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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4378-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS L. COAR,
a/k/a THOMAS COAR,

Defendant-Appellant.

Submitted December 19, 2017 – Decided January 22, 2018

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment Nos.
14-03-0746 and 14-03-0747.

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

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (LeeAnn
Cunningham, Special Deputy Attorney General/
Acting Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Thomas L. Coar appeals from two April 22, 2016 judgments of conviction, one following a jury trial under indictment 14-03-0746, and the second following a guilty plea under indictment 14-03-0747. The jury convicted defendant on two counts of first-degree robbery, N.J.S.A. 2C:15-1; one count of third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b), and two counts of third-degree possession of a weapon for unlawful purpose, N.J.S.A. 2C:39-4(a). Subsequent to his conviction, defendant pled guilty to second-degree possession of a weapon by a convicted felon, N.J.S.A. 2C:39-7(a). Defendant argues the trial court's response to a question from the jury during deliberations was inadequate and misleading, causing the jury to convict him on an erroneous theory of liability. We disagree and affirm.

The following facts are taken from the record. On October 6, 2013, Jose Tandazo and Rommel Bravo were standing outside of Tandazo's residence in Newark after their work shift ended at a local restaurant. As Tandazo and Bravo were parting ways, they were approached by two individuals, one of whom produced a gun, pointed it at Tandazo's head, and demanded money. Bravo noticed a Newark police vehicle approaching and flagged it down causing the two suspects to flee. Officer Miguel Ressurreicao exited his

police vehicle and gave chase. Officer Ressurreicao saw that one of the two suspects was wearing camouflage and holding a gun.

During the foot chase the two suspects separated and Officer Ressurreicao testified he followed the one wearing camouflage to the parking lot of a nearby Walgreens. There, he discovered defendant who was wearing camouflage and "fumbling with the garbage" and arrested him. Officer John Stutz and a third officer were dispatched to the scene. Officer Stutz testified he recovered a BB gun in an alleyway adjacent to the Walgreens parking lot. Subsequent testing of the gun did not yield any fingerprints of value.

At trial, Tandazo testified to the incident and stated the man with the gun was clean shaven. Defendant's booking photo, introduced into evidence, showed him with a full beard. Bravo also testified and recounted the incident in a similar fashion to Tandazo. Neither Bravo nor Tandazo identified defendant as one of the two men who tried to rob them. Officer Ressurreicao was the only witness to link defendant to the robbery.

During the first day of deliberations, the jury inquired whether defendant's arrest photo was admitted as evidence. The photo had been admitted into evidence during the trial, but mistakenly omitted from the jury's evidence packet. The photo was provided to the jury. The jury asked whether Officer

Ressurreicao's incident report was admitted as evidence. The trial judge informed the jury the report was not in evidence. The jury then sent the following note: "We need clarity. We need to know who Bravo and Tandazo claimed had the gun. Whatever you can provide please." The trial judge then played back the entirety of Bravo and Tandazo's testimony and the jury was excused for the day.

The jury returned for the second day of deliberations and sent the following note: "According to the law two suspects are charged with robbery with a deadly weapon. But only one has the weapon, are they both accused of possession?" In response, the trial judge re-read the jury charge on possession originally given to the jury and added an instruction on joint possession. The judge stated:

Rather than answer you in a very general way, you're reminded that here there's only one person who has been charged, and one person who is on trial. One person against [whom] the . . . charges in the indictment have been returned, and that is the defendant Thomas Coar.

During the testimony you have references and your recollection of the testimony controls as to the matter in which the alleged offense was . . . committed, and the number of parties who participated.

In response to your question, however, I will recharge you on the law of possession. I will

also charge you on the law of joint possession.

"Actual possession, a person is in actual possession of an item when he first knows what it is, that is, he has knowledge of its character; and second, knowingly has it on his person at a given time."

"Constructive possession, possession may be constructive instead of actual. As I just stated a person who with knowledge of its character, knowingly has direct, physical control over an item at a given time, is in actual possession of it. Constructive possession means possession in which the possessor does not physically have the item on his person, but is aware that the item is present and is able to and has the intention to exercise control over it. So someone who has knowledge of the character of an item and knowingly has both the power and the intention at a given time to exercise control over it either directly or through another person or persons is then in constructive possession of that item."

"There is a concept of joint possession [which] may be sole or joint. If one person alone has actual or constructive possession of an item, possession is sole. [I]f two or mor[e] (sic) persons share actual or constructive . . . knowing possession of an item, possession is joint."

[(quoting Model Jury Charge (Criminal), Possession N.J.S.A. 2C:2-1 (2014)).]

The jury's final question was: "What happens if we don't all agree on a verdict?" The trial judge read the model jury charge on further deliberations. The jury continued its deliberations and a few hours later returned a guilty verdict on all counts.

Defendant pled guilty to the certain persons offense in the second indictment, admitting he was in possession of a BB gun on the day of the incident and that he had previously been convicted of robbery in Hudson County.

The trial judge denied defendant's motions for acquittal and to set aside his plea. The judge also denied the State's motion for an extended sentence. Defendant was sentenced to twelve years in prison subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant's sentence ran concurrently with a ten-year sentence pursuant to his plea, which required he serve a mandatory minimum of five years.

On appeal, defendant argues the following point:

THE TRIAL COURT'S INADEQUATE AND GROSSLY MISLEADING RESPONSE TO THE JURY'S QUESTION PERMITTED THE JURY TO CONVICT DEFENDANT ON A THEORY OF LIABILITY THAT WAS NOT IN THE CASE.
(Not Raised Below).

We begin with our standard of review. When a defendant fails to object to a jury charge at trial, we review for plain error, and "disregard any alleged error 'unless it is of such a nature as to have been clearly capable of producing an unjust result.'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2). Plain error, in the context of a jury charge, is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice

by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Camacho, 218 N.J. 533, 554 (2014) (alteration in original) (quoting State v. Adams, 194 N.J. 186, 207 (2008)).

In reviewing any claim of error relating to a jury charge, "[t]he charge must be read as a whole in determining whether there was any error[,] " State v. Torres, 183 N.J. 554, 564 (2005), and the effect of any error must be considered "in light 'of the overall strength of the State's case.'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). However, counsel's failure to object to jury instructions not only "gives rise to a presumption that he did not view [the charge] as prejudicial to his client's case[,] " State v. McGraw, 129 N.J. 68, 80 (1992), but is also "considered a waiver to object to the instruction on appeal." State v. Maloney, 216 N.J. 91, 104 (2013).

At the outset, we note the record is devoid of any objection from defense counsel to the trial judge's second reading of the possession charge. The record reflects the trial judge informed the prosecutor and defense counsel of how the judge proposed to answer the jury's question by reinstructing the jury on possession and instructing on joint possession, gave counsel a copy of the joint possession instruction, and asked the counsel's position.

Defendant's counsel said "No objection from the defense, Your Honor."

Under the invited error doctrine, "trial errors that "were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal."" State v. A.R., 213 N.J. 542, 561 (2013) (citations omitted). A defendant cannot agree to a particular instruction, "and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought and urged, claiming it to be error and prejudicial." State v. Ramseur, 106 N.J. 123, 281-82 (1987) (citation omitted). Defense counsel clearly acquiesced in the instruction given to the jury. Accordingly, defendant "is barred from raising an objection for the first time on appeal." A.R., 213 N.J. at 561.

The invited error doctrine's bar does not "automatically apply" if it would "cause a fundamental miscarriage of justice." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342 (2010) (citation omitted). However, "this case presents no fundamental injustice that would warrant relaxing the invited error doctrine." Ibid.

Defendant contends the State based its theory that he was the principal and gunman during the robbery on Officer Ressurreicao's testimony that one of the two suspects was wearing camouflage and

holding a gun. Defendant contends Officer Ressurreicao's testimony was questionable because he testified that when calling for backup he did not tell the dispatcher that the man in camouflage had a gun. Defendant argues Officer Ressurreicao never told Officer Stutz that he had seen defendant holding a gun. Also, when Officer Ressurreicao apprehended defendant, he told the dispatcher defendant was the lookout.

