SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3709-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MAURICE A. HORNE,

Defendant-Appellant.

Submitted January 24, 2018 - Decided April 9, 2018

Before Judges Koblitz and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-03-0466.

Joseph E. Krakora, Public Defender, attorney for appellant (Seon Jeong Lee, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Carey J. Huff, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Maurice Horne appeals his conviction and sentence following a jury trial. Defendant argues that the judge failed

to sua sponte charge the lesser offense of theft after the charge of robbery, the verdict was against the weight of the evidence, and his sentence was manifestly unfair. We affirm.

A Monmouth County Grand Jury returned an indictment charging defendant with first-degree robbery, N.J.S.A. 2C:15-1 (count one), and fourth-degree unlawful possession of an imitation firearm, N.J.S.A. 2C:39-4(e) (count two). After a joint trial with co-defendant Duane Horne, a jury found defendant guilty on both counts. Defendant was sentenced to a twelve-year term of incarceration with eighty-five-percent of the maximum term to be served pursuant to the No Early Release Act.

The following facts are derived from the trial record. On December 14, 2013, M.N. was working at a gas station on Route 33 in Farmingdale, New Jersey.[1] Around 4 p.m., M.N. observed a white Crown Victoria with Virginia license plates pull into the gas station.

As M.N. attended to the vehicle, he observed two black males in their twenties inside. The front door of the vehicle was open when the driver, later identified as defendant Maurice Horne, asked M.N. for five dollars' worth of gas. Maurice then handed M.N. a twenty dollar bill. M.N. then pulled cash from his pocket

[1] We utilize the victim's initials for purpose of confidentiality.

to make change.[2] While in the driver's seat, Maurice attempted to grab the money from M.N.'s hand. M.N. kept hold of the money. Throughout the struggle, Maurice asked M.N., "Do you like your life?" M.N. then noticed a pistol in Maurice's right hand, which was tucked into his jacket with the back end of the pistol sticking out and pointing towards him. Maurice repeated the threat multiple times then said to the passenger, later identified as Duane Horne, "Get him." At that point, Duane pulled out a tactical folding knife and directed it toward M.N., who then released the money and backed away from the car.

Immediately after the incident, M.N. called 9-1-1. Two Howell Township police officers responded to the call. M.N. gave the police a description of the vehicle and advised them that he recalled the first three letters of the license plate. M.N. also showed the officers security footage of the incident.

New Jersey State Police Detective Shawn Bracht was stationed in his patrol vehicle in the center median on I-195 on the lookout for a white Crown Victoria with Virginia plates. Bracht observed a vehicle matching the description traveling toward him in the westbound lanes. After confirming the plate number, Bracht called dispatch for backup. When backup arrived, Bracht activated his

[2] We utilize the first names of Maurice Horne and Duane Horne for purpose of clarity.

lights, and pulled over the vehicle. There were two black male occupants in the vehicle.

Upon being ordered by Bracht, both men exited the vehicle. The men were handcuffed, read their Miranda rights, and searched.[3] The driver of the vehicle was identified as Maurice and the passenger was identified as Duane. The search of Duane revealed $992 cash. The search of Maurice was negative.

Thereafter, the State Police applied for and obtained a search warrant for the vehicle. The search revealed a black Airsoft pistol in the glove compartment, $930 cash in the center console, and a tactical folding knife located on the floor mat of the front passenger seat.

Subsequent to his arrest, Maurice provided a recorded statement wherein he admitted he had a toy gun and that he "snatched the money" from the "gas station guy." The statement was later presented by the State as part of its proofs at trial.

During the trial, both Maurice and Duane testified. Maurice testified to his four years of service in the Navy prior to receiving an honorable discharge and noted he suffered from medical issues after his discharge, which included substance abuse, suicidal tendencies, post-traumatic stress disorder, and bipolar

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

disorder. Further, Maurice testified that he grabbed the money and asked M.N. "Do you like your life?" about three times.

