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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5705-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROGER HOWARD,

Defendant-Appellant.

Submitted October 11, 2016 – Decided March 1, 2017

Before Judges Espinosa and Suter.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 13-07-1891.

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

Diane Ruberton, Acting Atlantic County Prosecutor, attorney for respondent (John J. Lafferty, IV, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Roger Howard appeals his conviction on two counts of first-degree attempted murder following a jury trial. Defendant alleges error regarding the jury charge on identification,

comments by the trial judge made in front of the jury and at sidebar directed to defense counsel, and the length and consecutive nature of his sentence. We affirm the convictions and sentence.

I.

In October 2012, cousins A.T. and Q.D.[1] were walking on New York Avenue in Atlantic City with three other friends on their way to Q.D.'s house a few blocks away. The group stopped at a convenience store called "501" and went in. While in the store, A.T. was approached by a person dressed in a dark-colored hoodie with a mask of some type pulled down around his neck, and asked A.T., who was wearing "Obsidian Jordan 12" sneakers, about the size of his shoes. A.T., who wore a size thirteen sneaker, said the sneakers were size eight. After that person left the store, A.T. peeked outside to see if the person was gone and, being satisfied, the group left.

Once outside, they proceeded toward Q.D.'s house, but three members of the group crossed to the other side of the street, leaving A.T. and Q.D. together. Shortly thereafter, A.T. and Q.D. were accosted from the shadows of a dark alleyway by an individual holding a gun in his hand and wearing a mask. After instructing A.T. to go into the alleyway, the assailant addressed Q.D. with

[1] We use initials throughout instead of the names of the victims.

his childhood name, and told Q.D. that he could leave. When A.T. would not go into the alley and started to back away from the assailant, and Q.D. would not leave his cousin, the assailant told them to run and as A.T. and Q.D. did so, the assailant started shooting. One bullet struck A.T. in the left leg and a second shot stuck him in the right leg, breaking his femur and incapacitating him. The assailant shot Q.D. in the leg as well, but Q.D. was able to continue running for a short distance. With A.T. incapacitated, the assailant approached him, laid the gun down between A.T.'s legs, took his sneakers, rifled through his pockets and then left with the gun.

Ten shell casings were found by the police in three different locations at the scene of the attack. A surveillance video from the convenience store showed the exchange between A.T. and the suspect, although there was no audio.

A.T. and Q.D. told the police, both at the scene and again at the hospital, that they could not identify who shot them. It was not until later when a second photo array was shown to A.T. that he identified defendant as the shooter. Q.D. testified that defendant came to his home several days after the shooting and denied that he was the shooter, apparently to counter word on the street to the contrary. Although Q.D. would not initially identify defendant as his attacker, he ultimately did so based on a photo

array. Both victims were familiar with defendant. A.T. went to high school with him and Q.D. played football with him when they were younger. The victims both expressed they were initially fearful of identifying their assailant.

Defendant was indicted on two counts of first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1)-(2) (counts one and two); two counts of first-degree robbery, N.J.S.A. 2C:15-1 (counts three and four); two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (counts five and six); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count seven); two counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (counts eight and nine); two counts of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7) (counts ten and eleven); two counts of fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4) (counts twelve and thirteen); and fourth-degree possession of a weapon by a convicted person, N.J.S.A. 2C:39-7 (count fourteen).

At trial, A.T. and Q.D. identified defendant as having shot them. However, later on redirect examination, Q.D. acknowledged being unsure. Defendant's witnesses provided alibi testimony.

Defendant was convicted on all counts before the jury.[2]

Defendant was sentenced in April 2014 to a nineteen-year term of incarceration for the attempted murder of A.T. subject to an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. He was sentenced to a consecutive eighteen-year term of incarceration for the attempted murder of Q.D., also subject to an eighty-five percent period of parole ineligibility. Defendant received an eighteen-month term for the fourth-degree possession of a weapon charge, which also was consecutive to the other sentences.[3]

Defendant appeals his judgment of conviction and sentence, raising the following points:

> POINT I
>
> THE TRIAL COURT'S ONE-SIDED INDENTIFICATION INSTRUCTION WHICH SET FORTH TESTIMONY FAVORABLE TO THE STATE WITHOUT ANY MENTION OF FAVORABLE DEFENSE EVIDENCE REGARDING MISIDENTIFICAITON AS WELL AS A PATENTLY INCORRECT ACCOUNTING OF EYEWITNESS TESTIMONY, REQUIRES THE REVERSAL OF DEFENDANT'S CONVICTIONS. (Not Raised Below)

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[2] The trial court conducted a bench trial after the jury verdict on the charge of possessing a weapon by a convicted person (count fourteen), finding defendant guilty.

[3] Defendant pled guilty to another charge in the interim which involved possession of a weapon (a shiv). The court accepted his guilty plea, sentencing him to a one-year prison term to run concurrently with the other sentences.

POINT II

THE TRIAL JUDGE'S INTERFERENCE AND BELITTLEMENT OF THE DEFENSE ATTORNEY IN FRONT OF THE JURY AND AT SIDEBAR MANDATES A NEW TRIAL. (Not Raised Below)

POINT III

THE AGGREGATE 38 AND ONE-HALF YEAR TERM OF IMRPRISONMENT [sic] FOR TWO ATTEMPTED MURDER CONVICTIONS WAS EXCESSIVE.

II.

A.

Defendant contends the jury instruction on identification was one-sided and improperly bolstered the State's case. Because there was no objection made to the charge at trial, 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); see also State v. Green, 86 N.J. 281, 289 (1981) (applying plain error when no objection was made to the judge's jury charge on identification).

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. Figueroa, 190 N.J. 219, 246 (2007) (citing State v. Wilbely, 63 N.J. 420, 422 (1973) (other citations omitted)). "[A]ppropriate and proper jury charges are essential to a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004) (citation omitted)); State v. Collier, 90 N.J. 117, 122 (1982) (quoting Green, supra, 86 N.J. at 287). Model jury charges are often helpful to trial courts performing this important function. 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).

The Model Criminal Jury Charge on identification does not require the trial court to comment on the evidence set forth by the parties. Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (2012) ("Model Charge"). However, "[i]f a court comments on weaknesses in the State's evidence, it is 'required, in the interest of fairness, to mention the State's explanations' for those weaknesses[,]" and the inverse. State v. Robinson, 165 N.J. 32, 45 (2000) (citing State

v. Walker, 322 N.J. Super. 535, 551 (App. Div.), certif. denied, 162 N.J. 487 (1999)).

Defendant objected to this portion of the identification charge:

> The State has presented testimony of [A.T.] and [Q.D.]. You'll recall that those witness identified the defendant in court as the person who committed the alleged robbery, attempted murder, and aggravated assaults charged in the indictment. The State has also presented testimony that, on a prior occasion before the trial, these witnesses identified the defendant as the person who committed these offenses. According to the witnesses, their identification of defendant was based upon the observations and perceptions that they made of the perpetrator at the time the offenses were being committed. It's your function to determine whether the witnesses' identifications of the defendant are reliable and believable or whether they're based on a mistake or for any reason not worthy of belief. You must decide whether it is sufficiently reliable evidence that this defendant is the person who committed the offenses charged.

We find no error in the charge as given. The objected to portion was only part of a lengthy charge that followed the Model Charge. It made clear that the burden of proof remained with the State and that the jury's recollection of the evidence should guide their deliberations, not what the judge may have said. In another portion of the jury charge regarding inconsistent

statements, the trial court highlighted the inconsistencies that defendant now contends were omitted, stating:

> [i]n regard to the testimony of the victims [A.T.] and [Q.D.] on both direct and cross examination, inconsistencies were shown between what was initially report[ed] to the police at the time of and following the shooting and what was ultimately reported by them to the police and in testimony, specifically the identity of their assailant.

Looking then at the charge as a whole, it was accurate on the law and the evidence, and it did not misinform or mislead the jury. Defense counsel emphasized throughout the trial the fact that both victims at first did not identify defendant. He argued to the jury in closing about this at length. As the court observed in Robinson,

> [i]t is highly unlikely that a jury which sat through a . . . trial in which the primary evidence was victim identification testimony, and then heard summations which discussed those identifications at length, was unaware of the specific identifications covered by the identification instruction.
>
> [Robinson, supra, 165 N.J. at 44 (second alteration in original) (quoting Walker, supra, 322 N.J. Super. at 550).]

The charge as a whole, therefore, was not such as to be "clearly capable of producing an unjust result."[4] See R. 2:10-2.

[4] Defendant also contends the charge was erroneous because it related that the victims' identification was based on their

B.

Defendant contends that seven statements by the trial judge directed toward defense counsel and made over the course of the eight-day trial, two of which were made at sidebar, were so prejudicial as to require a new trial. Our review of the transcript does not show a basis to overturn the verdict for these isolated comments, although we do not condone their tone.

The standard "in reviewing a claim of prejudicial intervention by a trial judge is whether it appears [the] trial judge has turned the jury against the defendant." Hitchman v. Nagy, 382 N.J. Super. 433, 452 (App. Div.) (internal citations and quotation marks omitted), certif. denied, 186 N.J. 600 (2006). The scope of review considers "the entire transcript to determine whether the conduct of the trial judge toward defense counsel tended strongly to prejudice the defendant in the eyes of the jury." Ibid. (internal citations and quotation marks omitted). A single instance of "judicial annoyance" will not "warrant the drastic remedy of vitiating an otherwise valid conviction." State v. Medina, 349 N.J. Super. 108, 132 (App. Div.), certif. denied, 174 N.J. 193 (2002). However, "we must determine whether, in the aggregate, 'the actions of the trial judge deprived the defendant

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perceptions at the time the offenses occurred. However, this was not an erroneous statement of the testimony.

of a fair trial.'" Hitchman, supra, 382 N.J. Super. at 452 (quoting Mercer v. Weyerhaeuser Co., 324 N.J. Super. 290, 299 (App. Div. 1999)). Plainly, "official expressions of displeasure or disapproval may convey to the jury the belief that defense counsel was somehow acting improperly, disrespectfully, or deceptively; or worse yet, give the impression that the judge has an opinion of defendant's guilt or innocence." State v. Tilghman, 385 N.J. Super. 45, 59 (App. Div.), remanded, 188 N.J. 269 (2006). We remind judges of the requirement to "be patient, dignified, and courteous . . . to lawyers . . . with whom the judge deals in an official capacity." Code of Judicial Conduct, Canon 3, Rule 3.5 (2016). That said, judges must also "control the conduct of the proceedings" with the goal of a fair and impartial trial. Tilghman, supra, 385 N.J. Super. at 54-55.

The first comment was made during cross-examination of a detective when the judge sought to avoid repetitive testimony, stating: "It's been asked and answered. If we're going to just repeat everything tell me now so I'll break for lunch. That's been asked and answered, as well as some other questions have been asked and answered." Review of the transcript shows this was in response to defense counsel's thorough but, at times, repetitive cross-examination.

The second instance was during cross-examination of a different detective where the remark was made to defense counsel that: "You're asking the questions, most of which are objectionable." However, this comment followed sustained objections to questions that called for hearsay testimony or testimony about a witness's state of mind.

The third passage followed intensive cross-examination of a detective, who actually posed a question to defense counsel, which resulted in an exchange that the judge appropriately terminated, as follows:

> WITNESS: If you got shot and someone shot you, would you tell the police or would you withhold it?
>
> COUNSEL: Me personally, I would tell them.
>
> WITNESS: Okay.
>
> COUNSEL: I'm an idiot.
>
> WITNESS: But, even if you was [sic] intimidated or threatened, what would you do?
>
> COUNSEL: I would tell the police.
>
> WITNESS: Okay, good for you. But, you don't live in the inner cities of Atlantic City.
>
> COUNSEL: Do you want to look at the holes in my body?
>
> WITNESS: Excuse me?

COUNSEL: I said would you like to look at the holes in my body?

COURT: Okay. We're finished with cross.

COUNSEL: Judge, if I may just ask a few questions based on redirect.

COURT: Well, if you're going to start talking about nonsense and about holes in your body, it's over.

In the fourth passage, the question was beyond the scope of redirect. The court exercised its discretion to terminate that area of questioning:

COUNSEL: And if this person knew that he had approached [the victim] for the purpose of intimidating him on October 15, would he be stupid enough to purposely leave a clip, some red, white and blue --

STATE: Judge, I'm going to object.

COUNSEL: A person who knows that he is a possible suspect in a case, would he leave clothing that might fit the description of the suspect, would he leave red, white and gray --

STATE: Is this closing arguments?

COURT: That objection is a court imposed objection. The question is improper. It goes way beyond the scope of redirect. It does sound like a closing statement, and the cross-examination is finished.

The final[5] remark that defendant contends was error was made in response to follow-up questions to a witness who already had testified he did not have personal knowledge of the issues.

> COUNSEL: Right. Now before you got in the room, again, the tape recording -- as you can see from this tape recorded statement, apparently he had been speaking to the detectives for some period of time, isn't that correct?
>
> WITNESS: I don't know how long he spoke to them.
>
> COUNSEL: Well, you just identified the photograph, there's a number of pages and then maybe three or four pages at the end.
>
> STATE: Judge, I'm going to object. The detective said more than once that he doesn't know what happened in the room before he got there. The purpose of him being there was to

[5] Defendant's brief includes sixth and seventh comments that were made at sidebar. These comments would not have affected the jury's determination. See Mercer, supra, 324 N.J. Super. at 314 ("[T]he clearly prejudicial remarks made by the judge could have been avoided had those exchanges taken place at sidebar, out of the hearing of the jury."). In one comment, the judge warned defense counsel he could be sanctioned if he talked over other persons. After the recess, the judge noted his "patience is starting to wane" and he was "not going to sit here and be a kindergarten teacher, okay?" In the other comment at sidebar, after defense counsel had gone beyond the scope of redirect and the court corrected him, he began to argue with the judge "it's a yes or no question if the officer would answer it," to which the court responded, "[s]ee, guys like you that are smarter than me, you have an answer for everything, okay. I'm telling you that you're not doing your client any favors, okay." All of these comments were made outside the presence of the jury.

not be a part of the investigation and all he can testify to is what happened in the room.

COURT: Whatever he doesn't know, whatever he wasn't there for, whatever he didn't partake in, he just says that.

COUNSEL: All right. So you don't know whether the detectives told him to say it was picture number 3?

STATE: Judge.

COUNSEL: Your Honor, I believe it's a fair question.

COURT: It's not a fair question but if we're going to play this out this way, ask it, he'll tell you he doesn't know, he'll tell you he wasn't there and we'll just go on that way. All right? You're not listening to his answers.

COUNSEL: All right. I'll withdraw the question.

In reviewing the transcripts, we are fully satisfied there was no "bias or partisanship on the part of the judge," Tilghman, supra, 385 N.J. Super. at 61, nor did any of these comments deny defendant a fair or impartial trial. These limited passages were not of the type likely to cause prejudice to defendant. Cf. Mercer, supra, 324 N.J. Super. at 301-02 (finding prejudice where the judge chastised defense counsel in a lengthy manner and made at least eighteen inappropriate comments, including launching into

an "evidence rules speech, complete with reference to counsel's violation of them").

The trial court here made clear in the jury charge that the State always had the burden of proof, and that the members of the jury were the judges of the facts. The court noted that its rulings were

> not an expression or an opinion by me as to the merits of the case. Neither should any of my other rulings on any other aspect of the trial be taken by you as me favoring one side or the other. I decided all those matters on their own merit.

The court instructed the jury that "[a]ny remarks made by me to counsel or counsel to me or between counsel is also not evidence and should not affect or play any part in your deliberations." Defense counsel thoroughly addressed the issues throughout the trial, and defendant has shown no harm, bias, or prejudice resulting from the comments. Although the remarks showed some frustration in their tone, which we do not condone, we also discern no prejudicial error by the comments in the context of the overall trial.

C.

We reject defendant's contention that his sentence to two consecutive terms for attempted murder was excessive. We review a judge's sentencing decision under an abuse of discretion

standard. State v. Fuentes, 217 N.J. 57, 70 (2014). As directed by the Court, we must determine whether: "(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.'" Ibid. (alterations in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Here, the sentencing guidelines were not violated. N.J.S.A. 2C:43-6(a)(2) provides that a person who has been sentenced of a first-degree crime, such as attempted murder, may be sentenced to "a specific term of years which shall be fixed by the court and shall be between [ten] years and [twenty] years." The court's analysis of the aggravating and mitigating factors was based on competent and credible evidence in the record. The judge observed that defendant had a significant juvenile and adult record for his age, including handgun possession (aggravating factor three); his criminal history "include[d] two adult convictions and six municipal," (aggravating factor six); and there was a strong need to deter defendant and others, (aggravating factor nine). The judge found no mitigating factors. Where the aggravating factors predominate, the sentence imposed can be toward the higher end of

the range, giving appropriate weight to all the factors. State v. Case, 220 N.J. 49, 64-65 (2014) (internal citations and quotation marks omitted). Finally, there was nothing about the sentence that shocked one's conscience, given the nature of the offenses.

Defendant contends that the judge should have imposed concurrent rather than consecutive sentences for the offenses. However, the trial court properly considered and applied the relevant factors under 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). The court noted that that the crimes were committed "predominantly independent of each other, involving separate acts of violence, and separate victims." The first crime was "to take a pair of sneakers and the other [was] to perhaps eliminate a potential witness." We find no error in the court's application and analysis of the Yarbough factors.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION