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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3753-16T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

GREGORY JEAN-BAPTISTE,

Defendant-Respondent.

Submitted April 19, 2018 – Decided April 30, 2018

Before Judges Simonelli, Haas and Gooden
Brown.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
14-01-0064.

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for appellant (Monica do
Outeiro, Assistant Prosecutor, of counsel and
on the brief).

Respondent has not filed a brief.

PER CURIAM

By leave granted, the State appeals from the Law Division's
March 23, 2017 order granting defendant's in limine motion to
suppress a recorded telephone call with his mother that the State

sought to introduce at trial as evidence of defendant's consciousness of guilt in this gun possession case. Having considered the State's arguments in light of the record and applicable principles of law, we reverse.

On May 3, 2013, a concerned neighbor reported there was a man, later identified as defendant, vomiting outside his residence. Two firefighters responded to defendant's home and found him lying on a sofa on the porch, intoxicated and asleep. The firefighters also saw a handgun on a small table that was within arm's reach of defendant on the sofa. The firefighters took possession of the handgun and gave it to the police. A grand jury subsequently returned a one-count indictment, charging defendant with second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1).

At trial, the State sought to introduce a recording it made of a June 22, 2015 telephone call between defendant and his mother while defendant was in jail.¹ During the call, defendant did not directly admit to possessing the handgun. However, he told his mother that his attorney said if he could "find someone who lives in the house who can say that the gun belongs to them, because

¹ Defendant and his mother spoke in Creole on the recording, and the State later had a transcript prepared that translated the recording into English.

they can't charge them with the gun[,] . . . [t]he case will be[,] you know, I would win." Defendant also said he "was wondering if Ali can do it for me[,] . . . Ali has to make believe . . . They're not going to charge him with anything[,] . . . We have to lie to these people."

Defendant's mother told him "Little Ali won't do it[,] and that she "can't say it's for me" because "where am I going to say I bought [it] from--where did I find it?" Defendant then asked his mother to lie and say that "a male cousin" left the gun in the house and she put it outside after finding it. Defendant further explained that if his mother failed to help him, he could get "15 or 20 years for this stupid thing."

On the first day of trial, defendant made a motion to bar the State from introducing the recorded telephone call to establish a reasonable inference as to defendant's consciousness of guilt and, thus, his control over the handgun. After oral argument, the trial judge granted defendant's motion.

In a brief oral decision, the judge first noted that defendant did not dispute that the recording was admissible under N.J.R.E. 803(b) as an exception to the hearsay rule. The judge also found that the recording was relevant as "evidence having a tendency in reason to prove or disprove a fact of consequence to the determination of the action" under N.J.R.E. 401. However, the

judge concluded the recording was inadmissible under N.J.R.E. 403 because its probative value was outweighed by the risk of undue prejudice to defendant.

While stating that a reasonable inference could be drawn from defendant's requests that his mother persuade "Ali" to lie and tell the police the gun belonged to him, or that his mother falsely report that a "male cousin" left the weapon at her home, the judge observed that defendant never confessed to possessing the handgun. Because of this, the judge found that other inferences could be drawn from the substance of the telephone call. By way of example, the judge pointed to defendant's claim during oral argument that his statements could be interpreted to mean he never possessed the gun, and was motivated to have someone else claim possession of the gun solely by his fear that his own denials would not be believed. Thus, the judge found that the recording had the potential to confuse the jury and barred its admission at trial. This appeal followed.²

On appeal, the State argues that the trial "court erred in ordering the exclusion of defendant's jail call." We agree.

"Once evidence is deemed relevant, it is admissible, N.J.R.E. 402, unless 'its probative value is substantially outweighed by

² The judge granted the State's motion to stay the trial pending its appeal.

the risk of [] undue prejudice,' N.J.R.E. 403, or some other bar to its admission is properly interposed." State v. Nantambu, 221 N.J. 390, 402 (2015) (alteration in original) (quoting Brenman v. Demello, 191 N.J. 18, 34-35 (2007)). While we generally defer to the trial court's evidentiary rulings and apply an abuse of discretion standard of review, we owe no such deference if they reflect a clear error of judgment or are premised on an erroneous legal conclusion. Ibid. (citations omitted).

Here, the recording clearly demonstrates that defendant asked his mother to lie about the ownership of the gun, or to have others falsely claim ownership. Therefore, the State sought to offer the recording as consciousness-of-guilt evidence against defendant. Contrary to the trial judge's ruling, this was manifestly appropriate. Indeed, the Supreme Court has recently noted that "[o]ur jurisprudence regarding consciousness-of-guilt evidence derives from the principle that certain conduct may be 'intrinsically indicative of a consciousness of guilt,' and may therefore be admitted as substantive proof of the defendant's guilt." State v. Cole, 229 N.J. 430, 454 (2017) (quoting State v. Phillips, 166 N.J. Super. 153, 160 (App. Div. 1979)).

Defendant is charged with a certain persons not to have weapons offense and, therefore, the State had to demonstrate that he possessed, owned, or controlled the handgun found within arm's

reach on the sofa where he was found. N.J.S.A. 2C:39-7(b)(1); see also Cole, 229 N.J. at 447 (relevance is "determined by reference to the applicable substantive law"). In a case where the State seeks to prove constructive possession of an item, "possession cannot be based on mere presence at the place where contraband is located. There must be other circumstances or statements of [the] defendant permitting the inference of [the] defendant's control of the contraband." State v. Whyte, 265 N.J. Super. 518, 523 (App. Div. 1992) (emphasis added), aff'd o.b., 133 N.J. 481 (1993).

Thus, "[t]he State's proffer [in this case was] classic consciousness[-]of[-]guilt evidence in the form of . . . [statements made by defendant] inducing others to lie[.]" State v. Williams, 190 N.J. 114, 129 (2007). Faced with this evidence, a jury could certainly infer from defendant's attempt to have his mother or others lie for him that he was guilty of possessing the handgun.

Although the jury might have been able to draw a different inference from the statements, this was insufficient to warrant the suppression of the evidence. Instead, "[s]uch evidence belongs in front of the jury; objections thereto should be evaluated by the jury as part of its weighing of the evidence." Id. at 127. This is so because when consciousness-of-guilt evidence is introduced, the judge must give "a strong limiting instruction

. . . informing the jury that it should not draw any inference of consciousness of guilt by defendant from his post-crime conduct unless it believes that defendant acted to cover up a crime." Cole, 229 N.J. at 454 (quoting Williams, 190 N.J. at 134).

Under these circumstances, the judge mistakenly exercised his discretion by barring the admission of the recorded telephone call. Defendant's requests that his mother have "Ali" lie that the gun was his, or that his mother falsely claim it belonged to a "male cousin," were highly probative of his consciousness of guilt. Moreover, an appropriate jury instruction would have obviated any prejudice to defendant, and eliminated the possibility of jury confusion in its evaluation of this evidence. Therefore, we are constrained to reverse the March 23, 2017 order and remand for further proceedings.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION