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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-1526-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN SELLOW,

Defendant-Appellant.

Submitted May 2, 2017 – Decided August 10, 2017

Before Judges Koblitz and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
14-06-0579.

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

Christopher S. Porrino, Attorney General,
attorney for respondent (Sarah E. Ross, Deputy
Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant John Sellow appeals from his conviction after a
jury found him guilty of second-degree eluding, N.J.S.A. 2C:29-
2(b), and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2).

On appeal, he challenges his conviction, arguing that the trial court improperly instructed the jury as to "flight." Specifically he argues:

BECAUSE DEFENDANT FLED BEFORE HE COMMITTED ANY OFFENSE, AND BECAUSE HE WAS SUBSEQUENTLY CHARGED WITH OFFENSES FOR WHICH FLIGHT WAS THE CENTRAL ELEMENT, IT WAS PREJUDICIAL ERROR TO INSTRUCT THE JURY THAT IT COULD CONSIDER HIS FLIGHT AS EVIDENCE THAT HE WAS CONSCIOUS OF HIS GUILT OF THOSE OFFENSES.

We have considered defendant's argument in light of our review of the record and the applicable legal principles. We affirm.

The facts surrounding defendant's arrest and conviction are not disputed and can be summarized as follows. On January 8, 2014, three Passaic County Sheriff's officers sought to execute two warrants issued for defendant's arrest relative to his failure to pay child support. While on duty in plain clothes with their badges visible, the officers activated their vehicle's overhead lights and approached defendant as he sat in his automobile, located outside his home. One officer approached defendant's driver-side window while the other went to the passenger side. When defendant was informed they were there to execute an arrest warrant and an officer directed him to step out of his vehicle, defendant backed his car up and then proceeded to drive away from the officers, jumping a curb as he did so and forcing the officers to get out of defendant's way to avoid being hit.

The officers pursued defendant in their vehicle and additional officers in other police cars joined the chase. During the pursuit, defendant drove in excess of 20 to 25 miles-per-hour over the speed limit, through numerous stop signs and down the wrong way on one-way streets. Defendant eventually stopped his vehicle, got out and attempted to run away, leaving his car in gear, allowing it to roll into a utility pole.

The officers followed on foot and pursued him. One of them quickly subdued defendant. As the officer attempted to handcuff him, defendant began to wave his arms in an attempt to avoid being handcuffed. Several police officers joined to force the handcuffs onto defendant.

The officers issued two traffic summonses to defendant for failure to obey stop signs and two additional summonses for careless and reckless driving. A grand jury later indicted defendant and charged him with the second-degree eluding and fourth-degree resisting for which he was convicted, as well as a third-degree resisting, N.J.S.A. 2C:29-2(a)(3).

After the presentation of evidence, Judge Adam E. Jacobs conducted a charge conference during which defense counsel raised an objection to the court charging "flight" as evidence of a

consciousness of guilt.¹ According to counsel, a flight charge was not warranted because there was no underlying crime that defendant was accused of committing, as the officers were trying to arrest defendant only for outstanding child support warrants and his driving and running away from the officers were not separate acts. The prosecutor disagreed, contending that driving away from the officers was an eluding relating to defendant's attempt to avoid the warrants being executed, and his running away was flight from the eluding.

After considering counsels' arguments, Judge Jacobs decided that the flight charge was warranted. The judge observed that defendant committed three separate acts in his encounter with the officers – "the underlying eluding and the subsequent . . . jogging away, and resistance by using [his] arms, arguably force." The judge reasoned that once defendant stopped his vehicle, the eluding was complete and defendant's ensuing attempt to run away could be found to be an expression of defendant's consciousness of his guilt on that charge.

In his subsequent instructions to the jury, Judge Jacobs distinguished defendant's "flight" from the eluding charge. He stated:

¹ See Model Jury Charge (Criminal), "Flight" (2010).

There has been some testimony in this case from which you . . . may infer that the defendant fled shortly after the alleged commission of the crime of eluding. The defendant denies any flight. The question of whether the defendant fled after the commission of the purported crime is another question of fact for your determination.

The state alleges that [defendant] exited the vehicle he was driving. He fled on foot until apprehended by police officers. Mere departure from a place where crime has been committed does not constitute flight. If you find that the defendant fearing that an accusation of [sic] arrest would be made against him on the charge of eluding involved in the indictment, took refuge and flight for the purpose of evading the accusation or arrest on that charge, then you may consider such flight in connection with all other evidence in the case as an indication or proof of consciousness of guilt. Flight may only be considered as evidence of consciousness of guilt if you should determine that the defendant's purpose in leaving was to evade accusation or arrest for the offense charged in the indictment, that being eluding.

[(Emphasis added).]

The judge continued by charging the jury about each of the offenses charged in the indictment, including lesser-included offenses, explaining the elements that the State had to prove beyond a reasonable doubt.

After the jury convicted defendant of the two offenses, the court merged the resisting charge into the eluding and sentenced defendant to six years. This appeal followed.

We begin our review by recognizing that appropriate and "proper jury charges are essential to a fair trial." State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Proper instructions consist of "a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Ibid. (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "[T]he court has an 'independent duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case, irrespective of the particular language suggested by either party.'" Ibid. (alteration in original) (quoting Reddish, supra, 181 N.J. at 613); see also State v. Scharf, 225 N.J. 547, 580 (2016). "Because proper jury instructions are essential to a fair trial, 'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." Baum, supra, 224 N.J. at 159 (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)); see also State v. McKinney, 223 N.J. 475, 495 (2015).

With these guiding principles in mind, we conclude from our review that Judge Jacob's instructions on flight were not erroneous. "Evidence of flight . . . by an accused generally is admissible as demonstrating consciousness of guilt, and is therefore regarded as probative of guilt." State v. Mann, 132

N.J. 410, 418 (1993). "The most common example of conduct that can give rise to an inference of consciousness of guilt is flight." State v. Randolph, 441 N.J. Super. 533, 562 (App. Div. 2015), aff'd in and part rev'd in part on other grounds, 228 N.J. 566 (2017). Evidence of flight need not be unequivocal, but it "must be 'intrinsically indicative of a consciousness of guilt.'" Randolph, supra, 228 N.J. at 595 (quoting Randolph, supra, 441 N.J. Super. at 562).

Contrary to defendant's contention, the fact that up until the point defendant began to elude the sheriff's officers he had not committed any crime did not prohibit the judge from instructing on "[f]light from the scene of [the] crime" of eluding. Randolph, supra, 228 N.J. at 594. "A jury may infer that a defendant fled from the scene of a crime by finding that he departed with an intent to avoid apprehension for that crime." State v. Wilson, 57 N.J. 39, 49 (1970) (emphasis added). As Judge Jacobs explained, the eluding was completed when defendant stopped his vehicle. Defendant's running away on foot from police after having eluded them was not part and parcel of the same offense, which relates to a defendant's use of an automobile to escape prosecution.²

² A person is guilty of second-degree eluding if:

Moreover, Judge Jacobs was careful to ensure that the jury limited its consideration of defendant's flight to the eluding offense and did not consider the flight charge with regard to the others.

while operating a motor vehicle [he] knowingly flees or attempts to elude any police or law enforcement officer after having received any signal from such officer to bring the vehicle . . . to a full stop [and] if the flight or attempt to elude creates a risk of death or injury to any person.

[N.J.S.A. 2C:29-2(b) (emphasis added).]

In order to convict the defendant of eluding, the State must prove beyond a reasonable doubt each of the following six (6) elements:

1. That [the defendant] was operating a motor vehicle on a street or highway[.]
2. That [the individual giving chase] was a police or law enforcement officer.
3. That [the officer] signaled [the defendant] to bring the vehicle . . . to a full stop.
4. That [the defendant] knew that the officer had signaled (him/her) to bring the vehicle . . . to a full stop.
5. That [the defendant] knew that [the individual signaling defendant] was a police or law enforcement officer.
6. That defendant knowingly fled or attempted to elude the officer.

[Model Jury Charge (Criminal), Eluding an Officer (Second and Third Degree) (2004).]

Affirmed.

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



CLERK OF THE APPELLATE DIVISION