SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0263-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NELSON S. AGUILAR-LOPEZ,

Defendant-Appellant.

———————————————————

Argued May 9, 2023 – Decided June 12, 2023

Before Judges Messano, Gilson and Perez-Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 18-11-0708.

Kevin S. Finckenauer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Kevin S. Finckenauer, of counsel and on the briefs).

David M. Galemba, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Daniel Finkelstein, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

In the early morning hours of August 19, 2018, a group of men chased Nelson Noe Garcia-Lopez into a parking lot near an apartment complex in North Plainfield, where they beat him and stabbed him to death. The State alleged that defendant Nelson S. Aguilar-Lopez was one of those men.

A Somerset County grand jury indicted defendant, Oscar Baquedano-Martinez (Oscar), Cesar Carcamo-Ortega (Cesar), Patricio Piruch-Nekta (known as Patino), and Alder E. Juarez (Alder), charging them with second-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1) and (2); first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); third-degree possession of a weapon with unlawful intent, N.J.S.A. 2C:39-4(d); and third-degree riot, N.J.S.A. 2C:33-1(a)(3).[1] Defendant was tried separately.

During trial, the judge dismissed the conspiracy charge; the jury found defendant guilty of second-degree reckless manslaughter as a lesser-included offense of murder, and riot. It acquitted defendant of possession of a weapon for an unlawful purpose. After denying defendant's motion for judgment

[1] We sometimes refer to the witnesses and defendant's co-defendants by their first names or nicknames used during trial. We do this to avoid confusion and intend no disrespect by this informality. A sixth defendant, Gicsy B. Galindo-Acosta, was charged with two counts of third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(a)(2) and (3).

notwithstanding the verdict or a new trial, the judge sentenced him to an eight-year term of imprisonment on the manslaughter conviction, subject to an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and imposed a concurrent three-year term on the riot conviction.

Before us, defendant raises the following points for our consideration:

> POINT I
>
> THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO INSTRUCT THE JURY ON AGGRAVATED OR SIMPLE ASSAULT AS A LESSER[-]INCLUDED OFFENSE OF MURDER.
>
> POINT II
>
> THE TRIAL COURT REVERSIBLY ERRED BY GIVING THE JURY AN INSTRUCTION ON THE DISMISSED MURDER-CONSPIRACY OFFENSE WHICH PREJUDICIALLY DEVIATED FROM THE MODEL CHARGE AND BY FAILING TO INFORM THE JURY THAT IT HAD DISMISSED THE CONSPIRACY TO COMMIT MURDER CHARGE FOR LACK OF EVIDENCE.
>
> POINT III
>
> THE INCLUSION OF EVIDENCE SURROUNDING MR. AGUILAR-LOPEZ'S APPREHENSION IN TEXAS UNDERMINED MR. AGUILAR-LOPEZ'S RIGHT TO DUE PROCESS AND A FAIR TRIAL

AND WARRANTS THE REVERSAL OF HIS CONVICTIONS.[2]

POINT IV

MR. AGUILAR-LOPEZ IS ENTITLED TO THE RETROACTIVE APPLICATION OF THE RECENTLY ENACTED MITIGATING FACTOR FOURTEEN FOUND IN N.J.S.A. 2C:44-1(B)(14).

Having considered these arguments in light of the record and applicable legal standards, we reverse defendant's manslaughter conviction because under the particular circumstances presented, the judge was required to include jury instructions on aggravated assault and simple assault as lesser-included offenses of the homicide charges. Because defendant makes no argument regarding the riot conviction, we affirm that conviction. State v. Shangzhen Huang, 461 N.J. Super. 119, 125 (App. Div. 2018) (citing 539 Absecon Blvd., LLC v. Shan Enters. Ltd. P'ship, 406 N.J. Super. 242, 272 n.10 (App. Div. 2009)), aff'd o.b., 240 N.J. 56 (2019).

We remand the matter for further proceedings and, in that context, address the sentencing argument defendant makes in Point IV.

I.

[2] We have eliminated the subpoints contained in defendant's brief.

The fatal altercation had its genesis approximately one week earlier, when Cesar and another friend, German Francisco Caseres-Garcia (German), had an altercation with the victim at a bar in Union City. The victim allegedly displayed a knife during the argument.

In the evening of August 18, defendant and Oscar were drinking at various bars with their girlfriends. They eventually met Oscar's brother, Jose Luis-Martinez (Jose), and a large group of other friends at a bar where they stayed until closing. A large contingent of the group, including Cesar and German, returned to Jose's apartment in North Plainfield to play cards, drink, and smoke marijuana. Jose shared the apartment with Luis Salazar (Luis), who was also with the group that night.

Some members of the group, including Oscar, German, and Yonathan Orlando-Hernandez (Yonathan), went to a nearby Chinese restaurant where they saw the victim, who German recognized from the prior altercation in Union City. Oscar returned to his brother's apartment looking for a bat to ostensibly protect himself because he knew the victim carried a knife; Oscar grabbed two knives from the kitchen for protection. Other people in the apartment became aware of the victim's presence at the nearby restaurant.

Although Cesar told the group he had no problem with the victim, others, particularly Patino, wanted retribution.

As the victim left the restaurant, a group of men, including defendant, Oscar, Cesar, Patino, and co-defendant Alder, gave chase after him. The men chased the victim into a parking lot where he pulled out a knife and came at Cesar. Although the testimony at trial diverged as to what happened next, Patino either took the knife away from the victim or retrieved a knife from one of the other participants and stabbed the victim several times before fleeing.

The victim was able to go to the back door of his brother-in-law's nearby apartment and cried out for help. His brother-in-law called 9-1-1, and police and EMTs arrived shortly thereafter. The victim was taken to the hospital where he was later pronounced dead. The medical examiner testified that in addition to multiple stab wounds to his torso and legs, the victim had superficial abrasions to his hands and face and a superficial knife wound to his head.

The prosecutor played surveillance camera video footage for the jury. While it showed the victim, Oscar, German, and Yonathan in the restaurant, defendant as part of the group of men who chased the victim, and the men returning to Jose's and Luis's apartment from inside the common hallway of

the building, there was no video footage from the scene of the fatal stabbing. The State obtained DNA evidence from the victim's fingernails that matched Oscar's and Cesar's profiles.

The extent of defendant's participation in the melee and fatal stabbing was unclear based on the conflicting accounts of the State's witnesses. German testified that he left the apartment and saw the men chasing the victim. He followed, but only for a short distance. The men had the victim surrounded and were beating him as he screamed. However, German admittedly could not see much as the group moved behind a building. When everyone returned to Luis's apartment, both Cesar and Oscar had been cut, and they tended to their wounds; Oscar later went to the hospital because of the serious wound on his arm. German said defendant was looking at one of his hands, and the video footage confirmed this, but German did not see any wound. Yonathan also testified, but he saw none of the altercation between the men and the victim.

The State called Oscar and Alder as witnesses, both of whom had pled guilty before trial and agreed to testify against defendant.[3] Alder testified that

[3] Oscar had pled guilty to aggravated manslaughter as a lesser-included offense of murder, as well as conspiracy, the weapons offense, and riot, with a recommended sentence of eight-years imprisonment subject to NERA.

Cesar was arguing with the victim, who pulled out a knife and wounded Cesar in the stomach. When the victim came at Cesar again, Oscar moved in between them and was cut on the arm. At that point, Patino "managed to take the knife that the [victim] had and the [victim] ran and Patino caught up to him and stabbed him. He stabbed him several times and he took off running." Alder left the scene and returned to Jose's and Luis's apartment. Alder never saw anyone with a knife other than the victim.

Oscar testified that he grabbed two knives from Jose's and Luis's apartment, placed them in his waistband and followed the crowd that had already begun to chase the victim. Oscar saw the victim had a knife. He described being cut, seeing Cesar being cut in the stomach, and the crowd beating the victim. Oscar said while the victim was down on the ground, Patino stabbed him in the back two or three times with a knife that had fallen to the ground from Oscar's waist. As Oscar fled the scene, he saw defendant standing a short distance away.

At other points, Oscar testified that he could not remember for certain, but he may have given a knife to Patino. In what can only be described as a

---

N.J.S.A. 2C:43-7.2. Alder had pled guilty to riot with a sentence recommendation of time served.

confused discussion at sidebar, the prosecutor requested a Gross[4] hearing, claiming Oscar's trial testimony was contrary to a prior sworn statement he gave to detectives and his guilty plea allocution. Defense counsel never truly objected, nor did the judge make a ruling permitting the State to introduce either of the prior inconsistent statements as substantive evidence. See N.J.R.E. 803(a)(1).[5]

Nonetheless, the prosecutor questioned Oscar about his plea allocution in which he said that defendant was "beating [the] victim up," and Oscar gave defendant a knife. The prosecutor then confronted Oscar with the statement he gave to police, in which Oscar said that he picked up the knives from the ground, turned to leave, and gave them to defendant.

On cross-examination, however, Oscar said that when Patino started to chase the victim, no one knew that he (Oscar) had any knives with him. Oscar

---

[4] State v. Gross, 121 N.J. 1, 15–17 (1990). "The Gross hearing is the name given to the Rule 104 hearing that the trial court conducts to determine the admissibility of a witness's inconsistent out-of-court statement—offered by the party calling that witness—by assessing whether the statement is reliable." State v. Greene, 242 N.J. 530, 540 n.2 (2020).

[5] The prosecutor's summation included references to these prior statements as if they had been admitted as substantive evidence.

also testified that "at no point in time" did he see defendant hit or cut the victim.

After the homicide, police executed a search warrant at defendant's home that did not yield any evidence, and they could not locate defendant. They eventually secured a communication data warrant (CDW) for defendant's phone. On August 29, 2018, they were able to pinpoint defendant's location near the Louisiana-Texas border, where he was apprehended at a bus station and taken into custody.

II.

During the charge conference, the judge indicated he would provide instructions on accomplice liability and the lesser-included offenses of murder, specifically aggravated manslaughter and reckless manslaughter. Noting his inability to reach agreement with the prosecutor, defense counsel asked about other possible lesser-included offenses and pointed out a potential "slippery slope" if the judge were to charge "aggravated assault or simple assault or disorderly conduct for that matter." He asked, "[W]hat does Your Honor think about that?" The prosecutor weighed in: "While I'm not agreeing with this . . . maybe the jury should be free to consider . . . that [defendant's] purpose was only to cause serious[] bodily injury or attempt[] to cause serious bodily

injury, or . . . significant bodily injury, or that [defendant] was just involved in the fight part of this." The prosecutor expressed concern that any guilty verdict could be subject to appellate review if the judge did not provide those instructions.

The judge responded,

> [W]hat I recall is when you're looking at lesser included, you look at the elements of the offense and if you can withdraw one of the elements . . . that makes it a greater offense that would lead it to be a lesser offense, you give the lesser offense if a reasonable jury could reach that conclusion.

The prosecutor countered, "based on [defense] counsel's arguments and the testimony that's come about, . . . if [defendant] was only involved in the beating of . . . the victim," the jury should be "given other alternatives."

Fixing on the victim's death and only the elements of reckless manslaughter, however, the judge reasoned that other than stab wounds, the victim only suffered "superficial bruises. I don't have agg[ravated] assault." He asked the prosecutor to cite controlling precedent. The prosecutor only responded that the court was "duty bound to scour the record and if there are any appropriate lesser includeds to give them. If the Court doesn't think there are lesser includeds, then don't do it." Defense counsel said, "I don't see it,"

and the judge agreed. The judge concluded none of the suggested assault charges were "lesser included[s] of manslaughter."

In Point I, defendant argues the judge committed reversible error by not giving the jury instructions on aggravated and simple assault as lesser-included offenses of murder. The State argues that "no rational jury could have acquitted defendant of murder while convicting him of assault." It also argues that defendant invited the error for strategic purposes, and the jury did not face an "all-or-nothing" situation in reaching a verdict because the judge provided instructions on aggravated manslaughter and reckless manslaughter.

We first dispense with the State's contention that any error was invited by defense counsel. "[T]he doctrine of invited error as applied in criminal cases 'is designed to prevent defendants from manipulating the system.'" State v. Cotto, 471 N.J. Super. 489, 535 (App. Div. 2022) (quoting State v. Jenkins, 178 N.J. 347, 359 (2004)). As the Court has explained, "[t]he doctrine of invited error does not permit a defendant to pursue a strategy . . . and then when the strategy does not work out as planned, cry foul and win a new trial." State v. Williams, 219 N.J. 89, 101 (2014). Because the doctrine is designed to prevent manipulation, it "is implicated only when a defendant in some way has led the court into error." Jenkins, 178 N.J. at 359. "[W]hen there is no

evidence that the court in any way relied on a defendant's position, it cannot be said that a defendant has manipulated the system. Some measure of reliance by the court is necessary for the invited-error doctrine to come into play." Ibid. It is clear from the colloquy quoted above that while defense counsel may have acquiesced to the judge's decision, he by no means urged that position.

In State v. Dunbrack, the Court said,

> If a defendant did not request a charge or did not object to the omission of a charge to a lesser[-] included offense, instead of reviewing the record to determine if a rational basis existed, our appellate review assesses whether the record "clearly indicated" the charge, such that the trial court was obligated to give it sua sponte.
>
> [245 N.J. 531, 545 (2021) (quoting State v. Denofa, 187 N.J. 24, 41–42 (2006)).]

"An unrequested charge . . . must be given only where the facts in evidence 'clearly indicate' the appropriateness of that charge." Ibid. (quoting State v. Savage, 172 N.J. 374, 397 (2002)). As the Court "explained[,] . . . 'the record clearly indicates a lesser-included charge . . . if the evidence is jumping off the page.'" Ibid. (quoting Denofa, 187 N.J. at 42). If a lesser-included charge is clearly indicated by the evidence, a judge is duty-bound to provide instructions, "even if at odds with the strategic considerations of counsel."

State v. Galicia, 210 N.J. 364, 392 (2012) (quoting State v. Garron, 177 N.J. 147, 180 (2003)).

In Savage, the defendant claimed that he only kicked the victim while his co-defendant brother repeatedly punched the victim in the face, ultimately leading to his death. 172 N.J. at 385–86. The trial judge not only charged the jury on murder, but also "the lesser[-]included offenses of murder (passion provocation, manslaughter, aggravated manslaughter, reckless manslaughter, second-degree aggravated assault, third-degree aggravated assault, and simple assault)," before proceeding to instruct the jury on accomplice liability. Id. at 390 (emphasis added).

The Court disagreed with the defendant's "contention that the instruction was internally inconsistent or legally deficient[,]" stating, "In our view, the jury charge was, in its expression of relevant legal principles, entirely correct." Id. at 393. The Court, however, agreed that "the trial court failed to articulate factually how [the defendant's brother] could have been guilty of purposeful or knowing murder, and [the defendant] guilty of one of the lesser offenses, for example, aggravated or simple assault, if he possessed a different state of mind." Ibid. (emphasis added). The Court reversed the defendant's

conviction, noting the confusion reflected by the jury's request for clarification and the trial judge's inadequate response. Id. at 394–95.

Under the circumstances of this case, the judge erred in concluding that aggravated and simple assault were not lesser-included offenses of the murder charge. This is so because, contrary to the State's assertion, the jury could have concluded that while defendant participated in the attack on the victim, he did not share the same criminal state of mind as his co-defendants who delivered the fatal stab wounds, i.e., defendant did not act purposely or knowingly to cause the victim's death or serious bodily injury resulting in his death. See, e.g., State v. Ramirez, 246 N.J. 61, 67 (2021) (quoting 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.' However, an accomplice may be guilty of a lesser crime if their state of mind is different from the principal's.") No witness said defendant stabbed the victim or that defendant was aware Oscar brought two knives with him to the fight, and there was conflicting testimony about what, if any, participation defendant had in beating the victim.

We reverse defendant's conviction for manslaughter, vacate the sentence imposed, and remand the matter for further proceedings.

III.

In Point II, defendant contends the judge failed to properly instruct the jury regarding the dismissal of the conspiracy count. Defendant does not argue that the court admitted evidence during trial that only supported the State's case regarding the conspiracy count and would otherwise not have come before the jury. He contends only that the failure to provide proper instructions requires reversal of both the manslaughter and riot convictions.

Defense counsel did not object to the judge's instructions, and so we review the argument using the plain error standard. R. 2:10-2. Plain error in the jury charge "requires demonstration of '[l]egal impropriety . . . prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Burns, 192 N.J. 312, 341 (2007) (alteration in original) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). Any error in the charge in this case did not affect the jury's verdict.

During the charge conference, the prosecutor reminded the judge that he should provide instructions for the jury regarding the now-dismissed conspiracy count of the indictment. The judge proposed the language, there

were some minor changes that both counsel agreed to, and the judge provided instructions to the jury as part of the final charge. The judge said:

> With regard to the indictment, I originally instructed you about a count of conspiracy which was the first count. That matter is not going to be submitted to the jury. I would say to you don't speculate as to the reasons why or read into it. Just accept the fact that it's not going to go to you.

Defendant contends this was inadequate because the judge should have informed jurors that defendant was acquitted of that count of the indictment because the State failed to adduce sufficient evidence. See Model Jury Charges (Criminal), "Addition or Dismissal of Charges," at 1 n.2 (Approved June 16, 2003) ("Although the law is not settled, it may be proper in some cases to grant a defendant's request to advise the jury that the Court has granted a Judgment of Acquittal on one or more offenses charged in the indictment.").

We agree with the State that although the judge's charge was "not perfect," it was adequate and could not possibly have led the jury to a verdict it otherwise would not have reached.

IV.

We address the argument raised in Point III in the event there is a retrial. Defendant argues it was error to allow the State to introduce evidence of his

alleged "flight" to Texas because it did not support an inference of "consciousness of guilt," and therefore the jury charge on flight was improper. He also contends that even if some evidence was properly admitted, the judge permitted the State to introduce an abundance of prejudicial testimony that brought about an unjust result. We disagree with defendant's arguments and conclude the judge properly admitted the evidence and gave the appropriate jury charge.

Because defendant never objected to either admission of the evidence or the jury charge, we review the contention under the plain error standard. R. 2:10-2. A defendant's "[f]light will have 'legal significance' if the circumstances 'reasonably justify an inference that it was done with a consciousness of guilt' to avoid apprehension on the charged offense." State v. Randolph, 228 N.J. 566, 594–95 (2017) (quoting State v. Ingram, 196 N.J. 23, 46 (2008)).

> The traditional triggering event for a flight charge is clear: "For departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt. "
>
> [Ingram, 196 N.J. at 46 (quoting State v. Mann, 132 N.J. 410, 418–19 (1993)).]

Courts must assess the potential prejudice of such evidence, which "mandate[s] careful consideration of the nature of the evidence to be admitted and the manner in which it is presented." State v. Cole, 229 N.J. 430, 454 (2017) (quoting Mann, 132 N.J. at 420).

In this case, police attempted to locate defendant shortly after the homicide, and they executed a search warrant at his home. They could not find defendant anywhere and so obtained a CDW to track the whereabouts of his cell phone. Defendant was located at a bus stop in Texas ten days after the killing. Contrary to defendant's assertion, there was no evidence adduced at trial that defendant had family in Texas and thus his presence there was an innocuous visit with relatives.

It is true that the prosecutor elicited an overabundance of testimony from multiple witnesses about the details of this process, including the cooperative efforts between local authorities and federal law enforcement agencies. We do not necessarily agree with defendant that this testimony ran afoul of the holdings in State v. Bankston, 63 N.J. 263 (1973), and State v. Branch, 182 N.J. 338 (2005). Nevertheless, if the case is retried, the judge should remain mindful of the Court's caution that any flight evidence be subject to the judge's "careful consideration of the nature of the evidence to be admitted and the

manner in which it is presented." Cole, 229 N.J. at 454 (quoting Mann, 132 N.J. at 420).

V.

In his final point, defendant contends he was entitled to a remand for resentencing so the judge could retroactively apply mitigating factor fourteen, which allows the sentencing court to "properly consider" that a "defendant was under [twenty-six] years of age at the time of the commission of the offense." N.J.S.A. 2C:44-1(b)(14). However, the Court has held the factor does not apply retroactively to sentences imposed prior to the amendment's effective date, as was the case here. State v. Lane, 251 N.J. 84, 87–88 (2022).

Having reversed defendant's manslaughter conviction and vacated the sentence imposed, we remand the matter to the trial court. Whether the State decides to retry defendant for manslaughter or not, the court has discretion to modify the sentence imposed on defendant's riot conviction "as part of any new overall sentencing calculus that may result following further proceedings." State v. Hahn, 473 N.J. Super. 349, 379 (App. Div. 2022) (citing State v. Young, 379 N.J. Super. 498, 508 (App. Div. 2005)). And mitigating factor fourteen will apply at any resentencing, regardless of whether the State retries defendant for manslaughter. See Lane, 251 N.J. at 97 n.3

("We view N.J.S.A. 2C:44-1(b)(14) to apply not only to defendants sentenced for the first time on or after October 19, 2020, but also to defendants resentenced on or after that date for reasons unrelated to mitigating factor fourteen.").

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.