SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2835-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRANDON D. WILSON,

Defendant-Appellant.

Submitted May 2, 2022 – Decided May 26, 2022

Before Judges Sumners and Petrillo.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 19-06-0452.

Joseph E. Krakora, Public Defender, attorney for appellant (Andrew R. Burroughs, Designated Counsel, on the briefs).

Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney for the respondent (Jonathan I. Amira, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In this criminal appeal, defendant Brandon D. Wilson seeks reversal of the trial court's denial of his motion for a mistrial based on cumulative error; its failure to charge the jury with a "lesser included" offense; its denial of his motion for a new trial; and its sentencing which failed to afford him the mitigating factors consideration that youthful offenders under age twenty-six are entitled to under N.J.S.A. 2C:44-1. Having considered the record below and the issues on appeal, we vacate defendant's conviction and order a retrial as we are satisfied that the cumulative effect of multiple instances of sustained objectionable testimony could not, in the final analysis, be overcome by the interim curative instructions given by the court. As a result of our decision, we do not reach the other issues on appeal.

I.

On November 16, 2017, defendant was arrested on charges of murder, possession of weapons, endangering, receiving stolen property, and hindering.[1] In its criminal complaint, The State alleged that defendant murdered Shawneeq

[1] (1) Murder N.J.S.A. 2C:11-3a(1), (2) Burglary N.J.S.A. 2C:18- 2a(1), (3) Possession of a Weapon for Unlawful Purpose N.J.S.A. 2C:39-4d, (4) Unlawful Possession of a Weapon N.J.S.A. 2C:39-5d, (5) and (6) Endangering the Welfare of a Child N.J.S.A. 2C:24-4a(2), (7) Receiving Stolen Property N.J.S.A. 2C:20-7, and (8) Hindering Oneself N.J.S.A. 2C:29-3b(1).

Carter on September 22, 2017. At the time of her death, Carter was staying at home of Latise Heath in the City of Woodbury.[2] The State alleged that defendant bludgeoned Carter to death with a metal dumbbell and stabbed her multiple times.

At the time Carter was killed, her son and his female cousin, both young children, were sleeping in the upstairs bedroom. Carter's body was discovered on September 23, 2017, by the children. The children reported their discovery to a neighbor who called the police. Police found the victim naked and face down with multiple signs of trauma. Blood stains were throughout the house.

Nearby Carter's body was a bloodied metal dumbbell with matted hair attached to it. A white powdery substance was sprinkled all over the victim's body. Bedding was askew adjacent to where Carter's body was found and bloody pillows and a bloody t-shirt were recovered from the kitchen floor. An L-shaped metal bar, possibly a piece of exercise equipment, was found covered with blood and hair and a container of Ajax cleaning powder and white wipes also covered in blood were found in a kitchen trashcan. A bloody handprint was

[2] Police investigation determined that defendant was familiar with the residence where Carter was killed as he previously resided there with Heath as a foster child and, slightly more than a year earlier on August 28, 2016, had been charged with burglarizing the residence.

displayed on a damaged window screen. DNA testing by the New Jersey State Laboratory later confirmed a match between defendant's DNA and the handprint as well as samples recovered from the L-shaped metal bar and the t-shirt.

A review of nearby video surveillance footage from the date in question revealed the presence of defendant, Michael Marella, and Nathan Hanlon. Defendant was wearing a baseball cap. Additional video places defendant near the crime scene in the early evening hours and later at a nearby convenience store in Woodbury Heights at 2:12 a.m. on September 23, 2017.

On October 27, 2017, investigators undertook shoe print analysis from crime scene photos. As part of that effort, they requested and obtained defendant's sneakers from the Cape May County Sherriff's Department who at that time had defendant in custody at the county jail on unrelated burglary charges.[3] At or around the time his shoes were seized, defendant contacted his parents by telephone, from the county jail, and requested they throw away two pairs of his shoes that were stored in a closet at their home. That call was recorded as part of standard jail operations. The call was also monitored by

[3] By this time, defendant was already a person of interest to the police in Carter's murder and had been interviewed on October 6, 2017, at the Salem County Jail where he had then been in custody on an unrelated drug charge.

Corrections Officer Kourtney Perry as part of her jail security responsibilities and in light of defendant's possible involvement in the Carter murder.

On January 31, 2018, a stolen 2016 Toyota Camry belonging to Margo Jones was recovered by Logan Township Police.[4] This vehicle was recovered in close proximity to where defendant was living on the date Carter was killed. On the day of Carter's murder, Jones reported the vehicle stolen from where she lived in Bucks County, Pennsylvania. On September 21, 2017, the day before the murder, defendant had been released from the Bucks County Jail, not far from where Jones lived and where the car had been parked at the time it was stolen. A search of the vehicle turned up a baseball cap. Subsequent DNA analysis matched the defendant's DNA to a sample recovered from this hat.

Following pretrial detention and indictment on all eight counts, the case went to trial on November 13, 2019. At trial, the State offered multiple witnesses in support of its case. Throughout the trial defendant moved for a mistrial, consistently alleging cumulative error based on objectionable questions

[4] By this time, the defendant had already been arrested for the Carter murder and was being detained without bail. The Jones vehicle was the basis for count seven of defendant's indictment.

and testimony offered by several of these witnesses. These motions were denied.[5]

On December 19, 2019, the jury returned a guilty verdict on all but two counts which were dismissed by the trial court at the close of the State's case.[6] Defendant moved for a new trial. This motion was denied. On February 7, 2020, defendant was sentenced to fifty-four years with no early-release, five-year parole supervision, and mandatory fines and penalties. The defendant moved for sentence reconsideration. This motion was denied.

Defendant's request for relief on appeal alleges a range of errors by the trial court:

(1) Denial of defendant's motions for mistrial in light of alleged cumulative error.

(2) Admission of an expert's testimony despite his refusal to indicate whether DNA results were within a reasonable degree of medical or scientific certainty.

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[5] Four witnesses provided testimony that was objected to. All objections were sustained. Curative instructions were given. None of the rulings sustaining the objects have been appealed. The witnesses are Dr. Gerald Feigin, the County Medical Examiner; Marella; Perry; Christina Molnar a forensic scientist and Jones.

[6] Counts (5) and (6) charging endangering the welfare of a child were dismissed for lack of any evidence that defendant was aware that children were present on the premises as the time of the incident.

(3) Failure to provide the jury sua sponte with an instruction for a lesser charge of trespass to the burglary charge (plain error).

(4) Denial of a fair trial due to cumulative error from the above individual errors.

(5) Denial of defendant's motion for a new trial for the above errors.

(6) Imposition of a fifty-four year prison sentence as excessive, and failure to consider defendant's youth as a mitigating factor.

II.

When considering, as we do here, allegations of prosecutorial misconduct, we will reverse a conviction when it was "clearly and unmistakably improper" and "so egregious" in the context of the trial as a whole that it deprived the defendant of a fair trial. State v. McNeil-Thomas, 238 N.J. 256, 275 (2019); State v. Pressley, 232 N.J. 587, 593-94 (2018); see e.g., State v. Jackson, 211 N.J. 394, 407 (2012). In determining whether a defendant's right to a fair trial has been denied, "an appellate court must consider (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." State v. Frost, 158 N.J. 76, 83 (1999). "If, after completing such a review, it is apparent to the appellate court that the remarks were sufficiently egregious, a

new trial is appropriate, even in the face of overwhelming evidence that a defendant may, in fact, be guilty." State v. Smith, 212 N.J. 365, 404 (2012).

According to the State, statements made by the medical examiner, a corrections officer, defendant's acquaintance, a victim of car theft, and a forensic scientist, and the State's line of questioning of these witnesses, amounted to, as the State puts it, "de minimis issues at worst." We disagree.

In its brief, the State acknowledges that repeated intervention of the trial court was required to address the prejudicial testimony that was elicited during its examination of these witnesses. The State does not quarrel with the correctness of the trial court's sustaining defense counsel's timely objections as to the questions and testimony multiple times. Neither does the State dispute the propriety, indeed the need, for curative instructions by the trial court, in the moment, every time. Instead, the State essentially argues that it is much ado about nothing, arguing that a fair trial need not be a "perfect" one.

While we have said "[n]ot every deviation from perfection on the part of a prosecutor will justify reversal; before reversal ensues the prosecutor's infraction must be clear and unmistakable and must substantially prejudice the defendant's fundamental right to have the jury fairly evaluate the merits of his defense . . . " State v. Blanks, 190 N.J. Super. 269, 279 (App. Div. 1983), the

Supreme Court has, more importantly, said "[e]ven when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008). This is what we conclude occurred here.

A. Dr. Gerald Feigin, Medical Examiner

Gloucester County Medical Examiner Dr. Gerald Feigin was called as a witness by the State. Dr. Feigen was asked "What was your reason for you seeing [Carter]?" Feigen stated, "She was murdered. There was a lot of trauma and they wanted me to evaluate it to determine the exact cause of death and manner of death." Defense counsel moved to strike, arguing the witness presupposed Carter's condition before conducting an autopsy. The objection was sustained. The court then gave a cautionary instruction to the jury to disregard the statement "that the victim was murdered."

After giving his observations of how Carter died, the State asked Dr. Feigin, "[w]hat was the manner of death that you determined", and he answered "[h]omicide." When asked what he meant, Dr. Feigin said "injury purposefully inflicted on the deceased by another person." Defendant again requested to strike the testimony, arguing the jury should make the determination of

"purposeful." The objection was sustained. The court instructed the jury to "disregard the use of the term purposeful and indicate from [the witness'] definition [of murder] that it was non-accidental." Defendant moved for a mistrial based on prejudicial accumulation of Dr. Feigin's statements. The motion was denied.

B. Michael Marella[7]

During Michael Marella's testimony, the following colloquy occurred between he and the prosecution:

> Q. How did you drive there?
>
> A. In a car.
>
> Q. Okay. Whose car was it?
>
> A. I'm not sure.
>
> Q. Who was driving the vehicle?
>
> A. Brandon.
>
> Q. Did you know Brandon to own a car?
>
> A. Not at the time.
>
> Q. Was it your understanding that that vehicle might have been stolen?

[7] As described above, Marella was captured on video in the company of defendant close to the location of Carter's murder on the day she was killed.

Defense counsel objected and moved for a mistrial. Counsel argued that the question should not have been asked. He correctly observed that at that point it had not yet been established that the vehicle was stolen thus the question was lacking in foundation and furthermore the question of whether the witness knew it was a stolen car was leading. The court agreed and promptly sustained the objection, giving another curative instruction.

C. Kourtney Perry

Over defendant's objection, the State called Perry to testify about a phone call recorded at Cape May County Jail between defendant and his parents while he was being detained. When asked to explain why the call had been recorded, Perry testified: "If anything is discussed that is criminal that needs further investigation or something that we need for internal use, we save it and put it on a disc." Defense counsel objected and moved for a mistrial. Counsel argued that the jury did not need to know the reason why the phone call had been recorded by the jail facility and that the officer's opinion on defendant's potential criminal activity was prejudicial. The trial court denied the mistrial motion and instead provided another limiting instruction.

In the call at issue, defendant asked his father to dispose of a pair of shoes that were in a downstairs closet. The recording was played for the jury. A

transcript was provided to the defense in advance. When the audio was played for the jury, defendant's father could be heard greeting defendant with the words "hey convict." This greeting was not included in the transcript. The State acknowledged that the greeting was supposed to have been redacted from the audio but erroneously was not.

Defense counsel objected and sought a mistrial. Arguing, inter alia, that for a jury to hear the defendant's own father refer to him as "convict" was prejudicial and, combined with all that had already been sustained on objection, so cumulatively prejudicial as to have reached a point where a mistrial was the only option. The trial court disagreed and denied the motion. The court provided a limiting instruction to the jury and struck from the record defendant's father's greeting of "hey convict."

D. Christina Molnar, Forensic Scientist

The State asked expert witness Christina Molnar about a baseball hat recovered from "a stolen vehicle." Defense counsel objected. The court sustained the objection.[8] Defendant, renewed his motion for a mistrial, stating "we're now up to at least six or seven times." The court denied the motion and provided a limiting instruction.

[8] A ruling specifically referred to as "proper" by the State in it's brief on appeal.

E. Margo Jones, Stolen Vehicle Owner

The State called Margo Jones, owner of the vehicle and showed her a photograph, asking her: "Do you recognize those two items in the trunk?" Defense counsel objected and asked for a mistrial on the basis the question was "improper" and that the prosecutor knew it was improper. The trial court sustained the objection but denied the motion for a mistrial. The court instructed the jury to ignore the previous question.

On appeal, defendant argues, as he did at trial, that the foregoing testimony, when taken together, constitutes "a prejudicial pattern of prosecutorial misconduct" that used "leading or suggestive questions on direct examination to put before the jury evidence that was otherwise impermissible." That the evidence was impermissible is not in dispute. The objections were sustained, curative instructions were given, certain testimony was stricken altogether, the State expressly acknowledges that it was "proper" to do so in one instance and has not sought to appeal a single of the trial court's rulings on these objections.

While we cannot conclude, nor do we imply, that any of the "misconduct" was intentional or designed to skirt the rules of evidence and inflame the jury,

we are satisfied that the cumulative prejudicial effect was as feared whether the misconduct was on purpose or inadvertent.

III.

In Point IV of its brief on appeal, the State argues "LACK OF SIGNIFICANT ERRORS UNDERCUTS DEFENDANT'S ARGUMENT FOR A MISTRIAL DUE TO CUMULATIVE ERRORS . . ." relying on State v. Weaver, 219 N.J. 131 (2014), for the proposition that "the theory of cumulative error will . . . not apply where no error was prejudicial . . . and the trial was fair." Id. at 155. In making this statement, the Court was describing a legal standard which, at the time of the Weaver decision, was already almost six decades old. Repeating that standard to this court, without more, does little to support the argument that the cumulative effect of the testimony in this case was not prejudicial. The State overlooks that despite the Court's recitation of the cited standard in Weaver, the Court there determined that case was a "classic case of several errors, none of which may have independently required a reversal and new trial, but which in combination dictate a new trial." Id. at 162. Such is the case here.

Not every error is prejudicial. Not every instance of prejudice is capable of depriving defendant a fair trial. It is the collective consequence of these

thousand paper cuts that we must gauge to answer the question of whether the defendant was deprived of a fair trial. Here, little is offered to argue that is not so. What is offered are hearty, well-crafted, and well-sourced arguments by the State as to the effect of each of the instances during the trial, but very little as to the effect of all of them. Our concern, on this appeal, is not any one of them individually, but the cumulative effect of the entirety of it all.

If we find cumulative error, we need not consider whether each individual error was prejudicial. Jenewicz, 193 N.J. at 473. We consider the aggregate effect of the trial court's errors on the fairness of the trial. Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 56-57 (2009). If "the cumulative effect of small errors is so great as to work prejudice" the judgment of conviction must be reversed. Id. at 53.

We agree with defendant that the test here is at what point did the prejudice from each of the individual instances of misconduct reach such abundance that there was no way forward without compromising the integrity of the trial. There is a point where "a juror will find it impossible to disregard such a prejudicial statement." State v. Boone, 66 N.J. 38, 48 (1974) (citing Krulewitch v. United States, 336 U.S. 440, 453 (1940)). That point was reached in this case. There were a series of prejudicial errors followed by curative

instructions. As a whole, the prejudice could not be overcome. The jury heard impermissible testimony over and over again.

Dr. Feigin opined aloud that Carter's death was caused by "purposefully inflicted" injuries and that she had been a victim of "murder."

The State asked a forensic scientist if evidence she examined had come from a "stolen vehicle."

The State failed to redact the audio recording of a phone call where defendant's own father called him a "convict" when greeting him after it delivered a transcript to the defense that failed to include this greeting.

The prosecutor elicited testimony from defendant's acquaintance about whether or not he knew or suspected that the vehicle defendant was driving was "stolen."

The prosecutor asked the witness whose car had been stolen about items in a vehicle trunk without any foundation or proper basis.

All of this testimony was improper. What purpose does this "evidence" serve? The answer is obvious: it serves no purpose at all other than to distract and prejudice the jury if not in any one standalone instance, certainly in toto. In fact, none of this is "evidence" at all having all been deemed improper or inadmissible. This is not a situation where, for example, prior bad acts evidence

was admitted, and its use had to be qualified pursuant to an instruction by the trial court to ameliorate its prejudicial effect. See N.J.R.E. 404(b). In such an instance, our law and rules have a well-developed paradigm for the admission and controlled consideration of unflattering evidence that meets certain criteria. This is different. This amalgam is a mass of improper questions and inadmissible responses which, according to our law, is of no evidentiary value and proves nothing.

There is little doubt in our mind that all of this can be fairly seen as an abuse of the privilege of direct examination, be it strategic or in error. We do not accept the argument by defendant that this was "part of the prosecutor's trial strategy [to] elicit otherwise impermissible testimony relying on the assumption that the trial court would likely not grant a defense motion for a mistrial" as there is nothing in the record that would cause us to conclude that is so. We do agree, however, that its happening, regardless of the prosecutor's state of mind, warrants reversal of the judgment of conviction and a retrial.

The fact that the trial court sustained all of defense counsel's timely objections and gave repeated curative instructions satisfies us that the defense objections were not frivolous and required the trial court to take action to mitigate the effect of the problematic testimony. Our review of the trial

transcripts confirms this. At some point, the swelling effect of the State's missteps was insurmountable, and a fair trial was no longer possible even with the multiple, contemporaneous, curative instructions. As defense counsel said repeatedly, there comes a point when you cannot "unring the bell."

It is certainly conceivable that any one of these objections standing alone would have been de minimis, or some lesser collection of them inconsequential. That is not the record, before us, and we offer no opinion in that regard. On this record we are satisfied that this assemblage exceeded the bounds of the jury's ability to discount all of what it had heard. Although the trial court sustained defense counsel's numerous objections and provided the jury with limiting instructions, the cumulative effect was, in our view, irreparably prejudicial. "In some circumstances, it is difficult to identify a single error that deprives a defendant of a fair trial. This is one of those cases." Weaver, 219 N.J. at 160.

Our decision does not, and is not intended to, exonerate defendant. Disposition of his guilt or innocence is left to a jury of his peers. Rather our purpose is, as it must be, to preserve and ensure fairness in the trial process as required by our constitution and the United States Constitution. No matter how loathsome the offense, nor likely an accused's guilt, fairness in process is sacrosanct and any deviation therefrom cannot be brooked.

IV.

Considering our decision, we need not address defendant's remaining arguments. R. 2:11-3(e)(2). Reversed and remanded for proceedings consistent 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