SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5135-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NASEEM N. ABU-DAYYA, a/k/a ABU NASEEM N, DAYA NASEEM N, DAYA NASEEM,

Defendant-Appellant.

Submitted September 11, 2017 – Decided October 26, 2017

Before Judges Messano and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Indictment Nos. 13-02-0126, 13-04-0384, and 13-12-1103.

Joseph E. Krakora, Public Defender, attorney for appellant (Lon Taylor, Assistant Deputy Public Defender, on the brief).

Robert L. Taylor, Cape May County Prosecutor, attorney for respondent (Gretchen A. Pickering, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury acquitted defendant Naseem N. Abu-Dayya of conspiring with co-defendant Alexander J. Hudson to commit burglary and burglary but convicted defendant of the lesser-included offense of fourth-degree theft, N.J.S.A. 2C:20-3(a). The judge sentenced defendant to 365 days in the county jail.

On appeal, defendant presents the following arguments for our consideration:

> POINT I
>
> THE MOTION FOR A JUDGMENT OF ACQUITTAL OF THE THEFT CONVICTION NOTWITHSTANDING THE VERDICT, SHOULD HAVE BEEN GRANTED IN LIGHT OF ACQUITTALS FOR BURGLARY AND CONSPIRACY, THE TRIAL COURT'S DENIAL OF THE STATE'S MOTION TO INSTRUCT THE JURY ON RECEIPT OF STOLEN PROPERTY, AS WELL AS THE COURT'S ERRONEOUS RESPONSE TO A JURY QUESTION REGARDING THEFT.

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

The victim testified that she returned home from vacation and found her house burglarized. Approximately $50,000 worth of various items were missing, including a laptop computer. She suspected the involvement of Hudson, who lived across the street and was a cousin to her children.

Hudson gave a statement to police implicating defendant and pled guilty to conspiracy and burglary, providing a plea allocution detailing defendant's involvement. However, when called by the State as a witness at trial, Hudson recanted and claimed defendant

was not involved. The judge permitted the State to introduce the plea allocution as substantive evidence, finding it met the requirements of State v. Gross, 216 N.J. Super. 98 (App. Div. 1987), aff'd and remanded, 121 N.J. 1 (1990).

Police arranged for Hudson to call defendant to seek the return of the laptop computer. They listened in on the phone conversation, wherein defendant said he had "wiped" the computer and had already received an offer to sell it to someone else. Hudson offered more money and defendant agreed to meet him with the laptop. Detectives drove Hudson to the designated location on the boardwalk and arrested defendant when he emerged from his store to meet him. Defendant did not have the computer. Subsequent searches of defendant's home and business did not produce any of the stolen items from the victim's home, including the laptop computer.

Defendant gave police a formal statement that was played for the jury in which he denied any involvement and claimed to have been somewhere else at the time of the burglary. He admitted speaking to Hudson on the phone, but his version of the conversation differed completely from what the officers testified they overheard.

At the close of the State's case, defendant moved for a judgment of acquittal, Rule 3:18-1, which the judge denied.

Defendant objected to the State's request to charge receiving stolen property, N.J.S.A. 2C:20-7, pursuant to the consolidation of theft provisions of the Criminal Code, N.J.S.A. 2C:20-2. The judge agreed and did not give the charge.

During deliberations, the jury asked "[o]n count three . . . , theft, does the defendant need to be on the property at the location [of the victim's home]?" The judge intended to respond simply in the negative. Defense counsel initially took no position, but then the parties went to sidebar. Unfortunately, the conversation at sidebar was indiscernible and not transcribed. The judge decided to "stick right to the . . . question" asked, and told the jurors, "No, the defendant does not have to be on the property." Shortly thereafter, the jury returned the verdicts we referenced earlier.

While arguing for bail pending sentence, defense counsel contended the judge's answer to the jury question was "wrong," and she intended to file post-verdict motions. She argued that in light of the acquittal on other charges, the judge's answer permitted the jury to find defendant guilty of receiving stolen property, not theft of that property.

Defendant subsequently moved for judgment notwithstanding the verdict (JNOV), Rule 3:18-2, or alternatively a new trial, Rule 3:20-1. He claimed the evidence was insufficient to prove beyond

a reasonable doubt that he committed theft, and the judge's answer to the jury question was improper. During argument, the judge clarified what occurred at sidebar prior to responding to the jury question. Specifically, the judge said defense counsel requested he recharge the jury on theft; defense counsel agreed with the judge's recollection. Defense counsel reiterated her argument that the judge's answer permitted the jury to find defendant guilty of receiving stolen property, not theft. Finally, defense counsel argued the judge should vacate the conviction because it was inconsistent with the jury's decision to acquit defendant of conspiracy and burglary.

The judge carefully reviewed the evidence and the standards applicable to motions for JNOV or a new trial. Regarding the theft conviction, the judge properly noted, "[p]roof of the location is not an element of the charge." The judge concluded the jury could not have convicted defendant of receiving stolen property because he never provided instructions on that substantive offense. The judge denied the motions.

We review of the denial of defendant's motion for acquittal de novo, applying the same standard used by the trial judge. State v. Bunch, 180 N.J. 534, 548-49 (2004). "We must determine whether, based on the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all the favorable

inferences drawn from that testimony, a reasonable jury could find guilt beyond a reasonable doubt." State v. Williams, 218 N.J. 576, 594 (2014) (citing State v. Reyes, 50 N.J. 454, 458-59 (1967)). We "must consider only the existence of such evidence, not its 'worth, nature, or extent.'" State v. Brooks, 366 N.J. Super. 447, 453 (App. Div. 2004) (quoting State v. Kluber, 130 N.J. Super. 336, 342 (1974), certif. denied, 67 N.J. 72 (1975)).

A "judge . . . may grant the defendant a new trial if required in the interest of justice." R. 3:20-1.

> "The trial judge shall not, however, set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law."
>
> [Ibid.]

The judge's decision on a motion for a new trial based upon the insufficiency of the evidence "shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. "[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295, 306 (App. Div. 2016) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)).

Defendant asserts the inconsistency of the verdicts requires reversal. However,

> "[i]n reviewing a jury finding, we do not attempt to reconcile the counts on which the jury returned a verdict of guilty and not guilty. . . . Instead, we determine whether the evidence in the record was sufficient to support a conviction on any count on which the jury found the defendant guilty."
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> State v. Muhammad, 182 N.J. 551, 578 (2005) (citations omitted).

"We do not speculate whether verdicts resulted from jury lenity, mistake, or compromise." Ibid.; see also State v. Grey, 147 N.J. 4, 11 (1996) (noting inconsistent verdicts may have "resulted from jury lenity, compromise, or mistake not adversely affecting the defendant").

"Review of the sufficiency of the evidence on the guilty verdict[s] is independent of the jury's determination that evidence on another count[s] was insufficient." State v. Petties, 139 N.J. 310, 319 (1995) (citing United States v. Powell, 469 U.S. 57, 67, 105 S. Ct. 471, 478, 83 L. Ed. 2d 461, 470 (1984)). "Each count in an indictment is regarded as if it was a separate indictment." Muhammad, supra, 182 N.J. at 578 (citations omitted).

To prove defendant guilty of theft, the State needed to prove he knowingly "took or unlawfully exercised control" of the victim's property with an intent to deprive her of it. See Model Jury Charge (Criminal), "Theft Of Movable Property" (2008) (emphasis

added). The judge cited the testimony regarding the overheard conversation, in which defendant admitted that he had the victim's computer, "wiped" it clean and intended to sell it. We agree fully with the judge that the evidence supported the jury's finding of defendant's guilt beyond a reasonable doubt.

Defendant cites to Grey and State v. Branch, 301 N.J. Super. 307, 329-33 (App. Div. 1997), rev'd 155 N.J. 317 (1998), but those cases are inapposite. In each, the jury convicted the defendant of felony murder but not the underlying felony, a necessary element of felony murder. Grey, supra, 147 N.J. at 17; Branch, supra, 155 N.J. at 319.

Defendant incorrectly claims that because the jury concluded he did not "take" the laptop computer, he could only be guilty of receiving stolen property, a crime the judge correctly refused to charge, in part, because defendant was not on notice of the charge. As we have already said, one can be guilty of theft through the knowing and unlawful exercise of control over property, accompanied by the requisite intent to permanently deprive its owner.

The balance of defendant's arguments not otherwise specifically addressed lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.