SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4485-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID CORREA, a/k/a ALEX MALDONADO, ALEX SANTANA, DAVID MALDNALDO, and RAYMOND CASTRO,

Defendant-Appellant.

Submitted May 8, 2018 – Decided May 18, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 14-01-0021.

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

Gurbir S. Grewal, Attorney General, attorney for respondent (Sarah C. Hunt, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant appeals from convictions for second-degree attempted kidnapping, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:13-1(b)(1); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree aggravated assault with a deadly weapon, N.J.S.A. 2C:12-1(b)(2); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-4(d). We affirm the convictions, but remand for further findings and re-sentencing on the consecutive sentences.

On appeal, defendant argues:

> POINT I
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S DISCOVERY MOTIONS BECAUSE THERE WAS A REASONABLE PROBABILITY THAT THE MATERIALS SOUGHT WOULD LEAD TO RELEVANT EVIDENCE. (U.S. CONST. AMENDS. V, VI AND XIV; N.J. CONST. (1947) Art. I, PARS. 1, 9 AND 10).
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> POINT II
> THE NEED FOR LESSER-INCLUDED-OFFENSE INSTRUCTIONS ON ATTEMPTED CRIMINAL RESTRAINT AND FALSE IMPRISONMENT WAS CLEARLY INDICATED BY THE RECORD. (U.S. CONST. AMENDS. V, VI AND XIV; N.J. CONST. (1947) ART. I, PARS. 1, 9 AND 10) (Not raised below).
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> POINT III
> JUST AS A JURY INSTRUCTION ON POSSESSION OF A WEAPON FOR AN UNLAWFUL PURPOSE MUST SPECIFY THE UNLAWFUL PURPOSE, [AN ATTEMPTED] KIDNAPPING INSTRUCTION SHOULD SPECIFY THE UNLAWFUL PURPOSE OF THE CONFINEMENT OR REMOVAL; A FAILURE TO DO SO IN THE INSTANT CASE WAS PLAIN ERROR. (U.S. CONST. AMENDS. V, VI AND XIV; N.J. CONST. (1947) ART. I, PARS. 1, 9 AND 10) (Not Raised Below).

POINT IV

THE TRIAL COURT ERRED TO THE DEFENDANT'S PREJUDICE BY FAILING TO PROVIDE THE JURY WITH THE MODEL INSTRUCTION ABOUT HOW TO CONSIDER UNRECORDED STATEMENTS ALLEGEDLY MADE BY THE DEFENDANT. (U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. (1947) Art. I, PARS. 1, 9, and 10) (Not Raised Below).

POINT V

THE CONVICTIONS MUST BE REVERSED BECAUSE THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY TO CONSIDER ALL OF THE FACTORS SET FORTH IN STATE V. HENDERSON[1] AND STATE V. CROMEDY,[2] SPECIFICALLY RACIAL DIFFERENCES BETWEEN THE WITNESS AND THE ACCUSED, WHEN ASSESSING THE WITNESSES' IDENTIFICATION TESTIMONY. (U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. (1947) Art. I, PARS. 1, 9, and 10) (Not Raised Below).

POINT VI

THE TRIAL [COURT] IMPROPERLY GAVE THE INSTRUCTION ON FAILURE TO TESTIFY WITHOUT THE DEFENDANT'S CONSENT, THEREBY DENYING HIM A FAIR TRIAL. (U.S. CONST. AMENDS. V, VI AND XIV; N.J. CONST. (1947) ART. I, PARS. 1, 9 AND 10) (Not Raised Below).

POINT VII

THE SENTENCING COURT ERRED IN ORDERING THAT THE SENTENCES FOR THE ATTEMPTED KIDNAPPING AND AGGRAVATED ASSAULT CONVICTIONS BE SERVED CONSECUTIVELY.

We consider defendant's arguments — with the exception of Points I and VII — for plain error because he raised the contentions for the first time. And we conclude defendant's argument in Point V

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1 State v. Henderson, 208 N.J. 208 (2011).

2 State v. Cromedy, 158 N.J. 112 (1999).

is without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2), because the victim dated defendant, worked with him for approximately thirteen years before dating, and knew him for a substantial period of time.

As to Point I, we reject defendant's contention that the judge erred by denying his discovery request for the victim's psychological treatment records.

Before trial, and without notifying the victim, defense counsel requested the State turn over the victim's mental health records reflecting diagnoses and medication. The State objected and contended that such documentation was irrelevant, and that the records otherwise did not suggest the victim was unable to recall the events in question. And the State maintains that defendant knew, because of his long-term relationship with her, about the victim's diagnosis and prescribed medication for depression.

The judge did not deny the discovery request outright. Instead, he reviewed the documentation in camera, which is part of the record on appeal. During oral argument before the judge, the assistant prosecutor emphasized that defendant knew the victim had been taking medication for depression, and stated that the victim had been depressed because her mother died. The assistant prosecutor also remarked that the in camera records reflected as much. Defense counsel added that he believed the victim suffered

from bipolar disorder, but he was unsure whether the records reflected that diagnosis.

After reviewing the records in camera, the judge denied without prejudice defendant's request for the records. The judge stated, "I just don't find that providing these records in any fashion would lead to anything that's relevant." He permitted defense counsel to re-make the request if warranted, which never occurred. The judge further determined that defendant had failed to demonstrate any basis for the records, which were protected by the psychologist-patient and physician-patient privileges.

At trial, the victim testified on multiple days. Defense counsel cross-examined her extensively, but never raised the subject of the victim's mental health. Specifically, he did not question the victim about her depression, medication, or alleged bipolar condition. Defense counsel requested the records because he suspected the victim suffered from a cognitive disorder that affected her ability to recall the events that led to the convictions. Even though defense counsel extensively questioned the victim about the facts of this case, there was no cross-examination on her purported inability to recall the facts due to her alleged mental health condition.

"We accord substantial deference to a trial court's issuance of a discovery order and will not interfere with such an order

absent an abuse of discretion;" however, we accord no deference to the trial court's interpretation of the meaning or scope of a court rule. State v. Hernandez, 225 N.J. 451, 461 (2016). We "generally defer to a trial court's resolution of a discovery matter, provided its determination is not so wide of the mark or is not 'based on a mistaken understanding of the applicable law.'" State ex rel A.B., 219 N.J. 542, 554 (2014) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). Against this standard, we see no error, let alone an abuse of discretion.

Next, we reject defendant's argument that the judge committed plain error by failing to charge false imprisonment and attempted criminal restraint as purported lesser-included offenses for kidnapping.

Defense counsel specifically requested that the judge not charge the offense of criminal restraint, which under the facts of this case is not a lesser-included offense to kidnapping. Even if there was error, which is not the case, "except in the most extreme cases[,] trial errors originating with defense counsel will not present grounds for reversal on appeal." State v. Berry, 140 N.J. 280, 302-03 (1995). Failing to give the charge would be the result of "invited error." And, "[u]nder that settled principle of law, 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. Bailey, 231 N.J. 474, 490 (2018) (quoting State v. A.R., 213 N.J. 542, 561 (2013)).[3]

Defense counsel did not request the false-imprisonment charge, or object to its absence. More importantly, false imprisonment is not a lesser-included offense of attempted kidnapping. False imprisonment requires the State prove defendant restrained the victim and that the restraint was unlawful. N.J.S.A. 2C:13-3. Here, the indictment charged defendant with attempted kidnapping based on unlawful removal, not actual unlawful confinement. Unlawful restraint is an element not required to prove attempted kidnapping, and therefore it is not a lesser-included offense under the facts of this case.

But even if it were a lesser-included offense, the judge was not required to give the charge because it was not clearly indicated by the evidence. Judges have an independent duty to sua sponte charge a lesser-included offense "only where the facts in evidence clearly indicate the appropriateness of that charge." State v. Alexander, ___ N.J. ___, ___ (2018) (slip op. at 12) (quoting State v. Savage, 172 N.J. 374, 397 (2002)). A judge is

[3] We emphasize that even if there had been no invited error, attempted criminal restraint requires proof that the unlawful restraint was attempted under "circumstances exposing [the victim] to risk of serious bodily injury." N.J.S.A. 2C:13-2(a). Such a requirement is unnecessary to establish attempted kidnapping.

not obligated to "scour the statutes," id. at 13 (quoting State v. Brent, 137 N.J. 107, 118 (1994)), or "meticulously sift through the entire record," ibid. (quoting State v. Funderburg, 225 N.J. 66, 81 (2016)), to determine if the "clearly indicated" standard has been met. Instead, the evidence must "jump[] off the page" to require the sua sponte charge. Ibid. (alteration in original) (quoting State v. Denofa, 187 N.J. 24, 42 (2006)).

The facts here show that defendant attempted to remove the victim by dragging her to a vehicle. The facts do not "clearly indicate" that he actually restrained the victim. In fact, at the charge conference, defense counsel acknowledged that "there is no indication about confinement." Thus, there is no error, let alone plain error.

Defendant contends for the first time that the judge gave a flawed attempted-kidnapping charge. He argues the judge should have instructed the jury on the specific crime defendant had the purpose to commit in attempting to kidnap the victim. Consequently, he argues the failure to give this added instruction constitutes plain error.

Defense counsel acknowledges that the judge used the model jury charge. Because defense counsel did not object, we must determine whether the charge was "clearly capable of producing an unjust result." R. 2:10-2. The failure to object to a jury

instruction creates "a presumption that the charge was not error and was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012). Under the plain error standard, reversal of a defendant's conviction is required if there was error "sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971).

In reviewing the adequacy of the judge's charge to the jury, we consider the charge as a whole in determining whether it was prejudicial. See State v. Figueroa, 190 N.J. 219, 246 (2007) (citing State v. Wilbely, 63 N.J. 420, 422 (1973)). "Appropriate and proper charges to a jury are essential for a fair trial." State v. Green, 86 N.J. 281, 287 (1981).

Here, there was nothing clearly capable of producing an unjust result about the judge's charge to the jury. The charge tracked the model jury charges. Model jury charges are often helpful to trial courts performing this important function. See Mogull v. CB Commercial Real Estate Grp., Inc., 162 N.J. 449, 466 (2000) (holding that instructions given in accordance with model charges, or which closely track model charges, are generally not considered erroneous).

Furthermore, the kidnapping statute identifies the unlawful purpose that will sustain a conviction. Here, the judge instructed

the jury that to convict defendant of attempted kidnapping, it must find that he had the purpose to facilitate commission of a crime or flight therefrom, or harm or terrorize the victim. The overwhelming evidence showed that defendant struck the victim on the head with a bat, and then continued to assault her as he dragged her toward a parked vehicle. In this vein, the evidence demonstrated that defendant attempted to remove the victim with the purpose to facilitate commission of a crime or flight therefrom, or harm or terrorize the victim. Accordingly, we see no error.

Next, defendant asserts that the judge erred in failing to charge the jury with the model jury instruction on statements of defendant. Defendant contends that the judge erred when he failed to charge the jury in accordance with State v. Kociolek, 23 N.J. 400 (1957). The Kociolek charge pertains to the reliability of an inculpatory statement made by a defendant to any witness. Id. at 421. Defendant contends for the first time that his statement to the victim that he attacked her because she "ratted [him] out" warrants the specific instruction.

In Kociolek, the Court held that when a defendant's oral statements have been introduced against him, the trial court must instruct the jury that it "'should receive, weigh and consider such evidence with caution,' in view of the generally recognized

risk of inaccuracy and error in communication and recollection of verbal utterances and misconstruction by the hearer." Ibid. The Kociolek charge should be given whether or not specifically requested by a defendant, but the failure to give this charge is not plain error per se. State v. Jordan, 147 N.J. 409, 428 (1997) (holding it would be "a rare case where failure to give a Kociolek charge alone is sufficient to constitute reversible error"). This is not that rare case.

We have held that "[w]here such a charge has not been given, its absence must be viewed within the factual context of the case and the charge as a whole to determine whether its omission was capable of producing an unjust result." State v. Crumb, 307 N.J. Super. 204, 251 (App. Div. 1997) (finding "no reported case in which a failure to include a Kociolek charge has been regarded as plain error"). Given the judge's extensive credibility instructions, at the outset and close of trial, as well as defense counsel's thorough cross-examination of the victim, we conclude that the judge placed the issue of the reliability of defendant's statement to the victim "thoroughly and sufficiently . . . before the jury." State v. Feaster, 156 N.J. 1, 73 (1998). We find no error.

Defendant did not testify at trial. As a result, the judge read to the jury the election-not-to-testify charge. Defense

counsel did not object, but he did not request the judge give the charge. But immediately before the final charge conference, the judge discussed defendant's election not to testify with counsel and defendant. Although defendant understood that the judge planned to give the charge, and without any objection, he now argues for the first time that he has been prejudiced.

If a defendant elects not to testify, the judge should directly inquire of counsel whether to give a specific "no negative inference" jury charge. State v. Cusumano, 369 N.J. Super. 305, 314 (App. Div. 2004). "Failure to address these issues, however, is not legal error when defendant, as here, was represented by counsel." Ibid. Although the judge should have inquired of counsel whether defendant wished the court to give the "no negative inference" instruction before doing so, we are satisfied that this error was harmless.

The judge merged the weapons conviction with the conviction for third-degree aggravated assault with a deadly weapon. But he imposed an eight-year prison term, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on the second-degree aggravated assault conviction consecutive to an eight-year prison term, subject to the NERA, on the second-degree attempted kidnapping conviction.

Defendant argues that the judge erred by imposing these consecutive sentences, and that he "failed to properly explain [his] reasons" for sentencing defendant accordingly. Defendant asserts that even if the crimes had separate objectives – which the verdict sheet did not reflect – then consecutive sentences are still not required. Defendant emphasizes that these two convictions, which have different elements, do not justify consecutive sentences. Instead, he argues that the judge must consider all of the Yarbough[4] factors, which defendant contends the judge did not do.

Under N.J.S.A. 2C:44-5, a sentencing court has the sole discretion to impose consecutive or concurrent sentences. The relevant criteria were set out in State v. Yarbough, 100 N.J. 627, 643-44 (1985):

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;

[4] State v. Yarbough, 100 N.J. 627 (1985).

> (b) the crimes involved separate acts of violence or threats of violence;
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> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims;
>
> (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors; [and]
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.

In exercising discretion when sentencing, the factfinder must always apply correct legal principles. State v. Roth, 95 N.J. 334, 363-64 (1984). A judge must state his or her reasons for the sentence imposed, R. 3:21-4(g), and those reasons must be in the judgment, R. 3:21-5. "When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal." State v. Miller, 205 N.J. 109, 129 (2011). Nonetheless, "if the court does not explain why consecutive sentences are warranted, a remand is ordinarily needed for the judge to place reasons on the record." Ibid.

Defendant argues that the record is devoid of any evidence that the assault was "predominantly independent" of the attempted kidnapping offense. Defendant asserts that even under the State's theory, and testimony from the victim, the assault was part of the attempted kidnapping. And that — especially because the verdict sheet does not reflect otherwise — there is no evidence showing a separate objective for the commission of these crimes. Instead, defendant argues the crimes were committed at the same time, the same place, and against the same victim.

We agree with defendant that the judge did not fully explain his reasons for the imposition of the consecutive nature of the sentences. We therefore remand and direct the judge to re-sentence defendant on the attempted kidnapping and aggravated assault convictions after making further Yarbough findings.

Affirmed as to the convictions; remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.