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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2785-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARC B. HIGHSMITH,

Defendant-Appellant.

Argued January 26, 2017 — Decided August 21, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment No.
10-09-0978.

Tamar Y. Lerer, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender,
attorney; Ms. Lerer, of counsel and on the
briefs).

Stephen E. Parrey, Assistant Prosecutor,
argued the cause for respondent (Angelo J.
Onofri, Mercer County Prosecutor, attorney;
Timothy F. Trainor, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

In July 2012, a jury convicted defendant Marc B. Highsmith of third-degree possession of a controlled dangerous substance (cocaine), N.J.S.A. 2C:35-10(a)(1); second-degree possession of a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:35-5(a)(1); and third-degree possession of a controlled dangerous substance with intent to distribute on or near school property, N.J.S.A. 2C:35-7. In April 2014, defendant was sentenced to an extended term of ten years, with a three-and-a-half-year period of parole ineligibility.

Defendant appeals these convictions. For the reasons that follow, we reverse all of the convictions and remand for a new trial.

I

The only witnesses at trial were two called by the State. Their pertinent testimony was as follows.

FBI agent Eric Clark testified that, based upon his training and experience, he was familiar with the narcotics trade in Trenton. In 2008, Joseph Baker, Jr., a person suspected of selling narcotics, was under investigation. A confidential informant (CI), who had been previously convicted of a drug offense in federal court, agreed to purchase cocaine from Baker and, in return, the government agreed to recommend his sentence be reduced from three to two years.

As instructed by the FBI, the CI contacted Baker, who told the CI to come to his home, located in Trenton. After being outfitted with a hidden audio and video device and provided with \$3000 in cash, the CI met with his "runner" and together they drove to Baker's home, although only the CI entered the house. The runner was unaware the CI was collaborating with the FBI. Once inside Baker's home, the CI remained in the kitchen until he left.

The FBI could hear but could not see what was occurring as events unfolded, but later viewed the video of the subject transaction. Clark testified about what he viewed on the video and proffered opinions interpreting what occurred among those present in the kitchen. At no time was Clark qualified to testify as an expert witness.

Clark noted the CI, Baker, and others were in the kitchen when the CI first arrived; defendant entered the kitchen soon thereafter. Clark stated the individuals in the kitchen were part of the "organization." Defendant objected to and the court sustained Clark's use of the term "organization." However, Clark later provided, without objection, his opinion about the actions of those in the kitchen, an opinion he claimed was based upon his training and experience:

[W]hat was occurring on the video [in the kitchen] was obviously illegal and they had accessibility to that space. And to have accessibility to that space firmly led us to believe that they were in on the conspiracy because that is not an area that just anyone could walk into because the drugs and the money were easily available to anyone who walked in the kitchen[.] [S]o they have to sort of secure that and protect that. And, also, in that kind of operation, they only want to let trusted people into that space for fear that someone might be recording them or taping them.

Thereafter, the court sustained defendant's objection to a question requesting Clark state how crack cocaine was made; defendant asserted the question impermissibly requested expert testimony. However, the court then stated it would permit the question if Clark acknowledged he had seen and could specifically state how crack cocaine is made, to which defendant replied, "I will leave that to the court's discretion."

Upon testifying he had seen and had been informed by those in the narcotics trade about how crack cocaine is made, Clark stated this drug is made by mixing cocaine, water, and baking soda and heating these ingredients. Clark then added:

[T]he idea is to take — is to take 100 grams of soft cocaine and stretch it to make 100 — the approximate number is 140 grams of hard cocaine. There is more to sell and it is financially profitable for the dealers to take the soft and go through this process and make it into crack cocaine.

After leaving Baker's home, the CI reported back to Clark and turned over what he had purchased in Baker's home. Subsequent testing revealed the substance purchased was cocaine and weighed 124.6 grams, which Clark noted was more than one-half of an ounce but less than five ounces. Clark also established there was school property within 1000 feet of Baker's home.

The CI also testified. Although the State never endeavored to and thus the court did not qualify him as an expert witness, the CI testified about the narcotics trade and the manufacturing of crack cocaine.¹ He noted he had been involved in the drug trade for over thirteen years and is familiar with how the trade works, including cooking and selling crack cocaine. He also opined about the dynamics among those in the kitchen based upon

¹ Although not frequently called as expert witnesses, likely because their criminal records taint their credibility, confidential informants or those who have engaged in the narcotics trade are not foreclosed from being qualified as expert witnesses merely because they may have a criminal record. A witness may be qualified as an expert as long as he or she has "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" N.J.R.E. 702. A witness may be qualified on the basis of his or her knowledge, skill, experience, training, or education. Ibid.; see, e.g., United States v. Oliver, 468 F. Supp. 2d 980 (C.D. Ill. Jan. 8, 2007), in which the court qualified a convicted felon as an expert on crack manufacturing and distribution because of his extensive experience in cooking and handling crack cocaine. Id. at 984.

his years of participating in the narcotics trade. Defendant did not object to the CI's testimony.

When the CI first arrived in the kitchen, he explained Baker was crushing cocaine that was in rock form into powder, in preparation for the cocaine to be cooked into crack. The CI explained that after cocaine powder is crushed, it is mixed with baking soda and water, and then heated on the stove. A man by the name of "Los" then entered the kitchen, who put money on the table and started crushing the cocaine as well. The CI testified the money came from the sale of drugs, and indicated placing the cash on the table was Los' way of transferring the cash to Baker.

Defendant then entered the kitchen with a box of baking soda, but Baker did not use any of that baking soda to cook the cocaine he was preparing on the stove. The CI pointed out defendant mentioned to those in the kitchen that he had just sold twenty-five bags of crack cocaine in less than ten minutes.

After heating the cocaine long enough to transform it into crack cocaine, Baker dried it with paper towels, weighed and placed it in a baggy, and transferred the baggy to a runner. The runner gave the baggy to the CI after he left Baker's house; in return for the runner's services, she received enough of the crack cocaine that had been prepared for her to get high.

Before leaving Baker's house, the CI paid Baker the cash provided to him by the FBI.

The CI testified Baker and the others in the kitchen, including defendant, were all part of "the drug crew, the drug gang." In a crew are a runner, "workers," and the head of the crew or "boss man." Baker was the "boss man" for this particular crew. The role of a crew is to distribute drugs.

The CI further stated each member of the crew in the kitchen benefitted from the sale of the crack cocaine to the CI, specifically, each would get a share of the profits. When asked how he knew that was in fact the arrangement among those in the kitchen, the CI replied, "Because I been in gangs for a long time." The CI also noted that only crew members are allowed in an area where cocaine is being cooked, because "That's the way it works. . . . I've been doing it for so long, I know."

In its summation, the State drew heavily from Clark's and the CI's testimony in support of its argument defendant distributed the subject drugs to the CI, noting such witnesses established how crack cocaine is made, that defendant was part of the crew that distributed drugs to the CI, and, as a member of the crew, he benefitted from the sale of those drugs.

II

On appeal, defendant asserts the following for our consideration:

POINT I — THE WITNESSES' TESTIMONY IN THIS CASE OVERSTEPPED THE BOUNDARIES OF ACCEPTABLE LAY OPINION TESTIMONY, CONTRARY TO STATE V. MCLEAN.

In his brief, defendant elaborates the witnesses provided expert testimony without first being qualified as experts and, thus, should not have been permitted to testify about the structure of any drug-dealing organization, let alone that defendant's mere presence in the kitchen made him a member of Baker's drug distribution ring, from which he derived a benefit when there was a drug sale. Defendant argues such testimony suggested defendant possessed the crack cocaine in the kitchen with the intent to distribute it to the CI. It was defendant's position he was not involved in the sale of the drugs to the CI.

Defendant further complains the jury was not provided with the expert witness charge to place these witnesses' testimony into proper context. See Model Jury Charge (Criminal), "Expert Testimony" (2003) (requiring the court to identify to the jury each testifying expert and such expert's area of expertise). Finally, defendant contends Clark inappropriately testified as to the ultimate issue when he stated what occurred in the kitchen was "obviously illegal."

Defendant maintains any one of these three errors warrants a reversal of his convictions and a remand for a new trial. We agree the testimony about which defendant complains exceeded what is permissible for fact witnesses, in violation of State v. McLean, 205 N.J. 438 (2011).

Lay opinion testimony is governed by N.J.R.E. 701, which permits lay witness "testimony in the form of opinions or inferences . . . if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue."

In contrast, an expert witness may testify in the form of an opinion provided it "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.J.R.E. 702. To be admissible, expert testimony must be about a subject that is beyond the understanding of the average person of ordinary experience, education, and knowledge. State v. Sowell, 213 N.J. 89, 99 (2013).

Our Supreme Court recently commented upon the scope of drug expert testimony in criminal cases. See State v. Cain, 224 N.J. 410, 426-27 (2016). The Court noted, "[t]he average juror is not knowledgeable about the arcana of drug-distribution schemes." Id. at 426. Thus, experts may testify about how drug traffickers package and process drugs for distribution; the

quantities and concentration of drugs; the value of drugs; and the function of drug paraphernalia. Ibid. "Experts may also provide insight into the roles played by individuals in street-level drug transactions, and into the various machinations used by drug dealers to thwart detection." Ibid. (citation omitted) (citing State v. Nesbitt, 185 N.J. 504, 515 (2016); State v. Berry, 140 N.J. 280, 301-02 (1995)).

The McLean Court also noted that, if properly qualified as an expert, "an expert may explain the roles played by multiple defendants in a drug distribution scheme and may offer an opinion about the implications of the behavior that was observed by the fact witness." McLean, supra, 205 N.J. at 460-61. On the importance a witness giving expert testimony be qualified as an expert, the Court has noted "testimony coming from a law enforcement officer claiming to have superior knowledge and experience likely will have a profound influence on the deliberations of the jury." Cain, supra, 224 N.J. at 427.

In addition, drug experts "should not express an opinion on matters that fall within the ken of the average juror or offer an opinion about the defendant's guilt." Ibid. (citing Nesbitt, supra, 185 N.J. at 512-14). Thus, "in drug cases, an expert witness may not opine on the defendant's state of mind. Whether a defendant possessed a controlled dangerous substance with the

intent to distribute is an ultimate issue of fact to be decided by the jury."² Id. at 429. In that regard, the Court has explained:

We have come to the conclusion that an expert is no better qualified than a juror to determine the defendant's state of mind after the expert has given testimony on the peculiar characteristics of drug distribution that are beyond the juror's common understanding. In drug cases, such ultimate-issue testimony may be viewed as an expert's quasi-pronouncement of guilt that intrudes on the exclusive domain of the jury as factfinder and may result in impermissible bolstering of fact witnesses. The prejudice and potential confusion caused by such testimony substantially outweighs any probative value it may possess.

[Id. at 427-28.]

Here, because defendant did not object to the testimony about which he complains, we review the claimed error under the plain error standard, whether the error was clearly capable of producing an unjust result. R. 2:10-2; State v. Maloney, 216 N.J. 91, 104 (2013). "Reversal of defendant's conviction is required only if there was an error 'sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise would not have reached.'" State v. Atwater, 400 N.J. Super. 319, 336 (App. Div. 2008) (quoting State v. Daniels, 182

² Cain was decided while this matter was on appeal, and we have determined Cain has pipeline retroactivity. State v. Green, 447 N.J. Super. 317, 328 (App. Div. 2016).

N.J. 80, 95 (2004)). Hence, a defendant need not demonstrate that but for the error the jury would have reached a contrary result. He must only show that the error raises a reasonable doubt that the jury was led to a result it otherwise might not have reached. We are satisfied such an error occurred.

First, neither Clark nor the CI were qualified by the court to testify as experts, yet both provided expert opinions; that is, they expressed opinions on topics outside the ken of the average person of ordinary experience, education, and knowledge. Both may well have been permitted to provide expert opinions because of their experience in the world of narcotics sales had the State offered them as experts and the court reviewed their qualifications, but that never occurred. Thus, neither was permitted to render any expert opinions.

The CI expressed the expert opinion that those in the kitchen were all part of a "drug crew," whose goal was to distribute drugs, and each person in the kitchen was going to benefit from the sale of the crack cocaine to the CI. His opinion was not derived from his experience with this particular crew but from his lengthy experience in the drug trade in general. He also noted only those on the crew were permitted in

the kitchen, the specific area where the crack-cocaine was being made.³

While there was evidence defendant had engaged in the sale of drugs, there was no evidence – apart from the witnesses' testimony – that he was involved in the sale of the drugs to the CI. To show defendant was involved in this sale, the State argues the baking soda defendant had in his hand when he entered the kitchen was used to make the alleged crack cocaine sold to the CI, but the record does not support this claim.

Clark voiced an opinion consistent with the CI's. Clark stated only those in the kitchen were permitted "in that space" because they were "in on the conspiracy," indicating defendant's presence alone in the kitchen made him a part of the scheme to distribute drugs to the CI. In addition, Clark opined what occurred in the kitchen was "obviously illegal," providing an opinion on the ultimate issue, clarified in Cain as forbidden. See Cain, supra, 224 N.J. at 429. Whether or not defendant committed any of the charged offenses was a decision to be made by only the jury.

³ There was evidence that at one point Baker's mother and her boyfriend came into the kitchen. The CI explained the mother contributed to the operation because she in fact owned the home and was permitting Baker to use her kitchen. The CI noted that in return, it was very likely she and her boyfriend received some of the drug Baker cooked on the stove, if only just enough to get high.

The witnesses' testimony was clearly capable of raising a reasonable doubt the jury was led to a result it otherwise might not have reached. Constructive possession (there was no evidence defendant had been in actual possession of the subject drugs) of an item may be found when "the circumstances permit a reasonable inference that [the defendant] has knowledge of its presence, and intends and has the capacity to exercise physical control or dominion over it during a span of time." State v. Spivey, 179 N.J. 229, 237 (2004).

While the circumstances permitted a reasonable inference defendant had knowledge of the presence of the drugs to be sold to the CI and that defendant had the capacity to exercise physical control over such drugs, there was no evidence he intended to exercise physical control or dominion over the drugs apart from the witnesses' testimony. Their testimony suggested defendant's mere presence in the kitchen made him a part owner of the drugs to be sold to the CI, and thus defendant exercised dominion over them. As for the distribution charge, the witnesses' testimony similarly provided evidence defendant's presence in the kitchen meant he was a part owner of the drugs and was included in Baker's and Los' efforts to prepare and sell those drugs to the CI.

It is eminently conceivable the jury could have been swayed by the witnesses' opinions, thereby prejudicing defendant. McLean, supra, 205 N.J. at 452 (noting that when a lay witness "crosses the line of permissibility[,] [this] contaminates all related proofs with prejudicial qualities not easily cured." (quoting State v. Singleton, 326 N.J. Super. 351, 354 (App. Div. 1999))). Given their testimony, we lack confidence in the integrity of defendant's guilty verdict. This is not a matter where the evidence of defendant's guilt was overwhelming. Cf. Sowell, supra, 213 N.J. at 107 (improper testimony of the State's drug expert was considered harmless error due to the defendant's admission, video of the transaction, and the arresting officer's observations of the transactions and discovery of drugs on the defendant). Consequently, we conclude the prejudicial testimony raises a reasonable doubt the jury was led to a result it otherwise might not have reached. Accordingly, defendant's convictions must be reversed and the matter remanded for a new trial.

Because of our disposition, we need not reach the remaining argument, specifically, whether the court erred by failing to provide the charge concerning how the jury is to consider an expert's testimony. However, we note for the benefit of the trial court that in all cases where expert testimony is allowed,

the court should give a limiting instruction to the jury "that conveys to the jury its absolute prerogative to reject both the expert's opinion and the version of the facts consistent with that opinion." Berry, supra, 140 N.J. at 304.

Reversed and remanded for a new trial.

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



CLERK OF THE APPELLATE DIVISION