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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3326-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LAWRENCE KING,

Defendant-Appellant.

Submitted May 9, 2017 – Decided April 30, 2018

Before Judges Ostrer, Leone, and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
12-09-2500.

Joseph E. Krakora, Public Defender, attorney
for appellant (Robert Carter Pierce,
Designated Counsel, on the brief).

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Nancy P. Scharff,
Assistant Prosecutor, of counsel and on the
brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Defendant Lawrence King was convicted by a jury of various weapons offenses and sentenced to nine years in prison. He appeals his March 4, 2015 judgment of conviction. We affirm.

I.

The following evidence was elicited at the jury trial before Judge Richard F. Wells. Investigator John Collins of the New Jersey Division of Criminal Justice was involved in an undercover investigation into the illegal sale of firearms. Collins first met defendant through a confidential informant, who was being paid to work on behalf of law enforcement. In September 2011, Collins had several conversations with defendant regarding the sale of a handgun. On September 28, 2011, defendant sold a handgun with a defaced serial number to Collins while being audio- and video-recorded. In January 2012, Collins was again in contact with defendant with regard to the sale of additional weapons. On January 18, 2012, defendant handed an assault rifle to Collins and was arrested.

Based on the handgun sale, defendant was charged with second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); fourth-degree unlawful possession of a defaced firearm, N.J.S.A. 2C:39-3(d); and fourth-degree unlawful disposition of a defaced firearm, N.J.S.A. 2C:39-9(e). Based on the assault rifle sale, the charges were amended to third-degree unlawful possession of a

rifle, N.J.S.A. 2C:39-5(c); and fourth-degree disposition of a weapon, N.J.S.A. 2C:39-9(d).

In addition, based on a sale of a shotgun on or around August 28, 2012, defendant was charged with third-degree unlawful possession of a shotgun, N.J.S.A. 2C:39-5(c)(1); third-degree unlawful possession of a sawed-off shotgun, N.J.S.A. 2C:39-3(b); and third-degree unlawful disposition of a sawed-off shotgun, N.J.S.A. 2C:39-9(b). The State dismissed those charges before trial.

On the first day of trial, the jury heard testimony from Collins, Special Agent Sara Coughlin, who testified primarily regarding the chain of custody of the firearms, and defendant, who presented the defense of entrapment. The jury heard recordings from the September 2011 and January 2012 conversations between Collins and defendant. The jury also reviewed the audio and video recordings from the September 28, 2011 handgun sale. The January 18, 2012 rifle sale, however, was not recorded.

On the second day of trial, a Friday, the jury heard closing arguments and the court's jury charge. Jury deliberations commenced around 1:00 p.m. At 2:40 p.m., the jury submitted the following question: "If entrapment are other charges dismissed?" After some discussion with counsel and research, the trial court responded that if defendant proved entrapment, the jury must find

him not guilty. At 2:53 p.m., the trial court received a note stating: "We cannot come to a decision." The court noted that it "essentially got this note from the jury virtually almost by the time they got back to the jury room with regard to the answer to their initial question," that the jury had deliberated for less than two hours, and that it was a "usefully insufficient time to basically deliberate." The court responded by giving the jury the charge adopted in State v. Czachor, 82 N.J. 392 (1980), and embodied in the Model Jury Charge (Criminal), "Judge's Instructions On Further Jury Deliberations" (approved Jan. 14, 2013):

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced that it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. You are not partisans, you are judges, you are judges of the fact[s].

The trial court asked the jury to continue its deliberations. At 3:45 p.m., the court received a third note from the jury, stating: "Several members of the panel have indicated they will

not change their mind, so we cannot come to a unanimous verdict." The court discussed the note with counsel. The court noted that while the trial was brief, due to the entrapment defense, this was "a complex case" with two burdens of proof and an unusual verdict sheet, and "a complex analysis that the jury needs to engage in." The court also noted the jury "still ha[d]n't even deliberated for three hours." The prosecutor thought that "any further instruction from the Court to continue deliberations would be viewed by a reviewing court as coercive," and that "probably the better cause is to declare a mistrial." Defense counsel agreed.

At 4:19 p.m., in the midst of the trial court's discussion of the third note with counsel, a fourth note was received from the jury asking: "Can we view the video and audio" recordings relating to the handgun sale. Defendant objected to consideration of the question and said a mistrial was required. The court noted the jury sent this follow-up note with "no prodding whatsoever," suggesting the situation was not "clearly intractable." Accordingly, at 4:25 p.m., the court said to the jurors he thought the appropriate course was "to ask you to return to court Monday and continue your deliberations. All right?" In a fifth note, the jury asked if it would "be able to view the video/audio of [the handgun sale] on Monday?" Court and counsel agreed they could.

On Monday, the trial court denied defendant's renewed request for a mistrial. The audio and video recordings of the handgun sale were played for the jury. After deliberating for about an hour, the jury found defendant guilty of the three offenses based on the sale of the handgun. The jury found defendant not guilty of the two counts regarding the sale of the rifle.

The trial court denied defendant's motion for a new trial. The court sentenced defendant to nine years' imprisonment, with four years of parole ineligibility, for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), and concurrent eighteen-month terms for fourth-degree unlawful possession of a defaced firearm, N.J.S.A. 2C:39-3(d), and fourth-degree unlawful transport of a defaced firearm, N.J.S.A. 2C:39-9(e).

Defendant argues the following on appeal:

POINT I — THE TRIAL COURT ERRED BY NOT ORDERING A MISTRIAL AFTER THE JURY'S SECOND NOTE DECLARING A DEADLOCK AND BY FAILING TO PROPERLY INQUIRE OF THE JURY WHETHER FURTHER DELIBERATIONS WOULD BE BENEFICIAL OR FUTILE.

POINT II — THE CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTIONS LED TO AN INCONSISTENT VERDICT.

POINT III — MR. KING WAS DEPRIVED OF A FAIR TRIAL DUE TO THE STATE'S DISCOVERY VIOLATION.
(Not Raised Below)

POINT IV — THE SENTENCE IMPOSED UPON MR. KING WAS MANIFESTLY EXCESSIVE.

II.

Defendant argues the trial court erred by giving the model charge quoted above after the jury's second note, and by not ordering a mistrial after the jury's third note. We must hew to our standard of review. "The grant of a mistrial is an extraordinary remedy[.]" State v. Yough, 208 N.J. 385, 397 (2011). "Whether an event at trial justifies a mistrial is a decision 'entrusted to the sound discretion of the trial court.' Appellate courts 'will not disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice.'" State v. Smith, 224 N.J. 36, 47 (2016) (citations omitted). Similarly, the "determination as to whether a Czachor charge is warranted" is left to the "'sound discretion'" of the trial court, and may be reversed only for an abuse of discretion. State v. Ross, 218 N.J. 130, 144 (2014) (quoting Czachor, 82 N.J. at 407).

In Czachor, our Supreme Court "provided guidance to trial courts confronted with a jury's declaration that its deliberations have progressed to an impasse." Ross, 218 N.J. at 143. The Court "adopted the model charge suggested by the American Bar Association," which was subsequently included as Model Jury Charge (Criminal), "Judge's Instructions on Further Jury Deliberations" (Jan. 14, 2013). Id. at 144.

In deciding whether to give a Czachor charge "[w]hen a jury communicates a deadlock, trial courts 'should be guided in the exercise of sound discretion by such factors as the length and complexity of trial and the quality and duration of the jury's deliberations.'" Ibid. (quoting Czachor, 82 N.J. at 413). Only "[w]hen the 'difference of opinion between members of the jury is clearly intractable,' . . . then the jury is deadlocked and a mistrial should be declared.'" Id. at 145 (quoting State v. Figueroa, 190 N.J. 219, 237 (2007)).

As the trial court explained, when the jury sent its second note indicating "[w]e cannot come to a decision," the jury had been deliberating for less than two hours.¹ The note also came only a few minutes after the trial court answered the jury's first note about entrapment.

¹ Defendant argues the jury had been deliberating for two hours and forty-five minutes. He cites the times mentioned three months after trial in the court's denial of the motion for a new trial, which stated that the "jury exited the courtroom for deliberations at 12:01 p.m.," and that "[a]t 2:45 p.m. the Court received a second note[.]" However, the trial transcript shows that the court sent the jury to lunch after its jury charge because "[i]t's noon" and told them to return "at 1," that the jury began "to deliberate at 1:00," that it was "seven minutes to three" when the jury sent the second note, and that the court and both counsel agreed the jury had been deliberating for two hours or less. We rely on the contemporaneous time references in the trial transcript rather than recollections three months later, which are not materially different in any event.

The entrapment issue added complexity to the trial, which already involved five counts and two transactions, spanned two trial days, and was "a tricky case procedurally," as defense counsel told the jury. Defendant argues the case was not complex because he did not contest making the gun sales. However, he vigorously claimed entrapment in his testimony and in his counsel's opening and closing arguments. To help show entrapment, his counsel expanded the case by eliciting evidence of the shotgun sale for which the charges had been dropped. The trial court's entrapment instructions required the jury to apply two different burdens of proof placed on different parties, and to consider a defense which had four subparts and "both subjective and objective elements"; even defense counsel in closing admitted he "never can tell which is which." The complexity of the entrapment defense was further evidenced by the jury's question about that defense.

Given the complexity of the case and the short period of deliberations, the trial court was properly concerned about the duration and quality of the jury's deliberations. As in Ross, "the trial court properly exercised its discretion in response to the jury's communication of an impasse by providing a Czachor charge and directing the jury to resume deliberations." 218 N.J. at 138, 145 (upholding the giving of a Czachor model charge when,

after five days of deliberations, the jury stated it could not reach a unanimous decision).

Defendant argues the trial court instead should have asked whether "further deliberations would be futile" using Model Jury Charge (Criminal), "Judge's Inquiry When Jury Reports Inability To Reach Verdict" (approved June 10, 2013). However, the instruction for this "inquiry" charge states: "This charge presumes that the jury has already indicated its deadlock and has been instructed about continuing deliberations" using the Czachor model charge. Id. at 1 n.1. Thus, it was proper to give the Czachor model charge first.

Further the "inquiry" charge was not required as the jury had deliberated for less than two hours. As the Supreme Court stated where a jury had deliberated for five hours and a half: "In light of the brevity of the deliberations, we find no error in the trial court's decision not to inquire specifically about whether further deliberations would likely result in a verdict," and instead "to require the jury to continue its deliberations." Figueroa, 190 N.J. at 226, 239-40. Even if the court had asked whether "further deliberations would be futile" and the jury had said "yes," it would have been proper for the court to then give the Czachor model charge. State v. Johnson, 436 N.J. Super. 406, 415 n.10 (App. Div. 2014).

After the trial court properly gave the Czachor model charge, the jury deliberated for less than an hour before sending the third note stating "we cannot come to a unanimous verdict." While the court and counsel were discussing how to respond, the jury sent its fourth note asking to "view the video and audio" recordings of the handgun sale. As the court found, the jury's fourth note revealed that the jury's alleged impasse was not "intractable."

In Ross, the jury sent a note that it was "'unable to reach a unanimous decision on any count. What is your next instruction?'" Id. at 138. The Supreme Court found the jury's note "did not signal an intractable divide that would warrant a declaration of mistrial. Instead, it communicated that its effort to reach consensus on the issues had fallen short." Id. at 145. Here, the jury's request to view key evidence suggested even more strongly that "the jury was still actively discussing the case and wished to further review evidence" and "wanted to deliberate more," as the trial court found in denying a new trial.

Defendant argues the trial court should have declared a mistrial or instructed the jury in the half hour between the third and fourth jury notes. However, it appears from the transcript that much of that time was consumed in reassembling the participants in the courtroom, as defendant had been sent to a

holding cell and the subsequent discussion between court and counsel covers less than two transcript pages before the fourth note is received. In any event, the court was hearing the positions of counsel and considering the caselaw and the facts to determine an appropriate response when it was interrupted by the jury's fourth note. The court was permitted to conduct "a careful analysis of the circumstances" rather than rushing into precipitous actions. See id. at 144.

The jury's request in the fourth note to view key evidence indicated the jury thought further deliberations would be worthwhile. Defendant nonetheless contends the trial court was required to ask the jury:

You have indicated that your deliberations have reached an impasse. Do you feel that further deliberations will be beneficial or do you feel that you have reached a point at which further deliberations would be futile? Please return to the jury room to confer, and advise me of your decision in another note.

[Model Jury Charge (Criminal), "Judge's Inquiry When Jury Reports Inability To Reach Verdict" (approved June 10, 2013).]

However, the jury's fourth note had already answered that question by requesting further deliberations. The note also indicated any prior impasse might not be impassable. Our Supreme Court has rejected the idea "that an initial impasse signals the end of meaningful deliberations"; our Court instead "contemplates

that a previously deadlocked jury can conduct fair and effective deliberations notwithstanding an earlier impasse." Ross, 218 N.J. at 154 & n.5 (Czachor "is premised upon the principle that a properly instructed jury can and will meaningfully deliberate, notwithstanding a prior declaration of an impasse").

Because the jury's fourth note indicated it was not at an intractable impasse, the trial court did not need to declare a mistrial. We note the jury still had deliberated less than three hours. See Id. at 138; State v. Hightower, 146 N.J. 239, 258 (1996). Moreover, the Czachor model "instruction may, as a matter of sound discretion, be repeated if the trial judge finds that the jury has been unable to agree." Czachor, 82 N.J. at 407; see Figueroa, 190 N.J. at 234-35.

The trial court properly responded to the jury's fourth and fifth notes by granting the jury's request to review the audio and video evidence of the handgun sale and to deliberate further. There was nothing coercive in simply giving the jury the opportunity it requested. Cf. State v. Adim, 410 N.J. Super. 410, 420-22, 424-30 (App. Div. 2009) (reversing because the judge "deviated from the Court-approved instruction" and "the content of [his] instruction was so improperly coercive and intrusive"). Indeed, rather than pressing the jury to resume deliberations at

a late hour on Friday, the court postponed further deliberations until Monday.

Thus, the trial court did not abuse its discretion in addressing the jury's notes. There was also no manifest injustice requiring the extraordinary step of a mistrial.

III.

Defendant next argues the trial court caused an inconsistent compromise verdict by its "erroneous jury instruction concerning the second deadlock note." However, as discussed above, after the jury's second and third notes, which indicated it could not reach a decision, the jury issued its fourth note stating it wanted to review the audio and video recordings of the handgun sale. All the court did was grant the jury's request. We have rejected defendant's arguments that the court issued an "erroneous jury instruction" or erred by "inaction."

Moreover, the verdict was not logically inconsistent. Defendant argues it was inconsistent for the jury to find defendant guilty of the charges relating to the handgun sale but not guilty of the charges relating to the rifle sale. Those charges arose from two separate interactions between Collins and defendant – one that was supported by audio and video recordings and one that was not. Defendant testified Collins entrapped him into making the two sales, Collins testified he did not, and defense counsel

attacked Collins's credibility. The jury could have found that the audio and video recordings of the handgun sale showed defendant was not entrapped, but that the absence of such recordings of the rifle sale raised doubts about the sale and suggested defendant was entrapped. As the trial court noted in rejecting defendant's inconsistency argument, defense counsel vigorously attacked Collins's explanation for not recording the rifle sale and for deleting a text that preceded the rifle sale, and defendant insisted the rifle sale had not been consummated because no money was exchanged. "Therefore, we see no inconsistency between the verdicts." State v. Goodwin, 224 N.J. 102, 116 (2016).

In any event, "[o]ur system of justice has long accepted inconsistent verdicts as beyond the purview of correction by our courts, and therefore a defendant is forbidden from collaterally attacking a guilty verdict on one count with an apparently irreconcilable acquittal on another count." State v. Kelly, 201 N.J. 471, 487 (2010). "[A] jury may render inconsistent verdicts so long as there exists a sufficient evidential basis in the record to support the charge on which the defendant is convicted." State v. Banko, 182 N.J. 44, 46 (2004). Defendant admitted selling the handgun, and the sale and the lack of entrapment was amply established by the audio and video recordings, Collins's testimony, and other evidence.

IV.

Defendant argues for the first time on appeal that the State committed a Brady² violation by declining to disclose the amount of money the confidential informant was paid. Collins testified that the informant was "working for money," and that the amount of money paid was not revealed because the amounts could help to identify the informant. Defendant did not request the revelation of the amounts at that time, and instead used the lack of testimony regarding the confidential informant's compensation to attack Collins's credibility.

Because defendant failed to raise such a claim during trial, defendant must show plain error. Under the plain error standard, "defendant has the burden to show that there is an error, that the error is 'clear' or 'obvious' and that the error has affected 'substantial rights.'" State v. Chew, 150 N.J. 30, 82 (1997) (quoting United States v. Olano, 507 U.S. 725, 734 (1993)). To show such an effect, defendant must prove the error was "clearly capable of producing an unjust result[.]" R. 2:10-2.

"In Brady, the United States Supreme Court held that 'the suppression by the prosecution of evidence to an accused . . . violates due process where the evidence is material either to

² Brady v. Maryland, 373 U.S. 83 (1963).

guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" State v. Knight, 145 N.J. 233, 245 (1996) (citing Brady, 373 U.S. at 87). "Central to the Brady analysis is the determination of whether evidence is sufficiently 'material' to require its timely disclosure to the defendant." Id. at 246. "[E]vidence is material for Brady purposes 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Ibid. (citation omitted).

Defendant cannot show the amount of money paid to the confidential informant was material because the informant had no involvement in the September 28 handgun sale other than introducing defendant to Collins back in August. The informant was not involved in the negotiations to purchase the handgun, was not present at the sale, and was not a witness at trial. Our Supreme Court has "refused to require the disclosure of the identity of an informer who had merely introduced the undercover agent to the defendant but had not participated in the criminal transaction itself, [even if] he had been present." State v. Florenz, 134 N.J. 570, 578-79 (1994) (citing State v. Milligan, 71 N.J. 373, 388-89 (1976)). Similarly, there was no need to disclose the informant's rate of pay as the informant played no role in the handgun sale.

Defendant argues that disclosure was required because he raised an entrapment defense. The informant's privilege, codified in N.J.S.A. 2A:84A-28 and N.J.R.E. 516, may be inapplicable "when the defendant may reasonably assert the defense of entrapment." Id. at 579. In Florenz, the State used two paid informants, Copola, and De La Roche who introduced the defendant to Copola. Id. at 577. The two informants were the State's only actors in the reverse-sting drug sale: the informants negotiated the sale with the defendants and were present at the site of the sale, and Copola sold the drugs to the defendants and collected the money from the defendants. Id. at 576-77. The Court stressed that Copola "played a central and critical part in the commission of the crimes" and was the State's "key witness" at trial, and that De La Roche "played a substantial part in arranging for the commission of the crimes," "attended all the meetings between defendants and Copola at which the criminal plan was devised," and "was present when the drug transaction occurred." Id. at 578, 580, 592. As a result, the Court held that the State erred in refusing to disclose Copola's true identity, and that it violated Brady by failing to reveal that De la Roche was an informant. Id. at 578-83, 592-94. The Court emphasized that "defendants urged the defense of entrapment based in large measure on Copola's status as an agent of the State and on his role in the commission of the

crime," and that "De La Roche could have provided information that would have had a direct bearing on Copola's testimony relating to the commission of the crime," which "also would have been relevant to the issue of entrapment." Id. at 580, 593.

By contrast, the confidential informant here was not involved in the negotiation or consummation of the handgun sale. Defendant testified informant "told [him] that it was easy to sell guns" and "it was easy money." He testified he sold the guns because he "was promised that it was easy money from the CI, and [he] needed money to support [his disabled] mom." However, that was back in August leading up to defendant's sale of the shotgun to Collins with the informant present.³ However, the informant had no such role in the handgun sale on September 28, which was negotiated and consummated solely between defendant and Collins.

In any event, the State revealed and the jury knew that the confidential informant was involved in August, and that the informant was "working for money." Defendant only claims the State should have revealed the amount the informant was paid, but that had little if any relevance. Defendant claimed he was entrapped not by pressure from the informant but by the prospect

³ The State withdrew the charges relating to the shotgun sale to avoid disclosing the informant's identity. See Milligan, 71 N.J. at 393 (noting defendants "may gain dismissal of the prosecution where the State declines to reveal its source of information").

of earning money by selling guns to Collins. Moreover, only Collins and defendant negotiated and carried out the two sales that went to trial; the informant was not involved in those sales and did not testify at trial. Defendant failed to show that if the amount had been disclosed, there was a reasonable probability he would not have been convicted of the recorded handgun sale. He certainly has not shown any error was "clearly capable of producing an unjust result[.]" R. 2:10-2.

V.

Finally, defendant challenges his sentence. "Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014). We "may disturb a sentence . . . in only three situations: (1) the trial court failed to follow the sentencing guidelines, (2) the aggravating and mitigating factors found by the trial court are not supported by the record, or (3) application of the guidelines renders a specific sentence clearly unreasonable." State v. Carey, 168 N.J. 413, 430 (2001).

Defendant argues his sentence was manifestly excessive because the trial court overlooked mitigating factors one, two, and eleven. A "sentencing court is required to consider evidence of a mitigating factor and must apply mitigating factors that 'are

amply based in the record.'" State v. Grate, 220 N.J. 317, 338 (2015) (citation omitted). Here, the trial court properly considered and rejected those mitigating factors.

Mitigating factor one applies if "[t]he defendant's conduct neither caused nor threatened serious harm," N.J.S.A. 2C:44-1(b)(1), and mitigating factor two applies if "[t]he defendant did not contemplate that his conduct would cause or threaten serious harm," N.J.S.A. 2C:44-1(b)(2). The trial court found those mitigating factors were not warranted because defendant's actions "had the potential to result in serious harm to the community." We agree. Defaced handguns are a common tool of criminals. Illegally selling such a handgun enables its criminal use. The jury and the court properly rejected defendant's claim he was coerced into making that sale.

Mitigating factor eleven applies if "[t]he imprisonment of the defendant would entail excessive hardship to himself or his dependents." N.J.S.A. 2C:44-1(b)(11). The trial court found this mitigating factor inapplicable, as there were "no proofs of excessive hardship to defendant or defendant's family over and beyond the obvious hardships imposed on any individual subject to incarceration." Although defendant testified at trial that he sold the guns because he needed money to support his disabled mother, he told Probation he had not been employed for five years.

He "presented no evidence that he was a significant source of support for his" mother. See State v. Hyman, 451 N.J. Super. 429, 460 (App. Div. 2017); see also State v. Blackmon, 202 N.J. 283, 301 (2010).

We agree these mitigating factors were not supported by ample credible evidence. Given the absence of any mitigating factors and the trial court's findings of aggravating factors three, six and nine, based in part on defendant's prior convictions for drug distribution and obstruction, defendant's sentence was not excessive.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION