SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4089-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRIAN K. RICHBURG, a/k/a MOOK and MOOKIE,

Defendant-Appellant.

Argued February 6, 2018 – Decided April 25, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 13-09-1681.

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

Erin M. Campbell, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Erin M. Campbell, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Brian K. Richburg appeals from his convictions after a jury trial for two counts of third-degree conspiracy to distribute heroin, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-5(b)(3) (counts three and eight), contending:

> POINT I
>
> THE COURT IMPROPERLY ALLOWED THE JURY TO CONSIDER AN INADMISSIBLE AND UNRELIABLE OUT-OF-COURT IDENTIFICATION AND THEN COMPOUNDED THE PROBLEM BY FAILING TO PROVIDE THE FACT FINDERS WITH APPROPRIATE JURY INSTRUCTIONS ON HOW TO CONSIDER THE EVIDENCE, THEREBY DENYING [DEFENDANT] DUE PROCESS AND A FAIR TRIAL.
>
> A. FAILURE TO COMPLY WITH DELGADO[1] RENDERED THE IDENTIFICATION INADMISSIBLE.
>
> B. FAILURE TO PROVIDE APPROPRIATE JURY INSTRUCTIONS ON HOW TO CONSIDER THE IDENTIFICATION EVIDENCE RENDERED THE TRIAL UNFAIR.
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> POINT II
>
> THE TESTIMONY OF STATE'S WITNESSES THAT THE NEIGHBORHOOD WAS KNOWN FOR DRUG ACTIVITY AND OTHER CRIMES WAS IRRELEVANT AND UNDULY PREJUDICIAL IMPROPER OPINION TESTIMONY, IMPLYING "GUILT BY ASSOCIATION[,"] DENYING [DEFENDANT] DUE PROCESS AND A FAIR TRIAL.
>
> POINT III
>
> AN EXCESSIVE SENTENCE WAS IMPOSED AFTER THE COURT FAILED TO CONSIDER AN APPLICABLE MITIGATING FACTOR.

[1] State v. Delgado, 188 N.J. 48 (2006).

We disagree with all but a portion of defendant's Point III argument and affirm, but remand for resentencing.

I

Defendant asserts for the first time that his convictions should be reversed because law enforcement personnel failed to memorialize the selection of his photograph by Detective Elizabeth Romano of the Hudson County Prosecutor's Office during an out-of-court identification procedure, in contravention of procedures required by our Supreme Court in State v. Delgado, 188 N.J. 48, 58-64 (2006), and later adopted as Rule 3:11.[2]

Romano testified at trial that she, acting in an undercover role as part of an initiative targeting open-air drug dealing, approached an individual later identified as defendant. During a thirty- to sixty-second conversation, she initially asked him if "there was anything good in the area," to which defendant responded he had "dope."[3] When Romano asked if she could buy five bags, defendant said the area "was too hot" because of a pronounced

[2] Defendant did not file a motion in the Law Division challenging the admissibility of any out-of-court identification; he does not argue that the identification made from his "DMV photo" was unreliable. See contra State v. Pressley, ___ N.J. ___, ___ (2018) (slip op. 3) (where the defendant requested a pretrial hearing under United States v. Wade, 388 U.S. 218 (1967), and State v. Henderson, 208 N.J. 208 (2011)).

[3] Romano testified she was referring to narcotics when she used the term "good" and that "dope" meant heroin.

police presence, and gave Romano his phone number which he told Romano to store in her phone under the letter "M"; Romano asked him to call her when they could complete the transaction.

Romano called the stored number later that day and arranged a narcotics purchase. The purchase was made with an individual later identified as Scott McKillop. Romano was that same day shown two "DMV"[4] photographs, one of a black male and one of a white male; she identified the black male as defendant and the white male as McKillop.

In Delgado, the Court exercised its constitutional supervisory powers[5] and required police, as a condition of the admissibility of an out-of-court identification, to "make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results."[6] 188 N.J. at 63. The Court nonetheless affirmed the

[4] DMV is the acronym for the Division of Motor Vehicles, the predecessor New Jersey State agency to the Motor Vehicle Commission, from whose records police obtained the photographs.

[5] N.J. Const. art. VI, § 2, ¶ 3.

[6] These requirements, codified in Rule 3:11, provide in pertinent part that, where "it was feasible to obtain and preserve the details" of an out-of-court identification procedure, the remedy for the preparation of a record "lacking in important details as to what occurred at the . . . procedure," is left to the discretion

defendant's conviction despite the absence of a written record because the defendant was aware of the issues regarding the out-of-court identifications prior to trial, and "fully developed" the issues at trial during direct and cross-examination; he, therefore, was not prejudiced. Id. at 64-66.

Likewise here — notwithstanding defendant's contention that Romano did not recall the details of the identification procedure — defense counsel "fully developed" the circumstances of the identification during cross-examination, establishing that a law enforcement officer showed Romano two photographs, one of each suspect. Romano admitted she was not shown a photo array, which she would have utilized had she — as a police officer — asked a civilian to make the identification.

We note Romano interacted with defendant on three occasions, and in two of those instances after her out-of-court identification, spent several minutes with defendant face-to-face in a convenience store and in an apartment building hallway at Ocean Avenue. Additionally, two other members of Romano's team

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of the trial court. R. 3:11(d). The court may "declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification." Ibid. Because defendant did not object below, the trial court was not given the opportunity to craft a remedy in this case.

observed defendant during the operation and identified him at trial.[7]

Inasmuch as defendant did not raise this issue at the trial level, "it is defendant's burden to demonstrate that the police failed to create an adequate record of the [identification] in those reports and that such failure was clearly capable of producing an unjust result." State v. Wright, 444 N.J. Super. 347, 362-63 (App. Div.), certif. denied, 228 N.J. 240 (2016). See R. 2:10-2 (instructing an appellate court to disregard any errors or omissions "unless it is of such a nature as to have been clearly capable of producing an unjust result"); see also Delgado, 188 N.J. at 64; State v. Macon, 57 N.J. 325, 337 (1971). Under the circumstances of this case, we determine the admission of Romano's out-of-court identification was not clearly capable of producing an unjust result.

We determine defendant's arguments that the judge's failure to craft and deliver a tailored jury instruction about proper

[7] We recognize that such "extrinsic evidence of guilt plays no role in assessing whether a suggestive eyewitness identification was nonetheless inherently reliable," State v. Jones, 224 N.J. 70, 89 (2016); but, again, defendant does not argue the identification was suggestive or unreliable, only that it violated the tenets of Delgado. We consider the other two identifications in our assessment of whether the admission of the identification was clearly capable of producing an unjust result.

identification procedures including the recording requirement, and an instruction on lineups and photo arrays, deprived him of a fair trial to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). The court instructed the jury using the model jury charge for in-court and out-of-court identifications, including the defense-requested cross-racial identification charge. See Model Jury Charge (Criminal), "Identification: In-Court and Out-Of-Court Identifications" (rev. July 19, 2012). Defendant did not request a tailored charge; as such "the trial judge was under no obligation to depart from the model charge." State v. Wilson, 362 N.J. Super. 319, 328 (App. Div. 2003). Defendant did not object to the jury charge and we perceive no plain error.

II

Defendant also argues testimony about the character of the "neighborhood where the drugs [were] located" deprived him of due process and a fair trial. Romano testified that the general area where she met defendant was "known for violent crime and open air narcotics distribution." Another surveilling detective, when asked during cross-examination why he thought individuals in the area may have been conducting counter-surveillance, said it was an area "known for drug distribution."

Because defendant did not object to this testimony at trial, we, again, apply the plain error standard to determine whether its admission was "of such a nature as to have been clearly capable of producing an unjust result." Macon, 57 N.J. at 337 (quoting R. 2:10-2).

Prior to testifying about the neighborhood, Romano explained that her assignment was to "target[] open air narcotics distribution locations throughout Jersey City" as part of an anti-crime initiative implemented by the Hudson County Prosecutor's Office Gang Task Force and the Jersey City Street Crimes Unit. Her description of the neighborhood explained why she was in the area "just walk[ing] around and initiat[ing] conversations with people and attempt[ing] to purchase drugs." Such brief testimony is "admissible to show that the officer was not acting in an arbitrary manner or to explain [the officer's] subsequent conduct." State v. Bankston, 63 N.J. 263, 268 (1973).

