SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1694-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRIAN ALSTON, a/k/a
BRAIN ALSTON, and
BRIAN A. TOWNES,

Defendant-Appellant.

Argued February 7, 2022 – Decided June 9, 2022

Before Judges Accurso, Rose and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 18-10-3384.

Adam W. Toraya argued the cause for appellant (Adam W. Toraya and Daniel S. Rockoff, Assistant Deputy Public Defender, on the briefs).

Matthew E. Hanley, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stevens II, Acting Essex County Prosecutor, attorney; Matthew E. Hanley, of counsel and on the briefs).

PER CURIAM

A jury convicted defendant Brian Alston of robbing Newark bodega owner, Marta Furcal, and her sixteen-year-old nephew, M.H. (Matt),[1] while armed with a toy gun in the midafternoon of August 18, 2017. Over the course of two trial days, the State presented the testimony of the victims and three law enforcement officers. The State also introduced in evidence the 9-1-1 call, and surveillance video depicting the robbery and defendant's visit to the store earlier that day. Defendant did not testify or present any evidence. He was sentenced to an aggregate sixteen-year prison term, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant's sole claim of trial error on appeal is belated. He contends the State improperly elicited testimony from Newark Police Detective Josue Duran, suggesting a non-testifying declarant identified defendant as the perpetrator. Defendant also asserts trial counsel was ineffective for failing to object to that relatively brief line of inquiry. Alternatively, defendant seeks a remand for resentencing. Through assigned counsel, defendant raises the following two points for our consideration:

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[1] We use initials to protect the confidentiality of the minor victim, R. 1:38-3(c)(12), and a pseudonym for ease of reference.

POINT I

WHERE THE IDENTITY OF THE PERPETRATOR WAS THE CENTRAL DISPUTE, AN OFFICER'S TESTIMONY THAT AN ANONYMOUS DECLARANT IDENTIFIED THE DEFENDANT AS THE PERPETRATOR VIOLATED THE DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, AND REQUIRES A NEW TRIAL. U.S. CONST., AMENDS. VI, XIV; N.J. CONST., ART. I, [¶] 10.
(Not raised below)

POINT II

THE COURT SHOULD REMAND FOR RESENTENCING FOR TWO REASONS: (1) ALTHOUGH THE PERSISTENT OFFENDER RANGE HERE WAS [FIVE TO TWENTY] YEARS, THE COURT ERRONEOUSLY CONCLUDED THAT THE RANGE WAS [TEN TO TWENTY] YEARS, AND (2) THE COURT ERRED BY REFUSING TO FIND AND WEIGH MITIGATING FACTOR [ELEVEN], ALTHOUGH IT WAS AMPLY SUPPORTED BY THE RECORD.

With the assistance of substituted retained counsel, defendant's supplemental brief raises an additional argument:

POINT III

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL CONSTITU-TIONALLY GUARANTEED TO HIM BY THE U.S. CONST., AMENDS. VI, XIV; N.J. CONST.[,] ART. I, [¶] 10.
(Not raised below).

Having considered the contentions raised in point I, we are not convinced Duran's testimony "compel[led] the inference that he had superior knowledge incriminating defendant from a non-testifying witness." State v. Medina, 242 N.J. 397, 420 (2020). Because defendant's ineffective assistance of counsel claim was limited to that discrete issue, we reject the contentions raised in point III. We therefore affirm the convictions. Because the judge, however, misstated the applicable sentencing range, we remand for resentencing consistent with the Supreme Court's opinion in State v. Pierce, 188 N.J. 155 (2006).

I.

The pertinent facts are not complicated. In their statements to police following the robbery and their trial testimony, Furcal and Matt consistently maintained the perpetrator was no stranger. They both claimed defendant frequented the bodega about once or twice a day in the year prior to the incident. The victims did not know defendant by name, but they recognized his face and voice. On the date of the incident, defendant visited the store twice. Surveillance video captured the defendant's actions in color, without audio.

Just after 10:30 a.m. on August 18, 2017, defendant entered the store, approached the register, and asked Matt to give him bills for loose change. Defendant was wearing a multi-colored flannel shirt over a gray hooded

sweatshirt, cut-up blue jeans, black shoes with white soles, a cap, and a green backpack. He left the store after Matt refused his request.

Around 2:00 p.m., defendant returned to the store. He was wearing nearly all the same clothes as earlier in the day, except his face was partially obscured by a mask. Matt was seated behind the counter, wearing headphones. Defendant went behind the counter, grabbed Matt by the neck, shoved him to the floor, and told Matt not to move. Defendant was holding a gun with an orange tip, signifying to Matt the gun was "fake." Defendant told Furcal he wanted the "case" with "the money"; he took a small metal box containing money from the store's lottery ticket sales. Furcal estimated between $500 to $600 in cash was stolen. As defendant fled, three DVDs fell from his backpack.

Immediately after defendant ran off, an unidentified woman, who worked in the store next to the bodega, called 9-1-1 to report the robbery. The woman informed the dispatcher a man wearing "black pants with a gray hoodie" robbed "the store on the corner [of] Bergen and Lehigh," and fled down Lyons Avenue. The woman did not identify defendant by name or otherwise indicate she knew him. She then gave the phone to Furcal, who reported the man "had a stocking in [sic] his face." Furcal repeatedly told the dispatcher she knew the robber.

Shortly thereafter, Duran and his partner were dispatched to the bodega. While his partner took statements, Duran downloaded the videos from the bodega's surveillance system. There is no indication in the record as to whether police interviewed the unidentified 9-1-1 caller or anyone else regarding the incident.

Three days later, Furcal selected defendant's photograph from an array administered by a detective, who was unfamiliar with the specifics of the case.[2] Furcal said she was 100 percent certain of her identification. Defendant was arrested at his home one week after the incident. Police did not recover the weapon, proceeds, or the clothing defendant was wearing at the time of the robbery. The forensic examination of the bodega's countertop and DVDs did not yield defendant's DNA or fingerprints.

During deliberations, the jury sent the judge several notes, four of which pertained to the evidence adduced at trial, including requests to hear Furcal's testimony, and opening and closing statements, and to view the surveillance videos. After deliberating over the course of three trial days, the jury found

[2] See State v. Henderson, 208 N.J. 208, 248 (2011) (holding an "identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion. Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array").

defendant guilty of all five counts charged in an Essex County amended, superseding indictment:[3] second-degree robbery, N.J.S.A. 2C:15-1 (counts one and three); third-degree possession of an imitation firearm for an unlawful purpose, N.J.S.A. 2C:39-4(e) (counts two and five); and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2) (count four). After he was sentenced, defendant filed this appeal.

II.

Defendant contends Duran violated his Confrontation Clause rights by relaying inadmissible hearsay concerning defendant's name developed from the State's investigation. Because defendant failed to object at trial, we review the exchange between the prosecutor and Duran under the plain error standard. R. 2:10-2. Thus, "we 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). "The mere possibility of an unjust result is not enough." Id. at 79. "In the context of a jury trial, the possibility

[3] The State obtained the superseding indictment after the trial judge granted defendant's motion to dismiss the two second-degree weapons offenses charged in the initial indictment: possession of a firearm, N.J.S.A. 2C:39-5(b); and possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). The judge amended counts two and five of the superseding indictment to reflect the proper grading of the offenses.

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. G.E.P., 243 N.J. 362, 389-90 (2020) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

At issue is the following exchange between the prosecutor and Duran, which occurred immediately after the 9-1-1 call and surveillance videos were played for the jury:

> PROSECUTOR: Now, at some point during the course of your investigation, detective, were you given a description of the robber?
>
> DURAN: Yes.
>
> PROSECUTOR: Okay. And do you recall what that was?
>
> DURAN: Not specifically.
>
> PROSECUTOR: Can you refer to [the arrest report] and see if it refreshes your recollection?
>
> DURAN: Yeah. It was a black male, mid 40's, salt-and-pepper beard, gray hoodie, blue jeans, black Jordan sneakers with white soles.
>
> PROSECUTOR: Now, during the course of your investigation, detective, did you uncover the name of a suspect?
>
> DURAN: Yes.
>
> PROSECUTOR: Okay. And what was the name of the suspect?

DURAN: I'm so . . . I don't recall. I don't remember.

PROSECUTOR: Okay. Would looking at that [arrest] report refresh your recollection?

. . . .

DURAN: Okay. Brian Alston.

PROSECUTOR: And that was the name that you were give [sic]. Is that correct?

DURAN: Yes.

PROSECUTOR: Okay. And what did you do with that information?

DURAN: Well, we went back to the office and a photo array was created. And then we called the victims into the office and the photo arrays were shown.

Although trial counsel objected to any potential testimony concerning the array based on Duran's lack of involvement in the identification procedure, counsel did not otherwise object to Duran's testimony. The prosecutor did not comment on this portion of Duran's testimony in her opening or closing statements. The jury made no inquiries concerning Duran's testimony, whatsoever. Nor did the jury question why or how police selected defendant's photo for inclusion in the array shown to Furcal.

Our federal and state constitutions both guarantee criminal defendants the right to confront witnesses and to cross-examine accusers. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10; see also Crawford v. Washington, 541 U.S. 36, 43 (2004); State v. Branch, 182 N.J. 338, 348 (2005). "A defendant's right to confrontation is exercised through cross-examination, which is recognized as the most effective means of testing the State's evidence and ensuring its reliability." State v. Guenther, 181 N.J. 129, 147 (2004); Medina, 242 N.J. at 412-13.

The admission of hearsay generally violates an accused's confrontation rights. Crawford, 541 U.S. at 49-51. However, "[t]he Confrontation Clause does not condemn all hearsay." Branch, 182 N.J. at 349. "It is well settled that the hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so 'upon information received.'" State v. Bankston, 63 N.J. 263, 268 (1973) (quoting McCormick on Evidence § 248 (Cleary ed., 2d ed. 1972)). That explanation is admissible to demonstrate "the officer was not acting in an arbitrary manner or to explain his subsequent conduct." Ibid. However, when the officer repeats "what some other person told him concerning a crime by the

accused," the hearsay rule is violated, and the admission of that testimony violates the Confrontation Clause. Id. at 268-69.

Moreover, an officer may not "state[] or suggest[] that some other person provided information that linked the defendant to the crime." Branch, 182 N.J. at 351 (citing Bankston, 63 N.J. at 268-69); see also Medina, 242 N.J. at 415-16. Accordingly, when a law enforcement witness implies that a non-testifying witness "possesses superior knowledge, outside the record, that incriminates the defendant," the Confrontation Clause is violated. Branch, 182 N.J. at 351; see also State v. Kemp, 195 N.J. 136, 155 (2008) (explaining this limitation is meant to avoid the implication that the officer's testimony is "worthy of greater weight").

In Branch, the Court "disapprove[d] of a police officer testifying that he placed a defendant's picture in a photographic array 'upon information received,'" because "[e]ven such seemingly neutral language, by inference, has the capacity to sweep in inadmissible hearsay. It implies that the police officer has information suggestive of the defendant's guilt from some unknown source." 182 N.J. at 352. Moreover, "[w]hy the officer placed the defendant's photograph in the array is of no relevance to the identification process and is highly prejudicial." Ibid.

In Medina, as in this case, the identity of the perpetrator was a contested issue in the trial, without physical evidence linking the defendant to the crime. 242 N.J. at 401. In that case, a witness, who was unwilling to give a formal statement to police or testify, "identified [the] defendant as the attacker" and showed police a picture of the defendant the witness had obtained from a social networking website. Ibid. At trial, the detective only disclosed the woman "didn't want to get involved." Id. at 405. Surveillance footage depicting the incident was played during the detective's testimony. Id. at 406. He then testified the victim and the victim's friend gave statements to police. Ibid. "[B]ased on . . . the evidence that [he] collected," the detective determined the defendant was a suspect and "[g]enerated a photo lineup" containing the defendant's picture. Ibid. From that array, the victim identified the defendant as the perpetrator. Id. at 403.

Relying largely on Bankston and Branch, this court held it was reversible error to permit the detective to "tell[] the jury that police spoke with the anonymous woman and thereafter generated a photo array." Id. at 409. On certification, the Supreme Court reversed. Id. at 401.

Reiterating the principles espoused in Bankston, Branch, and their progeny, the Court in Medina initially held the detective neither repeated to the

jury the specific information the anonymous witness told police, nor "otherwise created an 'inescapable inference' that she incriminated [the] defendant." Id. at 416. In reaching its decision, the Court noted the only references to the anonymous witness in the officer's testimony were that she did not wish to be involved or give a statement. Ibid. The Court was persuaded by the "relevant evidence in the record," which was similar to that adduced at trial in the present matter: "Both [witnesses] gave descriptions of the attacker that matched [the] defendant's picture; the surveillance video captured the incident; and [one of the two witnesses] unwaveringly identified [the] defendant both at trial and in the array." Id. at 416-17. The Court therefore held "[the detective]'s testimony did not violate [the] defendant's confrontation right or the hearsay rule under Bankston." Id. at 417.

Revisiting its decision in Branch, the Court explained it was "troubled not by the inherently inflammatory nature of the phrase 'based on information received,' but the use of that language given the lack of physical evidence" and that the descriptions given by the witnesses neither resembled the defendant's "appearance on the day of his arrest nor the picture of him in the array." Id. at 419 (quoting Branch, 182 N.J. at 345-47). Thus, without "anything else tying the defendant to the crime, the jury could easily have inferred that the

'information received' by the detective [in Branch] was from a non-testifying witness." Id. at 419-20 (quoting Branch, 182 N.J. at 352-53).

Distinguishing the circumstances in Branch from those in the case before it, the Court in Medina noted "'information received' suggests the existence of an informant, whereas 'evidence . . . collected' is a broader phrase that could encompass other types of evidence." Id. at 420. The Court was persuaded the detective "used that phrase after (1) he explained that [the victim and his friend] gave formal statements, (2) the jury watched the surveillance footage taken at [the crime scene], and (3) he read [the victim]'s description of the attacker." Ibid. According to the Court, "perhaps most importantly, [the detective] told the jury that no one other than [the victim and his friend] came forward to give a statement." Ibid. "Viewed in that light, 'the logical implication' of [the detective]'s testimony was that 'the evidence that [he] collected' referred to evidence other than hearsay: the surveillance footage and [the victim]'s and [his friend]'s formal statements and descriptions of the attacker." Ibid. (second alteration in original) (quoting Bankston, 63 N.J. at 271).

"[C]onsidering the entirety of the record," the Court in Medina was not convinced the trial court abused its discretion by admitting the detective's testimony. Id. at 421. However, the Court "caution[ed] that, going forward,

when the State improperly lays the foundation for an officer's testimony about a photo identification, the trial court should promptly give a curative instruction to direct the jury's attention away from evidence outside of the record." Ibid.

Based on our review of the record, in light of the principles set forth by the Court in Medina, we conclude Duran did not improperly convey to the jury he "possesse[d] superior knowledge, outside the record, that incriminate[d] . . . defendant." Branch, 182 N.J. at 351. The line of inquiry leading to the placement of defendant's picture in the array did not include the term, "based on information received." Instead, the prosecutor asked whether "during the course of [his] investigation," Duran "uncover[ed] the name of a suspect." That phrase was "broader": it did not suggest the information was received from an informant; it "could encompass other types of evidence." Medina, 242 N.J. at 420.

Similar to Medina, the prosecutor first played the surveillance videos during Duran's testimony, then elicited from Duran the description of the robber. Further, there is no indication in the record that anyone other than the victims gave statements in this case. The record reveals the only other person who witnessed defendant run from the store after the robbery was the unidentified woman, who called 9-1-1. According to the transcript of the call, this woman

did not identify defendant by name; she provided a description of his clothing, which matched the description given by Furcal and Matt – and was corroborated by the color video footage. Indeed, unlike Medina, there is no indication anyone was unwilling to cooperate in this matter. Most importantly, both Furcal and Matt were familiar with defendant, knew his voice, and had seen him in the store wearing the same clothing earlier in the day of the robbery.

We therefore discern no error, let alone plain error, in the prosecutor's line of inquiry at issue. The exchange was not commented on by the prosecutor in her opening or closing remarks, and the jury did not ask any questions about Duran's testimony or the development of defendant as a suspect in this case. Defendant's decision not to lodge a contemporaneous objection to the detective's testimony underscores our conclusion. See State v. Tierney, 356 N.J. Super. 468, 481-82 (App. Div. 2003) ("Defendant's failure to 'interpose a timely objection constitutes strong evidence that the error belatedly raised . . . was actually of no moment.'" (quoting State v. White, 326 N.J. Super. 304, 315 (App. Div. 1999))).

III.

To further support his argument, defendant claims his trial attorney was ineffective solely for failing to object to Duran's testimony "that he had been

'given' the name of [defendant] as the name of the suspect who committed the robbery." To prove ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that counsel's error so prejudiced defendant that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

Generally, we do not entertain ineffective assistance of counsel claims on direct appeal "because such claims involve allegations and evidence that lie outside the trial record." State v. Preciose, 129 N.J. 451, 460 (1992). The appropriate procedure for their resolution commonly is not direct appeal, but rather a post-conviction relief application attended by a hearing if a prima facie showing of remediable ineffectiveness is demonstrated. Id. at 460, 463. "However, when the trial itself provides an adequately developed record upon which to evaluate [the] defendant's claims, appellate courts may consider the issue on direct appeal." State v. Castagna, 187 N.J. 293, 313 (2006). Thus, when the defendant's claim of ineffectiveness relates solely to his allegation of a substantive legal error contained completely within the trial record, we can consider it. See State v. Quezada, 402 N.J. Super. 277, 280 (App. Div. 2008).

In the present matter, because defendant's claim of ineffective assistance of counsel pertains to an alleged legal error evident from the trial record – and

we have concluded any error was not capable of producing an unjust result – we reject defendant's contentions raised in point III. Accordingly, our disposition makes it unnecessary to further discuss defendant's discrete ineffective assistance of counsel claim raised in this appeal. R. 2:11-3(e)(2).

IV.

After granting the State's application for a discretionary extended term as a persistent offender under N.J.S.A. 2C:44-3(a), and ordering the appropriate mergers, the trial judge found aggravating factors: three (risk of re-offense), six (the extent of the defendant's criminal history), and nine (general and specific deterrence). See N.J.S.A. 2C: 44-1(a)(3), (6), and (9). The judge found no mitigating factors. As evidenced by the court's recitation of defendant's criminal background – including convictions for two prior robbery offenses committed on one day – there was abundant evidence in the record to support the court's imposition of sentence within the extended range. Indeed, defendant does not dispute his criminal record makes him eligible for a discretionary extended term. Nor does he challenge the judge's assessment of aggravating factors.

Instead, defendant claims the trial judge (1) "misconceived the discretionary extended term sentencing range for persistent offenders who commit a second-degree offense"; and (2) failed to find mitigating factor eleven.

See N.J.S.A. 2C:44-1(b)(11) (imprisonment "would entail excessive hardship to the defendant or the defendant's dependents"). We reject defendant's second argument, but conclude a remand is required under the Court's decision in Pierce.

In Pierce, the Court provided guidance for sentencing defendants pursuant to the persistent offender statute. If the trial court determines the defendant is eligible for an extended term as a persistent offender, "the range of sentences, available for imposition, starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range." 188 N.J. at 169. How a court chooses to sentence within that range "remains in the sound judgment of the court – subject to reasonableness and the existence of credible evidence in the record to support the court's [determinations] of aggravating and mitigating factors." Ibid.

In the present matter, because defendant qualified as a persistent offender pursuant to N.J.S.A. 2C:44-3(a), his sentencing exposure was a term of imprisonment between five and twenty years. N.J.S.A. 2C:43-6(a)(2); N.J.S.A. 2C:43-7(a)(3). Finding he met the criteria for a discretionary extended term sentence, the trial judge sentenced defendant to a sixteen-year prison term, subject to NERA on count one, second degree robbery. Although the trial judge

accurately set forth the criteria for imposing the discretionary extended term, including a recitation of the sentencing exposures for ordinary and extended prison terms, the record does not reveal the judge considered a sentencing range that included the lower end of the ordinary range of a second-degree crime. As such, the sentence imposed may have been higher than it might otherwise have been. We therefore conclude defendant is entitled to resentencing on count one within the range established by Pierce.

We are not, however, persuaded by defendant's contention that the trial judge should have found mitigating factor eleven. The judge considered defendant's argument, including the statement of his long-time companion, Felicia Samuels, who told the judge the couple's two-year-old baby "need[s] her father." Samuels also said defendant was "a good provider for the family," including her "other two kids." Referencing Samuels' "financial hardship" plea, the judge stated:

> The court is not callous to these issues. However, I . . . do not find that this factor is present because when applying this factor, the court would need to make a finding based on the record, something that would be more than just the ordinary suffering to the family as a result of the defendant's incarceration. And there is really nothing before the record to indicate that the family would suffer such undue hardship as a result of his incarceration, other than the ordinary hardship that is suffered by any family when a defendant . . . who is

> a relative, a parent, is incarcerated. For that reason, I find this factor is not present.

Guided by our well-settled and limited standard of review, see State v. Trinidad, 241 N.J. 425, 453 (2020), we discern no abuse of discretion in the trial judge's consideration and rejection of mitigating factor eleven. As our Supreme Court has made clear, the mere fact that a defendant has children does not require a trial court to find mitigating factor eleven. See State v. Dalziel, 182 N.J. 494, 505 (2005). Instead, a defendant must demonstrate the children are dependents, who will suffer an excessive hardship, i.e., adverse circumstances "different in nature than the suffering unfortunately inflicted upon all young children whose parents are incarcerated." State v. Locane, 454 N.J. Super. 98, 129 (App. Div. 2018). Here, the judge's reasoning reflects defendant failed to make that showing. See State v. Case, 220 N.J. 49, 65 (2014) (cautioning appellate courts may not substitute their judgment for that of the sentencing court, provided the "aggravating and mitigating factors are identified [and] supported by competent, credible evidence in the record").

We affirm defendant's conviction but remand for resentencing on count one consistent with the Court's holding in Pierce. We do not retain jurisdiction.