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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-2368-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANIEL A. CATALANO,

Defendant-Appellant.

Submitted May 4, 2017 – Decided July 6, 2017

Before Judges Lihotz and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment
No. 15-02-0354.

Joseph E. Krakora, Public Defender, attorney
for appellant (Monique Moyse, Designated
Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Paul H.
Heinzel, Assistant Prosecutor Senior
Litigation Counsel, of counsel; Lisa Sarnoff
Gochman, Legal Assistant, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Daniel A. Catalano appeals from a December 8, 2015 judgment of conviction, entered after a jury trial. The jury found defendant guilty of third-degree fraudulent use of a credit card, N.J.S.A. 2C:21-6(h), and fourth-degree credit card theft, N.J.S.A. 2C:21-6(c)(1). The court imposed a five-year term of imprisonment for the former and an eighteen-month concurrent term for the latter offense. We affirm.

I

The pertinent evidence is as follows. In July 2014, defendant's father, the victim of the crime, testified his credit rating had inexplicably dropped. He obtained a copy of his credit report, which revealed charges had been placed on a Capital One credit card that had been sent to him but never activated. Concerned, he telephoned Capital One and learned the card had been activated from his home, and charges were put on his card from March to May 2014. At the time, his wife, daughter, and defendant, who is his son, were living in his home; all three denied using the card.

The father contacted the local police department to report the unauthorized use of his card. After conducting an investigation, the police suspected defendant was the culprit. Sergeant Paul Santucci testified six of the charges on the card were money orders purchased through Western Union and sent to

defendant, who picked up the money orders in various municipalities in Monmouth County.

According to Western Union's records, the name of the ostensible "sender" - the term used by Western Union - was the father's. However, Santucci discovered the cell phone number used by the alleged sender to contact Western Union and arrange for money orders to be charged to the Capital One account, and then sent to defendant, in fact belonged to defendant. Santucci located the cell phone number in defendant's name using a database he accessed at the police station.

One charge placed on the credit card in March 2014 was a \$272 payment toward services provided by Mark Melango, a bail bondsman. Before addressing Melango's testimony, we discuss the controversy over his anticipated testimony before trial, as well as a comment made by a prospective juror during jury selection.

Before trial, the assistant prosecutor brought to the court's attention she wished to introduce evidence of a transaction between Melango and defendant. At the time of that transaction, defendant was in jail. Defendant contracted with Melango to provide him with the bail necessary to get him out of jail. The State proffered defendant used the subject charge card to pay for Melango's services, and gave Melango his cell

phone number, a number that matched the one used by the party who sent money orders to defendant through Western Union.

Although defendant allegedly used the credit card without his father's permission to post bail, the State noted it was not prosecuting defendant for the transaction involving Melango. However, the State regarded defendant's transaction with Melango as intrinsic to the offenses with which defendant was charged, because this transaction revealed defendant was in possession of and using the card around the same time charges were being posted on the card for the money orders. Also, the cell phone number defendant provided to Melango was the same cell phone number used by the sender to purchase the money orders, showing defendant sent the money orders to himself.

Defendant objected to the introduction of any evidence of defendant's interaction with Melango, arguing such evidence revealed defendant had engaged in a prior bad act, specifically, that he used the credit card in his father's name to pay for Melango's service without his father's authorization. The court stated it initially considered the admissibility of the evidence under N.J.R.E. 404(b), but then determined the subject evidence was not "other crimes" evidence, rendering unnecessary an analysis under N.J.R.E. 404(b).

The court concluded the evidence arising out of defendant's interaction with Melango was "intrinsic" to the charged crimes and, because it was relevant and its prejudicial value not substantially outweighed by the risk of causing undue prejudice, see N.J.R.E. 403, the evidence was admissible. However, the court granted defendant's request there could be no evidence defendant had been in jail, or that Melango was a bail bondsman, because of defendant's concern the identification of his profession would suggest to the jury defendant used his services to get out of jail.

We turn to the controversy over a prospective juror's comments during jury selection. The comments were made during the following exchange between the court and the prospective juror:

THE COURT: Did you know anyone on the
witness list?

THE JUROR: Mr. Melango, is he a bail
bondsman?

THE COURT: He is from Neptune.

THE JUROR: If he's a —

THE COURT: You know him?

THE JUROR: Yeah.

THE COURT: Okay. Why don't we come to
sidebar?

After the sidebar conference, the juror was excused by the court. The sidebar conference was not recorded because the voices were inaudible but, the following morning, the court placed on the record defendant had asked for a mistrial on the ground the juror's comments revealed Melango was a bail bondsman; however, the court denied the motion.

Defendant again asked for a mistrial when the parties assembled for another day of jury selection, maintaining all of the potential jurors sitting in the court room were tainted by the juror's comments. The court offered but defendant decided against giving a curative instruction; defendant was concerned an instruction would only highlight what the juror said. The court then denied defendant's second motion for a mistrial, providing the following reasons.

First, the court noted the juror's comments were not damaging because

bail is just something under our court rules that people post when they are accused of a crime. . . . [T]here is no negative inference they should draw as to his guilt because he has been accused of a crime. We take great pains during our initial instructions to indicate the indictment is not evidence. . . . So I don't think under any situation that what was blurted out by the potential juror is grounds for a mistrial. I don't believe it prejudices the defendant to that extent. That's number one.

The court then observed if the case were not tried at that time, given the shortage of judges and the backlog of criminal cases, defendant's matter might not be scheduled for trial again for another ten months. The court stated it squeezed defendant's case in for trial because defendant was in jail, but "if [defendant] says . . . I'll wait [ten months] to go to trial, I'll sit in jail happily, well, then, that's another consideration I'll have to make but I haven't heard that. . . . [But] I think the defendant is entitled to a speedy trial. I don't feel he's been prejudiced by what's been said."

Returning to our summary of the pertinent evidence adduced during trial, Melango's testimony was consistent with the State's proffer. Through his testimony, it was established defendant used the subject credit card in payment toward Melango's services, and provided the incriminating cell phone number to Melango. In addition, Melango testified that, although he initially dealt with defendant over the phone, defendant did come into his place of business to sign the credit card receipt. At that time, Melango took a picture of defendant. That picture was placed into evidence to provide proof defendant was the person with whom Melango did business.

Despite having a photograph to prove it was defendant with whom Melango interacted, the assistant prosecutor asked Melango if he could make an in-court identification of defendant. That exchange was as follows:

PROSECUTOR: And do you see Daniel Catalano in the courtroom here today?

MELANGO: Do I?

PROSECUTOR: Yes.

MELANGO: No. It might be him right now but he looks different.

THE COURT: I'm sorry?

MELANGO: Looks like him right there.

On cross-examination, defense counsel asked Melango the following: "Daniel Catalano was not physically in your place of business when this transaction began. Right?" Melango replied, "No. He was in jail." The court immediately delivered the following instruction to the jury:

Ladies and gentlemen, whether or not he was in jail at the time of this offense or this incident here is of no moment. He's not charged with anything dealing with this particular incident. And if he was or not in jail, again, reflects in no way on his guilt or innocence in this matter. Okay. So you are to disregard that response.

Again, the response was solicited through the defense question. I'm sure [defense counsel] didn't intend that to be the response. It was the response. But you are

to totally disregard it, and not, it should not enter into your deliberations in any way, shape, or form.

In addition, I was going to give you this instruction when the witness was finished but I'll give it to you now.

As you know, and will recall, when I read the indictment to you, it mentioned allegations involving Colts Neck, Marlboro, and Middletown.

During this testimony you've heard that Mr. Melango's place of business is Neptune. [Defendant] is not charged with anything to do with the executing of this agreement or whatever occurred with Mr. Melango in Neptune. He's not charged in that by way of the indictment.

This information was only presented to you intrinsically so the State could attempt to prove to you that Mr. Catalano had used a credit card which they are trying to match up to the credit card that was allegedly used in Colts Neck, Marlboro, and/or Middletown. So that was the only purpose it was presented.

