SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2247-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CALVIN FAIR,

Defendant-Appellant.

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Argued May 10, 2023 – Decided June 27, 2023

Before Judges Currier and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 17-01-0032.

Daniel S. Rockoff, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Daniel S. Rockoff, of counsel and on the brief).

Alecia Woodard, Assistant Prosecutor, argued the cause for respondent (Raymond S. Santiago, Monmouth County Prosecutor, attorney; Alecia Woodard, of counsel and on the brief).

PER CURIAM

Defendant Calvin Fair appeals from his conviction for resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2). We affirm.

I.

At approximately 7:00 p.m. on November 2, 2016, four Monmouth County Sheriff's Officers went to defendant's residence to arrest him on five warrants for outstanding child support. The officers arrived in an unmarked car, armed and in uniform, with their outer vests displaying the word, "Sheriff" in "big yellow letters" "on the front and back." Officers Timothy Carpenter and Dutko approached defendant's front door while Officers Joseph Borgia and Towle positioned themselves in defendant's backyard.[1]

At trial, Carpenter testified he and Dutko were on defendant's front porch when he saw defendant through the glass of the front door. After defendant passed by the door and walked toward the back of the house, the two officers knocked on the door and yelled for defendant. Their knocks became progressively louder, but defendant did not answer the door. Dutko radioed the officers in the backyard to let them know defendant was inside the home.

Officer Borgia testified that while he was in defendant's backyard, he

[1] The record does not include the first names of Officers Dutko and Towle.

heard Carpenter and Dutko knocking and yelling, "Sheriff's officers[,] come to the front door. Mr. Fair, come to the front door." He also stated that approximately ten minutes after the officers began knocking on defendant's door, and while he was still stationed in the backyard, he noticed "movement" in "the top most far right window." Borgia shined his flashlight at the window and saw "curtains immediately shut back." A few minutes later, Borgia heard "a thud," saw "something propel out of the window," and "hear[d] a crash." He pointed his flashlight upward and saw defendant "on the low roof of [the] house" adjacent to defendant's home.

Officer Borgia drew his firearm and "start[ed] giving [defendant] commands to [show] his hands." Defendant informed Borgia "his foot was stuck in the roof," so Borgia holstered his firearm, and he and Officer Dutko assisted defendant in getting down from the roof. Dutko then arrested and handcuffed defendant.

In January 2017, defendant was indicted on the charge of fourth-degree resisting arrest. During his January 2020 jury trial, Officers Carpenter and Borgia testified for the State; defendant elected not to testify. At the close of the State's case, defendant moved for a judgment of acquittal, arguing the State failed to present proof he knew or had reason to know the sheriff's officers who

came to his home in November 2016 were there to arrest him. He highlighted the fact there was no evidence any of the four officers who came to his home informed him of their intention to arrest him before he jumped out of his second-story window.

The judge denied the motion. He acknowledged the State had the burden of showing "defendant knew or had reason to know that a law enforcement officer was attempting to effect an arrest." However, he stated there was "no statutory or case law requirement that a verbal announcement [of arrest] be made" before a defendant could be found guilty of resisting arrest. In denying defendant's motion, the judge reasoned:

> Clearly, there is enough circumstantial evidence in this unique situation where a defendant is observed by one of the officers leaping from one building to another and having his leg go through the roof of what sounded . . . like an enclosed porch behind the adjacent house.
>
> There really is no other explanation that I can come up with why one would do that, especially when the house is surrounded by . . . officers.
>
> So, although there's testimony that there was an announcement of some sort, . . . there's clear testimony that the officers were wearing sheriff's regalia and that it was visible and that they were armed and the one officer even drew his weapon. [I]f . . . those pieces of evidence were not in the case, and all you had was the defendant leaping from one building to another, I think

> that is circumstantial evidence from which the jury could draw the inferences that the defendant reasonably knew that he was being pursued and that the officers were there to effect a lawful arrest.
>
> So, . . . giving the State the benefit of all favorable testimony and all favorable inferences, that application is denied. I cannot dismiss that count. . . .

Following this ruling, defendant confirmed he would not testify, and counsel proceeded with their closing arguments. Defense counsel stated defendant "concede[d] the first two" elements of the charged offense, i.e., that the State proved the officers who came to defendant's home in November 2016 "were Monmouth County sheriff's officers" and they had "legitimate, enforceable warrants for [his] arrest." However, defense counsel argued the State did "not have evidence beyond a reasonable doubt with respect to . . . whether [defendant] knew or should have known" "sheriff's officers were there to effect an arrest" and that defendant purposely tried to prevent his arrest.

The prosecutor refuted defense's closing remarks, claiming the evidence showed: sheriff's officers "surrounded [defendant's] house" on November 2, 2016; they were "armed with their badges, their guns[,] . . . wearing vests emblazoned with "Sheriff" . . . on the front and the back," and they "covered the entry and exi[]ts of this house." The prosecutor also stated Officers Carpenter and Dutko didn't "just simply stand there," but were "banging on the door" for

ten minutes and saw defendant through a "side window of the door" as defendant "move[d] away," rather than "answer that door."

Further, the prosecutor argued Officers Carpenter and Dutko were "so loud" in "announcing themselves at the front door" that Borgia "heard it in the backyard" and it was "[h]ard to believe that somebody inside that house [didn't] hear it." The prosecutor also told jurors that defendant was "seen by Carpenter" before defendant "jump[ed] out the second story window" and "across the alleyway," and that officers found him "on the roof next door." Against this backdrop, the prosecutor asked jurors to "[t]hink about [defendant's] desperation . . . when we talk about what . . . defendant knew or should have known."

Regarding defendant's mindset when officers came to his home, the prosecutor further stated, "you can determine from the facts and circumstances[,] from a person's actions, the way they behave[, to] tell you what he's thinking." Additionally, the prosecutor advised the jury, "as we start to get into the details, I'm telling you there's no way that . . . defendant didn't know that those officers were there to arrest him because if he had any other consideration, he would not have jumped out of a second-story window."

The prosecutor also reminded the jury that despite the officers knocking

and announcing their presence for ten minutes at defendant's home on the day of the incident, defendant did "not once go to that front door" or "send anybody to the front door" to "see what they want[ed]" or "what the problem [was]." The prosecutor also noted defendant walked past the window in his front door and "look[ed] out the window . . . in the back," so defendant was aware "[t]hose officers were not leaving . . . the scene."

Moreover, the prosecutor urged jurors to conclude defendant never asked the officers why they were there, and "didn't come to the door and tell them to go away" "because he knew they[were] there to arrest him." Further, the prosecutor asked jurors to note defendant didn't "hide" or "just stay in the house . . . to wait the[officers] out." Thus, the prosecutor asked jurors to conclude defendant knew the officers were "there to take him into custody" and this knowledge prompted defendant to attempt "a desperate . . . escape by jumping out a second-story window." The prosecutor added, "jumping out the second-story window . . . was an effort to evade those officers by flight."

Following the judge's charge to the jury, defendant was convicted and later sentenced to an eighteen-month prison term.

II.

On appeal, defendant again argues he was entitled to a judgment of acquittal "because the State failed to prove that [he] knew officers were effectuating his arrest based on probable cause" during the November 2016 incident. Additionally, he contends for the first time on appeal that the prosecutor engaged in "misconduct" during his summation "by imploring the jury to find . . . [defendant's] fair exercise of his constitutional rights — including his Fifth Amendment right not to speak to the police, and Fourth Amendment right not to consent to the police entry into his home — was substantive evidence of guilt."

We review a trial court's denial of a motion for acquittal de novo. State v. Williams, 218 N.J. 576, 593-94 (2014); State v. Brown, 463 N.J. Super. 33, 47-48 (App. Div. 2020). The motion under Rule 3:18-1 will be denied "if 'viewing [only] the State's evidence in its entirety, be that evidence direct or circumstantial,' and giving the State the benefit of all reasonable inferences, 'a reasonable jury could find guilt . . . beyond a reasonable doubt.'" State v. Sugar, 240 N.J. Super. 148, 152 (App. Div. 1990) (quoting State v. Reyes, 50 N.J. 454, 458-59 (1967)).

To be found guilty of resisting arrest under N.J.S.A. 2C:29-2(a)(2), a

defendant must have, "by flight, purposely prevent[ed] or attempt[ed] to prevent a law enforcement officer from effecting an arrest." Thus, before a defendant can be convicted of this offense, the State must prove:

> 1. That [the person effecting the arrest] was a law enforcement officer.
>
> 2. That [the person] was effecting an arrest.
>
> 3. That defendant knew or had reason to know that [the person] was a law enforcement officer effecting an arrest.
>
> 4. That defendant purposely prevented or attempted to prevent [the person] from effecting the arrest.
>
> [Model Jury Charges (Criminal), "Resisting Arrest - Flight Alleged (N.J.S.A. 2C:29-2(a))" (rev. May 7, 2007).]

Based on the unrefuted testimony of the State's witnesses and defendant's concession that the State established the first two of the four elements needed for a conviction, we are satisfied the trial judge's denial of defendant's motion for a judgment of acquittal is well supported. When viewing the State's evidence and affording it the benefit of all reasonable inferences, a reasonable jury could conclude defendant was guilty of resisting arrest by flight beyond a reasonable doubt.

The evidence supporting the third and fourth elements of the charge, that

defendant knew or had reason to know the sheriff's officers went to his home to arrest him and he tried to prevent his arrest, includes the fact that: numerous officers surrounded defendant's home to execute several child support warrants; the officers were armed and in uniform; their vests prominently displayed they were from the Sheriff's Office; Officers Carpenter and Dutko loudly announced their presence by yelling and knocking on the door for approximately ten minutes, commanding defendant to "come to the door"; defendant ignored their entreaties; Officer Borgia heard Officers Carpenter and Dutko knocking and yelling while he was in defendant's backyard; after officers repeatedly commanded defendant to answer the door, Officer Borgia saw "movement" from a rear, second-story window, shined his flashlight toward the window and saw "curtains immediately shut back"; a few minutes later, Officer Borgia saw defendant "propel" himself out of a second-story window and heard a "thud" before spotting defendant on the top of his neighbor's house, with his foot lodged through the roof.

Although defendant contends his motion for a judgment of acquittal should have been granted because the sheriff's officers never announced he was under arrest, we disagree. The law is clear that if an arrest is lawful, meaning it is supported by probable cause, a law enforcement officer's mere failure to

announce that a defendant is under arrest does not warrant an acquittal. State v. Branch, 301 N.J. Super. 307, 321 (App. Div. 1997), rev'd on other grounds, 155 N.J. 317, 319 (1998) ("The failure to announce that defendant was under arrest would only be one factor to be considered in the overall sequence of events leading to the arrest."). And even if a defendant was fearful of or wished to avoid an interaction with law enforcement, he had no right to resist arrest so long as "the arresting officers were clearly acting under color of their official authority in arresting [him]." State v. Kane, 303 N.J. Super. 167, 182 (App. Div. 1997).

In sum, affording "the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom," Reyes, 50 N.J. at 459, we agree with the judge that a reasonable trier of fact could find defendant guilty of resisting arrest beyond a reasonable doubt. Thus, the judge properly denied defendant's motion for judgment of acquittal.

Finally, we turn to defendant's prosecutorial misconduct argument. Because this argument is raised for the first time on appeal, we review it under the "plain error" standard. State v. Singh, 245 N.J. 1, 13 (2021); see also R. 2:10-2. That standard compels us to "disregard" a trial court's error unless it was "clearly capable of producing an unjust result." Ibid.

An appellate court may reverse a conviction due to prosecutorial misconduct when the conduct was clearly and unmistakably improper and "so egregious" that defendant was deprived of a fair trial. State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting State v. Wakefield, 190 N.J. 397, 437 (2007)). "Generally, however, a 'fleeting and isolated' remark [in the State's summation] is not grounds for reversal." State v. Gorthy, 226 N.J. 516, 540 (2016) (citation omitted).

Also, typically, "if no objection was made to [a prosecutor's] improper remarks, the remarks will not be deemed prejudicial. Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made." State v. Echols, 199 N.J. 344, 360 (2009) (quoting State v. Timmendequas, 161 N.J. 515, 576 (1999)). "The failure to object also deprives the court of an opportunity to take curative action." State v. R.B., 183 N.J. 308, 333 (2005) (quoting State v. Frost, 158 N.J. 76, 84 (1999)).

"[P]rosecuting attorneys, within reasonable limitations, are afforded considerable leeway in making opening statements and summations." Gorthy, 226 N.J. at 539-40 (quoting Wakefield, 190 N.J. at 443). However, the prosecution's comments must be "reasonably related to the scope of the evidence presented." McNeil-Thomas, 238 N.J. at 275 (quoting Frost, 158 N.J. at 82).

To the extent defendant argues, in part, the prosecutor engaged in misconduct by asking the jury to find defendant's exercise of his Fifth Amendment right not to speak to the police was evidence of defendant's guilt, we note a defendant is not obliged to "speak prior to arrest." State v. Brown, 118 N.J. 595, 613 (1990). But "evidence of pre-arrest silence, particularly in the absence of official interrogation, does not violate any right of the defendant involving self-incrimination." Ibid. (citations omitted)

Guided by these principles, we are persuaded the prosecutor's closing argument does not warrant a reversal. The statements were confined to the evidence revealed at trial, and references to defendant's actions on the date of the incident were provided to support the disputed elements of the crime charged. Thus, it was not improper for the prosecutor to tell jurors the evidence showed defendant did not answer the door or otherwise respond to sheriff's officers — who knocked loudly and implored him, by name, to "come to the front door" — or that defendant leapt from his second-story window, across an alleyway, to a neighboring roof after officers saw him in his home. Such closing remarks were offered to demonstrate defendant's awareness during the November 2016 incident that: (1) officers were at his home to arrest him; and (2) defendant took affirmative steps to prevent that arrest. That is to say, the

prosecutor's comments directly related to the two elements of the charged offense that remained in dispute.

In short, the prosecutor did not tell the jury defendant was guilty because he refused to speak to the officers or let them in his home. Rather, the prosecutor urged jurors to consider defendant's overall conduct to find beyond a reasonable doubt that defendant knew or had reason to know sheriff's officers were present to arrest him, and defendant purposely prevented or attempted to prevent them from effecting his arrest. Therefore, defendant has not demonstrated any error in the State's closing argument.

Affirmed.