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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0881-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HOMER ANDREWS, a/k/a HOMER JEROME ANDREWS, BRIAN THOMAS, THOMAS GREEN, TYRONE ANDREWS and JEROME ANDREWS,

Defendant-Appellant.

Submitted September 29, 2016 – Decided March 9, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 11-03-0472.

Joseph E. Krakora, Public Defender, attorney for appellant (Stefan Van Jura, Deputy Public Defender II, of counsel and on the brief).

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

PER CURIAM

In May 2014, a jury convicted defendant Homer Andrews of first-degree carjacking, N.J.S.A. 2C:15-2, and second-degree eluding, N.J.S.A. 2C:29-2(b). He was sentenced to a twenty-three year term of imprisonment for carjacking and to a concurrent six and one-half year term for eluding. Defendant appeals from the judgment of conviction and the sentence for carjacking. He contends the prosecutor made two remarks during her summation so prejudicial reversal of his convictions is warranted. He also asserts the trial court erred when it imposed a twenty-three year term of imprisonment for carjacking. For the reasons that follow, we affirm.

I

The pertinent evidence at trial was as follows. Late in the evening of September 18, 2010, E.B. (victim) was driving a taxi in Newark.[1] She testified she picked up two fares, defendant and a younger man. When their trip concluded, the younger passenger was dropped off at one location and defendant at another. Defendant refused to pay his fare and, after exiting the cab, opened the driver's door, pulled the victim out of the car, and drove off in the cab.

[1] We employ the use of initials to protect the victim's privacy.

The victim eventually flagged down a police car and advised the officers what occurred. She told them defendant was wearing a gray suit, appeared to be approximately forty years of age, was 5'7" or 5'8" tall, weighed about one-hundred-and-sixty-pounds, and had braids or dreads in his hair. Two days later, the victim picked out defendant from a photographic array. During the trial she testified she was "one hundred percent sure" defendant was the person who took her cab.

Approximately two hours after she reported her cab stolen to the police, a Newark police officer in a patrol car spotted the victim's cab. The officer activated his lights and siren and followed the cab, but the driver sped off and a chase ensued. The chase ended two to three miles later when the car ultimately crashed into a telephone pole.

The officer saw the driver of the cab at the accident scene. At trial, the officer identified defendant as that driver. Another police officer who responded to the accident scene testified defendant was standing outside of the cab when the officer arrived. The officer mentioned defendant was wearing a gray tweed suit.

Another man, Rhashon Leeks, was also in the cab at the time of the accident. At trial, Leeks identified defendant as the driver of the cab when the accident occurred. Leeks testified

defendant gave him a ride home in exchange for drugs that had a value of ten dollars. During the ride, Leeks heard a police siren, but defendant failed to pull over and eventually they crashed.

Defendant was taken from the accident scene to a local hospital to receive treatment for facial injuries. Although a copy of the hospital records placed into evidence was not provided to us, during her summation, the prosecutor noted the hospital records reveal defendant told the hospital staff he had been injured in a car accident.

Defendant also testified. He claimed this is a case of mistaken identity. He contended he had never been in the victim's cab and was not the person the police arrested at the scene of the accident. He maintained he was at a friend's home during the evening of September 18, 2010, but left the following morning at around 4:00 a.m. to take a bus home. However, when he approached the bus stop, the police appeared, threw him to the ground, and beat him up. He claims he was then transported by ambulance to the hospital for treatment of facial injuries inflicted by the police. He acknowledged he did not tell the hospital staff he had been assaulted by the police.

Defendant surmised the police assumed he was the person who had stolen the victim's cab because he was wearing a suit,

albeit a brown and not gray suit. He further assumed he was confused with the person who had stolen the cab, who had been taken to the same hospital at about the same time. Defendant also claimed he never had dreads or braids in his hair and was six feet tall.

As mentioned above, during her summation, the prosecutor made two comments defendant now claims were prejudicial. Defendant did not object to those comments during the trial. For the sake of brevity and conciseness, we do not set forth those comments here but do so below, where we provide an analysis of the issues on appeal.

Finally, during sentencing, defendant denied committing the crimes with which he had been convicted. The court found three aggravating factors applied. Specifically, the court found aggravating factor three, the risk defendant would commit another crime, N.J.S.A. 2C:44-1(a)(3); six, the extent of defendant's prior criminal record and the seriousness of the offense of which he has been convicted, N.J.S.A. 2C:44-1(a)(6); and nine, the need to deter defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). The court determined there were no mitigating factors. But the court declined to impose a discretionary extended term, even though defendant was extended term eligible. After considering the nature of the offense and

defendant's criminal history and circumstances, the court determined a twenty-three year term for the carjacking conviction was appropriate.

II

The specific argument points defendant presents for our consideration are:

> POINT I — DEFENDANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL, AND TO REMAIN SILENT, BY TWO PROSECUTORIAL COMMENTS: ONE THAT ASSERTED THE STATE "KNEW" DEFENDANT WAS GUILTY; ANOTHER THAT IMPLIED DEFENDANT HAD A BURDEN TO TIMELY INFORM POLICE OF HIS EXCULPATORY VERSION OF EVENTS.
>
> POINT II — A RESENTENCING SHOULD BE ORDERED FOR IMPOSITION OF A REDUCED TERM FOLLOWING A PROPER ANALYSIS OF THE OFFENSE AND THE OFFENDER.

We start with the contention the prosecutor made prejudicial remarks necessitating the reversal of defendant's convictions. As there was no objection to the prosecutor's comments at trial, our review is governed by the plain error rule. See R. 2:10-2. Under this standard, a conviction will be reversed only if the error was "clearly capable of producing an unjust result," ibid., and was "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. Taffaro, 195 N.J. 442, 454 (2008) (quoting State v. Macon, 57 N.J. 325, 336

(1971)). Defendant must prove a plain error was clear, obvious, and affected his substantial rights. State v. Chew, 150 N.J. 30, 82 (1997), cert. denied, 528 U.S. 1052, 120 S. Ct. 593, 145 L. Ed. 2d 493 (1999), overruled in part on other grounds, State v. Boretsky, 186 N.J. 271, 284 (2006).

In reviewing allegations a prosecutor made improper prejudicial remarks during an opening or closing statement, we consider whether defense counsel objected in a timely and proper fashion to the remarks; whether the offending remarks were withdrawn promptly; and whether the court gave the jury curative instructions. State v. Zola, 112 N.J. 384, 426 (1988), cert. denied, 489 U.S. 1022, 109 S. Ct. 1146, 103 L. Ed. 2d 205 (1989). However, where, as here, there was a failure to object at trial, we may infer defense counsel did not consider the remarks inappropriate or prejudicial. State v. Vasquez, 265 N.J. Super. 528, 560 (App. Div.), certif. denied, 134 N.J. 480 (1993). When prosecutorial misconduct is being raised for the first time on appeal, we need only be concerned with whether "the remarks, if improper, substantially prejudiced the defendant['s] fundamental right to have the jury fairly evaluate the merits of [his] defense, and thus had a clear capacity to bring about an unjust result." State v. Johnson, 31 N.J. 489, 510 (1960).

Defendant complains the prosecutor stated "We know the defendant is guilty" during the course of her summation. He argues the prosecutor conveyed to the jury the State believed defendant was guilty, and that such belief was likely due to the State's "presumed superior, extra-record knowledge of the incident." Defendant cites State v. Feaster, in which our Supreme Court observed the well-established principle, "A prosecutor is guilty of misconduct if he implies to the jury that he possesses knowledge beyond that contained in the evidence presented, or if he reveals that knowledge to the jury." 156 N.J. 1, 59 (1998). In addition, defendant noted it is improper for a prosecutor to state, explicitly or implicitly, a personal belief a defendant is guilty. See State v. Hipplewith, 33 N.J. 300, 311 (1960).

Set forth below is an excerpt from the prosecutor's summation, in which she makes the alleged offending statement. To put this statement in context, we provide what the prosecutor stated just before and after the subject remark.

> What do we know? You've heard the testimony of several witnesses; you'll soon have the evidence with you. We know that on September 18th of 2010, [the victim] was out in Newark making a living as a taxicab driver, that she stopped at Brookwood Street and picked up the defendant and another gentleman. We know she said the defendant had a suit on at the time; that she spent an

> hour with him in the cab. She drove back at some point and let the other gentleman out of the cab. The defendant and she became [sic] in an argument over the fare when they were at the corner of Linsey and Norwood Street, and the defendant, wearing a suit, grabbed her, ripped her out of the cab and took off with it.
>
> We know that a few hours later, Officer Oliveira saw the defendant driving the cab. He said that he saw him head on, that he pulled — he tried to pull him over. The defendant didn't stop, ultimately crashed the car into 551 Tremont Avenue, into a pole and there was a fare, Rashon Leeks, in the back seat.
>
> We know the defendant is guilty. I just want to go through some of the evidence with you now.
>
> First and foremost, the reason the defendant is guilty is because he was caught red-handed with the taxicab. Officer Oliveira testified that he saw the defendant after this cab — driving this cab on Tremont Avenue. It's my recollection that he actually saw him driving on Sanford and turning onto Tremont, and that he pulled [defendant] out of [his] seat. And that Officer Oliveira testified that when he approached the car after the crash, it was none other than this defendant, wearing the suit, albeit a plaid suit, be it gray, be it brown . . . .
>
> [(Emphasis added).]

The prosecutor continued to summarize additional evidence which in her view showed defendant was guilty of the offenses with which he was charged; it is not necessary to provide her

complete recitation of the evidence in order to address defendant's argument. In our view, the comment, "We know the defendant is guilty[,]" does not suggest the State possessed information known only to the State. The prosecutor's comment was referring to the evidence itself.

Immediately following this statement, the prosecutor stated, "I just want to go through some of the evidence with you now." She then proceeded to summarize in detail each piece of evidence supporting the State's case. Clearly, the use of the word "we" referred collectively to all of those who knew the evidence that was presented at the trial. Those who knew of such evidence were, of course, not only the prosecutor, but also defendant and the jurors. The use of the words "we know" did not suggest the State was in possession of information about the case that was not shared with the jury. As the State put it, the use of the words "we know" was merely a stylistic choice of words and not a reference to information that was not introduced into evidence.

Further, as we noted in State v. Rivera, a prosecutor's suggestion a defendant is guilty is acceptable if he or she makes it "perfectly plain" that the belief "is based solely on the evidence that has been introduced at trial." 437 N.J. Super. 434, 449 (App. Div. 2014) (quoting State v. Thornton, 38

N.J. 380, 398 (1962)). To the extent the prosecutor's choice of words even reflects a personal belief, such belief is based solely on the evidence. Accordingly, we reject the argument the prosecutor's statement had a clear capacity to bring about an unjust result.

In another portion of her summation, the prosecutor stated:

> [Defendant] tells the doctors, who have an obligation to report these records accurately, that he was in a motor vehicle accident, and he told them that because he wanted to get an appropriate treatment at the hospital because he was injured. You'll see these records . . . .
>
> And look through the records. They've repeatedly mentioned that he was the unrestrained driver in a motor vehicle accident, and that is from the horse's mouth. He told them that. And I submit to you, ladies and gentlemen, when you go to a doctor for treatment, what you tell them is accurate because you want to be treated accurately and that these records are reliable. They are reliable — they are reliable evidence of what actually happened that night because the defendant had an interest in reporting accurately what had happened to him that night so they knew how to treat him.
>
> Now if he had been beaten up by the police, as he wants you to believe now, four years later, as he was standing trial, he would have told the officers that at five in the morning, on September 18th, 2010, right after he was brought in.
>
> [(Emphasis added).]

Defendant complains the emphasized portion of the prosecutor's summation above suggested to the jury defendant had a duty to inform the police he had been assaulted by them. Defendant points out he did not have a duty to say anything to the police, as he had the right to remain silent under the Fifth Amendment. See U.S. Const. amend. V.

Given the context, it is clear the prosecutor intended to say defendant would have told the hospital staff he had been beaten up by the police if that had occurred, not that defendant would have told the police he had been assaulted by them. In her remarks leading up to the challenged statement, the prosecutor made the point defendant told the hospital staff he had been in a motor vehicle accident. The prosecutor further argued that had defendant been assaulted by the police, then he would have reported such fact but, instead of stating defendant would have reported such fact to the medical staff, she said defendant would have reported being assaulted by the police to the police.

The prosecutor's overall point was eminently obvious; if defendant had been beaten up by the police, he would have said something to the hospital staff. Her statement suggesting defendant would have reported to the police that they had beaten him is not even logical, and it is not reasonable a juror would

have been misled by this statement. This was an inadvertent slip of the tongue that did not have a clear capacity to bring about an unjust result.

We turn to defendant's contention a remand for resentencing on the conviction for carjacking is warranted. Defendant argues the court should have imposed a fifteen-year term for this offense. We disagree. The record reveals the court fully explained its reasons for finding the subject aggravating factors applied and that no mitigating factors were present.

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). We assess whether the aggravating and mitigating factors were based upon "competent credible evidence in the record." Ibid. (quoting State v. Bieniek, 200 N.J. 601, 608 (2010)). We do not "'substitute [our] assessment of aggravating and mitigating factors' for the trial court's judgment." Ibid. (quoting State v. O'Donnell, 117 N.J. 210, 215 (1989)). When a sentencing court's findings are supported by the record, we will only reverse if the sentence "shocks the judicial conscience" in light of the particular facts of the case. State v. Roth, 95 N.J. 334, 364 (1984); accord State v. Cassady, 198 N.J. 165, 183-84 (2009). Here, defendant's arguments do not warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION