SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5173-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SAMUEL K. DAVIS, a/k/a
KEVIN S. DAVIS,

Defendant-Appellant.

Submitted June 6, 2017 – Decided July 18, 2017

Before Judges Koblitz and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 12-12-1189.

Joseph E. Krakora, Public Defender, attorney for appellant (Alyssa Aiello, Assistant Deputy Public Defender, of counsel and on the briefs).

Sean F. Dalton, Gloucester County Prosecutor, attorney for respondent (Joseph H. Enos, Jr., Senior Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Samuel K. Davis appeals from his May 22, 2015 judgment of conviction after a jury convicted him of the first-degree crime of aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), of an elderly woman in her home. He was acquitted of murder and weapons charges in connection with the crime. Because the jury question as to whether mere presence at the scene was sufficient was not answered properly, we reverse and remand for a new trial.

Defendant was indicted for first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); third-degree possession of a golf club for an unlawful purpose, N.J.S.A. 2C:39-4(d); second-degree assault, N.J.S.A. 2C:12-1(b)(1); third-degree possession of a knife for an unlawful purpose, N.J.S.A. 2C:39-4(d); fourth-degree unlawful possession of a golf club, N.J.S.A. 2C:39-5(d); and fourth-degree unlawful possession of a knife, N.J.S.A. 2c:39-5(d).

The charges stem from the killing of seventy-nine-year-old Thirza Sweeten on March 18, 2012. The trial testimony revealed the following facts. Sweeten's daughter, Ms. Montalto, who lived nearby, checked on her mother, discovering the back door ajar before finding Sweeten's body.

Montalto testified that her brother Barry lived with their mother in the home, but had been in the hospital at the time of her death. Barry had a history of drug abuse and had people "com[ing] in and out" of the house.

Ms. Burgos was Sweeten's friend and had visited Sweeten the night of her death around 10:15 p.m. to ensure the elderly woman had taken her medication. While Burgos was visiting with Sweeten, Burgos heard a "thump" from Barry's room. Burgos went into Barry's room, but did not initially see anything. She remained there to make a phone call, and then heard the bedroom window slide open and saw defendant through the window. According to Burgos, she told defendant "What the F are you doing? Barry's not here. He's at the hospital." Defendant left and she then closed the window and pulled the window's safety tabs to ensure the window could not be raised more than a couple of inches.

Defendant's presence at the window "creeped [Burgos] out" because she did not know it was common for him come to the window when he was looking for Barry. Barry explained that he frequently let defendant and his other friends in and out through his bedroom window.[1] One print taken from the outside of Barry's window matched defendant.

Nicholas Schock, a detective with the Gloucester County Prosecutor's Office, conducted a "walk through" of the scene. He observed Sweeten lying on her back in the doorway between the front bedroom and the living room with her shirt and bra pulled

[1] Montalto's husband, Derrick, confirmed it was a common practice for visitors to tap on the living room window to get Sweeten's attention and to tap on Barry's window to get Barry's attention.

up, exposing her stomach and breasts. There was evidence of trauma to Sweeten's head, chest, hands, and neck. The detective also noticed a broken phone cord in the living room and a golf club, which had blood on it. There was a notepad in the living room that had "drugger Kevin" scrawled on it.

According to the medical examiner, Sweeten had two stab wounds in her chest, an injury to her neck that was consistent with strangulation with a cord, and a three-inch laceration on her head that was consistent with being struck with a golf club. Although the precise cause of death was unknown, the medical examiner testified that either the stab wounds or the blunt force trauma to Sweeten's head and neck could have caused her death.

Detective Schock "documented" evidence at the scene — like the phone cord, golf club, and notepad — but did not collect those items until after he returned from the morgue later that evening. Schock collected Sweeten's clothing at the morgue. He brought the victim's clothing back to her home.

The following morning, Schock returned to Sweeten's home to assist investigators in searching for additional evidence. During this visit, the following items were collected: a broken knife found on a kitchen chair; a pink plastic bag used to package drugs, which was found in the living room; beer, soda, and liquor bottles; cigarette butts; and dried blood scrapings from a kitchen chair.

Schock left Sweeten's home and returned to the prosecutor's office, where defendant was being interviewed, in order to collect defendant's clothing. While photographing defendant's clothing the following day, Schock noticed stains on the inside of the rear waistband of defendant's pants, which testing indicated was blood.

The day after the killing, defendant provided an extensive statement to the police denying his involvement in Sweeten's death. Defendant stated he did not have a permanent residence and occasionally slept in one of the junk cars parked in Conrad Campbell's yard. According to defendant, Campbell also occasionally employed defendant for odd jobs.[2]

Defendant initially told the police that he went to sleep early around 9:00 p.m. on the evening of March 18, 2012, but when confronted with the fact that someone had seen him near Barry's house around 11:00 p.m., defendant explained he had in fact been at Marlene Waller's house. Defendant further explained he did not want to admit where he was because he and Waller "got high" together and he did not want to be a "snitch." He said he left Waller's house around 11:30 p.m. Waller told him to return around midnight. Defendant returned then, but Waller refused to let him inside. Waller later testified that she refused to let him inside

[2] Campbell had known defendant for more than thirty years, and never had any problems with him, testifying defendant was "a good worker."

because her boyfriend was about to come home. After defendant was denied entry into Waller's home, he went to sleep in the truck that was in Campbell's yard.

Defendant explained to the police that he knew Barry because he and Barry were both "drug runners," although they worked for different people, and they occasionally would "get high" together. Defendant also explained he knew Sweeten because she was home when he visited Barry. He stated the last time he saw Barry was two weeks before, when Sweeten told him Barry had a heart-attack and was in the hospital. She told defendant not to come around anymore. Defendant denied involvement in Sweeten's murder, but did insinuate that another one of Barry's associates from his drug running could have had something to do with it.

The cigarette butts, pink plastic bag, broken knife, blood scraping from the kitchen chair and bottles were not forensically tested. Sweeten's clothing, Davis' clothing, the golf club, the phone cord, hair fragments found on the victim and the sexual assault kit were submitted for forensic analysis. The evidence was examined by a trace evidence examiner and a forensic serologist, both from the New Jersey State Police Office of Forensic Sciences. Defendant was not identified as the source of the hair fragments. No textile fibers transferred between

defendant's clothing and Sweeten's clothing, the samples taken from the sexual assault kit, the golf club, or the telephone cord.

The forensic serologist collected a saliva sample from Sweeten's bra, a blood sample from the head of the golf club, and two blood samples from defendant's clothing, one from a bloodstain on the left thigh of defendant's pants and another from the lower, right front of defendant's shirt. She also swabbed the golf club and phone cord for skin cells. She found no evidence of a sexual assault.

Another expert from the New Jersey State Police Laboratory conducted a DNA analysis on the blood, saliva samples, and skin cell samples. The expert identified Sweeten as the source of the major DNA profile on the blood found on the golf club. The expert also identified Sweeten as a possible contributor to the DNA profile for the skin cells that were found on the golf club handle, and was able to conclude defendant was not a contributor to the DNA profile. Samples from the phone cord revealed two DNA profiles: one from Sweeten and one from an unidentified male who was not defendant. Two DNA profiles were found on the blood sample from defendant's pants: Sweeten was the source of the major DNA profile and defendant the minor DNA profile. The expert was unable to identify the source of the mixed DNA profile obtained from defendant's shirt.

In defense counsel's summation, he argued defendant was truthful in his statement to law enforcement. He also argued defendant was not the assailant because his DNA was conclusively excluded from the DNA samples taken from the golf club and the phone cord. As for the bloodstain on defendant's pants, counsel explained that the blood could have stained the pants by cross-contamination during evidence collection. The detective did not initially notice the blood on the pant-leg, although noticing a spot on the waistband that was not tested. Counsel argued that if defendant had been the killer, more than a stain of Sweeten's blood would have been found on defendant's clothing, given the type of blunt force trauma she experienced. Moreover, counsel argued defendant had no motive for the crime — it was not a robbery and there was no evidence of sexual assault.

The day after the jury began deliberating, it sent the trial court a note asking, "Do charges include the suspect's presence at the time of the crime, without placing the weapon in his hand?" The court interpreted the question to mean defendant "was there, [but] someone else did it[.] Someone else had the weapon and struck the blows." Defense counsel urged the court to respond that "mere presence at or near the scene does not make a person a participant in the crime; nor, does the failure of a spectator to interfere make him or her a participant in the crime" and that

"[i]t depends upon the totality of circumstances that appear from the evidence." The State objected, reasoning that defense counsel's instructions came from the charge for accomplice liability and defendant was neither charged as an accomplice nor was his defense that he was an accomplice.

While the court and counsel conferred on the response to the jury, the jury sent another note asking if they would get a break for lunch as they were getting hungry. Before sending the jury for lunch, the court delivered its response to the jury's question. The court acknowledged that it could not comment on the evidence but "reminded [the jury] that the State bears the burden of proof to prove each and every essential element of the crimes charged, in each count, beyond a reasonable doubt." The court also stated that the jury "must determine . . . whether the crimes charged in the Indictment were committed by the defendant." The court did not reread the charge, but encouraged the jurors to review the copy of the charge that had been provided to them.

After returning from lunch, the jury returned its verdict, finding defendant guilty of aggravated manslaughter, a lesser-included offense of murder, and acquitting defendant of all other charges including possession of the golf club, the weapon recovered

at the scene covered in blood. The court sentenced defendant to prison for life without parole.[3]

On appeal defendant raised the following points:

> POINT I: THE JURY'S QUESTION INDICATED THAT THE JURY DID NOT KNOW HOW TO DETERMINE GUILT OR INNOCENCE IF IT CONCLUDED THAT DAVIS WAS PRESENT AT THE SCENE OF THE HOMICIDE BUT DID NOT CAUSE THE VICTIM'S DEATH BY HIS OWN CONDUCT. THE JUDGE'S RESPONSE, WHICH SIMPLY REITERATED, IN GENERAL AND ABSTRACT TERMS, WHAT THE BURDEN OF PROOF IS IN A CRIMINAL CASE, FAILED TO PROVIDE THE JURY WITH THE GUIDANCE IT NEEDED TO PROPERLY REACH A VERDICT ON THE HOMICIDE COUNT.
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> POINT II: THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING DAVIS TO LIFE IN PRISON. IN THE ALTERNATIVE, THE COURT ERRED IN ORDERING DAVIS TO SERVE HIS SENTENCE WITHOUT THE POSSIBILITY OF PAROLE BECAUSE LIFE WITHOUT PAROLE IS NOT A PERMISSIBLE SENTENCE UNDER N.J.S.A. 2C:44-3A.

On appeal, defendant takes issue with the trial court's instruction after the jury asked a question inferring defendant was at the scene but did not cause the victim's death. Quoting State v. Middleton, 299 N.J. Super. 22, 30 (App. Div. 1997), defendant argues a "trial court must respond substantively to questions asked by the jury during deliberations." While defendant

[3] This sentence, imposed as a discretionary extended term, is not statutorily authorized. N.J.S.A. 2C:43-7(a)(1). Defendant was eligible for a life term under the No Early Release Act, N.J.S.A. 2C:43-7.2(d)(2) (NERA). NERA explains "a sentence of life imprisonment shall be deemed to be 75 years." N.J.S.A. 2C:43-7.2(b). Life without parole is not authorized.

acknowledged the court did not have to read his proposed instruction on "mere presence," it "needed, at a minimum, to forcefully convey to the jury that [defendant] could not be found guilty of murder or any lesser homicide offense unless it was convinced that Sweeten's death was caused by [defendant's] own conduct and not by the conduct of another."

"'[W]hen a jury requests a clarification,' the trial court 'is obligated to clear the confusion.'" State v. Savage, 172 N.J. 374, 394 (2002) (quoting State v. Conway, 193 N.J. Super. 133, 157 (App. Div.), certif. denied, 97 N.J. 650 (1984)). "[T]he trial judge is obliged to answer jury questions posed during the course of deliberations clearly and accurately and in a manner designed to clear its confusion, which ordinarily requires explanation beyond rereading the original charge. The court's failure to do so may require reversal." Pressler & Verniero, Current N.J. Court Rules, comment 7 on R. 1:8-7 (2017). Our Supreme Court recently held in similar circumstances, where the defendant was not charged as an accomplice nor was the accomplice liability instruction given to the jury, that a "mere presence" instruction should have been provided to the jury. State v. Randolph, __ N.J. __, __ (2017) (slip op. at 3). In Randolph defendant was found hiding in an apartment above the apartment where the drugs were found that formed the bases for the criminal possession charges. Id.

at 5-7. The Court stated, "the better course would have been to give the charge to disabuse the jury of any possible notion that a conviction could be based solely on defendant's presence in the building." Id. at 31.

Here, defendant was not convicted of possession of the murder weapon, nor was forensic evidence presented linking him to the bloody golf club or the phone cord. Another male's DNA was found on the phone cord. The jury asked a question which the court interpreted to mean defendant "was there, [but] someone else did it[.] Someone else had the weapon and struck the blows." Rather than answering that question directly as defendant requested, the court repeated basic jury charges regarding the State's burden of proof and told the jury to reread the other charges, none of which included the answer to their question:

> Mere presence at or near the scene does not make one a participant in the crime, nor does the failure of a spectator to interfere make him/her a participant in the crime. It is, however, a circumstance to be considered with the other evidence.
>
> [Model Jury Charge (Criminal), "Liability for Another's Conduct" (N.J.S.A. 2C:2-6) (May 1995).]

In Randolph, in light of the charges given on joint and constructive possession, the Court found the error harmless. Randolph, supra, slip op. at 3, 31. Considering the jury's specific question and its verdict, we cannot find the failure to

answer the jury's question harmless, especially as the evidence tying defendant to the crime was not overwhelming.

Reversed and remanded for a new trial on the charge of aggravated manslaughter. We do not retain jurisdiction.