SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2815-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TATRONE R. WATERS,

Defendant-Appellant.

Argued September 19, 2017 – Decided October 3, 2017

Before Judges Fisher, Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 12-12-1129.

Stephen P. Hunter, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Hunter, of counsel and on the brief).

Kim L. Barfield, Assistant Prosecutor, argued the cause for respondent (Jennifer Webb-McRae, Cumberland County Prosecutor, attorney; Ms. Barfield, of counsel and on the brief).

PER CURIAM

Defendant, who was seventeen years old, appeals from his convictions for first-degree murder, N.J.S.A. 2C:11-3(a)(1) and

(2) (Count One); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (Count Two); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (Count Three); and fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4) (Count Four). The judge gave a flawed jury charge and improperly excluded certain testimony from a key witness, which deprived defendant of a fair trial. We therefore reverse and remand for a new trial.

Brock Gould (co-defendant) testified that defendant had threatened to kill the victim if the victim did not return an item in the victim's possession. After defendant allegedly threatened the victim, the police responded to a shooting at a trailer park. When an officer arrived at the scene, he found the victim lying down with a gunshot wound to the back. The victim died later that day.

There was conflicting testimony about how many guns were at the scene and who had used them. The shooting of the victim occurred while co-defendant's friend, who was a key witness at trial, drove defendant and co-defendant through the trailer park. The friend, defendant, and co-defendant remained in the car during the shooting of the victim. Co-defendant testified that the victim possessed a gun, admitted he himself possessed a gun, and stated that the victim pulled out his gun first. At trial, the friend

equivocated about whether the victim possessed a gun, and testified inconsistently as to whether defendant had fired a weapon at the victim.

Co-defendant initially told the police he was not involved in the shooting. After co-defendant pled guilty to second-degree possession of a weapon for an unlawful purpose, however, he testified that he and defendant fired weapons at the victim. According to co-defendant, defendant shot the victim before the victim could use his own weapon.

The judge sentenced defendant on Count One to sixty years in prison subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2(a). The judge merged Count Two and Count Four into Count One. The judge also sentenced defendant on Count Three to eight years in prison with four years of parole ineligibility, to run concurrently with Count One.

On appeal, defendant argues:

> POINT I
> THE TRIAL COURT'S FAILURE TO CHARGE PASSION/PROVOCATION MANSLAUGHTER AS A LESSER-INCLUDED OFFENSE OF MURDER WAS PLAIN ERROR BECAUSE THE EVIDENCE CLEARLY INDICATED A QUICK, SUDDEN REACTION TO [THE VICTIM] PULLING OUT A GUN FIRST. U.S. Const. [a]mend. XIV; N.J. Const. [a]rt. I, [¶]¶ 1, 10. (Not Raised Below).
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> POINT II
> THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE LAW OF SELF-DEFENSE WAS PLAIN ERROR

BECAUSE IT WAS CLEARLY INDICATED BY THE EVIDENCE THAT [THE VICTIM] PULLED OUT A GUN FIRST. U.S. Const. [a]mend. XIV; N.J. Const. [a]rt. I, [¶]¶ 1, 10. (Not Raised Below).

POINT III

THE TRIAL COURT'S REPEATED USE OF THE AMBIGUOUS PHRASE "AND/OR" IN THE JURY INSTRUCTION ON ACCOMPLICE LIABILITY WAS PLAIN ERROR BECAUSE IT "GENERATED NUMEROUS WAYS IN WHICH THE JURY COULD HAVE CONVICTED WITHOUT A SHARED VISION OF WHAT DEFENDANT DID." STATE V. GONZALEZ, [444] N.J. SUPER. [62], [77] (App. Div. 2016), [] U.S. Const. [a]mend. VI, XIV; N.J. Const. [a]rt. I, [¶]¶ 1, 9, 10. (Not Raised Below).

POINT IV

THE TRIAL COURT'S IMPROPER EXCLUSION OF EVIDENCE THAT CO-DEFENDANT TOLD [THE FRIEND] WHAT TO SAY IN HIS POLICE STATEMENT DENIED DEFENDANT A FAIR TRIAL. U.S. Const. [a]mend. XIV; N.J. Const. [a]rt. I, [¶]¶ 1, 10.

POINT V

SINCE THIS JUVENILE-DEFENDANT RECEIVED A DE FACTO SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE, THIS MATTER MUST BE REMANDED FOR A NEW SENTENCING HEARING AT WHICH THE COURT MUST "TAKE INTO ACCOUNT HOW CHILDREN ARE DIFFERENT, AND HOW THOSE DIFFERENCES COUNSEL AGAINST IRREVOCABLY SENTENCING THEM TO A LIFETIME IN PRISON." MILLER V. ALABAMA, 132 S. Ct. 2455, 2468-69 (2010).

I.

We begin by addressing defendant's contention that the judge committed plain error when the judge failed to charge passion/provocation manslaughter as a lesser-included offense of murder.

Defense counsel did not object to the jury charge even though defendant had the obligation "to challenge instructions at the time of trial." State v. Morais, 359 N.J. Super. 123, 134 (App. Div.) (citing R. 1:7–2), certif. denied, 177 N.J. 572 (2003). Failure to object creates a "presum[ption] that the instructions were adequate." Id. at 134-35 (citing State v. Macon, 57 N.J. 325, 333 (1971)). Thus, we review defendant's contention for plain error. R. 2:10-2.

It is undisputed that "[a]ppropriate and proper charges to a jury are essential for a fair trial." State v. Green, 86 N.J. 281, 287 (1981). The trial judge must guarantee that jurors receive accurate instructions on the law as it pertains to the facts and issues of each case. Id. at 287-88. We read the charge as a whole to determine whether there was any error. State v. Adams, 194 N.J. 186, 207 (2008).

"When the parties to a criminal proceeding do not request that a lesser-included offense such as attempted passion/provocation manslaughter be charged, the charge should be delivered to the jury only when there is 'obvious record support for such [a] charge[.]'" State v. Funderburg, 225 N.J. 66, 81 (2016) (first alteration in original) (quoting State v. Powell, 84 N.J. 305, 319 (1980)). "A trial court should deliver the instruction sua sponte 'only where the facts in evidence clearly

indicate the appropriateness of that charge.'" Ibid. (quoting State v. Savage, 172 N.J. 374, 397 (2002)). This also applies when, like here, defense counsel specifically asked the judge not to include any lesser-included offenses for murder.

"For a trial court to be required to charge a jury sua sponte on attempted passion/provocation manslaughter, the court 'must find first that the two objective elements of [the offense] are clearly indicated by the evidence.'" Id. at 82 (alteration in original and emphasis omitted) (quoting State v. Robinson, 136 N.J. 476, 491 (1994)). There are four elements to passion/provocation manslaughter: "[1] the provocation must be adequate; [2] the defendant must not have had time to cool off between the provocation and the slaying; [3] the provocation must have actually impassioned the defendant; and [4] the defendant must not have actually cooled off before the slaying." State v. Mauricio, 117 N.J. 402, 411 (1990). The first two elements are objective while the last two are subjective. Ibid.

Here, clear evidence exists as to the elements of passion/provocation manslaughter. The friend drove defendant and co-defendant to the trailer park and they searched for the victim. As they approached, the victim pulled out his gun before defendant and co-defendant fired their weapons. We conclude that the victim pulling out his gun first objectively constitutes adequate

provocation and, under the circumstances of this case, inadequate cooling-off time. Although defendant was predisposed to kill the victim before arriving at the trailer park, the victim brandishing his gun impassioned defendant's conduct. Such a sequencing of events demonstrates defendant did not "cool[] off before the slaying." Ibid. We therefore conclude it was plain error not to include the charge.

II.

Defendant contends that the judge failed to sua sponte charge self-defense. Defense counsel did not request a self-defense charge. We therefore review this argument for plain error. R. 2:10-2; State v. O'Carroll, 385 N.J. Super. 211, 235 (App. Div.), certif. denied, 188 N.J. 489 (2006).

"A person may justifiably use force against another if he 'reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.'" State v. Galicia, 210 N.J. 364, 389 (2012) (quoting N.J.S.A. 2C:3-4(a)). "The use of deadly force is not justifiable . . . unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm[.]" N.J.S.A. 2C:3-4(b)(2). Moreover, the use of deadly force is not justifiable if "[t]he actor knows that he can avoid the necessity of using such force

with complete safety by retreating . . . ." N.J.S.A. 2C:3-4(b)(2)(b).

"A trial judge must sua sponte charge self-defense in the absence of a request 'if there exists evidence in either the State's or the defendant's case sufficient to provide a rational basis for its applicability.'" Galicia, supra, 210 N.J. at 390 (quoting O'Carroll, supra, 385 N.J. Super. at 236). "The evidence must 'clearly indicate[]' such a defense to call for such an instruction in the absence of a request to charge." Id. at 390-91 (alteration in original) (quoting State v. Perry, 124 N.J. 128, 161 (1991)). Such is the case here.

As they approached the victim by car in the trailer park, the victim pulled out his gun. The evidence shows that defendant, who was not the driver and unable to himself drive away or retreat from the scene, could reasonably have believed that force was necessary to protect himself. There is therefore sufficient evidence in the record, as clearly indicated by co-defendant's testimony, providing a rational basis for the self-defense charge.

III.

Defendant contends that the judge committed plain error when he used the term "and/or" in the jury instructions on accomplice liability. Defense counsel did not object to the jury instruction;

we review this contention for plain error. R. 2:10-2; O'Carroll, supra, 385 N.J. Super. at 235.

In State v. Gonzalez, 444 N.J. Super. 62, 75-76 (App. Div.), certif. denied, 226 N.J. 209 (2016),[1] we found that the use of "and/or" in accomplice liability jury instructions rendered the instructions ambiguous. We explained that the "indictment required that the jury decide whether defendant conspired in or was an accomplice in the commission of a robbery, or an aggravated assault, or both." Ibid.

> By joining (or disjoining) those considerations with "and/or" the judge conveyed to the jury that it could find defendant guilty of either substantive offense . . . but left open the possibility that some jurors could have found defendant conspired in or was an accomplice in the robbery but not the assault, while other jurors could have found he conspired in or was an accomplice in the assault but not the robbery.
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> [Id. at 76.]

We further explained that because the jury was told that it could find the defendant guilty of robbery "and/or" aggravated assault if the State proved that co-defendant committed robbery "and/or"

[1] In denying certification, the Court expressed that it "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.

aggravated assault, "the jury could have convicted defendant of both robbery and aggravated assault even if it found [the co-conspirator] committed only one of those offenses[.]" Ibid.

Here, the jury instruction on accomplice liability was similar to the instruction in Gonzalez, repeatedly using the phrase "murder and/or aggravated assault." We therefore conclude that the judge committed plain error when he instructed the jury on accomplice liability because it could have convicted defendant of both murder and aggravated assault if it found co-defendant committed only one of the offenses.

IV.

Finally, we agree with defendant that the judge abused his discretion by excluding from evidence, as hearsay, testimony from the friend that co-defendant had told the friend what to say in the friend's statement to the police.

This court accords "substantial deference to a trial court's evidentiary rulings." State v. Morton, 155 N.J. 383, 453 (1998), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001). "[T]he decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Goodman, 415 N.J. Super. 210, 224-25 (App. Div. 2010) (alteration in original) (quoting

State v. Carter, 91 N.J. 86, 106 (1982)), certif. denied, 205 N.J. 78 (2011).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). "It follows, therefore, that if evidence is not offered for the truth of the matter asserted, the evidence is not hearsay and no exception to the hearsay rule is necessary to introduce that evidence at trial." State v. Long, 173 N.J. 138, 152 (2002). "[I]f proffered evidence is hearsay, it can be admitted only pursuant to one of the exceptions to the hearsay rule." Ibid.

The friend testified that he was unsure whether defendant fired a shot. The assistant prosecutor elicited testimony from the friend that he had told the police that defendant had fired one shot. On cross-examination, the friend admitted that co-defendant had told him what to say to the police. The judge struck from the record the friend's testimony about what co-defendant had told him to say to the police.

Although the friend eventually admitted at trial that he was unsure whether defendant possessed a gun, defense counsel did not offer, for its truth, co-defendant's instructions to the friend about what to tell the police. Rather, defense counsel attempted

to impeach the credibility of the friend by showing that co-defendant influenced the friend's statement to the police.

V.

Although we need not reach defendant's remaining contention as to the sentence because we are reversing the convictions, we make the following brief remarks.

Defendant, who was seventeen years old, received an aggregate term of sixty years of imprisonment subject to the NERA, N.J.S.A. 2C:43-7.2(a). Unlike the fourteen-year-old defendant in Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the judge did not sentence defendant to life imprisonment without parole or its functional equivalent. Nevertheless, we vacate the sentence and reverse the convictions.

Reversed and remanded for a new trial. We do not retain jurisdiction.