SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0626-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHARIFF H. ROBINSON,

Defendant-Appellant.

Submitted April 18, 2018 – Decided June 1, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 13-09-0176.

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

Gurbir S. Grewal, Attorney General, attorney for respondent (Arielle E. Katz, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Shariff Robinson appeals from his convictions after a jury trial, contending that the trial judge erred in permitting

certain reputation and opinion testimony from the State's witnesses, and failed to give a proper jury charge. We affirm.

Defendant was indicted of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count one); fourth-degree unlawful disposition of a weapon, N.J.S.A. 2C:39-9(d) (count two); fourth-degree possession of hollow nose or body armor penetrating bullets, N.J.S.A. 2C:39-3(f) (count three); fourth-degree distribution of a controlled dangerous substance, N.J.S.A. 2C:35-5(a)(1) and (b)(12) (count four); and fourth-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(3) (count five).

Count five was dismissed, and defendant was convicted of the remaining counts after a jury trial. He was sentenced on count one to a five-year prison term, with three years of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6.2. The sentences on the remaining counts were concurrent.

At trial, the State alleged that defendant sold a handgun to its cooperating witness, Stefan Farrar. New Jersey State Police Detective Michael Gregory testified that Farrar told him that defendant was selling marijuana and "had a handgun for sale." Gregory met with Farrar and devised a plan to "attempt to buy the marijuana and the handgun that [Farrar] was telling us [defendant] had." To confirm Farrar's information prior to executing the

plan, Gregory conducted an "overhear" in which he listened to a phone conversation between Farrar and defendant regarding the marijuana and handgun. In that conversation, defendant told Farrar the marijuana and handgun would cost $550, and set a time and place for the sale.

A second conversation between Farrar and defendant was recorded by Gregory and played for the jury. During that conversation, defendant said to Farrar: "I'm on [the] way to the 'hood now so we'll meet as soon as I get back" and "I'm going to be ready for you." Gregory explained to the jury that these phrases meant defendant would have the weapon and marijuana ready for Farrar when they met.

Farrar was instructed by Gregory on the protocol for a "controlled buy." He explained that a "controlled buy" involves the police searching an informant's person and vehicle, placing an "on-body recording device that he does not know how to operate . . . covertly on his body," and maintaining surveillance of him. Gregory also gave Farrar $550.

The jury also heard the recording from the device that Farrar wore during the meeting with defendant. They heard defendant show Farrar a gun that he was not selling, describing it as a "little sub-compact joint that shit spit rapid." The prosecutor asked Gregory, if "based on your investigation and your knowledge and

experience at that time," he knew what the defendant meant by those comments. Gregory testified that defendant was referencing a "second handgun that was present at the scene of the recording."

Farrar then started bragging to defendant about the amount of money he would make re-selling the drugs and weapons himself. Farrar said he would actually need more drugs to sell than they discussed earlier and asked about a bag defendant had with him. Gregory testified that the bag contained marijuana. Defendant and Farrar haggled over the price of the marijuana, but it is not clear from the transcript whether or not they actually agreed on a price. Eventually defendant told Farrar he had to leave to get a "black one." The prosecutor again asked Gregory if "based on your training and experience and throughout the investigation during this time," he knew what defendant meant by a "black one." Gregory testified that it meant another gun.

Gregory testified that he waited outside where the meeting took place, watched Farrar go into the house, and then emerge with defendant. Gregory saw defendant carrying a brown leather case in his right hand, which Gregory testified was "formed in the shape of a gun" and was a "gun case." Gregory observed defendant hand Farrar the gun case.

Farrar drove to a police station and Gregory followed him. When they arrived, Farrar turned over the items defendant had

given him, "a dime bag of marijuana and the gun case." Gregory opened the case and found a silver .357 magnum firearm inside. When searching the gun case, he found hollow-point bullets. Several other officers confirmed that they watched Farrar enter and exit the meeting for the controlled purchase, and followed his car to the police station.

Because defendant asserted an entrapment defense, the State presented Farrar as a witness to show that defendant had a reputation for selling marijuana. Defendant objected to the testimony and the judge conducted a N.J.R.E. 104 hearing. During the hearing, Farrar testified that he had known defendant for six or seven years, and had personally observed defendant selling marijuana to other people in the neighborhood. Farrar said he purchased marijuana from defendant "like every other week" for "some months." He identified a street corner where defendant sold drugs as well as the address of a residence. Defendant renewed his objection to the testimony regarding defendant's reputation in the community for criminal activities.

In permitting the testimony, the court found that defendant "raised the claim of entrapment as a defense and thus brought into issue his predispositions in connection with the crimes charged in the indictment relating to the marijuana as well as the crimes

charged in the indictment relating to the guns." The judge reasoned that,

> the proof presented does amount to clear and convincing evidence . . . of the reputation of the defendant by way of activities in the community and the witness has gotten on the witness stand here and testified in a way that does amount to a declaration against interest admitting his own involvement in [il]licit activity and has demonstrated that he lived in the neighborhood and had experience in the neighborhood, [and] knows the defendant.

The judge concluded that the testimony was "admissible in light of and in the face of the defense of entrapment to show the intent, the motive, the purpose of the defendant, the lack of innocence and the absence of susceptibility of entrapment." However, because Farrar had not testified as to knowledge of any reputation of defendant for dealing in guns, he forbade the State from arguing to the jury that defendant had a reputation in the community for gun dealing.

In addition to the above-described testimony, Farrar also told the jury that he learned defendant was selling a gun "[j]ust from word of mouth, people telling me." Farrar provided information to the police that defendant had a .357 revolver that he wanted to sell. Although at the conclusion of the transaction Gregory gave him two hundred dollars for the information, Farrar told the jury that he decided to work with the police because he

"had a couple of friends that got shot by guns . . . in the last year . . . [and] just wanted to get as many [guns] off the street as possible." He was not promised anything by the prosecutor's office or law enforcement in exchange for his testimony.

Farrar described the details of the transaction, corroborating the testimony provided by Gregory and the other officers. Although he requested defendant contact him if he had more guns to sell in the future, he did not hear from defendant again.

Defendant also testified he had known Farrar for about ten years, but denied ever selling marijuana to him. According to defendant, a few weeks before his arrest, Farrar called and asked him if he knew anybody that was selling a gun. Defendant stated that he eventually found someone selling a silver .357 magnum. However, Farrar told him he only wanted to deal with defendant directly and that he was willing to spend between $400 to $600 for the gun.

Defendant testified that he received the handgun from his friend. When they met for the purchase of the gun, defendant told Farrar he could get another handgun for him. However, when Farrar called him later that day to confirm the second gun purchase, defendant stated that his friend no longer had another gun.

Defendant testified that Farrar asked him to sell him a firearm "about fifteen times" in the three weeks prior to the controlled buy. He eventually sold Farrar a gun because Farrar told him he owed someone money and that he could pay off the debt by reselling the gun.

When asked about the gun he showed to Farrar during the meeting that was not for sale, defendant testified that it was not a real gun, but described it as a toy gun or BB gun. He conceded that he did give Farrar marijuana that day, but denied that he was a dealer or had ever sold drugs.

During the jury instructions, the judge advised the jury that defendant was asserting the defense of entrapment. After reading the model jury charge, the judge added:

> The State has introduced evidence to demonstrate, if believed, that the defendant was not an innocent person who would not have committed the gun, hollow-nose bullet and marijuana crimes charged were it not for the inducement of law enforcement officers and/or the officers' agent. That is . . . that he was predisposed to commit the . . . crimes charged.
>
> Therefore, for this purpose, the [c]ourt has permitted for your consideration the introduction of evidence of defendant's reputation . . . on or about October 2, 2012 for engaging in unlawful activities involving marijuana and/or guns, and evidence of defendant's having and admitting possession of a black gun not charged in the indictment, as well as discussing potential future gun sales

for profit during a recorded and transcribed conversation in person between the defendant and the law enforcement's agent, the witness Stefan F[a]rrar on October 2, 2012 . . . .

Whether such evidence, along with the other facts and surrounding circumstances shows a predisposition on the part of the defendant to commit the crimes charged is for you to determine.

. . . .

Now, the State has introduced evidence that the defendant had and admitted possession of a black gun not charged in the indictment and discussed potential future gun sales for profit during the recorded and transcribed conversation in person between the witness Stefan F[a]rrar and the defendant on October 2, 2012 . . . . Normally, such evidence is not permitted under our rules of evidence. . . .

. . . .

However, our rules do permit evidence of other crimes, wrongs or acts when the evidence is used for certain specific narrow purposes. In this trial, the State has offered the evidence in an effort to convince you that the defendant's intent, readiness, motive and lack of innocence, as well as absence of susceptibility to entrapment in his possession and transfer of the handgun . . . and hollow-nose bullets . . . for profit in the course of the defendant's conscious involvement in contemporaneous possession of another gun on October 2, 2012 and anticipated . . . possession of additional guns after October 2, 2012.

. . . .

However, you may not use this evidence to decide that the defendant has a tendency to

> commit crimes or that . . . he's a bad person. That is, you may not decide just because a defendant has committed other acts, including statements, he must be guilty of the present crimes.
>
> I have admitted the evidence to help you decide the specific question of the defendant's guilt, motive, readiness and lack of innocence, as well as absence of susceptibility to entrapment in possession and transfer of the handgun . . . and the hollow-nose bullets . . . admitted in evidence. You . . . may not consider it for any other purpose and may not find the defendant guilty of the crimes charged simply because the State has offered evidence that he committed other acts, including the statements I mention.

There was no objection to the charge.

On appeal, defendant raises the following issues:

> POINT I: IN EXPLAINING THE MATERIAL FACTS RELEVANT TO THE ENTRAPMENT CHARGE, THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT DISCUSSED THE STATE'S EVIDENCE SIGNIFICANTLY, IN FACT, OVERSTATING THE EVIDENCE, BUT FAILED TO EVEN MENTION THE DEFENDANT'S CONTRARY CONTENTIONS. U.S. Const. Amend. XIV; N.J. Const. Art. I, ¶¶ 1, 10 (Not raised below).
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> POINT II: THE DETECTIVE'S OPINION TESTIMONY IMPROPERLY INVADED THE PROVINCE OF THE JURY AND IMPLIED THAT HE POSSESSED SUPERIOR KNOWLEDGE OUTSIDE THE RECORD, AND THEREFORE WAS PLAIN ERROR. U.S. Const. Amends. VI, XIV; N.J. Const. Art. I, ¶¶ 1, 10 (Not raised below).
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> POINT III: THE ADMISSION OF FARRAR'S UNCORROBORATED TESTIMONY THAT DEFENDANT HAD A REPUTATION FOR SELLING MARIJUANA DENIED DEFENDANT A FAIR TRIAL. U.S. Const. Amends. XIV; N.J. Const. Art. I ¶¶ 1, 9, 10.

POINT IV: THE TRIAL COURT'S FAILURE TO ADDRESS DUE PROCESS ENTRAPMENT REQUIRES A REMAND FOR FURTHER PROCEEDINGS. U.S. Const. Amend. XIV; N.J. Const. Art. I, [¶] 10 (Not raised below).

We review the jury instructions under the plain error standard, disregarding any error "unless it is of such a nature as to have been clearly capable of producing an unjust result." State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2). To warrant reversal, the error "must be sufficient to raise 'a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached.'" Ibid. (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

Defendant argues that the trial judge erred in discussing the State's evidence as part of its charge on entrapment. He contends it was error to focus only on the State's evidence and not mention any evidence offered by the defense, and that the jury should have been charged on "due process entrapment." We disagree.

Jury instructions should "relate the law to the facts of a case." State v. Savage, 172 N.J. 374, 389 (2002). The "trial judge has the right, and oftentimes the duty, to review the testimony and comment upon it, so long as he clearly leaves to the jury the ultimate determination of the facts and the rendering of a just and true verdict on the facts as it finds them." State v.

Concepcion, 111 N.J. 373, 379 (1988) (quoting State v. Laws, 50 N.J. 159, 177 (1967), modified, 51 N.J. 494 (1968)).

In fact, in certain circumstances, the trial judge is required to give instructions limiting the way in which the jury may consider certain evidence. State v. Reddish, 181 N.J. 553, 611 (2004). Those circumstances were present here. In Reddish, the Court held that where evidence is involved that tends to show that the defendant has a propensity to commit crimes in general, the court must give an "explicit instruction that the jury should not make any inferences about defendant's propensity to commit crimes." Ibid. If the entrapment defense is raised, "the defendant's specific predisposition to commit a particular crime is at issue but not his general 'criminal propensity,'" and the trial judge must make that clear in his instructions. State v. Gibbons, 105 N.J. 67, 88 (1987).

The trial judge properly mentioned the State's evidence in the particular jury charge in order to provide the necessary limiting instructions on how the jury could consider the evidence. The judge discussed the State's evidence of defendant's reputation for selling drugs and that "defendant had and admitted possession of a black gun not charged in the indictment." He subsequently explained to the jury that while "[n]ormally, such evidence is not permitted under our rules of evidence[,] . . . our rules do permit

evidence of other crimes, wrongs or acts when the evidence is used for certain narrow purposes." The permissible purpose for which the evidence was being used here was "in an effort to convince you [of] the defendant's intent, readiness, motive and lack of innocence, as well as absence of susceptibility to entrapment." The judge was required to give this limiting instruction, and it was for that purpose that he discussed some of the State's evidence. See Gibbons, 105 N.J. at 88. The evidence presented by the defense did not require a limiting instruction and, therefore, the court did not err in mentioning the State's evidence without discussing the evidence defendant used to counter it.

We discern no merit to defendant's argument, raised for the first time on appeal that the jury should have been charged with due process entrapment. "The essence of due process entrapment inheres in the egregious or blatant wrongfulness of the government conduct." State v. Johnson, 127 N.J. 458, 470 (1992). A defendant may not be convicted if "the government's overall involvement in [the] crime was so outrageous as to violate due process." Ibid. (quoting Kevin H. Marino, Outrageous Conduct: The Third Circuit's Treatment of the Due Process Defense, 19 Seton Hall L. Rev. 606, 613 (1989)).

The doctrine is not applicable to the circumstances of this case. The use of informants to buy drugs or weapons from those

who sell them is common practice for law enforcement. There is nothing particularly outrageous or unreasonable about that government conduct. We perceive no plain error.

We turn to a review of defendant's contentions that the trial judge erred in allowing Gregory to give "opinion testimony" and in permitting Farrar to testify about defendant's reputation in the community as a drug dealer. Specifically, defendant objects to Gregory's testimony interpreting several phrases in the conversations recorded between him and Farrar. There was no objection to the testimony at trial.

Police officers may give lay opinion testimony so long as that testimony is "based on, and supported by testimony about, the officer's personal perception and observation." State v. McLean 205 N.J. 438, 459 (2011). However, a lay witness, even a police officer, may not offer an opinion on a matter "not within [the witness's] direct ken . . . and as to which the jury is as competent as he to form a conclusion." Ibid. (quoting Brindley v. Firemen's Ins. Co., 35 N.J. Super. 1, 8 (App. Div. 1955)).

Here, Gregory did not tell the jury his opinion of what he thought was happening. Rather, he was asked to provide the jury with the meaning of some street slang used in the recorded conversations, familiar to him because of his experience. In

McLean, the Court found this type of lay opinion testimony permissible, noting that

> a lay witness was permitted to offer an opinion about the meaning of street slang that defendant used during a conversation relating to a crime because it was "unfamiliar to the average juror, . . . [it] was of assistance in determining the meaning and context of his conversation with defendant and was obviously relevant to the issue of defendant's motive and intention."
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> [McLean, 205 N.J. at 458 (quoting State v. Johnson, 309 N.J. Super. 237, 263 (App. Div. 1998)).]

During the trial, over a defense objection, Farrar testified as to defendant's reputation for selling marijuana. Defendant argues this impermissible testimony denied him a fair trial. We disagree. In asserting the defense of entrapment, defendant created the "one situation where the State in a criminal case may introduce other crime evidence to show that a defendant is predisposed toward committing crime as a basis for an inference that the defendant committed the offense in question." Gibbons, 105 N.J. at 76 (quoting Biunno & Givavini, N.J. Rules of Evidence, cmt. 11 on N.J.R.E. 55 (1986)). While other crimes or bad acts evidence is normally inadmissible to show predisposition to commit the charged crime, N.J.R.E. 404(b), the State may rebut an entrapment defense "with evidence of predisposition, of which

similar bad-acts are probative." State v. Davis, 390 N.J. Super. 573, 597 (App. Div. 2007).

Because defendant raised the entrapment defense, it was permissible for the prosecution to ask Farrar about defendant's prior bad acts to show a predisposition to commit the charged crime. Farrar's testimony about defendant's past drug dealing was proffered to show that the crime committed did not originate with the State or its agent, but rather was something defendant would have done without State involvement. The evidence was relevant to the charged offenses and its admission was not an abuse of discretion.

Affirmed.