

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0841-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHANIQUA COLCLOUGH,

Defendant-Appellant.

Argued October 31, 2017 — Decided December 6, 2017

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
13-09-1683.

Cody T. Mason, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Mr. Mason, of counsel and on the briefs).

Frances Tapia Mateo, Assistant Prosecutor,
argued the cause for respondent (Esther
Suarez, Hudson County Prosecutor, attorney;
Ms. Mateo, of counsel and on the brief).

PER CURIAM

Following denial of her motion to suppress the results of a
search conducted pursuant to a warrant, a jury convicted defendant

Shaniqua Colclough of endangering the welfare of a child. On appeal, defendant argues that her conviction should be reversed because the trial court erred in denying her suppression motion. Alternatively, defendant contends a new trial is warranted due to deficiencies in the jury selection process and the trial court's refusal to excuse certain jurors for cause. Having considered the parties' arguments in light of the record and applicable legal standards, we affirm.

I.

We need only briefly outline the procedural history of the case. Defendant and others were charged in a twenty-one count indictment that stemmed from a 2013 narcotics investigation. Specifically, defendant was charged with possession with intent to distribute ten or more grams of phencyclidine (PCP), N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(6) (count eight); possession with intent to distribute ten or more grams of PCP within 1000 feet of school property, in violation of N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-7.1 (count nine); possession with intent to distribute ten or more grams of PCP within 500 feet of a public housing facility, public park, or public building, N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-7.1 (count ten); conspiracy to dispense or distribute ten or more grams of PCP, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5a(1), and N.J.S.A. 2C:35-5b(6) (count eleven); two counts

of possession of a firearm in the course of committing, attempting to commit, or conspiring to commit a drug offense, N.J.S.A. 2C:39-4.1a (counts fifteen and sixteen); possession of a defaced firearm, N.J.S.A. 2C:39-3d (count seventeen); and second-degree endangering the welfare of a child (count eighteen).

Following her indictment, defendant moved to suppress the fruits of the search of her second-floor apartment. Defendant argued that the search warrant did not describe the place to be searched with sufficient particularity because it did not identify an apartment number. In May 2014, the judge denied the motion without an evidentiary hearing.

In June 2015, a jury convicted defendant of second-degree child endangerment (count eighteen), and acquitted her of the remaining charges. On August 7, 2015, the judge vacated the second-degree child endangerment conviction due to an omission in the jury charge, and molded the verdict to third-degree child endangerment. The judge then sentenced defendant to three years' probation, subject to the following conditions: 364 days in the Hudson County jail; the Division of Child Protection and Permanency to approve all contact with her children; undergo parent counseling; and obtain gainful employment or perform 100 hours of community service.

In this appeal, defendant argues:

POINT I

THE TRIAL COURT SHOULD HAVE GRANTED THE MOTION TO SUPPRESS EVIDENCE BECAUSE THE SEARCH WARRANT DID NOT SPECIFY WHICH APARTMENT WAS TO BE SEARCHED, THE AFFIDAVIT CONTAINING THAT INFORMATION WAS NEITHER INCORPORATED INTO NOR ATTACHED TO THE WARRANT AND THE SEARCH WAS NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES.

A. The Warrant Was Invalid Because It Did Not State Which Apartment Was to Be Searched and Could Not Be Cured by the Underlying Affidavit, Which Was Neither Incorporated into Nor Attached to the Warrant.

B. The Officers Discovered the Guns, PCP, and Documents Connecting Colclough and Her Codefendants to the Apartment Through the Execution of a Search Warrant, and Not as the Result of Exigent Circumstances.

POINT II

THE TRIAL COURT VIOLATED COLCLOUGH'S RIGHT TO A FAIR TRIAL WHEN IT DID NOT ASK PROSPECTIVE JURORS REQUIRED QUESTIONS IN OPEN COURT (NOT RAISED BELOW), REHABILITATED PROSPECTIVE JURORS WHO EXPRESSED BIASES, AND CAUSED DEFENSE COUNSEL TO EXHAUST HIS PEREMPTORY CHALLENGES AFTER DECLINING TO REMOVE FOR CAUSE A JUROR WHO BELIEVED POLICE OFFICERS WERE MORE LIKELY TO TELL THE TRUTH.

A. The Trial Court Violated Colclough's Right to an Impartial Jury When it Failed to Ask Required Open-Ended Questions, Did Not Ensure That the Jurors Understood the Questions, Did Not Pose Probing Follow-Up Questions, and Rehabilitated Partial Jurors with Leading Questions.

1. The trial court violated Colclough's right to an impartial jury when it failed to ask required

open-ended questions and ensure that the jurors understood the questions posed.

2. The trial court violated Colclough's right to an impartial jury when it repeatedly rehabilitated partial jurors and failed to ask follow-up questions aimed at detecting possible biases.

B. The Trial Court Infringed on Colclough's Right to a Fair Trial When It Declined to Excuse a Biased Juror for Cause, Which Resulted in the Exhaustion of Defense Counsel's Peremptory Challenges and a Partial Jury.

II.

We first address defendant's challenge to the search warrant. This case arises out of a police investigation into drug-related activity in the area of xxx Wilkinson Avenue, Jersey City. Defendant resided with her seven-year-old daughter in the second-floor apartment at that location.

On April 17, 2013, Jersey City Police Officer Israel Cortes applied for a warrant to search the second-floor apartment of xxx Wilkinson Avenue. In his sworn affidavit, Cortez averred, in relevant part, that:

(1) In March 2013, he received information from a confidential informant (CI) who knew from personal knowledge and past interaction with an unidentified male that the unidentified male was one of the main suppliers of PCP within the Wilkinson Avenue

area. The CI told Cortes "that the unidentified male primarily conducts his narcotics distribution operations from his residence located at [xxx] Wilkinson Avenue, Apartment #[yyy], Jersey City, New Jersey." The CI described the suspect as "a dark brown skin black male[,] slim build, approximately 5'10", approximately 18-22 years of age with black dreadlocks, clean shaven[.]"

(2) On April 1, 2013, "the CI agreed to arrange a controlled purchase of [] PCP from the unidentified male from the area of Wilkinson Avenue[,] specifically [xxx] Wilkinson Avenue Apartment #[yyy], Jersey City[.]" Police set up surveillance and observed the CI hand the unidentified male currency, who in turn handed the CI two green tinted Ziploc bags containing suspected PCP. Cortes then "observed the unidentified male stick his head outside of the second-floor window and began talking with one of the individuals standing in the group in front of [xxx] Wilkinson Avenue[.]"

(3) On April 11, 2013, "the CI agreed to arrange a controlled purchase of [] PCP from the unidentified male from the area of Wilkinson Avenue[,] specifically [xxx] Wilkinson Avenue Apartment #[yyy], Jersey City[.]" Prior to the controlled buy, the police set up surveillance and Cortes again saw the unidentified male "look[] out of the second-floor window." Similar to the first transaction, the CI handed the suspect money in exchange for two Ziploc bags containing suspected PCP.

(4) A subpoena served on Public Service Electric & Gas (PSE&G) revealed that Shaniqua Colclough resided at xxx Wilkinson Avenue, Apartment #yyy. Defendant's criminal history showed she had been arrested for a narcotics offense, specifically PCP, in September 2012.

Cortes "requested that a [s]earch warrant be issued for the subject premise [xxx] Wilkinson Avenue, Apartment #[yyy], Jersey City, New Jersey." He described the "subject premise" as

[A] two-story red brick building with six cement white-colored steps leading up to a white-colored metal front door, with the number ["xxx"] in black located in the middle of the door, with the door positioned on the eastern most end of the building, and the windows having white trim. The structure also has two satellite cable antennas located above the first floor apartment windows positioned on the western most end of the structure.

Based on this information, a search warrant issued on April 17, 2013. The description of the premises to be searched mirrored that contained in the affidavit, as set forth above. Although the warrant identified the property address, it did not specify the apartment number.

The police executed the search warrant the next day. An inventory of the property seized pursuant to the warrant was prepared in defendant's presence. The inventory specified the items were recovered from "[xxx] Wilkinson Avenue Apt. [yyy]."

Among the items seized were 133 Ziploc baggies containing greenish vegetation dipped in suspected PCP; two handguns; ammunition; a New Jersey Identification Card bearing defendant's name, which listed her address as xxx Wilkinson Avenue, Jersey City; and numerous letters addressed to defendant.

On appeal, defendant does not challenge the probable cause supporting the search warrant. Rather, she renews her argument that the search warrant was invalid because it did not identify with sufficient particularity the apartment to be searched. She further contends the supporting affidavit did not cure the warrant's lack of particularity because it was neither incorporated into nor attached to the warrant.

Certain well-established principles guide our analysis. Although we normally grant deference to the findings of fact made by a trial judge in connection with a motion to suppress, there was no evidentiary hearing in this case. State v. Elders, 192 N.J. 224, 243-44 (2007). Instead, the judge relied on the text of Cortes's affidavit.¹ Our review of purely legal issues is plenary. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140

¹ A reviewing court may only consider whether the motion to suppress was properly decided based on the evidence presented at that time. State v. Gibson, 318 N.J. Super. 1, 9 (App. Div. 1999).

N.J. 366, 378 (1995); State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010), certif. denied, 205 N.J. 78 (2011).

"[A] search executed pursuant to a warrant is presumed to be valid" and "a defendant challenging its validity has the burden to prove 'that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable.'" State v. Jones, 179 N.J. 377, 388 (2004) (citation omitted). "Doubt as to the validity of the warrant '"should ordinarily be resolved by sustaining the search.'" State v. Keyes, 184 N.J. 541, 554 (2005) (citations omitted).

The Fourth Amendment to the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution provide in nearly identical language that "no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized." N.J. Const. art. I, ¶ 7 (emphasis added). This particularity requirement "mandates that 'the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended,'" State v. Marshall, 199 N.J. 602, 611 (2009) (quoting Steele v. United States, 267 U.S. 498, 503, 45 S. Ct. 414, 416, 69 L. Ed. 757, 760 (1925)), and was intended "to prevent general searches," Maryland v. Garrison,

480 U.S. 79, 84, 107 S. Ct. 1013, 1016, 94 L. Ed. 2d 72, 80 (1987).

As Justice Stevens explained for the Court in Garrison:

By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the [particularity] requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

[Id. at 84, 107 S. Ct. at 1016, 94 L. Ed. 2d at 80.]

That is, the scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." United States v. Ross, 456 U.S. 798, 824, 102 S. Ct. 2157, 2172, 72 L. Ed. 2d 572, 593 (1982).

The particularity requirement, however, has presented difficulties when police suspect criminal activity in a multi-unit structure. In keeping with the constitutional principles briefly outlined above, our Supreme Court has mandated that "the affidavit in support of the search warrant must exclude those units for which police do not have probable cause." Marshall, supra, 199 N.J. at 611. In Marshall, the Court found a search warrant – that did not define the particular apartment in a multi-unit structure but, instead, left it to the executing officers to discern the proper location upon execution of the warrant – repugnant to our state constitution. Ibid.

In an earlier case, State v. Wright, 61 N.J. 146, 149 (1972), which the Marshall Court limited to its facts, 199 N.J. at 615, the Court found sufficient a description of the premises to be searched as the apartment over which the suspect had "possession, custody, control, or access," id. at 608; the Wright Court found no constitutional violation because the record demonstrated the police were familiar with the apartment to be searched and there was no likelihood that the wrong apartment would be searched. Marshall differed in that the police did not know which of multiple apartments in a single structure was being utilized by the suspect and because the issuing judge abdicated his authority by leaving it to the police to determine the correct apartment upon execution of the warrant. 199 N.J. at 616-17.

In the present case, Cortes only sought to search the second floor apartment and not the entire dwelling. His request for a warrant was specifically limited to that apartment. The search conducted pursuant to the warrant was not a wide-ranging exploratory search, which the United States and New Jersey Constitutions are intended to prevent. The inventory of the items seized from defendant's second floor apartment confirms the limited scope of the search.

The Court noted in Wright that the premises to be searched must be described with "reasonable accuracy" rather than "pin-

point precision." Wright, supra, 61 N.J. at 149. There was no inaccuracy in the property description here. Moreover, in contrast to Wright, the issuing judge did not intend to leave it to the police to discern the correct apartment upon execution of the warrant. As in Wright, the police were familiar with the apartment to be searched, having conducted surveillance and obtained utility records from PSE&G. An officer could ascertain with little effort that the second floor apartment was in fact the subject of the search warrant by consulting the supporting affidavit establishing probable cause to search that apartment. Accordingly, under the specific facts presented, we conclude the suppression motion was properly denied.

III.

In Point II of his brief, defendant argues the trial court violated his right to a fair trial because the jury voir dire was deficient in its thoroughness. Defendant further contends the court improperly rehabilitated partial jurors, failed to ask follow-up questions aimed at detecting possible biases, and did not excuse a biased juror for cause. We address these arguments in turn.

A.

Defendant argues the trial court committed reversible error because it did not "read and review each question en banc with the

first jurors seated in the box" and did not ask open-ended questions during jury selection, as required by New Jersey Supreme Court Administrative Directive #4-07.

A criminal defendant is constitutionally entitled to a trial by an impartial jury. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10; Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S. Ct. 1507, 1522, 16 L. Ed. 2d 600, 620 (1966); State v. Fortin, 178 N.J. 540, 575 (2004). Historically, the scope and choice of questions used in jury voir dire rested with "the discretion of the trial court, limited only by the demands of fairness and justice." State v. Sullivan, 43 N.J. 209, 239 (1964), cert. denied, 382 U.S. 990, 86 S. Ct. 564, 15 L. Ed. 2d 477 (1966).

In 2006, our Supreme Court directed the Administrative Office of the Courts (AOC) to issue two directives addressing jury voir dires. See Administrative Directive #21-06, "Approved Jury Selection Standards, Including Model Voir Dire Questions" (Dec. 11, 2006),

http://www.njcourts.gov/attorneys/assets/directives/dir_21_06.pdf and Administrative Directive #4-07, "Jury Selection – Model Voir Dire Questions Promulgated by Directive #21-06 – Revised Procedures and Questions" (May 16, 2007),

http://www.njcourts.gov/attorneys/assets/directives/dir_04_07.pdf

Directive #21-06 mandated certain procedures for jury selection.

Among other things, that directive required trial judges to ask each individual juror a set of standard questions, as well as questions tailored to the individual case.

After Directive #21-06 was issued, trial judges reported that the requirement of individual questioning of jurors on every question was counterproductive and caused unnecessary delay. Thus, on May 16, 2007, the Supreme Court caused the AOC to issue Directive #4-07, which supplemented and modified Directive #21-06.

Directive #4-07 authorized trial judges to conduct voir dieres without asking each question individually to each juror. Instead, the trial court must provide potential jurors with a printed copy of the questions, and read the questions en banc to the first jurors seated in the box. Directive #4-07 also required that each juror be asked at least three open-ended questions that require answers in narrative form.

The directives in #4-07 and #21-06 are mandatory and are binding on all trial courts. We have previously explained:

[T]he Supreme Court . . . "has the power to promulgate rules of administration as well as practice and procedure" pursuant to the New Jersey Constitution. In addition, as Judge Stern (then sitting in the Law Division) noted, "the Chief Justice, as administrative head of the court system, can promulgate binding directives either directly or through the Administrative Director of the Courts."

Thus, the [d]irective which includes its commentary, has the force of law.
[State v. Morales, 390 N.J. Super. 470, 472 (App. Div. 2007) (quoting State v. Linares, 192 N.J. Super. 391, 397 (Law Div. 1983)).]

Here, the trial judge did not read aloud each question to the first group of jurors. Also, he only posed two, rather than three, open-ended questions to the jurors. Consequently, the court failed to comply with the mandatory requirements of Directive #4-07.

Having determined that the trial court here erred, we turn to the question of whether that error warrants a reversal of defendant's conviction. Because defendant did not raise this issue at trial, we consider it under the plain error standard, pursuant to which we disregard any error or omission by the trial court "unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. "To warrant reversal[,] . . . an error at trial 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. Funderburg, 225 N.J. 66, 79 (2016) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)). The plain error standard is akin to the harmless error standard, which "requires that there be some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable

doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. Lazo, 209 N.J. 9, 26 (2012) (alteration in original) (citing State v. R.B., 183 N.J. 308, 330 (2005)).

Constitutional errors, like other errors, are generally also subject to the harmless error analysis. State v. Camacho, 218 N.J. 533, 547 (2014). When a constitutional error has occurred, however, the burden shifts to the State to show that such error was harmless beyond a reasonable doubt. See State v. Slaughter, 219 N.J. 104, 118 (2014) (finding violation of defendant's confrontation rights was not harmless beyond a reasonable doubt); State v. Cabbell, 207 N.J. 311, 337-39 (2011) (holding denial of right to cross-examine witness was not harmless beyond a reasonable doubt).

In this case, we are not dealing with a constitutional error. Directive #4-07 arose from our Supreme Court's desire for uniform voir dire practices; the directive's mandates are not constitutionally required. Instead, as noted earlier, the Constitutions of both the United States and New Jersey guarantee a criminal defendant an impartial jury. See Skilling v. United States, 561 U.S. 358, 377, 130 S. Ct. 2896, 2912, 177 L. Ed. 2d 619, 641 (2010) ("The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury."); State v.

Winder, 200 N.J. 231, 252 (2009) ("Generally, a trial court's decisions regarding voir dire are not to be disturbed on appeal, except to correct an error that undermines the selection of an impartial jury.").

Moreover, failure to read the questions aloud or ask open-ended questions during jury voir dire is not a structural error. Structural errors exist "only in a very limited class of cases." Johnson v. United States, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549, 137 L. Ed. 2d 718, 728 (1997). "A structural error [has been] defined as a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" State v. Purnell, 161 N.J. 44, 60 (1999) (quoting Johnson, supra, 520 U.S. at 468, 117 S. Ct. at 1549, 137 L. Ed. 2d at 728).

Our Supreme Court has explained that "a structural error affects the legitimacy of the entire trial, rather than an isolated error that occurs during a certain part of the trial process and does not contaminate the trial as a whole." Id. at 61. Thus, a structural error is a "structural defect[] in the constitution of the trial mechanism, which [defies] analysis by 'harmless-error' standards." Ibid. (alterations in original) (quoting Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302, 331 (1991)).

Accordingly, here we apply the harmless error standard set forth in Rule 2:10-2. In doing so, we examine whether the trial court's failure to read the questions aloud, or ask three open-ended questions, was of "such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. Using that standard, we have reviewed the jury voir dire conducted in this case and conclude it was sufficiently comprehensive to ensure that an impartial jury was selected.

Here, twelve jurors and two alternates were selected. All potential jurors were given a printed copy of the jury questionnaire and instructed to provide full and truthful answers. The judge further instructed the jurors: "If, for any reason, my questions do not cover why you would not be able to listen with an open mind to the evidence in this case or be unable to reach a fair and impartial verdict, it is necessary that you volunteer this information to me when you are questioned."

All potential jurors then answered the standard list of questions with "yes" or "no" responses and provided their biographical information. The trial judge individually questioned potential jurors on any "yes" response. The judge then posed two open-ended questions to the jurors, asking them to explain why they could be a fair juror, and their opinion on the "war on drugs." During that process, defendant and his counsel had the

opportunity to evaluate each of the potential jurors based on their responses to these questions.

During jury selection, some seventy-eight potential jurors were examined, of which forty-four were excused by the court for cause based on their answers to questions and follow up questioning. The potential jurors who were not immediately excused for cause provided narrative responses, and all fourteen jurors selected to hear the case spoke during the selection process. Importantly, none of the jurors expressed confusion about the questions or asked to have them read aloud.

The overall jury selection process was comprehensive. Our review of the jury voir dire process in this case convinces us that the selected jury was an impartial jury. Thus, we conclude that the judge's failure to read the questions to the first group of jurors in the box or to ask three open-ended questions did not constitute plain error.

B.

Finally, defendant contends the trial court improperly rehabilitated several biased jurors and failed to thoroughly pose follow-up questions aimed at gauging the jurors' impartiality. Defendant also argues the court improperly denied his request to excuse an allegedly biased juror for cause, thereby forcing defense counsel to exhaust his peremptory challenges and leaving several

biased jurors on the panel. We do not find these arguments persuasive.


Trial courts possess considerable discretion in determining the qualifications of prospective jurors. State v. Pennington, 119 N.J. 547, 588-89 (1990). A trial court's decision on the removal of a prospective juror for cause is thus reviewed for an abuse of that discretion. Ibid. In determining whether removal is warranted, the trial court should make a "probing inquiry" on the record into the juror irregularity, and rely on its own objective evaluation of the potential for prejudice. State v. Scherzer, 301 N.J. Super. 363, 487-88 (App. Div.), certif. denied, 151 N.J. 466 (1997). A juror's statement of impartiality is afforded "a great deal of weight," and a reviewing court defers to the trial court's ability to assess the juror's sincerity and credibility about his or her impartiality. State v. Singletary, 80 N.J. 55, 64 (1979).

Guided by these principles, we conclude from our review of the record, when viewed as a whole, that the trial court exercised proper discretion in questioning and assessing potential jurors, and in excusing those who could not be impartial. Moreover, we note defendant was acquitted of all charges except for child endangerment, which buttresses our conclusion that the trial

court's jury selection process did not violate defendant's right
to a fair trial.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION