SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0660-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD HIGGS, a/k/a KYLE BEACHUM, DEVOAN EDWARDS, LEE HAROLD, DEVIN HIGGS, DEVON HIGGS, HAROLD LEE and AHMIR PIERCE,

Defendant-Appellant.

Argued January 23, 2018 – Decided February 7, 2018

Before Judges Fisher and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-09-2362.

Michael Denny, Assistant Deputy Public Defender, argued the cause for the appellant (Joseph E. Krakora, Public Defender, attorney; Michael Denny, of counsel and on the brief).

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

Appellant filed a pro se supplemental brief.

PER CURIAM

A jury convicted defendant of first-degree carjacking, N.J.S.A. 2C:15-2(a)(1), and second-degree robbery, N.J.S.A. 2C:15-1, based on evidence he stole, while armed, a Cadillac from a church parking lot. At trial, Faya Fontilus — the only eyewitness to the carjacking — couldn't make an in-court identification and instead testified juror number nine "kind of look[ed] like" the culprit. Because of this unusual response, defendant argues, in his first point in this appeal, that

> THE TRIAL JUDGE ERRED BY ALLOWING JUROR NUMBER NINE TO REMAIN ON THE JURY AFTER THE VICTIM IDENTIFIED HIM AS THE PERPETRATOR OF THE CRIME, RESULTING IN A DENIAL OF DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL BY AN IMPARTIAL JURY (Not Raised Below).
>
> > A. The Trial Judge Should Have Dismissed Juror Number Nine And Ensured The Panel Was Free From Irregular Influences.
> >
> > B. The Prosecutor's Remarks Were Improper, And Aggravated The Taint Caused By The Victim's In-Court Identification.

We reject this argument, as well as all defendant's other arguments, which we identify later. In explaining why we reject defendant's first point, we need to place it in its proper context.

Fontilus described for the jury that he and his two brothers were working at a church in Irvington on the evening of May 11, 2014. At some point he went to the church parking lot to charge a

phone in his brother's Cadillac, which was parked near the church's back door. While the phone was charging, Fontilus saw a man jump over a fence and enter his other brother's Honda, which was twenty-seven feet[1] from the Cadillac. Fontilus rolled down the Cadillac window and said, "what are you doing, do you want me to shoot you[?]" After additional words were exchanged, the man got out of the Honda and approached the Cadillac; according to Fontilus, the man drew a gun, which he kept at his side. Fontilus exited the Cadillac and entered the church to find his brothers; when they returned to the parking lot, they saw the Cadillac drive off. The brothers followed in the Honda and called police, who instructed them to return to the church and speak with a police officer there. They complied.

Police used OnStar to locate the Cadillac, which was found parked in front of a bar on North Fifth Street in Newark. Fontilus was brought there to identify the stolen vehicle. While seated in a police vehicle, Fontilus watched as three or four individuals exited the bar. He identified defendant — one of the departing bar patrons — as "the guy," emphasizing he was "positive, that's the

[1] This footage was based on Fontilus's description at trial of the distance between two particular points in the courtroom, which the judge identified as being twenty-seven feet apart.

guy that carjacked me." Defendant was immediately detained and arrested.

At trial, Fontilus was asked whether he could point out the man who stole the Cadillac:

> Q. [D]o you see that person today in the courtroom?
>
> (Pause in Hearing)
>
> A. Yeah, he kind of look like him.
>
> Q. What was he wearing that night?
>
> A. It was --
>
> [DEFENSE COUNSEL]: Your Honor, could I just . . .
>
> A. -- a hoodie, --
>
> (Sidebar . . .)
>
> [DEFENSE COUNSEL]: I want the record to reflect that the . . . witness was looking at the jury box --
>
> THE COURT: Identifies -- identified juror number 9?
>
> [DEFENSE COUNSEL]: Yes, correct.
>
> [ASSISTANT PROSECUTOR]: Yes.

The assistant prosecutor asked for a short break and later a longer break to consult with colleagues.

Once the assistant prosecutor was ready to proceed, defense counsel moved for dismissal. The judge recognized there was "now

no in-court I.D.," but, while "sympathetic to that argument . . . based upon the identification of juror number [nine] as the carjacker," proper procedure required that he allow the State to finish presenting its case-in-chief before considering such a motion. Defense counsel acknowledged his motion was premature, and Fontilus's direct testimony continued.

The jury then heard testimony from Fontilus he was "100 percent" sure that, while seated in a police car on North Fifth Street, he pointed out the culprit based on his "clothing and [his] face." The State also called one of Fontilus's brothers to identify the stolen vehicle from photographs admitted into evidence.

The State followed with testimony from a police officer, a detective, and a fingerprinting expert. The first testified that he drove Fontilus to Newark where the stolen car was located, that while there Fontilus identified defendant as the culprit, and that he detained defendant as a result. The detective testified, among other things, that he placed the detained defendant under arrest and that he later lifted a fingerprint from the stolen Cadillac's console. And a fingerprint expert employed by the prosecutor's office testified the fingerprint lifted from the stolen Cadillac's console matched defendant's fingerprints.

The State then rested, and defendant renewed his motion for a judgment of acquittal because Fontilus was unable to identify him, at trial, as the man who stole the Cadillac. The judge denied the motion in light of, among other things, evidence of Fontilus's out-of-court identification of defendant as the man who stole the Cadillac. Defendant does not argue in this appeal that the judge erred in denying that motion.

After that, defendant chose not to testify. The defense moved a few photographs into evidence and rested.

The jury, which included juror number nine, convicted defendant of first-degree carjacking and second-degree robbery; he was acquitted of two weapons offenses. At sentencing, with the merger of the robbery and carjacking convictions, the judge imposed a fifteen-year prison term, subject to an eighty-five percent period of parole ineligibility.

Because the defense failed to object or argue juror number nine should have been removed, we review defendant's first argument, quoted earlier, under the plain-error standard, which precludes our intervention absent a showing the claimed error was capable of producing an unjust result. R. 2:10-2; State v. Ross, 218 N.J. 130, 142-43 (2014).

To be sure, the in-court identification took an unexpected turn. But, far from prejudicing defendant, Fontilus's testimony

that the man who stole the Cadillac "kind of look[ed] like" juror number nine only inured in defendant's favor by revealing a significant weakness in the testimony of the only eyewitness. This is demonstrated by defense counsel's summation, in which he focused on this event, arguing there was more than a reasonable doubt about defendant's involvement. Only now, having been convicted, has defendant argued that the trial judge should have done more and that he was prejudiced by juror number nine's continued participation.

Defendant's arguments that juror number nine had a "strong personal interest" and the other jurors may have been incentivized to support juror number nine in finding defendant guilty are purely speculative. To be clear, Fontilus did not testify juror number nine "was" the culprit, only that the juror "kind of look[ed] like" the culprit.[2] No reasonable or rational juror could have thought this testimony turned juror number nine into a suspect. Accordingly, there is no merit to the suggestion that the jury, as constituted, convicted defendant to protect juror number nine. Defense counsel's failure to object or to urge any other course — such as a voir dire of the jurors to ascertain the effect of the

[2] We, thus, need not determine whether the judge should have sua sponte removed the juror if the witness had firmly declared that the juror was, in fact, the man who stole the vehicle.

failed in-court identification — suggests that counsel saw no harm in proceeding with juror number nine's continued participation. State v. Macon, 57 N.J. 325, 337 (1971). Indeed, counsel could very well have thought juror number nine's continued presence would serve as a constant reminder to other jury members of Fontilus's inability to identify defendant as the man who stole the Cadillac.

In his second and last argument, defendant's appellate counsel contends the judge erroneously failed to instruct the jury on receiving stolen property, N.J.S.A. 2C:20-7, a lesser-included offense. And defendant has filed a pro se brief in which he raises four more arguments:

> I. BECAUSE THE STATE FAILED TO SUBPOENA VICTIM OF CRIME TO THE GRAND JURY FOR TESTIMONY AND RELIED ON OFFICERS POLICE REPORT TESTIMONY WHICH WAS LATER REVEALED TO BE FABRICATED, THE COURT SHOULD HAVE DISMISSED THE INDICTMENT.
>
> II. TRIAL COURT SHOULD HAVE DISMISSED THE CASE . . . AFTER LEARNING [DEFENDANT] WAS NOT THE PERSON WHO COMMITTED THE CRIMES.
>
> A. The Trial Court Should Have Dismissed The Indictment After Victim[']s Trial Testimony That [Defendant] Was Not The Person Who Carjacked Him.
>
> B. Trial Court Should Have Dismissed Case After Viewing Video Footage Of [Defendant's] Innocence.

III. TRIAL COURT SHOULD HAVE RECUSED ITSELF AFTER LEARNING IT WAS NAMED A DEFENDANT IN A CIVIL COMPLAINT FOR VIOLATION OF [DEFENDANT'S] CONSTITUTIONAL RIGHTS.

A. After It Was Learned Of Fabricated Police Reports And Video Footage Of Direct Innocence Of [Defendant] On April 23, 2015 A Civil Action Was Filed In District Court, Newark, N.J. For Violation Of Civil Rights.

IV. IN SEEKING THE INDICTMENT, THE STATE FAILED TO RECITE THE ELEMENTS OF OFFENSES AGAINST [DEFENDANT] SUBVERTING THE GRAND JURY'S DECISION MAKING PROCESS. SPECIFICALLY CARJACKING OFFENSE.

We find insufficient merit in these arguments to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.