The other detective's comment was made during cross-examination about his observation of "several black males in the area conducting what [the detective] described as counter-surveillance." He replied to defense counsel's question:

> Based on my experience and training and the fact that[] . . . that area over there is known for drug distribution, when you see a bunch of people that are standing around and watching vehicles, it could be indicative of

> the fact that somebody's . . . acting as a lookout for somebody who might be dealing drugs in that area.

Not only did that testimony respond to defendant's implicit challenge to the detective's characterization of the black males' actions, it explained his actions in the area in accordance with Bankston. Ibid. Moreover, the brief reference to the neighborhood was buffered by the detective's answer to defense counsel's follow-up question, whether the perceived counter-surveillance could have been "indicative of anything else": "Could be just guys standing there and watching traffic too."

The testimony about the neighborhood was short, relevant and not unduly prejudicial. We, therefore, reject defendant's argument that it deprived him of due process and a fair trial. Again, we see no plain error.

III

In his pro se brief defendant argues:

> POINT I
>
> DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED; THE VERDICTS WERE FUNDAMENTALLY INCONSISTENT AND UNSUPPORTED BY THE RECORD EVIDENCE.
>
> A. INTRODUCTION
>
> B. THE CONSPIRACY INSTRUCTION WAS ERRONEOUS AND MISLEADING
>
> POINT II

A NEW TRIAL IS MANDATED BASED ON THE STATE BOLSTERING THE CREDIBILITY OF A STATE'S LAW ENFORCEMENT WITNESS.

POINT III

WHEN A JUROR WAS DISMISSED AT THE END OF THE TRIAL BASED ON [RECOGNIZING] MEMBERS OF THE DEFENDANT'S FAMILY WHO WERE SITTING IN THE COURTROOM GALLERY, THE TRIAL JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO CONDUCT A "VOIR DIRE" OF THE REMAINING JURORS TO DETERMINE IF THE DISMISSED JUROR HAD CONVEYED ANY OF WHAT SHE KNEW TO THE OTHER JURORS.

POINT IV

IMPOSING A DISCRETIONARY EXTENDED TERM SENTENCE IN THIS CASE WAS UNWARRANTED AND CONSTITUTES AN ABUSE OF JUDICIAL DISCRETION.

These arguments lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2). We add only that the verdict — guilty of two counts of conspiracy to distribute heroin, and not guilty of the underlying substantive counts of distributing heroin — was not inconsistent. As the trial judge observed, "the crime of conspiracy is a separate and distinct crime from the substantive offense involved in it." State v. Maddox, 153 N.J. Super. 201, 211 (App. Div. 1977). Because conspiracy is an inchoate crime — the essence of a conspiracy is an agreement to commit an unlawful act — a defendant may be found guilty of conspiracy even if the unlawful act never occurs. United States v. Jimenez Recio, 537 U.S. 270, 274-76 (2003). Further, the surveilling officers'

observations of defendant with the parties who delivered drugs to Romano, and one delivering party's statement that defendant told him to "take care of [Romano]," amply supported the conspiracy convictions.

The assistant prosecutor's summation addressed the evidence and defense counsel's summation comments on the lack of evidence, including fingerprints, recordings, photographs, marked money, phone call records, and statements from co-defendants; important information that was missing from police reports, and inconsistencies between the police reports and trial testimony; and the incredibility of the police officers' testimony. See State v. Murray, 338 N.J. Super 80, 88 (App. Div. 2001) (holding that "in reviewing a prosecutor's summation, [this court] must consider the context in which the challenged potions were made").

And, in light of excused-juror thirteen's negative response to the judge's inquiry if she spoke to anyone else regarding her recognition of some courtroom audience members, the judge did not abuse his discretion by electing not to voir dire the other jurors. See State v. R.D., 169 N.J. 551, 559-61 (2001).

IV

We, likewise, determine defendant's arguments concerning the imposition of an extended-term sentence to be without sufficient merit to warrant discussion here. R. 2:11-3(e)(2). Contrary to

his contention, "a finding of 'need to protect the public' is not a precondition to a defendant's eligibility for sentencing up to the top of the discretionary extended-term range." State v. Pierce, 188 N.J. 155, 170 (2006).

Defendant also argues the trial judge erred in finding the following aggravating factors: three, the risk that he will commit another offense, N.J.S.A. 2C:44-1(a)(3); six, the extent of his prior criminal record and seriousness of the offense, N.J.S.A. 2C:44-1(a)(6); and nine, the need for deterring defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). Specifically, he contends that the court "over-valued" both the risk that he would commit another offense and the need for deterrence.

Before imposing sentence, a trial judge must identify the relevant aggravating and mitigating factors, N.J.S.A. 2C:44-1, determine which factors are supported by the evidence, weigh those factors, and explain how it arrived at the sentence. State v. O'Donnell, 117 N.J. 210, 215 (1989). "An appellate court is bound to affirm a sentence, even if it would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record." Ibid.

As the judge noted, defendant had twenty-two arrests with eight prior indictable convictions, including three for distribution of controlled-dangerous substances. The judge found there was a risk that defendant would commit another offense because "he just keeps doing it" and a need to deter defendant because "[h]e doesn't care that he gets caught." The trial judge's finding of aggravating factors three, six, and nine was thus clearly supported by competent credible evidence in the record.

We are constrained to find the judge erred in completely discounting mitigating factor eleven, that "[t]he imprisonment of the defendant would entail excessive hardship to himself or his dependents." N.J.S.A. 2C:44-1(b)(11). "[W]here mitigating factors are amply based in the record before the sentencing judge, they must be found." State v. Dalziel, 182 N.J. 494, 504 (2005). "In short, mitigating factors 'supported by credible evidence' are required to 'be part of the deliberative process.'" State v. Case, 220 N.J. 49, 64 (2014) (quoting Dalziel, 182 N.J. at 505). A court may accord mitigating factors "such weight as the judge determines is appropriate," Dalziel, 182 N.J. at 504-05, but "[t]hat is a far cry . . . from suggesting that a judge may simply decline to take into account a mitigating factor that is fully supported by the evidence." Id. at 505.

The evidence here supported a finding of mitigating factor eleven in that defendant was taking care of his minor children and was their primary caregiver because their mother was gravely ill. He was also expecting another child in five months. Defendant explained that he did "fatherly things every day" like washing his children's clothes and taking them to school because their mother was dying. The judge acknowledged that defendant was "a good partner to his significant other" and was "a good father to [his] children" who needed him. The court, however, addressed defendant, explaining:

> But I can't find that to be a mitigating factor here, because you used this trade to support [the children] and you took the risk and -- on their behalf. So you knew it was coming, eventually, or maybe you were . . . oblivious to the fact that you can get caught. So I can't find mitigating factors.

The risk the judge found defendant took has no relation to the physical care he provided to his children and the hardship they would experience if defendant was incarcerated. Moreover, the monetary support the judge found was provided by defendant's illegal drug sales has no bearing on hardship caused by defendant's inability to provide physical care for the children, especially considering that their mother was gravely ill.

The balancing of aggravating and mitigating factors is not just a quantitative assessment, counting whether one set of factors

outnumbers the other, but rather a qualitative assessment in which each factor is assigned its appropriate weight. Case, 220 N.J. at 65. An error in the sentencing judge's determination concerning the existence of aggravating or mitigating factors "nullifies the weight accorded to such factors and materially alters the calculus in the ensuing balancing of aggravating and mitigating factors." State v. Jarbath, 114 N.J. 394, 406 (1989). Thus, although we have jurisdiction to resentence a defendant, "in the face of deficient sentences, a remand to the trial court for resentencing is strongly to be preferred." Id. at 410-11. That is not to say that defendant will receive a different sentence on remand, as sentencing courts can give mitigating factors "such weight as the judge determines is appropriate"; just that the court must "take into account a mitigating factor that is fully supported by the evidence" as mitigating factor eleven was here. Dalziel, 182 N.J. at 505. We thus remand for the judge's consideration of mitigating factor eleven in the overall sentencing analysis.

Affirmed but remanded for resentencing. We do not retain jurisdiction.