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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 NOS. A-2329-14T2
A-3012-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HECTOR R. DELGADO, a/k/a VICTOR
DELGADO,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARRIN S. BRYANT, a/k/a DARREN BRYANT
and SHAWN BRYANT,

Defendant-Appellant.

Submitted April 3, 2017 — Decided August 24, 2017

Before Judges Sabatino and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
13-06-1842.

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

Helmer, Conley & Kasselmann, PA, attorneys for appellant Darrin Bryant (Patricia B. Quelch, of counsel and on the brief).

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Linda A. Shashoua, Assistant Prosecutor, of counsel and on the briefs in A-2329-14 and A-3012-14).

PER CURIAM

Co-defendants Hector R. Delgado, Darrin S. Bryant, and James O. Coles beat and injured Daniel DeChurch in a Chesilhurst bar, The Last Chance Saloon. Delgado and Bryant appeal from their respective judgments of conviction: Delgado for disorderly persons simple assault and third-degree criminal restraint, for which a judge sentenced him to an aggregate forty-two month prison term; Bryant for third-degree aggravated assault and third-degree criminal restraint, for which a judge sentenced him to an aggregate five-year prison term with two years of parole ineligibility.¹

On appeal, Delgado challenges the trial court's jury instructions. Bryant argues that, separately and cumulatively, several errors deprived him of a fair trial. He contends a detective's testimony commenting on video surveillance recordings

¹ Delgado and Bryant filed separate appeals. We have consolidated them for purposes of this opinion.

invaded the function of the jury; the trial court abused its discretion by refusing to sanitize his prior conviction; the record did not sustain a conviction for criminal restraint and the trial court erroneously denied his motion for a new trial; his trial counsel was ineffective; and his sentence is excessive.

For the reasons that follow, we affirm the convictions and sentences of both defendants.

In June 2013, a Camden County grand jury charged Delgado and Bryant in a multi-count indictment with second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count one); second-degree conspiracy to commit aggravated assault, N.J.S.A. 2C:5-2 and 2C:12-1(b)(1) (count two); fourth-degree unlawful possession of a weapon, a knife, N.J.S.A. 2C:39-5(d) (count six); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d)(1) (count seven); and third-degree criminal restraint, N.J.S.A. 2C:13-2(a) (count eight). In counts three, four, and five, the grand jury charged Delgado with, respectively, third-degree aggravated assault, N.J.S.A. 2C:1(b)(2), fourth-degree unlawful possession of a weapon, a beer bottle, N.J.S.A. 2C:39-5(d), and third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d)(1). In count fourteen, the grand jury charged Bryant with fourth-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(a).

In addition to Delgado and Bryant, the grand jury charged James O. Coles in counts nine, ten, and eleven with, respectively, third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2), fourth-degree unlawful possession of a weapon, a pool cue, N.J.S.A. 2C:39-5(d), and third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d). Lastly, the grand jury charged the bartender, Nicole L. Reichle, in counts twelve and thirteen, with, respectively, third-degree hindering apprehension, N.J.S.A. 2C:29-3(a)(3), and third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(a)(7).

Delgado, Bryant, and co-defendant Coles were tried together. The jury found Delgado guilty of conspiracy to commit simple assault, simple assault, and third-degree criminal restraint. The court subsequently held Delgado's conspiracy conviction was "effectively . . . a not guilty finding[,]" and the parties agreed.² On the simple assault count, the court ordered Delgado pay fines and penalties and provide a DNA sample. On the criminal restraint count, the court sentenced defendant to a forty-two month custodial term and imposed appropriate fines and penalties.

² On October 20, 2014, the judge determined Delgado's conspiracy conviction was "really effectively a not guilty" because defendants could not conspire to commit a disorderly persons offense.

The jury found Bryant guilty of conspiracy to commit simple assault, third-degree aggravated assault, and third-degree criminal restraint. The court dismissed the conspiracy conviction, holding the verdict was "really effectively a not guilty" again because defendants could not conspire to commit a disorderly persons offense. The parties agreed the conspiracy count "was effectively a not guilty finding[.]"

Bryant moved for a new trial, but the judge denied the motion. On the aggravated assault count, the judge sentenced Bryant to a five-year custodial term with two years of parole ineligibility, and ordered that he pay appropriate fines and penalties. On the criminal restraint count, the judge sentenced Bryant to a concurrent four-year custodial term.³

The State developed much of their case at trial through The Last Chance Saloon's video surveillance recordings, which they had a detective comment on, and the testimony of the victim's brother-in-law. This evidence and testimony established the following timeline and facts.

Shortly before 7:00 p.m. on November 18, 2012, after a day of drinking, Daniel DeChurch and his brother-in-law entered the

³ The jury convicted Coles on the three counts with which he was charged.

Last Chance Saloon in Chesilhurst.⁴ The two men ordered a beer at the bar. At 7:00, DeChurch walked into the men's room and Delgado and Bryant walked in behind him. A third man, approximately six feet three inches tall, weighing 230 pounds, and bald, stood in front the men's room door, arms crossed. Three minutes later, DeChurch's brother-in-law heard some commotion and walked toward the bathroom door. The big man standing in front of the door punched him three times, knocked him down and kicked him. By then, DeChurch was on the floor outside the bathroom and men were beating him. DeChurch's face looked like he had been stung by bees multiple times.

DeChurch explained what happened before and after he entered the men's room. He was not familiar with the bar's restrooms and mistakenly attempted to turn on the light in the women's bathroom. Delgado, who was sitting at the bar, told DeChurch he had entered the wrong bathroom and directed him towards the men's room. DeChurch walked into the men's bathroom. Delgado and Bryant entered the men's room after DeChurch and stood next to him while he used the urinal. One of the men asked DeChurch why he had touched the wall. Confused, and under the assumption the man was

⁴ DeChurch was hospitalized the night he was beaten. His blood alcohol concentration was .317, nearly four times the level at which a driver is deemed to be driving under the influence of alcohol. N.J.S.A. 39:4-50.

referring to his mistaken attempt to enter the women's room, DeChurch said he had been looking for the light switch.

While DeChurch continued to use the urinal, Bryant punched him in the side of his head. As DeChurch turned towards the men, Delgado struck DeChurch in the back of his head with a beer bottle. DeChurch testified:

it pretty much knocked me unconscious. I remember a few seconds of falling forward. I hit my teeth on the chrome flush, the part where you flush the urinal. I actually slid down the inside of the urinal and ended up on the floor. At that point I started being kicked and hit from pretty much every direction.

Delgado and Bryant kicked DeChurch in his face and ribs, stomped on the back of his head, and knocked him down each time he attempted to get off his back and onto his hands and knees.

DeChurch fought back in self-defense. He reached and opened the bathroom door, which had been locked from the inside, but a man standing outside the door attempted to push DeChurch back into the bathroom. DeChurch fell down in the doorway of the men's room, and the kicking, punching and stomping resumed. DeChurch could not recall being attacked after exiting the men's room; however, footage from the saloon's surveillance cameras depicts DeChurch falling near the bar, being surrounded by men, and being struck with a pool cue.

DeChurch asked the barmaid to call the police while he stood at the bar and used napkins to wipe blood from his eyes, but the barmaid refused. According to Dechurch's brother-in-law, when he asked if the bar had video surveillance, the bartender told him it did not work.

Following the assault, DeChurch and his brother-in-law went to DeChurch's home where they called the police. The police and emergency medical services arrived at DeChurch's home and transported him to the hospital where Doctor Steven E. Ross treated DeChurch for "bruises around his face and head, a small subarachnoid hemorrhage to the right frontal region, [and] a large laceration of his right thigh." The doctor explained that a subarachnoid hemorrhage is "a very mild bruise on the surface of the brain." The cut on DeChurch's thigh required thirty-seven stitches and the doctor placed a draining tube in the wound for about one week to prevent infection. DeChurch spent three days in the hospital. Upon being discharged, a doctor treated DeChurch for a local infection of the wound on his thigh.

On appeal, Delgado argues:

POINT I

THE TRIAL COURT'S INSTRUCTION ON ACCOMPLICE LIABILITY DEPRIVED DEFENDANT OF A FAIR TRIAL DUE TO THE CONFUSION AND AMBIGUITY RESULTING FROM THE USE OF "AND/OR," AND DUE TO THE COURT'S FAILURE TO INSTRUCT THE JURY ON

ACCOMPLICE LIABILITY WITH RESPECT TO THE CHARGE OF CRIMINAL RESTRAINT AND FALSE IMPRISONMENT.

- A. The trial court's repeated use of "and/or" in the jury charge resulted in ambiguity such that jurors may have reached a guilty verdict based upon different theories.
- B. The trial court's failure to instruct jurors on accomplice liability with respect to criminal restraint and false imprisonment, pursuant to the principles enunciated in State v. Bielkiewicz, deprived defendant of a fair trial.

Bryant argues:

POINT I

THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

POINT II

THE DETECTIVE'S TESTIMONY WAS INAPPROPRIATE AND CONSTITUTES REVERSIBLE ERROR.

- A. HEARSAY.
- B. THE DETECTIVE'S IMPROPER LAY OPINION INVADED THE PROVINCE OF THE JURY.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO SANITIZE DEFENDANT'S PRIOR CONVICTION.

POINT IV

THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUSTAIN A CONVICTION FOR CRIMINAL RESTRAINT.

POINT V

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

- A. FAILURE TO REQUEST AN ADJOURNMENT OF TRIAL.
- B. FAILURE TO OBJECT TO IN-COURT IDENTIFICATION OF DEFENDANT AND/OR REQUEST WADE HEARING.
- C. FAILURE TO OBJECT TO PRITCHETT'S TESTIMONY.
- D. CRIMINAL RESTRAINT, COUNT 8.

POINT VI

A NEW TRIAL IS WARRANTED DUE TO CUMULATIVE ERROR.

POINT VII

DEFENDANT'S SENTENCE IS EXCESSIVE.

We first address Delgado's arguments, neither of which he raised before the trial court. "[N]o party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict" except when the error "is of such a nature as to have been clearly capable of producing an unjust result[.]" R. 1:7-2 and -5; R. 2:10-2. Plain error in a jury charge is a "legal

impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Hock, 54 N.J. 526, 538 (1969) (citation omitted), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970). We find no plain error here.

Defendant first challenges the trial court's charge on accomplice liability. The court gave the following instruction:

A person is an accomplice of another person in the commission of an offense if with the purpose of promoting or facilitating the commission of the offense he solicits such other person to commit it and/or aids or agrees or attempts to aid such other person in planning or committing it.

. . . .

That each defendant solicited the other to commit it and/or did aid or agree to attempt to aid him in planning or committing it.

. . . .

If you find that . . . Darrin Bryant, with the purpose of promoting or facilitating the commission of the offenses solicited [defendant] or that . . . defendant . . . with a purpose of promoting or facilitating the commission of the offenses solicited Darrin Bryant to commit it and/or aided or agreed or attempted to aid him in planning or committing it, then you must consider him as if he committed the crimes himself.

. . . .

That Darrin Bryant and/or [defendant] solicited each other to commit it and/or did aid or agree or attempt to aid each other in planning or committing it.

. . . .

Guided by these legal principles then if you've found the defendants not guilty of the crime charged, you should then consider whether the defendant is guilty or not guilty as an accomplice on the lesser charge of aggravated assault, significant bodily injury and/or simple assault bodily injury.

. . . .

Therefore, in order to find the defendants guilty of the lesser included offenses of aggravated assault significant bodily injury or simple assault bodily injury, the State must prove beyond a reasonable doubt that Darrin Bryant and/or [defendant] committed the crimes of aggravated assault and significant bodily injury and/or simple assault bodily injury as alleged in the lesser included offenses, that Darrin Bryant and [defendant] solicited the other to commit aggravated assault significant bodily injury and/or simple assault bodily injury and/or did aid or agree or attempt to aid him in planning to commit the aggravated assault significant bodily injury and/or simple assault bodily injury.

Number three, that . . . [defendant] and/or Darrin Bryant's purpose was to promote or facilitate the commission of the aggravated assault and significant bodily injury and/or simple assault bodily injury.

Number four, that Darrin Bryant and/or [defendant] possessed the criminal state of

mind that is required for the commission of aggravated assault significant bodily injury and/or simple assault bodily injury.

(Emphasis added).

Delgado contends the trial court's use of the phrase "and/or" in the accomplice liability charge "was likely to have resulted in juror confusion, and to have also created a myriad of potentially problematic, non-unanimous verdicts. As there is no way of ruling out the possibility that the verdict was other than unanimous in this case, the convictions must be reversed." To support this argument, defendant relies upon State v. Gonzalez, 444 N.J. Super. 62 (App. Div.), certif. denied, 226 N.J. 209 (2016).

In denying Gonzalez's petition for certification, the Supreme Court stated:

The Court agrees with the Appellate Division's conclusion that the use of "and/or" in the jury instruction in this case injected ambiguity into the charge. The criticism of the use of "and/or" is limited to the circumstances in which it was used in this case.

[Gonzalez, supra, 226 N.J. at 209 (citations omitted).]

The circumstances in the case before us do not replicate those in Gonzalez. Comparing the charge in Gonzalez, supra, 444 N.J. Super.

at 73-75, with the charge given by the court in the case before us makes the difference apparent.

In addition, here defendant restricts his challenge concerning the use of "and/or" to the accomplice liability portion of the charge. The trial court substantially followed Model Jury Charge (Criminal), "Liability for Another's Conduct" (1995). We infer from the Supreme Court's statement accompanying its denial of Gonzalez's petition for certification that if the Court deemed the model jury charge so per se ambiguous so as to deprive Gonzalez of a fair trial, the Court would have directed that the ambiguity in the model charge be corrected.

Lastly, we infer from the silence of three defense attorneys and the prosecutor that the parties did not perceive any ambiguity in the trial court's jury instructions. If, as defendant contends, the use of "and/or" was likely to have resulted in juror confusion, certainly one of four experienced attorneys would have called the issue to the court's attention.

We find equally unavailing Delgado's second argument: the trial court committed reversible error by omitting to repeat the accomplice liability charge with the instructions on criminal restraint and the lesser-included offense of false imprisonment. The State did not seek to convict Delgado and Bryant of criminal restraint on an accomplice liability theory. Accordingly, the

court instructed the jury to consider false imprisonment if it found "one or either of the defendants" not guilty of criminal restraint, and explained the verdict sheet identified each defendant specifically with the charge against him, independent from his codefendants. In other words, the judge explained criminal restraint and the lesser-included offense of false imprisonment separately, and instructed the jury to consider the charges as they pertained to each defendant specifically.

Delgado's reliance on State v. Bielkiewicz, 267 N.J. Super. 520 (App. Div. 1993) is misplaced. There, a panel of this court reversed a murder conviction not because the trial court failed to give an accomplice charge, but rather because "the trial court's instructions regarding accomplice liability for murder were inadequate." Id. at 524-25. The panel explained:

By definition an accomplice must be a person who acts with the purpose of promoting or facilitating the commission of the substantive offense for which he is charged as an accomplice. Therefore, a jury must be instructed that to find a defendant guilty of a crime under a theory of accomplice liability, it must find that he shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.

In addition, when an alleged accomplice is charged with a different degree offense than the principal or lesser included offenses are submitted to the jury, the court has an obligation to carefully impart[] to the jury

the distinctions between the specific intent required for the grades of the offense.

[Id. at 527-28 (alteration in original) (citations omitted).]

Here, unlike Bielkiewicz, the court did not charge on accomplice liability. Moreover, the charge the trial court gave on accomplice liability as to aggravated assault complied entirely with the pronouncements in Bielkiewicz.

We turn to Bryant's arguments. Having considered Points I through IV and VI in light of the record and applicable legal principles, we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add these brief comments.

We find no basis for concluding the trial court abused its considerable discretion concerning either the testimony of the law enforcement officers about the surveillance videos, State v. J.D., 211 N.J. 344, 354 (2012), or the admissibility of defendant's prior criminal record, State v. Sands, 76 N.J. 127, 144 (1978). Moreover, even if the trial court did misapply its discretion, the error was harmless considering the strength of the State's case and the verdicts. R. 2:10-2; State v. Macon, 57 N.J. 325, 337-38 (1971). The trial court properly instructed the jury on the crime of criminal restraint and the jury's verdict on that count was supported by adequate evidence on the record. Defendant's claim

the trial court erred by denying his motion for a new trial is entirely devoid of merit, as is his cumulative error argument.

As for Bryant's claims his trial counsel was ineffective, there is "a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record." State v. Preciose, 129 N.J. 451, 460 (1992) (citations omitted). We decline to address the issues on direct appeal.

Lastly, Bryant claims his sentence is excessive. We disagree. A sentencing court must exercise discretion "based upon findings of fact . . . grounded in competent, reasonably credible evidence" and "apply correct legal principles in exercising its discretion." State v. Roth, 95 N.J. 334, 363 (1984) (citations omitted). An appellate court reserves the power to modify sentences only "when the application of the facts to the law is such a clear error of judgment that it shocks the judicial conscience." Id. at 364 (citation omitted). An appellate court must not substitute its judgment for that of the trial court's judgment, but can:

(a) review sentences to determine if the legislative policies, here the sentencing guidelines, were violated; (b) review the aggravating and mitigating factors found below to determine whether those factors were based upon competent credible evidence in the record; and (c) determine whether, even though the court sentenced in accordance with the guidelines, nevertheless the application of

the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.

[Id. at 364-65.]

Here, defendant argues the trial court misapplied the aggravating and mitigating factors at sentencing and failed to provide a comprehensive statement of reasons.

A trial court must state its reasons for imposing a sentence, including the factual basis supporting its finding of aggravating and mitigating factors affecting the sentence. State v. Fuentes, 217 N.J. 57, 73 (2014) (citations omitted). A clear and thorough explanation of the balancing of the factors is particularly important, and a detailed statement of reasons is critical for appellate review because an appellate court must determine whether the aggravating and mitigating factors were based on competent credible evidence in the record. Id. at 73-74 (citations omitted).

At sentencing, the trial court explained its reasons for imposing defendant's sentence, including the factual basis supporting his finding of aggravating and mitigating factors. The judge based the aggravating and mitigating factors on defendant's criminal record, the testimony presented, and the Last Chance Saloon's surveillance footage. The court also "considered the nature and degree of the crime, the need for punishment and deterrence, the defendant's prospects for rehabilitation, the

presentence report, the defendant's previous involvement in the criminal justice system, and the recommendations of the prosecutor and the probation department."

Moreover, defendant's sentence was within the proper range of sentencing. The jury convicted defendant of third-degree aggravated assault and third-degree criminal restraint. N.J.S.A. 2C:43-6(a)(3) states the term of imprisonment for a crime of the third degree shall be between three and five years. Further, the court may fix a minimum term of parole ineligibility where it "is clearly convinced that the aggravating factors substantially outweigh the mitigating factors[.]" N.J.S.A. 2C:43-6(b).

In light of the foregoing, the imposition of an aggregate five-year custodial sentence with a two-year period of parole ineligibility is not excessive. It is supported by the record and does not shock the judicial conscience.

For the foregoing reasons we affirm defendants' convictions and sentences.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION