SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3824-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

XZAVIER D. HAYES a/k/a
DWAYNE HAYES,

Defendant-Appellant.

Submitted July 18, 2017 – Decided July 25, 2017

Before Judges Reisner and Suter.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 15-03-0309.

James R. Lisa, attorney for appellant.

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Erin M. Campbell, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Xzavier Hayes appeals his March 9, 2016 judgment of conviction. We affirm.

I.

On January 10, 2013, Officer Lowry (Lowry) and his partner were on patrol in plain clothes in an unmarked vehicle in the vicinity of Martin Luther King and Bayview Avenues in Jersey City. Lowry received a phone call from another officer, who advised based on information from a confidential informant that an individual located on the corner in front of a specific address "possibly had a brick of heroin" in his jacket pocket. Lowry was provided a description of the individual. Lowry and his partner drove to the address, which was just around the block, and saw a person matching the description standing on the corner. The police officers exited their vehicle with badges exposed and walked toward the individual, who had his back turned. Once he turned to see them, he discarded two small white objects to the ground. The objects were consistent with the size and shape of packaged heroin. The officers advised defendant of their investigation and, after confirming the packets were heroin, placed defendant under arrest. A search of defendant after arrest revealed he was carrying sixty-nine packets of heroin and $148 in cash.

Prior to trial, defendant sought to suppress this evidence, contending the officers had no reasonable articulable suspicion to conduct an investigatory detention. The suppression motion was denied. The motion judge found Lowry "received information from

a [confidential informant] who had been reliable in the past in similar situations," and that the information was "corroborated by the officers' own observations" when the officers saw defendant, who matched the description they were given, and defendant dropped the white packets. This gave the officers "a sufficient basis to believe a crime had been committed," according to the motion judge, who concluded the officers had probable cause for the arrest and that the evidence was lawfully seized incident to defendant's arrest.

The case was tried before a jury. Defendant was convicted of third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35—10(a)(1) (Count One); third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35—5(a)(1) and N.J.S.A. 2C:35-5(b)(13) (Count Two); third-degree possession of a CDS with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35—7(a) (Count Three); and second-degree possession of a CDS with intent to distribute within 500 feet of certain public property, N.J.S.A. 2C:35—7.1(a) (Count Four).

On March 9, 2016, defendant was sentenced on Count Four to a ten-year term of incarceration with five years of parole ineligibility. The other three counts were merged into Count Four.

On appeal, defendant raises these issues:

> POINT I. THE EVIDENCE SEIZED SHOULD HAVE BEEN SUPPRESSED BECAUSE OFFICER LOWRY LACKED SUFFICIENT REASONABLE SUSPICION NECESSARY TO CONDUCT AN INVESTIGATORY STOP.
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> POINT II. THE JURY INSTRUCTIONS, AS WELL AS STATEMENTS MADE BY THE STATE DURING CLOSING ARGUMENTS, ERRONEOUSLY INDICATED THAT HAYES COULD BE FOUND GUILTY OF INTENT TO DISTRIBUTE DUE TO SHARING. (NOT RAISED BELOW)
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> POINT III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENSE'S REYES MOTION TO DISMISS THE CHARGES OF POSSESSION OF A DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE, POSSESSION OF A DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE WITHIN 1000 FEET OF SCHOOL PROPERTY, AND POSSESSION OF A DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE WITHIN 500 FEET OF A PUBLIC PARK.
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> POINT IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENSE'S MOTION FOR A MISTRIAL.

II.

Defendant appeals the trial court's order denying his suppression motion. We defer to the trial court's factual findings on a motion to suppress unless they were "clearly mistaken" such that appellate intervention is necessary "in the interests of justice." State v. Elders, 192 N.J. 224, 244 (2007) (internal quotation marks and citation omitted). Our review of "purely legal conclusions" is plenary. State v. Goodman, 415 N.J. Super.

210, 225 (App. Div. 2010) (citation omitted), certif. denied, 205 N.J. 78 (2011).

There is no merit to defendant's contention that the motion judge erred in rejecting the motion to suppress. There was no investigatory detention.[1] The officers stepped out of their vehicle and began to walk toward defendant, who initially had his back turned. When defendant turned toward the police, he dropped the packets. Once he did that, and the officers recognized the packets were the size and shape of packed heroin, the officers had probable cause to arrest defendant based on their observations. See State v. Basil, 202 N.J. 570, 585 (2010) ("[A] police officer has probable cause to arrest a suspect when the officer possesses 'a well grounded suspicion that a crime has been or is being committed." (quoting State v. Sullivan, 169 N.J. 204, 211 (2001))). Defendant was arrested and searched.

[1] Sometimes referred to as a Terry stop, Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968), an investigatory detention does not require a warrant if it is based on "specific and articulable facts which, taken together with rational inferences from those facts," provide a "reasonable suspicion of criminal activity." Elders, supra, 192 N.J. at 247 (quoting State v. Rodriquez, 172 N.J. 117, 126 (2002)). An investigatory detention is considered more intrusive than a field inquiry and does implicate constitutional requirements. Id. at 246-47. See also State v. Rosario, __ N.J. __ (2017).

A search incident to arrest does not require a warrant. Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969) (allowing a warrantless search of a person and what that individual might be able to reach after an arrest); see also United States v. Robinson, 414 U.S. 218, 234, 94 S. Ct. 467, 476, 38 L. Ed. 2d 427, 439-40 (1973) (noting that justifications for a search incident to arrest include "the need to disarm the suspect" and "to preserve evidence for later use at trial"). Thus, there was no error by the motion judge in denying defendant's motion to suppress because the drugs were discovered pursuant to a search incident to arrest that was based upon probable cause.

III.

The primary issue at trial was whether defendant possessed the drugs with an intent to distribute them. Defendant testified he sometimes shared heroin with friends.

> PROSECUTOR: You had all 69 bags of heroin there for yourself, is that correct?
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> DEFENDANT: Yes, and sometimes I might look out for a friend of mine if they ask.
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> PROSECUTOR: So sometimes you would sell heroin?
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> DEFENDANT: No, I said sometime I might look out for a friend of mine. Share.

PROSECUTOR: So you would share. You would give him the heroin?

DEFENDANT: No, I would share them him [sic]. I sniff half of the bag, and they sniff half of the bag.

PROSECUTOR: Okay. You -- so you would share the heroin, right?

DEFENDANT: Sometimes.

In his summation, the prosecutor suggested the facts supported "distribution" if defendant shared heroin with a friend, commenting "[t]he defendant himself admitted to committing the offense." The court instructed the jury that to distribute means "the transfer, actual, constructive or attempted from one person to another of a controlled dangerous substance." The court defined intent as "a purpose to do something" but that it was "not necessary that the drugs be transferred in exchange for payment or promise of payment of money or anything of value." Defendant did not object to the summation or the judge's instruction. Defendant contends on appeal that he could not be found guilty of intent to distribute just because he shared drugs.

We review this issue under a plain error standard, meaning that our inquiry is to determine whether this was an error that was "clearly capable of producing an unjust result." R. 2:10-2; see State v. Macon, 57 N.J. 325, 336 (1971). Under that standard, reversal of defendant's conviction is required if there was error

"sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." State v. Green, 447 N.J. Super. 317, 325 (App. Div. 2016) (quoting Macon, supra, 57 N.J. at 336).

In reviewing the adequacy of the judge's charge to the jury, we must consider the charge as a whole in determining whether it was prejudicial. See State v. Wilbely, 63 N.J. 420, 422 (1973) (internal citations omitted).

There was nothing prejudicial about the judge's charge to the jury. It tracked the model charge for distribution of a CDS[2] and was consistent with our decision in State v. Heitzman, 209 N.J. Super. 617, 620 (App. Div. 1986) (concluding there "was a sufficient factual basis" to sustain conviction of possession with intent to distribute where defendant admitted an intent to share drugs), certif. denied, 107 N.J. 603 (1987). See Mogull v. CB Commercial Real Estate Grp., Inc., 162 N.J. 449, 466 (2000) (holding that instructions given in accordance with model charges, or which closely track model charges, are generally not considered erroneous). Similarly, the prosecutor did not commit plain error in commenting on distribution in his summation because of defendant's testimony that he shared drugs with friends, and that such conduct came

[2] See Model Jury Charge (Criminal), "Distribution of a Controlled Dangerous Substance" (2008).

within the definition of distribution. The jury was capable of determining whether to believe defendant's version about personal use or, given the quantity of the drugs and past sharing, that his intent was distribution.

III.

The State relied upon a map of Jersey City to show the location of defendant's arrest relative to a public library. After the State rested without introducing a copy of the ordinance that had adopted the map, defendant moved to dismiss Counts Two, Three and Four of the indictment. On appeal, defendant contends the trial court erred in granting the State's request to admit the ordinance as evidence, after it rested.

"[I]n reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion." Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008) (citing Brenman v. Demello, 191 N.J. 18, 31 (2002)). The general rule as to the admission or exclusion of evidence is that "[c]onsiderable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion." State v. Feaster, 156 N.J. 1, 82 (1998) (internal citations omitted), cert. denied, 532 U.S. 932, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001); see also State v. J.A.C., 210 N.J. 281, 295 (2012) (internal citations omitted).

Under this standard, an appellate court should not substitute its own judgment for that of the trial court, unless "the trial court's ruling 'was so wide of the mark that a manifest denial of justice resulted.'" State v. Marrero, 148 N.J. 469, 484 (1997) (quoting State v. Kelly, 97 N.J. 178, 216 (1984)).

Here, we agree with the court that although the State was late in offering evidence of the ordinance, the application was made promptly when the error was brought to the State's attention. There is no indication the defense was prejudiced by its introduction, aside from its attempt to capitalize on an oversight. A trial is to be a search for the truth, see McKenney v. Jersey City Medical Center, 167 N.J. 359, 370 (2001); Kernan v. One Washington Park Urban Renewal Associates, 154 N.J. 437, 467 (1998) (Pollock, J., concurring), and the court's ruling was consistent with that objective.

IV.

We agree with the trial court that defendant's motion for a mistrial was properly rejected. A "trial court's denial of [a] defendant's motion for a mistrial [is reviewed] in accordance with a deferential standard of review." State v. Jackson, 211 N.J. 394, 407 (2012). We "will not disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice." Ibid. (quoting State v. Harvey, 151

N.J. 117, 205 (1997), cert. denied, 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683 (2000)).

Defendant contends the court erred in denying his motion for a mistrial because on two occasions, one of the police officer witnesses indicated she received information about defendant from an out-of-court witness. In the first instance, the court stopped the officer mid-sentence, before any information was relayed. In the second instance, where the officer testified she "saw a male who was described to [her]," the court sustained the objection.

We are satisfied based on our review of the record that this brief reference was not sufficient to create reasonable doubt about the verdict in light of the totality of the evidence. See R. 2:10-2.

Affirmed.