SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1274-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAS J. LOYD a/k/a
RAS LLOYD and RAS
LYOD,

Defendant-Appellant.

Argued February 14, 2023 – Decided August 4, 2023

Before Judges Rose and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment Nos. 18-04-0207 and 18-04-0208.

Morgan A. Birck, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Morgan A. Birck, of counsel and on the briefs).

Regina M. Oberholzer, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin,

Attorney General, attorney; Regina M. Oberholzer, of counsel and on the brief).

PER CURIAM

A Somerset County grand jury charged defendant Ras J. Loyd and his cohort, Thomas N. Waller, in separate indictments for two residential burglaries that occurred within minutes of each other during the morning of February 21, 2018. In April 2018, defendant and Waller were charged in Indictment No. 18-04-0207, with third-degree burglary, N.J.S.A. 2C:18-2(a)(1), and third-degree theft by unlawful taking, N.J.S.A. 2C: 20-3(a), for an incident that occurred on Parlin Lane in Watchung Borough. On the same day, they were charged in Indictment No. 18-04-0208 with third-degree criminal mischief, N.J.S.A. 2C: 17-3(a)(1); second-degree burglary, N.J.S.A. 2C:18-2(a)(1); third-degree theft of a firearm by unlawful taking, N.J.S.A. 2C:20-3(a) and 2C:20-2(b)(2)(b); third-degree unlawful possession of a shotgun, N.J.S.A. 2C:39-5(c)(1); and third-degree attempted theft of an automobile by unlawful taking, N.J.S.A. 2C:5-1(a)(1) and 2C:20-3(a), for an incident that occurred on Blackthorn Road in Warren Township. Defendant also was charged in the Warren Township burglary indictment with third-degree hindering Waller's apprehension, N.J.S.A.

2C:29-3(a)(7). The court consolidated both indictments for trial on the State's unopposed motion in August 2018.[1]

Trial was held in July 2019 before a different judge. Prior to voir dire, Waller, through counsel, expressed his desire to plead guilty to the Watchung Borough burglary charges. Defendant's attorney stated, "My client is not willing to do anything." The trial judge indicated Waller "would have to plead open[2] . . . during . . . an interregnum in the trial proceedings before the jury" after opening statements.

During jury selection, the judge denied the State's ensuing motion to preclude the entry of "partial" guilty pleas to the offenses charged in the Watchung Borough indictment. But the judge determined evidence from the Watching Borough burglary was admissible as "intrinsic evidence pursuant to State v. Rose[, 206 N.J. 141 (2011)]," in the Warren Township matter. Apparently persuaded by the State's argument that the "same crime[s]," occurred

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[1] Sometime later, defendant's retained attorney was relieved as counsel; thereafter defendant was represented by another lawyer.

[2] "An 'open plea' to an indictment neither 'include[s] a recommendation from the State, nor a prior indication from the court, regarding sentence.'" State v. Vanness, 474 N. J. Super. 609, 625 (App. Div. 2023) (alteration in original) (quoting State v. Kates, 426 N.J. Super. 32, 42 n.4 (App. Div. 2012)).

"[f]ive miles away, fifteen minutes apart," using the "same pillowcase, same plan, same conspiracy, same motive to steal people's property, [and] to split the proceeds," the judge permitted the State to "expla[in], in part at least, how the police came to be at the Warren Township residence, what they found there, and what their purpose was."

Rejecting the defense attorneys' "propensity" argument, the judge found an N.J.R.E. 404(b) analysis was unnecessary. To minimize "prejudice to the State," the judge reiterated that the guilty pleas would be entered after opening statements to "deprive defense counsel of the opportunity to wax poetic" concerning those pleas other than "admit[ting] that [they] burglarized the property on Parlin [Lane] in Watchung Borough and stole personal property therefrom."

During the course of trial, the State presented the testimony of fifteen witnesses, including the homeowners and law enforcement officers who responded to the burglaries. Neither defendant testified nor presented any evidence on his behalf.

In essence, around 9:40 a.m. on February 21, 2018, police responded to an alarm activation at a residence on Parlin Lane in Watchung. The owner was not home but called police when he received an alert from his surveillance

system that someone had entered his residence. When police arrived, they observed the rear doors leading to a bedroom were open and various items were strewn about the room. While securing the home, police noticed other rooms in a similar state. They did not locate anyone inside the residence. The homeowner testified that jewelry and a pillowcase were missing.

Around 9:50 a.m., a Warren Township resident was alerted by text message that there was motion detected at the front door of his home on Blackthorn Road. The live feed of his Ring doorbell camera depicted a person in an orange vest and hat, holding a clipboard, approaching the front door. When the owner checked the feed again, the camera was blocked, and he could no longer see the front entrance. A neighbor agreed to check the house and saw an unoccupied black two-door Infiniti with the engine running in the driveway. When the neighbor entered the car to shut off the engine, he observed latex gloves, clothes, and jewelry on the Infinti's passenger seat.

Police were called to the Warren Township residence. The homeowner told police he had firearms in the home, including an unsecured shotgun. Police surrounded the perimeter of the home. Within a few minutes, defendant knocked out a window screen on the side of the garage and was immediately apprehended as he emerged. A pair of blue rubber gloves, a Clear View Energy employee

identification card and lanyard, and cash were seized from defendant incident to his arrest. Defendant repeatedly denied that anyone else was inside the home, but Waller was arrested during a sweep of the basement by police who had entered the home.

A pillowcase containing jewelry boxes, a passport and a marriage certificate was recovered during a search of the Infiniti parked outside the Warren Township home. The items were identified by the homeowner of the Watchung Borough residence.

At the conclusion of all evidence, defendant and Waller pled guilty to both offenses charged in the Watchung Borough burglary indictment. When the trial resumed the following week, the judge informed the jury that the Watchung Borough charges were resolved, were no longer for their consideration, and they should not "speculate as to why or how" those "charges were resolved."

Defendant was convicted of all charges, except unlawful possession of a shotgun and attempted theft of an automobile. The trial judge granted the State's motion for a discretionary extended term as a persistent offender under N.J.S.A. 2C:44-3(a), and sentenced defendant to an aggregate prison term of ten years,

subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on the second-degree burglary conviction.[3] This appeal followed.

Defendant only appeals from his convictions and sentence under Indictment No. 18-04-0208; he "does not contest his guilty plea under Indictment No. 18-04-0207, only the sentence imposed." Defendant raises the following points for our consideration:

POINT I

THE JURY INSTRUCTIONS ON ACCOMPLICE LIABILITY FAILED TO INSTRUCT THE JURY THAT THE ACCOMPLICE MUST HAVE THE SAME INTENT AS THE PRINCIPAL IN ORDER TO BE CONVICTED OF THE SAME OFFENSE TO THE SAME DEGREE.
(Not raised below.)

POINT II

THE PROSECUTOR MISSTATED THE LAW ON ACCOMPLICE LIABILITY, COMPOUNDING THE COURT'S INSTRUCTION ERRORS.
(Not raised below.)

[3] Waller was convicted of the same offenses, except hindering, and sentenced to an aggregate prison term of eight years, subject to NERA on the second-degree burglary conviction. We affirmed Waller's convictions and sentence in an unpublished opinion and, as such, he is not a party to this appeal. State v. Waller, No. A-0688-19 (App. Div. June 11, 2021) (slip op. at 29), certif. denied, 248 N.J. 494 (2021).

POINT III

THE ADMISSION OF A SLEW OF HIGHLY DETAILED AND IRRELEVANT EVIDENCE OF THE [WATCHUNG] BURGLARY CAUSED UNDUE PREJUDICE TO DEFENDANT AND REQUIRES REVERSAL OF HIS CONVICTIONS.

A. The evidence of the [Watchung] burglary was "other crimes" evidence subject to N.J.R.E. 404(b), not "intrinsic evidence."

B. Because the evidence did not prove a material issue in dispute, it should have been excluded.

C. Because the volume and detail of the evidence rendered its prejudicial impact greater than its probative value, it failed to meet the fourth prong for admissibility under Cofield.[4]

D. The failure to give a jury charge that clearly explained the permissible use of the prior-crime evidence necessitates reversal.

POINT IV

THE MATTER MUST BE REMANDED FOR RESENTENCING BECAUSE THE TRIAL COURT MISAPPREHENDED THE SENTENCING RANGE AND TO CORRECT THE JUDGMENT OF CONVICTION.

POINT V

THE MATTER MUST BE REMANDED FOR A HEARING ON DEFENDANT'S ABILITY TO PAY

4 State v. Cofield, 127 N.J. 328 (1992).

THE RESTITUTION IMPOSED AND TO CORRECT THE JUDGMENT OF CONVICTION REGARDING THE AMOUNT OF RESTITUTION IMPOSED.

In reply to the State's contention that defendant invited the error on the accomplice liability charge, defendant alleges ineffective assistance of trial counsel.

Persuaded by the contentions raised in point I, we reverse and remand for a new trial on the second-degree burglary count charged in the Warren Township indictment. We reject the contentions raised in points II and III. In view of our disposition, we decline to address defendant's sentencing contentions raised in points IV and V, noting only that the State acknowledged defendant was entitled to resentencing within the proper sentencing range and an ability-to-pay hearing.

I.

In his first point on appeal, defendant argues that the trial judge failed to issue the version of the model jury charge on accomplice liability applicable when lesser-included charges are submitted to the jury. Defendant contends the charge issued failed to explain that the jury could find he and Waller committed different degrees of burglary. Defendant claims the error was highlighted by the judge's answer to the deliberating jury's question concerning accomplice liability.

Because defendant failed to object to the accomplice liability charge when given, "we analyze his claim . . . through the lens of plain error review." State v. Ross, 229 N.J. 389, 408 (2017). Accordingly, we will reverse the unchallenged jury instruction error only if it was "clearly capable of producing an unjust result." R. 2:10-2. "The mere possibility of an unjust result is not enough." State v. Funderburg, 225 N.J. 66, 79 (2016). We will only reverse if the error is "sufficient to raise 'a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached.'" Ibid. (alteration in original) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

"[W]hen a prosecution is based on the theory that a defendant acted as an accomplice, 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); see also State v. Ingram, 196 N.J. 23, 38-39 (2008). Where, as in the present matter, "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." Ingram, 196 N.J. at 38 (alteration in original) (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."); State v. Norman, 151 N.J. 5, 37 (1997) (explaining that, under Bielkiewicz, "jury 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").

The judge's charge on accomplice liability failed to track the applicable instruction, Model Jury Charges (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6): Accomplice Charge Two" (rev. June 11, 2018), in effect at the time of trial. See Pressler & Verniero, Current N.J. Court Rules, cmt. 8.1 on R. 1:8-7 (2023) ("Use by the court of model jury charges is recommended as a method, albeit not perfect, for avoiding error."). Accomplice Charge Two is applicable when the "defendant is charged as [an] accomplice and [the] jury is instructed as to lesser[-]included charges." Model Jury Charges (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6): Accomplice Charge Two" (rev. June 11, 2018). In the present matter, the jury was instructed that third-degree burglary was a lesser-included offense of second-degree burglary.

As defendant correctly argues, the charge issued failed to include the following language from Accomplice Charge Two:

> Our law recognizes that two or more persons may participate in the commission of an offense but each may participate therein with a different state of mind. The liability or responsibility of each participant for any ensuing offense is dependent on his/her own state of mind and not on anyone else's.
>
> [Ibid.]

Although the judge instructed the jurors that "each defendant and each offense is to be considered separately," the ensuing instructions concerning the four elements of accomplice liability failed to track the lesser-included language set forth in Accomplice Charge Two.

The error was compounded by the jury's ensuing two questions about the charge: (1) "Can you please define the term accomplice (in layman's terms)?"; and (2) "Is the accomplice liable for all of the activities of his partner regardless of whether it was part of their agreement or his knowledge?" For the first time on appeal, defendant challenges the judge's response to the second question: "The answer is he may be, if with the purpose of promoting or facilitating the commission of the offense he solicits some other person to commit it and/or aids or agrees or attempts to aid such other person in planning or committing it." Defendant argues the judge should have responded "no." He further contends the Accomplice Charge Two language quoted above directly addressed the jury's inquiry. We agree.

The judge did not answer the jury's inquiry. See State v. Randolph, 441 N.J. Super. 533, 559-60 (App. Div. 2015); see also State v. Savage, 172 N.J. 374, 394-95 (2002) (finding plain error where the trial judge failed to explain how one defendant could be guilty of murder and the other guilty of a lesser offense if he possessed a different state of mind).

Nor are we persuaded by the State's responding argument that the error was harmless in view of "the strength and quality of [its] corroborative evidence." In this case, law enforcement was unable to lift fingerprints from the proceeds contained in the pillowcase, including the shotgun. Citing the detective's testimony that he found "something that looked more like a glove pattern" on one item, and gloves were found only on defendant and not Waller at the time of their arrests, the State argues either or both defendants placed the items in the pillowcase.

In light of the overwhelming evidence tying defendant to the Warren Township burglary – including his apprehension by police as he attempted to flee through the garage window – defendant attempted to distance himself from the shotgun, which elevated the burglary to a second-degree offense. N.J.S.A. 2C:18-2(b); State v. Ancrum, 449 N.J. Super. 526, 536 (App. Div. 2017) (stating burglary is "elevated to a second-degree crime, and thus subject to NERA, only

when the actor inflicts, attempts to inflict or threatens bodily injury, or is armed with or displays a deadly weapon."). During his summation, defense counsel recounted the lack of evidence tying defendant to the shotgun, emphasizing there was no proof that defendant "was the person who may have removed the gun from the closet where [the Warren Township homeowner] said it was being stored and placed it in a pillowcase." Counsel elaborated:

> So based upon the facts presented I am going to submit to you that there is no sufficient connection between Mr. Loyd and this gun and that he can't be found guilty of any of the offenses in the indictment that relate to the gun and, therefore, as to those charges you must find him not guilty.

In light of the defense advanced in this case, we conclude the faulty jury instruction was "clearly capable of producing an unjust result," R. 2:10-2, warranting reversal of the second-degree burglary conviction.

II.

For the first time on appeal, defendant challenges a handful of comments made during the prosecutor's summation. He argues the prosecutor misstated the law regarding accomplice liability, compounding the judge's erroneous jury instructions. Having ordered a new trial in view of the faulty accomplice liability charge, we briefly address the prosecutor's remarks.

Because no objections were made at trial, we conduct our review by

employing the plain error standard. R. 2:10-2. "Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial." State v. R.B., 183 N.J. 308, 333 (2005) (quoting State v. Frost, 158 N.J. 76, 83 (1999)). "Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made," and "deprives the court of the opportunity to take curative action." State v. Timmendequas, 161 N.J. 515, 576 (1999).

Moreover, New Jersey courts have long recognized prosecutors "are afforded considerable leeway in making opening statements and summations." State v. Williams, 113 N.J. 393, 447 (1988). They may even do so "graphically and forcefully." State v. Pratt, 226 N.J. Super. 307, 323 (App. Div. 1988). Nonetheless, "the primary duty of a prosecutor is not to obtain convictions but to see that justice is done." State v. Smith, 212 N.J. 365, 402-03 (2012).

Even if the prosecutor exceeds the bounds of proper conduct, however, that finding does not end an appellate court's inquiry. "[I]n order to justify reversal, the misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" State v. Smith, 167 N.J. 158, 181 (2001) (quoting Frost, 158 N.J.at 83). "To justify reversal, the prosecutor's conduct must have been 'clearly and unmistakably improper,' and must have substantially

prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." Timmendequas, 161 N.J. at 575 (quoting State v. Roach, 146 N.J. 208, 219 (1996)); see also State v. McNeil-Thomas, 238 N.J. 256, 276 (2019).

Against those well-settled principles, we turn to the belatedly challenged comments at issue. Spanning thirty transcript pages, the prosecutor's summation focused on the evidence recovered from both burglaries to demonstrate the common scheme between the defendants, i.e., "they came to Somerset County to steal." Recounting the evidence seized, the prosecutor argued it made no "logical sense under the circumstances" that defendants stole "everything else in that pillowcase[, j]ust not the gun." Defendant takes issue with the comment that immediately followed: "In fact, I submit to you, you couldn't find one guilty of second-degree burglary and not the other because, you don't know. And I think it is a mistake. It is not the law, and I am going to get to that in a second."

Defendant next challenges the prosecutor's explanation of constructive possession: "Defendants who conspire to steal anything of value . . . We are stealing anything that is valuable. We are going to share the proceeds. That's how it goes. The constructive possession of that gun is shared between the two who agreed to take."

Defendant also cries foul about two other comments made while the prosecutor underscored the evidence supporting second-degree burglary: (1) "He's at the desk taking a laptop. The other guy has control of the pillowcase. Who? It didn't matter which of the two as long as they are acting in concert. Their intent is to steal that laptop because they have moved it."; (2) "So long as the State proves that a deadly weapon was easily accessible and readily available that burglary becomes a burglary of the second degree."

Taken in context, these four remarks were fair comment based on the evidence adduced at trial and did not affirmatively misstate the law on accomplice liability. Although co-defendants certainly may be found guilty of different degrees of the same crime, see e.g., Whitaker, 200 N.J. at 458, the prosecutor permissibly argued the State's theory of the case, i.e., they shared the same intent. On retrial of the second-degree burglary, we expect that the prosecutor's comments will conform with the Accomplice Two Charge.

III.

Lastly, we consider defendant's contention that the trial judge erroneously determined evidence of the Watchung Borough burglary was "intrinsic evidence" of the Warren Township burglary. Defendant argues the other other-crime evidence should have been excluded under N.J.R.E. 404(b) and Cofield.

The State counters evidence of both burglaries was admissible at trial because defendant's guilty pleas to the Watchung Borough charges were not entered until the close of all evidence.

Resolution of this issue turns on the procedural posture. As a preliminary matter, defendant did not object to the prosecutor's pretrial motion to consolidate both indictments. During jury selection, Waller expressed his desire to plead guilty to the Watchung Borough indictment; defendant did not. The judge thereafter indicated he would permit defendants to plead guilty after opening statements to eliminate any "prejudice to the State." Just prior to opening statements, defendant's attorney sought clarification about the extent of the evidence regarding the Watchung Borough charges that the State would be permitted to introduce at trial so that he could "properly advise [his] client." The judge responded:

> Well, I don't know what the State may try to introduce. But pretty much that's it. There was a burglary. Stuff was stolen. A burglary and a theft. The proceeds of the burglary and theft were found in . . . defendant Loyd's car after it was searched, and the burglaries were back-to-back. I mean this is not going to come as a surprise to anybody, assuming that one or both of the defendants open in the fashion which you have advised. So, burglary, theft, proceeds, automobile, discovery.

During their opening statements, the defense attorneys primarily challenged the State's evidence concerning the shotgun and second-degree burglary. Immediately thereafter, the State called its first witness; neither defendant objected nor otherwise indicated his intention to plead guilty at that time. Trial proceeded without a break; the State called two more witnesses. All three witnesses were officers assigned to the Watchung Police Department, who testified about the burglary in their borough.

After the third witness testified, the trial judge asked the attorneys to approach sidebar and inquired whether defense counsel "still . . . inten[ded] to ask the court to entertain pleas of guilty" and when it would "be either necessary or convenient to do that." Waller's attorney indicated he was in the process of completing the plea forms but deferred to the court regarding the timing of the entry of his client's guilty pleas. However, defendant's attorney advised that his client was charged in another indictment with second-degree burglary and second-degree arson. Accordingly, he was unsure whether defendant would plead guilty to the Watchung Borough charges.[5] Defendant's attorney further stated: "I don't know if [a guilty plea] puts him in any better position and if it doesn't, just make the State prove [its] case."

[5] The disposition of the unrelated indictment is not contained in the record.

Near the end of the State's case, Waller's attorney advised that his client "may be pleading to [the Watchung Borough charges]." The judge indicated he would enter the guilty pleas the following day after the jury was excused. Recognizing defendant "was equivocating," the judge told defendant's attorney he would not "harangue" him for a decision. As stated, defendant and Waller pled guilty to the Watchung Borough charges at the close of all evidence. There is no indication in the record that defendant definitively expressed his intention to enter a guilty plea any time prior.

Against that procedural backdrop, we are persuaded by the State's argument that evidence of both burglaries was admissible at trial. Not only did defendant equivocate about pleading guilty prior to entry of his guilty pleas, they were not final until entered. Stated another way, until the judge accepted defendant's guilty pleas and because the burglaries were consolidated for trial, evidence of both burglaries was properly admitted. We therefore reject defendant's contention that evidence of the Watchung Borough burglary was propensity evidence in the consolidated trial. Moreover, defendant was apprehended at the scene in Warren Township and proceeds of the Watchung Borough burglary were seized from his car. We therefore agree with the trial judge that the evidence was intrinsic and not subject to a Cofield analysis at the

trial of both burglaries. See Rose, 206 N.J. at 179; State v. Sheppard, 437 N.J. Super. 171, 193 (App. Div. 2014) (holding that if the evidence is intrinsic, "N.J.R.E. 404(b) does not apply because the evidence does not involve some other crime, but instead pertains to the charged crime").

Notably, however, defendant has not appealed from his convictions on the Watching Borough indictment. Accordingly, at this juncture, the introduction of any evidence relating to the Watchung Borough burglary is now other-crime evidence under N.J.R.E. 404(b). Therefore, before that evidence is admitted at any retrial of the Warren Township second-degree burglary, it must be evaluated pursuant to N.J.R.E. 404(b) and the requisite Cofield analysis. Accordingly, should the State seek to introduce that other-crime evidence, the State must file an N.J.R.E. 404(b) application.

Affirmed in part; reversed in part, we do not retain jurisdiction.