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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1106-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

VERNON K. JOHNSON,

Defendant-Appellant.

Submitted June 6, 2017 – Decided June 26, 2017

Before Judges Fasciale and Sapp-Peterson.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
08-01-0136.

Joseph E. Krakora, Public Defender, attorney
for appellant (Carolyn V. Bostic, Designated
Counsel, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor,
attorney for respondent (Catherine A. Foddai,
Senior Assistant Prosecutor, of counsel and
on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from an August 4, 2015 order denying his
petition for post-conviction relief (PCR). We affirm.

We adduce the following facts from the evidence presented at trial. Defendant committed three crimes in a three-day span. The first crime occurred on September 15, 2007, at about 11:30 a.m. Defendant entered a National Wholesale Liquidators (Liquidators) store and spoke to the assistant manager about returning a large television, which retailed for \$499 plus tax. He explained that he did not have a receipt for it. The assistant manager informed defendant that refunds were not made without a receipt. Defendant then told the assistant manager that the receipt was in his car, and he would go out and get it. Defendant left the store with the television, and did not return.

Defendant testified that he purchased a television at Liquidators on September 14, 2007, with cash. According to defendant, he was told on September 15, 2007, that he was only entitled to seventy-five percent store credit without a receipt. At that point, defendant decided not to return the television, he left the store and put it in his Saturn. He then sold the television to a friend.

The following day, September 16, 2007, defendant robbed a gas station attendant. The attendant testified that a silver Saturn vehicle pulled into a BP gas station. The attendant asked defendant to open the gas cap several times. Defendant exited the vehicle joking about money, and the attendant repeated his request

for defendant to open the gas cap. Defendant then went back into the vehicle and retrieved a gun wrapped in a plastic bag, which he pointed at the attendant. Defendant then told the attendant "if you shout I kill you. If you shout I kill you. The money, I need all the money." Defendant went into the attendant's pocket, took out money, and proceeded to leave. The attendant immediately called the police, described the incident, gave them a description of defendant and relayed a partial license plate number.

On September 17, 2007, at approximately 12:15 p.m., defendant returned to Liquidators. Defendant attempted to return a large television, retailed at \$699, without a receipt. A worker at the store called security and a manager to speak with defendant. An argument ensued and defendant ran out of the building. The manager provided the license plate number, make, and model of the car to the police.

Defendant testified that he returned to Liquidators that day to obtain a larger television set he had previously wanted, took the television off a shelf at the store, and put it in his shopping cart. He testified that he told the store employees he came back to the store to buy a larger television set because he sold the other television he tried to return. An argument ensued between defendant and the employees, and defendant testified that he left the store because he was upset with the treatment he received.

The police used the information received from the manager of Liquidators and traced the Saturn to defendant's girlfriend (the girlfriend), who rented it from Enterprise Rent-A-Car. The Saturn was parked in a parking lot at the girlfriend's apartment. The police knocked on the door, and defendant answered the door. The police advised defendant that they were investigating a series of shoplifting incidents that occurred at Liquidators, and defendant responded that he thought they were there investigating the incident that took place at the BP gas station where he slapped a man that took his money. Defendant was placed in custody and Enterprise Rent-A-Car consented to a search of the Saturn. Police found a toy gun and a white plastic bag inside the trunk of the vehicle.

In January 2008, a grand jury indicted defendant with third-degree shoplifting, N.J.S.A. 2C:20-11(b)(1) (Count One); first-degree robbery, N.J.S.A. 2C:15-1 (Count Two); and third-degree attempted shoplifting, N.J.S.A. 2C:20-11(b)(1) and N.J.S.A. 2C:5-1 (Count Three).

In June 2010, after a seven-day trial, a jury convicted defendant of all the charges. In September 2010, defendant appeared before the court for sentencing. The court imposed a four-year prison term on count one, which was consecutive to count two and concurrent to count three; a fifteen-year prison term

subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, with five years of parole supervision on count two; and a four-year prison term on count three, which was concurrent to count two.

Defendant appealed his conviction and challenged various aspects of his sentence. State v. Johnson, No. A-2934-10 (App. Div. July 18, 2012) (slip op. at 2). This court affirmed defendant's robbery and attempted shoplifting convictions, but reversed the third-degree shoplifting conviction. Ibid. We explained that defendant could not have been convicted of third-degree shoplifting because "the full retail value of the television was below the statutory threshold of \$500." Id. at 21. This court amended the conviction to fourth-degree shoplifting. Id. at 22. We also remanded for re-sentencing on all counts because the sentencing court improperly considered aggravating factor eleven, N.J.S.A. 2C:44-1(a)(11). Id. at 24-25.

In January 2013, defendant was re-sentenced to an eighteen-month prison term on count one, consecutive to count two; a twelve-year prison term subject to the NERA with five years of parole supervision on count two; and a three-year prison term on count three, concurrent to count two. In April 2013, defendant appealed the sentence, and in April 2014, an Excessive Sentence Oral Argument (ESOA) panel affirmed the re-sentence.

Defendant filed a verified petition for PCR in December 2014. The court heard argument on the petition for PCR in August 2015. The judge rendered an oral opinion and denied defendant's petition without an evidentiary hearing.

On appeal, defendant argues:

POINT I

THE PCR COURT ABUSED ITS DISCRETION BY DENYING AN EVIDENTIARY HEARING WHERE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL.

A. The Defendant Was Denied the Effective Assistance Of Counsel When Trial Counsel Failed to Move for Severance of the Robbery Charge From the Shoplifting Charges Pursuant to [Rule] 3:15-2(b).

B. Trial Counsel Provided Ineffective Assistance of Counsel By Failing to Move for a Judgment of Acquittal After the Verdict Pursuant to [Rule] 3:18-2 and/or to Set Aside the Verdict as Against the Weight of the Evidence Pursuant to [Rule] 3:20-1 With Respect to the Shoplifting Charges. (Raised in Part Below).

C. The Defendant's Appellate Counsel Was Ineffective by Failing to Challenge the Denials of the Defendant's Motions for Acquittal on Direct Appeal. (Not Raised Below)[.]

POINT II

THE PCR COURT ABUSED ITS DISCRETION BY HOLDING THAT THE DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE PROCEDURALLY BARRED BY [Rule] 3:22-4.

Defendant raises the following points in his pro se supplemental brief:

POINT I

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT OF DUE PROCESS TO PARTICIPATE IN HIS TRIAL BY BEING EXCLUDED FROM THE JURY SELECTION PROCESS WHERE THE VOIR DIRE WAS HELD AT SIDEBAR, OUT OF DEFENDANT'S PRESENCE.

POINT II

DEFENDANT WAS DENIED DUE PROCESS OF A FAIR SENTENCING PROCESS BY ERRONEOUS, UNFAVORABLE INFORMATION CONTAINED IN THE PRESENTENCE REPORT.

POINT III

DEFENDANT WAS DENIED HIS RIGHT OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY BEING EXCLUDED FROM THE JURY SELECTION PROCESS, AND BY THE FAILURES TO ADDRESS THE INCORRECT INFORMATION CONTAINED IN THE PRESENTENCE REPORT. (Not Raised Below).

We conclude that defendant's arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by the judge in his oral opinion. We add the following remarks.

A defendant is entitled to an evidentiary hearing only when he or she "has presented a prima facie [case] in support of [PCR,]" meaning that "the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (first alteration in original) (quoting State v. Preciose, 129 N.J. 451, 462 (1992)), cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). Defendant fails to demonstrate a reasonable likelihood of success on the merits, and thus he is not entitled to an evidentiary hearing.

For defendant to obtain relief based on ineffective assistance grounds, he is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); accord State v. Fritz, 105 N.J. 42, 58 (1987). He failed to meet this standard. We agree with the judge's conclusion that defendant was not denied effective assistance of counsel when trial counsel did not move to sever his charges, move for an acquittal pursuant to Rule 3:18-2, or move to set aside the verdict pursuant to Rule 3:20-1.

Defendant's claims are also barred under Rule 3:22-4. Defendant does not meet prong one or three under Rule 3:22-4. He

also fails to meet prong two. "Our courts will find fundamental injustice when the judicial system has denied a 'defendant with fair proceedings leading to a just outcome' or when 'inadvertent errors mistakenly impacted a determination of guilt or otherwise wrought a miscarriage of justice.'" State v. Nash, 212 N.J. 518, 546 (2013) (quoting State v. Mitchell, 126 N.J. 565, 587 (1992)). Moreover "[t]o succeed on a fundamental-injustice claim, the petitioner must make 'some showing' that an error or violation 'played a role in the determination of guilt.'" Ibid. (quoting Mitchell, supra, 126 N.J. at 587). Here, defendant did not meet this requirement. He has had two previous opportunities to appeal both claims and there has been no newly discovered evidence.

We also agree with the PCR court, that despite the procedural bar, defendant's severance claim would be barred on the merits.

Rule 3:7-6 provides that

[t]wo or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.

However, if a defendant "is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials

of counts, grant a severance of defendants, or direct other appropriate relief." R. 3:15-2(b).

In reviewing whether a trial judge erred by allowing two or more offenses to be tried simultaneously, we "must assess whether prejudice is present, and [the court's] judgment is reviewed for an abuse of discretion." State v. Sterling, 215 N.J. 65, 73 (2013). "The test for assessing prejudice is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges.'" Ibid. (alteration in original) (quoting State v. Chenique-Puey, 145 N.J. 334, 341 (1996)).

Our Supreme Court has set forth the following criteria for admitting other-crimes evidence under N.J.R.E. 404(b):

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.

[State v. Cofield, 127 N.J. 328, 338 (1992).]

The trial court's analysis under Cofield should only be disturbed if there is "a 'clear error of judgment.'" State v. Gillispie,

208 N.J. 59, 84 (2011) (quoting State v. Barden, 195 N.J. 375, 390-91 (2008)).

Here, the other crimes evidence would be admitted under Cofield, and therefore defendant failed to prove that he was prejudiced under prong two of Strickland. The other crimes evidence is relevant to a material issue because it helps prove defendant's identity. Moreover, defendant used the same vehicle to commit all three crimes, referenced the robbery while he was being questioned by police for the store thefts, and committed all three crimes consecutively. The acts are similar in kind and reasonably close in time. Furthermore, the evidence of the crimes was clear and convincing; witness testimony was presented for each crime at trial. The probative value outweighed the prejudice because it helped prove defendant's identity in all the cases.


We also agree with the PCR court that defendant's claims, that he was denied effective assistance of counsel when trial counsel did not move for an acquittal pursuant to Rule 3:18-2 or move to set aside the verdict pursuant to Rule 3:20-1, also fail on the merits.

Here, there was sufficient circumstantial evidence for a jury to find guilt. The State presented testimony from employees at Liquidators, the victim at the gas station, and police officers that responded to the thefts. The State also presented other

videos and reports. When viewing the evidence in the light most favorable to the State, the evidence would be sufficient to convict defendant. See State v. Reyes, 50 N.J. 454, 459 (1967). It would also not be a manifest denial of justice to allow the jury verdict to stand given the evidence. R. 3:20-1. Therefore, defendant failed to satisfy the second prong of Strickland.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION