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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0678-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CANTREL C. SPARKS,

Defendant-Appellant.

Submitted December 11, 2017 – Decided January 11, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Burlington County, Indictment
No. 15-06-0781.

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

Scott A. Coffina, Burlington County
Prosecutor, attorney for respondent (Nicole
Handy, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

A jury found defendant Cantrel C. Sparks guilty of third-
degree conspiracy to commit robbery, N.J.S.A. 2C:5-2a (count two);

second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4a(1) (count three); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5b(1) (count four); and third-degree aggravated assault, N.J.S.A. 2C:12-1b(2) (count five). The jury acquitted defendant of first-degree robbery.

After merging the two firearms convictions, the judge sentenced defendant to a seven-year term of imprisonment with a forty-two month period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c). He sentenced defendant to a concurrent five-year term of imprisonment with an eighty-five percent period of parole ineligibility on the conspiracy conviction, and a concurrent five-year term on the aggravated assault conviction.

Defendant raises the following points for our consideration:

POINT I

THE TRIAL COURT'S INCOMPLETE INSTRUCTIONS ON POSSESSION OF A WEAPON FOR AN UNLAWFUL PURPOSE AND UNLAWFUL POSSESSION OF A WEAPON DEPRIVED THE DEFENDANT OF A FAIR TRIAL DUE TO THE COURT'S FAILURE TO DEFINE "POSSESSION." (NOT RAISED BELOW)

POINT II

THE TRIAL COURT FAILED TO SUA SPONTE INSTRUCT THE JURY THAT SPONTANEOUSLY ARMING ONE'S SELF TO AVOID INJURY OR DEATH IS A DEFENSE TO UNLICENSED POSSESSION, AND NEGATES THE UNLAWFUL PURPOSE ELEMENT OF POSSESSION OF A

WEAPON FOR AN UNLAWFUL PURPOSE. (NOT RAISED BELOW)

POINT III

THE TRIAL COURT ERRED IN IMPOSING A SEVEN-YEAR SENTENCE WITH A FIVE-YEAR PAROLE DISQUALIFIER BECAUSE IT FAILED TO PROPERLY BALANCE AGGRAVATING AND MITIGATING FACTORS.

I.

The State contended that defendant and his paramour and co-defendant, Nicole Zotolla, conspired to rob the victim. Zotolla pled guilty to a lesser offense and was the State's chief witness at trial. She claimed to have accepted the victim's invitation to meet for drinks. While she was out with the victim, defendant called and was very upset. The victim grabbed Zotolla's phone and told defendant "he wasn't scared of him and . . . stop calling."

Unbeknownst to the victim, defendant had sent a text message to Zotolla, telling her to drive the victim to Zotolla's former residence, which was unoccupied at the time, where defendant intended to assault and rob the victim. When Zotolla and the victim arrived, defendant was waiting in the driveway. The two men ran towards each other and began to fight, with the victim soon being on top of defendant. Zotolla saw the victim with a gun, which he had shown her earlier at the bar. Zotolla drove away and returned to her home where she met Rachid Rosa,

defendant's brother. Rosa was "flustered" and told Zotolla not to call police.¹

Zotolla testified that she spoke with defendant after the incident, and he claimed the shooting was an accident. Defendant said he tried to take the gun away from the victim, and the two were fighting over the gun when it discharged. The prosecutor confronted Zotolla with a prior statement she provided two weeks before trial.²

In that statement, Zotolla admitted being part of a plan to rob the victim. She saw defendant and Rosa attack the victim in the driveway before she drove away. Zotolla also stated that defendant told her he and the victim struggled over the victim's gun, and defendant eventually took control of it and struck the victim with the gun before it accidentally discharged, hitting the victim in the forearm.

After the shooting, the victim knocked on the door of a nearby home and told its occupant that he had been shot.³ Pemberton

¹ Rosa was also named as a co-defendant in count one of the indictment charging defendant and Zotolla with robbery, but was not tried with defendant.

² The judge admitted the statement as substantive evidence pursuant to State v. Gross, 216 N.J. Super. 98 (App. Div. 1987), aff'd, 121 N.J. 1 (1990).

³ The victim never testified at trial.

police officer Shannon Sawyer was dispatched to the scene, where she observed the victim with a significant amount of blood on his forehead and left arm and concluded he had been shot. Police recovered a spent shell in the driveway of Zotolla's former residence, as well as defendant's cell phone. They also obtained data from Zotolla's and defendant's cellphones that verified, through text messages, defendant's instructions to Zotolla regarding the robbery.

II.

In Points I and II, defendant challenges the jury instructions, arguing certain omissions amounted to plain error requiring reversal of the convictions on the weapons offenses in counts three and four. We agree.

The Court has said that

[i]n the context of a jury charge, plain error requires demonstration of "[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."

[State v. Burns, 192 N.J. 312, 341 (2007) (second alteration in original) (emphasis added) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).]

The allegation of error must be assessed in light of "the totality of the entire charge, not in isolation." State v. Chapland, 187 N.J. 275, 289 (2006) (citing State v. DiFrisco, 137 N.J. 434, 491 (1994)). While an erroneous jury charge may be a "'poor candidate[] for rehabilitation' under the plain error theory," Jordan, 147 N.J. at 422 (quoting State v. Simon, 79 N.J. 191, 206 (1979)), we nonetheless consider the effect of any error in light "of the overall strength of the State's case." Chapland, 187 N.J. at 289.

In a criminal prosecution, the State bears the burden of proving every element of an offense beyond a reasonable doubt. State v. Medina, 147 N.J. 43, 49 (1996) (citing In re Winship, 397 U.S. 358, 364 (1970)). "[P]roper explanation of the elements of a crime is especially crucial to the satisfaction of a criminal defendant's due process rights." State v. Burgess, 154 N.J. 181, 185 (1998) (citing State v. Martin, 119 N.J. 2, 15-17 (1990)). "[E]ach element of an offense must be properly defined." State v. Wallace, 158 N.J. 552, 558 (1999).

The Model Jury Charge for unlawful possession of a handgun incorporates comprehensive instructions on "possession":

The word "possess" as used in criminal statutes signifies a knowing, intentional control of a designated thing, accompanied by a knowledge of its character. Thus, the defendant must know or be aware that he/she

possessed the handgun, and the defendant must know what it is that he/she possesses or controls is a handgun. This possession cannot merely be a passing control that is fleeting or uncertain in its nature. In other words, to "possess" within the meaning of the law, the defendant must knowingly procure or receive the handgun possessed or be aware of his/her control thereof for a sufficient period of time to have been able to relinquish control if he/she chose to do so. A person may possess a handgun even though it was not physically on his/her person at the time of the arrest, if the person had in fact, at some time prior to his/her arrest, had control over it. When we speak of possession, we mean a conscious, knowing possession.

[Model Jury Charge (Criminal), "Unlawful Possession of a Handgun," (N.J.S.A. 2C:39-5b) (rev. Feb. 26, 2001) (emphasis added).]

The model jury charge for possession of a firearm with the intent to use it unlawfully directs the judge to incorporate the model jury charge on possession. See Model Jury Charge (Criminal), "Possession of a Firearm with a Purpose to Use it Unlawfully Against The Person or Property of Another (N.J.S.A. 2C:39-4a)," (rev. June 16, 2003). The model charge for possession, in turn, instructs the judge to charge where applicable, "Possession cannot merely be a passing control, fleeting or uncertain in its nature." Model Jury Charge (Criminal), "Possession (N.J.S.A. 2C:2-1)," (rev. June 20, 2014).

The Court has said "model jury charges should be followed and read in their entirety to the jury[,]" because, [t]he process by

which model jury charges are adopted in this State is comprehensive and thorough." State v. R.B., 183 N.J. 308, 325 (2005) (emphasis added). In this case, the State concedes that the judge never defined the term possession when he instructed the jury regarding counts three and four. The State argues, however, this omission was not plain error because the jury understood the term and there was no prejudice to defendant. According to the State and as argued by the prosecutor in summation, defendant either brought the gun to the scene of the planned robbery or he "possessed" the gun when he disarmed the victim and subsequently used it.

However, the direct evidence, both from Zotolla's testimony and her prior statement, was that the victim initially had the gun. There was no direct evidence that defendant ever had the weapon beforehand. There was no direct evidence that defendant exercised continued control over the gun after the fight. Because the jury was never told that the State must prove beyond a reasonable doubt that defendant's "possession" of the gun was more than "passing control" and not "fleeting or uncertain," the prejudice to defendant is obvious. We reverse defendant's convictions on count three and four and remand the matter for a new trial on those charges if the State so chooses.

We address defendant's second point in the event there is a retrial. Defendant maintains that pursuant to State v. Harmon,

104 N.J. 189, 208-09 (1986), the spontaneous possession of a handgun in the process of disarming an attacker is a defense to unlicensed possession, and that defendant's possession of the weapon in self-defense was not unlawful.

In response, the State argues that self-defense was unavailable because defendant planned and initiated the altercation. It further contends that Harmon only supports a defense to unlawful possession "in those rare and momentary circumstances where an individual arms himself spontaneously to meet an immediate danger[,]" and the events in this case were not spontaneous. We agree with defendant, and, in the event the State tries the case again, and the evidence supports defendant's contention as it did at trial, the judge must give an appropriate charge when instructing the jury on both unlawful possession and possession for an unlawful purpose.

"While self-defense is not a defense to a charge under [N.J.S.A. 2C:39-4], a purpose to use the weapon for self defense is not an unlawful purpose and so would negate the purpose element of th[e] offense." Cannel, New Jersey Criminal Code Annotated, cmt. 3 on N.J.S.A. 2C:39-4 (2017); see also State v. Williams, 168 N.J. 323, 335 (2001) ("[I]f an individual's possession of a firearm is motivated honestly by a self-protective purpose, then his conscious object and design may remain not to do an unlawful act,

and a material element of a 39-4(a) violation has not been met.") (quoting Harmon, 104 N.J. at 207). "Further, an unreasonable belief in the need for self-defense or defense of another may negate the element of unlawful purpose even though it would not be adequate to support the justification defenses of self-defense or defense of another." Cannel, cmt. 3 on N.J.S.A. 2C:39-4. Thus, the State's argument that defendant was not entitled to any instruction regarding self-defense because he was the initial aggressor is based upon a mistaken understanding of the law.⁴

Rather, the evidence at trial would support the following facts beyond a reasonable doubt: the victim, not defendant, was armed with a deadly weapon before and during the encounter; while the two men were engaged in mutual combat, defendant came into possession of the weapon, used it to strike defendant in the head; the gun accidentally discharged. As a result, a jury could

⁴ "The use of deadly force is not justifiable . . . if[] [t]he actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter." N.J.S.A. 2C:3-4(b)(2)(a); see also N.J.S.A. 2C:3-11(b) (defining deadly force as "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm"). Count one of the indictment alleged that defendant robbed the victim by use of a deadly weapon, and the prosecutor asserted there was circumstantial evidence that only defendant brought a gun to the scene. We do not address whether defendant was entitled to a substantive charge on self-defense because the issue is not squarely before us, and we do not know what evidence might be adduced at a retrial.

conclude that defendant's purpose in possessing the gun was not unlawful, and the judge was required to provide appropriate instructions to the jury. See Model Jury Charge (Criminal), "Possession of a Firearm with a Purpose to Use it Unlawfully Against The Person or Property of Another (N.J.S.A. 2C:39-4a)," (rev. June 16, 2003) (providing instructions if a defendant "raises the issue of protective purpose").


We also disagree with the State's contention that Harmon has no application to the possessory weapons offense charged in count four. Defendant cites to dicta in Harmon, where the Court, considering "unlawful possession" of a firearm, said that "[o]nly in those rare and momentary circumstances where an individual arms himself spontaneously to meet an immediate danger should the justification afforded by N.J.S.A. 2C:3-4 be considered." 104 N.J. at 208-09; accord State v. Kelly, 118 N.J. 370, 385 (1990) ("Harmon defines the extraordinary circumstances that allow for a self-defense under [N.J.S.A. 2C:39-5(d)] as those in which a person makes spontaneous use of a weapon to repel immediate danger."). We agree with defendant that based upon the evidence adduced at trial, there was a rational basis to provide carefully tailored jury instructions that conveyed these concepts.

Because we are reversing defendant's convictions on counts three and four, and vacating the sentence imposed on those merged

counts, we need not address the sentencing argument raised by defendant in Point III.

Reversed and remanded.

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


CLERK OF THE APPELLATE DIVISION