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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the 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-2781-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DALE A. ROBERTS,

Defendant-Appellant.

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Submitted September 12, 2017 – Decided September 20, 2017

Before Judges Fisher and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 15-10-1795.

Joseph E. Krakora, Public Defender, attorney for appellant (Peter T. Blum, Assistant Deputy Public Defender, of counsel and on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Mary R. Juliano, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

After having been found guilty by a jury, defendant appeals from his convictions for third-degree theft of movable property, N.J.S.A. 2C:20-3(a) (Count One); third-degree forgery, N.J.S.A.

2C:21-1(a)(2) (Count Two); and third-degree uttering a forged instrument, N.J.S.A. 2C:21-1(a)(3) (Count Three). The judge granted the State's motion for an extended term, treated defendant as a persistent offender pursuant to N.J.S.A. 2C:44-3(a), and sentenced defendant to an aggregate seven-year prison term with twenty-eight months of parole ineligibility.[1] We affirm, but remand for re-sentencing.

On appeal, defendant raises the following arguments:

> POINT I
> A NEW TRIAL SHOULD OCCUR BECAUSE THE [JUDGE]'S FAILURE TO ACT WHEN A JUROR WAS HAVING A PROBLEM HEARING DEPRIVED [DEFENDANT] OF A FAIR JURY. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. I, [¶¶] 1, 10. ([N]ot raised below)[.]
>
> POINT II
> [DEFENDANT]'S SENTENCE SHOULD NOT HAVE A PAROLE DISQUALIFIER - - AS THE [JUDGE] ORIGINALLY INTENDED - - BECAUSE THE [JUDGE] IMPOSED A DISQUALIFER ONLY WHEN INCORRECTLY INFORMED THAT IT WAS MANDATORY.

The State concedes the contention raised by defendant in Point II. As a result, we remand and direct the judge to re-sentence defendant accordingly. We focus instead on defendant's argument in Point I. We review this contention for plain error because defense counsel did not object during the trial. R. 2:10-

[1] The judge merged Counts Two and Three and imposed this sentence on Count One.

2. Under the facts of this case, we see no error, let alone plain error.

Defendant used the victim's home for several months. While there, defendant located the victim's checkbook, which she had stored in a kitchen drawer. Defendant wrote himself thirteen checks totaling approximately $5000 and cashed them without the victim's knowledge. After the victim confronted defendant about what he had done, defendant wrote her a letter admitting to his wrongdoing.

The trial occurred over three days in September 2016. As part of the judge's preliminary jury instructions before any witnesses testified, the judge instructed the jury to "pay careful attention to all of the testimony." The judge also instructed the jury, "[i]f you are unable to hear a witness, I ask that you indicate this to me by raising your hand so that I may instruct the witness to speak louder and/or clearly."

The State presented testimony from two witnesses: the victim and a sergeant. The assistant prosecutor called the victim as the State's first witness. The victim finished her testimony at approximately 12:10 p.m., and the assistant prosecutor then informed the judge that testimony from the sergeant would take longer than twenty minutes. As a result, the judge released the jury for an early lunch.

As the jury was exiting the courtroom, the judge and the assistant prosecutor briefly discussed the anticipated testimony from the sergeant. A court clerk then stated to the judge and counsel:

> THE CLERK: Juror [twelve] is saying that he can't hear you guys so if you could talk louder. He said you are all coming in very low.
>
> [DEFENSE COUNSEL]: Who is juror [twelve]?
>
> [ASSISTANT PROSECUTOR]: He's the older gentleman.
>
> [THE JUDGE]: With the sleeve on.
>
> THE CLERK: Just keep your voices up.
>
> [DEFENSE COUNSEL]: Okay.
>
> [Emphasis added.]

The jury returned after lunch and the assistant prosecutor called the sergeant to the witness stand. The judge immediately instructed the jury, "[i]f any juror is having difficulty hearing anything, just raise your hands and let me know, . . . we'll endeavor to speak loudly so you can hear without straining." Juror number twelve did not indicate that he was unable to hear the victim's testimony, he did not raise his hand during the victim's testimony, and he did not raise his hand after the judge gave this instruction.

Defendant contends for the first time that the judge's "failure to act[,]" in response to juror twelve's remarks to the clerk, deprived him of a fair trial. He argues that he is therefore entitled to a new trial. The premise of defendant's contention implies, without any credible basis in the record, that juror number twelve may have been unable to fulfill his duty as a fact finder. Defendant argues that the court had an obligation to question juror number twelve, and determine whether the juror could hear the testimony from the victim.

Under the United States Constitution, defendants have a due process right to an "impartial and mentally competent" tribunal. Jordan v. Massachusetts, 225 U.S. 167, 176, 32 S. Ct. 651, 652, 56 L. Ed. 1038, 1042 (1912) (citing U.S. Const. amend. XIV). We have previously noted that jury irregularity, such as sleeping, may violate a defendant's federal and state constitutional rights to a fair tribunal if it results in prejudice. State v. Scherzer, 301 N.J. Super. 363, 486-87 (App. Div.), certif. denied, 151 N.J. 466 (1997) (citing U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). Here, however, there was no such jury irregularity or prejudice.

The State concedes in general that a juror's inability to hear may be analogous to a juror who sleeps through a critical part of the trial. In such a case, where a juror is inattentive

and a judge notices the inattentiveness, that judge "will have broad discretion to determine the appropriate level of investigation and corrective action that must be taken." State v. Mohammed, 226 N.J. 71, 89 (2016). Defendant does not suggest that the judge personally observed evidence of inattentiveness on behalf of juror number twelve. If a party alleges a juror is not paying attention, or cannot pay attention, and "[i]f the judge did not personally observe the juror, the judge should conduct an individual voir dire to determine if the juror was inattentive, and make appropriate findings." Ibid. Defendant is not arguing that he or his counsel alleged during the trial that juror number twelve failed to hear testimony or otherwise pay attention at any point during the trial.

Instead, there is no evidence that the judge, defendant, or the attorneys noticed any juror irregularity. On this record, there is no credible evidence suggesting that juror number twelve was sleeping, inattentive, distracted, dozing, intoxicated, unable to participate in the trial, or unable to hear testimony from the witnesses. Instead, juror number twelve's remarks to the court clerk pertained solely to the communication between the judge and counsel, which prompted the clerk to tell them to "keep your voices up."

Importantly, defense counsel responded "[o]kay" to the clerk's comments and instruction to "keep your voices up." Defense counsel herself did not show or express any concern that juror number twelve missed the testimony from the victim or other critical parts of the trial. That is not surprising because the judge repeatedly instructed the jurors to raise their hands if they had difficulty hearing testimony from the witnesses, and juror number twelve did not raise his hand to indicate he had a problem hearing the witnesses. Moreover, we would not expect defense counsel to conclude juror twelve was unable to hear the victim's testimony because it is reasonable to conclude that the juror's remarks to the clerk referred to the communication between the judge and counsel.

Moreover, when the trial proceeded after the lunch recess, and before the sergeant began testifying, defense counsel did not object to the judge's instruction to the jury that "[i]f any juror is having difficulty hearing anything, just raise your hands and let me know, . . . we'll endeavor to speak loudly so you can hear without straining." We may presume based on trial counsel's failure to object to the judge's jury instruction that defense counsel did not consider the appellate issue related to juror number twelve to have deprived defendant of a fair trial or to have been prejudicial. See, e.g., State v. McGraw, 129 N.J. 68,

80 (1992) (finding that defendant's failure to object to a jury charge "gives rise to a presumption that he did not view its absence as prejudicial to his client's case").

Consequently, there is no basis for a new trial. That is especially so because of the overwhelming evidence of defendant's guilt. The State's proofs included defendant's letter, which the State introduced into evidence without objection, where defendant wrote to the victim, "[d]id I steal the checks? Absolutely. I was dead wrong and I'm sorry."

We affirm the convictions, but remand for re-sentencing in accordance with this opinion. 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