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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2572-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK LOVETT,

Defendant-Appellant.

Submitted November 7, 2016 – Decided June 27, 2017

Before Judges Sabatino and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 13-
03-00526.

Joseph E. Krakora, Public Defender, attorney
for appellant (Jason A. Coe, Assistant Deputy
Public Defender, of counsel and on the brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Camila
Garces, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Mark Lovett appeals from a judgment of conviction
for aggravated manslaughter, aggravated assault, and two weapons

offenses. For those crimes, a judge sentenced him to prison for thirty-one years. On appeal, he argues:

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S REQUEST FOR A WADE HEARING BECAUSE THERE WAS AMPLE EVIDENCE IN THE RECORD THAT CALLED THE RELIABILITY OF THE EYEWITNESS IDENTIFICATION PROCEDURE USED INTO QUESTION.

POINT II

WHEN THE JURY POLL REVEALED THAT JURORS WERE NOT UNANIMOUS AS TO THE VERDICT, THE COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INQUIRE AS TO WHETHER FURTHER DELIBERATIONS WOULD BE FRUITFUL AND FAILING TO INSTRUCT THE JURORS NOT TO ABANDON THEIR HONESTLY HELD VIEWS FOR THE SAKE OF REACHING A UNANIMOUS VERDICT.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO READ THE PORTION OF THE MODEL JURY CHARGE ON IDENTIFICATION WHICH DEALS WITH THE SUGGESTIVENESS OF SINGLE-SUSPECT IDENTIFICATION PROCEDURES. ([N]ot raised below).

POINT IV

THE AGGREGATE 31-YEAR PRISON SENTENCE IMPOSED WAS BOTH PROCEDURALLY DEFECTIVE AND MANIFESTLY EXCESSIVE FOR A DEFENDANT WITHOUT ANY PRIOR ADULT CONVICTIONS.

For the reasons that follow, we affirm.

In March 2013, an Essex County grand jury charged defendant and co-defendant Shawn Watford in a six-count indictment with the

following crimes: first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and 2C:11-3(a)(1) and (2) (count one); first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count two); two counts of first-degree attempt to commit murder, N.J.S.A. 2C:5-1 and 2C:11-3(a)(1) and (2) (counts three and four); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(c) (count five); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count six).

Defendant moved for a Wade¹ hearing, arguing the court should exclude a witness's out-of-court identification because it resulted from unduly suggestive circumstances. Analyzing defendant's motion under Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) and State v. Madison, 109 N.J. 223 (1988), rather than the new standards of State v. Henderson, 208 N.J. 208 (2011), the trial court denied defendant's motion for a hearing.

The court granted the State's pre-trial motion to dismiss count four, one of the attempted murder counts. The State tried defendant separately from the co-defendant. At the conclusion of defendant's trial, the jury found him not guilty of conspiracy to commit murder (count one), but guilty of the lesser-included

¹ United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

offense of aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1) (count two). On count three, the jury found defendant not guilty of attempted murder, but guilty of the lesser-included offense of third-degree aggravated assault, N.J.S.A. 2C:12-(b)(7). The jury found defendant guilty of the two weapons offenses.

For purposes of sentencing, the court merged count six, possession of a weapon for an unlawful purpose, with counts two and three, aggravated manslaughter and aggravated assault. The court sentenced defendant on count two to a twenty-seven-year prison term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court imposed a four-year prison term with two years of parole ineligibility on count three, consecutive to the sentence imposed on count two. On count five, unlawful possession of a weapon, the court imposed a five-year prison term with three years of parole ineligibility concurrent to the sentence imposed on count three.² This appeal followed.

The State developed the following proofs at trial. Shortly after midnight on May 27, 2012, fifteen or twenty people were

² We note counts two and three were not listed in the "final charges" section of the judgment of conviction. Counts two and three were, however, listed in the judgment of conviction's "sentencing statement" along with the sentences to be imposed on those counts. The judgment of conviction also improperly lists defendant's aggregate custodial term as twenty-seven years rather than the correctly computed figure of thirty-one years.

socializing in front of a home on Taylor Street, between Hickory and Center streets, in Orange. A light-colored Audi turned from Hickory Street onto Taylor Street and slowed as it passed the crowd. The Audi's front-seat passenger fired multiple bullets into the crowd. One bullet struck a victim in the chest, and he died as the result of the gunshot wound. Another bullet grazed the left leg and passed through the right leg of a second victim, who was seated in a car.

Law enforcement officers photographed and processed the crime scene. Officers found ten shell casings that had been ejected from a semi-automatic weapon, but found no evidence, such as fingerprints, to aid them in identifying the perpetrators. Officers also located a surveillance camera used by a nearby business. Although the camera captured the Audi turning from Hickory Street onto Taylor Street, authorities could identify neither the car's occupants nor its license plate number from the video recording.

