SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3588-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASHON JACKSON, a/k/a
RAY TAYLOR,

Defendant-Appellant.

Submitted December 13, 2017 – Decided February 7, 2018

Before Judges Nugent and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 11-05-0432.

Joseph E. Krakora, Public Defender, attorney for appellant (Alicia J. Hubbard, Assistant Deputy Public Defender, of counsel and on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Robert J. Wisse, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Rashon Jackson appeals from his conviction and sentence following a jury trial, asserting that the trial court erred by (1) not compelling a co-defendant to testify despite the invocation of his Fifth Amendment privilege against self-incrimination; (2) issuing an incomplete jury charge; and (3) imposing an excessive sentence. After a review of these contentions in light of the record and applicable legal principles, we affirm.

Defendant was charged in an indictment, along with several co-defendants, with first-degree murder, N.J.S.A. 2C:11-3(a)(1)-(2) (count seventeen); first-degree robbery, N.J.S.A. 2C:15-1 (count eighteen); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count nineteen); two counts of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count twenty and twenty-one); third-degree receipt of stolen property, N.J.S.A. 2C:20-7 (count twenty-two); and first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count twenty-three).[1]

A jury convicted defendant on all counts except for count twenty-one, second-degree unlawful possession of a weapon charges. He was sentenced to an aggregate prison term of sixty years, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

[1] All of the co-defendants pleaded guilty to various offenses and agreed to provide testimony for the State if called as witnesses.

We derive our factual summary from the testimony presented at trial. One of the co-defendants, Anthony Velez, believed that he had been "shorted" by a drug dealer on several transactions. In retaliation, he devised a plan to rob the dealer, enlisting the help of defendant and others. Defendant drove the group to the dealer's apartment where he and two co-defendants got out of the car and went to the door. Co-defendant Schelton Shennett remained in the car. Words were exchanged and defendant shot the dealer, killing him. The men ran back to the car and drove to Shennett's house where they hid the weapons.

As part of the homicide investigation, officers interrogated Velez, who eventually revealed the identities of his co-defendants and the location of the weapons. Defendant was arrested in Massachusetts, carrying a driver's license that did not belong to him.

Shennett accepted a plea agreement approximately one year before Velez and the third co-defendant pleaded guilty. Prior to the start of defendant's trial, the State advised the defense that it did not intend to call Shennett as a witness.

Defendant subpoenaed Shennett to testify as a defense witness, in an attempt to introduce evidence that Shennett had not incriminated defendant in the two statements he had given to the police during their investigation. It was not until Shennett

testified at his own plea hearing that he implicated defendant. Shennett had not yet been sentenced at the time of defendant's trial.

Upon taking the stand outside of the presence of the jury, Shennett invoked his Fifth Amendment privilege against self-incrimination. Defense counsel argued that he was entitled to have Shennett testify because he had agreed to do so as part of his plea agreement. He also asserted he was entitled to question Shennett about the statements he made to the police. He asked the court for various remedies, including a direction to the State to grant immunity to Shennett, an adjournment of the trial until after Shennett's sentencing, and an adverse inference charge for the State's failure to call Shennett to testify.

The judge denied defendant's requests. He found that defendant had no standing to contest or vacate the plea agreement entered into between the State and Shennett. The judge refused to direct Shennett to testify, advising that he could not compel Shennett to violate his Fifth Amendment right or require him to exercise his constitutional right in front of a jury. The judge also refused to permit the introduction of Shennett's statements on their own, finding they were impermissible hearsay.

On appeal, defendant raises the following arguments:

POINT I: THE COURT'S FAILURE TO ENSURE THAT THE DEFENSE WAS ABLE TO CALL CO-DEFENDANT SCHELTON SHENNETT VIOLATED MR. JACKSON'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHERE HE COULD PUT FORTH HIS DEFENSE.

A. Adjournment of the Trial Until After Mr. Shennett's Sentencing

B. Immunity for Mr. Shennett

C. Providing the Jury with An Adverse Inference Charge

POINT II: THE COURT GAVE THE JURY AN INCOMPLETE FLIGHT CHARGE, OMITTING DEFENDANT'S EXPLANATION FOR LEAVING NEW JERSEY, WHICH WAS INCONSISTENT WITH AN INFERENCE OF CONSCIOUSNESS OF GUILT [NOT RAISED BELOW].

POINT III: AN EXCESSIVE SENTENCE WAS IMPOSED AFTER THE COURT IMPROPERLY CONSIDERED MR. JACKSON'S CONTINUED DENIAL OF GUILT.

The following principles guide our review. Issues raised at trial are reviewed under the harmless error standard. R. 2:10-2. An alleged error brought to the trial court's attention will not be reversed unless it is "clearly capable of producing an unjust result." Ibid. Where constitutional rights are implicated, the reviewing court must consider whether the State has "proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Scherzer, 301 N.J. Super. 363, 454 (App. Div. 1997) (quoting Chapman v. Cal., 386 U.S. 18, 24 (1967)).

"[A] defendant cannot call a witness solely for the purpose of having him assert his Fifth Amendment rights before the jury." State v. Nunez, 209 N.J. Super. 127, 132 (App. Div. 1986) (citing State v. Karlein, 197 N.J. Super. 451 (Law Div. 1984)). The right against self-incrimination remains intact through sentencing. Even if the individual has pled guilty, if he or she were to testify, the testimony could be self-incriminating, leading to new charges. As we stated in Nunez, so long as a defendant is "yet to be sentenced and [has not] exhaust[ed] his appellate remedies, his conviction [is] not final." Ibid.

It is also well-established that a witness expected to invoke his Fifth Amendment privilege should not do so in the presence of a jury. "If the witness were allowed to invoke the privilege against self-incrimination at trial, the jury might infer that it was the witness who was involved in the criminal act, not the defendant." Id. at 133 (quoting Karlein, 197 N.J. Super. at 457). Therefore, we have stated that "the jury is not entitled to draw any inference from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense." Ibid. (quoting Bowles v. U.S., 439 F.2d 536, 541 (D.C. Cir. 1970) (en banc)).

We are satisfied that the judge's decision not to adjourn the trial for the sentencing of Shennett was not an abuse of

discretion. Shennett did implicate defendant during his plea hearing. The other two co-defendants both testified that they observed defendant shoot the victim. Defendant did not establish that Shennett's valid invocation of his Fifth Amendment privilege caused him sufficient prejudice to warrant a reversal of his convictions.

Nor did the judge err in refusing to direct the State to grant immunity to Shennett. Defendant's reliance upon State v. Feaster, 184 N.J. 235 (2005), is misplaced. There was no evidence presented here, as in Feaster, that the State acted in any manner to prevent Shennett from testifying. To the contrary, the record demonstrates that Shennett, upon advice of his counsel, made the decision to invoke his Fifth Amendment privilege.

Defendant also contends that the trial judge improperly instructed the jury on the issue of flight by failing to include a specific instruction as to his "innocent explanation for the purported flight." As this issue is raised for the first time on appeal, we review it for plain error. State v. Williams, 168 N.J. 323, 335 (2001). Under the plain error doctrine, "defendant not only must demonstrate that the instruction was flawed, but also that in the circumstances presented 'the error possessed a clear capacity for producing an unjust result.'" Id. at

336 (quoting State v. Melvin, 65 N.J. 1, 18 (1974)); see also R. 2:10-2.

Defendant was located in Massachusetts several months after the shooting. He was using an assumed name and possessed a stolen driver's license. Defendant concedes that the trial judge "exactly tracked the model charge" in his instruction to the jury, but argues that it was incomplete because "it omitted defendant's explanation for the purported flight."[2] Defendant contends that he was in Massachusetts to visit a cousin, and he produced evidence at the trial of prior visits made to his cousin out of state. In his summation, defense counsel reminded the jury of this evidence to contradict the State's theory that defendant had left the State to avoid arrest.

"Accurate and understandable jury instructions in criminal cases are essential to a defendant's fair trial." State v. Concepcion, 111 N.J. 373, 379 (1988). The trial judge has an absolute duty to provide a clear explanation of the issues that the jury must determine and the applicable law. Ibid.

[2] The Model Jury Charge directs the judge to "set forth explanation suggested by defense" for the jury's consideration "where the defense has not denied that he/she departed the scene but has suggested an explanation." Model Jury Charges (Criminal), "Flight" (rev. May 10, 2010) (emphasis omitted).

As defendant stated, the judge's instruction to the jury followed the model charge. There was no objection by defendant to the proposed jury instruction nor did he request any additions to it. Failure to object to the charge weighs heavily against defendant, State v. Cain, 224 N.J. 410, 432 (2016), and leads to the inference that he did not consider the flight instruction to be prejudicial. See State v. Macon, 57 N.J. 325, 333 (1971). The record does not demonstrate a legal error sufficiently grievous to warrant reversal.

Finally, defendant contends that the trial court imposed an excessive sentence after improperly referring to his continued expression of innocence as a lack of remorse. During the sentencing hearing, the judge remarked that defendant "appears to have shot [the victim] dead in cold blood. . . . I don't perceive any remorse whatsoever on his part. . . . If one actually feels remorse, they don't leave it to their lawyer to say how sorry they are."

A deferential standard is afforded sentencing decisions on appeal. State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). Where the "aggravating and mitigating factors are identified, supported by competent, credible evidence in the record, and properly balanced," the

sentence will stand. Ibid. (citing State v. Natale, 184 N.J. 458, 485 (2005)).

The trial court found aggravating factors three, five, six, and nine as being applicable. See N.J.S.A. 2C:44-1(a)(3), (5), (6), (9). The judge's findings were well supported in the record based on defendant's criminal history as a juvenile and an adult, his admitted substance abuse, lack of education and gainful employment, and his membership in the Bloods street gang. The judge also explained that defendant was not entitled to a finding of any mitigating factors. Therefore, because the aggravating factors greatly outweighed the nonexistent mitigating factors and the judge's decision is supported by competent, credible evidence in the record, we see no reason to disturb the trial court's sentence.

Affirmed.