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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2045-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARRELL SCOTT,

Defendant-Appellant.

Submitted January 23, 2017 – Decided March 1, 2017

Before Judges Nugent and Currier.

On appeal from the Superior Court of New
Jersey, Law Division, Mercer County,
Indictment No. 11-12-1229.

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

Angelo J. Onofri, Mercer County Prosecutor,
attorney for respondent (Christopher
Malikschmitt, Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Darrell Scott appeals from the trial court's
rulings that permitted the introduction of certain evidence

following a N.J.R.E. 404(b) hearing, and denied his motion for severance from his co-defendants' trial. Defendant also alleges errors in the imposition of his sentence. After a review of these arguments in light of the evidence in the record, and the applicable principles of law, we affirm.

I.

Defendant was charged in an indictment with: first-degree conspiracy to commit murder; first-degree murder; first-degree felony murder; first-degree robbery; second-degree possession of a weapon for an unlawful purpose; third-degree unlawful possession of a weapon; second-degree retaliation against a witness; and third-degree hindering prosecution. The victim of the murder was Kendra Degrasse. There were three co-defendants named in the indictment including brothers Anthony and Henry Kidd.

The State notified defendant that it intended to introduce multiple pieces of evidence alleging other bad acts pursuant to N.J.R.E. 404(b). The trial judge conducted a hearing over several days regarding the admissibility of the evidence. We summarize the facts developed in connection with the 404(b)¹ hearing at which the State presented several witnesses.

¹ The rule states:

At the time of these events, defendant resided in Alabama. He had family living in the Trenton area -- pertinent are his two cousins, Anthony and Henry Kidd. Following the shooting of two police officers in 2001, Anthony² was implicated by his girlfriend, Kendra Degrasse, in a statement to the police. Although Kendra recanted her statement at trial, Anthony was convicted of aggravated assault on an officer and other offenses in 2003 and was subsequently incarcerated. Anthony blamed Kendra for his conviction and did not want her available to testify again should his appeal result in a new trial.

Subsequent to his incarceration, Anthony became romantically involved with Kimberly Douglass. She smuggled several cellphones into the prison for Anthony to use to conduct his narcotics business and communicate with other individuals. She also brought drugs into the prison system and laundered money for Anthony.

Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

² We refer to co-defendants, witnesses and other individuals by their first names for purposes of clarity as two of the co-defendants have the same last name. We intend no disrespect.

During their relationship, Anthony told her that he felt betrayed by Kendra, and Kimberly understood that Anthony intended to have Kendra murdered.

Kimberly first met defendant in early 2005. She had wired money to him in Alabama for a train ticket. She understood that defendant was coming to Trenton to kill Kendra. However, the agreed-upon \$1000 payment for the murder was not available once defendant arrived and after several days he left. On the return drive to the train station, defendant told Kimberly that she should keep her "mouth shut."

Defendant came to New Jersey for a second visit in March 2005. Although Kimberly gave \$1000 to Henry, she had no knowledge as to the ultimate recipient of the money. She said she was told by Henry that they were going to kill Kendra. Kimberly did not meet defendant on this visit but she testified she was told that defendant killed Kendra. On March 24, 2005, Kendra was found dead in her car, with three bullets to her head.

Kimberly learned after Kendra's murder that, because of this knowledge, defendant wanted Kimberly dead. Her testimony on this issue is what the State sought to introduce as "other bad acts" under 404(b).

As a result of her prison distribution activities, Kimberly was indicted and subsequently pled guilty to the charges. She was

sentenced to a prison term. The night before Kimberly was to enter federal custody, she and Henry were arguing when Henry told Kimberly that she was only alive because of him. He explained that defendant wanted her killed because she knew too much about Kendra's murder and she could identify him.

Kimberly also testified to a second conversation in which Anthony told her over the phone that defendant wanted her dead. The State sought to introduce these two conversations at trial.

As corroboration of these conversations, the State presented an additional witness, Bernadette Humphrey. Kimberly had introduced Bernadette to Henry and the two became romantically involved. It followed that Bernadette became acquainted with Anthony and the two exchanged letters and had phone conversations. Bernadette also visited Anthony in prison and became involved in his prison narcotic distribution enterprise.

Bernadette stated she was present the night before Kimberly was going to prison and she heard Henry tell Kimberly that defendant wanted Kimberly dead. Bernadette also claimed that Anthony had told her that defendant wanted to kill Kimberly.

II.

The judge issued a lengthy, comprehensive written decision on January 28, 2013, in which he addressed and analyzed each proposed piece of evidence, applying the four-part test

established in State v. Cofield, 127 N.J. 328 (1992).³ In addressing defendant's desire to kill Kimberly following Kendra's murder, the judge found the first prong to be satisfied as the evidence was relevant as being probative of defendant's consciousness of guilt. The judge did not analyze the second prong because the evidence was only relevant as to defendant's state of mind, his desire to kill Kimberly because she could identify him. The third prong of Cofield was satisfied because the judge found the testimony of both Kimberly and Bernadette to be credible. Both had recounted conversations with Anthony and Henry informing them of defendant's desire. The judge found that the State had proven defendant's desire to kill Kimberly by clear and convincing evidence. Finally, the judge found the evidence

³ Evidence of other crimes or wrongs is admissible if:

1) [t]he evidence of the other crime . . . is relevant to a material issue; 2) [i]t . . . is similar in kind and reasonably close in time to the offense charged; 3) [t]he evidence of the other crime . . . is clear and convincing; and 4) [t]he probative value of the evidence . . . [is] not outweighed by its apparent prejudice.

[Id. at 338.]

was "highly probative of the consciousness of guilt of [defendant]." He did not find the probative value was outweighed by the apparent prejudice, and therefore, the fourth element was satisfied. As a result of his analysis, the judge determined that the statements of the women were admissible.

During the hearing, defendant argued that the proffered statements of Kimberly and Bernadette were hearsay and inadmissible. The judge found there were two exceptions to the hearsay rule, N.J.R.E. 803(b)(1), statement of a party-opponent, and 803(b)(5), statement of a co-conspirator, that would render the statements admissible. Because he found that hearsay testimony was admissible for the purposes of a 404(b) hearing, he considered the statements in his Cofield analysis. However, the judge noted: "Whether the State can overcome a hearsay objection at trial remains to be determined."

III.

Defendant and co-defendants moved to sever their trials from Anthony. Defendant contended that Anthony had exculpatory information regarding defendant's involvement in Kendra's murder. If the trial were to proceed with all defendants present, Scott would not have the benefit of that favorable testimony, as he could not compel Anthony to testify. The judge determined that a

closed interview with Anthony was appropriate under State v. Sanchez, 143 N.J. 273 (1996).

After conducting the interview, the judge informed all counsel and codefendants that defendant would call Anthony as a witness if their cases were to be tried separately. Anthony was unwilling to testify at a joint trial but indicated a willingness to testify in a separate trial after the conclusion of his own case. Based on his interview, the judge stated that Anthony would provide exculpatory testimony as to all three of the co-defendants. However, the judge concluded that Anthony's testimony would not be credible, stating: "[It] would substantially contradict a number of my findings at the 404(b) hearing and . . . there is substantial evidence in the record that I have relied upon in finding that [Anthony's] proffered testimony is not credible." The motion for severance was denied.

Following the court's rulings, defendant pled guilty to aggravated manslaughter, preserving his right to appeal the 404(b) and severance motion rulings. He was sentenced to twenty-nine years in prison with a period of parole ineligibility.

IV.

Defendant presents the following points for our consideration on appeal:

POINT I: THE COURT IMPROPERLY ADMITTED UNRELIABLE HEARSAY EVIDENCE AGAINST MR. SCOTT, THEREBY DENYING HIM THE RIGHT TO CONFRONTATION, A FAIR TRIAL, AND DUE PROCESS. U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. ART. I, ¶ 1, 10.

POINT II: THE COURT IMPROPERLY DENIED MR. SCOTT'S MOTION TO SEVER HIS MATTER FROM THAT OF HIS CO-DEFENDANT, VIOLATING MR. SCOTT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WHERE HE COULD PUT FORTH HIS DEFENSE. U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. ART. I, ¶ 1, 10.

POINT III: THE COURT FAILED TO PROPERLY FIND AND WEIGH THE AGGRAVATING AND MITIGATING FACTORS WHEN SENTENCING MR. SCOTT.

Our appellate review of the trial judge's evidentiary and severance motion rulings requires considerable deference. Such rulings generally "should be upheld 'absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" State v. J.A.C., 210 N.J. 281, 295 (2012) (quoting State v. Brown, 170 N.J. 138, 147 (2001)); see also State v. Buda, 195 N.J. 278, 294 (2008). "An appellate court applying this standard 'should not substitute its own judgment for that of the trial court, unless the trial court's ruling is so wide of the mark that a manifest denial of justice results.'" J.A.C., supra, 210 N.J. at 295 (quoting Brown, supra, 170 N.J. at 147).

Defendant does not contest the judge's decision to permit 404(b) testimony from Kimberly and Bernadette regarding statements

made to them by Henry and Anthony Kidd concerning defendant's desire to kill Kimberly. He argues, instead, that the proffered statements are inadmissible hearsay, not subject to any exception that would allow their introduction. Defendant's argument may have been meritorious, but it was not ever tested and ruled upon as he entered a guilty plea thus obviating a trial.

In considering the admissibility of the proffered statements of Bernadette and Kimberly, the judge acknowledged defendant's hearsay argument but found for the purposes of the 404(b) hearing that the statements were subject to the exceptions under N.J.R.E. 803(b)(1), admission of a party opponent, and 803(b)(5), statement made by a co-conspirator.⁴ Although the judge considered the statements in undertaking his Cofield analysis, he stated: "Whether the State can overcome a hearsay objection remains to be determined." The hearsay objection was not substantively ruled upon and defendant remained entitled to raise it at trial.

Hearsay is properly admissible in a preliminary hearing, see 104, and the judge noted at the commencement of the 404(b) proceeding that "all hearsay objections are preserved for trial." We, therefore, find defendant's argument to be without merit as

⁴ We need not determine whether the judge was correct in his analysis of 803(b)(1) and (5) as hearsay is admissible under N.J.R.E. 104.

the judge never ruled substantively upon the hearsay objection in light of the plea and it was preserved for trial.

In addressing defendant's argument that the judge improperly denied the motion for severance, we are mindful that the judge's decision is "entitled to great deference on appeal." State v. Mance, 300 N.J. Super. 37, 53 (App. Div. 1997). In determining whether to sever co-defendants' trials, the judge must balance the State's interest in the economy of a joint trial and a criminal defendant's interest in presenting exculpatory evidence to the trier of fact. Sanchez, supra, 143 N.J. at 290. Because

severance will increase the risk that a codefendant to be tried first will subsequently commit perjury in an effort to exonerate the accomplice, the trial court confronted with a motion for severance must carefully evaluate a codefendant's conditional offer to testify. Unless the court is persuaded that the reliability and trustworthiness of the proffered testimony significantly outweigh the risk of perjury, severance should be denied.

[Id. at 292.]

We are satisfied that the judge correctly rejected defendant's severance motion. After a closed interview, the judge verified that Anthony was willing to provide exculpatory testimony in defendant's subsequent trial, but determined the proffered testimony lacked credibility. He stated: "[T]here is substantial evidence in the record that I have relied upon in finding that

[Anthony's] proffered testimony is not credible." We discern no reason to disturb the judge's ruling. State v. Kuropchak, 221 N.J. 368, 382 (2015) (finding appellate courts should defer to trial courts' credibility findings founded on observations of character and demeanor of witnesses not transmitted by the record).

Turning to defendant's contentions concerning the imposed sentence, we note that our review of sentencing determinations is limited and is governed by the "clear abuse of discretion" standard. State v. Roth, 95 N.J. 334, 363 (1984). See also State v. Miller, 205 N.J. 109, 127 (2011). We will "not . . . substitute [our] assessment of aggravating and mitigating factors for that of the trial court." State v. Bieniek, 200 N.J. 601, 608 (2010).

Defendant asserts that the sentencing judge⁵ "ignor[ed] a mitigating factor, improperly [found] an aggravating factor, and inappropriately weigh[ed] the aggravating and mitigating factors." We disagree.

Contrary to defendant's contention that the judge disregarded his lack of prior indictable convictions, mitigating factor seven, N.J.S.A. 2C:44-1(b)(7), the judge considered and rejected it, stating: "It doesn't amount [to] much in my judgment [It]

⁵ A different judge presided over the sentencing than had ruled on the pre-trial motions.

is the only mitigating factor that could exist here . . . but it doesn't account for very much."

Defendant contests the judge's finding of aggravating factor one, N.J.S.A. 2C:44-1(a)(1), arguing that there was no finding that this murder was "especially heinous, cruel or depraved." Although the judge conceded some difficulty with the applicability of the factor, he found it appropriate, remarking, "[t]his is about as calculated and cold blooded a murder as you can imagine . . . [I]t was close up, in your face . . . [i]t's shocking." Nevertheless, the judge clarified that the weight of the factor was not great and was not going to "impact [his] ultimate decision making." He noted that the remaining aggravating factors weighed "extremely high on a quantitative basis." In view of the judge's explicit statement that his finding of aggravating factor one would not impact his sentencing decision, we are satisfied that the judge's assessment of the aggravating and mitigating factors was based upon competent and credible evidence in the record and we find no reason to disturb the imposed sentence.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION