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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5592-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD WHATLEY,

Defendant-Appellant.

Submitted May 31, 2017 – Decided July 18, 2017

Before Judges Messano and Suter.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 13-12-3038.

Joseph E. Krakora, Public Defender, attorney
for appellant (Susan Brody, Deputy Public
Defender, of counsel and on the brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Barbara
A. Rosenkrans, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Tried by a jury, defendant Richard Whatley was convicted of
the lesser-included offense of second-degree passion-provocation

manslaughter, N.J.S.A. 2C:11-4(b)(2), and second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). The judge sentenced defendant to a ten-year period of imprisonment, with an 85% period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on the manslaughter conviction. He imposed a consecutive eight-year term with a mandatory four-year period of parole ineligibility under the Graves Act, N.J.S.A. 2C:43-6(c), on the weapons charge.

Defendant raises the following issues on appeal:

POINT I

THE COURT'S PURPORTED LIMITING INSTRUCTION AS TO TAYLOR KENNEDY'S REBUTTAL TESTIMONY FAILED TO IDENTIFY THE SOLE LEGITIMATE PURPOSE FOR WHICH THE TESTIMONY COULD BE CONSIDERED OR TO INSTRUCT THAT IT COULD NOT BE USED FOR ANY OTHER PURPOSE, THUS GREATLY PREJUDICING DEFENDANT'S RIGHT TO A FAIR TRIAL. (Not Raised Below)

POINT II

THE PROSECUTOR COMMITTED MISCONDUCT IN A NUMBER OF INSTANCES THROUGHOUT THE TRIAL.

A. The Prosecutor Impermissibly Bolstered the Credibility Of the Lead Detective by Questioning Him as to Why He Sought Charges Against Defendant At the Time He Did.

B. The Prosecutor Repeatedly Emphasized to the Jury That Shaquanah Williams Was Fearful of Retaliation For her Testimony, Strongly Implying That Her Fear was Justified.

C. The Prosecutor's Summation Included A Crucial Statement That Was Based on Information Not Found In The Record And That Was Factually Inaccurate.

D. The Prosecutor Overstepped the Bounds of Permissible Questioning in His Cross-Examination of [Defendant] About His Failure to Go to Police with His Self-Defense Claim.

POINT III

THE COURT ERRED IN IMPOSING A CONSECUTIVE SENTENCE ON THE WEAPON POSSESSION CHARGE AND IN IMPOSING A MANIFESTLY EXCESSIVE TERM ON EACH CHARGE.

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

I.

We briefly summarize the evidence adduced at trial, limited to that which is necessary to place defendant's legal arguments in proper context.

On May 27, 2013, the Kennedy family hosted a barbecue for family and friends at their home in Newark. Rayquan Williamson organized the annual barbeque and approximately thirty to forty people were present at various times of the day. Rayquan's younger sister, Taylor Kennedy, invited defendant and his friend, identified only as Max, to the barbecue. Toward the end of the evening, an argument ensued, causing Williamson to escort defendant and Max out of the party. A derogatory remark aimed at

one of the women at the party led to a physical altercation involving several people in front of the house.

Shots rang out. Williamson saw defendant with a small revolver in his hand. Williamson and his friend briefly followed defendant and Max as they retreated down the street, with defendant repeating, "he hit me, he hit me first", and "he popped on me." Williamson heard police sirens, turned back to the house and found Teshon Clegg, a close family friend who lived nearby and was at the party, laying lifeless in the street. Clegg died of a single gunshot wound to the chest.

Williamson's sister, Janeal Ferguson, said Max instigated the trouble, and defendant was relatively calm during the party and as he and Max were leaving. As the melee ensued in front of the house, Ferguson saw Clegg strike defendant and pin him against a parked car. She went into the backyard to clean up because the party was winding down and heard two gunshots. When she ran to the front of the house, Clegg was laying in the street several houses away.

Shaquanah Williams was Williamson's girlfriend. While at the barbecue, she overheard defendant say he had a "pocket rocket," a slang term for a gun. She told Williamson she was leaving because she was "scared" and knew "somebody had a gun on them." Williams was about to get into her car when she saw Williamson "tussling

with Max." As she moved toward them, Williams saw defendant fire two shots in Clegg's direction.

A neighbor, who did not identify defendant in court, testified to seeing a man with a white shirt pointing a gun in the direction of the crowd and hearing two shots. Other witnesses testified that defendant was wearing a white shirt. The neighbor called 9-1-1 after hearing Clegg scream that he was shot.

The police witnesses described a hectic scene when they responded, with fifty or sixty people milling around. Police found a .22 caliber bullet at the scene, which was fired from the same gun as the bullet removed from Clegg's body at autopsy. Police conducted an investigation and attempted, unsuccessfully, to locate defendant. On June 11, 2013, police issued a warrant for defendant's arrest. Defendant turned himself into authorities on June 17, 2013.

Defendant testified. He stated Max began an argument with a woman at the party, which soon escalated into a melee, during which Clegg punched defendant in the head and tackled him to the ground. Defendant denied having a gun that evening, but, instead, claimed Clegg had a gun, which fell to the ground and discharged as Clegg lifted up his shirt to display the weapon. Both men grabbed for the gun, but defendant retrieved it. When Clegg tried to grab defendant's hand, a second round discharged.

Clegg ran off before collapsing. Defendant still had the gun in his hand as the crowd started to surround him. He ran off, throwing the gun in a manhole before arriving at his cousin's house. When asked why he threw the gun away, defendant testified, "I'm not used to walking around carrying guns. That's not . . . what I do. That's not the life that I live." Defendant's family arranged for him to surrender after learning about the arrest warrant.

During cross-examination, the prosecutor repeatedly asked defendant if he went to the police on the night of the shooting or any time prior to the issuance of the arrest warrant. Most of these questions prompted no objection. However, when the prosecutor asked if anything "prevented [defendant] from telling" police his version of events on June 17, 2013, the day he surrendered, defense counsel's objection prompted an extended legal argument outside the presence of the jury, during which defense counsel moved for a mistrial.¹

The judge denied defendant's mistrial motion, ordered the prosecutor to cease questioning defendant about his pre-arrest silence, and, when the proceedings reconvened, the judge gave the

¹ Over defendant's objection, the prosecutor had earlier asked one of the detectives, Eric Manns, if he had taken a statement from defendant when defendant surrendered. The detective responded in the negative.

following instruction to the jury: "A defendant's silence, while in custody, under interrogation, or at or near the time of his arrest, cannot be used against him." Defendant did not object to the charge nor ask for any additional instruction.

Defendant's cousin also testified. When he saw defendant late in the evening of May 27, defendant was "shaken up," "scared" and "frantic". Defendant told his cousin he had been in an altercation with another person, who was unintentionally shot when both men reached for a gun.

The prosecutor called Taylor Kennedy as a rebuttal witness. She had known defendant for about a year and spent time with him nearly every day. Toward the end of the barbecue, Kennedy heard gunshots and saw defendant holding a silver "little cowboy gun, like a revolver." Kennedy testified that she saw defendant with the same gun on a prior occasion at Max's house, although she was vague about exactly when this occurred. Kennedy stated that defendant grew angry with others in the house on that day and fired the gun into the ceiling.

After several days of deliberations, the jury returned the guilty verdicts referenced above and acquitted defendant of possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a).

II.

Although we have not been provided with transcripts of any pre-trial proceedings, the judge had apparently barred the State from introducing evidence of defendant's possession of a gun prior to the shooting. However, after defendant testified that he never possessed a gun, had a general aversion to them and the gun belonged to Clegg, the prosecutor sought to call Kennedy as a rebuttal witness.

After conducting a N.J.R.E. 104 hearing and over defendant's objection, the judge concluded defendant's testimony had "opened the door." He conducted an analysis pursuant to State v. Cofield, 127 N.J. 328 (1992), and agreed to permit Kennedy's testimony.

The judge provided the jury with the following limiting instruction, which included defense counsel's specific suggestions and which defense counsel ultimately approved:

[T]he State has just introduced evidence that the defendant allegedly possessed a handgun at a date prior to May 27th, 2013, the date of the alleged murder.

Normally such evidence is not permitted under our rules of evidence. Our rules specifically exclude evidence that a defendant has committed other crimes, wrongs or acts when it is offered only to show that he has a disposition or tendency to do wrong, and therefore must be guilty of the charged offenses. Before you give any weight to this evidence, you must be satisfied that the -- that the defendant committed the other crime,

wrong, or act. If you are not so satisfied, you may not consider it for any purpose.

However, our rules do permit evidence of other crimes, wrongs, or acts when the evidence is used for certain specific, narrow purposes.

In this case, the State has introduced evidence that the defendant allegedly possessed a handgun at a date prior to May 27th, 2013, the date of the alleged homicide, to show absence of mistake or accident as to whether the defendant allegedly possessed a handgun on the evening of May 27th, 2013. The State contends that the defendant possessed a handgun on May 27th, 2013; whereas the defense contends that the decedent, Teshon Clegg, was the one who allegedly possessed the handgun on May 27th, 2013, just prior to Mr. Clegg being shot.

Whether this evidence does in fact demonstrate the absence of mistake or accident it is for you to decide. You may decide that the evidence does not demonstrate the absence of mistake or accident and is not helpful to you at all. In that case, you must disregard the evidence. On the other hand, you may decide that the evidence does demonstrate the absence of mistake or accident and use it for that specific purpose.

However, you are not -- however, you may not use this evidence to decide that the defendant has a tendency to commit crimes or that he is a bad person. That is, you may not decide that just because the defendant had committed other crimes, wrongs, or acts, he must be guilty of the present crime. I have admitted the evidence only to help you decide the specific question of the absence of mistake or accident. You may not consider it for any other purpose and you may not find the defendant guilty now simply because the State

has offered evidence that he committed other crimes, wrongs, or acts.

The judge reiterated the limiting instruction during the final jury charge.

Defendant now argues the limiting instruction was "erroneous, misleading and inadequate," because he never contended he possessed the gun "by mistake or accident." Rather, the only point of Kennedy's testimony was to identify the murder weapon as a revolver belonging to defendant, not Clegg. Defendant argues the erroneous instruction, therefore, permitted the jury to use the evidence to impeach his credibility, which, he argues, was impermissible. We find these arguments unpersuasive.

Initially, defendant's argument that N.J.R.E. 404(b) evidence is not admissible to impeach the credibility of his trial testimony is plainly wrong. He cites State v. Skinner, 218 N.J. 496 (2014), but that reliance is misplaced. There, the Court repeated its discouragement of "the use of other-crime evidence merely to bolster the credibility of a testifying witness." Id. at 520 (emphasis added). Rather, this case is more like State v. Lykes, 192 N.J. 519 (2007). There, the Court concluded questioning about the "defendant's prior involvement with a vial of cocaine was relevant to the jury's assessment of defendant's credibility when

he testified that he did not know what was in the vial." Id. at 537.

Moreover, Kennedy's testimony was relevant to prove a contested fact at trial, not just to impeach defendant's testimony. The State's witnesses claimed defendant had the gun and shot Clegg. Defendant asserted Clegg's shooting was unintentional, i.e., an accident or mistake. The charge accurately focused the jury's attention on the relevancy of Kennedy's testimony as to defendant's prior possession of the very same gun.

In short, the instruction as given was not plain error. See, e.g., State v. Brown, 190 N.J. 144, 160 (2007) ("Plain error . . . is [l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." (quoting State v. Torres, 183 N.J. 554, 564 (2005))).

III.

Defendant argues the prosecutor's misconduct requires reversal. While prosecutors are entitled to zealously argue the merits of the State's case, State v. Smith, 212 N.J. 365, 403 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013), they occupy a special position in our system of

criminal justice. State v. Daniels, 182 N.J. 80, 96 (2004). "[A] prosecutor must refrain from improper methods that result in a wrongful conviction, and is obligated to use legitimate means to bring about a just conviction." Ibid. (quoting State v. Smith, 167 N.J. 158, 177 (2001)). Even if the prosecutor exceeds the bounds of proper conduct, "[a] finding of prosecutorial misconduct does not end a reviewing court's inquiry because, in order to justify reversal, the misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" Smith, supra, 167 N.J. at 181 (quoting State v. Frost, 158 N.J. 76, 83 (1999)).

In Points IIA and IID, the arguments involve the prosecutor's direct examination of Detective Manns and cross-examination of defendant. The contentions made in Points IIB and IIC relate to the prosecutor's summation. We find none of the objected to conduct, singly or collectively, requires reversal.

A.

Defendant argues the prosecutor improperly questioned Detective Manns by asking why the detective did not issue an arrest warrant immediately after the shooting, even though defendant was a "target" as of May 28. Defendant contends the testimony bolstered the credibility of Detective Manns, was largely irrelevant and was highly prejudicial.

In particular, defendant objects to the following exchange:

Prosecutor: Why did you seek charges in this case?

Detective: I seeked [sic] charges on June 11th, because . . . I had enough evidence to charge [defendant]. . . . [A]s a police detective, I was satisfied that there was enough evidence from enough witnesses to charge [defendant].

Defense counsel immediately objected on relevancy grounds, and, before the court ruled, the prosecutor agreed to "stop" the detective "right there."

We agree this exchange was improper, because it implied police had sufficient evidence to conclude defendant committed the homicide. See, e.g., State v. Frisby, 174 N.J. 583, 592-96 (2002) (explaining impropriety of police testimony regarding opinions formed during investigation as to credibility of witnesses). We are convinced, however, that this exchange does not require reversal.

As the Court has explained:

[A] trial is not a perfectly scripted and choreographed theatrical presentation; rather, it is an extemporaneous production whose course is often unpredictable given the vagaries of the human condition. Attorneys will sometimes pose inartfully crafted questions, and even the most precise question may bring an unexpected response from a witness. In any trial, "inadmissible evidence frequently, often unavoidably, comes to the attention of the jury."

[State v. Yough, 208 N.J. 385, 397 (2011)
(quoting State v. Winter, 96 N.J. 640, 646
(1984)).]

Here, defense counsel objected and, before the judge could sustain the objection, the prosecutor ceased further questioning.

Moreover, we disagree with defendant's contention that the prosecutor's questioning leading up to this exchange was irrelevant or bolstered the detective's credibility. From the prosecutor's opening statement, the State contended defendant fled the scene and could not be located for nearly three weeks after the shooting, implying the jury should ultimately reject defendant's version of events. The detective's earlier testimony detailed the efforts made to find defendant after the shooting. The judge charged flight in his final jury instructions. In short, while some of the testimony was improper, its admission does not require reversal. See id. at 397-98 ("[W]hen inadmissible evidence erroneously comes before the jury, an appellate court should not order a new trial unless the error was 'clearly capable of producing an unjust result.'" (quoting R. 2:10-2)).

B.

Defendant next argues the prosecutor's extensive cross-examination regarding defendant's failure to voluntarily approach law enforcement prior to his surrender and provide his version of events was improper and violated defendant's right to remain

silent. He contends the judge's limiting instruction was insufficient. We disagree.

In Brown, supra, 190 N.J. at 148, the Court considered whether the prosecutor could cross-examine the defendant, who fled after committing a vicious assault, about his failure to assert that he acted in self-defense prior to his testimony at trial. The Court stated that "once the defendant elects to testify, similar to every other witness, the defendant has an obligation to tell the truth on the witness stand." Id. at 158 (citing State v. Burris, 145 N.J. 509, 530 (1996)). The Court held "[w]hen the pre-arrest silence does not involve governmental compulsion, the State may fairly cross-examine defendant concerning his pre-arrest conduct as it bears on his credibility." Ibid. "[W]hen the objective circumstances demonstrate that a reasonable person in [the] defendant's position would have acted differently, the State may attempt to impeach defendant on that pre-arrest conduct or silence." Id. at 159.²

² The Court also held that the judge "should instruct the jury that the evidence of defendant's pre-arrest conduct or silence is admitted for the limited purpose of impeaching defendant's credibility and that it cannot be used as evidence of defendant's guilt." Brown, supra, 190 N.J. at 159.

Here, the judge ultimately ordered the prosecutor to cease questioning defendant about his pre-arrest silence. After his mistrial motion was denied, defense counsel did not object to the instructions given by the judge nor request any further instruction

Defendant argues Brown was wrongly decided, the circumstances in this case did not permit a conclusion that it was reasonable for defendant to have acted differently and the prosecutor's relentless questioning about his pre-arrest silence was prejudicial. We are unpersuaded by these arguments.

The Court reiterated the basic holding of Brown in State v. Stas, 212 N.J. 37, 58 (2012) ("[P]re-arrest silence that is not 'at or near' the time of arrest, when there is no government compulsion and the objective circumstances demonstrate that a reasonable person in a defendant's position would have acted differently, can be used to impeach that defendant's credibility with an appropriate limiting instruction."). Defendant claims that he acted reasonably under the circumstances by not coming forward because he had received threats on his life immediately after the shooting. If anything, that cuts the other way, because a reasonable person who acted in self-defense and only fled the scene in fear would likely have sought protection from law enforcement. The prosecutor's cross-examination was extensive, but much of it elicited no objection, and we defer to the judge's

limiting the use of the testimony to impeachment purposes. We cannot conclude that the failure to give an instruction limiting the use of defendant's pre-arrest silence to impeachment purposes was, in and of itself, plain error. R. 2:10-2.

discretion in matters involving the conduct of the proceedings and control of cross-examination. N.J.R.E. 611.

C.

Defendant argues the prosecutor's summation requires reversal. "Our task is to consider the fair import of the State's summation in its entirety." State v. Jackson, 211 N.J. 394, 409 (2012) (internal quotation marks and citation omitted). The prosecutor is permitted to vigorously rebut specific arguments made by defense counsel. See State v. Mahoney, 188 N.J. 359, 376-77 (2006) (holding a "prosecutor's comment[] . . . placed an unforgiving and harsh glare on defendant's . . . defense" but was permissible). "Whether particular prosecutorial efforts can be tolerated as vigorous advocacy or must be condemned as misconduct is often a difficult determination to make. In every instance, the performance must be evaluated in the context of the entire trial" State v. Negron, 355 N.J. Super. 556, 576 (App. Div. 2002).

Defendant argues the prosecutor improperly commented on defendant's claim that Clegg's gun accidentally fired when it hit the ground by telling jurors, "[G]uns have to be fired. They're inanimate objects, kind of like this pen. If you don't use them, they don't work. Somebody pulled that trigger. That gun just

didn't fall and go off." He argues significant academic studies support the conclusion that guns accidentally fire when dropped.

There was no objection to the prosecutor's comment, and while it might not be empirically accurate, it invited the jury to make a reasonable inference that the gun probably did not misfire. In the scheme of things, the comment was insignificant.

Defendant's second argument stems from Williams' trial testimony, during which the judge permitted the prosecutor to ask her on direct examination why her trial testimony differed from her prior statement to police. She explained that she was seven months pregnant at the time, "didn't want to be involved" and told police she was inside her car because she did not want to testify in open court. She told jurors she was "fearful."

In his summation, defense counsel vigorously attacked Williams' credibility, citing her inconsistent statements. In his summation, the prosecutor referenced William's demeanor during her tearful testimony and implied she feared defendant who she saw "shoot an unarmed man."

Defendant argues the summation comments implied he was a dangerous man whose mere presence could intimidate witnesses, even though there was no proof he had engaged in such conduct. The comments would have been better stated in more general terms, since it is an unfortunate reality, not lost on jurors, that

witnesses choose to remain uninvolved for a variety of reasons, including unspecified fears. However, given the evidence and considering the summation as a whole, we cannot conclude the prosecutor's comments denied defendant his right to have the jury fairly evaluate the evidence against him. See, e.g., State v. Echols, 199 N.J. 344, 360 (2009) ("Reversal is justified when the prosecutor['s] . . . conduct was 'so egregious as to deprive defendant of a fair trial.'" (quoting State v. Wakefield, 190 N.J. 397, 437 (2007), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008))).

IV.

Defendant argues the imposition of consecutive sentences was inappropriate, and the sentences were excessive. We disagree and affirm.

We begin by noting that "[a]ppellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). As the Court has reiterated:

The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[State v. Fuentes, 217 N.J. 57, 70 (2014)
(alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Furthermore, "trial judges have discretion to decide if sentences should run concurrently or consecutively." Miller, supra, 205 N.J. at 128. "When a sentencing court properly evaluates the Yarbough factors³ in light of the record, the court's decision

³ The Yarbough factors are:

- (1) there can be no free crimes in a system for which the punishment shall fit the crime;
- (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
 - (a) the crimes and their objectives were predominantly independent of each other;
 - (b) the crimes involved separate acts of violence or threats of violence;
 - (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
 - (d) any of the crimes involved multiple victims;
 - (e) the convictions for which the sentences are to be imposed are numerous;
- (4) there should be no double counting of aggravating factors;

will not normally be disturbed on appeal." Miller, supra, 205 N.J. at 129.

Here, the judge carefully considered the appropriate aggravating factors and mitigating factors urged by defense counsel. He noted that, although defendant was only nineteen when he committed these crimes and had no prior indictable convictions, defendant had prior juvenile adjudications and was an self-acknowledged member of the Bloods street gang. He credited defendant with certain mitigating factors, but found they were outweighed by the aggravating factors.

With respect to imposing consecutive sentences, citing Yarbough and Miller, the judge stated defendant's unlawful possession of the handgun was a crime separate from the homicide.⁴

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense[.]

[State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).]

A sixth factor, imposing an overall outer limit on consecutive sentences, was superseded by legislative action. See State v. Eisenman, 153 N.J. 462 (1998).

⁴ The State argues a consecutive sentence for the firearm possession was appropriate given defendant's possession of the gun on a date prior to the shooting. The judge specifically did not justify the sentence on this ground, and we reject the argument because defendant was never charged with possession of the handgun on any day other than the date of the homicide.

He imposed consecutive sentences because "there shall be no free crimes committed in the system, and . . . these were separate and independent crimes."

We accord substantial deference to the trial judge's decision, both as to the sentences imposed and whether they are to be served concurrently or consecutively. The judge did not mistakenly exercise his broad discretion in this regard, and we find no basis to reverse defendant's sentence.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION