SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0347-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ISAIH GORDON,

Defendant-Appellant.

Submitted October 17, 2017 – Decided October 27, 2017

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 13-11-2914.

Joseph E. Krakora, Public Defender, attorney for appellant (Michele E. Friedman, Assistant Deputy Public Defender, of counsel and on the briefs).

Robert D. Laurino, Acting Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the briefs).

PER CURIAM

Defendant appeals from his convictions for second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); fourth-degree possession of hollow-point bullets, N.J.S.A. 2C:39-3(f); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a). We conclude that the failure to qualify two witnesses as experts, give an expert witness charge, and properly charge the jury after they were deadlocked resulted in plain error. We therefore reverse and remand for a new trial.

At trial, the State produced lay testimony from Officer Edward Pearce and Officer Bao Ho. The State offered expert opinion testimony from Detective Robert Harris and Detective Kimiiko Woods. Although it is clear that they rendered expert opinion testimony in the field of fingerprint analysis and firearm ballistics, the assistant prosecutor did not offer them as experts, and the judge did not give an expert witness charge as to either one. Defendant did not testify, but called his girlfriend as a witness.

Officer Pearce testified that he noticed two males conversing in a parking lot. He observed one of them, not defendant, place what appeared to be drugs into his pocket. The officer exited his police vehicle, approached the two individuals, and saw "the handle of a handgun" in defendant's waistband. Defendant ran away from the officer, who pursued him on foot. During the chase, the

officer spotted the gun drop to the ground as defendant approached a fence.

Officer Ho testified that he saw defendant "sprint" from Officer Pearce. Officer Ho exited his police car, joined the foot chase, and searched for a gun after he heard Officer Pearce yell "gun." He found a gun on the ground. Officer Ho testified that he waited "a half an hour or more" for another officer to provide a camera, and then he photographed the gun before touching it.

Detective Harris testified as an employee in the crime-scene unit of the prosecutor's office. On direct examination, and after the assistant prosecutor established his professional credentials and extensive experience, especially as to his "fingerprint career," the detective explained that he tested the gun for fingerprints. After explaining how that was done, he testified that his examination of the gun showed no fingerprints.

Detective Harris opined that there is a low probability of lifting fingerprints off weapons because of a variety of reasons, such as the design of the weapon and the weather. The detective opined that the gun found at the scene had no fingerprints because the handle was plastic. According to the detective, the plastic handle amounted to an "alligator-type surface," which in his opinion was "made to grip and not to actually leave a fingerprint."

Detective Woods worked for the police department as a ballistics firearms examiner. On direct examination, she testified that she generally conducts "operability tests on handguns," and "performs microscopic examinations of bullets and casings that are recovered from the shooting scenes." Detective Woods tested the gun the police retrieved from the scene and concluded it was operable. She opined further that ten bullets accompanying the gun were "hollow[-]point [bullets]." The detective explained that hollow-point bullets "enter a target and mushroom open causing it to stop upon impact."

The girlfriend testified that defendant was at her home after she attended church. According to the girlfriend, defendant then left her house to get food. She testified that he did not have a gun when he left her house.

At sentencing, the State moved for a discretionary extended prison term. After denying that motion, the judge sentenced defendant to an aggregate prison term of eight years, with four years of parole ineligibility.

On appeal, defendant raises the following arguments:

> POINT I
> THE [JUDGE'S] FAILURE TO PROVIDE THE JURY WITH AN EXPERT JURY INSTRUCTION WITH RESPECT TO DETECTIVES HARRIS AND WOODS REQUIRES REVERSAL. (Not Raised Below)[.]

A. The Opinion Testimony of Detectives Harris and Woods Required Specialized Knowledge Beyond the Ken of the Average Juror.

B. The Absence of an Expert Jury Instruction Had the Clear Capacity to Distort the Jury's Deliberative Process.

POINT II
[DEFENDANT] WAS DEPRIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY DID NOT RAISE THE GUN-AMNESTY STATUTE ON HIS BEHALF. (Not Raised Below)[.]

A. []L. 2013, c. 117 Created a 180-Day Amnesty Period for Gun Possession.

B. Defendant's Trial Attorney Rendered Ineffective Assistance of Counsel by Failing to Raise a Gun-Amnesty Defense.

POINT III
THE [JUDGE'S] COERCIVE INSTRUCTION TO CONTINUE DELIBERATIONS AFTER THE JURY INDICATED THAT IT WAS AT AN IMPASSE ON TWO COUNTS DENIED THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL. (Not Raised Below)[.]

POINT IV
THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCE IMPOSED BY THE [JUDGE] IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

We review defendant's first three arguments for plain error because defense counsel did not raise objections. Under this deferential standard, we disregard any error or omission "unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2.

We begin with defendant's argument that the judge failed to give the appropriate expert witness charge as to Detectives Harris and Woods. We conclude that the failure to give this charge prevented the jury from placing these witnesses' testimony into proper context. See Model Jury Charge (Criminal), "Expert Testimony" (2003) (requiring the judge to identify to the jury each testifying expert and such expert's area of expertise). Under the circumstances of this case, such an error is clearly capable of producing an unjust result.

Lay opinion testimony is governed by N.J.R.E. 701, which permits lay witness "testimony in the form of opinions or inferences . . . if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." Detectives Harris and Woods did not render lay opinions. Rather, the State elicited expert opinion testimony from them.

An expert witness may testify in the form of an opinion provided it "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.J.R.E. 702. To be admissible, expert testimony must be about a "subject that is beyond the understanding of the average person of ordinary experience, education, and knowledge." State v. Odom, 116 N.J. 65, 71 (1989). The testimony from the detectives concerned

subjects that are beyond the ordinary intelligence of an average person. The State concedes this point.

On direct examination, the assistant prosecutor elicited testimony demonstrating that the detectives were qualified as experts. Although it is undisputed that the detectives rendered expert opinion testimony, the State failed to offer the witnesses as experts. The judge did not qualify them as experts before the witnesses provided their opinions.

Detective Harris testified that he has experience processing crime scene evidence; investigating crimes; performing forensic analysis; looking for fingerprints; and swabbing for DNA evidence. He explained that he started his law enforcement career in 1994, and started his fingerprint career in 1996. The detective stated that he received training on how to extract fingerprints, including reading literature, and attending symposiums and lectures; and he has fingerprinted thousands of guns, including shell casings, magazines, and bullets.

Detective Woods testified about her experience in processing ballistic evidence for the police. She explained that the police generally transport to her guns, casings, and bullets seized during the commission of a crime and she performs various testing in the ballistic lab. The detective stated she tests weapons and determines whether they are operable, she measures bullets by

looking at the "lands and grooves," which provide a bullet's unique identification, and determines whether bullets are hollow-point.

The failure to qualify the detectives as experts in the field of fingerprint analysis and ballistics firearm examinations, and then give the appropriate jury charge, deprived the jury of fully understanding how to consider their opinion testimony. The required model jury charge on expert opinion testimony states in part that

> witnesses can testify only as to facts known by them. This rule ordinarily does not permit the opinion of a witness to be received as evidence. However, an exception to this rule exists in the case of an expert witness who may give (his/her) opinion as to any matter in which (he/she) is versed which is material to the case. In legal terminology, an expert witness is a witness who has some special knowledge, skill, experience or training that is not possessed by the ordinary juror and who thus may be able to provide assistance to the jury in understanding the evidence presented and determine the facts in this case.
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> . . . .
>
> You are not bound by such expert's opinion, but you should consider each opinion and give it the weight to which you deem it is entitled, whether that be great or slight, or you may reject it. In examining each opinion, you may consider the reasons given for it, if any, and you may also consider the qualifications and credibility of the expert.
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> It is always within the special function of the jury to determine whether the facts on which the answer or testimony of an expert is

> based actually exist. The value or weight of the opinion of the expert is dependent upon, and is no stronger than, the facts on which it is based. In other words, the probative value of the opinion will depend upon whether from all of the evidence in the case, you find that those facts are true. You may, in fact, determine from the evidence in the case that the facts that form the basis of the opinion are true, are not true, or are true in part only, and, in light of such findings, you should decide what affect such determination has upon the weight to be given to the opinion of the expert. Your acceptance or rejection of the expert opinion will depend, therefore, to some extent on your findings as to the truth of the facts relied upon.
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> The ultimate determination of whether or not the State has proven defendant's guilt beyond a reasonable doubt is to be made only by the jury.
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> [Model Jury Charge (Criminal), "Expert Testimony" (2003).]

We reject the State's argument that the failure to give the expert jury charge did not deprive defendant of a fair trial. The State asserts that defense counsel defended the weapons charges by arguing defendant had never seen the gun. According to the State, the lack of fingerprints on the gun compliments defendant's defense theory. In other words, the State asserts it is irrelevant whether fingerprints were capable of residing on the plastic handle of the gun. Defendant's girlfriend maintained that defendant left her house without a gun. The jury could accept or reject that testimony. If they rejected it, then whether fingerprints were

on the plastic handle would be probative on the State's charge that defendant unlawfully possessed the weapon. The detective provided an expert reason for why fingerprints on the gun handle were unlikely, but the jury did not know that they could reject that testimony outright.

Defendant's purported theory of the case, therefore, does not obviate the requirement for properly offering the witnesses as experts, qualifying them as such, and instructing the jury on how to consider their opinion, especially as to Detective Wood's testimony on the operability of the weapon and hollow-point bullets. Certainly, without expert testimony, the jury was unable to comprehend what hollow-point bullets were.

We conclude that the failure to qualify and offer the detectives as expert witnesses, and the jury's ignorance about the role of forensic experts, how to consider expert testimony, and their ability to reject the detectives' expert opinion testimony, is clearly capable of producing an unjust result and therefore deprived defendant of a fair trial. The judge exacerbated this plain error when he coercively directed the jury to deliberate after the jury reported it was deadlocked on two of the charges.

After deliberating for two hours on the first day, and the entire second day until 5:00 p.m., the jury asked the judge if it could continue deliberating for two additional hours. Some of the

jurors were unable to return the next day, and apparently wanted to continue deliberating that night. The judge granted that request without objection.

At approximately 7:07 p.m. that night, the jury notified the judge it was deadlocked on two of the charges. At approximately 7:26 p.m., the judge gave the following instructions to the jury, which defendant argues deprived him of a fair trial:

> I have received a note, which I have marked as Court Exhibit [thirteen], which reads as follows: "The jury has reached a verdict as to one of the counts. The jury is unable to reach a verdict as to two of the counts."
>
> In light of your note, I am going to instruct you as follows: Members of the jury, I am going to ask that you continue your deliberations in an effort to reach an agreement upon the verdict and dispose of this case. And I would like . . . for you to consider, as you do so, the following: This is an important case. The trial has been expensive in time, effort, money, and emotional strain to both the defense and the prosecution. If you should fail to agree upon a verdict, the case will be left open and may have to be tried again. Obviously, another trial would only serve to increase the cost of both sides. And there's no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.
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> Any future jury must be selected in the same manner and from the same sources you were chosen. And there's no reason to believe that the case could ever be submitted to [twelve] men and women more conscientious, more impartial, or more competent to decide it or

that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of a conviction[,] those of you who disagree should reconsider whether your doubt is a reasonable one[,] since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of acquittal[,] the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence. But after full deliberation and consideration of the evidence in the case[,] it is your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt[,] the defendant should have your unanimous verdict of not guilty. You may be as leisurely in your deliberations as the occasion may require and should take all the time which you feel is necessary. I will ask you now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the other instructions I have previously given you.

And you have also indicated to the [c]ourt that you have reached a partial verdict. I must instruct you that your partial verdicts will be final and not subject to reconsideration even if you continue deliberating on other counts. You have the option of returning the partial verdicts now;

> which, as I have just instructed to you, will be final; or continuing deliberations on all the counts.

At approximately 8:13 p.m., the jury returned a guilty verdict on all charges. Because we do not know on which of the two charges the jury reached an impasse, we are unable to conclude that the coercion infected only the weapons charges. In other words, the entire verdict was infected.

In Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896), the United States Supreme Court upheld a charge in which "the court direct[s] the minority jurors to reconsider their views in light of their disagreement with the majority." United States v. E. Med. Billing, Inc., 230 F.3d 600, 602 n.1 (3d Cir. 2000). In State v. Czachor, 82 N.J. 392, 398-99 (1980), the New Jersey Supreme Court concluded the Allen charge was inherently coercive because it urged jurors to reach a verdict, instead of urging votes based on convictions. The model charge, based on Czachor provides:

> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous but do not surrender your honest

> conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. You are judges--judges of the facts.
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> [Model Jury Charge (Criminal), "Judge's Instructions on Further Jury Deliberations" (2013).]

The State concedes the judge erred by not giving the Czachor charge, but argues the error was harmless.

"[N]o judge may coerce a jury into rendering a verdict that does not represent the unfettered and unbiased judgment of each juror." State v. Barasch, 372 N.J. Super. 355, 361 (App. Div. 2004). "It is of the very essence of the right of trial by jury that the verdict be free and untrammeled . . . ." In re Stern, 11 N.J. 584, 588 (1953). "Urging a jury to an agreement contrary to the individual opinion and judgment of one of the jurors on the merits of the issue may be coercion." Ibid. Judges should not use "any form of language that has a tendency to 'understate[]' or 'trivialize the awesome duty of the jury.'" State v. Roberts, 163 N.J. 59, 59 (2000) (alteration in original) (quoting State v. Biegenwald, 106 N.J. 13, 41 (1987)). Indeed, "[t]rial courts must understand, as well, that nothing is more important than that they set the atmosphere of calm, unhurried, and studied deliberation that is the hallmark of a fair trial." Id. at 60.

The defendant argues this charge served as the functional equivalent of an Allen charge, because it stressed judicial economy and stated minority jurors "'should' reconsider their views in light of the majority jurors' beliefs." We disagree with the State's contention that the error was not clearly capable of producing an unjust result. We emphasize that plain error exists under the unique circumstances of this case, especially because of the cumulative failure to qualify the detectives as experts and give the required expert jury charge.

Defendant argues his trial counsel rendered ineffective assistance because he failed to argue his conviction for unlawfully possessing a handgun violated L. 2013, c. 117, § 1, which states:

> Any person who has in his possession a handgun in violation of [N.J.S.A. 2C:39-5(b)] or a rifle or shotgun in violation of [N.J.S.A. 2C:39-5(c)] on the effective date of this act may retain possession of that handgun, rifle, or shotgun for a period of not more than 180 days after the effective date of this act. During that time period, the possessor of that handgun, rifle, or shotgun shall:
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> (1) transfer that firearm to any person lawfully entitled to own or possess it; or
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> (2) voluntarily surrender that firearm pursuant to the provisions of N.J.S.[A.] 2C:39-12.

Defendant contends this law created a 180-day amnesty period for unlawful gun possession.

"Our courts have expressed a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record." State v. Preciose, 129 N.J. 451, 460 (1992). Ordinarily, a "defendant must develop a record at a hearing at which counsel can explain the reasons for his conduct and inaction and at which the trial judge can rule upon the claims including the issue of prejudice." State v. Sparano, 249 N.J. Super. 411, 419 (App. Div. 1991).

Nevertheless, and even though we are reversing the weapons convictions, we conclude defendant's argument is "without sufficient merit to warrant discussion in a written opinion." R. 2:11-3(e)(2). We add the following brief remarks. The New Jersey Supreme Court recently stated:

> We find that the amnesty law did not afford defendants blanket immunity for the entire amnesty period. Reading the law in that way would lead to absurd results that the Legislature did not intend. It would permit violent criminals to carry weapons in public with impunity, for almost 180 days, and remain free from prosecution so long as they transferred or voluntarily surrendered their firearms just before the end of the amnesty period.
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> [State v. Harper, 229 N.J. 228, 232 (2017).]

The amnesty law did not create a 180-day period of blanket immunity, but protected those who took steps to turn in illegal firearms. Such is not the case here.

As to defendant's argument that the judge imposed an excessive sentence, we are vacating his eight-year prison term because of the cumulative errors in the jury charge and failure to properly qualify the detectives as experts. We note, however, that the judge had denied the State's motion for a discretionary extended term, and there was nothing in the record suggesting that we should second-guess the judge's sentencing findings. Nevertheless, as to his resisting arrest conviction, we conclude that defendant's sentence is not excessive.

We reverse and remand for a new trial. We do not retain jurisdiction.