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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1527-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

YERO C. BAILEY, a/k/a
BAILEY C. YERO,

Defendant-Appellant.

Submitted December 12, 2016 – Decided May 1, 2017

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No. 13-
01-0110.

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

Grace H. Park, Acting Union County Prosecutor,
attorney for respondent (Meredith L. Balo,
Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Yero C. Bailey appeals from an August 1, 2014 judgment of conviction for two weapons offenses and resisting arrest, crimes for which a judge sentenced him to an aggregate six and one-half year custodial term. On appeal, defendant argues:

POINT I

DEFENDANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR INDICATED DURING HIS OPENING AND CLOSING STATEMENTS THAT DEFENDANT'S SISTER REACHED OUT TO STATE'S WITNESS ANTAWAN POWELL AT THE REQUEST OF THE DEFENDANT TO APOLOGIZE FOR THE EVENTS THAT TOOK PLACE ON SEPTEMBER 16, 2012. HE WAS FURTHER PREJUDICED BY THE PROSECUTOR'S IMPROPER BOLSTERING OF HIS POLICE WITNESS, AND MISCHARACTERIZATION OF THE OFFICER'S TESTIMONY. (PARTIALLY RAISED BELOW).

POINT II

DEFENDANT'S SENTENCE IS EXCESSIVE BECAUSE THE TRIAL COURT FAILED TO CONSIDER MITIGATING FACTORS SUPPORTED BY THE EVIDENCE, AND IMPOSED A CONSECUTIVE SENTENCE WHERE DEFENDANT'S CRIMES WERE PART OF A SINGLE, CONTINUOUS ACT, AND DID NOT INVOLVE VIOLENCE OR A TRUE THREAT OF VIOLENCE.

POINT III

DEFENDANT'S CONVICTION OF POSSESSION OF A FIREARM FOR AN UNLAWFUL PURPOSE MUST BE VACATED BECAUSE HIS ACQUITTAL OF THE CHARGE OF TERRORISTIC THREATS ERASED THE "UNLAWFUL PURPOSE" FOR WHICH HE POSSESSED A WEAPON. (NOT RAISED BELOW).

For the reasons that follow, we affirm defendant's convictions but remand the matter for resentencing because the

trial judge provided no explanation for the imposition of consecutive sentences.

In January 2013 a Union County grand jury returned an indictment charging defendant with second-degree possession of a weapon, a handgun, for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count one); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count two); third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count three); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a) (count four). At trial, the jury acquitted defendant of terroristic threats, but convicted him of the remaining counts.

At sentencing, the judge found aggravating factor three, N.J.S.A. 2C:44-1(a)(3), the risk defendant will reoffend, based on defendant's record of non-indictable convictions, many of which involved simple assault; and aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), the need for deterring defendant and others from violating the law. The judge found no mitigating factors. On each weapons count, the judge sentenced defendant to concurrent, five-year prison terms each with three years of parole ineligibility. On the resisting arrest count, the judge sentenced defendant to an eighteen-month custodial term to be served consecutively to the sentences on the weapons counts. He also ordered defendant to pay appropriate fees and penalties. The

judge gave a single reason for imposing consecutive sentences: "based upon [Yarbough] . . . it would be appropriate . . . to sentence [defendant] consecutively". This appeal followed.

The State developed the following proofs at defendant's trial. At approximately 3:00 p.m. on September 16, 2012, defendant's sister telephoned Antawan Powell and asked him to drive her to her friend's house to pick up her belongings. Powell agreed, drove to defendant's sister's house, and parked near the front entrance. Defendant's sister invited Powell inside, and the two went to her living room to watch television.

While they talked in the living room, Powell heard keys jingling at the front door. Defendant entered the residence and looked at Powell as if to say, "why are you here?" Defendant stayed inside for about ten minutes before leaving again through the front door. Ten minutes after defendant left, he returned through the front entrance and told Powell, in an aggressive tone, "yo, let me talk to you." After a further verbal exchange, Powell went outside. He testified he did not intend to fight defendant; rather, he wanted to know what defendant wanted to talk about. Powell admitted he felt more secure outside near his vehicle.

After stepping outside, Powell went to his vehicle and put on a pair of work boots. Defendant remained inside, and Powell could hear him and his sister arguing through the half-open front

door. Fearing for defendant's sister's safety, Powell called 911 and explained the situation. During the call, Powell stated he was an armed security guard, but was unarmed at that time. He told the operator defendant "tried to run [him] out" of the house, and he did not know whether any weapons were inside.

Shortly after Powell made the 911 call, defendant came outside and approached the front of Powell's vehicle. Powell smelled alcohol on defendant's breath. Powell exited his vehicle and asked defendant what he wanted to talk about. Defendant replied, "why [didn't you] acknowledge me when I walked into my house?" During their conversation, Powell moved between his open car door and the interior of his car. Defendant followed, moving to other side of the car door. Powell moved from behind the car door and asked defendant what the problem was and if he wanted to fight. Defendant responded, "if I really wanted to, I could dead you right now."

Powell testified that "dead you" means "I could kill you right now." On cross-examination, however, he conceded it could also mean, "I'm [going to] kick your ass."

Defendant turned to his right, put his hand inside his right pocket, pulled out a handgun and held it behind his leg.¹ After Powell observed the firearm, he exclaimed "okay, you got that, you got that" and got back into his vehicle, fearing he might be shot if he continued to argue with defendant. Powell testified defendant never pointed the gun at him nor threatened to shoot him.

As defendant began walking away, he told his five-year old nephew, who was standing outside with defendant's sister, "yeah, that's how you do it, that's how you do it." Powell called 911 again and informed the operator defendant had pulled a gun on him. He gave a physical description of defendant and his direction of travel. Powell also told the operator defendant was carrying a pink bag.

Meanwhile, while driving his personal vehicle to the police station to begin his shift, Union Police Officer Joseph Devlin heard a series of radio dispatches broadcasting the incident and describing the perpetrator. Officer Devlin was in full uniform. After listening to the dispatches, he observed a "black male with

¹ On cross-examination, Powell read a statement he gave to police admitting he first observed the gun in defendant's pocket as defendant entered the house, not while they were outside. Powell explained the statement he gave to law enforcement was untrue, and that he first observed the gun outside of the house.

blue jeans, a white shirt, and a black do-rag" carrying a pink plastic bag. The officer testified this man matched the suspect's description.

After confirming defendant's description with dispatch, Officer Devlin followed the male, whom the officer identified as defendant, as he walked down the street. At some point, defendant turned and looked directly at the officer. Believing defendant may have been armed, Officer Devlin exited his vehicle, drew his gun, and ordered defendant to stop and show his hands. In response, defendant ran into the backyard of a home. Officer Devlin ran after defendant. During his pursuit, the officer observed defendant reach into his front pants pocket, "stutter step," and throw a black object into an adjacent yard. As the chase progressed, Officer Devlin observed defendant throw a cell phone into the street, causing it to shatter. Shortly thereafter, another officer apprehended defendant.

Following defendant's arrest, Officer Devlin and other officers conducted a grid search of the area. During the search, one of the officers found a small, black semiautomatic handgun in a nearby yard.

After the incident, Powell and defendant's sister maintained contact, but spoke less often. Approximately seven months after defendant's arrest, his sister called Powell and left a voicemail

message in an attempt to have him drop the charges against defendant. She stated she would have defendant reach out to Powell to resolve the conflict because she did not believe the situation warranted criminal charges. That same day, defendant spoke with his sister and apologized for "yelling in [her] house with [her] son in there."

Defendant's sister testified she called Powell on her own accord, not at defendant's request. She also testified defendant did not know she was going to call Powell until after she did so.

As previously noted, the jury found defendant guilty of unlawful possession of a weapon, possession of a weapon for an unlawful purpose, and resisting arrest. The jury found defendant not guilty of terroristic threats.

On appeal, defendant first argues the prosecutor mischaracterized the testimony of defendant's sister in his opening and closing remarks to the jury, thereby depriving him of a fair trial. Specifically, defendant argues the prosecutor told the jury defendant's sister called Powell at defendant's request, an assertion unsupported by the sister's testimony or any other evidence.

During opening statements, the prosecutor made the following remarks:

defendant's sister [will] testify. . . . And you're going to be able to judge her credibility about what she says. There's one thing that she can't dispute. Sometime in April of last year, in . . . 2013, she reached out to [Powell] at the request of this defendant.
[(emphasis added).]

Defense counsel objected and argued at sidebar defendant never asked his sister to call Powell. After some discussion, the prosecutor offered to tell the jury that defendant apologized to his sister without any further remarks. Defense counsel agreed, and the prosecutor stated the following without any objection:

You're going to hear from [defendant's sister]. And on that day when she did reach out to [Powell], she had spoken to the defendant. He apologized to her for what happened that day. You're going to hear about that. You're going to be able to judge her credibility.

During closing statements, the prosecutor again discussed the sister's voicemail message. The prosecutor remarked:

why would [defendant's sister] call [Powell] to tell him that the defendant had apologized? Why would she do that if, as . . . defense counsel claims, he didn't have a gun that day and he didn't pull it on [Powell] . . . why would the defendant make it a point after the fact of apologizing to him for that? Why would he reach out to him and make it known that he apologized for what occurred?

Again, defense counsel objected, contending defendant never apologized to Powell. The court gave the following curative instruction:

[a]gain, ladies and gentlemen of the jury, just as a precaution, I . . . told you this previously and I'll be instructing you with respect to this later, that whatever the attorneys say during opening statements or summations is not evidence, not to be treated as evidence, a recollection of what they believed was said at trial through the testimony of the various witnesses. It doesn't control. It's what you . . . recall as to their testimony.

In some cases[,] things can be said that I think may need some instruction and with respect to any implication that the defendant himself called [Powell] and apologized, I have to instruct you that that is not at all my recollection of what occurred and . . . whether or not it's an inference that you can draw on your own is fine, but I believe that at least you need that curative instruction at this time in favor of the defendant, that there wasn't any such phone call made by the defendant to the victim in this case apologizing. It was as you recall a telephone call made by the defendant's sister to the victim.

Following the closing arguments, the judge again instructed the jury that statements made during opening and closing are not evidence. Thereafter, the judge reminded the jury to rely solely on their understanding and recollection of the evidence admitted during trial, notwithstanding any remarks made by counsel.

"Our jurisprudence requires that prosecutors act in accordance with certain fundamental principles of fairness." State v. Echols, 199 N.J. 344, 359 (2009) (quoting State v. Wakefield, 190 N.J. 397, 436 (2007)). One such principle mandates that prosecutors limit comments in their opening statements "to the 'facts [they] intend[] in good faith to prove by competent evidence[.]'" Id. at 360 (alterations in original) (quoting State v. Hipplewith, 33 N.J. 300, 309 (1960)). They should "not 'anticipate' their 'final argument.'" State v. W.L., 292 N.J. Super. 100, 108 (App. Div. 1966) (quoting State v. Ernst, 32 N.J. 567, 577 (1960), cert. denied, 364 U.S. 943, 81 S. Ct. 464, 5 L. Ed. 2d 374 (1961)).

Similarly, in summation, "prosecutors should not make inaccurate legal or factual assertions . . . [and] must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence." State v. Reddish, 181 N.J. 553, 641 (2004) (quoting State v. Smith, 167 N.J. 158, 178 (2001)).

Here, the prosecutor violated these principles. The question we must decide is whether the "misconduct was so egregious that it deprived the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999) (citations omitted). In making this assessment, we must "consider the tenor of the trial and the responsiveness

of counsel and the court to the improprieties when they occurred." State v. Timmendequas, 161 N.J. 515, 575 (1999) (citations omitted), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). The absence of a timely defense objection to a prosecutor's remarks in summation generally signifies the remarks are not prejudicial. See id. at 576.

Applying these principles to the case before us, we conclude the prosecutor's remarks do not warrant reversing defendant's convictions. Defense counsel promptly objected when the prosecutor misspoke in his opening remarks to the jury. During the ensuing sidebar discussion, defense counsel assented to the prosecutor's representation that he would tell the jury defendant apologized to his sister without any further comment. Defense counsel did not object to the prosecutor's ensuing remarks. When the prosecutor repeated the misstatement in his closing argument, the court gave a prompt curative instruction. Moreover, as the trial court suggested during the sidebar following the prosecutor's opening remark, what defendant said to his sister or what his sister said to Powell had little to do with the State's proofs that defendant unlawfully possessed a handgun.

For the foregoing reasons, we conclude the prosecutor's misstatements were not so egregious as to deprive defendant of a fair trial. Frost, supra, 158 N.J. at 83.

Defendant also alleges the prosecutor made unduly prejudicial remarks when he remarked in his closing statement that Officer Devlin "saw the defendant throw a gun" and was "entirely credible" in that respect. Defendant contends the statements were improper for two reasons: first, the officers saw defendant throw a black object, not a gun; second, the prosecutor vouched for the credibility of the officer. These arguments warrant little discussion.

Indisputably, a prosecutor can argue "reasonable inferences to be drawn from [the] evidence." Smith, supra, 167 N.J. at 178. Considering the entirety of the State's evidence, one could readily infer, even beyond a reasonable doubt, that the black object defendant discarded was the gun he had earlier pointed at Powell.

As to the remark concerning the officer's credibility, generally, a prosecutor cannot offer his or her personal opinion as to the veracity of any testimony. State v. Michaels, 264 N.J. Super. 579, 640 (1993). Opinions regarding the credibility of law enforcement officers are assessed "very carefully." State v. Hawk, 327 N.J. Super. 276, 285 (App. Div. 2000) (citing State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993)). A prosecutor may not "imply that police testimony should be accepted, 'not because of its believability but because the witnesses were policemen.'" Staples, supra, 263 N.J. Super. at 606 (quoting

State v. Jones, 104 N.J. Super. 57, 65 (App. Div. 1968), certif. denied, 53 N.J. 354 (1969)).

Here, it is not clear that the prosecutor was vouching for the officer. That is not to say, however, that a prosecutor can attempt to avoid the consequences of vouching for credibility by engaging in semantical contortions. Nonetheless, in attempting to glean the impact of the prosecutor's statement, we adhere to the general principle that "if no objection was made to the improper remarks, the remarks will not be deemed prejudicial." Timmendequas, supra, 161 N.J. at 576 (citing State v. Ramseur, 106 N.J. 123, 323 (1987), cert. denied, 508 U.S. 947, 113 S. Ct. 2433, 124 L. Ed. 2d 653 (1993)). The failure to make a timely objection generally demonstrates "defense counsel did not believe the remarks were prejudicial at the time they were made." Ibid. (citation omitted). Moreover, the failure to object "deprives the court of the opportunity to take curative action." Ibid. (citation omitted).

In the case before us, where the context of the prosecutor's remark does not clearly demonstrate he was vouching for the credibility of the officer, and the absence of a defense objection suggests the prosecutor's remark was not prejudicial, we cannot conclude the remark deprived defendant of a fair trial.

Defendant also contends his possession of a weapon for an unlawful purpose conviction must be vacated because the jury acquitted him of terroristic threats, thereby erasing the "unlawful purpose" for which he possessed a weapon. Because defendant did not raise this issue before the trial court, his argument is reviewed for plain error. R. 2:10-2.

To establish a possession of a weapon for an unlawful purpose conviction, the State must prove, beyond a reasonable doubt:

(1) the item possessed was a "firearm" within the meaning of N.J.S.A. 2C:39-1(f); (2) the defendant "possessed" it, which under N.J.S.A. 2C:2-1(c) requires knowledge or awareness of his control over the item; (3) the defendant's purpose or conscious objective was to use it against the person or property of another; and (4) the defendant intended to use it in a manner that was proscribed by law.

[State v. Harmon, 104 N.J. 189, 212 (1986).]

Defendant contends the jury could not have found the fourth element without convicting him of terroristic threats. As to the fourth element, the trial judge instructed the jury as follows:

the fourth element the State must prove [beyond a reasonable doubt] is that the defendant had a purpose to use the firearm in a manner that was prohibited by law.

. . . .

In this particular case the State has contended that the defendant's unlawful purpose in possessing the firearm was to threaten to harm [Powell]. You [must not]

rely on your notions about unlawfulness or some other undescribed purpose of a defendant[, rather you must] consider whether the State has proven the specific unlawful purpose charged. And the unlawful purpose alleged by the State may be inferred from all that was said and done and from all of the surrounding circumstances in the case. However, the State does not have to prove that the defendant accomplished his unlawful purpose of using the firearm.

Defendant relies primarily upon State v. Jenkins, 234 N.J. Super. 311 (App. Div. 1989) and State v. Turner, 310 N.J. Super. 423 (App. Div. 1998) in support of his argument. In Jenkins, the court noted "a charge of possession with unlawful purpose is [often] coupled with a charge of an act accomplished with the gun – a robbery, an assault, a homicide – which the court tells the jury is unlawful." Supra, 234 N.J. Super. at 315. A conviction for such an unlawful act provides the basis for an unlawful purpose in possessing the gun. Ibid. (citations omitted). The court also stated, "if acquittal of the accompanying charge erases the identification of the unlawful purpose, the court may not permit the jury to convict on the basis of speculation as to what possible purposes qualify as unlawful." Ibid.

In Turner, the defendant challenged his possession of a weapon for an unlawful purpose conviction by relying on Jenkins. In that case, the trial judge identified the only unlawful purpose as the defendant's accompanying aggravated assault charge alleging he

pointed a gun at the victim. Turner, supra, 310 N.J. Super. at 428-29, 432. The jury acquitted the defendant of aggravated assault. Id. at 429. As a result, we held "the rule of [Jenkins] applie[d] because 'acquittal of the accompanying charge erase[d] the identification of [the defendant's] unlawful purpose' in possessing the gun." Id. at 434 (second alteration in original) (citing Jenkins, supra, 234 N.J. Super. at 315). Accordingly, we reversed the defendant's possession of a weapon for an unlawful purpose conviction. Ibid.

However, "[t]o conclude that every acquittal of the substantive charge involving the use of a gun requires an erasure of the charge of possession for an unlawful purpose would be an over reading of [Jenkins]." State v. Petties, 139 N.J. 310, 317 (1995). Indeed, the law is well-settled that "[i]nconsistent verdicts are accepted in our criminal justice system." State v. Banko, 182 N.J. 44, 53 (2004) (citing State v. Grey, 147 N.J. 4, 11 (1996)). Such verdicts are allowed provided "there is sufficient evidence to permit a rational factfinder to find a defendant's guilt beyond a reasonable doubt on the charges on which the defendant was convicted." State v. Ellis, 299 N.J. Super. 440, 455-56 (App. Div.), certif. denied, 151 N.J. 74 (1997).

For instance, in Banko, our Supreme Court found the defendant's acquittal of the underlying charge of attempted

aggravated sexual assault was "not fatal to the conviction for possession of a weapon for an unlawful purpose." Supra, 182 N.J. at 56. According to the Court:

[t]he superficial inconsistency between the two charges does not void the legitimacy of the jury's conviction. The jury may have chosen to convict on possession of a weapon for an unlawful purpose, the purpose being, as the court instructed in respect of the State's theory of the case, to confine [the victim] and to assault her sexually. And, yet, the jury could have determined not to convict defendant on the substantive offenses for reasons known only to the jury.

We must accept the arguably inconsistent verdicts, and decline to speculate on the reasons for the jury's determination. The only factual assessment required is to ensure that there was sufficient evidence to support the charge for which defendant was convicted.

[Ibid.]

Here, defendant's conviction of possession of a weapon for an unlawful purpose was not clearly capable of producing an unjust result. The jury could have concluded based on Powell's testimony that defendant, by pulling out a handgun after telling Powell he "could dead [him] right now," possessed the firearm with the purpose of threatening to harm Powell. In addition, the jury could have likewise concluded that defendant's conduct would not have put Powell in "imminent fear of death under circumstances reasonably causing [him] to believe the immediacy of the threat

and the likelihood that it [would] be carried out." N.J.S.A. 2C:12-3(b). Stated differently, a jury could rationally distinguish between an "imminent fear of death" and the possession of a firearm with the intent to "threaten to harm Powell." Accordingly, defendant's conviction rests on a sufficient evidential basis and was not clearly capable of producing an unjust result.

Lastly, defendant alleges his sentence is excessive because the judge improperly imposed a consecutive sentence. The judge sentenced defendant to an eighteen-month prison term for resisting arrest consecutive to his two, five-year prison terms for the weapons offenses. Defendant challenges his consecutive sentence on the basis that his conduct amounted to a single event.

The decision to impose consecutive sentences under N.J.S.A. 2C:44-5(a) "requires analysis of specifically enumerated factors." State v. Randolph, 210 N.J. 330, 352-53 (2012). State v. Yarbough, 100 N.J. 627, 643-45 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986), obligates "a sentencing court to perform the well-known assessment of specific criteria when determining whether consecutive sentences are warranted[.]" Id. at 353. Hence, if "a trial court fails to give proper reasons for imposing consecutive sentences at a single sentencing proceeding, ordinarily a remand [is] required for resentencing." Ibid.

(alteration in original) (quoting State v. Carey, 168 N.J. 413, 424 (2001)).

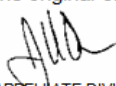
At sentencing, the judge merely stated, "based upon [Yarbough] . . . it would be appropriate . . . to sentence [defendant] consecutively." The judge's conclusory statement does not sufficiently explain the reason for imposing a consecutive sentence. Accordingly, we remand for resentencing. Should the sentencing judge impose consecutive sentences, he or she shall undertake and articulate a Yarbough analysis.

Defendant's remaining arguments concerning his sentence are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

We affirm defendant's convictions and remand for resentencing. We do not retain jurisdiction.

Affirmed in part, remanded in part.

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


CLERK OF THE APPELLATE DIVISION