Defendant also argues other evidence indicated he was the lookout. Specifically, defendant notes there was no dispute that he was bearded and wearing a camouflage jacket with a hood. Yet Tandazo described the man with the gun as clean shaven and wearing a pullover.

Thus, defendant asserts the jury could have found he was the lookout, and the trial judge should have given the jury the accomplice liability charge. Defendant argues the failure to do so foreclosed a chance at acquittal as the principal. Additionally, defendant argues the trial court erred by instructing the jury it could consider constructive and joint possession because the instruction implied the jury could find defendant guilty even if he did not possess the gun.

We find these arguments unpersuasive. Only "[w]hen a prosecution is based on the theory that a defendant acted as an accomplice [is] the trial court required to provide the jury with

. . . instructions regarding accomplice liability." State v. Savage, 172 N.J. 374, 388 (2002). "When the State's theory of the case only accuses the defendant of being a principal, and a defendant argues that he was not involved in the crime at all, then the judge is not obligated to instruct on accomplice liability." Maloney, 216 N.J. at 106.

It is undisputed the State's theory of the case was that defendant possessed the gun. Therefore, accomplice liability was not in question because it was not a part of the State's case. Moreover, defendant denied any involvement with the crime, and claimed he happened to be in the Walgreens parking lot when Officer Ressurreicao arrested him. For these reasons, we reject defendant's argument the jury should have been given an accomplice liability charge.

Aside from the theory of the State's case, we also reject defendant's arguments that there was sufficient evidence to support the jury finding he was the lookout. The evidence overwhelmingly supported defendant's conviction as the principal in possession of the gun. Officer Ressurreicao's testimony regarding his observation of the robbery, pursuit, and arrest of the defendant, and Officer Stutz's subsequent discovery of the gun nearby, were sufficient evidence for the jury to find defendant guilty as the principal and gunman.

The jury's question regarding possession of the gun did not signal a misunderstanding of defendant's role in the crime, but instead that clarification was sought regarding the legal basis for defendant's liability. The trial court's response to the jury's question regarding possession of the weapon with an instruction on constructive and joint possession was legally accurate and not plain error, let alone a fundamental injustice.

As the trial judge noted when she denied defendant's motion for acquittal:

The State's proofs at trial were the two individuals attempted to rob the victim[s] with one person placing a gun to the head of one of the victims and demanding money. The jurors were initially charged on actual and constructive possession. The testimony at trial supported a finding that when this defendant was arrested he did not have a weapon on his person, but that the weapon was recovered [near] the trash receptacle in [which] the police saw the defendant rummaging.

The jurors asked how two people could be found guilty of possession of one weapon? The jury instruction on joint possession is a response to that inquiry. As the charge is straightforward and [a]s noted by the State, the jurors heard the testimony of the witnesses with a complete playback of the testimony of the victims.

Considering the totality of the circumstances this Court does not find that the instruction was misleading or confusing. Defendant's defense was denial with any involvement with this crime. With regard to the weapon

defendant argues that his fingerprints [were] not recovered from the weapon . . . and that there is no forensic proof that he . . . actually possessed . . . the weapon. In his summation the defendant's only concession is that he was arrested in the parking lot of Walgreen[s].

The response to . . . the juror question, again including the charge of joint possession in no way prejudiced the defense, because the defense, again, [was] consistent [that] he maintains that he was [not] actively, constructively, solely, jointly, possessed of a weapon, and/or that he had in any[]way participated in a robbery. His defense is restricted to the fact that he happened to be arrested in a parking lot at Walgreens.

The Court find[s] that the defendant fails to establish that the verdict is a manifest denial of justice.

We agree with the trial judge's assessment. The totality of the circumstances demonstrate the jury's question had been answered. Indeed, "[t]he failure of the jury to ask for further clarification or indicate confusion demonstrates that the [court's] response was satisfactory." State v. McClain, 248 N.J. Super. 409, 421 (App. Div. 1991). There is no indication the jury convicted defendant as an accomplice not in possession of the gun.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION