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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1927-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WOODY ARMAND, a/k/a
FRANKY AUSTIN, WOODROW
PHILIP, WOODROW PHILLIPS,
and WOODROW ARMAND,

Defendant-Appellant.

Submitted November 10, 2022 – Decided January 5, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment Nos. 19-01-0233
and 19-01-0235.

Joseph E. Krakora, Public Defender, attorney for
appellant (Molly O'Donnell Meng, Designated
Counsel, on the brief).

Theodore N. Stephens, II, Acting Essex County
Prosecutor, attorney for respondent (Matthew E.

Hanley, Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Woody Armand was convicted by a jury of: (1) second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); (2) third-degree possession of a controlled dangerous substance (CDS) (heroin), N.J.S.A. 2C:35-10(a); (3) third-degree possession of a CDS (oxycodone), N.J.S.A. 2C:35-10(a); (4); second-degree trafficking of personal information, N.J.S.A. 2C:21-17.3(b)(2); and (5) third-degree forgery, N.J.S.A. 2C:21-1(a)(2). He later pled guilty to second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7(b), and was sentenced to an aggregate seven-year custodial term with forty-two months of parole ineligibility.

Defendant challenges his convictions and argues for the first time before us:

- I. THE JURY CHARGE DEPRIVED DEFENDANT OF A FAIR TRIAL BECAUSE THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON HOW TO EVALUATE THE PRIOR INCONSISTENT STATEMENT OF A RECANTING WITNESS. (Not Raised Below).
- II. THE REPEATED MENTION OF A SEARCH WARRANT AND POLICE TESTIMONY ABOUT OBTAINING A SEARCH WARRANT

WAS HIGHLY PREJUDICIAL AND
VIOLATED DEFENDANT'S RIGHT TO DUE
PROCESS. (Not Raised Below).

We have considered defendant's contentions in light of the record and the applicable law and affirm.

I.

In October 2018, the Bloomfield police began surveilling 422 Beardsley Avenue after receiving numerous complaints regarding individuals frequently entering and leaving the residence. During that surveillance, police observed individuals entering the apartment, exiting shortly thereafter, and returning hours later. The police also observed defendant leaving the residence to deliver envelopes to individuals waiting in vehicles.

On November 2, 2018, police observed Adeeb Salih and John Cochrane enter the residence and return to their vehicle four or five minutes later. The officers followed Salih and Cochrane to a Stop & Shop and observed them go inside for a few minutes. As they were leaving the parking lot, the officers pulled the men over, arrested them, and seized from the vehicle debit cards, credit cards, and checks that did not belong to them.

After arriving at the police station, Salih gestured to the police indicating he wanted to speak with them. Officer Donald Grey separated Salih from

Cochrane, at which point Salih expressed a desire to cooperate with the police in order to avoid being charged. After their initial conversation, Salih asked Grey: "Grey, you got me, right?"; and "Me and you are cool, right?" Salih testified at trial that he was seeking assurances from Officer Grey that he would not be charged or deported and defendant would never learn he spoke with the police. According to Grey, he did not promise anything to Salih, but instead told Salih he would inform the prosecutor Salih cooperated with the police.

The officers brought Salih into an interrogation room around 2:00 a.m. on November 3, 2018 and read him his Miranda¹ rights. In his subsequent recorded statement, Salih indicated defendant lived at 422 Beardsley Avenue, and Salih and Cochrane went to Stop & Shop to deposit fraudulent checks printed by defendant.

Salih explained defendant regularly used a printer and laptop in his apartment to print fake checks, which he then gave to others to deposit. According to Salih, defendant kept fifty percent of the fraudulently acquired money with Salih receiving a smaller percentage. Salih also claimed defendant kept a gun in the apartment. At the end of the interview, Salih confirmed he was

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

not under the influence of any drugs or alcohol and the police did not make any promises of threaten him in exchange for his statement.

The following day, Bloomfield police and postal service authorities executed a search warrant for 422 Beardsley Avenue. In defendant's bedroom, the police found "multiple debit cards with other individual's names on [them], along with checks, which had information of businesses and other individuals that were not [defendant]." They also discovered checks and debit cards in other rooms, as well as the following items in the common areas:

multiple stacks of blank checks, check paper, as well as printed checks with various businesses and different names on them; . . . [four] printers; [two] laptops; a scanner; [thirty-seven] decks of heroin; a digital scale; a rubber stamp from a bank; . . . [seventeen] cell phones[;] . . . [and] [twelve] oxycodone pills.

The officers also recovered a .40 caliber handgun stashed in the wall behind a framed photograph in the hallway outside the apartment.

