SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4062-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARCUS A. DAVIS,

Defendant-Appellant.

Submitted October 23, 2017 – Decided April 27, 2018

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 13-05-0473.

Joseph E. Krakora, Public Defender, attorney for appellant (Paul B. Halligan, Assistant Deputy Public Defender, of counsel and on the briefs).

Sean F. Dalton, Gloucester County Prosecutor, attorney for respondent (Douglas Pagenkof, Assistant Prosecutor, and Monica Bullock, on the brief).

PER CURIAM

Defendant Marcus A. Davis appeals from his conviction, after a jury trial, of third-degree possession of over one ounce but

less than five pounds of marijuana, with the intent to distribute it. N.J.S.A. 2C:35-5(b)(11). We affirm.

I.

Possession with intent to distribute was the sole count presented to the jury. Pitman Police Sergeant Joseph Kelly, who retired sometime before trial, testified that he responded to a report of a suspicious vehicle in a park, shortly before 1:00 a.m. The car was said to be backed into a parking stall and "people were seen entering and exiting the vehicle."[1]

The sergeant found defendant alone in the car, reclining in the front seat. No one else was around. Defendant started his vehicle's engine, but a police vehicle blocked defendant from leaving. Defendant told the sergeant he was waiting for a woman named Crystal he met on the internet. Defendant possessed an appropriate registration, driver's license, and proof of insurance. But, the sergeant took defendant into custody after learning there were two outstanding traffic-related warrants for his arrest.[2] He posted bail shortly thereafter, using close to $800 that he possessed on his person.

[1] The court overruled a defense objection to what the officer was told. The point is not raised on appeal.

[2] Defense counsel did not object to the State eliciting the grounds for his arrest.

A back-up patrolman, Matthew Perry, also a retiree by the time of trial, remained at the scene. He noticed discrepancies in the vehicle's inspection sticker, which led him to impound defendant's vehicle. Before the vehicle was towed, the patrolman noticed a white plastic canister in the rear seat area. He did not attach any importance to it until the vehicle was lawfully searched after it was impounded. Defendant made the search process difficult because he had locked the car with the key inside. Five sandwich-size plastic bags of suspected marijuana, plus thirty-one empty yellow plastic bags, were found inside the canister, and were introduced into evidence. Two digital scales tucked inside of a sneaker were found in the vehicle's trunk.

A New Jersey State Police chemist testified that scientific tests confirmed that two of the plastic bags contained marijuana weighing almost forty grams, or over 1.4 ounces. The laboratory did not test the contents of the other three bags. The chemist explained that it would not have made a difference in the grading of the crime if they were confirmed to be marijuana. Together all five bags weighed seventy-five grams, or almost three ounces.

Detective Keith Palek testified as an expert in the area of use and distribution of controlled dangerous substances. Drawing on his experience and training, he opined that, generally, persons purchasing marijuana in quantities of an ounce or greater are more

likely to be dealers. Dealers also are more likely than users to possess clean, unused plastic bags to package their wares; and to possess scales to weigh their product. The detective stated that dealers often separate the tools of their trade, in the hope that some of them may be undiscovered by police. On the other hand, users are more likely than dealers to have in their possession utensils for consuming marijuana — such as pipes, papers and matches. The detective reviewed the range of retail prices for marijuana, stating that the market price of an ounce of marijuana ranged between $75 and $400.

Then, the assistant prosecutor presented a hypothetical that closely tracked the evidence in the case against defendant.

> Q. [I]f you were presented with a hypothetical scenario that there was present approximately 39.97 grams of marijuana, digital scales, empty and unused baggies and approximately . . . $775, what would your opinion be as to the possession of that marijuana?
>
> A. My opinion would be that that person had possessed that marijuana with the intent to sell it for money.

On cross-examination, defense counsel dropped any pretense that the detective was opining about some hypothetical person. He elicited the detective's opinion that defendant possessed marijuana with the intent to distribute it. He highlighted the discrepancy between the detective's testimony, which focused on

just the 39.97 grams of chemically tested marijuana, and his written report, in which he assumed that all five bags — weighing almost three ounces — contained marijuana. The defense attorney asked, "So, in order for us to accept your analysis that this substance was possessed with an intent to distribute, we have to conclude as a threshold that we have five bags of marijuana, as opposed to two bags of marijuana . . . ?"

At sidebar, defense counsel rejected the suggestion that, by referring to the specific evidence in the case, he was eliciting the detective's direct opinion of defendant's state of mind. The trial judge expressed concern that defense counsel was opening the door to questions of the expert on redirect about the specific evidence in the case. Defense counsel replied, "I don't care about that."

Defense counsel then resumed cross-examination, eliciting that the detective concluded, in his report, that the five bags of marijuana were possessed for personal use or for distribution. Although counsel elicited that the detective referred to five bags of marijuana in his report, the detective insisted that he based his opinion on the 39.97 grams of chemically confirmed marijuana. He conceded that 39.97 grams of marijuana could be consistent with personal use, acknowledging that possession of less than fifty grams was not even a crime; it was a disorderly persons offense.

But, he believed possession of the 39.97 grams in this case was consistent with possession with intent to distribute based on the totality of circumstances, including the presence of $775 in currency, two digital scales, and thirty-one unused plastic bags. At one point, defense counsel expressly told the detective, "I'm not asking you a hypothetical"; and then asked him whether he factored defendant's possession of $775 "into [his] analysis, in determining whether or not the narcotics in this case were possessed with an intent to distribute . . . ?" Counsel again referred to the detective's opinion whether "the marijuana in question was purchased for personal use or for distribution."

On redirect, the assistant prosecutor elicited that the detective found no paraphernalia associated with personal use. The assistant prosecutor then recapped the impact of drug quantity; packaging materials; and scales on the likelihood that the drugs were possessed with the intent to distribute.

> Q. You were walked through on cross-examination what I would say was a subtraction of some of the facts and circumstances in this case and I just want to make it clear for the jury, to understand what your expert opinion is, based on the facts and circumstances of this case.
>
> Let's walk back. Your cross-examination indicated that the presence of one ounce of marijuana, in and of itself, in your expert opinion is what?

A. Could be personal use.

Q. Okay. Now, let's walk through. If you added into the factor the un -- empty and unused baggies, what would that conclude to you? What would that tell you?

A. I'd begin to develop an[] opinion of a CDS distribution.

The prosecutor then injected the facts of the case:

Q. All right. The empty and unused baggies in this case; 31?

A. Correct.

Q. Let's talk about an ounce. An ounce is 28 grams.

A. Correct.

Q. So that ounce, if we follow your logic, could be distributed at the street level in half gram, creating 56 bags?

A. Correct.

Q. All right. So as a result, those 31 empty and unused baggies could have been used to distribute that marijuana at the street level?

A. Correct.

Although the assistant prosecutor asked the witness to "set[] aside all the facts," he then referred to them:

Q. Now, let's talk about the presence of digital scales. Setting aside all the facts and just what I tell you here; one ounce -- 1.4 ounces of marijuana and the presence of two digital scales. What's your expert opinion?

A. That leads me to lean towards distribution.

Q. Okay. You say you lean towards distribution. Now, what about if I add into that equation the presence of the empty and unused baggies?

A. My opinion is enhanced that it would be CDS for distribution.

Q. So your opinion would be, within a reasonable degree of certainty of similar individuals, who share the same experience as you, in your professional capacity?

A. Correct.

The assistant prosecutor then asked the ultimate question: "So, it would be your expert opinion, if you add the scales, the empty baggies and the 1.4 ounce of tested marijuana, it would be possessed with the intent to distribute?"

At that point, defense counsel objected, in part on the ground that the State did not seek the expert's opinion in the form of a hypothetical, invoking the principles of State v. Odom, 116 N.J. 65 (1989). Denying that he opened the door, defense counsel argued that Odom controlled only the State's questioning of its expert, not cross-examination. The court overruled the objection, concluding that the defense had opened the door with regard to the specifics of the case. The assistant prosecutor then rephrased his question to the detective, "If you could please provide your

expert opinion as to what your opinion is when presented with the circumstances of the presence of 1.4 ounces of marijuana, 31 empty and unused baggies and two digital scales?" The detective answered, "The marijuana was possessed with the intent to sell it."

Defendant's father, Justino Brooks, testified that he borrowed his son's car the day before his arrest. Without his son's knowledge, he drove the car to Camden where he bought $100 of marijuana for personal use, but equivocated as to the quantity. Brooks first stated he bought four ounces, then corrected himself that he bought "four halves," and the supplier threw in a small bag "for being a customer" — for a total of five bags. He said he put the marijuana in the canister, but simply forgot to take it with him when he returned the car to his son. He also claimed the two scales belonged to him. He said he used one scale to make sure his supplier did not cheat him; the other one was broken. Contrary to the police testimony, Brooks said the scales were kept in the passenger compartment. He did not explain why he possessed so many empty plastic bags, which he said were clear, not yellow.

To explain why he did not come forward to police immediately after his son's arrest, Brooks said he was charged with a violation of probation (VOP) at the time, and his attorney tried without success to package a plea to both cases, in which a sentence for

the new charge would run concurrent with his VOP sentence. His attorney confirmed that he made such an effort, but the prosecutor rejected it.

In summation, the defense argued that defendant did not possess the marijuana, because he was unaware of its presence in his vehicle, and it belonged to his father. The assistant prosecutor contended that Brooks was incredible, highlighting discrepancies in his testimony, and his offer to plead guilty without additional punishment. The assistant prosecutor also argued defendant demonstrated consciousness of guilt by attempting to avoid police detection by reclining in his vehicle; starting the engine in an effort to leave when the police arrived; and by locking the car with the key inside. The assistant prosecutor contended that defendant's possession of $775, two scales, unused baggies, and seventy-five grams of marijuana indicated that he possessed the marijuana intending to distribute it.

II.

Invoking State v. Cain, 224 N.J. 410 (2016), which the Supreme Court decided after his trial, defendant contends the State's drug expert infringed upon the jury's fact-finding function by opining, sometimes in the guise of a response to a hypothetical question,

that defendant had the requisite intent to distribute.[3] In a supplemental brief, defendant contends that our decision in State v. Hyman, 451 N.J. Super. 429 (App. Div. 2017), certif. denied, __ N.J. __ (2018), supports his argument.

The State responds that Cain should not apply to this case, and questions our holding in State v. Green, 447 N.J. Super. 317, 328 (App. Div. 2016), granting Cain pipeline retroactivity. The State also argues that even if Cain does apply, the use of hypothetical questions was not reversible error. The State also argues that Hyman does not compel a different result.

III.

We apply Cain to the case at hand. The Supreme Court held that "[g]oing forward, in drug cases, an expert witness may not opine on the defendant's state of mind. Whether a defendant possesses a controlled dangerous substance with the intent to distribute is the ultimate issue of fact to be decided by the jury." Cain, 224 N.J. at 429.

The Court reasoned that experts may properly testify generally about the significance of packaging, quantities,

[3] Defendant's sole point heading states (with the capitalization removed): "The State presented highly impermissible expert testimony that infringed upon the jury's fact-finding function, and denied the defendant a fair trial, necessitating reversal. U.S. Const., Amend. VI; N.J. Const. (1947), Art. 1, Par. 9. (Partially raised below)."

paraphernalia, and other factors in determining whether drugs are possessed for distribution. Id. at 420, 426. These matters are outside the ken of average jurors. Ibid. However, once a jury is informed by such opinion, it is capable of reaching its own conclusion — without the need of expert testimony — whether a particular defendant possessed drugs intending to distribute them. Id. at 426-27. Allowing an expert to render an unnecessary opinion as to a specific defendant's state of mind regarding intent to distribute may inappropriately bolster fact witnesses, id. at 426; prejudice the defendant, id. at 427-28; and usurp the jury's function, id. at 425. The Court also held that hypothetical questions that mirror the evidence in a particular case run afoul of the rule limiting expert testimony because "no one is fooled" by such questions. Id. at 429.

We decline to revisit the Green panel's holding of pipeline retroactivity, which we applied in Hyman, 451 N.J. Super. at 446. For the cogent reasons set forth in Green, 447 N.J. Super. at 327-28, we are convinced that the Supreme Court intended that its limitation on expert testimony should apply to cases that were pending appeal when it was decided.

Applying Cain, there is no question that the direct examination of Detective Palek eventually crossed the line the Supreme Court drew. The direct examination began with inquiries,

consistent with Cain, about the significance of drug quantities, packaging materials such as empty bags, scales, and possession of a large quantity of cash. However, the assistant prosecutor concluded his direct examination, without objection, with a hypothetical question that summed up the specific evidence in defendant's case.

The cross-examination dropped the facade of hypothetical questions. Defense counsel elicited, and challenged at the same time, the expert's opinion regarding defendant's state of mind, based on the evidence in this case. Defense counsel did so without regard to the trial judge's well-founded warnings that he was opening the door to similar questions on redirect. The trial court appropriately overruled defense counsel's objection to the assistant prosecutor's final question on redirect.

Defendant presents a claim of plain error. He did not raise an objection to the hypothetical question that the assistant prosecutor posed on direct examination. See R. 2:10-2. Any objection to the questioning on redirect examination came too late; a hypothetical opinion was already rendered, and defense counsel opened the door to testimony about defendant's state of mind.

In affirming defendant's conviction, we need not rely on his trial counsel's decision to elicit the expert's opinion on

defendant's state of mind. Perhaps, defense counsel recognized what the Supreme Court observed in Cain, and concluded the jury was not fooled by the hypothetical question posed at the end of direct examination. Thus, he reasonably felt compelled to confront the expert's opinion for what it was.

Rather, we affirm because there was no error that was "clearly capable of producing an unjust result," R. 2:10-2; in other words, there was no error "'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Taffaro, 195 N.J. 442, 454 (2008) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). Defendant bears the burden of showing prejudice. State v. Morton, 155 N.J. 383, 422 (1998).

Defendant's theory of the case — raised in opening and summation, and the focus of his two witnesses — was that he did not possess the marijuana that was found in the rear seat area of his vehicle. The jury obviously rejected Brooks's testimony that the drugs were his, and he simply forgot them after going to the trouble of driving to Camden to buy them. The expert's testimony did not address the issue of possession.

On the other hand, the evidence was overwhelming that whoever possessed the marijuana did so with the intent to distribute it. Detective Palek did not violate the precepts announced in Cain

when he opined about common quantities of marijuana for personal use, and the significance of empty plastic bags, scales, separation of scales from drugs, and possession of a relatively large amount of cash. Had the expert stopped there, we have no reasonable doubt that the jury would have concluded that the marijuana was possessed with the intent to distribute it. Brooks's testimony that he possessed the marijuana for personal use was incredible, because he failed to account for the presence of the packaging, and the location of the scales. His credibility was also impaired by his failure to recall definitively the quantity he purchased; his implausible claim he forgot the canister in the car; and his claim that he paid $100 for what he described was over two ounces of marijuana, far less than the bottom of the price range Detective Palek described.

Further, defendant's reliance on the fact that only two bags of marijuana were chemically confirmed, the inference that the other three bags contained some other substance, and the argument that the confirmed amount was consistent with personal use, proved fruitless as Brooks unequivocally testified that all five bags — whatever their amount — contained marijuana. Thus, the addition of the detective's opinion testimony that is now clearly barred by Cain did not produce an unjust result.

Affirmed.