Duane testified that while in the passenger seat at the time of the incident, he was listening to his iPod and playing with his tactical folding knife. Duane also testified he heard Maurice arguing with M.N. and, believing the men were involved in a struggle, displayed the knife in an attempt to "get them to separate."

After the conclusion of testimony, the judge held a jury charge conference where counsel for Maurice did not provide any recommendations or offer any comments or instructions regarding the lesser-offense of theft.

During the reading of the charges, the judge first instructed the jury as to the robbery charge against Maurice. He then instructed the same charge as to Duane. Following that charge, the judge instructed the jury on the lesser-included offense of theft as to "a defendant." Thereafter, a charge for the lesser-included offense of theft was read pertaining to Duane only.

In pertinent part, the judge read the following charge:

> The State alleges in a lesser-included charge of theft from the person by taking cash from [M.N.] that defendant Duane Horne is legally responsible for the criminal conduct of Maurice Horne in violation of the law which provides in pertinent part: A person is guilty of an offense if it is committed by his own

> conduct or the conduct of another person for which he is legally accountable or both. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of an offense.
>
> . . . .
>
> In order to find [Duane] guilty of a specific crime of theft from the person, the State must prove beyond a reasonable doubt each of the following elements:
>
> That Maurice Horne committed the crime of theft from the person. I've already explained the elements of this lesser-included offense.

Furthermore, in explaining the verdict sheet, the judge read:

> 1B: State your verdict with respect to the lesser-included charge that Maurice Horne committed the crime of theft by taking money from the immediate custody and control of M.N.

At sidebar, Maurice's counsel argued the judge's charge as to the lesser-included offense of theft from a person was confusing because the judge neglected to repeat the charge for each defendant separately.[4] The discussion occurred as follows:

> DEFENSE COUNSEL: All the substantive law was defendant specific and it was Maurice, robbery first, robbery second, then went to Duane, robbery first, robbery second, then went to theft as a lesser-included under Maurice but it wasn't — I mean Duane but wasn't under Maurice, I think you need to clarify.

[4] While counsel did not specifically note an "objection," we consider the post instruction argument to be an objection for the purpose of our review.

> THE COURT: I think I didn't use either on both because as to theft as to both of them, it's a lesser-included as to both.
>
> DEFENSE COUNSEL: I'm aware of that but the way it was read, robbery, robbery, then you went to the second one.
>
> THE COURT: That's because that's a lesser-included offense. It's not an element of the crime that's charged. I'm going to have to change the language in the verdict sheet to include the alternate of robbery, which is either theft or not.

Subsequently, after considering counsel's argument, the judge concluded:

> THE COURT: Right. I think — the way that it comes out is, rather than do that charge separately as to each one, the theft from a person is a lesser-included as to both.

Defendant raises the following points on appeal:

POINT I

> THE JURY INSTRUCTION FOR THE LESSER-INCLUDED OFFENSE OF THEFT AS APPLIED TO DEFENDANT IS ERROR THAT WARRANTS A REVERSAL OF DEFENDANT'S ROBBERY CONVICTION BECAUSE THE COURT DID NOT GIVE THE CHARGE IMMEDIATELY AFTER DEFENDANT'S ROBBERY CHARGE AND IT NEVER INSTRUCTED THE JURY TO CONSIDER THE LESSER-INCLUDED THEFT CHARGE IF IT FOUND DEFENDANT NOT GUILTY OF ROBBERY. (Raised Below)

POINT II

> DEFENDANT'S VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE. (Raised Below)

POINT III

DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE.

I.

We first address defendant's argument regarding the jury charge. Defendant argues that the judge failed to sua sponte charge the jury with the lesser-included offense of theft after his robbery charge. Defendant also argues the judge misled the jury by failing to specify whether the lesser-included offense applied to one or both defendants. We disagree.

It is well-settled that "[a]ppropriate and proper jury charges are essential [in a criminal case] to assure a fair trial. State v. Reddish, 181 N.J. 553, 613 (2004) (quoting State v. Green, 86 N.J. 281, 287 (1981)). N.J.S.A. 2C:1-8(e) directs that "[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." See State v. Sinclair, 49 N.J. 525, 540 (1967). In State v. Brent, 137 N.J. 107, 113-14 (1994), our Supreme Court commented on N.J.S.A. 2C:1-8(e):

> The statute has been characterized and construed as requiring not only a rational basis in the evidence for a jury to convict the defendant of the included offense but requiring also a rational basis in the evidence for a jury to acquit the defendant

> of the charged offense before the court may instruct the jury on an uncharged offense.

Although Rule 2:10-2 applies to our review of the charge issues, we must assure that any defects in the charge, even in the absence of timely objection, were inconsequential. Indeed, "[e]rroneous jury instructions on matters material to a jury's deliberations are ordinarily presumed to be reversible error." State v. Jackmon, 305 N.J. Super. 274, 277-78 (App. Div. 1997) (citation omitted). Where a jury charge was "inadequate to guide the jury in the course its deliberation should take," the defendant's conviction must be reversed. Id. at 290 (quoting State v. Cook, 300 N.J. Super. 476, 489 (App. Div. 1996)). Moreover, jury charges providing "incorrect instructions of law 'are poor candidates for rehabilitation under the harmless error theory.'" State v. Harrington, 310 N.J. Super. 272, 277 (App. Div. 1998) (quoting State v. Weeks, 107 N.J. 396, 410 (1987)).

In evaluating whether claimed defects in the jury instructions rise to the level of reversible error, we must consider those defects within the overall context of the charge as a whole. See State v. Simon, 161 N.J. 416, 479 (1999). "The alleged error [must be] viewed in the totality of the entire charge, not in isolation." State v. Chapland, 187 N.J. 275, 289 (2006). If, upon reviewing the charge as a whole, the reviewing

court finds that prejudicial error did not occur, then the jury's verdict must stand. State v. Coruzzi, 189 N.J. Super. 273, 312 (App. Div. 1983).

"In reviewing instructions to the jury, a court must not isolate the language challenged but must examine the remark in the context of the entire charge." State v. DiFrisco, 137 N.J. 434, 491 (1994) (citation omitted). "A jury charge must adequately set forth the elements of an offense in a way that explains the law to the jury in an understandable manner." Ibid. "The test, therefore, is whether the charge in its entirety was ambiguous or misleading." State v. Hipplewith, 33 N.J. 300, 317 (1960).

Here, we are satisfied that the instructions were neither ambiguous nor misleading. In the instruction of theft, the judge provided the elements of the crime and the State's burden to prove beyond a reasonable doubt each of those elements. Even if there was some lack of clarity, we view the charge as a whole to be adequate. State v. Randolph, 228 N.J. 506, 592 (2017). As such, we conclude the charge was not erroneous to the extent that it brought about an unjust result. See State v. Smith, 322 N.J. Super. 385, 399-400 (App. Div. 1999).

II.

Defendant also argues that his twelve-year term of incarceration is manifestly excessive because the judge failed to conduct the requisite aggravating and mitigating factor analysis.

Upon weighing the aggravating and mitigating factors, the judge found aggravating factor nine, the need to deter the defendant and others from violating the law, applied; as well as mitigating factor seven, lack of prior criminal history. The judge rejected counsel's arguments regarding mitigating factors three and eleven, and found that neither Maurice's drug use nor his financial difficulties justified his criminal conduct.

The judge's findings relating to the sentencing factors are supported by the evidence. State v. Johnson, 42 N.J. 146, 161 (1964). The sentence is in accord with the sentencing guidelines and based on a proper weighing of the factors. State v. O'Donnell, 117 N.J. 210, 215 (1989). The sentence, which was in the lower end of the first-degree range, was not manifestly excessive or unduly punitive and does not shock our judicial conscience. See State v. Bieniek, 200 N.J. 601, 608 (2010) (citing State v. Roth, 95 N.J. 334, 364-65 (1984)).

Having considered defendant's remaining argument relative to the verdict in light of the record and our standard of review, we

conclude it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.