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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2398-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAZIR GORDON,

Defendant-Appellant.

Submitted December 18, 2017 – Decided January 17, 2018

Before Judges Messano, O'Connor, and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 14-
02-0322.

Joseph E. Krakora, Public Defender, attorney
for appellant (Stephen P. Hunter, Assistant
Deputy Public Defender, of counsel and on the
brief).

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Stephen
A. Pogany, Special Deputy Attorney
General/Acting Assistant Prosecutor, on the
brief).

PER CURIAM

After his motion to suppress physical evidence was denied without an evidentiary hearing, defendant Jazir Gordon proceeded to trial and was found guilty by a jury of third-degree possession of heroin, N.J.S.A. 2C:35-10a(1); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5b; fourth-degree possession of a defaced firearm, N.J.S.A. 2C:39-3d; fourth-degree possession of hollow nose bullets, N.J.S.A. 2C:39-3f; third-degree resisting arrest by physical force or violence, N.J.S.A. 2C:29-2a(3)(a); and fourth-degree resisting arrest by flight, N.J.S.A. 2C:29-2a(2). The jury acquitted him of the remaining charges.

On the unlawful possession of a firearm conviction, the judge imposed 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). The judge imposed concurrent terms on the remaining counts.

On appeal, defendant raises the following points for our consideration.

POINT I

THE TRIAL COURT'S FAILURE TO PROVIDE CORRECT JURY INSTRUCTIONS WAS PLAIN ERROR. ADDITIONALLY, THE TRIAL COURT IMPROPERLY DIRECTED A VERDICT ON COUNT FIVE. U.S. CONST. AMEND. XIV; N.J. CONST. ART. I, ¶¶ 1, 10. (NOT RAISED BELOW)

POINT II

THE TRIAL COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING ON DEFENDANT'S MOTION TO SUPPRESS. U.S. CONST. AMEND. IV, XIV; N.J. CONST. ART. I, ¶¶ 1, 7.

POINT III

THE SENTENCE WAS EXCESSIVE. U.S. CONST. AMEND. VIII, XIV; N.J. CONST. ART. I, ¶¶ 1, 12.

I.

At trial, Essex County Sheriff's Detective Angel Cintron testified that on the evening in question, he was surveilling an intersection in Newark after receiving certain information. Cintron saw a man approach defendant and engage in a hand-to-hand transaction, in which defendant exchanged some "item" with the other man and received cash. Defendant began to ride away from the area on his bicycle, and Cintron radioed to backup units present at the scene, and they responded.

Detective Anthony Docke intercepted defendant's bicycle with his police vehicle. When defendant saw the detective, he pulled a black handgun from his waistband, tossed it over a fence, dropped his bicycle and ran. Docke retrieved the gun, a .40 caliber semi-automatic that contained four hollow point bullets. Its serial number had been defaced.

Sheriff Officer Frank Betts gave chase and ultimately caught and tackled defendant. Betts tried to place handcuffs on defendant, but defendant "flailed his arms around" so the officer could not gain control of his wrists and hands. After defendant was subdued, Betts found four glassine envelopes of heroin in the rear pocket of defendant's shorts. Defendant had two dollars in his front pocket.

Before the State rested, the prosecutor read the following stipulation to the jury:

Upon request from the Essex County Prosecutor's Office, Detective Sergeant Brett Bloom caused the records of the firearms investigations unit to be thoroughly searched with regard to one Jazir Gordon, date of birth 4/22/95. The search failed to reveal the defendant making an application for, or being issued, a permit to carry a handgun, permits to purchase handguns, a firearms purchaser identification card, or a permit for an assault weapon with respect to the Smith & Wesson model High Point, caliber 40, serial number unknown. The Firearms Investigation Unit cannot conduct a search for firearms in our . . . database without serial numbers.

Defendant elected not to testify but called two witnesses, an investigator and the property manager of a building near where the gun was found. Together, they established that surveillance cameras were in place and operational on the day in question, and that law enforcement officers never requested to see the video recordings.

II.

In Point I, defendant argues the judge committed plain error by omitting two portions of the model charge for unlawful possession of a firearm, Model Jury Charges (Criminal), "Unlawful Possession of a Handgun (N.J.S.A. 2C:39-5b)" (rev. Feb. 26, 2001) (the Model Charge), and by directing a verdict on an essential element of that crime. He asks us to reverse his conviction for the unlawful possession of a firearm and related charges.

The judge began his jury instructions by defining some basic principles, including "possession." His language generally tracked Model Jury Charges (Criminal), "Possession (N.J.S.A. 2C:2-1)" (rev. June 20, 2014). He did not include the following portion of that charge:

[WHERE APPLICABLE, charge: Possession cannot merely be a passing control, fleeting or uncertain in its nature.] In other words, to "possess" an item, one must knowingly procure or receive an item or be aware of his/her control thereof for a sufficient period of time to have been able to relinquish his/her control if he/she chose to do so.

[Ibid.]

When providing instructions as to the substantive crime, the judge reminded the jury that he had already defined "possession." He did not include the following portion of the Model Charge:

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.

The judge also told the jury "that the State must prove beyond a reasonable doubt . . . that . . . defendant did not have a permit to possess such a handgun." He did not include the following portion of the Model Charge:

If you find that the defendant knowingly possessed the handgun, and that there is no evidence that defendant had a valid permit to carry such a handgun, then you may infer, if you think it appropriate to do so based upon the facts presented, that defendant had no such permit. Note, however, that as with all other elements, the State bears the burden of showing, beyond a reasonable doubt, the lack of a valid permit and that you may draw the inference only if you feel it appropriate to do so under all the facts and circumstances.

Instead, he told the jury: "It is a stipulated fact that defendant had no permit to carry a handgun." Defendant did not object or take exception to the judge's instructions.

"Our rules provide that a defendant waives the right to contest an instruction on appeal if he does not object to the instruction. R. 1:7-2. We may reverse on the basis of unchallenged error if we find error that was 'clearly capable of

producing an unjust result.' R. 2:10-2." State v. Torres, 183 N.J. 554, 564 (2005). 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 422-23 (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.

While "model jury charges should be followed and read in their entirety to the jury," State v. R.B., 183 N.J. 308, 325 (2005), the omission of instructions on "fleeting possession" was not plain error capable of bringing about an unjust result in this

case. Defendant's entire strategy focused on the lack of any evidence, save Detective Docke's testimony, that defendant ever had the gun. In summation, defense counsel emphasized that none of the other officers saw defendant with the gun, there was another person in the area who police never apprehended or questioned, the gun was never processed for fingerprints and police never checked to see if surveillance cameras recorded defendant discarding the weapon, as the State claimed. A charge on "fleeting possession" ran counter to this defense.

Defendant's second argument presents a closer question. It is axiomatic that "[t]he prosecution bears the constitutional burden of proving each element of a crime beyond a reasonable doubt." State v. Grenci, 197 N.J. 604, 622 (2009) (citing In re Winship, 397 U.S. 358, 364 (1970); State v. Denofa, 187 N.J. 24, 38 (2006)). "[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)). It is improper for the judge to relieve the State of its burden to prove an element of any offense, and "when the constitutional deprivation consists of a directed verdict, preservation of the integrity of the right to trial by jury requires reversal." State v. Ragland, 105 N.J. 189, 196 (1986). "A directed verdict results when the

court instructs the jury to find the defendant guilty of a particular charge." Grenci, 197 N.J. at 622 (quoting Ragland, 105 N.J. at 202).

In Grenci, the defendant was charged with burglary and aggravated assault. The State alleged that he and his co-defendants forced their way into the victim's apartment and engaged in a violent brawl. Id. at 608. The melee followed the victim's earlier visit to the home of the parents of a co-defendant, Fallas; the victim, who had been in an earlier fight with Fallas, told the parents he wanted to talk with their son and would be waiting for him at home. Id. at 609.

The defendant was tried in absentia, and defense counsel argued that the brawl was a consensual fight and the defendant had not committed a burglary. Id. at 610. In providing instructions on the elements of burglary, N.J.S.A. 2C:18-2a(1), the judge told the jury without objection that "it's true with regard to [the defendant] that [he] entered [the victim's apartment] without license or privilege to be there." Ibid. The judge contrasted the defendant's position with that of Fallas, by further telling the jury that "there is some evidence here that . . . Fallas may have — it could be inferred that he had license to be there or some type of implied or expressed invitation." Id. at 621.

The Court concluded these instructions "directed the jury to find that [the] defendant was not licensed or privileged to enter [the victim]'s apartment." Id. at 622. In concluding this was plain error requiring reversal, the Court said, "[w]e doubt that directing a verdict on an element of an offense can ever be harmless." Id. at 623 (citing Torres, 183 N.J. at 564).

Here, the parties entered into a stipulation that the State's search of relevant records failed to reveal defendant had ever applied for or received the requisite firearms permit. The Model Charge explains to the jury how to use this information: "you may infer, if you think it appropriate to do so based upon the facts presented, that defendant had no such permit." Model Jury Charges (Criminal), "Unlawful Possession of a Handgun (N.J.S.A. 2C:39-5b)" (rev. Feb. 26, 2001).

It was a mistake for the judge not to provide these instructions, and he further erred by contorting the parties' stipulation and telling the jury it was "a stipulated fact that defendant had no permit to carry a handgun." However, the effect of these errors was ameliorated by the judge's instructions on stipulated evidence.

Some of the evidence in this case consists of stipulated facts. A stipulated fact is one that all parties have stated they agree upon as being true. You must regard such stipulations as proper evidence and you may

accept the facts therein as having been proven. Remember, however, that you are the sole judges of the facts and even though there's no dispute over these stipulated facts, you must still determine how much weight, if any, to give them in your deliberations.

More importantly, unlike the defendant in Grenci, whose defense was undercut entirely by the judge's instructions, for reasons already discussed, defendant's lack of a permit to carry the weapon did not impair the defense in the case, i.e., that defendant never possessed the weapon at all. Indeed, we might assume that defense counsel's failure to object evidenced a conscious strategy.

The effect of the judge's mischaracterization of the stipulation and his failure to provide the proper instructions effectively relieved the State of its burden to prove an element of the offense. However, under the particular facts of this case, we conclude this is one of those very rare instances where such error was harmless beyond a reasonable doubt. See R.B., 183 N.J. at 330 ("The harmless error standard thus requires . . . 'some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'") (alterations in original) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)).

III.

In Point II, defendant argues the motion judge, who was not the trial judge, erred by failing to hold an evidentiary hearing on his motion to suppress the drugs and gun seized by police. Neither party has supplied us with the motion and supporting or opposing papers that were filed.

As a result, we rely upon the transcript of the proceedings, which began with the judge acknowledging receipt of defendant's notice of motion, the State's brief, and defendant's reply brief. The judge asked if there were any other documents counsel wished him to review; both attorneys answered in the negative. The judge then acknowledged receipt of a "statement of facts from the State, statement of facts from the [d]efense," and asked if either attorney wished to argue. The prosecutor submitted on the papers, as did defense counsel.

The judge quoted Rule 3:5-7(c), which states "[i]f material facts are disputed, testimony . . . shall be taken in open court." Relying on State v. Green, 346 N.J. Super. 87 (App. Div. 2001); State v. Kadonsky, 288 N.J. Super. 41, 45-46 (App. Div. 1996), and State v. Hewins, 166 N.J. Super. 210, 214 (Law. Div. 1979), aff'd, 178 N.J. Super. 360 (App. Div. 1981), the judge proceeded to consider defendant's motion by extensively reciting the facts contained in each side's brief.

We need not repeat all those facts. It suffices to say that the State alleged Cintron and another officer received information from a confidential informant that a man fitting defendant's description would be selling heroin at a certain intersection, while sitting on a bicycle and armed with a handgun. The balance of the State's version of events mirrored the trial testimony described above.

The judge then read defendant's counter-statement of facts:

On August 26th, 2013, Mr. Gordon was standing with a group of associates at the intersection of 7th Avenue and Cutler Street in Newark. While at this location, several dark-colored vehicles "came into the lot at a rapid pace." Fearing for his safety, he and several other people ran from the area.

Contrary to the incident report and opposition brief, Mr. Gordon never tossed a handgun to the ground. Contrary to the incident report and State's opposition brief, Mr. Gordon stopped when he heard someone yell "police," these officers ran up to the apartment and forced their way inside to find Mr. Gordon.

Ms. King¹ never gave them permission to enter or search her apartment. Most important, prior to the police entering the parking lot, Mr. Gordon was not engaged in any suspicious behavior that would have warranted the search.

¹ It is unclear from the record who "Ms. King" is.

The judge concluded, "defendant has failed to place specific material facts in dispute sufficient to warrant an evidentiary hearing. His blanket statement that he was 'not engaging in any suspicious behavior that would have warranted a search' constitutes the conclusory assertion of unconstitutional search deemed insufficient by the Hewins and Kadonsky courts." Citing State v. Moore, 181 N.J. 40 (2004), the judge determined the officers had probable cause to arrest defendant based upon the observed exchange of money for an object. The judge further concluded he "need not address the abandonment doctrine" regarding the firearm, because the seizure of "any object within the constructive possession of defendant at or about the time of arrest would have been incident to the lawful arrest."

Defendant does not challenge the legal conclusions reached by the judge, but rather argues his counter-statement raised "contested issues of fact going to the validity of the search." He contends without any supporting legal argument that the judge was required to hold an evidentiary hearing because "[i]f defendant's version of the facts were found to be credible . . . his motion to suppress should have been granted." He urges us to remand for an evidentiary hearing. The State counters by arguing defendant's counter-statement of facts was nothing more than the

conclusory statements that the cases cited above hold do not demonstrate material factual disputes requiring a hearing.

In our opinion, it was unwise for the judge not to have conducted an evidentiary hearing. As the judge correctly noted, the most critical fact asserted by the State was that officers observed defendant consummate a drug deal, which gave them probable cause to apprehend and arrest defendant. Defendant's counter-statement of facts, however, essentially contested that fact. According to defendant, he was merely standing on a street corner with some associates when police vehicles came upon the scene, causing him to run in fear.

However, defendant not only failed to object to the judge rendering a decision on his motion without testimony, but also defense counsel affirmatively submitted the issue for the judge to decide on the papers. Under the invited error doctrine, "trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal.'" State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)). Such was the case here.

IV.

Defendant argues the sentence imposed was excessive. He contends the judge failed to find appropriate mitigating factors, N.J.S.A. 2C:44-1b, and inappropriately weighed defendant's drug

abuse and youth against him. The argument lacks sufficient merit to warrant extensive discussion. R. 2:11-3(e)(2).

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). As the Court has reiterated:

The appellate court must affirm the 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."

[State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

The judge found aggravating factors three and nine. See N.J.S.A. 2C:44-1a(3) (the risk of re-offense); a(9) (the need to deter defendant and others). The record adequately supported both.

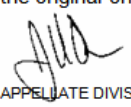
The judge did not find mitigating factors seven or eight, N.J.S.A. 2C:44-1b(7) (the lack of any history of prior delinquency or criminal activity); and b(8) (defendant's conduct resulted from circumstances unlikely to recur). Defendant claims this was error requiring re-sentencing.

However, there was no evidence to support factor eight. As to factor seven, while this was defendant's first conviction, he had a prior juvenile arrest and subsequent adult arrest, neither

of which resulted in adjudications of delinquency or conviction. Under the circumstances, the judge did not err by failing to find mitigating factor seven. See State v. Torres, 313 N.J. Super. 129, 162 (App. Div. 1998) (finding no error in not finding mitigating factor seven even though the defendant's two prior juvenile arrests did not result in a "final disposition").

Affirmed.

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


CLERK OF THE APPELLATE DIVISION