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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0882-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELIJAH FORD, a/k/a
BABY SAV, and ELIJAH T. FORD,

Defendant-Appellant.

Submitted October 17, 2024 – Decided January 2, 2025

Before Judges Currier, Marczyk, and Torregrossa-
O'Connor.

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Indictment No.
21-04-0240.

Jennifer N. Sellitti, Public Defender, attorney for
appellant (Margaret McLane, Assistant Deputy Public
Defender, of counsel and on the brief).

Yolanda Ciccone, Middlesex County Prosecutor,
attorney for respondent (Hudson E. Knight, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his convictions and sentence after a jury trial. He contends the court failed to charge the jury on the State's burden regarding identity, admitted other bad-acts evidence that was prejudicial to him and imposed an excessive sentence. Because the State's case relied primarily on circumstantial evidence regarding the shooter's identity, the court erred in not charging the jury with the general identification charge, Model Jury Charge (Criminal), "Identification: No In- Or Out-of-Court Identification" (approved Oct. 2015). Therefore, we vacate the convictions and remand for a new trial.

I.

Defendant was charged in an indictment with: first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (count one); second-degree unlawful possession of a weapon (a handgun), N.J.S.A. 2C:39- 5(b) (count two); and second-degree possession of a weapon (a handgun) for unlawful purposes, N.J.S.A 2C:39-4(a) (count three). Two additional counts were later dismissed.

We present the pertinent facts from the trial testimony necessary for disposition of the issues raised on appeal. On December 24, 2020, Jahmir Andrews was shot while "hanging with a friend named Babysav" on a block by Babysav's house. According to Andrews, Babysav had texted Andrews and

invited him to come over to smoke marijuana. Andrews had only met Babysav once before.

When the two ran out of marijuana after about twenty minutes, they walked to a nearby housing complex to meet someone Babysav knew to get some more. The two waited at the housing complex's entrance. Andrews stated he was looking at his phone and then, "just got shot." He did not see anyone prior to being shot, and told police that he did not know who shot him. Andrews suffered multiple gunshot wounds to his back, thigh, chest, arm, and knee.

During the investigation, detectives discovered an Instagram chat conversation at 8:57 p.m. to 8:59 p.m. on December 24 between Andrews and "Babysav_RSC" discussing Andrews meeting up with Babysav. In testifying about the Instagram profile, a detective noted there were "numerous photos of an individual [whom] the account appeared to belong to," and the detective identified defendant from a photo in the account. The bio in the account contained the phrase: "Real Serious Cash." The detective referred to the alphabetical letters RSC as "threat letters."

The same Instagram conversation was found on defendant's phone. And the phone contained a video taken from the scene depicting officers giving Andrews medical treatment that was sent as an "instant message" to an unknown

number from defendant's phone on December 25, 2020, at around 4:00 a.m. In addition, a prosecutor's detective testified she found a Facebook profile with the username "Babysav RSC" and she identified the tattoo on defendant's hand as a tattoo seen in several Facebook photos from that page.

During a discussion regarding jury instructions, defense counsel requested the court include "the identification charge." Counsel began reading the first few sentences of Model Jury Charge (Criminal), "Identification: In-Court Identification Only" (rev. July 2012). The State agreed it was appropriate "because there was identification." Thereafter, the court agreed to issue the charge.

However, the following day, the court advised counsel the in-court identification charge was not applicable because the instruction referenced "a victim or a witness making an in-court identification," which was not present in the case. Defense counsel responded that he believed the first paragraph of the charge "appl[ied] universally" as requiring the State

to prove identity as part of their case in chief. And I . . . wanted that in. . . . But when I went on and I read the rest of the jury charge . . . [I] only thought that the first paragraph and maybe the last two had any application to this particular case.

Defense counsel then agreed that "reading the whole [charge] . . . would be very confusing." There was no further objection to the charge.

During its deliberations, the jury sent out a note with twelve questions, the pertinent one to this appeal being: "Could [the State] have asked if he is in the courtroom? He being Babysav." The court stated it intended to advise the jury it should "only rely upon, in [their] fact finding function as jurors, the evidence that was presented during the [t]rial."

Defense counsel agreed but asked the court to remind the jury that the State bore the burden "to prove each and every element of all the offenses beyond a reasonable doubt." The court denied the request, reasoning that such an instruction would amount to "impermissibly . . . commenting on evidence."

The jury found defendant guilty on all counts. The court sentenced defendant to seventeen years in prison with an eighty-five percent period of parole ineligibility for count one and a concurrent term of seven years with forty-two months of parole ineligibility for count two. Count three was merged with count one.

II.

On appeal, defendant raises the following points for our consideration:

POINT I

THE FAILURE TO GIVE ANY IDENTIFICATION INSTRUCTION AND TO PROPERLY RESPOND TO JURY QUESTIONS ABOUT THE ABSENCE OF EVIDENCE REQUIRES REVERSAL.

A. The Court Was Required To Instruct The Jury On The State's Burden To Prove Identity Beyond A Reasonable Doubt.

B. The Court Was Required To Instruct The Jury On The State's Burden Of Proof In Response To The Jury Questions.

POINT II

THE IMPROPER ADMISSION OF OTHER-BAD-ACT EVIDENCE WITHOUT ANY LIMITING INSTRUCTIONS REQUIRES REVERSAL.

POINT III

DEFENDANT'S SENTENCE IS EXCESSIVE AND SHOULD BE REMANDED FOR RESENTENCING.

We begin with the jury charge. Appropriate and proper jury instructions are "essential for a fair trial." State v. Scharf, 225 N.J. 547, 581 (2016) (quoting State v. Green, 86 N.J. 281, 287 (1981)). As a result, "[i]t is the independent duty of the court to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case" Id. at 580 (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). This includes "the necessity of tailoring jury instructions to the facts" of an individual case. State v. Frisby, 174 N.J. 583, 600 (2002).

In assessing the adequacy of a jury instruction, we must read the charge in its entirety and determine its overall effect, not simply concentrate on the challenged portion. See State v. Garrison, 228 N.J. 182, 201 (2017). In so doing, "[t]he test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law" with respect to the relevant issue. State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997)).

"When a defendant does not request an instruction or fails to object to its omission in the final jury charge, we review the omission of that instruction for plain error." State v. Dunbrack, 245 N.J. 531, 544 (2021) (citing State v. Funderburg, 225 N.J. 66, 79 (2016)); see also R. 1:7-2 ("Except as otherwise provided by R. 1:7-5 and R. 2:10-2 (plain error), no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires . . ."); cf. State v. Montalvo, 229 N.J. 300, 320 (2017) ("Without an objection at the time a jury instruction is given, 'there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case.'" (quoting State v. Singleton, 211 N.J. 157, 182 (2012))).

In the context of jury instructions,

[t]he plain error standard requires a twofold determination: (1) whether there was error; and (2)

whether that error was "clearly capable of producing an unjust result," that is, whether there is "a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached."

[Dunbrack, 245 N.J. at 544 (first quoting R. 2:10-2; and then quoting Funderburg, 225 N.J. at 79).]

In applying this standard, "[t]he error must be evaluated 'in light of the overall strength of the State's case.'" State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Galicia, 210 N.J. 364, 388 (2012)). If the criteria are met, "reversal is warranted." Dunbrack, 245 N.J. at 544.

Our courts have long underscored the necessity of a proper identification charge. In State v. Davis, 363 N.J. Super. 556, 561 (App. Div. 2003), this court found that "as a matter of general procedure[,], a model identification charge should be given in every case in which identification is a legitimate issue." We continued,

[w]hile in some instances it may not be necessary to present an extended charge on identification, nevertheless, the complete absence of any reference to identification as an issue or as an essential element of the State's case is improper. That is the situation in the present case. Although the trial court gave general instructions on such things as credibility and the elements of the crimes charged, there was no specific instruction on the State's burden to prove identification beyond a reasonable doubt. The defense's claim of misidentification, although thin, was not specious. A jury is at liberty to reject a meritless defense, but trial

courts are not at liberty to withhold an instruction, particularly when that instruction addresses the sole basis for defendant's claim of innocence and it goes to an essential element of the State's case. An extended instruction on identification was not necessary on the present facts, but at the very least the jury should have been told, in the words of the present standard Model Jury Charge on identification[.]

[Id. at 561-62.]

Applying these principles, the court's decision not to give an identification instruction here was error. Defendant argues, and the State concedes, the State's case against defendant was based entirely on circumstantial evidence and there was no identification of defendant as the shooter. Defendant's theory, pursued through opening statements, examination of the witnesses and closing arguments was that the State could not prove, beyond a reasonable doubt, that he was the one who shot Andrews.

The question of identification was defendant's chief issue, and the lack of direct evidence regarding it was recognized by the jury when it questioned the court during deliberations whether an in-court identification could have occurred. The jury's question bolsters the conclusion that, under Davis, the court was required to address the issue of identification and the State's burden regarding it, in its charge.

The State contends the omission of the identification charge was harmless error because the court gave generalized instructions regarding the State's burden, making it clear that the State had to prove defendant was the shooter.

Those instructions included:

The burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant. . . .

Your role as jurors is to judge[] . . . the facts and you are to determine the credibility of the various witnesses and the weight to be attached to the testimony of each witness. . . .

Whether or not the defendant has been proven guilty beyond a reasonable doubt is for you to determine based on all the evidence presented during the [t]rial.

The State relies on State v. Cotto, 182 N.J. 316, 326 (2005), where the Supreme Court approved of the trial court's instruction that stated, "the State bears the burden of proving beyond a reasonable doubt each and every element of the offense, including that of the defendant's presence at the scene of the crime and his participation in the crime." (internal quotation marks omitted). The Court found that where a trial court gives a more generalized instruction that nevertheless emphasizes the same "common denominator" as that within a formal identification charge—i.e., that "the State bears the burden of proving beyond a reasonable doubt that the defendant is the wrongdoer"—the trial court

commits no error. Id. at 327. The Court found instead that the test is more simply whether the trial court "clearly explained the State's burden to the jury."

Ibid.

However, here, unlike Cotto, the charge did not clearly specify that the State must show, as an essential element of defendant's guilt, defendant's presence at the scene of the crime and his participation in the crime. The jury charge was not sufficiently explicit in delineating each aspect of the State's burden of proof to permit it to stand as an adequate replacement for a formal identification charge.

This is especially true in light of the State's thin evidence proffered against defendant at trial. There were no eyewitness identifications. Andrews repeatedly stated he did not know who shot him. The circumstantial evidence presented by the State consisted of social media connections and text messages, attempting to establish that defendant was Babysav and with Andrews the night he was shot.

We recognize defense counsel only referred to the "Identification: in-court identification" model jury charge when he requested the court initially include it in the charge. And the following day, when the court advised it did not find

the charge was applicable to the presented facts, defense counsel agreed that the entire charge was not appropriate.

However, the language counsel sought is in the general "Identification" model jury charge. That charge reads:

Defendant, as part of his/her general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he/she is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find this defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that this defendant is the person who committed it.

[Model Jury Charge (Criminal), "Identification: No In-Or Out-of-Court Identification" (approved Oct. 2015).]

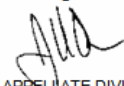
The footnote to the charge states: "This instruction should be given when defendant's defense is that he/she did not commit the crime and the State is seeking to prove his/her guilt without adducing any direct identification evidence, e.g., is relying on circumstantial evidence to tie the defendant to the crime." Ibid.

This charge clearly instructs the jury regarding the burden of proof regarding identification. Because the State's corroborative evidence against defendant was weak, the omitted charge had the potential to tip the scales against defendant because the court's instruction did not adequately convey the State was required to prove the identity of the person who committed the crime—namely that defendant was the shooter—for the jury to find defendant guilty of the charged offenses. Therefore, the absence of the general identification jury charge rose to the level of plain error requiring the vacating of defendant's convictions and a new trial.

Given this determination, we need not address the remainder of defendant's arguments, noting only the following. Defendant asserts the State presented inadmissible bad acts evidence. Defendant should raise the issue prior to the new trial and permit the court to assess the evidence under a N.J.R.E. 404(b)/Cofield¹ analysis. Since most of the evidence refers to prior bad acts of Babysav, and defendant denies he is that person, the trial court must consider that in its determination.

Vacated and remanded for a new trial in accordance with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION

¹ State v. Cofield, 127 N.J. 328 (1992).