SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1870-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

V.

DENNIS KULINETS,

Defendant-Appellant.

Submitted January 22, 2018 - Decided February 22, 2018

Before Judges Whipple and Rose.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 14-05-0515.

Joseph E. Krakora, Public Defender, attorney for appellant (Stefan Van Jura, Deputy Public Defender, of counsel and on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Dennis Kulinets of various drug and weapon offenses. For the first time on appeal, defendant contends certain evidentiary errors warrant reversal of his

convictions. Defendant argues further the trial court erred in applying aggravating factor five when imposing sentence. Having reviewed defendant's arguments in light of the record and applicable legal principles, we affirm.

I.

We summarize the pertinent facts from the trial record. Acting on complaints of drug activity in a local park, Edison Police Detectives established an undercover surveillance of possible targets, including Mandeep Singh.[1] Defendant was not a target of the investigation.

On October 15, 2013, at approximately 1:45 p.m., detectives observed the driver of a gray Volkswagen, later identified as defendant, approach Singh in the park. Singh entered the car and defendant drove out of the park. Detectives followed the Volkswagen, which stopped suddenly in the middle of the road. From their vantage point in an unmarked vehicle, detectives observed defendant exit his car, open the trunk, and remove a clear plastic bag containing marijuana. When detectives activated the overhead lights on their vehicle, defendant threw the marijuana back into the trunk.

[1] Prior to defendant's trial, Singh pled guilty pursuant to an unspecified plea agreement with the State. His appeal is not before us.

Detectives detained defendant and Singh, and seized a marijuana grinder and three large bundles of cash from the open glove box. Detectives obtained a warrant to further search defendant's car. Two bags of marijuana were seized from the trunk: the clear plastic bag, containing forty-nine ounces of marijuana defendant had removed from the trunk in the presence of the detectives; and a black shopping bag, containing ninety-six ounces of marijuana. Detectives also recovered from the trunk a digital scale, and a .38 Smith & Wesson revolver loaded with two bullets. Defendant gave detectives the password to his cellular telephone, and they found an "owe sheet" listing money owed to him by four individuals, including Singh.

After waiving his Miranda[2] rights, defendant made two video-recorded statements that were played for the jury at trial.[3] In the first statement, defendant admitted he intended to sell one ounce of marijuana to Singh for $280, and the cash in the glove box totaling approximately $2,900 or $3,000. Defendant stated

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

[3] It is unclear from the record whether the court held a pretrial Miranda hearing. See N.J.R.E. 104(c) and N.J.R.E. 803(b)(1). However, prior to admitting into evidence each video-recorded statement, the trial court instructed the jurors it was their "function to determine whether or not the statement was actually made by the defendant, and if made[,] whether the statement or any portion of it is credible."

further he could purchase an ounce of "indoor" quality marijuana for less than $100, but he had to drive two hours to purchase it. Defendant did not make the transaction with Singh in the park because he "[did not] like doing things at parks." Although his car smelled of marijuana, he claimed he had not smoked the drug in one year.

During his questioning in the second statement, the lead detective suggested defendant grew the loose marijuana because it appeared freshly cut and was contained in a grocery bag, while the other quantity of marijuana was packed into a sealed bag. Indicating he lived with his parents, defendant denied growing marijuana. He stated further he "usually" purchases similarly-packaged marijuana. Defendant claimed he found the revolver in a creek near his home, approximately two weeks prior to his arrest, and did not know why he stored the weapon in the trunk.

On April 22, 2016, a jury convicted defendant of third-degree possession of one ounce or more of marijuana with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(11); second-degree possession of more than one ounce of marijuana with intent to distribute within 500 feet of a park, N.J.S.A. 2C:35-7.1; second-degree unlawful possession of a firearm, N.J.S.A. 2C:39-5(b); and second-degree possession of a firearm during a drug offense, N.J.S.A. 2C:39-4.1.

At sentencing, the trial court merged the conviction for third-degree possession with intent to distribute marijuana with the conviction for second-degree possession with intent to distribute within 500 feet of a park, and sentenced defendant to a six-year term of imprisonment. The court merged the conviction for second-degree unlawful possession of a firearm with the conviction for second-degree possession of a firearm during a drug offense. The court imposed a consecutive six-year term of imprisonment, with forty-two months of parole ineligibility pursuant to N.J.S.A. 2C:39-4.1(d). The court also sentenced defendant to a consecutive four-year term of imprisonment for a violation of probation, having found defendant committed the present offenses while he was serving a term of probation.

On appeal defendant raises the following arguments for our consideration:

> POINT I
>
> THE ARRESTING OFFICER'S ACCUSATION AND OPINION THAT DEFENDANT WAS INVOLVED IN THE MANUFACTURE OF MARIJUANA WERE UNFOUNDED, INAPPROPRIATE, AND VIOLATIVE OF DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL. U.S. Const. [a]mend[]. VI and X[IV]; N.J Const., [a]rt. 1, [¶] 9 and 10.
> (Not raised below)
>
> POINT II
>
> WHERE THERE WAS NO CLAIM THAT THE POLICE WERE ACTING ARBITRARILY IN THEIR SURVEILLANCE

OPERATION, THE INTRODUCTION OF GRATUITOUS TESTIMONY PORTRAYING DEFENDANT'S ASSOCIATE AS THE SCOURGE OF THE NEIGHBORHOOD DENIED DEFENDANT HIS RIGHTS TO CONFRONTATION AND A FAIR TRIAL.
(Not raised below)

POINT III

IF THE CONVICTIONS ARE NOT REVERSED, THE MATTER SHOULD BE REMANDED FOR IMPOSITION OF A LESSER SENTENCE BECAUSE THE COURT SHOULD NOT HAVE FOUND AGGRAVATING FACTOR FIVE.

For the reasons that follow, we affirm.

II.

For the first time on appeal, defendant raises constitutional challenges to the admission of evidence at trial. He claims his right to due process was violated because testimony was elicited from the lead detective suggesting defendant manufactured marijuana. Defendant claims further his right of confrontation was denied because the trial court permitted hearsay testimony of Singh's drug dealing.

When a defendant fails to raise an issue at trial, our review is governed by the plain error standard. R. 1:7-2; R. 2:10-2; see State v. Singleton, 211 N.J. 157, 182-83 (2012). "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result. . . ." R. 2:10-2. When applying the plain error standard to evidence that should have been excluded, "the error

will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached." State v. R.K., 220 N.J. 444, 456 (2015) (citing State v. Daniels, 182 N.J. 80, 95 (2004)). In weighing the effect of improperly admitted evidence, this court may assess "if the State's case is particularly strong." Ibid.; see also State v. Chapland, 187 N.J. 275, 289 (2006)(recognizing "any finding of plain error depends on an evaluation of the overall strength of the State's case"). Under this heightened standard, defendant's arguments are unpersuasive.

A.

We first address defendant's contention the trial court erred in permitting testimony suggesting he manufactured marijuana, when he was not charged with a manufacturing offense. Defendant contends the jury was "misled to believe that [he] was a high-level player in the marijuana business, so they would conclude that certainly he was guilty of the less serious charges before them." Defendant claims the court erred not only in admitting the video recording of his second statement to the detectives, but also in permitting follow-up questioning by the State of the lead detective after the recording was played for the jury at trial:

> Q: Okay. . . . you questioned [defendant] on why — on whether he was growing marijuana, right?

A: Yes.

Q: Why did you do that?

A: Well, because the marijuana was loose in a bag, and it was freshly — you can see that it was freshly cut.

Q: Okay. What do you mean by freshly cut?

A: It was — the marijuana was very fresh. It wasn't dried out. It was — it looked like it had just come off a plant recently.

To support his argument this testimony was problematic, defendant first claims the detective was not qualified as an expert in marijuana manufacturing. This argument is misplaced. The lead detective did not opine at trial defendant grew marijuana. Rather, his pretrial interrogation of defendant was an investigative technique designed to elicit an admission. The technique failed, however, because defendant consistently denied he grew the marijuana, claiming, "I live with my parents, there's no way that's happening."

Further, the lead detective's testimony the marijuana was "freshly cut," "wasn't dried out," and "looked like it had just come off a plant recently" are observations based on his perceptions. To be admissible, lay opinion must be based on the perception of the witness and provide evidence that will assist the factfinder in performing its function. State v. McLean, 205

N.J. 438, 456 (2011) (citing N.J.R.E. 701, which permits testimony based on the perception of the witness when it "will assist in understanding the witness' testimony").

Ultimately, admissibility of lay opinion rests with the discretion of the trial court. State v. LaBrutto, 114 N.J. 187, 197 (1989). Therefore, we review the admission of this evidence for an abuse of discretion. State v. Feaster, 156 N.J. 1, 82 (1998). Substantial deference is afforded to the trial judge's discretion on evidentiary rulings unless it is a clear error of judgment or so wide of the mark that a manifest denial of justice results. See, e.g., State v. Koedatich, 112 N.J. 225, 313 (1988); State v. Swint, 328 N.J. Super. 236, 253 (App. Div. 2000).

In light of our deferential standard of review and defendant's failure to object to the detective's line of inquiry and the State's follow-up questioning, we discern no error, much less plain error, in the admission of the detective's observations of the characteristics of the marijuana. Rather, the detective's description of the marijuana seized aided the jury in understanding the detective's technique in questioning defendant.

Moreover, aside from its belated nature, defendant's argument is flawed because the evidence against him at trial was "particularly strong." R.R., 220 N.J. at 456. Specifically, the detectives observed defendant retrieve marijuana packaged in a

clear plastic bag from his Volkswagen in broad daylight. Further, defendant admitted ownership of all contraband seized from the car, specifically: two packages of marijuana, a grinder, a digital scale; large quantities of bundled cash; and a loaded revolver. He also admitted driving two hours to purchase marijuana at a significantly lower price than he sold it. He not only admitted he contacted Singh to sell him marijuana but also that Singh and three other individuals listed on the "owe sheet" in his cellular phone owed him money. Based on this overwhelming evidence of defendant's guilt, we also are not persuaded he was unduly prejudiced by the admission of the detective's testimony. N.J.R.E. 403.

Defendant claims further for the first time that the trial court did not issue a limiting instruction regarding the lead detective's challenged testimony. Defendant is "in a poor position to argue on appeal about the failure of the trial judge to give a [limiting] instruction when he had not requested one[.]" State v. Nelson, 318 N.J. Super. 242, 254 (App. Div. 1999); see also N.J.R.E. 105 (providing for a limiting instruction "upon request"). Notably at the conclusion of trial, the court instructed the jurors, among other things, that their verdict must not be based on "speculation, conjecture, and other forms of guessing." Given the strong evidence against defendant, "we are

not prepared to view this purported error as plain," State v. Johnson, 287 N.J. Super. 247, 262 (App. Div. 1996), particularly because "the prosecutor did not suggest to the jury, in summation or otherwise, that [it] should use the evidence to draw . . . an improper conclusion." State v. Burden, 393 N.J. Super. 159, 172 (App. Div. 2007).

Nor, on these facts, do we discern a basis for the trial court sua sponte to have given such an instruction. See, e.g., State v. Brown, 138 N.J. 481, 535 (1994) (no limiting instruction required if affected party waives right to have it given); Nelson, 318 N.J. Super. at 254 (no plain error found where limiting instruction should have been given even though not requested). Therefore, we find no plain error in the judge's failure to provide a limiting instruction relative to the lead detective's suggestion during questioning that defendant manufactured marijuana, or at trial as to why he conducted his inquiry.

B.

We next address defendant's newly minted argument he was denied his constitutional right to confrontation and a fair trial by the court's admission of hearsay statements concerning drug activity in the park, and the State's "excessive" references to Singh's drug dealing. Defendant also argues the trial court failed to provide the jury with a limiting instruction to counter the

implication defendant was guilty by association with Singh. Under the heightened plain error standard, defendant's arguments fail.

Initially, defendant's reliance on State v. Branch, 182 N.J. 338 (2005), is misplaced. There, the Court held police officers "may not imply to the jury that [they] possess[] superior knowledge, outside the record, that incriminates the defendant." Id. at 351. Further, "the Confrontation Clause and the hearsay rule are violated when . . . a police officer conveys . . . information from a non-testifying declarant to incriminate the defendant." Id. at 350.

Here, evidence was adduced at trial that detectives established an undercover surveillance operation in the vicinity of a local park and Singh's residence based on citizen complaints of drug activity in that area. The complaints of these non-testifying concerned citizens did not incriminate defendant. Rather, the testimony explained why the officers were in the area.

Indeed, defendant was arrested because he sold a quantity of marijuana to Singh, in the presence of law enforcement officers, and possessed a large quantity of marijuana and a firearm. Further, he subsequently admitted he supplied Singh with marijuana, and that he had previously purchased marijuana for resale. In light of the overwhelming evidence of defendant's guilt, the admission of background information pertaining to Singh

and the surveillance of the park near his residence is not "'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Williams, 168 N.J 323, 336 (2001) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). See also State v. Prall, ___ N.J. ___, ___ (2018) (upholding a conviction despite evidentiary errors because the errors were harmless in light of the "overwhelming admissible evidence" of defendant's guilt).

III.

Defendant also challenges his sentence, arguing the court improperly considered aggravating factor five. He urges us to remand for resentencing without this factor.

At defendant's sentencing hearing, the court found aggravating factors three, the risk defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3); five, a substantial likelihood the defendant is involved in organized criminal activity, N.J.S.A. 2C:44-1(a)(5); and nine, the need for deterrence, N.J.S.A. 2C:44-1(a)(9). The court found no mitigating factors. Pertinent to this appeal, the court made the following findings regarding aggravating factor five:

> There is a substantial likelihood that defendant was involved in organized criminal activity, based upon the fact that he was selling marijuana, that he did not manufacture or grow. So he must have obtained it from

> someone else; and, hence, we have an organized crime here.

We review sentencing determinations for abuse of discretion. State v. Robinson, 217 N.J. 594, 603 (2014) (citing State v. Roth, 95 N.J. 334, 364-65 (1984)). The sentencing court must "undertake[] an examination and weighing of the aggravating and mitigating factors listed in [N.J.S.A.] 2C:44-1(a) and (b)." Roth, 95 N.J. at 359; State v. Kruse, 105 N.J. 354, 359 (1987). Furthermore, "[e]ach factor found by the trial court to be relevant must be supported by 'competent, reasonably credible evidence'" in the record. State v. Fuentes, 217 N.J. 57, 72 (2014) (quoting Roth, 95 N.J. at 363).

We accord deference to the sentencing court's determination. Id. at 70 (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). We must affirm defendant's sentence unless

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Ibid. (quoting Roth, 95 N.J. at 364-65).]

We will remand for resentencing if the sentencing court fails to provide a qualitative analysis of the relevant sentencing factors, ibid. (citing Kruse, 105 N.J. at 363), or if it considers an

inappropriate aggravating factor. Ibid. (citing State v. Pineda, 119 N.J. 621, 628 (1990)).

Aggravating factor five requires proof defendant is involved in organized criminal activity. In applying this factor, the sentencing court need not demonstrate defendant's criminal behavior was related to his participation or membership in an organized crime group, such as a gang. Rather the nature of the offense, itself, may warrant a finding of organized criminal activity, where, as here, a defendant is convicted of narcotics distribution. See State v. Varona, 242 N.J. Super. 474, 491-92 (App. Div. 1990) (finding evidence in the record supported applying aggravating factor five where defendant was convicted of conspiracy to distribute cocaine); see also State v. Velez, 229 N.J. Super. 305, 316-17 (App. Div. 1988), aff'd as modified, 119 N.J. 185 (1990) (determining a fact-finding hearing was unnecessary after a drug distribution conviction because defendant was not manufacturing the drugs, and thus he had to be obtaining them from other sources). While we appreciate defendant's argument that the finding of aggravating factor five could apply in "virtually every case," he fails to persuade us that the finding was improper in the present case.

Conversely, to support her finding of aggravating factor five the trial judge here, like the court in Velez, assumed defendant

obtained the marijuana "from someone else" because he did not manufacture or grow the marijuana he sold. The evidence adduced at trial, and our prior decisions, support this finding.

Here, in his second statement to the detectives, defendant repeatedly denied he grew marijuana. He also admitted he purchased "loose" marijuana at a reduced rate and resold it at a profit. Further, a loaded revolver was seized with marijuana from the trunk of defendant's vehicle, and a large quantity of bundled cash was seized from his glove compartment. From this evidence, we agree the trial court properly concluded defendant was engaged in the business of purchasing and selling marijuana, an illegal business implicating organized criminal activity. Thus, we find credible evidence supported the court's finding of aggravating factor five. See Velez, 119 N.J. at 188.

We have considered defendant's remaining arguments in light of the record and conclude they are "without sufficient merit to warrant discussion in a written opinion[.]" R. 2:11-3(e)(2).

Affirmed.