SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4900-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AMIR LEGRANDE, a/k/a
YUNG SNOW,

Defendant-Appellant.

Argued April 5, 2017 – Decided August 7, 2017

Before Judges Fuentes, Simonelli and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 13-10-1875.

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).

Eric P. Knowles, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Mr. Knowles, on the brief).

PER CURIAM

A Hudson County grand jury returned Indictment No. 13-10-1875, charging defendant Amir Legrande with second degree unlawful possession of a handgun, N.J.S.A. 2C:39-5b; second degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4a; second degree conspiracy to commit aggravated assault, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:12-1b(1); second degree aggravated assault, N.J.S.A. 2C:12-1b(1); and second degree possession of a firearm following a conviction for one of the offenses listed in N.J.S.A. 2C:39-7b.

Defendant was tried before a jury and convicted of second degree conspiracy to commit aggravated assault. The jury acquitted defendant of the remaining charges.[1] The trial judge sentenced defendant to a term of eight years, with an eighty-five percent period of parole ineligibility and three years of parole supervision, as mandated by the No Early Release Act, N.J.S.A. 2C:43-7.2.

On appeal, defendant argues the trial court erred by failing to instruct the jury on the lesser included offenses associated

[1] In Indictment No. 13-10-1874, defendant was charged with third degree possession of methylone, contrary to N.J.S.A. 2C:35-10a(1). In Indictment No. 13-01-0003, defendant was charged with three counts of fourth degree unlicensed entry into a structure, contrary to N.J.S.A. 2C:18-3a. Pursuant to a negotiated agreement with the State, defendant disposed of these two indictments by pleading guilty to third degree possession of methylone and one count of fourth degree unlicensed entry.

with second degree conspiracy to commit aggravated assault. With respect to the portion of the indictment charging him with second degree aggravated assault, defendant asserts the trial judge properly instructed the jury on the lesser included offense of third degree aggravated assault, as well as the disorderly persons offense of simple assault. Defendant argues the trial judge should have taken the same approach with respect to the portion of the indictment charging him with second degree conspiracy. Specifically, defendant argues the trial judge should have instructed the jury to consider the lesser included offenses of conspiracy to commit third degree aggravated assault and conspiracy to commit fourth degree aggravated assault.

In a letter-brief submitted in lieu of a formal brief pursuant to Rule 2:6-2(b), the State argues defense counsel's failure to request an instruction on lesser included offenses for the conspiracy count shows the inapplicability of this doctrine to the facts of this case. Alternatively, the State argues defendant has not shown that the trial judge committed plain error under Rule 2:10-2. Finally, the State argues there was no rational basis for the trial court to instruct the jury on fourth degree conspiracy to point a deadly weapon under N.J.S.A. 2C:12-1b(4) because the victim was shot in the back as he drove away in his car. In support of this argument, the State notes that codefendant Michael

A. Pasuco's testimony did not mention anything about using the handgun to merely scare the victim.

After reviewing the evidence presented at trial, we are convinced there was a rational basis to instruct the jury on the lesser included offenses of conspiracy to commit third degree aggravated assault, N.J.S.A. 2C:12-1b(2); and conspiracy to commit fourth degree aggravated assault, N.J.S.A. 2C:12-1b(4). If properly instructed, the jury could have considered the overt acts described in the indictment as well as the evidence presented at trial to find defendant guilty of one of these two lesser included offenses.

The State has adopted the statement of material facts described in defendant's appellate brief. See R. 2:6-2(a)(5). We will thus consider the following facts uncontested for the purpose of this appeal.

Pasuco and defendant were indicted as codefendants in this case. Pasuco pled guilty to second degree unlawful possession of a firearm, N.J.S.A. 2C:39-5b. As part of his plea agreement with the State, Pasuco agreed to testify against defendant in this trial. S.G.[2] also testified as a witness for the State.

[2] We use initials to protect the privacy of the fact witnesses who testified in this trial.

On May 25, 2013, approximately thirty to forty people boarded a private "party bus" in Jersey City to travel to Seaside Heights to celebrate S.G.'s twenty-first birthday. Defendant and a man we identify as J.R. were among the revelers. S.G. testified that defendant was seated in the "VIP section" in the rear part of the bus. J.R. was seated in the front of the bus with his girlfriend. J.R. testified that his recollection of the night was somewhat unclear because it "was like a year ago[]" and he was "drunk that night."

At some point during the trip, J.R. claimed he was involved in an altercation. In response to the prosecutor's questioning, J.R. reiterated that his memory of what occurred was hazy: "I don't know if I was[] personally[] fighting. I thought it was like a brawl[.]" J.R. could not recall how many people were involved in the "brawl" because the lights were off. By contrast, S.G. testified that no fight occurred on the bus. The trip to Seaside Heights took approximately two hours. According to S.G., defendant remained in the VIP section the entire time.

The bus arrived back in Jersey City between 3 a.m. and 4 a.m. on May 26, 2013. J.R. testified that he was one of the first people to exit the bus. When asked if his girlfriend was with him when he stepped off the bus, he responded: "No, I was going home -- matter of fact, I had to go to work, or something like that.

No, she wasn't with me." As he walked to his car, J.R. testified that he heard gunshots. He gave the following account of what transpired next:

> Q. Were the shots near you?
>
> A. I don't know. I just heard shots.
>
> Q. Okay. So then you got into your car and you sped away backwards?
>
> A. Yeah.
>
> Q. And you hit a tree or a sidewalk. Correct?
>
> A. Yeah, I -- I guess I hit a tree. I hit something.
>
> Q. Okay. Do you remember what you hit?
>
> A. No, see, after that I don't remember nothing [sic].
>
> . . . .
>
> Q. Did you think the shots were meant for you?
>
> A. I wasn't thinking if they [were] meant for me. I just heard shots so I'm trying to get low.

There were bullet holes in J.R.'s car after the shooting. A bullet also "grazed" J.R. in his lower back. The trial judge described the location of J.R.'s injury as "[r]ight above [his] waist[.]" J.R. was not injured in any other way. The State did not produce any medical evidence to describe the severity of the injury. J.R. did not see who was shooting. When asked if defendant

was involved in the shooting, J.R. responded: "No, I never seen [sic] him before." The record shows J.R. was an uncooperative witness who made clear that he did not want to pursue this case.

> Q. Now you indicated on direct [examination] . . . [that] you've been visited by detectives a couple of times. Right?
>
> A. Yeah.
>
> Q. And were you ever asked if you could identify the person who --
>
> A. No.
>
> Q. -- fired the gun? The police never asked you to?
>
> A. Nope.
>
> Q. Did you ever tell them that you could?
>
> A. No, I didn't. I told them over, and over, I don't remember. And I told them to leave me alone. Like they keep coming to my house. I don't wanna [sic] be bothered. I don't even really wanna [sic] be -- I want -- I can't -- I gotta [sic] leave. I got things to do.

Pasuco was not on the party bus. He testified that defendant borrowed his 2010 Dodge Charger at approximately 8 p.m. on May 25, 2013. About three hours later, Pasuco received a call from defendant asking him how quickly he could get to Seaside Heights because "he had [gotten] into a fight on the party bus and . . . he didn't wanna [sic] take it back." When Pasuco told defendant

he could not make the trip to Seaside Heights, Pasuco claimed defendant decided to take the bus back to Jersey City.

Approximately thirty minutes later, defendant called Pasuco again. This time, Pasuco testified defendant told him "to go and get his gun[.]" Defendant told Pasuco he had parked the Dodge Charger in the parking lot of Our Lady of Mercy Academy before boarding the bus to Seaside Heights, and he had placed his handgun underneath the tire of a grey vehicle parked nearby. Pasuco drove to the parking lot in his sister's car and retrieved the handgun. Pasuco then received a text message from defendant advising him that the bus was fifteen minutes away. Defendant told Pasuco that he wanted the handgun as soon as he arrived.

Pasuco drove the Charger to where the bus was scheduled to arrive and waited. He soon saw the bus pull up. According to Pasuco, defendant was "almost the last [person to get] off the bus." Pasuco walked to meet defendant and said: "[W]hat's going on?" Defendant responded: "Oh nothing. You know, the kid . . . must have went home." Despite defendant's previous instructions, Pasuco did not hand the gun over to defendant. Pasuco testified he was waiting for defendant to say: "Oh, give it to me[.]" Pasuco gave the following account of what occurred next: "As we're walking[,] . . . a greenish car . . . starts flying down Lembeck [Avenue] and pulls into the . . . driveway . . . like towards the

left of where the cars are parked[.] . . . [H]e[] . . . speeds in and . . . he gets out . . . of his car and he starts to argue with . . . us."

Pasuco claimed the unidentified driver screamed and cursed at them. In the midst of this verbal dispute, Pasuco testified defendant told him "to give him the gun[.]" Pasuco claimed he was "frozen up[.]" Eventually, as Pasuco reached into his pocket, defendant "grab[bed]" the gun. At this point, someone threw a bottle at the unidentified driver's car, and the driver sped away. Pasuco testified that he heard a single gunshot followed by the sound of broken glass. He did not see defendant fire the gun because he was running away from the scene.

Pasuco drove his sister's car back to his home after the shooting took place. Defendant arrived with the Dodge Charger approximately five minutes later. Pasuco then drove defendant and two other friends home. Pasuco testified that during the ride, defendant said: "Oh, when I drink, man, I don't know . . . what the fuck I'm doing[.] . . . I didn't wanna [sic] do that." Pasuco also testified that he overheard the two friends saying they had "stashed" the handgun.

Against this record, defendant raises the following arguments on appeal:

POINT I

THE COURT'S [FAILURE] TO CHARGE THE JURY ON ANY LESSER-INCLUDED OFFENSES WITH RESPECT TO THE CONSPIRACY CHARGE REQUIRES REVERSAL OF DEFENDANT'S CONVICTION. (Partially Raised Below).

POINT II

DEFENDANT'S EIGHT-YEAR SENTENCE WITH AN [EIGHTY-FIVE PERCENT] PAROLE DISQUALIFIER IS EXCESSIVE.

N.J.S.A. 2C:1-8e cautions trial courts not to charge the jury "with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." However, a trial judge has an independent, non-delegable duty "'to instruct on lesser-included charges when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense.'" State v. Funderburg, 225 N.J. 66, 76 (2016) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)). Thus, even if neither the State nor defendant requests the trial judge to instruct the jury on a lesser included offense, the court must sua sponte provide such an instruction when appropriate. State v. Maloney, 216 N.J. 91, 107 (2013) (quoting State v. Thomas, 187 N.J. 119, 132 (2006)).

An offense is "included" when:

> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

> (2) It consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein; or
>
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.
>
> [N.J.S.A. 2C:1-8d (emphasis added).]

During the Rule 1:8-7(b) charge conference, the trial judge considered instructing the jury on lesser included offenses with respect to defendant's alleged conspiracy to commit second degree aggravated assault. The judge ultimately decided against giving this instruction based on the indictment's description of defendant's overt acts, which provided:

> Michael Pasuco retrieved a [r]evolver and brought it to the parking lot of Our Lady of Mercy Church, at the direction of Amir Legrande. Amir Legrande then took the gun and used it to discharge four bullets in the direction of [J.R.].

The judge concluded:

> [T]he jury would have to be instructed that the aggravated assault that makes up the conspiracy is only that . . . contained in the [i]ndictment, not any of the lesser included [offenses] that I'm charging. It has to be an attempt to . . . purposely or knowingly cause serious bodily injury, and that's it.

As this passage shows, the trial judge mistakenly believed the lesser included offense analysis required under N.J.S.A. 2C:1-8(d) was bound by the four corners of the overt acts described in the indictment.

The evidence presented at trial clearly provided a rational basis to instruct the jury on the lesser included offenses of conspiracy to commit third degree aggravated assault, N.J.S.A. 2C:12-1b(2); and conspiracy to commit fourth degree aggravated assault, N.J.S.A. 2C:12-1b(4). The jury could have found from Pasuco's testimony that defendant only wanted to have the gun available to him when he returned to Jersey City. Stated differently, the original conspiracy did not exclusively involve actually shooting anyone.

Because defendant did not request these charges, we review the trial judge's decision for plain error. R. 2:10-2. As applied to jury instructions, plain error requires us to determine whether the charge's impropriety "prejudicially affect[ed]" defendant's "substantial rights" and was "sufficiently grievous" to convince us that the error had a "clear capacity to bring about an unjust result." State v. Chapland, 187 N.J. 275, 289 (2006) (citation omitted). We are satisfied the trial judge's error had the clear capacity to produce an unjust result.

Aside from second degree conspiracy, the jury acquitted defendant of all charges in the indictment, including unlawful possession of a handgun and possession of a handgun for an unlawful purpose. The only evidence of conspiracy came from Pasuco's testimony. Pasuco testified that defendant told him "to go and get his gun." There is no other evidence revealing the conspiracy's underlying purpose. The failure to provide the jury with the options we have discussed sealed defendant's fate. Under these circumstances, the record "clearly indicated" the jury should have been charged with the lesser included offenses applicable to second degree conspiracy, see State v. Rivera, 205 N.J. 472, 475 (2011), and the trial judge's error constituted a manifest injustice.

We are compelled to reverse defendant's conviction and remand this matter for a new trial. In this light, we will not address defendant's argument attacking the reasonableness of his sentence.

Reversed and remanded. We do not retain jurisdiction.