SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5241-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN WHITE,

Defendant-Appellant.

Submitted March 6, 2018 – Decided March 22, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 12-12-1811.

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

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his convictions of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); third-degree

possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1); third-degree possession with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3); third-degree possession with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7; third-degree possession of prescription legend drugs with intent to distribute, N.J.S.A. 2C:35-10.5(a)(3); and second-degree possession of a firearm while possessing CDS with intent to distribute, N.J.S.A. 2C:39-4.1.

An officer on patrol observed defendant's vehicle and defendant's friends surrounding it, while defendant was in a liquor store. He used his in-car computer to check the vehicle's license plate, and determined the vehicle was stolen. He testified at trial that he subsequently learned the car was not stolen. The officer radioed for backup and after other officers arrived, they converged on defendant's car with their guns drawn.

The officers secured the scene and asked all individuals to step away from the vehicle while keeping their hands visible. Defendant alerted the officers that he owned the vehicle. An officer then conducted a pat-down search of defendant and discovered marijuana and eleven dollars in his pants pocket.

Officers arrested numerous individuals at the scene and transported the group to the police station. A loaded handgun was found in the vehicle. Upon further inspection, a detective found

sixty-eight Xanax pills in a backpack in the trunk. Defendant was searched incident to arrest after he arrived at the police station and an officer found eight decks of heroin and $616.

A grand jury indicted defendant, and his co-defendants, including Barbara Hinson (Hinson) and Tanaya Hepburn (Hepburn), on second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (Count One); and third-degree receiving a stolen automobile, N.J.S.A. 2C:20-7 (Count Two).

Defendant was also indicted on third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1) (Count Three); third-degree possession with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (Count Four); third-degree possession with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7 (Count Five); fourth-degree possession with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(12) (Count Six); third-degree possession with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7 (Count Seven); third-degree possession of prescription legend drugs with intent to distribute, N.J.S.A. 2C:35-10.5(a)(3) (Count Eight); second-degree possession of a firearm while possessing CDS with intent to distribute, N.J.S.A. 2C:39-4.1 (Count Nine); and third-degree receiving stolen property, N.J.S.A. 2C:20-7 (Count Eleven).

At defendant's jury trial, Hepburn testified about a conversation she had with defendant regarding how defendant acquired the gun found in his vehicle. Hepburn testified that defendant said he received the gun from his cousin. Defendant's counsel cross-examined Hepburn, asking specifically about the validity of defendant's statement and whether she testified to such information for a favorable plea agreement from the State.

Hinson also testified at trial regarding defendant's possession of the gun. She testified that defendant admitted ownership of the gun while in the holding cell on the night of the arrests. Hinson further testified that she received a text message from defendant stating he would admit ownership of the gun so the other co-defendants' charges would be dropped.

At trial, the judge granted the State's motion to dismiss Counts Two and Eleven. The judge also granted defendant's motion for a judgment of acquittal on Counts Six and Seven. The jury found defendant guilty on the remaining six charges.

The judge merged Counts Three and Four with Count Five, and sentenced defendant to five years with three years of parole ineligibility. The judge sentenced defendant on Count Nine to five years with three years of parole ineligibility to be served consecutively with Count Five. The judge further sentenced him on Count One to five years with three years of parole

ineligibility, and on Count Eight to three years; each to be served concurrently to his other convictions.

On appeal, defendant argues:

> POINT I
> BECAUSE THE PROSECUTOR POSED A HYPOTHETICAL QUESTION DESIGNED TO ELICIT AN OPINION THAT [DEFENDANT] POSSESSED DRUGS WITH THE INTENT TO DISTRIBUTE AND THE STATE'S NARCOTICS EXPERT TESTIFIED ON THE ULTIMATE ISSUE OF [DEFENDANT'S] STATE OF MIND, THE EXPERT INVADED THE JURY'S EXCLUSIVE DOMAIN AS FACTFINDER AND THE STATE'S FACT EVIDENCE WAS IMPROPERLY BOLSTERED. (Not raised below.)
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> POINT II
> THE PROSECUTOR COMMITTED MISCONDUCT IN VOUCHING FOR THE CREDIBILITY OF A WITNESS WHOSE TESTIMONY WAS CONTRADICTED BY ANOTHER STATE'S WITNESS, USING INFORMATION THAT WAS NOT BEFORE THE JURY TO CREATE THE MISIMPRESSION THAT THEIR STORIES COULD BE RECONCILED. (Not raised below.)
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> POINT III
> BECAUSE THE STATE FAILED TO PROVIDE A PROPER FOUNDATION FOR SECONDARY EVIDENCE THAT [DEFENDANT] SENT AN INCULPATORY TEXT MESSAGE TO CO-DEFENDANT HINSON, THE COURT ERRED IN ADMITTING HER TESTIMONY REGARDING THE ALLEGED CONTENTS OF THAT MESSAGE. BUT EVEN IF THE EVIDENCE COULD BE CONSIDERED BY THE JURY, THE COURT ERRED IN FAILING TO PROVIDE A LIMITING INSTRUCTION. (Not raised below.)
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> POINT IV
> THE COURT ERRED IN FAILING TO PROVIDE JURORS WITH THE MODEL CHARGE ON STATEMENTS OF DEFENDANT. (Not raised below.)
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> POINT V
> THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE JUDGE INTENDED TO IMPOSE THE

MINIMUM SENTENCE ON THE SCHOOL-ZONE DRUG OFFENSE BUT ERRONEOUSLY IMPOSED A SENTENCE THAT EXCEEDED THE MINIMUM BY TWO YEARS. (Not raised below.)

Each of defendant's arguments are raised for the first time on appeal. We review these arguments for plain error. R. 2:10-2. "Any error or omission shall be disregarded by [this court] unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ." Ibid. In a jury trial, the possibility of such an unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971). Defendant carries the burden of showing plain error. State v. Morton, 155 N.J. 383, 421 (1998). We address each of defendant's arguments in turn.

First, defendant contends that the companion cases, State v. Cain, 224 N.J. 410 (2016) and State v. Simms, 224 N.J. 393 (2016), should be applied retroactively to his case. The Court in Cain, 224 N.J. at 429-30, held that the use of a hypothetical question "should be used only when necessary in drug cases" and should not be utilized when the evidence presented before the jury is uncomplicated and easily understood. Furthermore, the Court established that it is improper for a drug expert to opine as to a defendant's state of mind. Id. at 426-29. Here, defendant

appeals the use of a hypothetical question and the expert's opinion in light of Cain and Simms.

Lieutenant Steven Weitz (Weitz) testified as a drug expert at trial. The prosecutor posed the following hypothetical question to him:

> Let's suppose we have some police officers in the evening hours in the area that's known as a high crime and drug trafficking area. They come across an individual. This individual is found to be in possession of — I'd call it a smaller quantity of heroin, less than ten packets of heroin. Along with the heroin he's got a significant quantity of cash in various denominations, over $500 I'd say. Those are stored together in a bag that's in his pocket. Alongside those there is a loose $20 bill outside of the bag with the heroin and the money. In addition, this individual is later found to also be in possession of some marijuana, [and] some additional cash in other pockets of his pants . . . . At that point do you have any opinion as to whether that heroin is possessed for personal use or for distribution purposes?

Weitz then offered his expert opinion that such a person usually possesses such an amount of heroin and money with the intent to distribute. He further testified about the typical packaging for various quantities of heroin. The packaging Weitz described resembled the packaging that police discovered in defendant's possession.

We first address whether Cain and Simms apply to defendant retroactively. This court addressed the retroactive effect of Cain and Simms in State v. Green, 447 N.J. Super. 317, 327-29 (App. Div. 2016). We held that the new rule of law expressed in Cain and Simms applies through "pipeline retroactivity," meaning it applies to those cases on direct appeal at the time Cain and Simms were decided, and those in the future. Id. at 326-28.

Defendant was tried in December 2014 and sentenced in June 2016. The delay in sentencing was a result of defendant's motion for a new trial, which he filed in January 2015.[1] The judge did not decide the motion until March 2016 due to defendant's request for new counsel. Cain and Simms were both decided in March 2016 when defendant had not yet appealed his convictions. Defendant is not entitled to rely on the holdings of Cain and Simms because he is not within the scope of pipeline retroactivity. This matter was not on direct appeal at the time of the Court's decisions. Cain and Simms are inapplicable to defendant's case.

The prosecutor's hypothetical question and the State's expert opinion were in accordance with State v. Odom, 116 N.J. 65 (1989), which preceded Cain and Simms. There is no violation "as long as the expert does not express his opinion of defendant's guilt but

[1] Defendant does not argue that the delay prejudiced him, or was caused by either the court or the State.

simply characterizes defendant's conduct based on the facts in evidence in light of his specialized knowledge, the opinion is not objectionable even though it embraces ultimate issues that the jury must decide." Id. at 79. The use of a hypothetical question is also permitted to assist the jury so long as the expert does not express his or her view that a defendant is guilty. Id. at 82.

We find no error in the expert's testimony at trial in light of the Court's pre-Cain and Simms standards expressed in Odom. Weitz's opinion did not express his view that defendant was guilty, and the judge explained to the jury that it may accept or reject his expert opinion in making its determination. Defendant has failed to show that such testimony amounted to plain error requiring the reversal of his convictions.

Next, defendant contends that the prosecutor committed misconduct in his summation to the jury. Defendant asserts that the prosecutor attempted to reconcile Hepburn's and Hinson's testimonies regarding who was in the car when defendant drove from Highland Park to New Brunswick on the night of the arrests. Defendant contends the prosecutor's summation, which told the jury that each witness's account could be reconciled if it considered the statements that were made to the police two and a half years earlier, vouched for the State's witnesses.

We determine prosecutorial misconduct by considering "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." State v. Frost, 158 N.J. 76, 83 (1999). If no objections were made to the remarks at trial, they will generally not be deemed prejudicial. Ibid. The failure to object to such remarks "also deprives the court of an opportunity to take curative action." Id. at 84. "A prosecutor may argue that a witness is credible, so long as the prosecutor does not personally vouch for the witness or refer to matters outside the record as support for the witness's credibility." State v. Walden, 370 N.J. Super. 549, 560 (App. Div. 2004).

Hinson and Hepburn provided conflicting testimony as to who was in defendant's car, and defendant seeks to attack their credibility and the prosecutor's remarks because both women also testified about defendant's ownership of the gun. Defendant, however, failed to object to the prosecutor's statements at trial. The judge directed the jury to weigh the witnesses' testimonies and examine each's credibility, as it sought fit, in making its decision. Regardless of defendant's failure to object, there exists sufficient evidence in the record to support the jury's finding of guilt.

Although the prosecutor may have inappropriately made statements regarding the witnesses' credibility during his summation, they were not "so egregious that it deprived [him] of a fair trial." Frost, 158 N.J. at 83. We find no plain error.[2]

Next, defendant argues the judge erred by failing to conduct an N.J.R.E. 104(a) hearing to determine whether proper foundation was laid for the admission of Hinson's testimony regarding a text message from defendant; and erred by failing to charge the jury with a limiting instruction regarding that evidence.

Hinson testified at trial that she and defendant communicated through text message following their arrests. She testified that defendant admitted to owning the gun and stated that he would admit ownership so no other co-defendant would be charged. The State did not produce a copy of the message because Hinson testified that she lost the telephone containing the message.

Defendant failed to object to the testimony about the evidence at trial. He also failed to request an evidentiary hearing until his motion for a new trial, and even then only challenged its relevance to the case in light of the message's prejudicial value. In a separate opinion dismissing defendant's motion for a new

[2] During this appeal's pendency, defendant moved to supplement the record. Another panel of the court reserved, leaving it for this panel to decide. We grant defendant's motion to supplement.

trial, the judge determined that the use of the testimony regarding the text message was prejudicial to defendant, but its relative value outweighed that concern.

Additionally, the text message was not the only testimony that Hinson gave in regard to defendant's ownership of the gun. Hinson also testified to a conversation with defendant in the holding cell when he admitted to owning the gun. Thus, there is sufficient evidence in the record for the jury to have ultimately decided that defendant owned the gun. Any error regarding Hinson's testimony was harmless and defendant has failed to show plain 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 she failed to charge the jury in accordance with State v. Hampton, 61 N.J. 250 (1972), and State v. Kociolek, 23 N.J. 400 (1957). Defendant contends that Hepburn's and Hinson's testimonies regarding defendant's statements admitting to own the gun warranted the specific instruction.

The failure to provide the charge in question does not necessarily constitute plain error. State v. Jordan, 147 N.J. 409, 425 (1997). However, the failure to provide such a charge may be reversible "when the defendant's statement is critical to

the State's case and when the defendant has challenged the statement's credibility." Ibid. "If, however, the defendant's statement is unnecessary to prove defendant's guilt because there is other evidence that clearly establishes guilt, . . . the failure to give a Hampton charge would not be reversible error." Id. at 425-26.

During the preliminary charge conference, the judge discussed the jury charge concerning Hepburn's and Hinson's testimonies. The judge did not propose the jury instruction in Hampton, however, defendant's counsel did not object to the judge's proposed charge. Defendant's counsel also failed to object to the charge after being provided a copy of the charge. After the judge read the jury charge, she asked counsel if either required a sidebar meeting, and both declined.

Although the judge did not provide the specific instruction outlined in Hampton, the judge did charge the jury with examining both witnesses' testimonies with "special scrutiny." The judge instructed the jury to independently assess each witness's testimony, and determine credibility. She further explained to the jury, "you may consider whether [the witnesses] have a special interest in the outcome of the case, and whether their testimony was influenced by the hope or expectation of any favorable treatment or reward, or by any feelings of revenge or reprisal."

The judge's instruction captured the same information as a Hampton charge and alerted the jury to the same credibility issues. Thus, defendant failed to show plain error in the jury charge.

Lastly, defendant contends that the judge erred at sentencing by imposing a five-year minimum sentence in connection with defendant's conviction of Count Five, possession with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7(a). At trial, the judge recognized that defendant should be sentenced to the mandatory minimum sentences for each conviction because defendant had mental-health issues and the gun was not used in the incident. Defendant argues that the minimum sentence should have been three years, rather than the five-year sentence imposed.

A violation of N.J.S.A. 2C:35-7(a) is a third-degree crime, and carries a minimum sentence of three years. Thus, the judge incorrectly applied the minimum sentence for defendant's conviction and erred in sentencing defendant on the school-drug related offense.

Defendant's convictions are affirmed, except we remand for resentencing in accordance with this opinion. We do not retain jurisdiction.