At trial, the State called Salih to testify. Prior to testifying, however, Salih sought to withdraw his recorded November 3, 2018 statement, claiming he fabricated it. He explained he was "under the influence" when he gave the statement, was "desperate", and made false accusations about defendant so he could "go home as . . . promised."

Salih also stated he went to 422 Beardsley Avenue on November 2, 2018, only to pick up a hoodie, and defendant was not at the apartment when he arrived. He also claimed defendant neither give him nor printed any checks, but rather he and Cochrane were operating their own independent forgery scheme. He asserted he and Cochrane went to Stop & Shop to purchase snacks, not to deposit checks, and he lied about defendant's involvement only to draw attention away from himself. When shown a portion of the statement transcript, he responded: "I got to stop doing drugs, man. This is crazy. I've got to stop doing drugs because I just was saying anything."

The next day, the court held a Gross² hearing. After considering the fifteen Gross factors, the court concluded Salih's initial statement to the police was reliable and granted the State's application to admit the statement into evidence in redacted form. The court informed counsel, however, "in light of all the circumstances, including [Salih's] interests in giving the statement", the jury instructions would stress Salih's custodial status and "focus the jury's attention on [Salih's] motives and interests in the outcome of the criminal proceeding, the point we touched on in Gross." The court also noted that defendant's counsel was "free to comment upon Salih's status and his expectation

² State v. Gross, 121 N.J. 1 (1990) (Gross II).

of [a] favor in exchange for the statement." In response to the court's comments, the State requested "an instruction regarding redaction be provided [by] the [c]ourt."

The following day, the State moved the redacted recording and transcript of Salih's November 3, 2018 statement into evidence and played the recording for the jury. Salih again testified he lied in his recorded statement, adding that he did so "[b]ecause [he] thought it would be a chance for [him] to not get deported." Salih explained, as a non-citizen currently serving a prison sentence, he was subject to an immigration detainer.

That morning, defense counsel produced a letter defendant received from Salih the day before. Salih testified he wrote the letter and asked someone to deliver it to defendant. In the letter, Salih stated he lied to the police, regretted the current circumstances as he and defendant shared good times together, and noted people were calling him a "rat" on the streets because he "snitched" on defendant.

At the close of all evidence, the court provided the following instructions consistent with its earlier comments and which mirrored Model Jury Charges (Criminal), "Credibility – Prior Conviction of a Witness" (rev. Feb. 24, 2003),

and Model Jury Charges (Criminal), "Credibility – Immigration Consequences of Testimony" (rev. June 6, 2016):

You have heard evidence that Adeeb Salih has previously been convicted of crimes. This evidence may be only used in determining the credibility or believability of this witness' testimony. A jury has a right to consider whether a person who has previously failed to comply with society's rules, as demonstrated through criminal convictions, would be more likely to ignore the oath requiring truthfulness on the witness stand than a person who has never been convicted of a crime.

You have also heard evidence that Adeeb Salih, who had testified for the State, is a foreign national, who is not a citizen of the United States and, therefore, subject to removal from this country. You may not use the mere fact that Adeeb Salih may not be a legal resident of the United States to conclude that he is less likely to comply with our society's rules, and therefore, more likely to ignore the oath requiring truthfulness on the witness stand; indeed that Adeeb Salih may be here in violation of federal immigration laws does not in and of itself affect his credibility. [T]he focus must be on whether the possibility that this witness believed that the state or federal agents could help Adeeb Salih delay or avoid removal from the United states improperly influenced his testimony. In weighing this witness' testimony you may consider whether his testimony was influenced by the hope or expectation or any favorable treatment or reward such as delaying or avoiding removal from the United States by federal immigration authorities.

Finally, you're not . . . obligated to consider Adeeb Salih's interest in avoiding or delaying removal from

this country as having any particular effect on his credibility. You may, however, consider this evidence in light of my instructions, along with all the other factors we previously discussed in determining the credibility of Adeeb Salih.

If you believe Adeeb Salih to be credible and worthy of belief, you have a right to convict the defendant on his testimony alone provided, of course, that upon consideration of the whole case you are satisfied beyond a reasonable doubt of the defendant's guilt.

The court also provided Model Jury Charges (Criminal), "Redacted Recorded Statement of Defendant" (appv'd Oct. 6, 2014), again consistent with the State's request at the conclusion of the Gross hearing:

There is for your consideration in this case an audio/video statement made by Adeeb Salih.

It's your function to determine whether or not the statement was actually made by Mr. Salih, and if made, whether the statement or any portion of it is credible.