The State proved defendant and co-defendant were the perpetrators through the testimony of a witness who identified co-defendant as the Audi's driver, and through the prior statement of another witness, decedent's friend, who had once identified co-defendant and defendant to law enforcement as the driver and

shooter.³ The first witness, who had observed the shooting from the third floor of a neighboring house, could not identify the passenger who fired the shots. This witness was looking through the window because the noise from the crowd was keeping him awake. He saw the Audi slow down as it neared the crowd, and then he heard "boom, boom, boom, boom." He saw fire coming from the car as people on the sidewalk fled or ducked behind parked cars.

The driver's side window was down. The witness had seen the driver previously in Orange, and described his hair, moustache, and sideburns. Within the next two weeks, the witness gave a statement to authorities and identified a photo of co-defendant as the Audi's driver. The witness could not identify the car's other occupant, who he believed to be the shooter. The witness had seen "flames" coming "[f]rom the right-hand side of the front window."

The other witness, decedent's friend, had given a video-recorded, sworn statement to police two days after the homicide. According to the statement, he was talking to decedent when "a silver or beige Audi hit the corner hard and it slowed down by us and started shooting." When asked by detectives if he saw who was

³ A third witness, who had been at the scene, had also given a statement to police identifying defendant as the shooter and co-defendant as the Audi's driver. This third witness refused to testify at trial, and the court held him in contempt.

shooting the gun, decedent's friend said it was defendant, "Mark Lovett." The friend saw defendant sticking his hand out the Audi's window firing a gun. Decedent's friend had known defendant for approximately six or seven years, since seventh grade, and he had seen him recently at a deli and liquor store. According to decedent's friend, defendant, also known as "Spitter," was "always" at the deli. The friend also had known co-defendant, nicknamed "Spot," for approximately four years. Decedent's friend identified Spot as the Audi's driver. Decedent's friend said in his statement he "got a very good look" at defendant and co-defendant.

During the friend's interview, after he identified defendant and explained how he knew him, detectives showed the friend a single photograph of defendant. The friend identified defendant as Spitter, Mark Lovett. Decedent's friend also identified co-defendant from an array of six photographs.

Decedent's friend recanted at trial, asserting the men in the Audi wore black masks and he could identify neither of them. Following a Gross⁴ hearing the trial court determined the friend's video-recorded statement was reliable and admissible. The State played a redacted version for the jury.

⁴ State v. Gross, 121 N.J. 1 (1990).

As previously noted, the jury found defendant guilty of aggravated manslaughter, aggravated assault, and two weapons offenses; and the court sentenced defendant to an aggregate thirty-one year custodial term.

On appeal, defendant first challenges the trial court's denial of his motion for a Wade hearing. He argues that because police showed decedent's friend a single photograph – an inherently suggestive procedure – the trial court should have conducted a hearing to determine whether the friend's identification was sufficiently reliable to satisfy due process. Defendant also argues the trial court wrongly analyzed the identification issue under Manson and Madison rather than Henderson. We find defendant's arguments unavailing. Under either a Manson-Madison or Henderson analysis, defendant failed to make the showing necessary to entitle him to a hearing.

Here, the officers did not show decedent's friend a photograph, thereby prompting the friend to identify defendant; rather, the friend identified defendant, thereby prompting the officers to obtain his photograph. The friend's identification of defendant and co-defendant had been made and was complete before the officers showed the friend defendant's photograph. The friend had known defendant for six or seven years, and he had seen him in middle school and in the community. Defendant could not

demonstrate when he filed his Wade motion, nor can he demonstrate now, that the officers showing the witness defendant's photograph after he identified defendant had any likelihood of influencing his identification.

Under the Manson-Madison analytical framework, a defendant must first "proffer . . . some evidence of impermissible suggestiveness" to be entitled to a Wade hearing. State v. Rodriquez, 264 N.J. Super. 261, 269 (App. Div. 1993) (citations omitted), aff'd o.b., 135 N.J. 3 (1994). A defendant cannot satisfy this requirement by isolating one of the totality of circumstances surrounding an identification and ignoring all others. In cases such as this, where a witness has positively identified a perpetrator who he has known for six or seven years, has seen in middle school, and has seen in the community, police later showing the witness a photograph of that perpetrator does not constitute an impermissibly suggestive procedure.

Defendant fares no better under Henderson's analytical framework. Under Henderson, "to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification." Supra, 208 N.J. at 288. Here, defendant failed to demonstrate how showing his photograph to a witness who had already positively identified him as the shooter realistically constituted "some

evidence of suggestiveness that could lead to a mistaken identification." Ibid.

In short, the trial court correctly determined defendant had not made the required initial showing entitling him to a Wade hearing.

Next, we address defendant's contention the trial court committed reversible error by failing to instruct the jury on show-up identifications, Model Jury Charges (Criminal), "Identification: Out-of-Court Identification Only" (2012), even though defendant did not request the charge.

"If the defendant does not object to the charge at the time it is given, there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012). Here, defendant did not object to the court omitting the show-up identification instruction. Because defendant did not object at trial, we review the charge for plain error. R. 1:7-2; R. 2:10-2; State v. McKinney, 223 N.J. 475, 494 (2015). Plain error in this context is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant 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. Adams, 194 N.J. 186, 207 (2008)

(alteration in original) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

For the same reasons we expressed in rejecting defendant's argument that he was entitled to a Wade hearing, we conclude that even if the trial judge erred by omitting the show-up identification charge, the omission did not have a clear capacity to bring about an unjust result. Ibid. As previously pointed out, the witness had identified defendant before detectives showed him the photograph. Under those circumstances, the court's omission of an instruction that defendant did not request, and that had little if any bearing on the witness's identification, was at most harmless error. R. 2:10-2.

We also reject defendant's argument the court erred by failing to make an appropriate inquiry of the jury and failing to give an instruction to the jury when they revealed they were not unanimous as to the verdict. Defendant raises this argument for the first time on appeal.

These are the circumstances concerning the jury's verdict. The jury began deliberating on a Thursday at 12:16 p.m. and went to lunch from 12:56 p.m. to 2:10 p.m. The jury ceased deliberations at 4:01 p.m. and returned the following Tuesday.

The jury deliberated from 9:28 a.m. to 1:06 p.m. when they announced they had reached a verdict. After the foreperson

announced the verdict, the court began to poll the jury. Juror number six initially whispered "yes," indicating agreement with the verdict, but then whispered "no" when the court repeated the inquiry. Following a sidebar discussion with counsel, the court stated: "All right. The record will reflect we've been waiting here for over a minute for Juror Number 6 to respond. He is not responding. The verdict is not unanimous. I'm going to send them back in for further deliberations"

Defendant made a motion for a mistrial, which the court denied. Defendant did not request any further inquiry or instruction. After breaking for lunch from 1:19 p.m. to 2:25 p.m., the jury resumed deliberations. At 3:21 p.m., the jury sent a note stating they were again ready "to report our unanimous verdict." The jury then returned a unanimous verdict.

Defendant now argues the court should have inquired if further deliberations would have likely resulted in a verdict, and should have instructed the jury on further deliberations in accordance with Model Jury Charges, (Criminal), "Judge's Instructions on Further Jury Deliberations" (2013). Because defendant did not request either further inquiry or an instruction, we review the omissions for plain error. R. 2:10-2; McKinney, supra, 223 N.J. at 494.

Rule 1:8-10 governs situations such as this. The rule states:

Before the verdict is recorded, the jury shall be polled at the request of any party or upon the court's motion If the poll discloses that there is not unanimous concurrence in a criminal action . . . the jury may be directed to retire for further deliberations or discharged.

While it is appropriate "to inquire of the jury whether further deliberations will likely result in a verdict . . . it is not always necessary for the trial court to do so." State v. Figueroa, 190 N.J. 219, 240 (2007) (citations omitted). A trial court also has discretion "to decide whether repeating [the jury charge on further deliberations] is appropriate when a jury . . . is unable to agree." Id. at 235.

Here, no juror announced the jury was deadlocked, nor did juror number six indicate in any way a verdict could not be reached. Moreover, the court had instructed the jury near the end of its charge:

It is your duty as jurors to consult with one another and deliberate with a view to reaching an agreement, if you can do so without doing violence to your individual judgment. Each of you must decide the case for yourself, but do so only after impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purposes of

returning a verdict. You are not partisans.
You are judges . . . of the facts.

In view of this instruction, defendant's failure to request either further inquiry or further instruction after juror number six was polled, and the absence of any indication the jury had reached a deadlock, we cannot conclude the trial court's omissions require reversal. The omissions did not amount to "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant 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." Adams, supra, 194 N.J. at 207 (alteration in original).

Lastly, defendant challenges his sentence as excessive. We may not substitute our judgment for that of the trial court's when reviewing a sentencing decision. State v. Johnson, 118 N.J. 10, 15 (1990) (citation omitted). "[A]s long as the trial court properly identifie[d] and balance[d] aggravating and mitigating factors . . . supported by competent credible evidence in the record[,]" we must affirm even if we would have reached a different result. State v. O'Donnell, 117 N.J. 210, 215 (1989).

Here, the court based its finding of aggravating and mitigating factors on defendant's background and juvenile record. The court reasonably balanced the factors, and concluded the

aggravating factors preponderated. Further, defendant's sentence is not manifestly excessive, but falls within the range of available sentences for the crimes of which he was convicted. Finally, the court conducted an adequate Yarbough⁵ analysis and its imposition of consecutive terms was proper.

We affirm defendant's convictions and sentence, but remand to the trial court to correct the judgment of conviction to include the correct final charges and aggregate sentence. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION

⁵ State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).