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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5552-18**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DEREK SCHOR,

Defendant-Appellant.

Argued September 14, 2021 – Decided November 14, 2022

Before Judges Fisher, DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 17-12-1031.

John P. Flynn, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; John P. Flynn, of counsel and on the briefs).

Tiffany M. Russo, Assistant Prosecutor, argued the cause for respondent (Robert J. Carroll, Morris County Prosecutor, attorney; Tiffany M. Russo, on the brief).

Appellant filed a pro se supplemental brief.

The opinion of the court was delivered by
FISHER, P.J.A.D.

On August 19, 2017, police attempted to stop defendant Derek Schor's vehicle on Route 23 after he was identified as a possible suspect in the theft of a pack of cigarettes from a gas station in Wayne. Police signaled him to stop, but defendant instead led them on a high-speed chase that came to an end in Riverdale when defendant crashed his truck by hitting a curb, causing the truck to roll over. Defendant crawled out from underneath the wreckage and fled on foot into an overgrown retention pond where police eventually apprehended him.

Defendant was charged with: second-degree eluding, N.J.S.A. 2C:29-2(b); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2); and fourth-degree operating a motor vehicle during a period of license suspension, N.J.S.A. 2C:40-26(b).

During the pretrial stage, the State moved to admit certain evidence in its case-in-chief, namely the alleged Wayne theft that preceded defendant's eluding police. The judge granted the State's application to permit evidence of the theft; he viewed that evidence as intrinsic to the eluding and resisting arrest charges.

The judge also determined that the driving-while-suspended charge should be tried separately from the eluding and resisting arrest charges.

The matter then proceeded to trial before a different judge. At the conclusion of the first part of the trial, the jury found defendant guilty of second-degree eluding and fourth-degree resisting arrest by flight. At the conclusion of the second part, the same jury found defendant guilty of fourth-degree operating a motor vehicle during a period of license suspension.

Defendant was sentenced to a seven-year prison term on the eluding conviction, a concurrent one-year term on the resisting arrest conviction, and a consecutive one-year term, with six months of parole ineligibility, on the driving-while-suspended conviction.

In this appeal of the judgment of conviction, defendant argues:

I. THE TRIAL COURT DEPRIVED SCHOR OF A FAIR TRIAL BY PROVIDING DEFICIENT JURY INSTRUCTIONS ABOUT OTHER-CRIMES EVIDENCE (Not Raised Below).

A. The Theft Was Not Intrinsic to the Eluding and Resisting Arrest.

B. The Trial Court Failed to (1) Prohibit the Jury from Considering the Other-Crimes Evidence for Propensity; (2) Sufficiently Define the Permissible Uses of the Other-Crimes Evidence; and (3) Give

the Limiting Instruction in its Final Charge
(Not Raised Below).

II. THE TRIAL COURT DEPRIVED SCHOR OF A FAIR TRIAL BY PROVIDING DEFICIENT JURY INSTRUCTIONS ABOUT FLIGHT (Not Raised Below).

III. EVEN IF THE AFOREMENTIONED ERRORS ARE INDIVIDUALLY INSUFFICIENT TO WARRANT REVERSAL, THEIR CUMULATIVE EFFECT DEPRIVED SCHOR OF A FAIR TRIAL (Not Raised Below).

IV. RESENTENCING IS REQUIRED BECAUSE THE COURT IMPROPERLY FOUND AGGRAVATING FACTOR THREE BASED ON SCHOR'S HISTORY OF MENTAL ILLNESS AND SUBSTANCE ABUSE.

V. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING CONSECUTIVE SENTENCES FOR ELUDING AND DRIVING WHILE SUSPENDED.

We find insufficient merit in Points II, III, IV, and V to warrant further discussion in a written opinion. R. 2:11-3(e)(2). We also reject defendant's Point I for the following reasons.

Defendant was not charged with having stolen a pack of cigarettes. Evidence about that event was only admissible at his trial if it was intrinsic to any of the charged crimes or was otherwise admissible as a prior bad act under N.J.R.E. 404(b). State v. Santamaria, 236 N.J. 390, 409-10 (2019). The judge who considered the admissibility of this evidence at the pretrial stage concluded

the cigarette theft was intrinsic to the eluding and resisting arrest charges. We disagree. Evidence is intrinsic when it either directly proves the charged offense or occurs simultaneous with and facilitates the commission of the charged offense. State v. Rose, 206 N.J. 141, 180 (2011) (quoting United States v. Green, 617 F.3d 233, 248-49 (2d Cir. 2010)). That defendant may have stolen cigarettes from a gas station was not a part or element of the charged offenses, nor did it facilitate the charged offenses. At best, this evidence suggested a motive for defendant's commission of the charged offenses and was admissible under N.J.R.E. 404(b) for that reason. Defendant, in fact, concedes the cigarette-theft evidence was admissible under N.J.R.E. 404(b).¹

Defendant instead argues only that the judge's instructions about the jury's use of this N.J.R.E. 404(b) evidence were inadequate. The record reveals that, after the jury heard testimony about the alleged cigarette theft, the judge provided the jury with the following instructions:

Ladies and gentlemen let me just say to you, let me interrupt for one moment. The State has introduced evidence that Mr. Schor committed a theft from a location in Wayne, New Jersey. In this case the evidence has been introduced by the State for the purposes of motive, knowledge, intent and/or identity

¹ In his appeal brief, defendant acknowledges that "this other-crimes evidence was admissible under N.J.R.E. 404(b) to provide background and as relevant to motive."

in connection with the charges in the indictment. The evidence – that evidence is to provide you with the location to assist you in your understanding of the context and background and assist you in deciding what happened or the defendant's motive, knowledge, intent and/or identity to elude the police and resist arrest. Whether this evidence does in fact demonstrate motive, knowledge, intent and/or identity is for you to decide. You may decide that the evidence does not demonstrate motive, knowledge, intent and/or identity and is not helpful to you at all. In that case you must disregard the evidence. On the other hand, you may decide that the evidence does demonstrate motive, knowledge, intent and/or identity and use it for that specific purpose.

In criticizing the trial judge's handling of the situation, defendant argues that the instruction: (a) should have included a warning that the jury was not entitled to use the evidence of the cigarette theft to conclude defendant had a propensity toward criminal conduct, State v. Reddish, 181 N.J. 553, 611 (2004); (b) did not "focus . . . precisely" on the permissible uses of this evidence, State v. Hernandez, 170 N.J. 106, 132 (2001); and (c) was not repeated during the final jury charge, Rose, 206 N.J. at 161.

These are three important aspects for judges to consider and employ when cautioning juries about the use of N.J.R.E. 404(b) evidence. But defense counsel did not object or raise these matters at trial; had he, the judge undoubtedly would have provided more fulsome instructions. For that reason, before intervening, we must be satisfied that the alleged inadequacies in the judge's instructions

were clearly capable of producing an unjust result. R. 2:10-2; State v. Funderburg, 225 N.J. 66, 79 (2016). Stated another way, to reverse, we must find that the errors now alleged for the first time were "sufficient to raise a reasonable doubt as to whether [they] led the jury to a result it otherwise might not have reached." State v. Taffaro, 195 N.J. 442, 454 (2008) (quoting State v. Macon, 57 N.J. 325, 366 (1971)).

In adhering to this standard of appellate review, we find no reasonable doubt about whether these alleged errors could have led to an unjust result. The evidence of the crimes for which defendant was convicted was overwhelming; for example, there was no doubt defendant was driving the vehicle that eluded police since he was caught red-handed at the end of the pursuit. That defendant may have stolen a pack of cigarettes shortly before engaging in that far more serious offense was hardly the type of evidence that would have likely had any impact on the jury's deliberations.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION