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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3474-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TARIK A. DUPREE,

Defendant-Appellant.

Argued January 19, 2017 – Decided February 17, 2017

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
11-01-0005.

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

Maura M. Sullivan, Assistant Prosecutor,
argued the cause for respondent (Mary Eva
Colalillo, Camden County Prosecutor,
attorney; Ms. Sullivan, of counsel and on the
brief).

PER CURIAM

A jury found defendant guilty of robbing Claire¹ with a knife. The trial court sentenced defendant to twenty years in prison. He appeals, arguing:

POINT I

REPEATED AND PREJUDICIAL REFERENCES TO UNCHARGED ROBBERIES WERE INADMISSIBLE UNDER N.J.R.E. 404(b) AND REQUIRE REVERSAL OF DEFENDANT'S CONVICTIONS. (NOT RAISED BELOW).

POINT II

THE ERRONEOUS ADMISSION OF THE VICTIM'S UNRELIABLE IDENTIFICATION REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

POINT III

THE ROBBERY AND TERRORISTIC THREATS CONVICTIONS ARE PART OF THE SAME OFFENSE AND MUST MERGE. (NOT RAISED BELOW).

We have considered these arguments in light of the record and applicable law. We affirm.

I.

Because defendant's appeal focuses on the trial court's admission of Claire's out-of-court identification, we derive the following facts from the court's hearings on whether to admit her identification, unless otherwise noted.

At about 3:00 p.m. on July 3, 2010, Claire parked her car at an apartment complex to deliver pizza to a resident. She walked

¹ We refer to the victim using a pseudonym to protect her privacy.

to the resident's door and knocked, but no one came to the door. As she turned to walk back to her car, she saw someone running towards her with a knife. She tried to walk away, but the person caught up to her, and then, he "stuck the knife to [her] back." She "immediately turned around to look at him" and saw "he wasn't wearing a mask," so she "was staring at his face." "He said, 'Don't look in my face,' so [she] turned back around."

The man said, "Give me all the money." Claire told him the money was in her shoe, reached down to her shoe, and pulled the money out. She "turned around again to look at him." Their faces were "about a foot, [eighteen] inches" apart. He again told her, "Don't look at me." She then turned around and handed him the money. The man then "ran off" towards another apartment building. The robbery lasted a total of ten minutes.

Claire immediately went to her car and called the police. She quickly delivered her last pizza before coming back to meet the police at the scene of the robbery. Police Sergeant George Smith testified he responded to a reported robbery just after 3:00 p.m. on July 3, 2010. When he arrived at the scene, he found Claire "distraught," "scared," and "nervous."

Sergeant Smith asked her "what had happened." She described the robbery and the man's appearance. "[H]e was a little taller than me. He had big lips." He was "a black male," wearing "a t-

shirt." "He had black basketball shorts" with "a red stripe going down the sides of them."

Sergeant Smith had heard patrol alerts for other armed robberies of delivery workers within the "past week or two in that same area." He stated, "[T]he detectives that were working on other jobs advised that [defendant] was a suspect for them at that time." Defendant's appearance was consistent with Claire's description of the man who robbed her. He therefore asked her whether she thought she could identify her robber in a photograph. Claire said yes, so Sergeant Smith "pulled a picture of [defendant] up on [his] laptop" and showed it to her. The picture was a straight photograph of defendant's face. She immediately said, "I'm a hundred percent certain that that was the person who robbed me." Thirteen to fourteen minutes elapsed between Sergeant Smith's dispatch to the scene and Claire's identification of defendant.

Defendant's house was in the same direction as the robber had fled the scene. Sergeant Smith and one or two other police officers approached the front of defendant's house, and Sergeant Smith had other police officers go to the back of his house in case he tried to flee when he realized the police were there. Sergeant Smith knocked on the front door, and when someone answered, he asked whether defendant was in the house. Defendant

then came to the front door, and Sergeant Smith asked him to step outside, which he did. Defendant said he had been home all day.

Sergeant Smith told defendant's mother that he was "investigating an armed robbery," and defendant was a suspect. Defendant's mother consequently consented to the police searching her house. Sergeant Smith searched defendant's bedroom and found a pair of black shorts with "red trim," but he did not find a knife. He showed the shorts to Claire. She confirmed those were the same shorts her robber had worn. The police then arrested defendant.

A grand jury returned an indictment against defendant, charging him with twelve counts arising from three armed robberies that occurred on three separate dates: June 22, June 23, and July 3, 2010. The counts were first-degree armed robbery, N.J.S.A. 2C:15-1(a)(2) (counts one to three); third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (counts four to six); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (counts seven to nine); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (counts ten through twelve).

Before trial, the State dismissed all counts related to the June 23 robbery. Defendant then moved to suppress Claire's initial identification of defendant, and the trial court denied his motion after holding two hearings.

The court explained that it found Claire a "very credible witness" and Sergeant Smith a "credible witness." It concluded:

Yes, it was a suggestive identification [in] that there was . . . one photograph; however, it was only [fifteen] minutes after the robbery that she observed it. She had . . . spent ten minutes with the alleged perpetrator in this matter and had an opportunity to view his face [and] gave a description previously. And the officer, while he showed her one photograph, he did not suggest . . . anything about this person, only asking if this was the person she saw. And she immediately identified him as a person who had just robbed her [fifteen] minutes previously and that she was a hundred percent certain.

The court then denied defendant's motion to suppress Claire's identification.

The trial testimony by Claire and Sergeant Smith was mostly consistent with their respective testimony provided during the hearing. Although Claire was unable to say whether the robber's shorts were black with a red stripe or red with a black stripe, she was able to identify them when the prosecutor showed them to her. She also said she had not seen the shorts since the robbery.

At trial, the State played an audio recording of an interrogation of defendant, who did not testify. The prosecutor and defense counsel had both reviewed the tape, and defense counsel said, "All the redactions we've asked for have been removed." Before playing the recording, the trial court told the jury:

[A]s part of my charge to you at the end of the case it indicates that just because something is asked by way of a question does not mean it's true. For something to be true the person hearing that question has to acknowledge it as being true. So you just have to understand that with any type of questioning we're having here in court, if somebody asks a question and the answer is no, then there's really no evidence.

The recording showed defendant told the detective that he was at home with his mother and brother all day. Defendant also denied having any shorts, explaining he shared his bedroom with his brother.² Defendant further stated he was "nowhere near" the location where Claire was robbed. When asked how he knew the exact location of the robbery, defendant claimed another police officer had told him the location.

During the interrogation, the detective repeatedly said he suspected defendant had committed other robberies:

You can, either, handle all of these together and, usually, it gets merged into one; or we'll go and — you know — handle each thing, individually, and you're going to have to stand trial for each and every one of those robberies. . . . But I can tell you right now, Tarik, this has been the fourth.

. . . .

And you know what it means. Hold up. But you know what it means that to face four of them individually.

² The State's previous witness was a forensic DNA analyst, who testified the shorts contained a "major DNA profile" belonging to defendant and two other "minor" DNA profiles.

. . . .

Your name was already -- you were already our suspect for. . . all the other robberies.

. . . .

But you're going to, individually, face four armed robberies.

. . . .

[W]e didn't come knocking on your door after the first, the second, the third, we didn't.

. . . .

[W]e got another person coming in on Tuesday to identify you for the other ones. Because, like I said, you were our suspect before

. . . .

[Y]ou're going to court for each individual robbery. And you're facing the charges, individually.

. . . .

[We] got your cell phone number being used, same one for all the robberies.

During its jury charge, the court emphasized the importance of its limiting instructions when it told the jury "if I give a limiting instruction as to how to use certain evidence, that evidence may be considered by you for that purpose only. You may not use it for any other purpose."

Bailey³ testified regarding the June 22 robbery of a Chinese man. The State had an audio recording of a detective interrogating Bailey. On the recording, Bailey said defendant had committed this robbery. At trial, Bailey denied the recording contained his voice. The State therefore asked the court to play the recording for the jury. The court noted the recording contained statements that violated N.J.R.E. 404(b). It asked the prosecutor and defense counsel to review the recording to see if they could agree on what the prosecutor should redact from it. Before playing the redacted recording, the court asked defense counsel whether the redacted recording contained "anything . . . that you thought should have been redacted that the prosecutor did not redact?" He said, "No. Everything that I asked for was redacted."

Five days later, the court played the redacted recording for the jury. On the recording, someone said, "I heard . . . the Chinese man got robbed." He said he "had nothing to do with none of them robberies with them Chinese people." He nevertheless admitted a man named "Reek" had used his cellular phone to call a Chinese restaurant, and then he left for the "V Section." The detective asked the man whether "everybody that [he] h[u]ng out with, you know, (inaudible) jail (inaudible)." The man replied,

³ We refer to the witness using a pseudonym to protect his identity.

"He just came home. I don't really know him like that." The man said "Reek" spent time at a particular address. During his questioning, the detective referred to "robberies" multiple times.

The detective then went to investigate the address Bailey had identified. When he arrived, he spoke with defendant's mother. He asked her whether he could search her home, and she said yes. He found defendant's driver's license, with the name "Tarik Dupree." He asked defendant's mother if her son had any nicknames. She said "family and friends referred to Tarik as Reek."

The jury found defendant not guilty of all counts related to the June 22 robbery, but it found him guilty of all counts related to the July 3 robbery (counts three, six, nine, and twelve). The trial court sentenced defendant to twenty years in prison on count three, first-degree armed robbery, with an seventeen-year period of parole ineligibility, and a concurrent five years in prison on count six, third-degree terroristic threats. The court merged counts nine and twelve into count three. This appeal followed.

II.

Plaintiff argues the trial court (1) should not have played recordings that contained references to other robberies and defendant's prior incarceration, (2) should not have admitted Claire's out-of-court identification, and (3) should have merged his convictions for first-degree armed robbery and third-degree

terroristic threats. He raised only his second argument before the trial court.

A. Other-acts evidence

When reviewing a trial court's decision to exclude or admit evidence pursuant to N.J.R.E. 404(b), we use an abuse of discretion standard. State v. Rose, 206 N.J. 141, 157-58 (2011) (citing State v. Barden, 195 N.J. 375, 391 (2008)). "However, if the party appealing did not make [an] objection to admission known to the trial court, the reviewing court will review for plain error, only reversing if the error is 'clearly capable of producing an unjust result.'" Id. at 518 (quoting R. 2:10-2).

N.J.R.E. 404(b) provides that:

[E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

The purpose of N.J.R.E. 404(b) is to prevent the "underlying danger . . . that the jury may convict the defendant because he is a 'bad' person in general." State v. Cofield, 127 N.J. 328, 336 (1992) (citation omitted). Not all "other acts" evidence is barred under N.J.R.E. 404(b), however. The Rule "seeks to strike a balance between the prejudice to a defendant that is inherent

in other-crimes evidence and the recognition that the evidence may be highly relevant to prove a defendant's guilt of the crime charged." Barden, supra, 195 N.J. at 388.

When determining whether to admit other acts evidence under N.J.R.E. 403 and 404(b), the New Jersey Supreme Court has instructed this court to apply the following test:

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.

[Cofield, supra, 127 N.J. at 338 (citation omitted).]

In the case of improperly admitted evidence, the effect can generally be eradicated by an immediate and strong curative instruction to the jury to disregard the evidence. State v. Winter, 96 N.J. 640, 648 (1984).

The decision on whether inadmissible evidence is of such a nature as to be susceptible of being cured by a cautionary or limiting instruction, or instead requires the more severe response of a mistrial, is one that is peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting.

[Id. at 646-47.]

Similarly, "when weighing the effectiveness of curative instructions, a reviewing court should give equal deference to the determination of the trial court. The adequacy of a curative instruction necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached." Id. at 647.

In this case, the State's recording showed the detective suspected defendant had committed other robberies, but it did not show the State arrested or charged defendant with other robberies, nor did it show anyone had personal knowledge of defendant committing other robberies. The detective's suspicions were in the context of trying to elicit defendant's confession to the charged robberies. The trial court also issued a preemptive and "strong [limiting] instruction to the jury" that it could not consider the detective's questions as evidence of defendant's guilt. Winter, supra, 96 N.J. at 648. We conclude the trial court did not abuse its discretion when it concluded the detective's suspicions were "of such a nature as to be susceptible of being cured by a cautionary or limiting instruction." Id. at 646.

The defendant also argues the trial court erred when it allowed the State to present the audio recording of Bailey's

interrogation. The recording does contain references to other robberies, but Bailey's statements implicated defendant in only the June 22 robbery. The statements about other robberies were not evidence of defendant's other acts. N.J.R.E. 404(b). Although Bailey said, "He just came home," he does not explicitly say defendant had recently returned from jail. Moreover, the jury found defendant not guilty of the June 22 robbery. The jury must not have found Bailey credible as a witness. The record does not show the jury credited Bailey's offhand comment about defendant's recent return home any more than his accusation that defendant used his phone to commit the June 22 robbery. We conclude Bailey's statements were not "clearly capable of producing an unjust result." Rose, supra, 206 N.J. at 157 (quoting R. 2:10-2). We therefore affirm the trial court's admission of these recordings.

B. Claire's out-of-court identification

When we review a decision concerning a showup, we assign "very considerable weight" to the trial court's "findings at the hearing on the admissibility of identification evidence." State v. Adams, 194 N.J. 186, 203 (2008) (quoting State v. Farrow, 61 N.J. 434, 451 (1972)). If the record contains sufficient credible evidence to support the trial court's findings, we will not disturb the trial court's findings. Ibid. Our review of the trial court's

application of the law to the facts, however, is plenary. State v. Coles, 218 N.J. 322, 342 (2014).

The showup here predated State v. Henderson, 208 N.J. 208 (2011), in which the New Jersey Supreme Court revised the criteria for evaluating out-of-court identifications. For that reason, we review defendant's claim under the two-pronged test formulated by the United States Supreme Court in Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977), and adopted by the New Jersey Supreme Court in State v. Madison, 109 N.J. 223, 232-33 (1988); see State v. Jones, 224 N.J. 70, 86 n.2 (2016) ("Because the events underlying this case were decided before the Henderson decision was handed down, the guidelines established in Manson/Madison are applicable to this matter."); State v. Micelli, 215 N.J. 284, 287 (2013) (noting that the Manson/Madison standard applies because the identifications were completed prior to the decision in Henderson).

The Manson/Madison test "requires the court first to ascertain whether the identification procedure was impermissibly suggestive." State v. Herrera, 187 N.J. 493, 503 (2006). If so, the second step involves a determination whether the impermissibly suggestive procedure "was nevertheless reliable." Id. at 503-04. "The totality of the circumstances must be considered in weighing

the suggestive nature of the identification against the reliability of the identification." Id. at 504.

Analyzing the totality of the circumstances

involves considering the facts of each case and weighing the corruptive influence of the suggestive identification against the "opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the time of the confrontation and the time between the crime and the confrontation." Manson v. Brathwaite, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154 (citing Neil v. Biggers, [409 U.S. 188, 199, 93 S. Ct. 375, 382, 34 L. Ed. 2d at 401, 411 (1972)]).

[Madison, supra, 109 N.J. at 239-40.]

In undertaking this "reliability assessment," a trial court "must restrict its focus to the accuracy and trustworthiness of the specific identification," Jones, supra, 224 N.J. at 74, and not "drift into consideration of circumstantial evidence of guilt such as would be pertinent in a harmless error analysis." Id. at 92.

"[S]howups by definition are suggestive because the victim can only choose from one person, and, generally, that person is in police custody." Herrera, supra, 187 N.J. at 504. Although "one-on-one showups are inherently suggestive," "standing alone a showup is not so impermissibly suggestive" so as to require a

hearing. Ibid. Nonetheless, "only a little more is required in a showup to tip the scale toward impermissibly suggestive." Ibid.

Our Supreme Court has "permitted on or near-the-scene identifications because '[t]hey are likely to be accurate, taking place, as they do, before memory has faded[] [and because] [t]hey facilitate and enhance fast and effective police action and they tend to avoid or minimize inconvenience and embarrassment to the innocent.'" Ibid. (alterations in original) (quoting State v. Wilkerson, 60 N.J. 452, 461 (1972)).

In this case, Claire had two opportunities to see defendant's face during the ten-minute robbery. Both times, she looked at him long enough that he told her to stop each time. When she described her robber, Sergeant Smith knew defendant fit the description, and Sergeant Smith found shorts matching Claire's description in defendant's bedroom. When she saw the photograph within a half-hour of the robbery, she immediately said she was "one hundred percent certain" it showed the man who robbed her. Claire's near-scene identification was "likely to be accurate," "facilitate and enhance fast and effective police action," and "avoid or minimize inconvenience and embarrassment to the innocent." Herrera, supra, 187 N.J. at 504 (alterations in original) (quoting Wilkerson, supra, 60 N.J. at 461). We conclude the trial court properly

denied defendant's motion to suppress Claire's out-of-court identification.

C. Merger

We review a judge's sentencing determination under a deferential standard. State v. Fuentes, 217 N.J. 57, 70 (2014). "At its core, merger's substantial purpose 'is to avoid double punishment for a single wrongdoing.'" State v. Romero, 191 N.J. 59, 80 (2007) (quoting State v. Diaz, 144 N.J. 628, 637 (1996)). Additionally, N.J.S.A. 2C:1-8 sets forth

a series of factors that help a court determine whether to bar multiple convictions for conduct that constitutes more than one offense. In particular, N.J.S.A. 2C:1-8(d) calls for merger when one offense is established by proof of the same or less than all of the facts required to establish the commission of another offense charged

[State v. Mirault, 92 N.J. 492, 502 n.10 (1983).]

In this fact-sensitive inquiry, we must determine whether the two offenses are the same and therefore merge or whether "each [offense] requires proof of an additional fact[,] which the other does not," making merger inapplicable. State v. Dillihay, 127 N.J. 42, 48 (1992) (first alteration in original) (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932)).

Under our criminal code, "[a] person is guilty of robbery if, in the course of committing a theft, he . . . [t]hreatens another with or purposely puts him in fear of immediate bodily injury." N.J.S.A. 2C:15-1(a)(2). "Robbery is a crime of . . . of the first degree if in the course of committing the theft the actor . . . purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon." N.J.S.A. 2C:15-1(b). A person is guilty of third-degree terroristic threats when "he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out." N.J.S.A. 2C:12-3(b).

"Where precisely the same physical acts are used to make out the robbery and the assault, they have been found to merge." Cannel, New Jersey Criminal Code Annotated, comment 4 on N.J.S.A. 2C:1-8(a)(1) (2016) (citing Mirault, supra, 92 N.J. at 503-504); see also State v. Pyron, 202 N.J. Super. 502, 504-05 (App. Div. 1985). However, where the conduct constituting an assault is factually separable from the force used to raise theft to robbery, the assault conviction does not merge with the robbery conviction. State v. Carlos, 187 N.J. Super. 406, 418 (App. Div. 1982), certif. denied, 93 N.J. 297 (1983). "Failure to merge convictions that

should have been merged makes the sentence imposed illegal, and illegal sentences may be corrected at any time." Cannel, supra, cmt. 10 on N.J.S.A. 2C:1-8 (citing Romero, supra, 191 N.J. at 80).


In this case, the jury found defendant guilty of first-degree armed robbery and third-degree terroristic threats. To find defendant guilty of first-degree armed robbery, the jury had to find he purposely inflicted or attempted to "inflict serious bodily injury, or [was] armed with, or use[d] or threaten[ed] the immediate use of a deadly weapon." N.J.S.A. 2C:15-1(b). To find defendant guilty of third-degree terroristic threats, the jury had to find he threatened "to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out." N.J.S.A. 2C:12-3(b).

Brandishing a deadly weapon or threatening to injure someone seriously is not the same as threatening to kill them. Defendant committed a terroristic threat when he "stuck" his knife to Claire's back while he robbed her. Proving third-degree terroristic threats therefore required proving something unnecessary for establishing first-degree armed robbery. Moreover, first-degree armed robbery required proving defendant was armed and committed a theft. Defendant committed armed robbery when he approached Claire with a knife in his hand and stole her

money. "[E]ach [offense] require[d] proof of an additional fact[,]
which the other d[id] not," making merger inapplicable. Dillihay,
supra, 127 N.J. at 48 (quoting Blockburger, supra, 284 U.S. at
304, 52 S. Ct. at 182, 76 L. Ed. at 309).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION