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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4163-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN K. AGYEMANG,

Defendant-Appellant.

Argued November 8, 2017 – Decided February 15, 2018

Before Judges Fisher and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
13-11-3427.

Brenden T. Shur argued the cause for appellant
(Law Offices of John J. Zarych, attorney;
Brenden T. Shur, on the brief).

Linda A. Shashoua, Assistant Prosecutor,
argued the cause for respondent (Mary Eva
Colalillo, Camden County Prosecutor,
attorney; Linda A. Shashoua, of counsel and
on the brief).

PER CURIAM

We granted defendant John K. Agyemang's motion for leave to

consolidate appeals relating to his applications for a Graves Act¹ waiver, discovery for Graves Act cumulative files, and post-conviction relief (PCR). Although not requested in that motion we also consolidate his appeal from the denial of his motion for a new trial for purpose of this opinion.

Defendant was convicted after a jury trial of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), and third-degree criminal restraint, N.J.S.A. 2C:13-2(a).²

He argues:

POINT I

THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO ACCESS THE STATE'S GRAVES ACT CUMULATIVE FILES.

POINT II

THE LOWER COURT ERRED IN DENYING APPELLANT'S PETITION FOR [PCR].

- A. FAILURE TO MAKE A GRAVES WAIVER APPLICATION
- B. FAILURE TO REQUEST THE CUMULATIVE FILE
- C. FAILURE TO CALL CHARACTER WITNESSES

¹ N.J.S.A. 2C:43-6(c).

² The State dismissed a fourth-degree aggravated assault charge in the indictment against defendant after the jury could not reach a verdict on that count.

- D. FAILURE TO CALL DR. PIERSON
- E. FAILURE TO PROVIDE THE JURY WITH INFORMATION REGARDING WHY A GUN OWNED BY APPELLANT WAS IN POLICE CUSTODY
- F. FAILURE TO OBJECT TO STATE POINTING A GUN AT THE JURY DURING CLOSING STATEMENTS
- G. FAILURE TO ADEQUATELY MEET WITH APPELLANT PRIOR TO HIS TESTIFYING

POINT III

THE [LOWER] COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR NEW TRIAL BASED ON THE NUMEROUS ISSUES DURING TRIAL AND CLOSING ARGUMENTS.

POINT IV

THE LOWER COURT ERRED IN FAILING TO GRANT A NEW TRIAL DUE TO THE FACT THAT THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

We disagree and affirm.

I.

We reject defendant's arguments in Point I. Our Supreme Court recently held that "defendants are not entitled to discovery of a prosecutor's case-specific memorializations and cumulative files when challenging the denial of a Graves Act waiver in an Alvarez³ motion because there are sufficient procedural safeguards in place for meaningful judicial review of a prosecutor's waiver

³ State v. Alvarez, 246 N.J. Super. 137 (1991).

decision." State v. Benjamin, 228 N.J. 358, 375 (2017). The motion judge, therefore, did not err in denying defendant's request for the State's cumulative files in order to challenge the denial of his request for a Graves Act waiver.⁴

II.

Defendant's timely-filed PCR application was denied without an evidentiary hearing. Our review of the factual inferences drawn by the court from the record is therefore de novo. State v. Blake, 444 N.J. Super. 285, 294 (App. Div.), certif. denied, 226 N.J. 213 (2016). Likewise, we review de novo the PCR court's legal conclusions. Ibid.

In order to establish a case of ineffective assistance of counsel defendant must demonstrate a reasonable likelihood of success under the two-prong test established by Strickland v. Washington, 466 U.S. 668, 694 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must first show that counsel was deficient, or made errors so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment of the United States Constitution. Strickland,

⁴ On motion by the prosecutor or referral by a sentencing judge with the approval of the prosecutor, N.J.S.A. 2C:43-6.2 authorizes an assignment judge to grant relief from the mandatory-minimum-term sentencing provisions of the Graves Act, N.J.S.A. 2C:43-6(c), for first-time Graves Act offenders.

466 U.S. at 687. A defendant must also demonstrate that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690. Further, because prejudice is not presumed, Fritz, 105 N.J. at 60-61, defendant must establish "how specific errors of counsel undermined the reliability of the finding of guilt." United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

Because, under the Benjamin holding, the State's cumulative files were not discoverable, 228 N.J. at 375, we reject defendant's argument that counsel was ineffective for failing to request those files.

Defendant's argument that his trial counsel was ineffective because he failed to seek a Graves Act waiver fails to convince us that the results of the proceedings would have been different if an application was made. There is no indication the prosecutor would have moved the assignment judge to impose a reduced sentence, especially considering the State claimed – and the jury obviously found – defendant possessed a gun for an unlawful purpose during a videotaped incident in which he criminally restrained the victim.

Moreover, the prosecutor's motion for waiver would not have automatically resulted in a probationary sentence. If a prosecutor moves before an assignment judge, the judge has the authority to choose to impose a probationary sentence or a one-year mandatory prison term. State v. Nance, 228 N.J. 378, 394 (2017). A prosecutor may argue in favor of one sentence recommendation or another, but the judge need not accept that recommendation. Ibid. Further, the acceptance of a Graves Act waiver does not exempt defendant – on a second-degree crime – from the presumption of incarceration. Id. at 395-96.

Defendant contends trial counsel failed to submit evidence of: defendant's long-standing military service; his protection-based reason for possessing the gun in connection with his pharmacy practice; his assertion that he had no intention to harm anyone when he pranked the victim; and the numerous character references accessible to counsel, so that defendant's case could be "removed from the normal course of prosecution" and a probationary sentence be extended. We agree with the PCR judge's finding that there is nothing in the record to indicate defendant would have accepted a probationary sentence.

Defendant also argues his trial counsel ineffectively failed to call character witnesses and Dr. Melvin Pierson at trial. A defendant who "asserts that his attorney failed to call witnesses

who would have exculpated him . . . must assert the facts that would have been revealed, 'supported by affidavits or certifications based upon . . . personal knowledge'. State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). As the PCR judge found, defendant failed to submit, in connection with his PCR petition, affidavits or certifications from any prospective character witnesses or Pierson. We do not know what those witnesses would have said, and do not know if they were available to testify. See State v. Arthur, 184 N.J. 307, 326 (2005).

Defendant also failed to establish the second prong of the standard in arguing trial counsel erred in failing to call witnesses to testify about his reputation for honesty and non-violence. Even if counsel was ineffective by failing to call those witnesses, defendant's reputation for honesty was besmirched when, in his statement to police, he denied pointing the gun at the victim, contrary to surveillance footage which showed him doing just that. His reputation for non-violence was also sullied by that same footage. Testimony of any character witnesses would be dubious in light of that evidence.

Likewise, even considering defendant's now-proffered argument that Pierson would have testified that he "consistently played

jokes on [the victim] and others . . . during [the victim's] employment" with Pierson, showing the victim had reason to believe she was not in danger, that evidence does not satisfy the second prong of the standard. The victim did not know of Pierson's involvement until well after the incident. The victim's mental state, as the PCR judge noted, was not an element of either crime for which defendant was convicted. And defendant admitted that the victim was so shaken during the incident she could not dial the phone to call Pierson, and that Pierson never told defendant to possess or point a gun during the prank.

We reject defendant's argument that counsel was ineffective for failing to present evidence to explain a detective's trial testimony referencing a gun owned by defendant – not relevant to the instant matter – that was in police custody. The statement was made when the assistant prosecutor was attempting to elicit from the detective defendant's misstatements about where the gun brandished to the victim was located. After the detective related defendant's statement that the gun was in a gun shop, the assistant prosecutor asked if defendant mentioned that the gun was at another location. Instead of the answer the prosecutor was seeking – that defendant said it was at a friend's house – the detective said, "There was another weapon that he said was in . . . police custody." Trial counsel thereafter cross-examined the detective about his

mention of three guns and established that the detective might not have been clear in questioning defendant about the location of the gun he was seeking.

The trial judge characterized the statement by the detective as "fleeting" – so fleeting that he missed it. In fact, trial counsel broached the subject to the trial judge saying, "I don't know if the [c]ourt's aware, but one of the weapons [defendant] owned was in the custody of the police for some other reason." It is clear that the brief comment about the gun had no relation to the gun used during the crimes charged against defendant, and that there was no mention that another gun was in police custody because of some other misdeed by defendant. Because there was no evidence elicited about the gun in police custody, the jury would had to have speculated about that gun in order for defendant to be prejudiced – an act from which they were prohibited by the trial judge in his final charge. A jury is presumed to follow the trial court's instructions, State v. Burns, 192 N.J. 312, 335 (2007); hence, defendant was not prejudiced by the detective's fleeting remark.

Defendant contends trial counsel was ineffective for failing to object when the assistant prosecutor – during summation – pointed the gun toward the jury panel. The record reveals the

prosecutor pointed the gun while she was refuting defendant's contention that the gun wasn't loaded:

Oh, no, it wasn't loaded. Really? Why does he have the gun? To protect himself. He told you, I have it to protect myself in case I get robbed, in case somebody comes in and tries to shoot me, in case someone tries to harm me. I put it in my holster every morning. That's what he said. Oh, no, but I have the clip hanging. Okay. Oh, I'm sorry. You're robbing me? Can you wait a minute? Don't shoot yet. I've got to get my gun out, take my loaded magazine, which is hanging there, and shove it in now, and now -- now I can -- I'm so sorry that I pointed it that way. And now I can protect myself. Really?

The PCR judge found "the record is clear that the gun was not loaded." The trial judge also told the jury they would not have the bullets and the gun together in the jury room.

Examining defendant's contention under the circumstances existing at the time, we conclude defendant has met neither of the Fritz/Strickland factors. The brief and obviously inadvertent pointing of the unloaded gun during a demonstration of how defendant would unholster and load the weapon if threatened, followed by the prosecutor's immediate apology, was not objectionable or prejudicial. No objection was made. See State v. Frost, 158 N.J. 76, 83-84 (1999) (finding when a defense counsel fails to object to improper remarks, "the remarks will not be deemed prejudicial"). Nor, especially since there was no evidence

of any juror reaction, is there any established prejudice to defendant. If the pointing was simultaneously accompanied by the assistant prosecutor asking the jury how they would feel if a gun was pointed at them, our analysis and conclusion would differ; that was not the case here.

Finally, defendant argues that trial counsel was ineffective because he failed to meet with defendant prior to his testimony, and have defendant "acknowledge" to the jury that his statement to the police in which he denied pointing the gun at the victim – a statement belied by the surveillance footage – was made in fear of being arrested. We determine that argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Defendant admits that "it would have been difficult" for him to "explain" that motivation to the jury. Defendant was aware of the video and his statement. He knew he had falsely denied pointing the gun in the video – parts of which were played for the jury – and chose to continue that lie on the witness stand. It was not incumbent on trial counsel to manufacture an explanation. If that was the true reason for the initial lie to the police, nothing prevented defendant from relating that reason.

Defendant's PCR application was properly denied.

III.

Defendant argues his motion for a new trial was erroneously denied, urging that the prosecutor effectively vouched for the victim's credibility by consoling her on the witness stand; and that the detective's testimony regarding the gun in police custody, combined with the prosecutor's conduct during summation – repeatedly telling the jury defendant was a liar, asking jurors how they would feel if a gun was pointed at them, and pointing the gun at the jury – denied him a fair trial. In a separate point, defendant argues he is entitled to a new trial because the verdict was against the weight of the evidence.⁵

Under our well-settled standard of review, pursuant to Rule 2:10-1, a trial court's ruling on a motion for a new trial "shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." A trial judge shall not set aside a jury verdict unless "it clearly and convincingly appears that there was a manifest denial of justice under the law." R. 3:20-1. In this context, there is no difference between


⁵ We consider defendant's argument, rejecting the State's contention that it is procedurally barred because "post-conviction proceedings are not a substitute for direct appeal, and so, defendant's claims are inappropriately raised for the first time in the instant PCR appeal." The denial of the motion for a new trial was included in the notice of appeal; this is defendant's first appeal.

"miscarriage of justice" and "manifest denial of justice under the law." See Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 3:20-1 (2017) (citing State v. Perez, 177 N.J. 540, 555 (2003)). "[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295, 306 (App. Div.) (alteration in original) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)), certif. denied, 228 N.J. 239 (2016).

We conclude the motion judge did not abuse his discretion in denying the motion and, incorporating our foregoing remarks on some of these issues, affirm substantially for the reasons set forth in his oral opinion on October 9, 2015. The grounds advanced by defendant did not clearly and convincingly establish a manifest denial of justice in light of the strong evidence supporting the State's allegations. Even if defendant did not receive a "perfect trial," he received a fair one. See State v. Loftin, 287 N.J. Super. 76, 110 (App. Div. 1996).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION