SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1768-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALDO ORELLANA,

Defendant-Appellant.

Submitted February 28, 2017 – Decided December 7, 2017

Before Judges Ostrer and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 11-08-1289.

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

A jury found Aldo Orellana guilty of second-degree conspiring to possess, to possess with intent to distribute, and to distribute, heroin. N.J.S.A. 2C:5-2; N.J.S.A. 2C:35-5(a)(1). The court sentenced him to a seven-year prison term, consecutive to a federal term he was then serving. He presents the following points on appeal:

> POINT ONE
>
> THE INDICTMENT SHOULD HAVE BEEN DISMISSED FOR VIOLATION OF THE PROVISIONS OF THE INTERSTATE AGREEMENT ON DETAINERS.
>
> POINT TWO
>
> THE TESTIMONY OF DETECTIVE MARCHAK AND DETECTIVE COFFEY EXCEEDED THE SCOPE OF PROPER LAY OPINION. (Not raised below)
>
> POINT THREE
>
> LIEUTENANT WEITZ'S EXPERT OPINIONS USURPED THE ROLE OF THE JURY.[1]
>
> POINT FOUR
>
> DEFENDANT WAS PREJUDICED BY THE ADMISSION OF INADMISSIBLE "OTHER CRIMES" EVIDENCE.

We affirm, although this was far from a perfect trial. See State v. Marshall, 123 N.J. 1, 170 (1991) ("[A] defendant is entitled to a fair trial but not a perfect one." (quoting Lutwak

[1] As discussed below, defense counsel raised this objection late, after Lieutenant Weitz had at least twice expressed the opinion the defense contends was objectionable.

v. United States, 344 U.S. 604, 619, 73 S. Ct. 481, 490, 97 L. Ed. 593, 605 (1953)), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993)). Two of the State's police witnesses, Detectives Marchak and Coffey, gave expert opinions without being offered as experts; and a third witness, Lieutenant Weitz, although a qualified expert, offered opinions that exceeded the scope our case law allows. Furthermore, the State introduced other crimes evidence that, although admissible, was unaccompanied by the appropriate limiting instruction. However, these errors do not warrant reversal, given the strength of the State's other evidence.

I.

Defendant's indictment arose out of a wiretap investigation of a drug distribution ring involving co-defendants, Levan Bryant, Jomas Arrington and several others.[2] Bryant pleaded guilty and, in compliance with his plea agreement, testified for the State. He stated that defendant supplied him with heroin. Bryant admitted, and the wiretapped conservations corroborated, that he, in concert with Arrington, prepared and packaged the heroin for sale. Arrington then distributed the heroin to street-level dealers. At the end of the investigation, police raided Bryant's

[2] The twenty-nine count indictment charged twelve defendants, including the three men. Although many of the others were charged with various substantive drug-related crimes, Orellana was charged in a single conspiracy count.

and Arrington's homes, and seized large quantities of heroin, drug paraphernalia and cash.

The case against defendant principally rested on Bryant's direct testimony, as well as powerful circumstantial evidence that defendant distributed heroin to Bryant at three person-to-person meetings in March 2011. Surveillance officers observed the meetings in front of a donut shop, a pharmacy, and a convenience store in Perth Amboy. At the first meeting, an officer testified that defendant left his car holding a small shopping bag, entered Bryant's car briefly, returned to his car without the shopping bag, reached inside, walked back to Bryant's car and shook Bryant's hand, then again returned to his car and left. An apparent exchange of something occurred at a second meeting. The police conceded they did not observe drugs themselves; nor did they seize drugs immediately after these meetings. They asserted that would have compromised their broader ongoing investigation.

In addition to Bryant's testimony, the State demonstrated that these meetings were neither coincidental nor innocent, through numerous wiretapped conversations and texts. Although defendant was overheard in none of them, his first name was mentioned in several, and based on other evidence, he was the clear subject of others. In some instances, Bryant referred to

defendant as "the Mexican," although defendant actually emigrated from Ecuador.

In overheard conversations before each of the three meetings, Bryant referred to his source of supply. He discussed meeting with his supplier and mentioned issues he intended to raise with him. In one recorded conversation, Bryant announced that his supplier had arrived, just as police observed defendant pull into the parking lot where Bryant was waiting. Once the meetings ended, Bryant was overheard referring to the meeting, or reflecting that he had been resupplied with heroin. Bryant was also overheard talking to, or about, other drug dealers, who had the same source of supply. Bryant testified that at least one other dealer was supplied heroin by defendant.

In addition to Bryant's testimony, the State presented its case through three police witnesses. Detectives Marchak and Coffey observed the meetings between defendant and Bryant, and conducted the search and seizure at the end of the investigation. Lieutenant Steven Weitz, as a fact witness, described the course of the investigation, and, as an expert witness, interpreted the recordings and texts the State introduced.

Defendant did not testify or present witnesses. His counsel readily conceded in opening and closing statements that Bryant and Arrington were involved in distributing drugs; the overheard

conversations corroborated that; and drugs, drug paraphernalia, and cash were seized from their homes. However, counsel argued the evidence was insufficient to establish defendant was the supplier. Counsel argued that Bryant was talking to defendant about selling his truck and Bryant's real supplier lived in Plainfield.

II.

Defendant contends the State failed to try him within the time allotted under the Interstate Agreement on Detainers, after he was delivered to Middlesex County from federal custody. He relies on the wrong deadline.

When the State requests the transfer of a prisoner to New Jersey for trial, he shall be brought to trial within 120 days of his arrival. See N.J.S.A. 2A:159A-4(c). However, when a defendant seeks transfer to New Jersey for trial, a 180-day deadline applies. See N.J.S.A. 2A:159A-3(a). Both deadlines are subject to reasonable and necessary continuances granted by the court for good cause. N.J.S.A. 2A:159A-3(a), -4(c).

Defendant does not dispute that the State complied with the 180-day deadline, as extended by the court for good cause. Rather, he contends, as he did before the trial court, that the State was required to bring him to trial within 120 days. Defendant claims

he was transferred at the prosecutor's behest, not his own. The trial court found that simply was not so. We agree.

In June 2012, defendant signed forms requesting transfer from federal prison to New Jersey for trial, and acknowledging that he must be tried within 180 days, subject to continuances. The federal warden conveyed defendant's request to the Middlesex County Prosecutor. On September 24, 2012, the prosecutor signed a form accepting temporary custody of defendant and expressing his intention to bring defendant to trial "within the time specified in Article III(a) of the [IAD]," which is codified at N.J.S.A. 2A:159A-3. The form was entitled "Prosecutor's acceptance of temporary custody offered with an inmate's request for disposition of a detainer." It stated that it was "[i]n response to [defendant's] letter of June 6, 2012 and offer of temporary custody." Defendant was then transferred to Middlesex County.

In sum, defendant was transferred at his request.[3] The State had 180 days, plus reasonable and necessary continuances, to bring him to trial. The State complied with that requirement.

III.

[3] We attach no significance to a mistaken statement in defendant's presentence report that "2/24/2012: Prosecutor requested the defendant to be produced from LCSI to MCACC for criminal trial." The IAD documentary record governs.

We apply a plain error standard of review to defendant's newly minted argument that Detectives Marchak and Coffey offered expert opinions while testifying as lay witnesses. Detective Marchak identified various forms of drug paraphernalia found in Arrington's home, and described their use in processing and packaging of heroin. Detective Coffey offered similar opinions about items found in Bryant's residence.

We recently distinguished between the allowable scope of police lay and expert opinion in drug prosecutions. See State v. Hyman, ___ N.J. Super. ___, ___-___ (App. Div. 2017) (slip op. at 8-11). With those principles in mind, we have no doubt that the two detectives exceeded the scope of allowable lay opinion, as they drew upon their "specialized knowledge" outside the jury's understanding. See N.J.R.E. 702; see also State v. Cain, 224 N.J. 410, 426-27 (2016) (noting "[t]he average juror is not knowledgeable about the arcana of drug-distribution schemes," and officers with "specialized knowledge" may offer expert opinions to "assist the trier of fact to understand the evidence or to determine a fact in issue.").

However, the detectives here offered their opinions without objection. Defense counsel conceded in her opening statement that Bryant and Arrington were drug dealers, and police found heroin, cocaine, paraphernalia, stamps and packaging materials in their

homes. The issue at trial, which defense counsel highlighted, was whether defendant supplied these undisputed drug dealers with heroin. Thus, it is apparent that "the failure to object was a recognition by counsel that the alleged error in fact was of no moment or was a tactical decision to let the error go uncorrected at the trial." State v. Macon, 57 N.J. 325, 337 (1971). The detectives' opinions did not deny defendant "a fair trial and a fair decision on the merits," id. at 338, nor were they "clearly capable of producing an unjust result." R. 2:10-2.

IV.

Defendant contends that Lieutenant Weitz usurped the jury's role by testifying that defendant was Bryant's supplier. Although we agree, we decline to reverse on that ground.

The State introduced the numerous recorded conversations and texts through Lieutenant Weitz, who was qualified as an expert in drug enforcement and the crimes that defendant was charged with conspiring to commit. He explained generally how heroin is distributed, from the supplier down to the street level dealer. He described the investigation, which focused on Bryant's and Arrington's drug network.

The lieutenant offered his opinion about the meaning or significance of each conversation and text. Without objection, the lieutenant translated drug slang that Bryant or others used,

see Hyman, supra, and opined that certain communications referred to Bryant's "source of supply" or "the Mexican," without identifying him as defendant.

However, the lieutenant also opined, initially without objection, that defendant was Bryant's source of supply. For example, regarding the first meeting at the donut shop, Lieutenant Weitz testified that police observed Bryant's "source of supply" arrive; and then he testified that the person was defendant. Describing Bryant's conversation with Arrington immediately after the donut shop meeting, the lieutenant testified, "it's clear [from] that conversation Bryant met Orellana, [who is] the source of supply . . . ."

Only after the third time the lieutenant identified defendant as Bryant's source of supply — noting that Bryant was "talking about getting larger quantities from Mr. Orellana" — defense counsel objected. She asserted it was inappropriate for the witness to offer an opinion about "the identity of who they're talking about."

The court held that such an opinion was admissible, so long as the State laid a proper foundation. The State then elicited the lieutenant's explanation: "After the intercepts and the subsequen[t] surveillance in which Mr. Orellana was observed meeting with Mr. Bryant, it became clear that the source of supply

was in fact Aldo Orellana." He added that he believed "the Mexican" was defendant. Thereafter, the witness repeatedly referred to defendant as the supplier mentioned in the recorded conversations, although in several instances it was unnecessary, as one of the speakers actually referred to defendant by his first name, Aldo.

Lieutenant Weitz exceeded the permissible scope of expert opinion when he asserted that defendant was the unnamed supplier mentioned or referenced in several recorded conversations. An expert "may not . . . usurp the jury's function by, for example, opining about defendant's guilt or innocence . . . ." State v. McLean, 205 N.J. 438, 453 (2011). Nor may a drug expert offer opinions "on the meaning of facts that the jury is fully able to sort out without expert assistance . . . ." Id. at 461. Expert opinion "is not a substitute for jurors performing their traditional function of sorting through all of the evidence and using their common sense to make simple logical deductions." Cain, supra, 224 N.J. at 427; see also Hyman, supra, ___ N.J. Super. at ___ (slip op. at 17) (stating that a trial court "must guard against opinions that stray from interpreting drug code words and

pertain to the meaning of conversations in general . . . ."). [4] In opining that defendant was "the Mexican" in some conversations, and the unnamed supplier in others, the lieutenant relied on the circumstantial evidence that was not beyond the jury's ken to evaluate — the observed meetings between Bryant and defendant, and Bryant's phone calls immediately before and after those meetings.

However, the error does not warrant a new trial. Defense counsel failed to object the first two times the lieutenant offered his opinion equating the source of supply with defendant. We review such untimely objections for plain error. See State v. Bueso, 225 N.J. 193, 203 (2014). "[T]hat high standard provides a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct potential error." Ibid. Further, "a timely objection [also] signifies that the defense believes itself to have been prejudiced by the prosecutor's remarks." Ibid. (quoting State v. Wilson, 57 N.J. 39, 51 (1970)). Here, defense counsel's late objection did not alert the trial court that the defense took issue with the lieutenant's testimony

[4] Notably, defendant did not object to the lieutenant's expert opinion on the ground that he was also an investigating officer. See Hyman, supra, ___ N.J. Super. at ___ (slip op. at 27) (stating that a trial court has the discretion to permit such a dual role, notwithstanding the risks of prejudice, but the trial court is obliged to instruct the jury that it may reject both the expert opinion and factual recitation offered by such a witness).

and did not allow the court to address it with a timely curative instruction. In light of the State's strong proofs against defendant, the admission of the lieutenant's opinions about the supplier's identity was not "clearly capable of producing an unjust result." R. 2:10-2.

Even if we assume the error was preserved and we apply a harmful error standard, the error did not deny defendant a fair trial and fair decision on the merits; as to that we have no reasonable doubt. See State v. Mohammed, 226 N.J. 71, 86-87 (2016) (setting forth harmful error standard). The lieutenant's opinion added relatively little to the State's case. The jury learned that the lieutenant was relying on the same circumstantial evidence that it was asked to interpret. Furthermore, defendant was mentioned by his first name in some conversations and was observed meeting with Bryant on three occasions, providing powerful evidence of his connection to Bryant.

Thus, we conclude the erroneous admission of expert opinion identifying defendant as the source of supply does not warrant a new trial. See State v. Sowell, 213 N.J. 89, 107 (2013) (declining to reverse defendant's conviction, notwithstanding error in admitting opinion that drug transaction occurred, "because of the overwhelming evidence of defendant's guilt"); Hyman, supra, ___ N.J. Super. at ___ (slip op. at 33-34).

V.

Finally, defendant contends the court erred in allowing Lieutenant Weitz to opine, in interpreting an overheard conversation, that defendant supplied heroin not only to Bryant, but to a man known as "Yellow." Defendant contends the opinion was inadmissible "other crimes" evidence.

Here, too, defense counsel's objection was late. The lieutenant described "a call between Bryant and [an] unidentified male a/k/a Yellow who I believe . . . also — obtained his heroin from Aldo Orellana." The lieutenant observed that the two men were discussing the quality of the heroin they obtained. The defense did not object. The lieutenant interpreted another call between Bryant and Arrington, in which Bryant referred to his previous call about drug quality with Yellow. Again, defense counsel registered no objection.

Only after the lieutenant interpreted yet another conversation did defense counsel object. Bryant and Arrington talked again about the quality of heroin and their efforts to find a second source of supply because they wanted to sell drugs in Pittsburgh. The lieutenant testified that the conversation made it clear that Bryant and Arrington had "only . . . one person that they're dealing with because they're speaking about this other person, Yellow, who is also obtaining his heroin from Aldo Orellana

and . . . has other outlets. He has the ability to get higher quality heroin from other individuals other than just Orellana." Defense counsel objected:

> I have an issue with him saying that the [person] now known [as] Yellow is being (indiscernible) [supplied by] Orellana. It's not anywhere in the transcript. . . . I think it's bringing an inference in that he knows he was being supplied by Aldo Orellana from someone other than what we're hearing . . . .

She elaborated that the lieutenant should not be permitted to "give his opinion about who he thinks [is] doing what and with whom[m] . . . ." Defense counsel did not refer to N.J.R.E. 404(b), or other crimes evidence. Her objection appeared to focus on the foundation and allowable scope of the lieutenant's opinion.

The judge concluded that the lieutenant was entitled to express his opinion that defendant supplied Yellow, so long as it was made clear it was his opinion. The court instructed the jury that Yellow was not a defendant in the case. "[Y]ou also heard testimony from the lieutenant that Mr. Orellana was the source [of] supply for this Yellow. And this is Lieutenant Weitz's opinion." The court then gave the model charge on expert opinion. Notably, defense counsel did not object when Bryant, a fact witness, testified that he and Yellow both obtained heroin from defendant.

On appeal, defendant recasts his argument, and contends evidence that defendant sold drugs to Yellow was other crimes evidence; the court failed to subject it to a Cofield[5] analysis to determine its admissibility; and failed to issue a limiting instruction on the permitted and impermissible use of the evidence.

For two reasons, we apply a plain error standard of review. Defendant raised an objection only after Lieutenant Weitz had already testified that defendant sold drugs to Yellow. See Bueso, supra, 225 N.J. at 203 (applying plain error standard to untimely objections). When defense counsel did object, she did so on different grounds. See State v. Nunez, 436 N.J. Super. 70, 76-77 (App. Div. 2014) (applying plain error standard where defense counsel's objection was based on the incorrect ground). Although the court did not provide the required limiting instructions as to the proper use of other crimes evidence, see State v. Marrero, 148 N.J. 469, 495 (1997), defendant did not request them.

As the trial court did not apply N.J.R.E. 404(b), we must do so. State v. Rose, 206 N.J. 141, 158 (2011). We are persuaded

[5] State v. Cofield, 127 N.J. 328, 338 (1992) (stating that evidence of other crimes must be (1) "admissible as relevant to a material issue"; (2) the other crime must be "similar in kind and reasonably close in time to the offense charged"; (3) "[t]he evidence of the other crime must be clear and convincing"; and (4) "[t]he probative value of the evidence must not be outweighed by its apparent prejudice").

that evidence that defendant also sold drugs to Yellow satisfied the Cofield test. It was relevant because it demonstrated the lack of a coincidence or mistake. Defendant argued that his meetings with Bryant pertained to his potential purchase of Bryant's truck. Defendant wanted the jury to believe that Bryant's conversations before and after his meeting with defendant were merely coincidental, or efforts to shift blame to defendant. Evidence of defendant's sale of drugs to others tended to show that defendant's meetings with Bryant were not mere coincidence. See United States v. Decinces, 808 F.3d 785, 791 (9th Cir. 2015) (admitting evidence of similar insider trading transactions to prove lack of coincidence in connection with charged transaction); United States v. Guerrero, 524 F.3d 5, 14 (1st Cir. 2008) (evidence of prior robberies were admissible to prove it was unlikely that defendant's presence in getaway car was "a mere coincidence").

As to the other three factors, based on the conversations, the sales to Yellow were made at or near the time of sales to Bryant. The evidence that the defendant sold drugs to Yellow was clear and convincing, based upon the recorded conversations, and Bryant's own testimony. Finally, the probative value was not outweighed by its apparent prejudice. Defendant argued that he was not the person who supplied Bryant or Yellow. Ultimately, the

State's case depended on persuading the jury that defendant was Bryant's supplier.

Although the court did not, sua sponte, provide the jury with the required instructions related to other crimes evidence, we are not persuaded that the omission "was clearly capable of producing an unjust result." R. 2:10-2. The evidence was not presented to demonstrate that defendant was a bad person, or had a propensity to commit crimes, nor was it likely the jury would use the evidence that way. The key issue at trial was whether defendant was Bryant's supplier. The judge instructed the jury that Yellow was not a defendant in the case. Furthermore, defense counsel used the evidence to tactical advantage and argued in summation that Yellow may have been Bryant's supplier, not defendant. The State did not highlight the defendant-Yellow connection in its summation.

In sum, we reject defendant's argument that the conviction should be reversed because Lieutenant Weitz opined that defendant also sold heroin to another person.

Affirmed.