SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4464-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JESUS DEJESUS, a/k/a JESUS T. FLORES, JESUS DE JESUS, JESUS FLORES, JESUS TORRES-FLORES, JESUS TORRES, and JAMES DEJESUS,

Defendant-Appellant.

Submitted March 19, 2018 – Decided May 24, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment Nos. 08-05-0724, 08-07-0924, and 12-09-0693.

Joseph E. Krakora, Public Defender, attorney for appellant (Mark H. Friedman, Assistant Deputy Public Defender, of counsel and on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Robert J. Wisse, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Jesus DeJesus of first-degree armed robbery, N.J.S.A. 2C:15-1(a)(1), second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a), and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b). In a bifurcated trial that immediately followed, the same jury convicted defendant of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b). After appropriate mergers, the judge imposed a twenty-year term of imprisonment, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the robbery conviction and concurrent sentences on the remaining convictions.

Before us, defendant raises the following points:

> POINT I
>
> THE TRIAL COURT'S REFUSAL TO PERMIT THE DEFENSE TO IMPEACH STATE'S WITNESS JAMES WOODMANCEY'S CREDIBILITY BY CONFRONTING HIM WITH HIS 1996 CONVICTION FOR ROBBERY DEPRIVED DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.
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> POINT II
>
> THE STATE'S ARGUMENT IN SUMMATION THAT DEFENDANT SHOULD BE CONVICTED BECAUSE "IT'S YOUR TURN, GET INVOLVED, CONVICT DEFENDANT ON ALL CHARGES" CONSTITUTED PROSECUTORIAL MISCONDUCT NECESSITATING REVERSAL. (NOT RAISED BELOW)
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> POINT III
>
> DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

Briefly stated, the evidence at trial revealed that on the afternoon of June 19, 2012, the victim was sitting on a sidewalk bench in Paterson when a man approached, placed a gun to her forehead and demanded she give him her purse or he would kill her. The victim slapped the gun away, but the robber grabbed the purse, dragging the victim as he did so onto the sidewalk crowded with passersby. The victim fell to the ground, striking her head, and the assailant fled with her purse.

Two people, J.W. and T.G., saw the incident and gave chase.[1] They eventually caught and subdued the assailant until police arrived. When apprehended, the victim's purse was still in defendant's hands. Both J.W. and T.G. identified defendant in court. A security guard found a pellet gun along the route defendant used to flee from the scene of the robbery. Defendant did not testify or call any witnesses.

Prior to testifying at trial, J.W. had been convicted of crimes on two occasions. The parties agreed that J.W.'s March 2004 conviction for second- and third-degree crimes would be admissible for impeachment purposes pursuant to N.J.R.E. 609.

[1] We use initials to maintain the confidentiality of those involved.

However, the State sought to exclude a 1996 conviction, for which J.W. was resentenced on apparently two occasions, most recently in 2003. Defendant argued the 2004 conviction was an "intervening conviction," N.J.R.E. 609(b)(2)(i), and should be admitted.

Judge Sohail Mohammed concluded the 1996 conviction was "presumptively . . . inadmissible" and carefully considered the factors contained in N.J.R.E. 609(b), which provides:

> Use of Prior Conviction Evidence After Ten Years
>
> (1) If, on the date the trial begins, more than ten years have passed since the witness's conviction for a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof.
>
> (2) In determining whether the evidence of a conviction is admissible under Section (b)(1) of this rule, the court may consider:
>
> > (i) whether there are intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses,
> > (ii) whether the conviction involved a crime of dishonesty, lack of veracity or fraud,
> > (iii) how remote the conviction is in time,
> > (iv) the seriousness of the crime.

The judge excluded any evidence of the 1996 conviction. On direct examination, the prosecutor asked J.W. about his 2004 convictions.

Before us, defendant contends the inability to impeach J.W. about his 1996 conviction deprived defendant of a fair trial and due process. The argument lacks sufficient merit to warrant extensive discussion. R. 2:11-3(e)(2). We add only the following.

We apply a deferential standard of review to the trial court's decision to admit or exclude evidence of prior convictions for impeachment purposes. State v. T.J.M., 220 N.J. 220, 233-34 (2015). "The question is not whether we would have made a different determination in the first instance." Id. at 234.

Here, the case was tried in November 2015, nearly twenty years after the 1996 conviction and twelve years after J.W.'s release. Thus, under N.J.R.E. 609(b)(1), evidence of that conviction was admissible "only if the court determine[d] that its probative value outweigh[ed] its prejudicial effect, with [defendant] having the burden of proof." Judge Mohammed considered the factors outlined in section (b)(2) of the Rule, and ultimately decided the probative value of J.W.'s 1996 conviction did not outweigh its prejudice.

We recognize, as defendant asserts, that "the potential prejudice to the criminal defendant is fraught with more serious consequences than those confronting a prosecution witness." State v. Balthrop, 92 N.J. 542, 546 (1983) (construing prior version of our evidence rules). However, "we cannot say that the trial court's assessment of the probative value of the conviction for impeachment purposes was so off the mark as to have rendered defendant's trial unfair." T.J.M., 220 N.J. at 234.

Defendant's argument in Point II, however, involves comments by the assistant prosecutor in summation that, at the outset, compel our sternest rebuke. As he completed his remarks, the prosecutor drew the jurors' attention to J.W. and T.G., "two Good Samaritans" who saw the robbery and chased defendant. He then said:

> And now . . . it's your turn to convict that man for what he did on a sunny summer day in Paterson.
>
> I want to thank you for all of your patience. This hasn't been long. On some days it has. Don't be like those other people, don't look away, don't hope somebody else gets involved. It's your turn, get involved, convict on all charges, ladies and gentlemen. Thank you very much for all your time.

There was no objection. Defendant now argues these comments — intended to inflame the jury and imply it was the jurors' "civic duty" to convict — denied him a fair trial.

While prosecutors are entitled to zealously argue the merits of the State's case, State v. Smith, 212 N.J. 365, 403 (2012), they occupy a special position in our system of criminal justice. State v. Daniels, 182 N.J. 80, 96 (2004). "[A] prosecutor must refrain from improper methods that result in a wrongful conviction, and is obligated to use legitimate means to bring about a just conviction." Ibid. (quoting State v. Smith, 167 N.J. 158, 177 (2001)).

In considering defendant's argument, we examine whether a timely objection was made, whether the remarks were withdrawn, or whether the judge acted promptly and provided appropriate instructions. Smith, 212 N.J. at 403. "Our task is to consider the fair import of the State's summation in its entirety." State v. Jackson, 211 N.J. 394, 409 (2012) (citation omitted). And, "[g]enerally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial." State v. R.B., 183 N.J. 308, 333 (2005).

Finally, even if the prosecutor exceeds the bounds of proper conduct, "[a] finding of prosecutorial misconduct does not end a reviewing court's inquiry because, in order to justify

reversal, the misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" Smith, 167 N.J. at 181 (quoting State v. Frost, 158 N.J. 76, 83 (1999)).

We have far too often found it necessary to rebuke trial prosecutors, and reverse convictions, because of improper summation comments. See, e.g., State v. Rodriquez, 365 N.J. Super. 38, 52 (App. Div. 2003) (prosecutor's "persistent characterization in a pejorative context of the defense as an 'excuse'" and suggestion that "justice would [only] be done if the jury found [the] defendant guilty"); State v. Hawk, 327 N.J. Super. 276, 282-83 (App. Div. 2000) (prosecutor's invitation to send the community "a message" by convicting the defendant and holding him "accountable for his actions"); and State v. Goode, 278 N.J. Super. 85, 90 (App. Div. 1994) (suggesting the jury could "do something" to "make a difference in [the] community" by convicting the defendant).

Certainly, the prosecutor's comments in this case closely mirror those in Goode. They were improper, and we strongly condemn them. After literally decades of bringing trial prosecutors to task, we expect they would have learned the lessons from our prior holdings. Moreover, given the overall strength of the State's case, it is indeed mystifying that the prosecutor engaged in this rhetoric at all.

However, unlike the circumstances we confronted in Goode, 278 N.J. Super. at 92, where the prosecutor's "repeated improper comments . . . ran as a thread through th[e] trial, from opening to summation," the comments here were fleeting and came at the very end of an otherwise proper summation. They were not so egregious as to have deprived defendant of a fair trial. Smith, 167 N.J. at 181.

Lastly, defendant argues his sentence was excessive. Defendant takes issue with the judge's failure to find any mitigating factors, even non-statutory mitigating factors, see State v. Rice, 425 N.J. Super. 375, 381 (App. Div. 2012) ("Although our sentencing statute lists only thirteen mitigating factors, we have recognized the court's ability to use non-statutory mitigating factors in imposing a sentence."), despite Judge Mohammed acknowledgement of defendant's remorse.

"Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). Generally, we only determine whether:

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes

> the sentence clearly unreasonable so as to shock the judicial conscience."
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> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65, (1984)).]

In this case, the judge denied the State's motion to impose an extended term of imprisonment on defendant as a persistent offender. N.J.S.A. 2C:44-3(a). Judge Mohammed found aggravating sentencing factors three, six and nine. N.J.S.A. 2C:44-1(a)(3) (the risk of re-offense); (6) (the extent and seriousness of defendant's prior record); and (9) (the need to deter). Defense counsel essentially conceded these applied, given the extent and growing seriousness of defendant's prior criminal history, and he did not argue any of the mitigating sentencing factors applied. See N.J.S.A. 2C:44-1(b).

In his sentencing allocution, defendant repeatedly claimed he was innocent, and the verdict was based on "emotions." He told the judge any exculpatory evidence was "either unavailable for one reason or another, or has been tainted by investigators." Judge Mohammed did observe that defendant was tearful during the sentencing and opined defendant's emotions were "genuine" and he was remorseful. However, we find no mistaken exercise of the judge's discretion in not crediting the defendant's conduct at sentencing as a mitigating factor in the

sentencing calculus. Nor does the overall sentence for this brazenly violent crime shock our judicial conscience.

Affirmed.