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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3222-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH BUNDY, JR., a/k/a
JOSEPH BUNDY,

Defendant-Appellant.

Submitted May 9, 2017 – Decided June 28, 2017

Before Judges Fisher, Ostrer and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Salem County, Indictment No. 13-
05-0273.

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

John T. Lenahan, Salem County Prosecutor,
attorney for respondent (Derrick Diaz,
Assistant Prosecutor, of counsel and on the
brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

In this appeal, defendant argues, among other things, the
trial judge erred in imposing consecutive prison terms for his

reckless manslaughter and unlawful possession of a firearm convictions. We agree the judge's Yarbough¹ analysis does not support consecutive terms and for that and other reasons, we remand for resentencing.

Defendant was charged, in connection with a shooting, with: first-degree murder, N.J.S.A. 2C:11-3(a); second-degree unlawful possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); second-degree unlawful possession of a firearm, N.J.S.A. 2C:39-5(b); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); and third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2). At the conclusion of a trial, a jury acquitted defendant of murder, aggravated manslaughter, and possession of a weapon for an unlawful purpose, but convicted him of the lesser-included offense of second-degree reckless manslaughter, second-degree unlawful possession of a weapon, second-degree aggravated assault, and the lesser-included disorderly persons offense of simple assault with a deadly weapon. Defendant was sentenced to an eight-year prison term – with an eighty-five percent parole disqualifier – on the reckless manslaughter conviction to run consecutively to an eight-year prison term with four years of parole ineligibility

¹ State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

on the unlawful possession of a firearm conviction. The trial judge also ordered \$5,720 in restitution.

Defendant appeals, arguing:

I. THE FAILURE TO REDACT DEFENDANT'S INVOCATION OF HIS RIGHT TO COUNSEL FROM HIS RECORDED STATEMENT PLAYED FOR THE JURY, OR AT LEAST PROVIDE LIMITING INSTRUCTION, DEPRIVED DEFENDANT OF A FAIR TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS (Not Raised Below).

II. THE PROSECUTOR'S SUMMATION UNFAIRLY DENIGRATED DEFENSE COUNSEL AND SHIFTED THE BURDEN OF PROOF, DEPRIVING DEFENDANT OF HIS FAIR TRIAL AND REQUIRING REVERSAL OF HIS CONVICTION.

III. DEFENDANT'S SENTENCE IS EXCESSIVE AND MUST BE VACATED BECAUSE THE COURT MISAPPLIED YARBOUGH, FAILED TO ADDRESS MITIGATING FACTORS, IMPROPERLY FOUND AGGRAVATING FACTOR 6, AND IMPOSED RESTITUTION WITHOUT EVALUATING DEFENDANT'S ABILITY TO PAY.

Defendant also submitted a pro se letter brief in which he argues:

IV. THE TRIAL JUDGE ABUSED HIS DISCRETION BY PERMITTING A PHYSICIAN TO RENDER AN INDEPENDENT OPINION AND TESTIFY AS TO THE CAUSE OF DEATH OF THE VICTIM BASED ON AUTOPSY PHOTOGRAPHS, AND THE NOTES OF ANOTHER PHYSICIAN.^[2]

We address these arguments separately.

² We have renumbered these arguments and reworded defendant's pro se argument into a succinct point heading.

Defendant first contends that his invocation of the right to counsel should have been redacted from the recorded statement he gave to police when played for the jury. He argues this circumstance deprived him of a fair trial.

Because defendant raises this issue for the first time on appeal, we apply the plain error standard and will not reverse unless the error was "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. In the context of a jury trial, relief will be afforded when the possibility of an unjust result is "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971).

At trial, the State played for the jury the entirety of defendant's recorded statement to police. At the statement's end, defendant invoked the right to counsel:

A: Well you ain't going to believe me do you want me to get a lawyer?

Q: Do you need one?

A: You aren't going to believe me.

A: I'm not going to risk my whole life (indiscernible) to you, you all saying one thing and got other people coming in saying another. No. I'll call my dad and we'll get a lawyer. Got to[o] much on the line (indiscernible).

Q: You said a mouthful there, you got too much on the line to be taking any chances, you're right so if you want a lawyer obviously, that's your choice.

A: (Indiscernible) fucking lawsuit (indiscernible) at least I'm fuck (indiscernible). You people won't believe me.

Defendant argues "[t]he court's failure to exclude [this] portion of [defendant's] statement, or at a minimum provide a jury instruction about the invocation, was clearly capable of producing an unjust result . . . and deprived him of a fair trial."

Admission of testimony that defendant "desire[d] or request[ed] . . . a lawyer is impermissible[,]" United States v. Williams, 556 F.2d 65, 67 (D.C. Cir.), cert. denied, 431 U.S. 972, 97 S. Ct. 2936, 53 L. Ed. 2d 1070 (1977), and "trial courts should endeavor to excise any reference to a criminal defendant's invocation of his right to counsel," State v. Feaster, 156 N.J. 1, 75 (1998), because it might be viewed by jurors as suggestive of guilt, State v. Tilghman, 345 N.J. Super. 571, 576-77 (App. Div. 2001). This circumstance, however, does not always lead to a finding of plain error. In Feaster, the Court found an invocation of the right to counsel was erroneously heard by the jury but, because of its "fleeting" nature, because the prosecutor did not comment on it during his summation, because instructions were given that barred the jury from drawing negative inferences as a

result, and because defense counsel did not request further jury instructions, the Court determined that the admission of the invocation did not constitute plain error. Feaster, supra, 156 N.J. at 77. The facts of this case require the same result.

Defense counsel did not object to the jury hearing that portion of the recorded statement. He did not ask that it be stricken from the record once it was played. He did not seek limiting or cautionary jury instructions. The prosecutor made no mention of the invocation during closing statements. And defendant's invocation of his right to counsel was heard at the end of a statement that exceeded two hours during which defendant professed his innocence multiple times and only when it seemed to him the police didn't believe him. Just as was held in Feaster in similar circumstances, we conclude the "jury was unlikely to have drawn any unfavorable inferences against defendant that jeopardized his fundamental right to a fair trial." Feaster, supra, 156 N.J. at 77.

II

Defendant claims the prosecutor's summation exceeded the bounds of propriety by (a) denigrating defense counsel and (b) improperly shifting the burden of proof to the defense. We find insufficient merit to warrant discussion in a written opinion. R.

2:11-3(e)(2). We add only the following brief comments on each aspect of this argument.

A

Defendant argues that the prosecution denigrated defense counsel by suggesting his goal was "to create confusion." This comment was certainly objectionable but we conclude not "so egregious that it deprived a defendant of a fair trial". State v. Frost, 158 N.J. 76, 83 (1999).

To warrant reversal, a prosecutor's conduct must have "substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). "In determining whether prosecutorial misconduct is prejudicial and denied defendant a fair trial, we consider whether defense counsel made a timely and proper objection, whether the remark was withdrawn promptly, and whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." State v. Ramseur, 106 N.J. 123, 322-23 (1987). If counsel does not object at trial, "the remarks usually will not be deemed prejudicial." Id. at 323.

The prosecutor's comment that defense counsel was attempting to create confusion was not "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. The record shows defense counsel did not object, and the trial judge reminded the jurors in both his initial instructions and the final charge that they are the sole judges of fact, including witness credibility, and that summations are not evidence and should not be treated as such.

B

The second claim of prosecutorial misconduct requires some background information.

The prosecution offered into evidence surveillance footage showing defendant entering an apartment complex in close proximity to where the shooting occurred. In that footage, defendant appeared to be wearing a white shirt. Later, defendant voluntarily approached the police to clear his name. When then questioned about his attire, defendant asserted he was wearing a black shirt the night of the shooting. At trial, however, defendant testified he was wearing a white shirt the night of the shooting. During his closing statement, the prosecutor referred to defendant's conflicting accounts and rhetorically asked, "[w]here's the white shirt," arguably conveying that defendant failed to explain this

inconvenient circumstance. Defendant argues that, in this way, the prosecutor was able to "shift the burden of proof." Following the prosecutor's argument on this point,³ defense counsel objected, and the judge correctly struck from the record any reference that the prosecution made to the shirt in his summation. The judge further directed the jury "not [to] consider it for any purpose." The judge reiterated that defendant "has no obligation or duty to prove his innocence or offer any proof relating to his innocence", and that the "State has the burden of proving [defendant's] guilt beyond a reasonable doubt."⁴

The prosecutor's comment was not "of such a nature as to have been clearly capable of producing an unjust result," R. 2:10-2, because the comment was swiftly stricken and the jury thoroughly instructed against considering it. This eliminated any potential for prejudice.

³ The entire passage in question is as follows:

The black/white shirt thing. When he was first interviewed, [defendant] didn't know we had a video. [Defendant] said, "I was wearing a black shirt." Why would he say that? Was there something on that white shirt that he didn't want the police to know? . . . I'll throw something at you just like [defense counsel] threw at you. Where's the white shirt?

⁴ Juries are presumed to understand and follow a trial judge's instructions. State v. Loftin, 146 N.J. 295, 390 (1996); State v. Manley, 54 N.J. 259, 271 (1969).

III

Defendant appeals the sentence imposed.

Our review of a sentence is "relatively narrow" and governed by an abuse of discretion standard. State v. Blackmon, 202 N.J. 283, 297 (2010). Consequently, we are tasked only with determining, "whether the correct sentencing guidelines [were] followed," whether "there is substantial evidence in the record to support the findings of fact upon which the sentencing court based the application of those guidelines," and "whether in applying those guidelines to the relevant facts the trial court clearly erred by reaching a conclusion that could not have reasonably been made upon a weighing of the relevant factors." State v. Roth, 95 N.J. 334, 365-366 (1984).

As we have observed, defendant was sentenced to an eight-year prison term – with an eighty-five percent parole disqualifier – on the reckless manslaughter conviction; that term was ordered to run consecutively to an eight-year prison term subject to a four-year period of parole ineligibility on the unlawful possession of a firearm conviction. Defendant contends the judge erred: (a) by imposing consecutive terms; (b) by failing to address mitigating factors and erroneously finding aggravating factor six; and (c) by ordering restitution without evaluating defendant's ability to pay.

A

Defendant argues that the judge misapplied Yarbough, which provides a series of factors to consider when choosing between the imposition of concurrent or consecutive sentences. 100 N.J. at 643-44. At sentencing, the judge analyzed the Yarbough factors individually and concluded the sentence of unlawful possession of a weapon should run consecutive to the sentence imposed for the manslaughter offense by reasoning that:

The crimes and their objectives were predominately independent of each other. The crime of unlawful possession of a weapon, the purpose of it is to possess a weapon without being legally entitled to do so. The reckless conduct towards [the victim] which resulted in his death.

They involve separate acts . . . [and] were at different times. The unlawful possession of the weapon goes back to the nexus of the time when [defendant] obtained the weapon unlawfully from someone on the street, as opposed to [the shooting that occurred later]. I recognize that they are sort of in the same 24-hour period, but at a later time when he confronted [the victim] in the early hours of the next morning.

There aren't multiple victims here because the unlawful possession of a weapon is — it's victimless in a sense that it — doesn't require [defendant] to do something to someone, so I would say that that factor is inapplicable.

And we're imposing sentences on two different offenses. Our system requires that there be

no free crimes; that the punishment should fit the crime. There should be no double-counting. I would suggest that there are none . . . in what I am doing now.

In State v. Copling, 326 N.J. Super. 417, 440-42 (App. Div. 1999), cert. denied, 164 N.J. 189 (2000), we found erroneous the imposition of consecutive sentences for murder, manslaughter and unlawful possession of a weapon convictions, because "[t]he objective and purpose" of the unlawful possession statute is similar to that of the murder statute.

In Copling, we recognized that the objective and purpose of the unlawful possession statute "is to protect others from being killed by those who own weapons" and "[t]here is a strong legislative policy in this State with respect to gun control, designed to protect the public, which places restrictions on those who may carry such weapons and is intended to prevent criminal and other unfit elements from acquiring and possessing them." Ibid. (quoting State v. Wright, 155 N.J. Super. 549, 553 (App. Div. 1978)). We also recognized the "purpose of the murder statute is obviously to protect the public and individuals from unlawful killing." Ibid. Consequently, we concluded that the statutes were intended to protect the same class of victims – in short, society as a whole. So viewing the purposes of these statutes – a view

that eliminated one of the Yarbough factors found by the trial judge – we remanded in Copling for resentencing.

The facts here are similar. Defendant was convicted of reckless manslaughter, a lesser-included offense of murder, and unlawful possession of a weapon. The trial judge erred by determining "the crimes and their objectives were predominantly independent of each other," Yarbough, supra, 100 N.J. at 643-44, a conclusion inconsistent with our holding in Copling. Because, like Copling, only two of the five Yarbough factors applied here, we remand for resentencing at which time the judge may not impose consecutive prison terms.

B

At sentencing, defense counsel requested the judge's consideration of "mitigating factors three, four, five, seven, and eight."⁵ Despite this request, the trial judge made no mention of

⁵ These mitigating factors apply when:

(3) The defendant acted under a strong provocation;

(4) There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense;

(5) The victim of the defendant's conduct induced or facilitated its commission;

them. Instead, the judge addressed and properly weighed "aggravating factors three, six and nine," and he also properly gave weight to "mitigating [factor] ten."⁶ After creating a record on these factors – but without addressing mitigating factors three, four, five, seven, and eight – the trial judge concluded the "aggravating factors substantially outweigh the mitigating factors."

On remand for resentencing, and in order "[t]o facilitate meaningful appellate review," State v. Case, 220 N.J. 49, 65 (2014), the judge should address the mitigating factors that were urged by the defense but as to which the judge made no reference. Blackmon, supra, 202 N.J. at 297. We offer no view about these factors only that, once invoked, the judge was obligated to give a rationale for his view of their applicability or lack thereof. Without such an explanation, we cannot determine whether the judge

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense; [and]

(8) The defendant's conduct was the result of circumstances unlikely to recur.

[N.J.S.A. 2C:44-1(b)(3)-(8)].

⁶ The trial judge concluded that "[t]he defendant is particularly likely to respond affirmatively to probationary treatment," N.J.S.A. 2C:44-1b(10).

erred with respect to any mitigating factor that was not found or applied.

C

Defendant argues the trial judge erred by ordering that defendant pay \$5,720 in restitution without first conducting an ability-to-pay hearing. Defendant argues, and the State agrees, that due process requires that such a hearing be conducted when there is a good faith dispute about a defendant's ability to pay. State v. Martinez, 392 N.J. Super. 307, 319-22 (App. Div. 2007); State v. Jamiolkoski, 272 N.J. Super. 326, 329 (App. Div. 1994).

At the sentencing hearing on January 9, 2015, defendant agreed to the judge's holding off on the issue of restitution until a later date. On March 5, 2015, however, and without conducting a hearing, the trial judge ordered restitution in the amount of \$5,720. Although the State agrees with defendant's position that due process requires a hearing when there is a dispute about a defendant's ability to pay, the State argues there was no dispute about the amount. That may be true, but it does not address whether defendant had the ability to pay that amount.

In resentencing defendant, the judge should conduct an ability-to-pay hearing.

IV

Defendant, in his pro se submission, raises another issue. He argues the trial judge erred by permitting an expert to render an independent opinion and to testify about the cause of death through consideration of autopsy photographs and the notes of another expert. We find insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only the following brief comments.

Since this issue is raised for the first time on appeal, we apply the plain error standard, R. 2:10-2, which precludes reversal unless the error "is of such a nature as to have been clearly capable of producing an unjust result." Ibid.

The State called Dr. Gerald Feigin, Salem County's medical examiner, to testify about the victim's cause of death. The parties stipulated Dr. Feigin was an expert in forensic pathology, but Dr. Feigin did not conduct the autopsy; instead, he reviewed the medical report of the pathologist who conducted the autopsy, examined photographs of the autopsy, and considered the other pathologist's notes. Dr. Feigin concluded that the victim died of a "gunshot wound to the chest and that the bullet caused damage

by passing through the heart and liver, causing massive bleeding." He also concluded "the manner of death is homicide."⁷

Although a prosecutor's use at trial of a medical examiner who did not perform the autopsy may in different circumstances prove problematic, see State v. Bass, 224 N.J. 285, 291-92 (2016), Dr. Feigin did not rely on the non-testifying expert's report or conclusions; he gave his own opinion based on material of the type normally considered by experts, and he reached his own conclusion about the mechanics of death. In addition, no harm resulted because the issue at trial was whether defendant shot the victim, not whether the victim died of a gunshot wound.

We affirm defendant's convictions. We reverse defendant's consecutive sentence and remand for an ability-to-pay hearing and for resentencing in conformity 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.


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⁷ This last comment represented an improper legal opinion. But there was no objection, and the propriety of this legal opinion has not been raised here, so we need not consider whether the Dr. Feigen's declaration that defendant was the victim of a "homicide" was erroneous.