an attorney. Perez did not, however, follow his brother's advice.

Perez further testified that in November 2014, he was interviewed by defendant's attorney. After the attorney inquired if he had any questions, Perez asked if he "could find help somewhere to obtain proper documentation." Defendant's attorney said she could not help him because she was representing defendant.

Perez testified that in June 2015, he spoke with an attorney about obtaining authorization to stay in this country legally. He explained that he asked the attorney about the immigration law, but he did not mention "anything about what happened to [him] in this case." He stated that as of the date of the hearing, he still had not filed an application or any paperwork seeking authorization to remain in the United States as a victim of crime.

Perez also testified that approximately six months before the hearing, he was working at a restaurant in Pennsylvania when a co-worker recommended that he find a lawyer to help him seek authorization to remain in the United States as a crime victim. Perez did not follow his co-worker's advice.

The judge placed her decision on the record. The judge found that the probative value of the evidence regarding Perez's immigration status was minimal, and it was outweighed by the prejudice that would result if the jury was informed of Perez's immigration status. The judge noted that the issue of illegal immigration was in the news, and admission of this evidence could "sway the jury." The judge therefore granted the State's motion to bar the defense from questioning Perez about his immigration status.

On appeal, defendant argues that the judge's decision was "manifestly erroneous" because it precluded him from raising an

issue that pertained to Perez's alleged bias. He contends the evidence would show Perez was in this country illegally and wanted to be considered a crime victim, since this might allow him to remain in this country lawfully. We are convinced, however, that the record supports the judge's decision to bar the defense from eliciting testimony about Perez's immigration status.

As the judge explained in her decision, one month after the stabbing, Perez's brother told him that as a crime victim, he might be able to obtain a visa that would allow him to remain lawfully in the United States. Perez's brother told him to speak with a lawyer. Perez did not, however, contact a lawyer to pursue the matter.

Moreover, about six months before the N.J.R.E. 104 hearing, Perez's co-worker recommended that he find a lawyer and seek authorization to stay in the United States as the victim of a crime. Perez did not follow his co-worker's advice. Furthermore, as of the time of the hearing, Perez still had not filed an application for the "U visa."

In addition, as the judge noted, Perez's "story never changed." The judge found Perez's testimony credible. The judge noted that from the night of the incident when he told the police that defendant stabbed him, Perez's account remained the same. There was no evidence that Perez's account changed or was affected

by his conversations with his brother and his co-worker regarding the possibility he could obtain a "U visa" and remain lawfully in the United States.

The recent decision in State v. Alexis Sanchez-Medina, __ N.J. __ (2018), supports our conclusion. In that case, the prosecutor had questioned the defendant about his immigration status, and on appeal the State had conceded this was improper. Sanchez-Medina, slip op. at 13. The Court stated that

> [i]n limited circumstances, proof of a person's immigration status can be admissible. If the prosecution, for example, promised a witness favorable immigration treatment in exchange for truthful testimony, a jury would be entitled to assess the witness's credibility in light of that promise. Or if a defendant had lied about his immigration status to obtain government benefits as part of a scheme to defraud, his true status would be relevant to the crime charged. Still, exceptions like those are rare. In most cases, the immigration status of a witness or party is simply irrelevant, and a jury should not learn about it.
>
> [Id. at 13-14.]

The Court noted that federal and state courts had reached the conclusion that a witness's immigration status was not relevant. Id. at 14 (citing Solis v. SCA Restaurant Corp., 938 F. Supp. 2d 380, 401 n.11 (E.D.N.Y. 2013); Velasquez v. Centrome, Inc., 183 Cal. Rptr. 3d 150, 168 (Cal. Ct. App. 2015); Ayala v. Lee, 81 A.3d

584, 598 (Md. Ct. Spec. App. 2013); Figeroa v. INS, 886 F.2d 76, 79 (4th Cir. 1989)).

The Court also stated that there was a risk of undue prejudice from the introduction of evidence regarding a witness's immigration status, which could "trigger negative sentiments in the minds of some jurors." Id. at 15 (quoting Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 258 (App. Div. 2009)). The Court pointed out that such evidence could be excluded under N.J.R.E. 403 because the potential prejudice resulting from a jury's knowledge of a witness's immigration status could outweigh any probative value the evidence might have. Id. at 15-16 (citations omitted).

Here, the judge did not mistakenly exercise her discretion by barring the defense from questioning Perez regarding his immigration status. As the judge found, such evidence would prejudice the State by triggering a negative view of Perez in the minds of some jurors. Moreover, Perez's immigration status had no bearing on Perez's credibility. The judge noted that Perez's version of the facts remained the same from the time of the stabbing, and there was no evidence indicating Perez sought to characterize himself as a crime victim so that he could obtain a "U visa" and remain in the United States lawfully.

III.

Next, defendant argues that the judge erred by failing to integrate the instruction on self-defense with the instruction on aggravated assault. This argument was not raised at trial. Therefore, we consider whether the judge's instructions were erroneous and, if so, whether the error was "clearly capable of producing an unjust result." R. 2:10-2.

When reviewing a charge for plain error, an appellate court must not examine the "portions of the charge alleged to be erroneous in isolation; rather, 'the charge should be examined as a whole to determine its overall effect.'" State v. McKinney, 223 N.J. 475, 494 (2015) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). If a defendant does not object to a jury instruction at the time it is given, "there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case." State v. Montalvo, 229 N.J. 300, 320 (2017) (quoting State v. Singleton, 211 N.J. 157, 182 (2012)).

Here, when instructing the jury on aggravated assault, the judge explained the elements of that offense and instructed the jury that it "must find the defendant guilty if those basic elements of aggravated assault were proven by the State." The judge then instructed the jury on self-defense.

Defendant concedes the self-defense charge was correct, but argues that the instruction on self-defense was inconsistent with the judge's statement that the jury "must" find defendant guilty if the State established the elements of aggravated assault beyond a reasonable doubt. He contends the alleged contradictory instructions were plain error, which deprived him of due process and a fair trial.

We note that during the charge conference, the judge asked the attorneys where she should place the model charge on self-defense in the instructions. The assistant prosecutor said the judge should read that charge after the instructions on aggravated assault and defense counsel agreed. Defendant's attorney stated that "[s]o long as . . . [it] is clear, I don't think it really matters where you read it."

We are convinced the judge did not plainly err in instructing the jury on aggravated assault and self-defense. As noted, the judge told the jury that it "must" find defendant guilty if it found that the State had proven all of the elements of aggravated assault, but the judge also told the jury that the State had the burden of proving that the defense of self-defense was not true. The judge specifically instructed the jury that "[i]f the State does not satisfy this burden and you do have a reasonable doubt,

then it must be resolved in favor of the [d]efendant and you must allow the claim of self-defense and acquit the [d]efendant."

Thus, when read together, the judge's instructions on aggravated assault and self-defense were integrated sufficiently so that the jury would not be misled to believe it could find defendant guilty of aggravated assault without considering his claim of self-defense. The jury was told that if the State failed to carry its burden of proof on self-defense, the jury must acquit defendant. Read together, the instructions were not plain error.

To show plain error, defendant must show "that the error is 'clear' or 'obvious,'" State v. Chew, 150 N.J. 30, 82 (1997) (quoting United States v. Olano, 507 U.S. 725, 734 (1993)), under the law "at the time of appellate consideration." Johnson v. United States, 520 U.S. 461, 468 (1997). Defendant cannot make that showing because no case requires the changes to the aggravated assault instructions which he demands.

In support of his argument, defendant relies upon State v. Coyle, 119 N.J. 194 (1990). In that case, the trial judge read the jury the instructions for murder and thereafter read the instructions on passion/provocation. Id. at 222. The Court stated that

> [n]owhere in the initial charge concerning purposeful murder did the court refer to the State's burden of disproving

> passion/provocation beyond a reasonable doubt. The trial court's initial charge concerning purposeful murder failed to make clear that if there is evidence of passion/provocation, a jury cannot convict for murder without first finding that the defendant did not kill in the heat of passion.
>
> [Ibid.]

In Coyle, the Court found that the charge was flawed because the jury could have found defendant guilty of murder by finding that it was his conscious object to cause death or serious bodily injury, without having considered the possibility of a passion/provocation manslaughter verdict. Id. at 222-23. The Court held that the trial judge's failure to distinguish between these two findings was plain error and reversed the defendant's conviction. Id. at 228, 239.

Defendant's reliance upon Coyle is misplaced. Here, the judge instructed the jury on the elements of aggravated assault. The judge then made clear that the State had the burden of proof on self-defense and had to establish beyond a reasonable doubt that the defense of self-defense was not true. The judge told the jurors that they must find defendant guilty if the State established the elements of aggravated assault beyond a reasonable doubt, but they were also instructed that they must find defendant not guilty if the State failed to carry its burden of proof on self-defense.

Thus, the jury could not find defendant guilty of aggravated assault without considering his claim of self-defense.

We therefore conclude that the judge did not clearly err in instructing the jury on aggravated assault and self-defense. We also conclude that because the judge did not clearly err in instructing the jury by failing to better integrate the instructions, the error was not an error "clearly capable of producing an unjust result." R. 2:10-2.

Defendant's remaining arguments on this issue lack sufficient merit to warrant further comment. R. 2:11-3(e)(2).

IV.

Defendant argues that the judge erred in instructing the jury on the charge of unlawful possession of a weapon. He contends the judge should have instructed the jury that self-defense also was a defense to the weapons charge. Again, we disagree.

"Self-defense does not excuse possession of a weapon in violation of [N.J.S.A. 2C:39-5(d)] except in 'those rare and momentary circumstances where an individual arms himself spontaneously to meet an immediate danger.'" State v. Kelly, 118 N.J. 370, 372 (1990) (quoting State v. Harmon, 104 N.J. 189, 208-09 (1986)). Self-defense does not, however, excuse a violation of N.J.S.A. 2C:39-5(d) "when a person arms himself prior to a danger becoming imminent." Harmon, 104 N.J. at 208. "Indeed,

precautionary arming during a non-emergency situation is the type of conduct that the Legislature sought to interdict under [N.J.S.A. 2C:39-5(d)]." Kelly, 118 N.J. at 386. "[B]ecause [N.J.S.A. 2C:39-5(d)] is a strictly possessory offense, . . . self-defense rarely constitutes a defense to such a charge." Id. at 380.

Defendant argues that Kelly is no longer viable as a result of the decision in Caetano v. Massachusetts, __ U.S. __, 136 S. Ct. 1027 (2016). In Caetano, the Court considered whether a Massachusetts law that prohibited the possession of stun guns violated the Second Amendment. Ibid. The Court reversed the judgment of the Supreme Judicial Court of Massachusetts, which held that stun guns are not protected under the Second Amendment. Id. at 1027-28. Caetano does not, however, hold that the Second Amendment bars a State from making possession of a weapon unlawful without providing an exception for self-defense. Thus, Caetano lends no support to defendant's argument on appeal.

Defendant further argues that under Kelly, he was entitled to an instruction on self-defense because he "spontaneously seized control of the weapon" from Perez to protect himself. As noted, Kelly allows a defendant charged under N.J.S.A. 2C:39-5(d) to claim self-defense when the defendant armed "himself spontaneously to meet an immediate danger." Kelly, 118 N.J. at 372.

Defendant did not seek this instruction at trial. On appeal, he argues that the judge should have instructed the jury sua sponte that self-defense also was a defense to the charge under N.J.S.A. 2C:39-5(d). However, a trial judge is only required to instruct a jury sua sponte on a defense "when the evidence clearly indicates the appropriateness of such a charge." State v. Walker, 203 N.J. 73, 87 (2010). See also State v. Denofa, 187 N.J. 24, 42 (2006) (requiring sua sponte instruction on lesser-included offense when evidence "clearly indicates" the instruction is required).

Here, the evidence did not "clearly indicate" that defendant spontaneously armed himself with a knife to protect himself from Perez. At trial, defendant testified that he never possessed the knife. He stated that he did not "have control" of the weapon. Furthermore, Perez testified that he was never armed during the stabbing and never possessed the knife. Perez asserted that he was able to get control of the knife that defendant possessed, but he never took the knife out of defendant's hands.

In addition, J.H. testified that she and defendant were in their bedroom, and defendant became angry when Perez complained about the loud music. According to J.H., defendant left the bedroom with a knife, went to the kitchen with the knife, and stabbed Perez.

Thus, the testimony does not clearly indicate that defendant "spontaneously" armed himself with the knife in order to defend himself against an imminent danger. Therefore, the judge was not obligated to instruct the jury sua sponte on self-defense with regard to the charge under N.J.S.A. 2C:39-5(d).

Affirmed.