SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0629-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LEROY A. WEEKS, a/k/a LEROY A. EEKS, ADAM JONES, AHMED MED, AHMED WEEKS, and MED WEEKS,

Defendant-Appellant.

Argued September 27, 2023 – Decided November 8, 2023

Before Judges Haas and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 19-10-0621.

Alyssa Aiello, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Alyssa Aiello, of counsel and on the briefs; Tiffany J. Barlow, Assistant Deputy Public Defender, on the briefs).

Milton S. Leibowitz, Assistant Prosecutor, argued the cause for respondent (William A. Daniel, Union County Prosecutor, attorney; Milton S. Leibowitz, of counsel and on the brief).

PER CURIAM

Tried to a jury, defendant Leroy A. Weeks was convicted of third-degree theft from the person of another, N.J.S.A. 2C:20-2(b)(2)(d); and disorderly persons simple assault, N.J.S.A. 2C:12-1(a)(1). For the theft, defendant was sentenced as a persistent offender to a six-year extended term with a three-year period of parole ineligibility pursuant to N.J.S.A. 2C:43-7 and N.J.S.A. 2C:44-3(a). For the simple assault, defendant was sentenced to a six-month concurrent term.

On appeal, defendant presents three points for our consideration:

POINT I

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE DEFENDANT COMMITTED THEFT FROM THE PERSON.

POINT II

REVERSAL OF THE THEFT-FROM-THE-PERSON CONVICTION IS REQUIRED BECAUSE THE JURY WAS NOT GIVEN THE OPTION OF FINDING DEFENDANT GUILTY OF THE LESSER-INCLUDED OFFENSE OF DISORDERLY PERSONS THEFT, EVEN THOUGH THERE WAS A CLEAR EVIDENTIAL BASIS UPON WHICH THE JURY

COULD HAVE CONCLUDED THAT THE THEFT OF THE BEER FROM THE HALLWAY STEPS WAS NOT "FROM THE PERSON OF ANOTHER."

POINT III

A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE JUDGE'S DECISION TO IMPOSE AN EXTENDED TERM WAS BASED ENTIRELY ON CONDUCT FOR WHICH DEFENDANT WAS ACQUITTED.

We have considered these arguments in light of the record and applicable legal standards and affirm defendant's conviction and sentence.

I.

The State adduced the following facts at trial, primarily through surveillance video from the apartment building where both defendant and the victim F.G.[1] resided. In the evening of August 8, 2019, defendant arrived at the apartment building by bicycle. After placing his bike near the entrance to the building, defendant sat down on the front steps. Shortly thereafter, F.G. arrived at the door and met a delivery person, who handed him a twelve-pack case of beer.

During F.G.'s exchange with the delivery person, defendant stood up and placed his hand on the front door. When F.G. went back into the building, he

[1] We use the victim's initials to protect his privacy.

forcibly shut the door as defendant's hand was on it, causing defendant to lurch forward. F.G. then hurried towards the stairs leading to his apartment, and defendant entered the building using his key access.

Defendant followed F.G. into the stairwell, ran at him, and used his body to slam F.G. against the wall while hitting him in the head with his forearm. As F.G. fell, defendant punched him again. F.G. was knocked unconscious and collapsed on the stairs, bleeding from his head. He dropped the case of beer, which landed at his feet. Defendant picked up the case of beer, walked away with it and retrieved his bike from the front steps. Defendant then returned to F.G., who was still lying in a pool of blood on the stairs, and took photos of him. Defendant returned to his apartment and posted on Facebook two photos of F.G. with a laughing emoji and text that read:

> Wasn't going to post it but the cops ain't been to my door yet. He ain't got no papers so no police called. Racists spics. Hate that I'm in this building and the only Negro. They had it coming. He pulled the door closed, almost got my fingers. Seen I had a key and started running. Lol. Sipping on his case…

He also posted a photo of himself drinking the beer in what the trial court found to be "a mocking and celebratory way."

Defendant was indicted for first-degree robbery, second-degree aggravated assault with attempt to cause serious bodily injury, and first-degree bias crime with a purpose to intimidate.

In addition to charging the jury on the indicted offenses, the court also instructed the jury on third-degree theft from the person as a lesser-included offense of robbery, and third-degree aggravated assault with attempt to cause significant bodily injury and disorderly persons simple assault as lesser-included offenses of aggravated assault with attempt to cause serious bodily injury. The jury found defendant guilty of third-degree theft from the person and disorderly persons simple assault, and not guilty of bias intimidation.

The State moved to sentence defendant to an extended term as a persistent offender pursuant to N.J.S.A. 2C:43-7 and N.J.S.A. 2C:44-3(a). The court found defendant was over the age of twenty-one when he committed the instant offenses and had eight prior adult criminal convictions, including five convictions in the ten years preceding the instant offenses, with the most recent one committed seven months prior. Accordingly, the court found defendant met the statutory definition of a persistent offender and was eligible for a discretionary extended sentence. The State sought a ten-year sentence. Defense

counsel did not contest defendant's eligibility for extended sentencing but requested the court exercise its discretion not to impose it.

In sentencing defendant, the court addressed aggravating and mitigating factors pursuant to N.J.S.A. 2C:44-1(a) and (b). The court did not grant the State's request to find aggravating factor one (nature and circumstances of the offense), but noted it was a "close call." The court found aggravating factor three (the risk that defendant will commit another offense), based on defendant's "constant stream of anti-social conduct from a juvenile to the present," including "more than a dozen arrests for assaultive conduct." It also found aggravating factor six (the extent of the defendant's prior criminal record), which it gave great weight because defendant had "approximately fifty-seven separate incidents in either the family court, juvenile justice system, a multitude of states . . . and the State of New Jersey." The court also found aggravating factor nine (the need for deterring the defendant and others from violating the law) and gave it great weight because "the public must be protected from [defendant]. In his present state, the slightest provocation results in volcanic rage."

The court did not grant defendant's request to find mitigating factor one (defendant's conduct neither caused nor threatened serious harm) because F.G. testified to the fear he experienced when defendant ran at him with "such force

as to render him unconscious and motionless." The court likewise did not find mitigating factor two (defendant did not contemplate that the defendant's conduct would cause or threaten serious harm), because defendant "deliberately and consciously chased and ran this victim down, who was retreating, cowering, frankly, holding the twelve-pack of beer so he was utterly defenseless and [defendant] exploited that and with a running start, with his full body weight, struck the victim in his face."

In balancing the factors, the court determined the aggravating factors substantially outweighed the non-existing mitigating factors. The court then stated:

> The defense's position is that the defendant was insulted because the victim shut the door on the defendant. [Defendant] was not injured. His fingers were not jammed in the door, prompting an outburst that might be explainable even if improper. Defendant didn't suffer any physical injuries from the perceived insult. There were about a thousand other ways . . . that you could have more properly expressed your frustration and your disappointment of being subjected in your mind to undeserved, undignified conduct but, instead, you flew into a rage, full speed. You ran through the front foyer, hell bent on exacting retribution for a perceived slight and you did so with brutal efficiency.
>
> At full speed with your fist cocked, you struck a hapless, helpless victim with your full body weight behind you, propelled by a running start. Compounding that, you struck a victim who was cowering and

> retreating and who couldn't protect himself and you struck him with such force, he was rendered unconscious and motionless and then you left him but not before you grabbed his [twelve]-pack of beer for good measure and you left him not knowing, frankly, if you killed him.
>
> And then I see you return about four minutes later. Was this return prompted by a pang of human concern for a stranger? Did you check his pulse? Did you contact a neighbor? Did you call 911? You had your phone and you used your phone.
>
> At this juncture, he was laid out still in an ever-increasing pool of blood dripping down a multitude of steps. No. Instead, as stated over and again, you took his picture, you posted it, and mocked him.
>
> That this offense occurs on the immediate heels on assaultive conduct on law enforcement indicates to the [c]ourt in the context of your entire criminal history that you pose a serious risk to the safety of the public. That doesn't mean . . . that I think at any given moment or every given moment, that you are somebody who doesn't care about other people, doesn't love your children or love your mother or otherwise a perfectly optimal neighbor but under any provocation, perceived provocation, you result to anger and violence and there's no way to honestly look at your conduct here or elsewhere and come to a contrary conclusion.
>
> The [c]ourt will exercise its discretion and sentence you as a persistent offender because, frankly, if you're not subject to a persistent offender statute, who would be?

The court noted defendant had never served any lengthy period of imprisonment. It found the State's request for a sentence in the high range was

not warranted, but a sentence in the third-degree range did not "adequately address the seriousness of the offense and the persistent offender statute," and sentenced defendant to six years with a three-year period of parole ineligibility for theft, and six months for assault to run concurrently.

II.

A.

Defendant urges us to find he was not guilty of theft from the person because F.G. was unconscious and therefore not in custody or control of his property when defendant took it. He further argues that because F.G. was unconscious, there was no danger of confrontation or intrusion of privacy. We find defendant's arguments unavailing.

When reviewing the sufficiency of evidence to support a criminal conviction, the relevant question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Josephs, 174 N.J. 44, 80 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

To prove defendant committed third-degree theft from a person, the State must prove 1) defendant knowingly took or unlawfully exercised control over

movable property; 2) the movable property was property of another; 3) the movable property was taken from the person of another; and 4) defendant's purpose was to deprive the other person of the movable property. N.J.S.A. 2C:20-2(b)(2)(d); N.J.S.A. 2C:20-3(a).

Defendant points to State v. Blow, 132 N.J. Super. 487 (App. Div. 1975) and State v. Link, 197 N.J. Super. 615 (App. Div. 1984) to support his argument he did not take the beer from F.G.'s person.

In Blow, we affirmed a conviction for theft from the person where the defendant took money from underneath the victim's car seat, because the money was within the victim's immediate custody and control. Blow, 132 N.J. at 488, 491. "A danger of confrontation between thief and victim was present and the victim's person and privacy were invaded." Ibid. Thus, we found that the Legislature did not intend the phrase "from the person" be limited to the physical person of the victim. Id. at 490. "Rather . . . to constitute larceny 'from the person' it is sufficient if the property is taken while in [the victim's] possession and immediate presence." Ibid. (quoting Banks v. State, 74 Ga. App. 449 (Ct. App. 1946)).

In Link, we likewise affirmed a conviction for theft from the person where the defendant took the victim's purse, which was located next to her on the train.

We found the purse was in the victim's custody and control and there was a danger of confrontation and an invasion of the victim's privacy. Link, 197 N.J. Super. at 619 (citing Blow, 132 N.J. at 491).

Here, a reasonable jury could find defendant guilty beyond a reasonable doubt of committing third-degree theft from the person. Implicit in the jury's verdict is that it found defendant's taking of the beer to be an afterthought and therefore he was not guilty of committing robbery. See State v. Lopez, 187 N.J. 91 (2006). When F.G. dropped the case of beer it remained in his presence at his feet. Although he may not have been in actual control of it because he was unconscious, his incapacity was caused by defendant's own conduct. Here, the danger of confrontation and the invasion of the victim's privacy that we identified in Blow had already occurred, and defendant's assault should not benefit him with a lesser grade of offense because of its consequences on the victim. We are satisfied the Legislature intended theft from the person to include an unconscious victim, particularly where a defendant has caused the incapacity.

Thus, viewing the evidence in the light most favorable to the prosecution, rational triers of fact could find beyond a reasonable doubt defendant committed theft from the person. Josephs, 174 N.J. at 80.

B.

Defendant also argues the trial judge erred by not charging the jury with disorderly persons theft as a lesser-included offense of robbery because the jury could have concluded that the theft was not "from the person of another." We disagree.

"When the parties to a criminal proceeding do not request that a lesser-included offense . . . be charged, the charge should be delivered to the jury only when there is 'obvious record support for such [a] charge . . . .'" State v. Funderburg, 225 N.J. 66, 81 (2016) (quoting State v. Powell, 84 N.J. 305, 319 (1980)). "A trial court should deliver the instruction sua sponte 'only where the facts in evidence "clearly indicate" the appropriateness of that charge.'" Ibid. (quoting State v. Savage, 172 N.J. 374, 397 (2002)).

Because defendant did not ask for the jury charge, we review under a plain error standard. State v. Singleton, 211 N.J. 157, 182-83 (2012). Plain error is error that is "clearly capable of producing an unjust result." Id. at 182; See also R. 2:10-2. In terms of its effect in a jury trial, the error 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). Here, the record discloses no error, let alone plain error. The undisputed video

evidence showed defendant knocking F.G. unconscious and then taking his beer. As we just held, these actions constitute theft from the person and therefore the court did not err in not charging disorderly persons theft.

Moreover, faced with a robbery charge, during summation defense counsel urged the jury to find defendant guilty of theft from the person:

> [T]he beer is an afterthought. It's after the fact. His intentions at that time was to connect with [F.G.], fist to face. After that, the beer that's right there, he took it. It's theft from a person. He committed a theft. Yes, he did. He committed a simple assault. Yes, he did. He punched him in his face. Yes, he did. He did all that stuff. He is liable for that, but this wasn't an aggravated assault. This was not a bias intimidation crime. This was not a robbery. (emphasis added).

"A defendant cannot request the trial court to take a course of action, and upon adoption by the court take his chance on the outcome of the trial, and, if unfavorable, then condemn the very procedure which he urged, claiming it to be error and prejudicial." State v. Sykes, 93 N.J. Super. 90, 95 (App. Div. 1966) (citing State v. Pontery, 19 N.J. 457, 471 (1955)). The doctrine of invited error "is designed to prevent defendants from manipulating the system." State v. Jenkins, 178 N.J. 347, 359 (2004).

Given defendant's approval of the jury charges, which did not include the lesser-included offense of disorderly persons theft, and the lack of foundation

for the court to sua sponte include the charge, we discern no error clearly capable of producing an unjust result.

C.

Defendant argues the case should be remanded for resentencing because the court sentenced him as if he had been convicted of first-degree robbery and second-degree aggravated assault. He further contends the court erred in acknowledging the theft was "de minimis" but then imposing an extended term based partly on the assault, which was not subject to an extended term.

Trial courts must "explain and make a thorough record of their findings to ensure fairness and facilitate review." State v. Comer, 249 N.J. 359, 404 (2022). See State v. Torres, 246 N.J. 246, 272 (2021) (requiring an "explanation for the overall fairness of a sentence"); State v. Fuentes, 217 N.J. 57, 74 (2014) ("A clear and detailed statement of reasons is thus a crucial component of the process conducted by the sentencing court, and a prerequisite to effective appellate review.").

"Proper sentencing thus requires an explicit and full statement of aggravating and mitigating factors and how they are weighed and balanced." State v. McFarlane, 224 N.J. 458, 466 (2016) (quoting State v. Randolph, 210 N.J. 330, 348 (2012)). "[C]ritical to the sentencing process and appellate review

is the need for the sentencing court to explain clearly why an aggravating or mitigating factor presented by the parties was found or rejected and how the factors were balanced to arrive at the sentence." State v. Case, 220 N.J. 49, 66 (2014) (citing Fuentes, 217 N.J. at 73.) The reviewing court should affirm the sentence, so long as the sentence does not "shock the judicial conscience." Id. at 65.

Here, the court was authorized to impose a sentence between three and ten years. The record reflects sound reasons for the court's determination and balancing of aggravating and mitigating factors, and its detailed reasons for imposing the six-year sentence.

Despite defendant's contentions, this case is not analogous to State v. Melvin, 248 N.J. 321 (2021). In that case, the trial court made factual findings during sentencing that contradicted the jury verdict; specifically, although the defendant was acquitted of first-degree murder, the judge determined the evidence at trial established he was the shooter. Melvin, 248 N.J. at 328-30, 341-45. Our Supreme Court reversed, finding the improper consideration of acquitted conduct violated due process and fundamental fairness. Id. at 347-52.

Here, the court did not consider facts related to acquitted conduct to enhance defendant's sentence nor did it make findings contrary to the jury's

verdict. Rather, the judge, who had also presided over the jury trial and heard testimony firsthand, considered the facts and circumstances of the underlying conduct in their entirety. The court recognized the monetary value of the theft was de minimis, but rightly considered it in context, including defendant's assault of F.G. before the theft and his conduct after the theft, to be "unjustified and cold and callous and brutal." The court found the nature and circumstances of the offense, combined with defendant's "unrelenting and serial" criminal history including a "multitude of assaultive conduct," justified the imposition of an extended term. We discern no abuse of discretion in this decision.

Affirmed.