You may consider all of the circumstances surrounding the statement in making that determination with the following caution: I instruct you that in this case certain portions of the audio/video statement, as well as of the transcript of the statement, have not been provided to you. You may only consider those portions of the statement which have been admitted into evidence and must not speculate as to the comments or the reasons for the omissions.

Finally, the court gave the following general credibility instructions, which tracked Model Jury Charges (Criminal), "Parts 1 and 2 (General Information to Credibility of Witnesses)" (rev. Sept. 1, 2022):

You will also be called upon to assess the credibility of the witnesses. As judges of the facts you are to determine the credibility of the witnesses, and in determining whether a witness is worthy of belief, and, therefore, credible, you may take into consideration the appearance and the demeanor of the witness; the manner in which he or she may have testified; the witness' interest in the outcome of the trial, if any; his or her means of obtaining knowledge of the facts; the witness' power of discernment, meaning his or her judgment, understanding, his or her ability to observe, recollect, and relate; the possible bias, if any, in favor of the side for whom the witness testified; the extent to which, if at all, each witness is either corroborated or contradicted, supported or discredited by other evidence; whether the witness testified with an intent to deceive you; the reasonableness or unreasonableness of the testimony the witness has given; whether the witness made any inconsistent or contradictory statements; and all matters in evidence which serve to support or discredit his or her testimony.

Through this analysis, as the judges of the facts, you weigh the testimony of each witness, and then determine the weight to . . . give to it. Through that process you may accept all of it, a portion of it, or none of it.

During closing arguments, both parties addressed the inconsistencies between Salih's recorded statement and his in-court testimony. Defense counsel

addressed Salih's motivation to lie to the police, reminding the jury of Salih's testimony that "he was concerned mainly about being deported because he had a criminal history."

The State argued, however, Salih's excuse was illogical, as he knowingly admitted to multiple crimes in his recorded statement. The State further asserted Salih's statement was corroborated by evidence discovered in defendant's home and based on the letter, Salih likely was motivated to recant his testimony because "he doesn't want to be [considered] a rat." The State disputed Salih's claim that he was under the influence when he gave his statement, as there was no evidence in the video that Salih slurred his words or appeared inebriated. Finally, during deliberations, the court granted the jury's request to rewatch Salih's November 3, 2018 recorded statement and his in-court testimony.

II.

Defendant first argues the court deprived him of a fair trial in violation of his due process rights by failing to properly instruct the jury on how to evaluate Salih's recanted statement. Specifically, he asserts the court was required to instruct the jury on the fifteen factors set forth in State v. Gross, 216 N.J. Super. 98, 109-110 (App. Div. 1987) (Gross I) and Gross II, as incorporated into Model Jury Charges (Criminal), "Recanting Witness (Substantive)" (appv'd Oct. 24,

1994), and the court's failure to provide this specific jury instruction "was clearly capable of producing [an] unjust result" under Rule 2:10-2. We disagree.

As defendant did not raise his current arguments before the court, we will reverse only upon a showing of plain error. R. 2:10-2. "Plain error refers to any error 'clearly capable of producing an unjust result.'" State v. Montalvo, 229 N.J. 300, 320-21 (2017) (quoting R. 2:10-2). "The mere possibility of an unjust result is not enough. To warrant reversal . . . , an error at trial 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. Funderburg, 225 N.J. 66, 79 (2016) (citation omitted) (second alteration in original) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

In the context of jury instructions, "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and 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. Chapland, 187 N.J. 275, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969)). We "read [the instructions] as a whole in determining whether there was any error." State v. Torres, 183 N.J. 554, 564 (2005). Moreover, the effect of any error must be considered "in

light 'of the overall strength of the State's case.'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting Chapland, 187 N.J. at 289).

Here, because the court admitted Salih's November 3, 2018 statement in redacted form, it provided the "Redacted Recorded Statement of Defendant" Model Charge. As noted, however, there is another Model Charge, "Recanting Witness (Substantive)," that should be provided to the jury to decide whether a recanted statement memorialized in a sound recording is reliable.

This charge instructs the jury to consider the fifteen factors set forth in Gross I and Gross II as follows:

1. [Name of declarant-witness]'s connection to and interest in the matter reported in his/her prior statement;
2. The person or persons to whom he/she gave the statement;
3. The place and occasion for giving the statement;
4. Whether [name of declarant-witness] was then in custody or otherwise the target of investigation;
5. The physical and mental condition of [name of declarant-witness] at the time;
6. The presence or absence of other persons;
7. Whether [name of declarant-witness] incriminated himself/herself or sought to exculpate himself/herself by the statement;
8. Whether the writing is in [name of declarant-witness]'s hand;
9. The presence or absence, and the nature of, any interrogation;
10. Whether the [sound recording] [writing] contains all, or only a portion or summary, of what [name of declarant-witness] said;

11. The presence or absence of any motive to fabricate;
12. The presence or absence of any explicit or implicit pressures, inducement, or coercion for making the statement;
13. Whether the use to which the authorities would put the statement was apparent or made known to [name of declarant-witness];
14. The inherent believability or lack of believability of the statement;
15. The presence or absence of any corroborating evidence.

[Model Jury Charges (Criminal), "Recanting Witness (Substantive)" (appv'd Oct. 24, 1994).]

Additionally, this Model Charge suggests the court instruct the jury: "If you decide that the statement is reliable, then you may consider it for its truth and weigh it along with all the other evidence in the case. However, if you decide that the statement is not reliable, then you may not consider it for any purpose."

Ibid.

In Gross II, the Court explained the evidentiary rule on prior inconsistent statements "is designed 'to limit substantive admissibility of prior inconsistent statements [of the proponent's witness] to those statements given in a form and under circumstances importing special reliability.'" 121 N.J. at 9 (alteration in original) (quoting Gross I, 216 N.J. Super. at 107). The Gross factors are relevant to the reliability determination. Ibid. According to the Gross II court, "statements of a suspected accomplice or codefendant, who might have been

motivated to inculcate the defendant in order to exonerate [themselves], to gain revenge, or to curry favor with the authorities, engender skepticism." Id. at 14. The Court also concluded, however, that skepticism is strongest when declarants are not available to testify at trial, as "in-court cross-examination of a witness can be relied upon to explore and to expose most, if not all, relevant circumstances surrounding the prior inconsistent statement." Id. at 13. When prior inconsistent statements that engender heightened skepticism are admissible as substantive evidence, the court should instruct the jury to consider the Gross factors and "carefully scrutinize[] and assess[]" the witness' prior inconsistent statement "in light of all the surrounding circumstances, including [their] interest in giving the statement at the time." Id. at 17.

Here, Salih testified regarding his recorded statement and was subject to rigorous cross-examination regarding his recantation, during which he explained why he purportedly fabricated his initial statement. The jury also watched the redacted recording of Salih's statement during trial and deliberations. Between direct and cross-examination, and its multiple viewings of the statement, the jury had the opportunity to assess the circumstances surrounding Salih's initial statement and the reasons and circumstances surrounding his recantation.

In addition to Salih's testimony and recorded statement, the State offered substantial evidence supporting defendant's conviction. The State first offered Officer Grey's testimony that surveillance observed individuals going in and out of defendant's residence and defendant passing envelopes to individuals in vehicles. The State then produced evidence of heroin, oxycodone, multiple printers, two laptops, check paper, debit cards and printed checks containing information of businesses and individuals that were not defendant, and one handgun, all discovered at defendant's residence. This evidence not only supported defendant's conviction, but also corroborated the portions of Salih's recorded statement he claimed to have fabricated.

The court then twice informed the jury of its responsibility to determine Salih's credibility and specifically explained, in doing so, "[y]ou may consider all of the circumstances surrounding" his recorded statement. Additionally, in its general credibility instructions, the court instructed the jury to consider factors such as the witnesses' interest in the outcome of trial, any possible bias, whether their testimony was either corroborated or contradicted by other evidence, and whether they testified with an intent to deceive the jury. And, as noted, the court also specifically instructed the jury to consider "whether the possibility that [Salih] believed . . . the state or federal agents could help [him]

delay or avoid removal from the United States improperly influenced his testimony."

We are satisfied under the unique circumstances here, the court met its obligation under Gross II to instruct the jury to "carefully scrutinize" Salih's recorded statement "in light of all the surrounding circumstances." 121 N.J. at 17. Additionally, the jury was adequately prepared to do so, as the court's instructions addressed the Gross factors most implicated by Salih's recorded statement, the circumstances surrounding that statement were fleshed out through direct and cross-examination, and the State produced evidence corroborating the portions of the statement Salih sought to recant.

In light of these circumstances and the strength of the State's case, see Walker, 203 N.J. at 90, to the extent there was any error in the court's failure to specifically list the Gross factors, we are satisfied it did not "[lead] the jury to a result it otherwise might not have reached," Funderburg, 225 N.J. at 79 (quoting Jenkins, 178 N.J. at 361), or "of itself, . . . possess[] a clear capacity to bring about an unjust result," Chapland, 187 N.J. at 289. We therefore discern no plain error.

III.

As noted, defendant also argues the court's failure to exclude evidence of the search warrant or provide a limiting instruction to prevent the jury from inferring defendant's guilt from the State's repeated references to the existence of the warrant "was clearly capable of producing an unjust result" under Rule 2:10-2. Relying on State v. Cain, 224 N.J. 410, 433 (2016), defendant contends the State improperly referenced and elicited testimony about the search warrant over fifty-times during trial and that testimony was "irrelevant and extremely prejudicial" to his defense, thereby requiring reversal of his convictions. We disagree.

In Cain, the defendant argued the State's repeated references to the "court authorized warrant" communicated to the jury that a judge had heard the State's evidence and deemed it credible and reliable. Id. at 418. The Court explained "the [State] has the right to convey to the jury that the police were authorized to search a home," but "repeated statements that a judge issued a search warrant for a defendant's home — when the lawfulness of the search is not at issue — may lead the jury to draw the forbidden inference that the issuance of a warrant by a judge supports the rendering of a guilty verdict." Id. at 433. The Court also noted "[t]he constant drumbeat that a judicial officer issued a warrant to

search defendant's home had little probative value but did have the capacity to lead the jury to draw an impermissible inference that the court issuing the warrant found the State's evidence credible." Id. at 436.

We have addressed the propriety of the State's reference to warrants during criminal trials on several occasions. For example, in State v. Milton, 255 N.J. Super. 514, 520 (App. Div. 1992), we held the State's references to a search warrant for the defendant's person, in addition to a warrant for the premises searched, denied the defendant his right to a fair trial as "[t]he natural inference from the mention of the warrant itself . . . was that sufficient independent proof had been presented to a neutral judge to believe that defendant would be found in possession of drugs." Similarly, in State v. Alvarez, 318 N.J. Super. 137, 148 (App. Div. 1999), we reversed the defendant's conviction because "the [State] managed to insert into [its] questions the fact that a judge issued the search warrant, thus suggesting that a judicial officer with knowledge of the law and the facts believed that evidence of criminality would be found in defendant's room."

In State v. McDonough, 337 N.J. Super. 27, 32 (App. Div. 2001), the defendant, relying upon Alvarez and Milton, argued testimony alluding to an arrest warrant and a search warrant "suggested to the jury that a judge had found

sufficient cause to justify the arrests and searches." We distinguished those cases, however, and explained:

the evidence of the warrants in Milton and Alvarez not only indicated that a judge had found sufficient basis to justify their issuance, but also implied that the State had presented evidence to the judge that was not introduced at trial which indicated that the defendant was likely to be in possession of contraband.

[Id. at 34.]

We held the State's "passing reference" to warrants was not prejudicial as the State did not imply it had presented evidence to the issuing judge that was not before the jury and "the jury heard extensive evidence concerning the evidence obtained in the lengthy police investigation that preceded issuance of the warrants." Ibid.

Here, the State first referenced the search warrant during its opening statement, when it explained to the jury it would "hear that on November 4th of 2018, at approximately 6[:00] a.m., officers of the Bloomfield Police Department executed a search warrant at . . . defendant's residence." The State also, through the direct testimony of Officer Grey and Lieutenant Nicholas Polidoro, who was present during the execution of the warrant, provided background information regarding the issuance of the search warrant, its execution, and the evidence seized. The State also referenced the search warrant

during the direct testimony of those witnesses to lay an appropriate foundation for certain of the State's exhibits. Finally, during closing argument, the State referenced the search warrant when commenting upon Salih's, Officer Grey's and Lieutenant Polidoro's testimony as well as the evidence seized as result of the warrant. We also note defense counsel referenced the search warrant during cross-examination of Officer Grey and Lieutenant Polidoro.

We are satisfied from our review of the record that the numerous references to the search warrant during trial did not suffer the same infirmities as those condemned in Milton, Alvarez, and Cain, as, unlike in those cases, the State did not "insert into [its] questions the fact that a judge issued the search warrant." Alvarez, 318 N.J. Super. at 148. Rather, the references cited by defendant provided necessary context for jury to understand the actions taken by the police and explained how the evidence before the court was obtained. As in McDonough, the State presented evidence describing the State's investigation and did not imply the State presented evidence to the judge that was not before the jury. 337 N.J. Super. at 34. Moreover, the State's references during closing argument corroborated Salih's recorded statement, the veracity of which was a critical issue at trial, and therefore had probative value. As a result, we conclude those references did not "[lead] the jury to a result it otherwise might not have

reached," and therefore did not constitute plain error under Rule 2:10-2. Funderburg, 225 N.J. at 79 (quoting Jenkins, 178 N.J. at 361). .

To the extent we have not specifically addressed any of the parties' arguments, it is because we have concluded they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION