FILED, Clerk of the Appellate Division, August 30, 2023, **A-001275-22**
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Docket No. A-1275-22

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

	: SUPERIOR COURT OF NEW JERSEY
	: CUMBERLAND COUNTY
STATE OF NEW JERSEY,	: APPELLATE DIVISION
	:
Respondent,	: ON APPEAL FROM: LAW
	: DIVISION, CRIMINAL PART,
	: CUMBERLAND
	: COUNTY VICINAGE
	:
	: INDICTMENT NO. 18-03-266-I
v.	:
GERALD BUTLER,	: SAT BELOW:
	: HON. MICHAEL J. SILVANTO, J.S.C.
	: HON. WILLIAM F. ZIEGLER, J.S.C
Appellant.	:

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

On March 1, 2017, a Cumberland Grand Jury returned Ind. No. 17-03- 190 against twenty-one people, including defendant-appellant Gerald W. Butler, and co-defendants Joshua D. Phillips, Adam Yurdock, and Rafael Gonzalez, alleging various weapons and narcotics offenses arising from "Operation That's All Folks." (Da 1-14)[1]. On July 5, 2017, the prosecutor dismissed the charges against Yurdock, Gonzalez, and Butler on her own motion. (Da 15). Phillips pled guilty to third-degree possession of a controlled dangerous substance (CDS) and received a term of probation. (Da 24-26).

On March 31, 2017, a Cumberland Grand Jury returned Ind. No. 17-05- 503, charging only Yurdock, Butler, and Gonzalez with narcotics and weapons offenses. (Da 27-29). Gonzalez pled guilty to second-degree possession of a firearm while committing a CDS offense, N.J.S.A. 2C:39-4.1(a), and received a sentence of five years incarceration with one year of parole ineligibility. (Da 30-33). Yurdock was

[1] [1] [1] "Db" – defendant-appellant's brief
"Da" – defendant-appellant's appendix.
"1T" – Transcript - September 10, 2018 (motion).
"2T" – Transcript – February 22, 2022 (motion).
"3T" – Transcript – May 24, 2022 (motion)..
"4T" – Transcript – June 10, 2022 (trial).
"5T" – Transcript – June 14, 2022 (trial).
"6T" – Transcript – June 15, 2022 (trial).
"7T" – Transcript – June 28, 2022 (trial).
"8T" – Transcript – June 29, 2022 (trial).
"9T" – Transcript – August 29, 2022 (motion).
"10T" – Transcript – October 3, 2022 (sentencing).
"11T" – Transcript – November 7, 2022 (sentencing).

admitted into Pretrial Intervention. (Da 34). On March 28, 2018, the charges against Butler were dismissed. (Da 35-38).

On March 28, 2018, a Cumberland Grand Jury returned Ind. No. 18-03- 266 charging only Butler with second-degree conspiracy to possess CDS with the intent to distribute, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:35-5(b)(2) (Count 1); third-degree conspiracy to distribute CDS, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:35-5(b)(3) (Count 2); third-degree distribution of CDS, N.J.S.A. 2C:35-5(b)(3) (Count 3); two counts of third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1) (Count 4 and 7); second-degree possession of CDS with the intent to distribute, N.J.S.A. 2C:35-5(b)(2) (Count 5); second degree possession of a weapon while committing a CDS offense, N.J.S.A. 2C:39-4.1 (Count 6); and possession of a weapon by a convicted person, N.J.S.A. 2C:39-7(b)(1) (Count 8). (Da 39-41).

On May 24, 2022, the court held a hearing on various evidentiary issues. (3T) On May 31, 2022, the court entered an order:

> 1. Denying defendant's motion to bar the lead detective's testimony but prohibiting him from mentioning the confidential informant (CI) or "comment[ing] or opin[ing] on whether he believes a narcotics transaction took place";
>
> 2. Denying defendant's motion to compel the identity of the CI;
>
> 3. Denying defendant's motion to prohibit the officers from testifying they work for the Organized Crime Bureau;
>
> 4. Granting defendant's motion to bar the State from referencing the "search warrant";

5. Granting defendant's motion to prevent the State's expert from opining on whether defendant possessed CDS with an intent to sell.

(Da 45-46)

A bifurcated trial was held concerning Counts 1 through 7 on June 10, 14, 15, 28, and 29, 2022. (4T-8T). On June 29, 2022, the jury acquitted Butler of Count 6, charging possession of a weapon while committing a CDS offense, and found him guilty of the remaining counts. (Da 146-148). In light of the jury's acquittal, the judge dismissed the certain persons charge. (Da 151).

On July 1, 2022, the State filed a motion for a mandatory extended term pursuant to N.J.S.A. 2C:43-6(f), which was granted on November 7, 2022. (Da 149-150). Butler was sentenced to an extended term of 15 years imprisonment with 7.5 years of parole ineligibility for second-degree possession of CDS with intent to distribute (Count 5), and a concurrent sentence of 5 years imprisonment with 2.5 years of parole ineligibility for third-degree distribution of CDS (Count 3). The remaining convictions merged. (Da 152-155)

Butler filed a Notice of Appeal on December 28, 2022. (Da 156-159) This brief follows.

<u>COUNTER-STATEMENT OF FACTS</u>

In April of 2016, Sergeant Ryan Breslin of the Organized Crime Bureau served as the lead agent on a "large scale weapons trafficking and narcotics investigation out of Millville." (4T101-5, 103-17 to 22, 104-21 to 23, 107-17). The purpose of the Organized Crime Bureau was "to conduct proactive investigations into narcotic trafficking within the county." (4T104-15 to 18). The investigation, called "Operation That's All Folks," "target[ed] individuals that had been involved in violence in the city of Millville, as well as weapons trafficking throughout the county." (4T105-1 to 9).

The police "received information about several shootings being conducted within the city of Millville" and matched "shell casings from different scenes." (4T106-9 to 10, 107-6 to 10). They "were able to identify an individual selling firearms in the county" and "targeted that individual as well as the other group that [they] believed to be involved in these shootings." (4T107-10 to 14). The police obtained wiretaps and began intercepting phone calls on three different lines as part of this investigation, intercepting "hundreds of sessions." (4T109-6 to 12, 114-5 to 8).

In late August or early September, the police attempted to conduct a firearm purchase using an undercover officer with one of the targets of the investigation. (4T108-1 to 109-5). Though this purchase was not completed, the suspected seller called another number, 856-392-3763, on September 6, 2016, asking "when can I go get that from old boy?" (4T109-16 to 22, 117-21 to 23, 119-14 to 25, Da 48). The police did not know who this number belonged to, so Breslin searched the phone number on Facebook, which linked to a profile with the name “Fast Life Blizzy Ho.” (4T117-24 to 118-1, 124-21 to 125-10). Breslin twice testified that one of the photos on this profile matched the defendant and made an in-court identification of Butler as the person depicted in the profile. (4T124-11 to 25, 128-21 to 25). Another member of the Organized Crime Bureau, Lieutenant Steven J. O’Neill, Jr., also opined that the Facebook images depicted Butler. (5T74-7 to 10).

The police obtained authorization to intercept this line, which became another target of the investigation. (4T120-21 to 122-17). Several calls and texts were intercepted and admitted into evidence, many of which were either distorted, contained missing words, or indiscernible. (4T123-7 to 151-3; Da 47-144). The State alleged that these conversations used slang terms relating to drugs and reflected individual buyers seeking to purchase drugs from Butler. On the transcript of the calls and text messages, the officers transcribed who they believed the writer of the message was or who they believed the voices belonged to. (5T44-18 to 45-9). Even so, some of the parties were unknown and unidentified. (Da 47-144). On one call, a participant responds “yes” when asked if he was “Mr. Butler” (Da 53.

O’Neill listened to a call made on September 12, 2016, and identified the voice heard as belonging to Butler. (5T60-18, 61-19 to 23, 63-17 to 22, 65-17 to 66-4). He maintained that he was familiar with Butler’s voice because six years prior, in 2010, he had a 35-minute conversation with him. (5T64-20 to 65-6, 67-25).

During this prior conversation, Butler said his nickname was Blaze. (5T65-9 to 13). Prior to making the identification, he was aware that the police believed that the phone belonged to Butler and had seen the Facebook profile. (5T71-17 to 19). He did not prepare a report documenting his identification until 2020. (5T76-1 to 10).

During the weeks of September 11th and 18th of 2016, Breslin conducted surveillance of the Delsea Gardens apartment complex during which he twice observed Butler entering Apartment 16D. (5T22-21 to 24, 23-5 to 11, 24-7 to 16). He also saw Butler driving a Nissan Maxima. (5T24-7 to 16, 28-23 to 29- 16, 30-25).

On September 23, 2016, Lieutenant Joseph P. Hoydis, Jr., also of the Organized Crime Bureau, conducted surveillance of Delsea Gardens. (6T16- 25, 18-8 to 22, 20-11 to 15). From 100 yards away, Hoydis observed a driver of a Trans Am approach a driver of a Nissan in the parking lot. (6T21-6 to 22-9, 46-4 to 7). Hoydis testified multiple times that he observed "what I believed to be a narcotics transaction[.]" (6T20-23 to 25, 21-22 to 23, 22-5 to 6)

Sergeant Christopher Rodriguez -- who also worked with the Organized Crime Bureau on "Operation That's All Folks," which he described as a "very large operation" -- conducted a motor vehicle stop of the Trans Am. (7T12-13 to 16, 14-16 to 18, 17-7 to 19). He arrested the driver, Joshua Phillips, who was in possession of two wax bags containing suspected heroin, and one colored rock substance suspected to be cocaine. (7T20-6 to 21-24, 22-17 to 19). One of seized items was later tested and determined to be heroin. (6T204-18 to 22).

When arrested, Phillips told the police he bought narcotics from a person he knew as "B," but was "on a lot of drugs" and high at the time. (7T91-8 to 92-13, 102-21 to 103-9, 95-1 to 13). A year and a half later, he made an out-of-court identification of the seller as a person in the Facebook page found by Breslin. (7T92-1 to 16; Da 145). He could not remember if the police showed him this single photograph or an array. (7T94-6 to 8). At trial, Phillips testified he bought drugs from a person named Blaze and made an in-court identification of Butler as the seller, stating that he "may or may not have been him," and explaining that he only "vaguely" remembered that day (7T86-5, 87-1 to 15).

"Operation That's All Folks" concluded on September 28, 2016, with "arrests made" and "searches . . . conducted" of multiple locations and vehicles. (5T31-20 to 25, 32-2 to 7; 7T52-17 to 53-2, 58-1 to 4). As part of this takedown, the police obtained a warrant for Apartment 16D naming Butler as the target. (5T32-11 to 15; 6T26-7 to 27-21). The apartment, however, was leased to Rafael Gonzalez, who resided in the upstairs bedroom. (6T37-12 to 20). Butler was never seen at the apartment on the 28th. (6T60-12 to 17).

Upon arrival at 16D, the officers knocked and announced their presence as required by the search warrant. (6T50-12 to 23; 7T59-8 to 24). After entering, the officers found Adam Yurdock sitting on a chair in the living room next to a sofa where a child was laying. (6T51-18 to 53-5; 7T34-16 to 35-1). A .38 caliber gun was found shoved in between the cushions of that sofa couch. (6T52-12 to 53-5). Yurdock had slept on the couch the night before and testified that Butler had also stayed over. (6T149-14 to 150-2, 158-9 to 11, 161-7 to 19, 164-12 to 18, 169-17 to 21). He disclaimed ownership of the gun found in the sofa. (6T152-6 to 7).

The police found bags of suspected heroin and cocaine, wax folds, various caliber bullets, a comb, and three spent .38 cartridges. (6T38-24 to 29- 8). Several of these items were found upstairs in Gonzalez's bedroom, including: a bag containing a brown substance in the air conditioning vent; a bag containing suspected heroin; numerous empty blue wax folds; and the .22 caliber gun in the closet along with paperwork addressed to Gonzalez and bags of suspected crack cocaine (6T53-6 to 55-18, 61-12 to 14, 72-5 to 24; 7T37-6 to 9, 70-20 to 73-21). Other bags of suspected cocaine were found in a kitchen cabinet along with two scales. (6T60-18 to 61-11; 7T79-7 to 16). Of the suspected drugs found, two bags cumulatively weighing 14.676 grams were tested and determined to contain heroin; two other bags cumulatively weighing 20.362 grams were tested and determined to contain cocaine. (6T30-22 to 35- 8, 203-13 to 17, 203-20 to 22, 205-3 to 8).

Detective Lynn Welhing, also of the Organized Crime Bureau, testified that in her work as a narcotics officer, she had come across "drugs and/or guns that are being shared amongst more than one individual." (7T79-23 to 25).

Gonzalez received a phone call that his house was "being raided" and returned to his apartment where he was told that it was a raid targeting Butler. (6T67-16 to 68-7). Gonzalez admitted ownership of the .38 caliber gun found in his bedroom but claimed he had never seen the .22 caliber weapon. (6T68- 16 to 69-4). Gonzalez also disclaimed ownership of any of the drugs and testified that he did not know whose they were. (6T70-8 to 12). Gonzalez further explained that he, Yurdock, and Butler were friends and that Butler "stayed at [his] house a few times." (6T66-8 to 18, 67-22 to 23, 77-13 to 20). There were "a lot of people sleeping and coming in and out of" his house, but Butler never lived at the apartment. (6T71-1 to 7, 76-3 to 25).

Yurdock and Gonzalez were arrested and charged concerning the items found in Apartment 16D. (6T63-17 to 22). Gonzalez was convicted in 2016 of possession of the .38 caliber weapon. (6T71-2 to 11). He explained that he possessed it for self-defense because a friend of his was recently killed in the Delsea Gardens apartment complex, which he described as "dangerous." (6T71-9 to 25). Yurdock testified that he did not remember being charged with anything arising from the search. (6T161-21 to 162-11). He claimed he did not know about any drugs in the house. (6T157-2 to 4).

Upon arrest, Gonzalez gave a statement accusing Butler of possessing the gun and drugs in his home, telling the police that Butler was living there at the time, slept on the couch, and kept items in the kitchen cabinet. (6T72-8 to 13, 79-21 to 80-2, 116-19 to 21, 120-7, 118-1 to 119-7). Because Gonzalez was using drugs at the time of his arrest, he did not remember telling the police that the gun and drugs belonged to Butler. (6T83-14 to 20). At trial, Gonzalez testified he never saw either Yurdock or Butler with a gun. (6T79-3 to 7).

On the same day that 16D was searched, Sergeant Raymond Cavagnaro located a Nissan Maxima parked outside a doctor's office. (5T81-2 to 82-22). Butler and a pregnant woman exited the office, entered the Nissan, and drove away. (5T82-19 to 83-19). The officers stopped the vehicle at 1:40p.m. and arrested Butler, who was the passenger in the car, pursuant to an arrest warrant. (5T84-16 to 85-13). A search of Butler revealed $875. (5T86-8 to 14).

When it was discovered that the driver, Tiffany Parker, had active warrants, two detectives took her into custody. (5T87-13 to 88-2). The vehicle was searched pursuant to a search warrant. (5T88-3 to 17; 7T31- 21 to 22, 49-19 to 22). Two phones were found in the vehicle: an LG and a Cricket phone. (5T124-5 to 21). The car contained a t-shirt with the words "Fast Life," as well as Butler's identification documents. (7T47-17 to 49-13). The police seized a total of $25. (7T42-12 to 18).

No drugs, drug paraphernalia, or weapons were found on Butler, Parker, or in the car. (7T55-16 to 56-10).

Detective Nicholas Barber conducted extractions on the phones found in the vehicle. (5T94-1, 98-16 to 99-1). On the LG phone were messages from September 28, 2016, saying "they behind your house with dog and gun" and "they just raided 16D." (5T110-3 to 24). A message from the day before reads: "bro, this my new number….Blaze." (5T111-12 to 15). The Facebook messenger account on the phone was for the username Fast Life Blizzy Ho. (5T114-16 to 25). Breslin testified that the cell tower data for this phone indicated that, at some point, it had been close to the Delsea Gardens apartment complex. (5T128-7 to 22). The Cricket phone belonged to Parker and contained messages with a person named "Blaze." (5T116-19 to 119-19). "Fast Life Blizzy Ho" is listed as a contact. (5T118-23 to 119-3). Parker engaged in a Facebook message with Fast Life Blizzy Ho on September 27th during which she asked: "Are you coming to the doctor's tomorrow?" (5T119-4 to 19).

Lieutenant Daniel D. Holt testified as an expert in narcotics distribution and drug terminology. (4T51-21, 65-1 to 71-7, 71-2 to 79-6). He testified that a narcotics network could be 30 people, one person, or that "a dealer and his buyers could be its own network." (4T63-25 to 64-4, 98-18 to 25).

Butler was acquitted of possession of the weapons found in Apartment 16D, but he was convicted of possession of the narcotics found in the apartment, as well as the single distribution to Phillips.

LEGAL ARGUMENT

POINT I

THE STATE'S REFERENCE TO A TELEVISION PROGRAM AND TO THE INVESTIGATION THAT RESULTED IN THE EVIDENCE USED AGAINST THE DEFENDANT AT TRIAL WAS APPROPRIATE.

Opening statements by prosecutors "should provide an outline or roadmap of the State's case and should be limited to a general recital of what the State expects, in good faith, to prove by competent evidence." State v. Land, 435 N.J. Super. 249, 269 (App. Div. 2014) (internal quotation marks and citation omitted). Improper remarks made by a prosecutor are to be considered in the context of the opening statement as a whole and will not be grounds for reversal, particularly if unobjected to, as long as they did not deprive the defendant of a fair trial. State v. Roman, 382 N.J. Super. 44, 57-58, 61 (App. Div. 2005), certif. dismissed as improvidently granted 189 N.J. 420 (2007).

In closing statements, prosecutors are permitted to "sum up the State's case graphically and forcefully," State v. Bradshaw, 195 N.J. 493, 510 (2008); State v. Pratt, 226 N.J. Super. 307, 323 (App. Div. 1988) and to pursue these and other prosecutorial duties "with earnestness and vigor." State v. Ingram, 196 N.J. 23, 43 (2008). A fleeting and isolated remark is generally not grounds for reversal unless it is clearly capable of producing an unjust result. See State v. Gorthy, 226 N.J. 516, 539-540 (2016). However, while prosecutors are encouraged to make "vigorous and forceful" arguments, they must "refrain from improper methods" and "use legitimate means to bring about a just conviction." State v. Smith, 167 N.J. 158, 177 (2001) (citations omitted).

On appeal, the defendant objects to the prosecutor's reference to the once-popular television program *The Wire* in opening and closing statements, arguing that this "served to inflame the jury, to make Butler appear dangerous, and to improperly increase the odds of conviction." (Db 18). This is at best an exaggeration and more likely a misrepresentation of the statements made by the prosecutor at trial. The prosecutor did not compare the defendant to the violent, drug selling, murderers stalking the corners of Baltimore in the HBO program, she referred to the television drama to illustrate the nature of the complex investigatory techniques used by police in this case as a means of putting the collected data used as evidence into context.

At the start of her opening remarks, the prosecutor made a reference to *The Wire*:

> You heard a little bit from the Judge about what this case was about. You heard about drugs. You heard about guns. But it's a little bit bigger than that, because all those guns and drugs go together. This is a case about a phone intercept, that's also known as a wire.
>
> And there was a few years ago, many years ago now, that show on tv called *The Wire*. And in that show there was in Baltimore a rash of crime happening within the community. It seemed very organized. People were always at certain locations. They seemed to be following a hierarchy, or someone's orders. And they were trying to figure out how guns and drugs were coming into their community. And while they were trying to surveil all these different locations, they used all of the investigative means that they had available to them, they still weren't able to really crack down.
>
> But they were eventually able to realize that there was a person they needed to focus on. The only way to really find out how the guns and drugs were flowing in the community was to get on that person's phone. So they got an intercept known as the wire.
>
> That's similar to this case. Back in August to September in 2016, in the City of Millville, the county prosecutor's office, specifically the Organized Crime Unit, got their own wire. And they did this because there was a rash of violence that was happening throughout Millville and throughout the Summer of 2016. They wanted to know what was the emphasis of that, what was the origin? Where was is coming from? Who was involved?
>
> And so much was happening that they finally decided that they needed to get on a wire. So they narrowed down their investigation, they narrowed it down to four individuals. And the names of those individuals are not important to

> you because none of them are Mr. Butler. But do understand that that's how the investigation began.
>
> (8T 18-14 to 20-2)

In her opening statement, the prosecutor did not compare the defendant to Stringer Bell, the criminal mastermind, or Avon Barksdale, the ruthless and violent drug kingpin, or Omar Little, the shotgun-wielding outlaw. Any such comparison would have been grossly prejudicial in line with State v. Williams, 244 N.J. 592 (2021) (the prosecutor referred to Jack Nicholson's character in The Shining). Instead, she discussed a complex tool used by police to solve crime as it would most easily be understood by an uninformed jury: through popular television. This would be more like referring to The Shining to demonstrate the severity of cold winters in the Northeast, which is a far cry from the facts of Williams. Here, the prosecutor set the stage for evidence that would be introduced at trial by describing the investigatory techniques used by local police and illustrated those techniques by eliciting an appropriate parallel from pop culture.

Immediately following her reference to *The Wire*, the prosecutor explained the investigation that led to various police intercepts of the communications of targeted suspects. (8T 18-14 to 24-52). The purpose of discussing the television show was to illustrate the shape and character of these intercepts: the manner in which investigators were able to uncover evidence that the State would rely on in seeking the defendant's conviction. The complexities of the evidence presented and the way it was obtained warranted illustration through comparison to something the jury might be more familiar with.

Similarly, the reference to “large-scale criminal enterprise” (Db 18) that concerned the defendant in the prosecutor’s closing statement was not a prejudicial implication that the defendant was some manner of criminal mastermind, but a contextualization of the investigation that led to the defendant’s arrest. The jury was shown evidence obtained from wiretaps that included coded language about drug use and drug sales. Because it was important that the jurors understood the manner in which these communications were made, how they were intercepted, and what exactly they mean, the prosecutor rightfully underscored context in which they were uttered and how and why investigators got access to them.

The prosecution relied on critical pieces of circumstantial evidence to establish the identity of the criminal actor in this offense and a series of intercepted communications needed careful consideration in order to make the defendant’s guilt clear. (see 8T 54-25 to 65-2). It was not only proper but, in this case, necessary for the prosecutor to frame the manner in which these communications were obtained, which necessarily required reference to the investigation of the Organized Crime Unit and Operation “That’s All Folks”.

On appeal, the defendant also raises an objection to testimony that referenced a search warrant. Reference was made to the search warrant by a testifying witness (6T26-13 to 27-21; 7T59-8 to 24), but defendant's trial counsel failed to make an objection at that time. Had he done so, the Court could have provided a curative instruction then. Furthermore, counsel for the defense chose to bring up the existence and execution of the search warrant multiple times themselves in summation (8T11-15 to 12-3; 8T18-16 to 17). Under that settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal… '" State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)). Because trial counsel did not object at the time, the court must now apply a plain error standard of review, which the appellant fails to satisfy.

POINT II

THERE IS NO INDICATION THAT THE TESTIMONY OF JOSHUA PHILLIPS, A WITNESS FOR THE PROSECUTION, WAS UNRELIABLE AND THE DEFENDANT HAS NO STANDING TO ASSERT THE CONSTITUTIONAL RIGHTS OF THIS THIRD-PARTY WITNESS.

After being subpoenaed by the State, Joshua Phillips initially invoked his Fifth Amendment rights on the stand and declined to testify. (6T124-15 to 25, 126-15 to

22) At that time, he was serving a Recovery Court sentence for the crime springing from the same events he was being asked to testify about. (Da 24-26, 42-44)

Indeed, the witness proclaimed his intention to "plead the Fifth" in response to any question asked, whether there was a chance it could incriminate him or not.

> [Prosecutor] Mr. Phillips, did you plead guilty to possession of CDS back in 2017?
>
> [Phillips] I plead the Fifth.
>
> [Prosecutor] Is it your intention, sir, to answer every question with you plead the Fifth?
>
> [Phillips] Yes.
>
> (6T128-2 to 7)

The witness made it clear that his fear was not self-incrimination, but the fact that he could not benefit from testifying. He stated, "I indicated four years ago that if I wasn't getting anything out of this, I wasn't helping you do your job" (6T127-9 to 11) and "I can either be on my way or we can sit here and waste more time. Or you can give me what I want and I'll give you what you want." (6T127-24 to 128-1).

Phillips was reluctant to testify and the judge warned that he could be held pending a contempt hearing if he did not do so. (6T143-25 to 144-11). Counsel for the defense raised the issue of coerced testimony and the Judge permitted the State to move on to another witness while it was sorted out. (6T145-14 to 18) Ultimately, Phillips spoke to an attorney and, based on the advice of that attorney, chose to testify. (6T210-12 to 23)

When the witness made it clear that he was unenthusiastic about testifying, the prosecutor requested, and the Judge agreed, that the witness should be considered unavailable under Rule 804 and that his prior statements related to the events of the evening in question should be admitted as evidence under Rule 803 (c)(25) as a statement against interest. (6T133-1 to 16) The defense attorney preferred to hear testimony from Phillips in order to retain his opportunity to cross examine the witness instead of his evidence being introduced through prior statements and it was the defense that suggested "[…]there's always been the option to hold somebody in contempt" (6T 134-22 to 23) so that the witness would be available (coerced or not) to testify and be made available for cross-examination for the benefit of the defense.

The defendant here cannot claim that he was prejudiced by the information obtained from a witness who may have preferred to exercise a right not to testify where the substance of his testimony would have come in any way through the prior statement of an unavailable witness, but for defense counsel's own insistence that the witness take the stand instead. Similarly, it cannot shock the conscience of the Court to permit any coerced testimony against the defendant when it was defense counsel who took part in the coercing. Ultimately, even if the testimony should not have been permitted, there is no undue prejudice against the defendant who championed the case for such testimony and where the substance of the testimony would have been heard regardless, minus defense counsel's opportunity to cross-examine. Furthermore, if Phillips' right against self-incrimination was indeed violated, the defendant here has no standing to invoke that right on his behalf.

"Mistakes at trial are subject to the invited-error doctrine." State v. A.R., 213 N.J. 542, 561 (2013). "Under that settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal…'" State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)). See State v. Santamaria, 236 N.J. 390, 409 (2019) ("a party cannot strategically withhold its objection to risky or unsavory evidence at trial only to raise the issue on appeal when the tactic does not pan out"). "The doctrine prevents litigants from 'playing fast and loose' with, or otherwise manipulating, the judicial process." State v. Bailey, 231 N.J. 474, 490 (2018) (quoting State v. Jenkins, 178 N.J. 347, 359 (2004)). "In other words, if a party has 'invited' the error, he is barred from raising an objection for the first time on appeal." State v. A.R., 213 N.J. 542, 561 (2013). "The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to 22 be error." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 340 (2010) (quoting Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996)).

POINT III

FILED, Clerk of the Appellate Division, August 30, 2023, **A-001275-22**
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THE OFFICER'S TESTIMONY REGARDING A NARCOTICS TRANSACTION DID NOT IMPROPERLY PREJUDICE THE DEFENDANT.

At trial, defense counsel did not object to Detective Hoydis's testimony regarding a narcotics transaction. Where an issue is not raised below, Rule 2:10-2 applies. "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of trial or appellate court." Rule 2:10-2. "In the context of a jury trial, the possibility 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. G.E.P., 243 N.J. 362, 389 (2020) (quoting State v. Jordan, 147 N.J. 409, 422 (1997) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). Thus, the plain error standard requires a determination of: "(1) whether there was error; and (2) whether that error was 'clearly capable of producing an unjust result,' R. 2:10-2; 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.'" State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)). "To determine whether an alleged error rises to the level of plain error, it 'must be evaluated in light of the overall strength of the State's case.'" State v. Clark, 251 N.J. 266, 287 (2022) (slip op. at 23) (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)).

Detective Hoydis's testimony as to the narcotics transaction he observed did not improperly infringe on the role of the jury as the finder of fact because this transaction was not a part of the crime for which the defendant was on trial and was not a necessary fact to be determined by the jurors. Furthermore, the testimony provided by Phillips, stating unequivocally and, because it was a statement against his own interest, especially credibly that a narcotics transaction did occur as the detective testified. Given the overall strength of the State's case and the fact that this same information was otherwise appropriately provided to the jury by Phillips, this does not rise to the plain error standard under State v. Clark.

The State's reference to the narcotics transaction, independently testified to by Phillips, in its summation also fails to rise to the level of plain error. "The trial court has broad discretion in the conduct of the trial, including the scope of counsel's summation." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 392 (2009). "The abuse of discretion standard applies to the trial court's rulings during counsel's summation." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 392-93 (2009). See cases listed under Rule 1:7-1 (Opening and Closing Statement) and Rule 2:10-2. When no objection was made to the comments, the appellate court applies the plain error standard. R. 2:10-2; State v. Santamaria, 236 N.J. 390, 405 (2019); Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 493 (2001).

POINT IV

THE DEFENDANT WAS NOT UNDULY PREJUDICED BY THE IDENTIFICATION PROCEDURES AND INSTRUCTIONS RELIED UPON AT TRIAL.

The appellate standard of review for an out-of-court-identification is abuse of discretion. State v. Wright, 444 N.J. Super. 347, 356-57 (App. Div. 2016) (*citing* State v. Johnson, 42 N.J. 146, 161 (1964)). "The aim of the review at the outset is to determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." Ibid. "Appellate review of a motion judge's factual findings in a suppression hearing is highly deferential." State v. Gonzales, 227 N.J. 77, 101 (2016) (*citing* State v. Hubbard, 222 N.J. 249, 262 (2015)). An appellate court will "not disturb the trial court's findings merely because 'it might have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close case." State v. Elders, 192 N.J. 224, 244 (2007) (*citing* Johnson, 42 N.J. at 162).

Here, the State relied on an out-of-court identification made by Phillips of the person depicted in a Facebook photo as the individual who sold him drugs. Phillips could not remember if the police showed him a single photo or multiple photos. (7T93-20 to 94-15). Phillips also made a consistent in-court identification at trial, testifying that Butler "may or may not have been" the person who sold him drugs. (7T87-8 to 12).

State v. Henderson, 208 N.J. 208 (2011) established a new defendant-friendly framework for identification issues, but even under this new standard, the defendant has the burden of showing some evidence of improper suggestiveness in an identification and can then argue the point in a pre-trial hearing. Id at 288. Not only does defendant fail to provide grounds for which this identification should be challenged on appeal when it was unobjected-to at trial, he fails to point to a tangible source of undue suggestiveness at all. "The court should conduct a Wade hearing only if defendant offers some evidence of suggestiveness." Id. at 290. Where the defendant fails to make a timely and supported request for a Wade hearing before trial, it is inappropriate to apply the Henderson factors to an identification post-hoc on appeal.

The defendant now argues, "Pursuant to Watson, which was issued before Butler's trial, the court should have held a hearing to test the reliability of this in-court identification." (Db 44). However, Watson "did not object to [the witness's] in-court identification. Nor did defendant request a Wade hearing to determine the admissibility of the out-of-court identification procedure that had been administered to [the witness]." State v. Watson, 472 N.J. Super. 381, 476 (2022). In Watson, Defendant contend[ed] for the first time on appeal that the model charge does not adequately explain the inherently suggestive nature of in-court identifications," but the Court "decline[d] to impose a new categorical restriction on a familiar trial practice that has been used for many decades and that jurors have come to expect. [The Court] thus conclude[d] that [the witness's] in-court identification was admissible. [The Court] also conclude[d] that the trial court did not commit plain error in instructing the jury regarding the in-court identification." Id at 475-476. It is wholly in line with Watson for this court to reject the defendant's newly raised argument alleging any error as to out-of-court or in-court identification in the present case.

Any perceived inadequacies in the identification procedures were not raised below, nor did defense counsel object to the jury instructions regarding identification at trial.

Furthermore, given the ambivalent nature of the witness's in-court-identification and his comments about his previous out-of-court identification, it is clear that the jury adequately understood that this was not a positive identification and, even if improper, it could not have had a considerable prejudicial effect on the defendant. Indeed, that the defendant "may or may not have been" the man who sold Phillips drugs is scarcely an identification at all.

In her summation, the prosecutor stated:

> And counsel had mentioned something about the identification procedure in and of itself and how it should have been done. Ladies and gentlemen, you had no evidence presented to you about how the identification should have been done. This case isn't about how I would have done the investigation, how counsel would have done the investigation or even how you would have done it. If you had evidence to the contrary where somebody said, yeah, that's not the way you should do that, that's improper, that's something for you to consider. But you don't have that evidence.
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> Mr. Phillips was shown a photo, and he signed it and said that's the person I bought from. He's not a victim. Victim's [sic] get photo arrays so that they don't misidentify somebody who committed a crime against them or there's a stress under the event or the crime that's happening where you might misidentify somebody. That's not who Mr. Phillips was, so he doesn't get a photo array. You can put a photo in front of him and say is this the guy? It's yes or no. He's not a victim, so that's not before you either.
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> (8T72-5 to 25)

The prosecutor accurately described the identification made by Phillips and the procedure by which it was done. The prosecutor was not explaining the law to the jury, nor was she making an improper implication that the investigation and identification was carried out flawlessly (indeed, she implies that it was not). She merely reviewed the evidence produced by the witness and reviewed the process that led to that evidence, warts and all.

In closing statements, prosecutors are permitted to "sum up the State's case graphically and forcefully," State v. Bradshaw, 195 N.J. 493, 510 (2008); State v.

Pratt, 226 N.J. Super. 307, 323 (App. Div. 1988) and to pursue these and other prosecutorial duties "with earnestness and vigor." State v. Ingram, 196 N.J. 23, 43 (2008). A fleeting and isolated remark is generally not grounds for reversal unless it is clearly capable of producing an unjust result. See State v. Gorthy, 226 N.J. 516, 539-540 (2016). However, while prosecutors are encouraged to make "vigorous and forceful" arguments, they must "refrain from improper methods" and "use legitimate means to bring about a just conviction." State v. Smith, 167 N.J. 158, 177 (2001) (citations omitted).

POINT V

THE STATE'S EVIDENCE WAS SUFFICENT TO DEMONSTRATE A CONSPIRACY.

The defendant argues that the State failed to produce sufficient evidence to demonstrate a conspiracy and that "a simple agreement to buy drugs is insufficient to establish a conspiracy between a seller and a buyer." (Db47 citing State v. Roldan, 314 N.J. Super. 173, 182 (App. Div. 1998). However, the present case is not merely a simple agreement to buy or sell drugs and this truncated reference to Roldan is a distortion of its holding: "[A] drug distribution conspiracy falls outside of the general rules that a simple agreement to buy drugs is inefficient to establish a conspiracy between the seller and the buyer." Id.

As the defendant points out in his brief, the State proved the existence of the conspiracy to possess narcotics with intent to sell through numerous intercepted text messages and phone calls regarding the narcotics located in apartment 16D and the defendant's sale of those same narcotics. (Db49). This nexus of drug possession and distribution is clearly within the Roldan exception to the Warton Rule, and the jury rightly found as much.

> "The essential rationale of […] Wharton's Rule is that where an agreement between two parties is inevitably incident to the commission of a crime, such as a sale of contraband, 'conspiracy, which assumes the voluntary accession of a person to a crime of such character that it is aggravated by a plurality of agents, cannot be maintained. However, when the evidence shows that two or more parties have entered into an agreement to engage in concerted criminal activity which goes beyond the kind of simple agreement inevitably incident to the sale of contraband and consequently 'makes possible the attainment of ends more complex than those which one criminal could accomplish,' the participants may be found guilty of conspiracy."
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> Roldan, at 182-183 (internal citations omitted)

A single narcotics sale from a seller to a buyer may not rise to the level of a conspiracy and, indeed, multiple transactions may not sustain a conspiracy conviction, but,

> "The federal courts have identified various factors which may support the conclusion that a defendant was a participant in a drug distribution conspiracy rather than

> simply a seller or buyer in an isolated drug transaction. […] [One] indication of a conspiracy is a 'pattern of frequent and repeated transactions' between the participants. The amount of drugs involved in a transaction also may give rise to an inference that each of the participants had to have been aware he was part of a venture which extended beyond his individual participation."
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> Roldan, 183 (internal citations omitted)

The defendant's reliance on Roldan, which held that it may be appropriate to find conspiracy where there is a "pattern of frequent and repeated transactions" (like those proved through text messages and phone calls), is misguided. Clearly, Roldan held that, in circumstances not unlike those before the court at present, narcotics sales can rise to the level of conspiracy.

POINT VI

THE CUMULATIVE IMPACT OF ANY ALLEGED ERRORS HAS NOT DENIED THE DEFENDANT DUE PROCESS OR A FAIR TRIAL.

The defendant claims that the individual errors he alleges, even if found harmless by this Court, when taken as a whole constitute reversible error.

Evaluating claims of cumulative error does not simply entail counting mistakes, because even a large number of errors, if inconsequential, may not operate to create an injustice. Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 22 (2009). This creation of apparent injustice must result in a trial that appears to have been rendered fundamentally unfair in order to warrant action taken regarding the appearance of cumulative error. State v. Orecchio, 16 N.J. 125 (1954).

The errors alleged by the defendant, whether taken singly or cumulatively, did not amount to reversible error, and defendant's conviction and sentence should not be overturned on this ground.

POINT VII

THE TRIAL COURT IMPOSED AN APPROPRIATE SENTENCE.

A. Defendant lacks standing to invoke Attorney General Directive 2021-4 as a third party.

While the defendant points to Attorney General Directive 2021-4 to cite an obligation on the part of prosecutors to waive extended parole ineligibility for non-violent drug crimes (Db 51-54), he lacks standing to raise this issue.

Attorney General Directive 2021-4 includes a Non-enforceability by third parties clause that states:

> This Directive is issued pursuant to the Attorney General's authority to ensure the uniform and efficient enforcement of the laws and administration of criminal justice throughout the State. This Directive imposes limitations on law enforcement agencies and officials that may be more restrictive than the limitations imposed under the United States and New Jersey constitutions, and federal

> and state statutes and regulations. **Nothing in this Directive shall be construed in any way to create any substantive right that may be enforced by any third party**.
>
> (Da 169)

Attorney General Directive 2021-4 is an instructive tool to assist State agencies in providing uniform justice throughout New Jersey, but it was not created as a tool for third party defendants to overturn statutorily authorized convictions or sentences.

B. The sentencing court provided an adequate basis for its finding of aggravating factors, properly considered mitigating factors, and did not erroneously impose a trial tax.

At sentencing, the judge found aggravating factors three, five, six, and nine to be applicable and gave consideration to the defendant's assertions regarding mitigating factors seven and five. (11T34-13 to 36-23). The defendant now asserts that the court incorrectly considered the defendant's criminal history in its application of aggravating factors three and six (Db54) and did not adequately provide the basis for its finding of aggravating factor nine. (Db55). The defendant also claims that the court erred in failing to find mitigating factors nine and eleven. (Db55-56).

A reviewing court will not disturb the sentencing court's findings on the aggravated and mitigating factors if the findings were supported by credible evidence in the record. State v. Kromphold, 162 N.J. 345, 355 (2000). Furthermore, an appellate court is not to substitute its judgment for that of the trial court. State v. Miller, 237 N.J. 15, 28 (2019).

In considering aggravating factor three, the risk the defendant will commit another offense, the court stated, "I find aggravating factor three applies in this case, I give it moderate weight. That's the risk the defendant will commit another offense. He has nine total convictions, including this matter and a lengthy juvenile history. His prior convictions for, both, guns and drug possession and distribution." (11T34-13 to 34-18). In regard to aggravating factor six, the extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted, the Court stated, "I find aggravating factor six applies. That involves the defendant's prior criminal record and the seriousness of the offense for which he's been convicted I give it moderate weight." (11T35-11 to 35-14).

With regard to the application of mitigating factor eleven, the court in State v. Hyman, 451 N.J. Super. 429, 459, 460 (App. Div. 2017), certif. den. 232 N.J. 301 (2018) rejected the defendant's contention in that case that the court should have found mitigating factor eleven where the defendant had failed to show that his children would experience "excessive" hardship from his absence or that he was a significant source of support for them. Once more, in State v. Locurne 454 N.J. Super. 98, 129-130 (App. Div.), certif. den. 235 N.J. 457 (2018), the court found that even though the factor did apply in that case, the court questioned the weight given the factor when the hardships suffered by that defendant's children were not distinct from those suffered by any incarcerated defendant's children.

Of note as well is that, despite the defendant's current contentions that the sentencing court "did not even mention" mitigating factor eleven, the court did in fact hear argument about this factor and gave it due consideration (Db56). However, the defendant's trial counsel did not cite mitigating factor eleven in his sentencing brief and only touched on it fleetingly on the record. Appropriately, the prosecutor rebutted the defendant's argument in favor of mitigating factor number eleven:

> "I believe counsel just added mitigating factor 11. That's a very unique mitigating factor in a sense that the defendant is […] solely the only person who's responsible for the family that he's leaving behind. And I think the conversation that we had earlier and what the state attached to its November 4th letter, is he's not the only person that's responsible for his family. He has family that has stepped in, he has an individual in the court today who is graciously stepping in to assist with his family. So they are going to be taken care of, Your Honor.
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> So his incarceration is not going to unduly, substantially affect him where you could now put him in mitigating factor 11. He is situated no differently than any other defendant, including the defendant who was just sentenced today, Your Honor, where being incarcerated is a hardship but it is not an excessive hardship in his family because he's already taken steps to make sure his custody is transferred and that they're being taken care of, Your Honor."
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> (11T 27-4 to 23).

Accordingly, the sentencing court appropriately considered the applicability of mitigating factor eleven and determined that, based on the record before it, the court could not find mitigating factor eleven. Where the defendant has failed to present any basis upon which to conclude that the sentencing court ought to have otherwise determined that this factor applied, the defendant is not entitled to relief on this basis.

Furthermore, the defendant's allegation that the sentencing court imposed a "trial tax" is unsupported by facts on the record. While it is true that a defendant's decision to exercise their constitutional right to a trial cannot be used in aggravation at sentencing, there is no evidence to suggest that happened here. The sentencing judge stated, "Since this is a sentencing after a jury trial I find the aggravating factors far outweigh mitigating factors." (11T36-24 to 37-1). However, this statement followed an inventory of the aggravating and mitigating factors he considered which did not include the fact that the case was argued at trial. (11T34-13 to 36-23). The judge's passing reference to the jury trial was merely a matter of describing the context of his current action: considering factors relevant to sentencing after a guilty verdict at the conclusion of a jury trial.

CONCLUSION

For the reasons stated above, defendant's appeal should be denied, and the conviction and sentence should be affirmed.

Respectfully,

/s Jeffrey Krachun
Jeffrey Krachun
Assistant Prosecutor

Dated: 8/30/23