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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-5496-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DUANE S. HORNE, a/k/a
DUANE HORNE, JR. and DUANE
S. HORNE, JR.,

Defendant-Appellant.

Argued January 24, 2018 – Decided April 9, 2018

Before Judges Koblitiz and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
14-03-0466.

Molly O'Donnell Meng, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Molly O'Donnell Meng, of counsel and on the
brief).

Ian D. Brater, Assistant Prosecutor, argued
the cause for respondent (Christopher J.
Gramiccioni, Monmouth County Prosecutor,
attorney; Ian D. Brater, of counsel and on the
brief).

PER CURIAM

Defendant Duane Horne appeals from his conviction after trial. Defendant argues that the judge's jury charge was erroneous and the sentence was premised upon consideration of improper factors. We affirm.

A Monmouth County Grand Jury returned an indictment charging defendant with first-degree robbery, N.J.S.A. 2C:15-1 (count one); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count three); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count four). After a joint trial with co-defendant Maurice Horne, a jury found defendant guilty on all counts. Defendant was sentenced to a twelve-year term of incarceration with eighty-five-percent of the maximum term to be served pursuant to the No Early Release Act.

The following facts are derived from the trial record. On December 14, 2013, M.N. was working at a gas station on Route 33 in Farmingdale, New Jersey.¹ Around 4 p.m., M.N. observed a white Crown Victoria with Virginia license plates pull into the gas station.

As M.N. attended to the vehicle, he observed two black males in their twenties inside. The front door of the vehicle was open when the driver, later identified as Maurice Horne, asked M.N. for

¹ We utilize the victim's initials for purpose of confidentiality.

five dollars' worth of gas. Maurice then handed M.N. a twenty dollar bill. M.N. then pulled cash from his pocket to make change.² While in the driver's seat, Maurice attempted to grab the money from M.N.'s hand. M.N. kept hold of the money. Throughout the struggle, Maurice asked M.N., "Do you like your life?" M.N. then noticed a pistol in Maurice's right hand, which was tucked into his jacket with the back end of the pistol sticking out and pointing towards him. Maurice repeated the threat multiple times then said to the passenger, later identified as Duane Horne, "Get him." At that point, Duane pulled out a tactical folding knife and directed it toward M.N., who then released the money and backed away from the car.

Immediately after the incident, M.N. called 9-1-1. Two Howell Township police officers responded to the call. M.N. gave the police a description of the vehicle and advised them that he recalled the first three letters of the license plate. M.N. also showed the officers security footage of the incident.

New Jersey State Police Detective Shawn Bracht was stationed in his patrol vehicle in the center median on I-195 on the lookout for a white Crown Victoria with Virginia plates. Bracht observed a vehicle matching the description traveling toward him in the

² We utilize the first names of Maurice Horne and Duane Horne for purpose of clarity.

westbound lanes. After confirming the plate number, Bracht called dispatch for backup. When backup arrived, Bracht activated his lights, and pulled over the vehicle. There were two black male occupants in the vehicle.

Upon being ordered by Bracht, both men exited the vehicle. The men were handcuffed, read their Miranda rights, and searched.³ The driver of the vehicle was identified as Maurice and the passenger was identified as Duane. The search of Duane revealed \$992 cash. The search of Maurice was negative.

Thereafter, the State Police applied for and obtained a search warrant for the vehicle. The search revealed a black Airsoft pistol in the glove compartment, \$930 cash in the center console, and a tactical folding knife located on the floor mat of the front passenger seat.

Subsequent to his arrest, Maurice provided a recorded statement wherein he admitted he had a toy gun and that he "snatched the money" from the "gas station guy." The statement was later presented by the State as part of its proofs at trial.

During the trial, both Maurice and Duane testified. Maurice testified to his four years of service in the Navy prior to receiving an honorable discharge and noted he suffered from medical

³ Miranda v. Arizona, 384 U.S. 436 (1966).

issues after his discharge, which included substance abuse, suicidal tendencies, post-traumatic stress disorder, and bipolar disorder. Further, Maurice testified that he grabbed the money and asked M.N. "Do you like your life?" about three times.

Duane testified that while in the passenger seat at the time of the incident, he was listening to his iPod and playing with his tactical folding knife. Duane also testified he heard Maurice arguing with M.N. and, believing the men were involved in a struggle, displayed the knife in an attempt to "get them to separate."

During the jury charge conference, counsel for Duane argued the judge should not charge accomplice liability as to theft. Counsel also requested that the judge charge the justification defenses of defense of others and mistake of fact. The judge subsequently denied both requests.

The final charge, based upon a sua sponte determination by the judge, included theft as an accomplice as a lesser-included offense to robbery relative to Duane. At the conclusion of the charge, counsel for Duane argued that the manner in which the jury instructions were provided relative to the robbery charges and the theft as an accomplice was confusing. Counsel requested that the judge provide clarification. The judge denied the request finding that the instructions were appropriate.

Defendant raises the following points on appeal:

POINT I

THE TRIAL JUDGE'S CHARGE ON ROBBERY WAS RIDDLED WITH ERRORS, RESULTING IN A CONFUSING AND LEGALLY DEFICIENT CHARGE THAT DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL. THEREFORE, DEFENDANT'S ROBBERY CONVICTION MUST BE REVERSED.

A. THE TRIAL JUDGE IMPROPERLY SUBMITTED THEFT AS AN ACCOMPLICE AS A LESSER-INCLUDED OFFENSE OF ROBBERY.

B. THE ROBBERY CHARGE IMPERMISSIBLY EXPANDED DEFENDANT'S CRIMINAL LIABILITY TO ENCOMPASS THE CODEFENDANT'S CONDUCT.

C. THE JURY CHARGE FAILED TO MAKE IT CLEAR THAT THE LIABILITY OF EACH PARTICIPANT IN A CRIME IS DEPENDENT ON HIS OWN STATE OF MIND, NOT ON ANYONE ELSE'S.

D. THE JURY CHARGE FAILED TO MAKE IT CLEAR THAT, IN ORDER TO CONVICT DEFENDANT OF ROBBERY, THE JURY HAD TO FIND THAT HE FORMED THE INTENT TO STEAL BEFORE OR AT THE TIME HE DISPLAYED THE POCKETKNIFE.

E. PREJUDICE.

POINT II

THE TRIAL COURT'S FAILURE TO CHARGE THE JURY ON DEFENSE OF OTHERS AND MISTAKE OF FACT DEPRIVED DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW, AND REQUIRES REVERSAL OF HIS CONVICTIONS.

POINT III

IF THE CONVICTIONS ARE NOT REVERSED, THIS MATTER MUST BE REMANDED FOR RESENTENCING BECAUSE THE TRIAL COURT UTILIZED A NON-STATUTORY AGGRAVATING FACTOR, INCORRECTLY APPLIED AGGRAVATING FACTOR THREE, AND FAILED TO TAKE INTO ACCOUNT RELEVANT MITIGATING FACTORS SUPPORTED BY THE RECORD.

A. THE TRIAL COURT IMPROPERLY USED DEFENDANT'S MILITARY SERVICE AS A NON-STATUTORY AGGRAVATING FACTOR.

B. THE TRIAL JUDGE INCORRECTLY APPLIED AGGRAVATING FACTOR THREE.

C. THE TRIAL JUDGE FAILED TO CONSIDER MITIGATING FACTORS THAT WERE CLEARLY SUPPORTED BY THE RECORD.

I.

We begin with defendant's arguments regarding the jury charge. At the outset, we note that while defendant suggested language to be included or excluded in the charge during the charge conference, there was no objection to the final charge when given.

It is well-settled that "[a]ppropriate and proper jury charges are essential [in a criminal case] to assure a fair trial." State v. Reddish, 181 N.J. 553, 613 (2004) (quoting State v. Green, 86 N.J. 281, 287 (1981)). N.J.S.A. 2C:1-8(e) directs that "[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." See State v.

Sinclair, 49 N.J. 525, 540 (1967). In State v. Brent, 137 N.J. 107, 113-14 (1994), our Supreme Court commented on N.J.S.A. 2C:1-8(e):

The statute has been characterized and construed as requiring not only a rational basis in the evidence for a jury to convict the defendant of the included offense but requiring also a rational basis in the evidence for a jury to acquit the defendant of the charged offense before the court may instruct the jury on an uncharged offense.

Here, the State did not proceed under a theory of accomplice liability. Notwithstanding, if the court sua sponte provides the accomplice charge, "the court is obligated to provide the jury with accurate and understandable jury instructions regarding accomplice liability even without a request by defense counsel." State v. Bielkiewicz, 267 N.J. Super. 520, 527 (App. Div. 1993) (citation omitted). In such a case, a "jury must be instructed that defendant 'shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.'" State v. Oliver, 316 N.J. Super. 592, 596 (App. Div. 1998) (quoting Bielkiewicz, 267 N.J. Super. at 528); see also State v. Whitaker, 200 N.J. 444, 458 (2009) ("An accomplice is only guilty of the same crime committed by the principal if he shares the same criminal state of mind as the principal.").

"[J]ury instructions on accomplice liability must include an instruction that a defendant can be found guilty as an accomplice of a lesser[-]included offense even though the principal is found guilty of the more serious offense." State v. Norman, 151 N.J. 5, 37 (1997). Thus, "when an alleged accomplice is charged with a different degree offense than the principal or lesser[-]included offenses are submitted to the jury, the court has an obligation to 'carefully impart[] to the jury the distinctions between the specific intent required for the grades of the offense.'" Bielkiewicz, 267 N.J. Super. at 528 (alteration in original) (quoting State v. Weeks, 107 N.J. 396, 410 (1987)).

Here, it is essentially argued that the error was in providing the charge to the jury, rather than error as to the substance of the charge. To the extent that the arguments are addressed to the substance of the charge, we find them to be more "semantical rather than substantive." State v. Bridges, 254 N.J. Super. 541, 564 (App. Div. 1992).

We are satisfied that the judge's decision to instruct the jury on the lesser-included charge of theft was not in error. The record supports the jury's consideration of the lesser-offense of theft as an accomplice. Defendant was an occupant of the vehicle at the time his brother Maurice confronted the attendant. The jury could infer, based upon Maurice's verbal threat to the

attendant and defendant's own conduct, that he knew of Maurice's criminal plan and knew of and actively participated in that plan. As the judge properly instructed the jury, they could accept or reject defendant's testimony and convict or acquit defendant of the offense. In sum, we are satisfied from our review that the judge provided the jury with "accurate and understandable jury instructions regarding accomplice liability." Bielkiewicz, 267 N.J. Super. at 527.

Having considered defendant's remaining arguments relative to the substance of the jury charge on robbery in light of the record and our standard of review, we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

II.

We next address defendant's argument related to his request to charge certain defenses. Defendant argues the judge's failure to submit the defenses of mistake of fact and defense of others, as requested by defendant's counsel, was in error. Defendant contends that the only reason he displayed his tactical folding knife was to protect his brother, who he believed was involved in a struggle. At the charge conference, defendant requested the judge to instruct the jury regarding the defenses of mistake of fact or law and defense of others. The State objected to the

defenses being charged and argued defendant's own testimony that he heard Maurice threaten M.N. negated his claim that he did not know what was going on. At the conclusion of the arguments, the judge stated:

I agree [with the State]. I don't think that there's any factual evidence to support a claim that Maurice was being assaulted in any way by the gas station attendant. All that happened was that Maurice asked for [five dollars'] worth of gasoline, the attendant went to the rear of the car because the window wouldn't open. Maurice had to open the car driver side door in order to pay for the gas because he couldn't roll down the window and hand out the cash. He handed the attendant a [twenty-dollar] bill.

There was no physical contact – there was no struggle, there was no physical contact or attempt at physical contact by the attendant to Maurice, nor did Maurice attempt in any way to harm or assault physically the physical person of the attendant.

On the other hand, when the door opened and Maurice turned to the side, the attendant indicated two things. I'm not sure whether the jury can believe either one of them but they're sort of mutually exclusive. He indicated – the attendant indicated at that point Maurice, when the door was open and turned sideways facing him so that he could reach outside the door, he took out a [twenty-dollar] bill, and the attendant realized he had to make change.

At that point the attendant believed that he saw the butt of the gun, which turned out to be an imitation gun[,] but for purposes of today don't make any difference, the butt of

the gun visible and at another point believed that the gun was actually pointed at him.

But at no time did the attendant strike Maurice, at no time did the attendant raise his hand or in any way menace Maurice, so there's no factual basis for the jury to believe that Duane was coming to the assistance in the defense of the assault by the attendant against Maurice.

What did happen, according to the evidence, was that the attendant then pulled out a roll of bills that contained a lot more, it turned out, roughly about perhaps as much as \$2000 but certainly more than a thousand dollars, closer to \$2000, a wad of smaller bills, and that there was no – at no time was there any physical contact between the bodies of the attendant and Maurice. So that there was no basis for – whatsoever for Duane even mistakenly to believe the gas station attendant was assaulting his brother that required the pulling of the knife to come to the defense of his brother.

I'm satisfied there's absolutely no basis for the defense of others or the mistake in fact. People misperceive things all the way, but that doesn't rise to the level of a mistake of fact, as I understand is correctly pointed out by the State.

When the trial judge does not give a jury a charge requested by defendant, we must determine if the omission of the charge was not harmless error. State v. Macon, 57 N.J. 325, 337-38 (1971). "The test of whether an error is harmless depends upon some degree of possibility that it led to an unjust verdict." State v. Burton, 309 N.J. Super. 280, 289 (App. Div. 1998).

Under N.J.S.A. 2C:3-5,

the use of force upon or toward the person of another is justifiable to protect a third person when:

(1) The actor would be justified under section 2C:3-4 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and

(2) Under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

(3) The actor reasonably believes that his intervention is necessary for the protection of such other person.

Additionally, we have explained that "[t]he defense is valid if the defendant reasonably believed both that the person he sought to aid was unlawfully attacked and that the force used was necessary to protect that person from the attack." State v. Bryant, 288 N.J. Super. 27, 35 (App. Div. 1996) (citing State v. Martinez, 229 N.J. Super. 593, 600 (App. Div. 1989)). "[T]he reasonableness of the defendant's belief is judged from the perspective of a reasonable person in defendant's position under the circumstances existing at the time he intervened." Ibid.; see State v. Holmes, 208 N.J. Super. 480, 486-88 (App. Div. 1986).

We are satisfied that it was not error to reject the defendant's request to instruct the jury on the justification of defense of others. The essence of defendant's argument that his conduct was justified is premised upon his claim that he believed his brother was being assaulted. Our review of the record causes us to conclude, as did the trial judge, that there was no rational evidential basis for the judge to instruct the jury on the defense of others charge. To the contrary, a rational evidential basis for defendant's conduct was that he was acting in furtherance of the crime his brother was committing; which the jury found.

III.

We next address defendant's argument that the failure to charge the defense of mistake of fact was erroneous. N.J.S.A. 2C:2-4(a)(1) provides: "[i]gnorance or mistake as to a matter of fact or law is a defense if the defendant reasonably arrived at the conclusion underlying the mistake and . . . [i]t negatives the culpable mental state required to establish the offense[.]" Hence, "evidence of [a defendant's] mistaken belief relates to whether the State has failed to prove an essential element of the charged offense beyond a reasonable doubt." State v. Sexton, 160 N.J. 93, 106 (1999).

For the same reasons the judge rejected defendant's request to charge on defense of others, he rejected defendant's request

to charge mistake of fact. Again, similar to our holding regarding the request for the defense of others, we perceive no error.

In sum, we hold that the judge's factual findings on both requests were rooted in the record. Predicated upon our independent analysis, we conclude that the judge's application of the law that flowed from the findings is unassailable.

IV.

Finally, we address defendant's argument that the judge failed to conduct an appropriate analysis of the aggravating and mitigating factors per N.J.S.A. 2C:44-1. Defendant argues that the judge erred in using defendant's military service as a non-statutory aggravating factor. He further argues the judge incorrectly found aggravating factor three applied based on defendant's participation in a diversionary program in a Pennsylvania Veteran's Court. Defendant also asserts the judge failed to consider certain mitigating factors supported by the record.

The judge found aggravating factors three, the risk that defendant will commit another offense, and nine, the need for deterrence. The judge found no mitigating factors.

In reaching his finding on aggravating factor three, the judge considered defendant's prior plea of guilty to criminal charges in Pennsylvania which resulted in defendant's sentence to

a diversionary program. While the diversionary nature of the sentence precluded the infraction from consideration as a prior conviction, it did not preclude the infraction from consideration as a sentencing factor based upon defendant's "awareness of the criminal implications of his conduct." State v. Marzolf, 79 N.J. 167, 176 (1979).

The judge rejected counsel's argument that mitigating factors two, four, six, seven, eight, nine, and eleven applied. As such, the judge found the aggravating factors outweighed the mitigating factors and sentenced defendant at the lower end of the first-degree range, and imposed the mandatory period of parole ineligibility and parole supervision. See N.J.S.A. 2C:15-1; N.J.S.A. 2C:43-7.2.

A reviewing court must ensure that any aggravating and mitigating factors found by the trial judge pursuant to N.J.S.A. 2C:44-1 are based upon sufficient credible evidence in the record. State v. Miller, 205 N.J. 109, 127 (2011). If they are, the sentence must be affirmed even if the reviewing court would have reached another result. State v. O'Donnell, 117 N.J. 210, 215 (1989) (citations omitted). When the judge has followed the sentencing guidelines, and the findings of aggravating and mitigating factors are supported by the record, we will only reverse if the sentence "shocks the judicial conscience" in light

of the particular facts of the case. State v. Roth, 95 N.J. 334, 364 (1984). However, an appellate court may remand for resentencing where "the trial court considers an aggravating factor that is inappropriate to a particular defendant or to the offense at issue." State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. Pineda, 119 N.J. 621, 628 (1990)).

After consideration of the sentence record, we conclude the sentencing factors identified by the judge were supported by the evidence. The court carefully considered the totality of the circumstances in making determinations regarding those aggravating and mitigating sentencing factors and there is no basis to support a finding of error. As such, under our "limited" and "deferential" standard of review, we reject defendant's challenge to his sentence. See State v. Bolvito, 217 N.J. 221, 228 (2014).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION