SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1493-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WALLY NANCE, a/k/a
WILLEY NANCE,

Defendant-Appellant.

Submitted November 6, 2017 - Decided February 15, 2018

Before Judges Messano, Accurso and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 13-05-0665.

Joseph E. Krakora, Public Defender, attorney for appellant (Sophie Kaiser, of counsel and on the brief).

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Timothy P. McCann, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Following the denial of his motion to suppress his statement to employees of the Department of Labor investigating his claim for unemployment benefits, defendant Wally Nance was convicted by a jury of one count of third-degree theft by deception, N.J.S.A. 2C:20-4(a). Defendant was sentenced to 364 days in the county jail, ninety days to be served immediately on the weekends, with the remainder to be served at the end of his five years' probation. Defendant was also ordered to pay $16,000 in restitution on a five-year payment plan.

Defendant appeals, raising the following issues:

> POINT I.
>
> THE COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE BY STRIKING CERTAIN TESTIMONY IN SUCH A WAY AS TO MAKE DEFENDANT APPEAR UNTRUTHFUL AND AS AN INFERIOR WITNESS; THIS ERROR WAS EXACERBATED BY THE JURY INSTRUCTIONS AND THE PROSECUTOR'S STATEMENTS. (Partially Raised Below).

He adds the following points in a pro se brief:

> POINT I.
>
> APPELLANT'S CONFESSION WAS INADMISSIBLE BECAUSE IT WAS NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY GIVEN AND VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE NEW JERSEY AND THE UNITED STATES CONSTITUTION.

POINT II.

THE TRIAL JUDGE'S VIOLATION OF THE RULES OF EVIDENCE VIOLATED THE APPELLANT'S CONSTITUTIONAL RIGHTS.

Having considered defendant's arguments in light of the facts and the applicable law, we affirm.

The facts presented to the jury were not complicated. Following the end of his employment by the City of Trenton after twenty-five years, defendant applied for unemployment benefits in January 2011. He began receiving benefits in the second week of June. In the middle of July, he got a job with R.M. Nizzardi, Inc., a plumbing contractor. He did not, however, advise the Department of Labor.

The Department only learned of defendant's reemployment when Nizzardi filed a "new hire" report in August. Upon receiving Nizzardi's report, the Department of Labor placed a hold on defendant's unemployment benefits. Defendant, however, told a representative of the Department on the telephone that he had not yet started work for Nizzardi, and the hold was lifted. Defendant started reporting the wages he was earning at Nizzardi in September 2011, and continued to do so into May 2012.

In July 2012, another hold was placed on defendant's account. After learning of the hold, defendant went to the Department of Labor and asked to speak to someone about his

benefits. Defendant met with an investigator, who initiated an inquiry into the claim.

The investigator asked Nizzardi for defendant's weekly wages. Nizzardi provided the investigator with a report of defendant's weekly wages based on the timecards defendant completed each week reporting his hours. A comparison of Nizzardi's documents to the Department's records of defendant's reported wages made clear defendant was omitting and underreporting his earnings.

When defendant went again to the Department to discuss his claim after receiving the Department's summary fact-finding notice, he was greeted by the investigator and two supervisors. Their meeting, in a small, windowless conference room with the door closed, was recorded on a tape machine in the room. The investigators told defendant they were there to discuss what happened and to make a determination "as to the overpayment that is going to be coming back to the State of New Jersey."

Defendant immediately asked if he needed a lawyer. One of the senior investigators replied, "Nah, you don't need a lawyer," but quickly added, "I mean, it's up to you. You are entitled to representation." After defendant said, "nah, it's, nah I just want to get this [over]," he proceeded to make several incriminating statements. Defendant acknowledged the

underreporting, but claimed he was unfamiliar with the reporting requirements, got bad or incomplete advice from the local unemployment office and was placed in a difficult financial situation when the Department delayed almost six months before starting his benefits.

Defendant explained the delay in his receipt of benefits left him "in a situation where I'm just about to lose my home ok so whatever I needed to do, whatever I had to do, I had to do, ok and you know and however you know you, y'all want to put it together." Defendant also told the investigators he was "taking full responsibility for it and I'm saying yes, yes whatever ya know whatever it is, it is what it is and I take full responsibility of it."

Following a N.J.R.E. 104 hearing, the court denied defendant's request to suppress the statement, finding defendant not in custody and the statement clearly voluntary. The statement figured prominently at trial. The prosecutor referred to it in his opening, played it for the jury in the course of the State's case in chief and replayed bits of it in his summation. Through witnesses from Nizzardi and the Department of Labor, the State presented proof that defendant was overpaid $15,548 in unemployment benefits over the course of twenty-seven weeks.

Defendant testified in his own behalf. In response to questions by his counsel, defendant was unable to say when he began receiving unemployment benefits or when he started work for Nizzardi, and did not know whether he had begun receiving his benefits by that time. Defendant also could not say how many hours he worked per week for Nizzardi and could only estimate that he might have worked for the company for six or seven months. He claimed it was not he but his wife who called every two weeks to report his earnings. Defendant maintained he did not fail to report his employment with Nizzardi or how much he earned in wages.

When confronted on cross-examination with the Department of Labor's records showing the underreporting, defendant claimed the records failed to show he "paid over $10,000 back." The prosecutor moved to strike, saying, "There's absolutely no evidence of that in this case." The court granted the motion and told the jury it was not to consider the statement.

A few minutes later, defendant again testified he paid back the money. Becoming emotional, defendant said,

> You don't see that. I paid back into it. I set up a payment, and I paid back into it. They gave me a suspension. They told me to pay it back. They told me even put a fine. And you know what I said, whatever it is, I'll take it, because you know what, whatever I need to do to protect my family,

> I'm going to do it. But to tell me I'm a criminal, that's just wrong.

After defendant continued into other areas he had been repeatedly advised not to mention before the jury having to do with a separate indictment, the judge ordered a break to permit defendant to compose himself. After the trial reconvened, defendant returned again to the topic of repayment, saying, "You asked me pay the money back. I set up a payment plan. I paid the money back." The judge responded, saying "Mr. Nance, Mr. Nance, please. Please lower your voice. . . . I've addressed that. . . . And so the payment plan, it's stricken from the record. There is no evidence about the payment plan." On the last exchange in the cross, defendant testified the investigators told him if he made payment he would not be prosecuted, "and now I'm being prosecuted."

After defendant rested, the State requested a curative instruction on the issue of repayment, claiming there was no proof defendant repaid any monies voluntarily. The prosecutor claimed any sums defendant repaid were either withheld from other benefits or were court-ordered while defendant was enrolled in the Pre-trial Intervention Program, which he could not address with defendant on cross examination given the

obvious prejudice of discussing his participation in PTI.[1] Noting the several times defendant returned to the topic even after the court struck the testimony, the prosecutor claimed the jury "has now been left with the thought that somehow Mr. Nance has come up with $10,000 and repaid the State of New Jersey, and now the big bad State is going after him again for some unknown reason."

Defendant's counsel expressed the view that a curative instruction was not necessary. The judge explained he struck the testimony regarding repayment because

> [t]heft by deception occurs when one obtains the property of another by creating a false impression. It's purposeful conduct, and the State has alleged that the Defendant has created the false impression that he was [un]employed at various [times]. His efforts to compensate at a later date does not really have anything to do with his state of mind at the time he allegedly gave that false impression. The Defendant's restitution in this matter or repayment commenced well after the offense, the alleged offense had been committed.
>
> In addition, his repayment was ordered by PTI. There was really no choice in the matter. Therefore, any evidence as to his

[1] Defendant was admitted into PTI and remained in the Program for a year before voluntarily withdrawing without completing it. The prosecutor represented the initial amount defendant was deemed to owe to the Department of Labor was $23,970, which was reduced subsequently by benefits withheld. The prosecutor claimed defendant was ordered to repay the State $18,890 in PTI. At trial, the State claimed defendant was overpaid $15,548.

> restitution or repayment is not relevant to his state of mind or to offset any type of intent at the time the alleged offense was committed.
>
> Additionally, the State is entitled to criminally prosecute the Defendant for his crime whether or not he decided to pay it back at a later date or not. It does not touch upon the issues of the Court, and I believe it improperly focuses attention on the Defendant's subsequent efforts to repay the debt, and it's just not proper.

Following that discussion, the judge delivered two "curative" instructions to the jury, the first at the request of defendant and the second at the request of the State. They were as follows:

> And I would like to address two matters concerning testimony you may have heard in this case. During this case, you may have heard testimony from Department of Labor witnesses that the Department of Labor made certain determinations in this case with regard to fraud or penalty.
>
> I direct you, I further direct you, that you are in no way to consider in your deliberations any determination in this case by the Department of Labor with regard to fraud or the penalty. In addition, the Defendant in this matter testified that he repaid a portion of his employment benefits to the State. Immediately after I provided — he provided such testimony, I ordered it stricken from the record and instructed you to disregard it. I would like to repeat that instruction. His testimony concerning repayment is stricken. It is not evidence and shall not enter into your final deliberations. It must be disregarded by

> you. This means that even though you may remember the testimony, you are not to use it in your discussions or deliberations.

We reject defendant's argument that the court's decision to strike his testimony regarding the repayment of benefits was error or that it deprived him of a meaningful opportunity to present a complete defense. "A defendant in a criminal trial has a Sixth Amendment right to offer any evidence that refutes guilt or bolsters a claim of innocence." State v. Harris, 156 N.J. 122, 177 (1998). The right to present a defense, "[a]lthough fundamental, . . . is not absolute." State v. Jenewicz, 193 N.J. 440, 451 (2008). "The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Ibid. (quoting Montana v. Egelhoff, 518 U.S. 37, 42 (1996)).

Defendant claims his "defense was that any underreporting on his part was negligent, not intentional or criminal" and that his "willing[ness] to pay the money back upon realizing his mistakes" was relevant to prove his errors were unintentional. We accept that conduct occurring after a charged offense may circumstantially support an inference about a defendant's state of mind, and that such evidence might be offered to show the defendant's conduct was not intentional. See State v. Williams,

190 N.J. 114, 125 (2007). To the extent the proffered evidence, limited to defendant's willingness to repay the funds, was probative of his state of mind, however, it was cumulative of similar statements defendant made to the investigators, which were played for the jury.

But the statements excluded went beyond merely expressing a willingness to return any overpayment. Defendant attempted to testify, not only that he was willing to repay the money, but that he paid back $10,000, and the State was prosecuting him anyway. The State argued that testimony was misleading because defendant's repayment was not voluntary. The State maintained it recouped monies overpaid to defendant by withholding other benefits due him and from payments defendant was ordered to make as a condition of PTI. Defendant did not dispute that assertion at trial. We agree that any such payments were not probative of a "willingness" to repay if not made voluntarily. Further, involuntary payments do not make it more likely defendant's conduct in obtaining the funds was negligent and not intentional.

We also agree the State was limited in attacking the testimony on cross-examination because of the prejudice to defendant in discussing his participation in PTI. Accordingly, the evidence, even if deemed relevant, was properly excluded

under N.J.R.E. 403(a) because its probative value was substantially outweighed by the risk of undue prejudice, confusion of issues and misleading the jury. We accordingly do not find the trial judge abused his considerable discretion in excluding defendant's testimony that he repaid monies to the State. See State v. Cole, 229 N.J. 430, 449 (2017).

We do not agree the judge's instruction striking the testimony was in any way prejudicial to defendant, see State v. Tilghman, 385 N.J. Super. 45, 60 (App. Div. 2006), or that the "curative" instruction, considered in the context of the entire charge, was error. See State v. McKinney, 223 N.J. 475, 497 (2015). At the same time the judge told the jury it was to disregard any evidence of repayment to the State, he also advised them to disregard any statements by the investigators at the Department of Labor referring to fraud or penalty. We see no prejudice to defendant.

We find no error in the prosecutor's remarks in summation. The prosecutor's argument was based on the facts in the record, indeed, defendant's own words, and the reasonable inferences to be drawn therefrom. See State v. Timmendequas, 161 N.J. 515, 594 (1999). Defense counsel made no objection to the remarks, leading us to infer he did not find them prejudicial. See State v. Irving, 114 N.J. 427, 444 (1989). Having examined the entire

record, we are satisfied "it was the weight of the evidence, particularly the damning statements uttered by defendant himself, that led to this . . . conviction rather than the prosecutor's . . . comments." See Timmendequas, 161 N.J. at 596 (quoting State v. Feaster, 156 N.J. 1, 63-64 (1998)).

Finally, we reject defendant's argument that the judge erred in admitting his statement to the Department of Labor investigators. There is no dispute that defendant was not in custody when he made his recorded statement to the investigators. The investigators thus had no obligation to provide him with Miranda[2] warnings or to terminate the questioning when defendant asked whether he should get a lawyer. See State v. P.Z., 152 N.J. 86, 121 (1997) (finding "no basis to require [Division of Youth and Family Services] caseworkers to give Miranda warnings or afford a right to counsel during non-coercive, non-custodial interviews of parents subject to Title Nine investigations" and no constitutional or other basis on which to hold the statement inadmissible). There is no indication in the record that the investigators interviewed defendant with the purpose of aiding in this criminal prosecution, which had yet to be instituted. Id. at 120.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

To the extent we have not addressed them, defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

Affirmed.