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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0434-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DESHAUN J. WILLIAMS,

Defendant-Appellant.

Submitted April 25, 2017 – Decided June 8, 2017

Before Judges Reisner, Koblitz and Mayer.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 14-09-2178.

Joseph E. Krakora, Public Defender, attorney
for appellant (Daniel S. Rockoff, Assistant
Deputy Public Defender, of counsel and on the
brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (LeeAnn
Cunningham, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant DeShaun Williams appeals from his conviction for first-degree robbery, N.J.S.A. 2C:15-1, disorderly persons simple assault, N.J.S.A. 2C:12-1(a), fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d), third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d), and third-degree witness tampering, N.J.S.A. 2C:28-5(a)(1).¹

On this appeal, defendant presents the following arguments:

POINT I

THE PROSECUTOR'S IMPROPER TACTICS UNFAIRLY BOLSTERED THE CREDIBILITY OF THE SOLE EYEWITNESS IDENTIFICATION OF THE PERPETRATOR.
(Not Raised Below)

In Summation, The Prosecution Improperly Directed Jurors To Stare At Each Other While Imagining Themselves Being Robbed, Then Urged Them To Use Their Experiences From This Emotionally-Charged, Non-Record, Flawed Simulation To Assess The Credibility Of The Real Victim's Identification Of The Perpetrator

The Prosecution Improperly Bolstered The Victim's Identification When He Argued That Time Slowed Down For Her, She Experienced Elevated Awareness, And She Constantly Relived The Attack

¹ Defendant was sentenced to an aggregate term of twelve years, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2 for the robbery conviction, with a consecutive term of three years for witness tampering. The other sentences were imposed concurrent.

The Prosecution Improperly Emphasized The Impact Of The Robbery On The Victim's Life, Despite Its Utter Irrelevance

The Prosecution Unnecessarily Denigrated Defense Counsel's Attempts to Cross-Examine The Victim On Her Identification

POINT II

THE COURT ERRED BY NOT OFFERING ANY GUIDANCE TO THE JURY ON THE MEANING OF THE PHRASE "TO TESTIFY FALSELY" AFTER THE JURY SENT A NOTE TO THE COURT EXPRESSING ITS CONFUSION ABOUT THIS ESSENTIAL ELEMENT OF THE TAMPERING CHARGE

POINT III

COUNSEL FOR WILLIAMS, WHO IS AT LEAST SIX FEET TALL, REPEATEDLY TRIED TO SHARE WITH THE JURY AN INCONSONANT STATEMENT THAT THE PERPETRATOR WAS FIVE FEET, FOUR INCHES TALL. THE COURT ACCEDED TO THE PROSECUTOR'S HEARSAY OBJECTIONS, AND BARRED DEFENSE COUNSEL FROM SHARING THIS STATEMENT WITH THE JURY. BUT THE STATEMENT SHOULD HAVE BEEN ADMITTED AS NONHEARSAY, BECAUSE IT WAS NOT BEING OFFERED FOR THE TRUTH. IN ADDITION, THE DOCTRINE OF COMPLETENESS COMPELLED THE STATEMENT'S ADMISSION, EVEN IF IT WOULD HAVE OTHERWISE BEEN INADMISSIBLE. N.J.R.E. 106

We agree with defendant that the trial was infected with prejudicial errors, requiring that we reverse the conviction and remand for a retrial.

I

The essential facts concerning the crime were largely undisputed. We will summarize them briefly here, and discuss

additional pertinent trial developments when we address the legal issues.

The victim, a home health aide, testified that she was robbed right after leaving a client's home at about 11:00 a.m. on the morning of March 24, 2014. According to the victim, the client's son accompanied her as she left the house but left quickly thereafter. As the son departed, a slender young black man approached the victim, nicked her hand with a knife, and then robbed her while holding the knife to her chest. The robber was wearing a black hat that covered his hair, leaving only his face visible. The victim testified that the robbery lasted perhaps five minutes and that she spent two minutes looking at the robber's face. She spent the rest of the time struggling unsuccessfully to comply with his demand that she remove her wedding ring. She testified that the robber fled after a bus pulled up nearby.

Within two hours after the robbery, the police showed the victim two books of photographs. In the second book, she picked out defendant's photo and identified him as the robber. She also identified defendant in court as being the robber. There were no other witnesses to the robbery. Defendant was arrested several weeks after the crime occurred. He insisted he was innocent, and there was no evidence connecting him to the robbery, other than the victim's identification.

II

In addressing defendant's appellate arguments, we conclude that the trial court erred in excluding evidence that the victim initially described the robber as five feet, four inches tall. The victim's statement, contained in a police incident report, was not admissible for its truth as to the robber's actual height. See N.J.R.E. 801(c); N.J.R.E. 802. However, it was admissible for other purposes. Because defendant was at least six feet tall², the victim's description, which was documented in the incident report, was relevant to the thoroughness of the police investigation and to the victim's credibility.³ See State v. James, 144 N.J. 538, 561-62 (1996) (recognizing that problems with a victim's identification can be critical to the defense). It was also relevant to the credibility of defendant's testimony about the witness tampering charge. Because the victim's statement about the robber's height was contained in a public record,

² The booking report lists his height as six feet, while the arrest report lists his height as six feet, one inch.

³ In the final charge to the jury, the judge gave the identification instructions mandated in State v. Henderson, 208 N.J. 208 (2011), including an instruction to consider the accuracy of the witness's description of the perpetrator before she identified the defendant, and whether that description matched the person she later identified. Absent the inconsistent information on the police report, however, the jury had no context in which to consider those factors.

N.J.R.E. 803(c)(8), and because the fact that she made the statement was relevant, it was admissible for the three purposes we have just described. See N.J.R.E. 805 (addressing the admissibility of included hearsay).

We turn to defendant's arguments concerning witness tampering. Defendant was charged with third-degree witness tampering, which does not require proof of force or threats against the witness. Rather it only requires proof that defendant knew that an "official proceeding or investigation" was pending, and "knowingly engage[d] in conduct which a reasonable person would believe would cause a witness or informant to . . . [t]estify or inform falsely." N.J.S.A. 2C:28-5(a)(1).

The tampering charge was based on a letter defendant, who was not yet represented by counsel, sent to the victim. Along with the letter, defendant enclosed a copy of the police incident report listing the robber's height as five feet four inches, and the arrest report documenting that defendant was six feet, one inch tall. In the letter, defendant sought to portray himself as a hard-working, good person who was the victim of misidentification, and he asked the victim to look at the incident report and the arrest report attached to his letter and consider whether she had correctly identified him. The charge was also based on phone calls that defendant's relatives made to the victim, begging her

to meet with them because, as they expressed it, they believed defendant was a victim of misidentification. However, the jury only saw defendant's letter to the victim, and did not see the incident report or hear a description of its relevant content, which would have put defendant's letter to the victim in context. We agree with defendant that the additional information was not excludable hearsay and should also have been admitted under the doctrine of completeness. See N.J.R.E. 106; Alves v. Rosenberg, 400 N.J. Super. 553, 562 (App. Div. 2008); State v. Underwood, 286 N.J. Super. 129, 140 (App. Div. 1995).

Due to the judge's strong admonition to defense counsel precluding her from eliciting information about the police report, defense counsel could not have her client explain why he believed the victim had made a mistaken identification of him.⁴ The police report, with its description of the robber as five feet four inches tall, when defendant was at least six feet tall, was central to the defense against witness tampering - i.e., that defendant had a good faith reason to contact the victim, even if he should not

⁴ The first time this issue arose, it would have been the better practice for the judge to allow the attorneys to come to sidebar to argue the prosecutor's objection, instead of immediately sustaining the objection. That would have given defense counsel an opportunity to explain why the information was admissible and for what purposes.

have done so, and was only trying to get her to truthfully acknowledge a mistake.

Further compounding the prejudice to the defense, during his summation the prosecutor exploited the lack of that evidence, criticizing defendant for sending the letter to the victim without proof that he had been misidentified. He argued: "Why would you need to play on [the victim's] emotions if you weren't the person who did it? Why wouldn't you show them that you're not the person who did it?" The prosecutor also told the jury that if defendant really wanted to convince the victim he was innocent, "[h]e could have pulled out a thousand documents to corroborate anything he's saying." That was fundamentally unfair because, as the prosecutor well knew, the defense had been precluded from presenting the evidence of misidentification.⁵

Because the excluded information bore on defendant's credibility as well as his substantive defense, its improper exclusion was harmful error and warrants reversal of the witness tampering conviction. See State v. Garron, 177 N.J. 147, 168-69 (2003), cert. denied, N.J. v. Garron, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2004). Additionally, because a jury may

⁵ During deliberations, the jury asked a question about the witness tampering charge, which suggested that they were having some difficulty reaching a verdict on that issue. This further leads us to conclude that this trial error was prejudicial.

fairly view witness tampering as evidence of a defendant's guilt on the underlying offenses, we conclude that this trial error, together with the additional errors discussed below, warrants reversal of defendant's conviction for robbery and the other associated offenses.

We next address defendant's argument that the prosecutor improperly caused the jurors to engage in a misleading demonstration during summation. This was the context. The prosecutor argued to the jurors that the victim must have been able to identify defendant accurately because she was looking at him for two minutes during the robbery. In order to demonstrate that point, during his summation, the prosecutor directed the jurors to form pairs, in which each pair of two jurors would stare at each other for two minutes while the prosecutor made summation remarks. He then asked them to conclude that, after staring at each other for two minutes, they would recall each other's faces, and asked them to apply that conclusion to the victim's identification as well.

We agree with defendant, that this demonstration was misleading. There is no fair analogy between staring at a person with whom one has become familiar over several days of jury service, and staring at a complete stranger holding a knife. Where, as here, the victim's identification of defendant was a

crucial issue, it was plain error to allow the prosecutor to have the jurors engage in this misleading exercise. See State v. Rivera, 437 N.J. Super. 434, 455-56 (App. Div. 2014). The error was compounded by the prosecutor's statement to the jury, unsupported by any testimony, that while the victim was looking at the robber, time "slowed down." See State v. Bradshaw, 195 N.J. 493, 510 (2008).

For completeness and for the guidance of the trial court and counsel, we also note additional errors which should not be repeated at the retrial. Defendant had no prior convictions and therefore was able to testify without concern that the jury would hear highly prejudicial information about any prior brushes with the law. See N.J.R.E. 404(b); State v. Cofield, 127 N.J. 328, 340-41 (1992). However, for reasons we cannot comprehend, defense counsel unnecessarily mentioned in front of the jury the fact that her client's photo, which was in a photo book shown to the victim, came from a group of prior "offenders."

And, although her client freely admitted that he was in New Jersey on March 24, 2014, the date the robbery was committed, counsel elicited from defendant the fact that he was arrested and "incarcerated" in New Jersey in 2013. She presented this testimony ostensibly for the purpose of impeaching a prosecution witness's marginally relevant testimony concerning defendant's whereabouts

in 2013. Moreover, counsel did not even attempt to mitigate the prejudice from that information by eliciting from her client the fact that his 2013 arrest did not result in a conviction. The judge gave the jury an instruction in the final charge, concerning the limited purpose for which they could consider defendant's prior arrest and incarceration. However, there did not appear to be any rational strategic basis to place this highly prejudicial information before the jury in the first place.


Finally, in his testimony, the officer who showed the victim the books of photos testified to his opinion that an identification made within two hours of a crime was more likely to be reliable. The officer was not qualified as an expert witness, and that improper testimony should not be repeated at the retrial.

In conclusion, based on our careful consideration of the trial record, we are persuaded that due to cumulative error, defendant did not receive a fair trial. R. 2:10-2; State v. Weaver, 219 N.J. 131, 155 (2014); Rivera, supra, 437 N.J. Super. at 444-45. Because the case hinged on a contested eyewitness identification and on witness credibility, we cannot conclude that the errors were harmless. See State v. J.R., 227 N.J. 393, 417

(2017). Accordingly, we reverse defendant's conviction, vacate the sentence, and remand for a new trial.⁶

Reversed and remanded.

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


CLERK OF THE APPELLATE DIVISION

⁶ In light of our disposition of this appeal, we do not address defendant's additional appellate arguments.