SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1317-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARRELL J. BLOUNT, a/k/a REMY BETHEA, DARRYL BLOUNT, DARRYL J. BLOUNT, HERBER CASTILLO and JONATHAN STEWART,

Defendant-Appellant.

Submitted February 12, 2018 – Decided April 23, 2018

Before Judges Messano and DeAlmeida.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 07-07-0630.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

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

PER CURIAM

A jury convicted defendant Darrell J. Blount of first-degree robbery and related offenses, and the judge sentenced him to life

imprisonment without parole under the "Three Strikes Law," N.J.S.A. 2C:43-7.1(a). State v. Blount, No. A-2466-11 (App. Div. Nov. 7, 2014) (slip op. at 1-2).[1] We rejected the two arguments raised on direct appeal — admission of an out-of-court identification and prosecutorial misconduct in summation required reversal — and affirmed defendant's conviction. Id. at 2-3. The Supreme Court denied defendant's petition for certification. 222 N.J. 18 (2015).

Defendant's pro se petition for post-conviction relief (PCR) alleged the ineffective assistance of trial and appellate counsel (IAC). The court appointed PCR counsel who also asserted IAC claims, only two which defendant now reiterates on appeal. After hearing oral argument, the judge denied the petition for reasons stated in a comprehensive written opinion. This appeal followed.

We place defendant's arguments in context by relying upon our prior opinion's summary of the evidence at trial.

> [A] man entered a liquor store . . . shortly before 10:00 a.m. After walking around the store for a few minutes, he approached the counter, asked the store cashier for a six-pack of beer, then pulled out a handgun and

[1] Although citing an unpublished opinion is generally forbidden, we do so here to provide a full understanding of the issues presented and pursuant to the exception in Rule 1:36-3 that permits citation "to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law." See Badiali v. N.J. Mfrs. Ins. Grp., 429 N.J. Super. 121, 126 n.4 (App. Div. 2012), aff'd, 220 N.J. 544 (2015).

demanded money from the register. The robbery victim refused and hit the panic alarm button. The robber immediately fled. The victim ran after him and observed the robber get into a silver Dodge Neon.

The Roselle Police arrived a few minutes later. The victim told the police that the robber was an African American man, between 30 and 40 years old, with a medium build, about five-feet-eight to five-feet-ten, wearing a green shirt, blue pants, a hat, and carrying a blue bag. He also described the gun and provided the robber's license plate number.

After determining that the suspect's car was registered to an Edison resident, the police contacted Edison police for assistance. Within minutes, the Edison police located the vehicle, unoccupied, in front of an apartment complex. After about ten minutes, Edison Police Officer Gerry Katula observed a man enter the car and drive away; several other officers immediately pulled over the vehicle. Defendant was removed from the car and arrested at 10:55 a.m. The police searched the vehicle incident to the arrest and found a green shirt on the front seat, a black skull-cap hat in the rear passenger seat, and a blue bag and a handgun on the back passenger-side floor.[2]

Upon learning a suspect was apprehended, Roselle Park Detective Richard Cocca told the victim that the vehicle and suspect had been located in Edison, and he needed to go to the scene in order to make a positive identification. . . . When the victim saw defendant, he immediately responded, "that's him." According to Cocca, the victim had "absolutely no doubt" that defendant was the robber, "there was no second-guessing and

[2] The gun was a BB gun.

there was no other communication other than . . . that's him."

[D]efendant's sister and the owner of the vehicle, testified that she lived in Edison with defendant and her then eighteen-year-old son James. According to her testimony, at about 10 a.m., she noticed her car was not parked where she left it and her spare key was gone. She believed that her son James may have taken the car without permission, as he had previously done. Since she suspected James might have driven it to the nearby housing complex, his usual hang-out spot, she asked defendant to walk over there and retrieve the car.

Defendant's nephew James testified that he borrowed his mother's car whenever his car was not working. He could not recall if he took the car on the day of the robbery but denied any involvement in the robbery. At the time of defendant's trial, James was serving a prison sentence for a 2008 robbery he committed using his mother's car.

[Id. at 3-5.]

Before us, defendant raises the following points for our consideration:

DEFENDANT'S ROBBERY CONVICTION MUST BE REVERSED DUE TO TRIAL AND APPELLATE COUNSELS' INEFFECTIVENESS, AND THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF COUNSELS' INEFFECTIVENESS.

A. TRIAL AND APPELLATE COUNSEL FAILED TO PURSUE THE TRIAL COURT'S NOT INSTRUCTING THE JURY ON THE LAW OF ATTEMPT AS AN ELEMENT OF ROBBERY.

B. TRIAL COUNSEL FAILED TO REQUEST A JURY CHARGE ON THIRD-PARTY GUILT AND "REVERSE 404(B)" EVIDENCE REGARDING THE TESTIMONY OF JAMES BETHEA.

Having considered these arguments in light of the record and applicable legal standards, we affirm.

To establish an IAC claim, a defendant must satisfy the two-prong test formulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 52 (quoting Strickland, 466 U.S. at 687).

Second, a defendant must prove he suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 687. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52). We apply the same standard to a defendant's claims of ineffective assistance by appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007) (citing State v. Morrison, 215 N.J. Super. 540, 546 (App. Div. 1987)).

Although the judge provided the model jury charge on robbery, he failed to heed its reminder that if the robbery were an attempt, the judge should also charge the jury with the model jury charge on attempt. Trial counsel did not object to this omission, and appellate counsel did not raise the issue on direct appeal.

Trial counsel also did not request, and the judge did not provide, two other charges: Model Jury Charges (Criminal), "Proof of Other Crimes, Wrongs, or Acts — Defensive Use (N.J.R.E. 404(b))" (May 22, 2000); and a charge on third party guilt (approved Mar. 9, 2015). The defense was not only the affirmative alibi supplied by his sister, but also an effort to raise a reasonable doubt of the robber's identity by implying his nephew committed the robbery.

In his written opinion, the PCR judge, who was also the trial judge, rejected these arguments. He said he had "instructed the jury in accordance with the Model Jury Charge for robbery" and even if he had instructed the jury on "attempt, it would not have led to a different verdict, as the jury had already determined that [defendant] had attempted a theft." As to the other jury instructions, the judge noted that defendant called James as a witness and examined him at length about the 2008 robbery that led to his incarceration. The judge determined that the jury had the opportunity to consider James' credibility and compare his physical appearance to that of the robber's description provided

by the victim, and counsel's failure to request the charges did not amount to ineffective assistance.

Citing our decisions in State v. Dehart, 430 N.J. Super. 108 (App. Div. 2013), and State v. Gonzalez, 318 N.J. Super. 527 (App. Div. 1999), defendant argues trial and appellate counsel provided ineffective assistance by failing to object to the omission of instructions on criminal attempt during the charge on robbery and by failing to raise that omission on direct appeal.

In Dehart, we reversed a conviction for reasons identical to those in Gonzalez. Dehart, 430 N.J. Super. at 120. The defendant was charged with a robbery that was alleged to have been committed by a threat of force during an attempted theft. Id. at 116-17. The court did not instruct the jury on attempt during its charge on robbery or at any other time during its final instructions. Id. at 118. Consistent with our holding in Gonzalez, we found plain error because the jury instructions did not define the elements of criminal attempt that were essential to the jury's determination of defendant's guilt on the robbery charge. Id. at 120.

However, 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."
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> [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 422-23 (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.

Our colleagues in DeHart, 430 N.J. Super. at 120, and Gonzalez, 318 N.J. Super. at 536-37, found plain error in the failure to charge "attempt" despite the strength of the State's cases. However, our colleagues in State v. Belliard, 415 N.J. Super. 51 (App. Div. 2010), reached a different result, and we subscribe to their reasoning.

In Belliard, the defendant was convicted of first-degree robbery and felony murder. Id. at 60. In his appeal, the defendant argued, among other things, the trial court failed to define

"attempt" for the jury. Id. at 64. However, because there was evidence the defendant had taken a substantial step toward committing a robbery, we found the court's error to be harmless. Id. at 72. "Therefore, while the judge's failure to charge the jury with attempt was in error, this error was not sufficient to lead the jury to a result it would not have otherwise reached." Id. at 74.

Here, the judge clearly erred by not defining attempt during the jury charge. See State v. R.B., 183 N.J. 308, 325 (2005) ("[M]odel jury charges should be followed and read in their entirety to the jury."). Assuming arguendo trial counsel's failure to object to the charge was evidence of deficient performance, defendant cannot meet the second prong of the Strickland/Fritz standard.

The focus of the defense was not whether a robbery occurred, but rather, whether defendant was the perpetrator. The victim described the demand for money that was accompanied by the threat of a handgun. Only the victim's decision to sound the panic alarm thwarted the completion of the theft. There was no dispute that the robber, whoever he was, "purposely" took "a substantial step in a course of conduct planned to culminate in his commission of the crime." N.J.S.A. 2C:5-1(a)(3). Omitting a charge on attempt did not "lead the jury to a result it would not have otherwise

reached," Belliard, 415 N.J. Super. at 74, and therefore does not "undermine [our] confidence in the outcome" the jury reach. Pierre, 223 N.J. at 583. Since appellate counsel has no obligation to raise issues on direct appeal that would not succeed, see State v. Echols, 199 N.J. 344, 361 (2009), defendant's IAC claim as to appellate counsel is unavailing.

We also reject defendant's IAC claim premised on trial counsel's failure to request the reverse 404(b) evidence and third party guilt instructions. Once again, the judge erred by not providing the reverse 404(b) evidence charge to the jury. However, assuming arguendo counsel's failure to ask for the charge evidences deficient performance, defendant again fails to establish prejudice under the second prong of the Strickland/Fritz standard.

As noted, defendant produced James as a witness to advance a theory of third party guilt. See State v. Weaver, 219 N.J. 131, 150-51 (2014) (explaining the defensive use of "reverse 404(b)" evidence). The model jury charge on the defensive use of 404(b) evidence does little more than tell the jury it "should consider this evidence, along with all the other evidence in the case, in determining whether or not the State has proven beyond a reasonable doubt that defendant is the person who committed" the crime. Model Jury Charge (Criminal), "Proof of Other Crimes, Wrongs, or Acts — Defensive Use (N.J.R.E. 404(b))." At other points in the jury

charge, the judge repeatedly made clear that the State bore the burden of proof on identification, that defendant had no burden of proof and that the State had to prove beyond a reasonable doubt that defendant committed the charged offenses. The omission of this charge was not prejudicial.

The third party guilt charge provides more guidance to jurors. It states:

> The defendant contends that there is evidence before you indicating that someone other than he or she may have committed the crime or crimes, and that evidence raises a reasonable doubt with respect to the defendant's guilt.
>
> In this regard, I charge you that a defendant in a criminal case has the right to rely on any evidence produced at trial that has a rational tendency to raise a reasonable doubt with respect to his/her own guilt.
>
> I have previously charged you with regard to the State's burden of proof, which never shifts to the defendant. The defendant does not have to produce evidence that proves the guilt of another, but may rely on evidence that creates a reasonable doubt. In other words, there is no requirement that this evidence proves or even raises a strong probability that someone other than the defendant committed the crime. You must decide whether the State has proven the defendant's guilt beyond a reasonable doubt, not whether the other person or persons may have committed the crime(s).
>
> [(Emphasis added).]

Defense counsel intended to raise a reasonable doubt in jurors' minds as to the identity of the perpetrator through the extensive direct examination of defendant's nephew James. James admitted he was serving a sentence for a 2008 robbery of a liquor store, committed less than one year after the instant offense, while he was driving his mother's car and while his co-defendant was armed with a BB gun. Certainly, the model charge would have properly focused the jurors' attention not on whether James had actually committed the robbery, but rather whether the evidence raised a reasonable doubt that defendant committed the robbery.

However, the failure to request the model charge was not evidence of deficient performance because the model charge was not adopted until 2015, years after this trial. Our research reveals no similar charge existed at the time of this trial. In addition, defendant points to no decision predating the model charge that required the court to provide a similar instruction. Therefore, defendant's IAC claim must fail.

Moreover, while charging the jury on the State's burden to prove identity, the judge specifically told jurors "[d]efendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person." This instruction incorporated the most

significant aspect of the model charge as it relates to burden of proof.

Affirmed.