So again whether or not he was in jail at the time that his transaction occurred, this transaction itself, you are not to consider them in any way, shape, or form as to whether or not he's a bad person or he was guilty of the items that have been testified to previously in which the State is alleging occurred in other municipalities, Colts Neck, Marlboro, and Middletown between March 20th, 2014 and May 5, 2014.

When delivering the final jury charge, the court stated:

Now, as I said to you during the testimony of the State's witness, Mark Melango, and as

noted in the indictment, Mr. Catalano is charged in Counts 1 and 2 with events allegedly occurring in Colts Neck, Marlboro, and Middletown. The incident testified to by Mr. Melango that allegedly occurred in Neptune in March 2014 is not part of the indictment. You are not to speculate why, if at all, Mr. Catalano may have engaged the services of Mr. Melango. Any speculation as to whether this defendant has other troubles he was dealing with during this time period is just that, speculation, and should not enter your deliberations.

This testimony was only allowed as intrinsic evidence to aid the State in their attempt to show Daniel Catalano had access to the Capital One credit card and had the ability to use it, utilize it, at the times and locations noted in the indictment.

You are not to utilize this testimony for any other purpose other than what I have instructed you.

As previously stated, the jury convicted defendant of the two charges with which he had been indicted.

II

On appeal, defendant asserts the following arguments:

POINT I — THE TRIAL COURT DEPRIVED MR. CATALANO OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL AND ABUSED ITS DISCRETION BY FAILING TO DISMISS THE JURY PANEL.

POINT II — THE ADMISSION OF EVIDENCE OF MR. CATALANO'S ALLEGED UNCHARGED TRANSACTION IN NEPTUNE, NEW JERSEY, WITH MARK MELANGO VIOLATED HIS RIGHT TO A FAIR TRIAL.

POINT III — THE TRIAL COURT'S JURY CHARGE ON IDENTIFICATION WAS INADEQUATE AND

INCOMPLETE, DEPRIVING MR. CATALANO OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

POINT IV — THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING INTO EVIDENCE HEARSAY FROM A POLICE DATABASE.

POINT V — THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A MANIFESTLY EXCESSIVE SENTENCE.

Defendant raised the following arguments in a supplemental pro se brief:

POINT I — THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING EVIDENCE OF UNCHARGED CRIMES TO BE ADMITTED WITHOUT A LIMITING INSTRUCTION OR HEARING.

POINT II — THE CONVICTION MUST BE REVERSED DUE TO THE COURT'S REFUSAL TO SUBMIT TERRITORIAL JURISDICTION AS AN ELEMENT OF THE OFFENSE TO BE DECIDED BY THE JUDGE.

POINT III — THE ADMISSION OF EVIDENCE OF A CRIME; THE GRAND JURY SAW, AND DECLINED TO INDICT VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL.

POINT IV — IT IS UNKNOWN IF THE JURY WAS UNANIMOUS; DUE TO A STRUCTURAL ERROR IN THE JURY CHARGES.

POINT V — REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT DENIED THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

We have reviewed the arguments in light of the record and applicable law. We are not persuaded.

A

Defendant contends he was denied his right to a fair trial when the trial court failed to dismiss the jury panel and declare a mistrial after the prospective juror asked the court if Melango were a bail bondsman, followed by her statement she knew him. Defendant argues the juror's comment was tantamount to confirming, in the presence of the full jury panel, Melango was in fact a bail bondsman.

"A defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial." State v. Loftin, 191 N.J. 172, 187 (2007). That right "includes the right to have the jury decide the case based solely on the evidence presented at trial, free from the taint of outside influences and extraneous matters." State v. R.D., 169 N.J. 551, 557 (2001). However, even if the court determines a jury "has been exposed to [an] outside influence," a "new trial . . . is not necessary in every instance." Id. at 559. "Ultimately, the trial court is in the best position to determine whether the jury has been tainted. That determination requires the trial court to consider the gravity of the extraneous information in relation to the case, and the overall impact of the matter on the fairness of the proceedings." Ibid.

"We traditionally have accorded trial courts deference in exercising control over matters pertaining to the jury." Id. at

559-60. We review the disposition of a motion for a mistrial for an abuse of discretion. Id. at 559. "Application of that standard respects the trial court's unique perspective." Ibid.

"[T]he test for determining whether a new trial will be granted because [of] . . . the intrusion of irregular influences is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs." State v. Jenkins, 182 N.J. 112, 131 (2004) (quoting Panko v. Flintkote Co., 7 N.J. 55, 61 (1951)). Thus, a new trial is required where the irregularity has the capacity to influence the outcome of the trial; a showing of actual prejudice is not required. See R.D., supra, 169 N.J. at 558. Moreover, "it is presumed the irregularity had the capacity to influence, 'unless it has affirmatively been shown [by the State that] it does not.'" State v. Wormley, 305 N.J. Super. 57, 69 (App. Div. 1997) (alteration in original) (quoting State v. Grant, 254 N.J. Super. 571, 588 (App. Div. 1992)), certif. denied, 154 N.J. 607 (1998)).

Applying these principles, we are unconvinced defendant was prejudiced by the juror's comments, and conclude the trial court did not abuse its discretion in denying his motion for a mistrial and the convening of a new jury pool. The mere mention one of the witnesses was a bail bondsman did not have a tendency

to influence the jury in arriving at its verdict in a manner inconsistent with the evidence. Even if the jury surmised defendant contracted with Melango to obtain bail, as stated by the trial court, there is no negative inference to be drawn simply because one has been accused of a crime, a point stressed in the court's initial instructions to the jury when it emphasized the indictment was not evidence of defendant's guilt of the charges.

In addition, when Melango testified defendant was in jail the first time he communicated with him, the court delivered a prompt and forceful curative instruction to ameliorate the effect of Melango's comment, and jurors are presumed to follow a court's instructions. See State v. Martini, 187 N.J. 469, 477 (2006), cert. denied, 549 U.S. 1223, 127 S. Ct. 1285, 167 L. Ed. 2d 104 (2007).

Among other things, the court instructed the jury to disregard Melango's testimony, that such testimony was not to enter into its deliberations in "any way, shape, or form." The court also pointed out that whether defendant was or was not in jail did not reflect upon his guilt or innocence in the matter before the jury. Of course, this instruction equally applied to any assumption Melango was a bail bondsman. That is, defendant was not concerned Melango was a bail bondsman per se. Defendant

was concerned his association with a bail bondsman would suggest he contacted Melango because he was in jail.

Accordingly, we are satisfied the juror's remarks could not have influenced the outcome in this matter. Even if the remarks had such a tendency, the court's strong curative instruction appropriately guided the jury from using such evidence during its deliberations.

B

Defendant contends evidence of his unauthorized use of the credit card in his transaction with Melango was a prior bad act that negatively tainted the jury's impression of him, violating his right to a fair trial and requiring the reversal of his convictions. Defendant's argument warrants little discussion. Evidence of defendant's interaction with Melango was "intrinsic" to the charged crimes and admissible.

"[E]vidence is intrinsic if it 'directly proves' the charged offense." State v. Rose, 206 N.J. 141, 180 (2011) (quoting United States v. Green, 617 F.3d 233, 248 (3d Cir. 2010)). In Rose, the Court instructed the "threshold determination under [N.J.R.E.] 404(b) is whether the evidence relates to 'other crimes,' and thus is subject to continued analysis under [N.J.R.E.] 404(b), or whether it is evidence intrinsic to the charged crime, and thus need only satisfy the

evidence rules relating to relevancy, most importantly

[N.J.R.E.] 403." Id. at 179.

Here, the court found the evidence intrinsic, relevant, and its probative value not substantially outweighed by the risk of undue prejudice. The challenged testimony was admissible because it related directly, and was intrinsic to, the crimes for which defendant was being tried. The father testified he never used the Capital One card; in fact, he claimed he had never even activated the card. The transaction with Melango exposed the fact defendant was in possession of and using the card during the time period the unauthorized charges were placed on the card.

The transaction also confirmed defendant's cell phone number, enabling the State to tie defendant to the Western Union charges placed on the card. Additionally, the photograph taken at the time defendant signed a contract with Melango challenged the asserted mistaken identity defense and claim a third party was placing the unauthorized charges on the card. We see no error in the introduction of the challenged evidence.

Moreover, the court properly instructed the jury on the limited use of this evidence. "In setting forth the prohibited and permitted purposes of the evidence the trial court must include within the instruction 'sufficient reference to the

factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.'" State v. Hernandez, 170 N.J. 106, 131 (2001) (quoting State v. Stevens, 115 N.J. 289, 304 (1989)). The court emphasized the evidence of defendant's interactions with Melango was introduced for a specific, narrow purpose. The court informed the jury the evidence was only allowed as intrinsic evidence to aid the State in its attempt to show, among other things, defendant had access to and the ability to use the Capital One credit card. The jury was further instructed it could not utilize Melango's testimony for any purpose other than what the court directed.

C

Defendant maintains the crux of the State's case was whether he was the one who placed the unauthorized charges on the credit card in his father's name and, thus, the case turns on Melango's identification of defendant. The State concedes Melango's in-court identification of defendant was equivocal, but notes it did not rely upon this identification to establish defendant was the individual with whom Melango interacted. In addition to Melango's testimony that the person with whom he dealt indentified himself as Daniel Catalano and affixed his signature to their contract and the credit card receipt, the

State relied upon the photograph Melango took of defendant when defendant appeared in his office. That photograph was put into evidence, allowing the jury to decide if the person in the picture was defendant.

For the first time on appeal, defendant argues the trial court failed to properly instruct the jury on how to evaluate the identification evidence offered by Melango. Although the court did provide an instruction on identification, defendant claims the court erred because it did not issue to the jurors Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (2012).¹ For simplicity and for the purpose of this opinion only, we refer to this charge as the MJC.

In our view, the MJC would not have been at all suitable for this case. The MJC was implemented in light of the Supreme Court's decision in State v. Henderson, 208 N.J. 208 (2011). In Henderson, a defendant challenged an identification on the ground police officers had unduly influenced the eyewitness. Id. at 217. The eyewitness initially expressed doubt about the identity of the perpetrator, but was able to confidently identify the defendant after meeting with investigators. Id. at

¹ Because of the length of this charge, we do not reproduce it here.

223-24. The Court identified numerous factors that can affect the ability of a witness to remember and identify perpetrators of crimes, resulting in misidentifications, and ordered an amplified, comprehensive jury charge. Id. at 298-99. The MJC was then drafted and adopted by the Court.

In the MJC, the court instructs the jury to consider the eyewitness's attentiveness and opportunity to view the perpetrator, as well as the following factors: the witness's stress, the duration of observations, focus on weapons, distance, lighting, intoxication, and disguises or changed appearance. See Model Jury Charge (Criminal), supra, at 3-5. The jury is also instructed about the potential impact of the witness's prior description of the person identified, the witness's confidence and accuracy, the time that elapsed between the event and the identification, cross-racial effects, and the impact of other's opinions. Id. at 5.

Here, such factors have nothing to do with a jury's examination of a photograph to determine whether it depicts the person identified in court as defendant. Memory is not in issue. See Henderson, supra, 208 N.J. at 245-76. Nor is there a need to explain to the jury how the memory works. See id. at 273-74. A jury reviewing a photograph is not under stress;

distracted by weapons; or hampered by shortness of time, distance, and poor lighting.

Here, the jury was capable of assessing the evidence without the instructions contained within the MJC. The jury's in-court comparison of the photograph to defendant was not an identification procedure subject to Henderson. We therefore conclude the omission of such an instruction was not "clearly capable of producing an unjust result." R. 2:10-2.

D

Defendant next contends the trial court committed reversible error by admitting into evidence hearsay from the police database. Specifically, defendant argues it was error to permit Santucci to testify the database set forth defendant's cell phone number. The State concedes the evidence was inadmissible hearsay, but notes evidence of defendant's cell phone number was also supplied by Melango, who testified defendant told him his cell phone number.

We are satisfied the error was, beyond a reasonable doubt, harmless, because the evidence from the database was merely cumulative to evidence that was properly admitted and did not affect the outcome. See State v. Carter, 91 N.J. 86, 114 (1982).

We have carefully examined defendant's remaining arguments and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



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