SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3851-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WALTER LOCKWOOD,

Defendant-Appellant.

Submitted December 20, 2017 - Decided February 22, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 14-01-0001.

Joseph E. Krakora, Public Defender, attorney for appellant (Jack L. Weinberg, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Brian Uzdavinis, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Walter Lockwood appeals from his conviction following a jury trial. After a review of his contentions in

light of the record before us and the applicable principles of law, we affirm.

Defendant was charged in an indictment, along with others, with manufacturing, distributing, or possessing with intent to manufacture, distribute, or dispense less than one half ounce of cocaine, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count one); possession of heroin, N.J.S.A. 2C:35-10(a)(1) (count four); aggravated assault by attempting to cause bodily injury to a law enforcement officer, N.J.S.A. 2C:12-1(b)(5)(a) (count six); and possession of a weapon — a machete — for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count seven). The charges arose out of evidence seized from defendant's home following the execution of a search warrant.

Several officers were involved in executing the no-knock warrant and, upon entering the residence, they saw defendant and several other individuals. Defendant was holding a machete that he raised as the police came through the door, despite the officers yelling "police" and "search warrant."[1] When he refused to drop the weapon, an officer lunged at him and the two men fell to the ground and into a closet at which point defendant dropped the

[1] All officers were wearing bullet proof vests with the word "POLICE" written on the front and back of the vest and had their badges visible upon entering the residence.

machete. None of the other individuals on the premises resisted arrest. Once the officers were able to handcuff defendant, Manville Police Department Detective David Sheffrin advised defendant of his Miranda rights, to which defendant replied, "Okay."

Officers proceeded to search defendant's residence where they recovered a sealed glassine fold filled with heroin, a spoon containing a liquid substance suspected to be heroin, and a flowered pouch containing hypodermic needles and empty glassine folds.[2] The officers also found a utility bill bearing defendant's name and the address of that location. Following the search, Sheffrin went to speak with defendant who was seated in a patrol car. Sheffrin testified that he reminded defendant that he had been apprised of his Miranda rights. He then informed defendant of the items found during the search of the residence, to which defendant replied, "It's mine." None of the other individuals present in the residence claimed ownership of the seized items.

Prior to trial, defendant filed motions to disclose the identity of a confidential informant (CI), and to suppress the

[2] The officers also recovered a purse holding hypodermic needles and empty glassine folds appearing to have previously held heroin. A woman who was in the apartment at the time of the search claimed ownership of the purse.

evidence seized from his residence. The judge[3] granted the motion to disclose the CI's identity. During oral argument on the suppression motion, however, the State advised it would dismiss count one of the indictment if the judge would reconsider her decision requiring disclosure of the CI's identity. The judge agreed, finding that the dismissal of count one would change her analysis because the CI had no integral involvement in the events surrounding the execution of the search warrant. The judge accordingly entered an order on December 19, 2014, dismissing count one and granting reconsideration of her prior decision to disclose the informant's identity.

In addressing the motion to suppress evidence, defendant argued that the no-knock search warrant was based upon "materially false information," specifically with regard to a past conviction, provided by Sheffrin and, therefore, the evidence recovered during the search should be suppressed. In his testimony supporting the issuance for the warrant, Sheffrin stated that defendant had "a criminal history from 1981 [that included] an aggravated assault on police."[4] Sheffrin continued, reciting further history of

[3] Three different judges handled the search warrant application, the pretrial motions, and the trial.

[4] Sheffrin referred to defendant's New Jersey Criminal History Detailed Record which shows that defendant was found guilty of

obstruction in 1991, third degree resisting arrest and eluding, and a conviction of substance abuse in 2008. Defendant was also a victim of a drive-by shooting outside of his home in 2012.

The judge considering the search warrant application found probable cause to believe that a crime had been committed, and that evidence of the crime might be found at defendant's residence. She stated:

> I will grant the no-knock warrant . . . based upon the criminal history of [defendant] which includes . . . some CDS and assault and eluding violations . . . but also the fact that approximately a year ago there was a drive by shooting . . . at that residence and I believe [defendant] . . . was the victim of that . . . shooting . . . . [G]iven that concern, I will . . . authorize a no[-]knock warrant.

In her comprehensive written decision addressing defendant's motion to suppress the warrant, the judge noted that the criminal history record listed the charge of aggravated assault on a police officer. She also reviewed the transcript from the application for the search warrant proceeding in which Sheffrin was asked by the court: "[Defendant] has a criminal history from 1981 there was an aggravated assault on police is that correct?" Sheffrin

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aggravated assault on a police officer, N.J.S.A. 2C:12-1(b)(5)(a), in June 1981. In support of his motion to suppress the evidence seized from the search warrant, defendant provided a Judgment of Acquittal dated May 12, 1981, stating that he was found not guilty on the charge.

responded affirmatively. The judge found the detective's affirmation was not false or misleading, noting that he did not state that defendant "was found guilty for the aggravated assault, just that it was included in his criminal history." "Referencing inclusion of an offense in a defendant's criminal history does not translate to the offense as an actual criminal conviction." She denied defendant's motion, stating that even if that portion of Sheffrin's testimony was disregarded, there was still ample evidence for a sufficient finding of probable cause to justify the issuance of the warrant.

Defendant's case was tried before a jury on several dates in January 2016. At the close of the State's case, defendant moved for a judgment of acquittal under Rule 3:18-1. In denying the motion, the trial judge stated:

> [t]here is certainly sufficient evidence with regard to the ag[gravated] assault and the weapons offenses. There's direct testimony, as a matter of fact, from the witnesses indicating the elements with regard to those charges.
>
> As to the CDS charge, yes, there [are] four people in the apartment. Clearly it is the defendant's apartment. Clearly there are drugs there, heroin specifically as defined by the chemist, and there apparently is an admission by the defendant that it was his, and the jury will take those factors into consideration.

After being convicted on the remaining counts in the indictment, defendant renewed his motion for a judgment of acquittal, specifically as to the possession charge. He argued that since there were other individuals found in the location where the heroin was seized, that it was against the weight of the evidence to conclude that the drugs were his. The judge denied the motion, stating:

> clearly there was an indication in the case that the defendant did not use heroin . . . himself but used other drugs. And it was apparent from the testimony in this case that this was basically a drug house and that there was pretty open notorious use of drugs . . . there, and that was backed up by the search warrant that was executed by the police.
>
> In the charge to the jury, I know that the Court gave the charge that there were concepts of joint possession; that people can share custody and control of various items within the household. In addition to that, we have the heroin found at his house. We have the defendant admitting that it was his when questioned by the police. . . . [C]onsidering the evidence, . . . the jury could find beyond a reasonable doubt that he was guilty of that offense.

Defendant also filed a motion for a post-verdict jury inquiry and requested a new trial based on the juror issue. Defense counsel advised that, several days after the verdict, her office had received a call from an attorney on behalf of a juror who advised that the juror was "afraid of [defendant]" because he had

given her a "dirty look" during trial. Although the attorney had subsequently reached out to the juror several times, she had stopped returning his calls. Defense counsel was concerned that if this juror had relayed the information to any other jurors, it might have played an "inappropriate part in their deliberations." She requested the court interview the juror to determine if "there was any taint during the deliberation, or at any part prior to the jurors deliberating."

In a thorough oral decision, the trial judge denied the request for a juror inquiry and for a new trial on those grounds. He carefully considered the applicable rules and case law and determined that that the information provided was too speculative to vault the high threshold required to recall a jury. He noted the lack of information concerning the juror's observations, surmising that defendant might have reacted to a testifying police officer with a "dirty look" or made an expression while testifying himself. The jury had been advised that part of their responsibility was to judge the credibility of the witnesses. In doing so, they are instructed to take into account a "variety of factors[,] including their appearance, [and] their demeanor during the course of the trial."

Defendant presents the following issues on appeal:

POINT I: THE COURT DEPRIVED THE DEFENDANT OF A FAIR TRIAL WHEN IT PERMITTED THE STATE TO PROCEED WITHOUT IDENTIFYING THE CONFIDENTIAL INFORMANT. IN THE ALTERNATIVE, THE COURT ERRED WHEN IT DID NOT RECONSIDER WHETHER THE SEARCH WARRANT WAS BASED ON STALE INFORMATION AFTER IT DETERMINED THAT THE STATE DID NOT HAVE TO REVEAL THE IDENTITY OF THE CONFIDENTIAL INFORMANT. (PARTIALLY RAISED BELOW).

POINT II: THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT. THE STATE'S FAILURE TO ADVISE THE ISSUING COURT THAT THE DEFENDANT WAS ACQUITTED OF THE CHARGE OF AGGRAVATED ASSAULT ON A POLICE OFFICER CONSTITUTED FALSE AND MISLEADING INFORMATION. THERE WAS NO JUSTIFICATION FOR THE ISSUANCE OF A NO-KNOCK PROVISION TO THIS WARRANT.

POINT III: PROSECUTORIAL MISCONDUCT DURING THE TRIAL AND SUMMATION DEPRIVED THE DEFENDANT OF A FAIR TRIAL. (PARTIALLY RAISED BELOW).

POINT IV: THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL PURSUANT TO R. 3:18-1. IN THE ALTERNATIVE, THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL PURSUANT TO R. 3:18-2 AND 3:20-1.

POINT V: THE TRIAL COURT ERRED IN DEALING WITH THE POST-VERDICT JUROR ISSUE. THE COURT'S FAILURE TO PROPERLY INVESTIGATE THE SITUATION HAS DEPRIVED THE DEFENDANT OF A FAIR TRIAL, ONE THAT INSTILLS CONFIDENCE IN THE VERDICT.

We have carefully considered each of defendant's contentions and find them to be without merit. Count one of the indictment was based on a CI's controlled purchases of controlled dangerous substances from defendant. After the State dismissed that count,

the CI was no longer "an active participant in the crime for which defendant [was] prosecuted." State v. Foreshaw, 245 N.J. Super. 166, 180-81 (App. Div. 1991) (citing State v. Oliver, 50 N.J. 39, 42, 45 (1967)). The remaining charges stemmed from the evidence seized following the search of defendant's residence. Under those circumstances, the judge did not abuse her discretion in denying disclosure of the CI's identity. The New Jersey Supreme Court has affirmed that a motion to compel the disclosure of an informer should be denied if the informer only played a marginal role in the events leading up to the arrest, "such as providing information or 'tips' to the police or participating in the preliminary stage of a criminal investigation." State v. Milligan, 71 N.J. 373, 387 (1976); see also State v. Brown, 170 N.J. 138, 149 (2001).

Although not raised to the trial court, defendant argues on appeal that, upon denying the disclosure of the CI's identity, the motion judge should have reconsidered whether the information relied upon in the search warrant application was stale. We must consider whether the totality of the information in the affidavit permitted the judge who issued the warrant to find "a fair probability that contraband or evidence of a crime [would] be found" if defendant's premises were searched during the time permitted in the warrant. State v. Smith, 155 N.J. 83, 93 (1998). In short, staleness is a question of whether probable cause existed

both when the warrant was issued and at the time of the search. State v. Blaurock, 143 N.J. Super. 476, 479 (App. Div. 1976).

Here, defendant failed to demonstrate plain error under Rule 2:10-2 because the probable cause that existed when the warrant was issued still existed at the time of the search. The warrant issued on November 12, 2013, was based on Sheffrin's testimony that defendant engaged in two controlled buys with a CI on October 6 and November 7, 2013. The judge found "probable cause to believe that [a] crime has been committed and that evidence of that crime may[] be . . . found at the [defendant's] residence." The search was executed on November 13, 2013. As the warrant was issued and executed within one week of the most recent controlled buy from defendant, there was a fair probability that evidence of the crime would be found at the time of the search.

We next consider defendant's argument that the motion judge erred in denying the suppression of the evidence seized pursuant to the warrant because the warrant was based on false testimony. "We are bound to uphold a trial court's factual findings in a motion to suppress provided those 'findings are supported by sufficient credible evidence in the record.'" State v. Watts, 223 N.J. 503, 516 (2015) (quoting State v. Elders, 192 N.J. 224, 243-44 (2007)).

As the search of defendant's residence was executed pursuant to a warrant, it enjoys a presumption of validity. See State v. Marshall, 199 N.J. 602, 612 (2009). Defendant's burden in challenging the search is "to prove 'that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable.'" State v. Jones, 179 N.J. 377, 388 (2004) (quoting State v. Valencia, 93 N.J. 126, 133 (1983)).

To support his claim of suppression here, defendant must make "a substantial preliminary showing" of material falsity, by specifying the information that the police included or withheld from the judge, "either deliberately or with reckless disregard of the truth." State v. Dispoto, 383 N.J. Super. 205, 216 (App. Div. 2006) (quoting State v. Sheehan, 217 N.J. Super. 20, 25 (App. Div. 1987)), aff'd as mod. on other grounds, 189 N.J. 108 (2007). The defendant must also show that the false or withheld information was material because it "would have militated against issuance of the search warrant." Ibid. (quoting Sheehan, 217 N.J. Super. at 25).

In his challenge to the warrant, defendant claims that Sheffrin intentionally made a false statement that defendant was convicted of a previous aggravated assault charge. In her consideration of this argument, the motion judge concluded that the detective had not made an affirmative misleading or false

statement. Furthermore, there was ample evidence to support the finding of probable cause to issue the warrant. Defendant had an extensive criminal history (even disregarding the 1981 aggravated assault charge), there was testimony regarding controlled buys made from defendant, and the purchased substance was tested and confirmed to be cocaine. We are satisfied that the judge's determination to deny the suppression motion was based on the sufficient credible evidence in the record.

Defendant argues that he was deprived of a fair trial due to prosecutorial misconduct during trial and summation. He refers to testimony given by Sheffrin at trial, who, while detailing the items found during the search of defendant's apartment, referred to a spoon that he described as containing liquid heroin.[5] Following a defense objection, the judge advised that the prosecutor should just refer to the spoon as containing "a liquid." The prosecutor confirmed with Sheffrin that the liquid in the spoon had not been tested to confirm that it was heroin. During his summation, the prosecutor referred to "the spoon with the substance in it that Detective Sheffrin thought to be." Defense counsel objected before the prosecutor could finish his sentence.

[5] The substance in the spoon was never tested by a lab to confirm its identity.

The court sustained the objection and the prosecutor continued with his argument without ever naming the substance in the spoon.

While a "prosecutor may be zealous in enforcing the law[,] . . . he must nevertheless refrain from any conduct lacking in the essentials of fair play." State v. Wakefield, 190 N.J. 397, 437 (2007) (quoting State v. Siciliano, 21 N.J. 249, 262 (1956)). Where a prosecutor's "conduct has crossed the line and resulted in foul play," reversal of the judgment is proper. Ibid. As such, "in order to justify reversal, the misconduct . . . must have been 'clearly and unmistakably improper,' and . . . 'must have been so egregious that it deprived the defendant of a fair trial.'" Id. at 438 (quoting State v. Smith, 167 N.J. 158, 181-82 (2001)).

In considering accusations of improper comments by the prosecutor, we examine whether defense counsel made a timely objection, whether the prosecuting attorney withdrew the remarks, and whether the judge acted promptly and provided appropriate instructions. See State v. Smith, 212 N.J. 365, 403 (2012). Here, defense counsel objected both to the comments made during Sheffrin's testimony and during summation. The judge sustained the objections, and the testimony and argument continued without incident. Defendant has failed to demonstrate that these fleeting comments were so egregious as to require a new trial.

Defendant points to an additional comment made by the State in summation when it asked the jury to assess the credibility of the defense witnesses who had felony convictions against the testifying police officers. Defendant did not object to the comment and we are satisfied the statement was not "clearly capable of producing an unjust result." R. 2:10-2. The State was commenting on evidence in the record. Two of the testifying defense witnesses had admitted to criminal convictions. Furthermore, defense counsel had argued to the jury in her summation that police "have an interest in the outcome of [a] case." And, that just because some of the witnesses had convictions that "does not mean that everything they say is a lie." The State is permitted to properly respond in its summation to arguments made by the defense. We are satisfied that it did so properly here.

We also conclude that defendant's arguments that the trial judge erred in denying his motions for acquittal and a new trial are without merit. The State presented testimony that a search of defendant's apartment recovered a sealed glassine fold filled with heroin, a purse holding hypodermic needles and empty glassine folds appearing to have previously held heroin, a spoon containing liquid suspected to be heroin, and a flowered pouch containing hypodermic needles and empty glassine folds. Defendant admitted

ownership of all of the items to the police.[6] There was ample evidence presented for a jury to render its determination of guilt. "[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000) (citing State v. Artis, 36 N.J. 538, 541 (1962)).

Defendant finally argues that the trial court erred in its handling of the post-verdict juror issue by failing to conduct an adequate investigation to insure defendant was not deprived of a fair trial. We disagree. We review a trial court's determination whether to conduct a post-verdict juror inquiry against the abuse of discretion standard and accord deference to the trial court's "unique perspective." State v. R.D., 169 N.J. 551, 559 (2001).

Post-verdict juror inquiry is an "extraordinary procedure" invoked only where a defendant makes a "strong showing" of harm by "jury misconduct." State v. Griffin, 449 N.J. Super. 13, 19 (2017) (quoting Davis v. Husain, 220 N.J. 270, 279 (2014)). A "bald accusation" that jurors considered extraneous information

[6] At trial, defendant did not deny that he had made the statement to the police. He did deny that any of the seized items were his, however, and said he told the police otherwise because he was angry and thought if he took ownership, the police would release the other people.

or some outside influence tainted the jury is simply not enough to reconvene a jury that convicted a defendant. State v. Harris, 181 N.J. 391, 503-04 (2004); see also State v. Keodatich, 112 N.J. 225, 289-90 (1988).

Here, defense counsel's office received a communication from an unidentified female juror's[7] attorney stating that the juror was "afraid of [defendant]" because defendant allegedly "gave her a dirty look" during trial. Defendant sought a post-verdict juror inquiry to determine whether a dirty look played an "inappropriate part in [the jury's] deliberations."

The trial court took the appropriate steps to investigate the issue: the presiding criminal judge contacted the unidentified juror's attorney for more information, but the juror was no longer responsive. The judge, thereafter, denied defendant's motion, reasoning that there was insufficient information to "take the drastic extreme step of calling this jury back" to inquire whether anything had occurred that affected their verdict. We are satisfied that the trial court did not abuse its discretion in denying defendant's motion because defendant failed to make a strong showing of potential jury misconduct.

Affirmed.

[7] It was unknown whether the juror in question participated in deliberations or was selected as an alternate.