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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4209-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASHEED BROWN,

Defendant-Appellant.

Submitted January 17, 2018 – Decided May 15, 2018

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 15-
06-1363.

Joseph E. Krakora, Public Defender, attorney
for appellant (Kevin G. Byrnes, Designated
Counsel, on the brief).

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Kayla
Elizabeth Rowe, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Rasheed Brown appeals his convictions for the
lesser-included offense of third-degree aggravated assault with a

deadly weapon, N.J.S.A. 2C:12-1(b)(2), third-degree possession of a weapon with the intent to use unlawfully, N.J.S.A. 2C:39-4(d), and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d), as well as his four-year prison term.

Before us, defendant argues:

POINT I

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE IMPROPER ADMISSION OF HIGHLY PREJUDICIAL AND CUMULATIVE OTHER-CRIME EVIDENCE.

POINT II

THE LIMITING OTHER-CRIME EVIDENCE INSTRUCTION WAS INCOMPLETE, DEFECTIVE, AND PREJUDICIAL. (Not Raised Below).

POINT III

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY PROSECUTORIAL MISCONDUCT. (Not Raised Below).

POINT IV

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE IMPROPER ADMISSION OF HIGHLY SUGGESTIVE IDENTIFICATION EVIDENCE.

A. THE IDENTIFICATION EVIDENCE WAS UNDULY SUGGESTIVE AND INSUFFICIENTLY RELIABLE.

B. THE POLICE FAILED TO PRESERVE PHOTOS FROM THE OUT-OF-COURT IDENTIFICATION PROCEDURE.

POINT V

THE SENTENCE IS EXCESSIVE: THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING AND MITIGATING FACTORS.

For the reasons that follow, we affirm.

I

We discern the following facts from the record. The conflict in question allegedly emanated in 2009, when defendant had sublet his room – without the authority to do so – at a Newark hotel serving as a homeless shelter to Jeffrey Taylor. According to Taylor, defendant repeatedly assaulted him upon seeing him wearing a pair of defendant's jeans that were left in the room. Taylor claims that the police were contacted but no charges were ever made against defendant. Understandably, Taylor no longer stayed in the room.

About three years later, Taylor came across defendant outside an Irvington bar. An argument ensued before Taylor went into the bar after seeing defendant pull out a knife. After having some drinks, Taylor left the bar with two friends, and defendant again confronted Taylor brandishing a knife. When Taylor and his friends got into their car, Taylor gestured to defendant who started

banging on the closed front passenger's side window where Taylor was seated. The driver then inexplicably lowered the automatic window, which allowed defendant to reach inside the car and hold the knife to Taylor's throat. Taylor moved back, but defendant was able to point the knife towards him again. Taylor grabbed defendant's arm, but defendant escaped his grasp and slashed his thigh, stomach, and right thumb with the knife. The driver then sped away, not realizing until he pulled over about two blocks later that Taylor was injured.

An ambulance took Taylor to the hospital where he informed the police that his assailant was a former roommate whose name he could not recall. After he was treated, Taylor went to the police station where he gave detective Mitchell Molina a physical description of his assailant that was put into a computer program to generate photographs of men who fit the description. Taylor, however, was unable to identify his assailant from the photos, which were not saved.

Ten days later, Taylor informed Molina he believed the man who stabbed him was named Lamont. He further believed that Lamont lived in East Orange and had a girlfriend named Maya. Taylor later advised Molina that he thought his assailant's last name was Johnson. Consequently, he went back to the police station where Molina showed him four photographs of men named Lamont Johnson.

However, he could not identify his assailant in any of the photographs.

Further investigation by Molina resulted in a tip that Maya lived with a man in a basement apartment located next to the bar where the incident occurred. When Molina questioned Maya at her apartment, she stated that her boyfriend's name was Randy Williams not Lamont Johnson. After no such person could be identified, Molina discovered that Maya lived with a man named Rasheed Brown. Molina obtained Brown's license photo, and believing he matched Taylor's description of his assailant, showed it to Taylor who confirmed that it depicted his assailant. Molina then revealed Brown's name to Taylor.

On the eve of trial, the judge conducted a Rule 104 hearing after which she determined that testimony concerning Taylor's photo identification of defendant and a limited account of the 2009 assault were admissible. After considering the trial testimony of Taylor, Taylor's friend who drove the night of the incident, Molina, and the initial investigating police officer — defendant exercised his right not to testify — the jury found defendant guilty of the lesser-included offense of third-degree aggravated assault with a deadly weapon, third-degree possession of a weapon with the intent to use unlawfully, and fourth-degree

unlawful possession of a weapon. At sentencing, after merger, defendant was sentenced to a five-year prison term.

II

Initially, we address defendant's argument in Point I that the State was improperly allowed to introduce the highly prejudicial evidence of other-crimes – the 2009 assault. He argues that since defendant was not charged for the alleged assault, the State failed to satisfy N.J.R.E. 404(b) by proving with clear and convincing evidence that the assault occurred.

We disagree. We review the trial judge's decision to admit evidence, including evidence subject to N.J.R.E. 404(b), for abuse of discretion. See State v. Willis, 225 N.J. 85, 96 (2016); State v. J.M., 225 N.J. 146, 157 (2016). N.J.R.E. 404(b) provides that evidence of other crimes or bad acts is generally not admissible, unless used for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute." In State v. Cofield, our Supreme Court set forth a four-pronged test to govern the admission of such evidence:

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;

3. The evidence of the other crime must be clear and convincing; and

4. The probative value of the evidence must not be outweighed by its apparent prejudice.

[State v. Cofield, 127 N.J. 328, 338 (1992) (citation omitted); see also State v. Carlucci, 217 N.J. 129, 140-41 (2014) (reaffirming the Cofield test).]

Further, even if relevant under N.J.R.E. 404(b), such evidence must nevertheless survive the crucible for all relevant evidence: "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence."

[State v. Lykes, 192 N.J. 519, 534-35 (2007) (quoting N.J.R.E. 403).]

The Court has also explained that Cofield's prong two "need not receive universal application in [N.J.R.E.] 404(b) disputes," and therefore need not apply where it is not relevant. State v. Williams, 190 N.J. 114, 131 (2007).

Once N.J.R.E. 404(b) evidence is found to be admissible, "the court must instruct the jury on the limited use of the evidence." Cofield, 127 N.J. at 340-41. "[T]he court's instruction 'should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend

and appreciate the fine distinction to which it is required to adhere.'" Id. at 341 (quoting State v. Stevens, 115 N.J. 289, 304 (1989)).

Here, after hearing Taylor's testimony during a N.J.R.E. 104 hearing, the court determined that he was credible and there was clear and convincing evidence that the 2009 assault occurred, and allowed it to show defendant's "motive and perspective" for attacking Taylor and how Taylor identified him as his assailant. The judge found this evidence probative and not prejudicial. We agree; there was no abuse of discretion in the admission of Taylor's testimony that defendant assaulted him three years prior to the altercation that was being tried. The fact that defendant was not charged in that initial assault is of no import, and even if he was, he could still challenge the admissibility of that assault. And, as we discuss next, the judge properly instructed the jury on the purpose for which the testimony was admitted and how it could evaluate the testimony.

Related to his Point I argument, defendant contends in Point II for the first time on appeal that the judge failed to charge the jury that they should disregard the evidence of other crimes, wrongs or acts if not clearly convinced that they occurred. He further argues the judge failed to charge the jury that it should not infer that defendant had a propensity to commit crimes or

infer that he had a bad character because he committed "fraud" by illegally subletting a room to Taylor. Because defendant did not object to the charge, we do not "consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). In addition, unraised issues that are of constitutional magnitude or constitute plain error under Rule 1:7-5 – where a trial error is "of such a nature as to have been clearly capable of producing an unjust result" – can be heard on appeal. Id. at 20; State v. Galicia, 210 N.J. 364, 383 (2012).

Under these parameters, we decline to consider defendant's contention that the jury charge was erroneous. Defendant fails to articulate a jurisdictional issue, a matter of great public interest, a constitutional violation, or plain error. As for the last, the charges did not produce an unjust result. In considering the 2009 assault, the jury was provided the Model Jury Charge (Criminal) "Proof of Other Crimes, Wrongs, or Acts (N.J.R.E. 404(b))" (2007), detailing how it should determine if the 2009 assault occurred. In pertinent part, the charge provides: "Before you can give any weight to this evidence, you must be satisfied

that the defendant committed the other [crime, wrong, or act]. If you are not so satisfied, you may not consider it for any purpose." Ibid. Defendant conflates the clear and convincing standard the judge must apply under Cofield to decide whether the other crimes evidence is admissible with the model jury charge standard the jury must apply to determine if it should accept the testimony of other crimes or bad acts. See State v. Wilson, 158 N.J. Super. 1, 10 (App. Div. 1978) (recognizing the jury decides whether to accept the testimony of the uncharged offense).

Moreover, as for the defendant's contention that Taylor claimed he committed "fraud," we do not see it. It is unclear how Taylor's accusation constitutes fraud. Neither defendant nor Taylor cited a criminal statute that was violated by the sublet arrangement. The agreement was admitted merely to explain their prior relationship, which led to the initial assault. Even conceding that the jury should not have been advised the sublet arrangement was illegal or wrong, the testimony was harmless as the clear focus of their 2009 relationship was the alleged assault, and we cannot envision the arrangement established "defendant's alleged bad character with a propensity to commit crimes" as defendant argues.

In Point III, defendant contends the prosecutor improperly injected his personal opinion in his summation, stating: "In my opening, I told you [this case] was about identification. Well, I was wrong. I heard the evidence and this weekend I thought about it using common sense." We disagree.

To warrant a new trial, a prosecutor's conduct must have been "'clearly and unmistakably improper' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Smith, 167 N.J. 158, 181-82 (2001) (quoting State v. Timmendequas, 161 N.J. 515, 575 (1999)). In determining whether a prosecutor's actions were sufficiently egregious we consider: (1) whether defense counsel made a timely and proper objection; (2) whether the remarks were promptly withdrawn; and (3) whether the judge struck the remarks from the record and issued a curative instruction. Id. at 182. In our review we "consider the tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred." Timmendequas, 161 N.J. at 575.

If no objection was made, the prosecutor's conduct generally will not be deemed prejudicial, as the failure to object indicates counsel did not consider the conduct improper and deprives the trial judge of the opportunity to take curative action. State v. Echols, 199 N.J. 344, 360 (2009). Absent an objection, defendant

must establish the conduct constitutes plain error. State v. Feal, 194 N.J. 293, 312 (2008).

We find insufficient merit in defendant's argument to warrant discussion here. R. 2:11-3(e)(2). We add only that the prosecutor is allowed to draw legitimate inferences from the facts presented at trial, namely that he used his common sense to think about the evidence. The prosecutor did not allude to his opinion as being the correct choice that the jury should abide by, and did not prejudice defendant's right to have the jury objectively weigh the evidence so as to require reversal. See State v. Land, 435 N.J. Super. 249, 269 (App. Div. 2014).

Turning to Point IV, defendant argues that Taylor's out-of-court identification of defendant from a single photo shown by Molina was unnecessarily suggestive and should not have been admitted. Defendant further emphasizes the unreliability of the identification process by pointing out that Taylor told police his assailant's name was Lamont Johnson, and not defendant. Moreover, he maintains the detective's failure to preserve the photos of men named Lamont Johnson did not comply with State v. Adams, 194 N.J. 186, 202-03 (2008), and State v. Earle, 60 N.J. 550, 552 (1972), and therefore warrants a new trial. Again, we disagree.

We accord a trial judge's findings regarding the impermissible suggestiveness of the identification procedure

"considerable weight." Adams, 194 N.J. at 203 (quoting State v. Farrow, 61 N.J. 434, 451 (1972)). "[A] defendant has the initial burden of showing some evidence of suggestiveness" in the identification proceeding "that could lead to a mistaken identification." State v. Henderson, 208 N.J. 208, 288 (2011) (citations omitted). "The findings of the trial judge as to reliability of the witnesses are [also] entitled to considerable weight." State v. Wilson, 362 N.J. Super. 319, 327 (App. Div. 2003). The identification may be admitted into evidence as long as "there is sufficient credible evidence in the record to support the findings." Adams, 194 N.J. at 203.

In our view, we agree with the judge's finding that Taylor's identification of defendant through a single photo shown to him by Molina was not impermissibly suggestive. There is no indication that the manner in which Molina conducted the identification process suggested that defendant was the assailant. Significantly, before being shown the photo, Taylor knew defendant from their sublet agreement and the assault in 2009. And Taylor had ample opportunity to see defendant before he entered the bar and after he left the bar prior to the assault in question. Moreover, between those two assaults, Taylor testified that he had seen defendant on three occasions and avoided contact with him.

Simply put, defendant was not a stranger to Taylor before he reached into the car and slashed Taylor with a knife.

The fact that Taylor had mistaken defendant's name is insignificant in determining whether the photo identification was admissible; it is the circumstances surrounding his identification of defendant's photo that is important. Although we agree with defendant that the photos of "Lamont Johnson" should have been preserved, under the totality of the circumstances, this shortcoming does not undermine the reliability of Taylor's identification.

Finally, in Point V, defendant maintains the record supports a three-year sentence – not the four-years given – because there was no basis for the judge to apply aggravating factor numbers three and nine. N.J.S.A. 2C:44-1(a)(3)(the risk of re-offense); -1(a)(9) (the need to deter). He also suggests mitigating factor five should have been considered because it was Taylor's taunts that caused defendant to attack him with the knife. N.J.S.A. 2C:44-1(b)(5) (victim induced defendant's conduct).

Review of a criminal sentence is limited; a reviewing court must decide "whether there is a 'clear showing of abuse of discretion.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)). Under this standard, a criminal sentence must be affirmed unless "(1) the sentencing

guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" Ibid. (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). If a sentencing court properly identifies and balances the factors and their existence is supported by sufficient credible evidence in the record, this court will affirm the sentence. See State v. Carey, 168 N.J. 413, 426-27 (2001); State v. Megargel, 143 N.J. 484, 493-94 (1996).

Here, we are unpersuaded that the judge erred in sentencing defendant. We find support in the record for the judge's findings, and the sentence does not shock our judicial conscience.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION