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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5581-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DEVON R. HAILE-JONES,

Defendant-Appellant.

Argued January 18, 2018 — Decided February 23, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment No.
14-04-0506.

Rebecca Gindi, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Rebecca Gindi, of counsel and on the brief).

Timothy P. McCann, Assistant Prosecutor,
argued the cause for respondent (Angelo J.
Onofri, Mercer County Prosecutor, attorney;
Timothy P. McCann, of counsel and on the
brief).

PER CURIAM

Defendant Devon R. Hallie-Jones appeals from his June 8, 2016 conviction and sentence. For the following reasons, we affirm.

I.

We derive the following facts from the evidence presented at trial. During the evening of February 5, 2014, Detective Sarai Cheek of the Trenton Police Department was on duty as a member of the Street Crimes Unit. Cheek was patrolling the Donnelly Homes housing project with her partner, Detective Sam Johnson, in an unmarked police car. In addition to Cheek and Johnson, a second Street Crimes Unit was also patrolling Donnelly Homes.

At approximately 11:13 p.m., Cheek and Johnson observed a tan Buick drive in front of their vehicle. As the car passed, Cheek noticed the driver, later identified as defendant, was not wearing a seatbelt. Cheek also noticed there was a passenger in the vehicle, later identified as co-defendant, Raymond Porter Jr.¹

After driving past Cheek and Johnson, the car stopped in the middle of the parking lot. The detectives observed Porter exit the vehicle, stop and look back into the vehicle, then close the door before quickly proceeding to the steps of one of the row homes. After defendant parked, Cheek initiated a motor-vehicle

¹ Porter is not a party to this appeal but was a co-defendant at trial. Unless otherwise stated, references to defendant refer only to Devon R. Hallie-Jones.

stop, at which time Porter took off running from the steps of the row home.

As the detectives approached the vehicle, Cheek immediately saw a large silver revolver with a black handle in plain view on the passenger's seat. At this time, Cheek notified Johnson there was a gun in the car, Johnson removed defendant from the vehicle, and Cheek removed the handgun. During the stop, defendant remained in the driver's seat until removed from the car and made no gestures toward the gun. Defendant was then arrested. Co-defendant, Porter, was arrested by the other Street Crimes Unit patrolling Donnelly Homes.

On April 29, 2014, a Mercer County Grand Jury charged defendant and Porter with second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1). Defendant does not contest he did not have a permit for the handgun.

Defendant and Porter jointly moved to suppress the handgun. On March 10, 2015, the trial court denied their motion, finding the traffic stop lawful, and the seizure of the handgun permitted under the plain view doctrine. Defendant does not appeal that ruling.

Defendant and Porter were tried jointly. The jury heard testimony from: Cheek, who testified regarding the facts leading to defendant's arrest; Detective Edward J. Burek, Jr., who is

assigned to the Ballistics Unit of the Trenton Police Department and testified regarding the evidence intake process and his finding that the gun was operable; Detective William Salhanick, who was assigned to the Street Crimes Unit the evening of the incident and testified regarding Porter's arrest; and Detective Robert J. Paccillo, who testified regarding the detection, collection, and identification of fingerprints. Notably, Paccillo found no identifiable fingerprints on the gun.

Cheek testified the area of the stop was "really well lit," and upon walking up to the car, she "immediately saw a large handgun sitting on the passenger seat." She further testified that although she had a flashlight, she believed she would have been able to see the gun without it. When describing defendant's proximity to the handgun, Cheek noted, "[i]t wasn't far from him. It was within arm's reach, directly next to him in the passenger seat." Cheek also stated defendant made no attempt to move toward the weapon or control it at any point during the stop. The handgun was admitted into evidence.

Defendant and Porter elected not to testify during the trial. After the parties rested, defendant's attorney moved for acquittal, arguing the State did not prove defendant possessed the gun because he made no moves toward it, did not exercise any control over it, and there were no fingerprints on the gun linking

it to him. After considering the evidence presented by the State, the inferences the jury could reach from the evidence, the elements of the offense, and the law regarding constructive possession, the trial judge denied the motion, concluding a reasonable jury could find all three elements of the charge were satisfied by the State beyond a reasonable doubt.

At the conclusion of testimony, the judge provided counsel with proposed jury instructions, giving counsel an opportunity to review the instructions prior to the charge conference. The proposed instructions included interchangeable use of the words "defendant or defendants." During the charge conference, the judge provided his reasoning for this language, stating: "it says, the [d]efendant or [d]efendants because I want the jury, obviously, to understand that they have to decide the evidence as to each of the [d]efendants, individually, so I wanted to, you know, clarify that." Notably, neither attorney objected to the proposed jury charges during the conference.

Because there was more than one defendant, the trial judge instructed the jury:

Ladies and gentlemen, obviously, we have more than one defendant as to each of the charges being tried.

You must return separate verdicts for each defendant as to each of the charges being tried.

In other words, you will have to decide each case individually. Whether the verdicts as to each defendant are the same depends on the evidence and your determination as judges of the facts.

With only minor modifications, the judge used the applicable portions of Model Jury Charge (Criminal), "Unlawful Possession of a Handgun (N.J.S.A. 2C:39-5b)" (rev. Feb. 26, 2001) (the Model Charge), which included the following:

The word "possess" as used in criminal statutes signifies a knowing, intentional control of a designated thing, accompanied by a knowledge of its character. Thus, a defendant or defendants must know or be aware that he possessed the handgun and a defendant must know what it is that he/they possess or control is a handgun. 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, a defendant or defendants must knowingly procure or receive the handgun possessed or be aware of his/their control thereof for a sufficient period of time to have been able to relinquish control if he/they chose to do so. A person may possess a handgun, even though it is not physically on his person at the time of arrest, if a person had, in fact, at some time prior to his arrest, had control over it.

. . . .

The law recognizes that possession may be constructive or actual. Constructive possession means possession in which the person does not physically have the handgun, but though not physically on one's person, he

is aware of the presence of the handgun and is able to and has the intention to exercise control over it.

The judge modified the last paragraph of the Model Charge by adding the phrase, "as to one or both defendants" as indicated below:

If you find that the State has failed to prove any of the elements of a crime charged beyond a reasonable doubt, your verdict must be not guilty as to one or both defendants.

On the other hand, if you are satisfied that the State has proven all of the elements of the crime beyond a reasonable doubt, your verdict must be guilty as to one or both defendants.

[(Emphasis added).]

During their deliberations, the jury presented two questions to the court simultaneously. The first asked, "How long constitutes possession?" The second asked, "What is fleeting?" The judge responded, "Unfortunately, ladies and gentleman, there is nothing more I can add, other than what that paragraph states."

On April 12, 2016, the jury returned a verdict, finding defendant and Porter guilty of second-degree unlawful possession of a handgun. At defendant's sentencing, the State argued for a seven-year term of imprisonment with a three-and-a-half year period of parole ineligibility. Defendant argued the court should impose the lowest sentence possible because this was his first

Superior Court conviction, he had two dependent children, he was unaware of the presence of the gun, and he cooperated fully with the justice system. Defendant contended he should be sentenced below the statutory requirement to a term of probation. The State would not consent to a Graves Act waiver under N.J.S.A. 2C:43-6.2. The trial judge asked the prosecutor, "had he pled guilty before trial, . . . would that have been appropriate to ask for some type of Graves Act waiver from the criminal presiding judge?" The prosecutor responded, "[i]t certainly would have been a possibility." The court replied, "we're way beyond that stage."

Defendant had not led a law-abiding life. He was adjudicated delinquent, placed on probation, and then violated probation. As an adult, he was convicted of an ordinance violation and contempt of court for violating a domestic violence restraining order, N.J.S.A. 2C:29-9(b), for which he was placed on probation.

The judge found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk defendant will commit another offense); six, N.J.S.A. 2C:44-1(a)(6) (extent of prior criminal record and seriousness of offense of which he has been convicted); and nine, N.J.S.A. 2C:44-1(a)(9) (need for deterrence) applied. The judge also assigned slight weight to mitigating factor seven, N.J.S.A. 2C:44-1(b)(7) (lack of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time) and

"some weight" to mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11) (imprisonment would entail excessive hardship to defendant or his dependents).² The judge concluded "the aggravating factors slightly outweigh the mitigating factors because of the great weight" he assigned to aggravating factor nine.³

The judge sentenced defendant to a five-year prison term, subject to a forty-two-month period of parole ineligibility pursuant to N.J.S.A. 2C:43-6(c). In reaching that result, the judge stated:

Now, obviously the [c]ourt has discretion but it must be based upon the statute and the statute, I believe, does not give the [c]ourt discretion to give home probation despite his lack of [a superior] court [conviction]. As I said earlier, with the second degree gun charge there's a presumption of imprisonment. I think the prosecutor's request for seven years, three-and-a-half-period [of parole ineligibility] is too harsh given the lack of a[] [superior] court [conviction].

. . . .

² The judgment of conviction (JOC) incorrectly indicates the judge found no mitigating factors. "In the event of a discrepancy between the court's oral pronouncement of sentence and the sentence described in the judgment of conviction, the sentencing transcript controls[.]" State v. Abril, 444 N.J. Super. 553, 564 (App. Div.), certif. denied, 226 N.J. 213 (2016).

³ The JOC is also incorrect to the extent it states, "the aggravating factors outweigh and preponderate over the non-existent mitigating factors."

I think this sentence is in keeping with justice and the dictates of the statutes which control this matter.

On appeal, defendant raises the following arguments:

POINT ONE

THE TRIAL COURT ERRED BY DENYING HAILE-JONES' MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THERE WAS NO EVIDENCE THAT HAILE-JONES POSSESSED THE GUN.

POINT TWO

THE TRIAL COURT'S CHARGE ON POSSESSION OF THE HANDGUN WAS MANIFESTLY CONFUSING, AND IMPROPERLY INSTRUCTED THE JURY THAT IT COULD CONVICT HAILE-JONES IF IT FOUND THAT ONLY PORTER POSSESSED THE GUN, DENYING HAILE-JONES HIS RIGHT TO A FAIR TRIAL. (Not Raised Below)

POINT THREE

THE TRIAL COURT'S FAILURE TO TAILOR THE JURY CHARGES TO INCLUDE A "MERE PRESENCE" INSTRUCTION DENIED HAILE-JONES A FAIR TRIAL (Not Raised Below)

POINT FOUR

A REMAND FOR RESENTENCING IS PROPER BECAUSE THE COURT ERRONEOUSLY BELIEVED THAT IT COULD NOT RECOMMEND A SENTENCE WITH A ONE YEAR PAROLE-DISQUALIFIER OR PROBATION, PURSUANT TO N.J.S.A. 2C:43-6.2

II.

We first address defendant's claim that the court erred in denying his motion for acquittal at the close of the State's case, pursuant to Rule 3:18-1. In his motion, defendant argues there

was no evidence he possessed the gun. When reviewing the denial of a motion for judgment of acquittal, "[w]e apply the same standards used by the trial court in its determination of defendant's motion." State v. Tindell, 417 N.J. Super. 530, 549 (App. Div. 2011). Thus, "[w]e must determine whether, based on the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all favorable inferences drawn from that testimony, a reasonable jury could find guilt beyond a reasonable doubt." State v. Williams, 218 N.J. 576, 594 (2014). "We review the record de novo in assessing whether the State presented sufficient evidence to defeat an acquittal motion." State v. Dekowski, 218 N.J. 596, 608 (2014).

Defendant argues the State failed to present evidence he possessed the handgun. His argument is belied, however, by the record. Possession may be actual or constructive. "'Possession' does not necessarily mean actual physical possession; it is enough that defendant have 'intentional control and dominion' over the object." State v. Humphreys, 54 N.J. 406, 413-14 (1969) (quoting State v. DiRienzo, 53 N.J. 360, 369 (1969)). "A person constructively possesses an object when, although he lacks 'physical or manual control,' the circumstances permit a reasonable inference that he has knowledge of its presence, and intends and has the capacity to exercise physical control or

dominion over it during a span of time." State v. Spivey, 179 N.J. 229, 236-37 (2004). However, "[t]here must 'be circumstances beyond mere presence' that permit a reasonable inference of the defendant's intention and capacity to exercise control over the object and the defendant's knowledge of what the object is." State v. Randolph, 441 N.J. Super. 553, 559 (App. Div. 2015) (citing State v. Whyte, 265 N.J. 518, 523 (App. Div. 1992)).

Here, the handgun was not concealed or in a remote location but, rather, sat in plain view on the adjacent passenger seat within arm's reach of defendant, after Porter exited the vehicle, in a car that had been occupied by only defendant and Porter. A reasonable jury could infer defendant was in constructive possession of the handgun. Defendant does not contest he did not have a permit for the handgun.

Viewed in its entirety and in a light most favorable to the State, the testimony was sufficient to warrant the denial of defendant's motion for acquittal.

III.

Defendant argues the jury instruction on unlawful possession of a handgun was "inherently confusing," and deprived him of his right to a fair trial. First, defendant contends the court arbitrarily replaced the term "the defendant" with "defendants," "defendant," or "defendant or defendants." He argues the court

should have instructed the jury that unlawful possession of a handgun and joint possession charges should be applied to each defendant individually. Second, defendant argues the court should have included a "mere presence" instruction.

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Afanador, 151 N.J. 41, 54 (1997)). "A [jury] charge is a road map to guide the jury, and without an appropriate charge, a jury can take a wrong turn in its deliberations." State v. Nelson, 173 N.J. 417, 446 (2002) (alteration in original) (quoting State v. Koskovich, 168 N.J. 448, 508 (1999)).

Defendant did not object to the jury charges at trial and raised the claim of error for the first time on appeal. "Consequently, we must consider this issue under the plain error rule." State v. Walker, 203 N.J. 73, 89 (2010) (citing R. 2:10-2); see also State v. Burns, 192 N.J. 312, 341 (2007). Our Supreme Court has established that

[i]n the context of jury instructions, plain error is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and 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. Camacho, 218 N.J. 533, 554 (2014) (second alteration in original) (quoting State v. Adams, 194 N.J. 186, 207 (2008)).]

"Therefore, we may reverse only if the unchallenged error was 'clearly capable of producing an unjust result.'" Ibid. (quoting R. 2:10-2). "We consider alleged error in light of 'the totality of the entire charge, not in isolation.'" Burns, 192 N.J. at 341 (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

"[T]he test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." McKinney, 223 N.J. at 496 (quoting State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997)). However, where there is no objection to the jury charges, "it may be presumed that the instructions were adequate." State v. Belliard, 415 N.J. Super. 51, 66 (App. Div. 2010) (quoting State v. Morais, 359 N.J. Super. 123, 134-35 (App. Div. 2003)).

In the present case, largely consistent with the model jury charges, the judge instructed the jury:

Ladies and gentlemen, obviously, we have more than one defendant as to each of the charges being tried.

You must return separate verdicts for each defendant as to each of the charges being tried.

In other words, you will have to decide each case individually. Whether the verdicts as to each defendant are the same depends on

the evidence and your determination as judges of the facts.

The judge further instructed the jury:

If you find that the State has failed to prove any of the elements of a crime charged beyond a reasonable doubt, your verdict must be not guilty as to one or both defendants.

On the other hand, if you are satisfied that the State has proven all of the elements of the crime beyond a reasonable doubt, your verdict must be not guilty as to one or both defendants.

[(Emphasis added).]

The jury verdict sheet reflected these instructions, requiring the jury to answer a separate question as to each of the two defendants. Although defendant contends the interchangeable use of "defendant" or "defendants" was confusing, the judge made clear several times that the jurors must consider each defendant individually.

Next, defendant argues that in light of the questions posed by the jury during deliberations, the trial court should have tailored the jury charge on constructive possession to inform the jury that defendant's presence in the car, without more, was a legally insufficient basis to support a finding of constructive possession and that all of the circumstances must be considered in evaluating whether the State met its burden of proving defendant constructively possessed the gun.

Courts are encouraged to "mold the [jury] instruction in a manner that explains the law to the jury in the context of the material facts of the case." State v. Concepcion, 111 N.J. 373, 379 (1988); see also State v. Robinson, 165 N.J. 32, 42-43 (2000) (explaining jury instructions should be "'molded' or 'tailored' to the facts adduced at trial . . . in various contexts in which the statement of relevant law, when divorced from the facts, [are] potentially confusing or misleading to the jury").

The jury asked the court "How long constitutes possession?" and "What is fleeting?" The judge directed the jury to page twenty-two of the written jury instructions which defined "possession." He indicated there was nothing more he could add to his earlier instructions. In that regard, we note the earlier instructions included:

The word "possess" as used in criminal statutes signifies a knowing, intentional control of a designated thing, accompanied by a knowledge of its character. Thus, a defendant or defendants must know or be aware that he possessed the handgun and a defendant must know what it is that he/they possess or control is a handgun. 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, a defendant or defendants must knowingly procure or receive the handgun possessed or be aware of his/their control thereof for a sufficient period of time to have been able to relinquish control if

he/they chose to do so. A person may possess a handgun, even though it is not physically on his person at the time of arrest, if a person had, in fact, at some time prior to his arrest, had control over it.

. . . .

The law recognizes that possession may be constructive or actual. Constructive possession means possession in which the person does not physically have the handgun, but though not physically on one's person, he is aware of the presence of the handgun and is able to and has the intention to exercise control over it.

[(Emphasis added).]

This instruction, considered in the context of the entire charge and the evidence in this case, sufficiently advised the jury that mere presence in the vehicle was insufficient for it to find defendant guilty of possession of the handgun. See State v. Montesano, 298 N.J. Super. 597, 615 (App. Div. 1997). The charge provided "an accurate statement of the law and was sufficient for the jury to consider the defendant's guilt based on the correct legal standards." Ibid.

We, therefore, conclude the jury instructions did not possess a clear capacity to bring about an unjust result. Accordingly, we find no plain error.

IV.

Finally, we address defendant's argument that the trial court erred by not considering a Graves Act waiver pursuant to N.J.S.A. 2C:43-6.2, which provides:

On a motion by the prosecutor made to the assignment judge that the imposition of a mandatory minimum term of imprisonment under [the Act] for a defendant who has not previously been convicted of an offense under [the Act], does not serve the interests of justice, the assignment judge shall place the defendant on probation pursuant to paragraph (2) of subsection b. of N.J.S. 2C:43-2 or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole. The sentencing court may also refer a case of a defendant who has not previously been convicted of an offence under that subsection to the assignment judge, with the approval of the prosecutor, if the sentencing court believes that the interest of justice would not be served by the imposition of a mandatory minimum term.

[(Emphasis added).]

A defendant may also request the sentencing judge to refer the matter to the assignment judge for leniency. State v. Alvarez, 246 N.J. Super. 137, 140 (App. Div. 1991). "In order to be granted a hearing before the assignment judge to challenge the prosecutor's decision, the defendant must establish a prima facie case either of arbitrary action or denial of equal protection." Cannel, N.J. Criminal Code Annotated, cmt. 2 on N.J.S.A. 2C:43-6.2 (2017)

(citing Alvarez, 246 N.J. Super. at 148-49; State v. Miller, 321 N.J. Super. 550, 555 (Law Div. 1999)). A prosecutor's decision not to pursue or endorse a waiver application "will not be disturbed on appeal unless arbitrary, capricious, or unduly discriminatory." Ibid. (citing State v. Mastapeter, 290 N.J. Super. 56, 64-65 (App. Div. 1996); Miller, 321 N.J. Super. at 555).

In his sentencing memorandum, defense counsel requested the prosecutor petition the assignment judge pursuant to N.J.S.A. 2C:43-6.2 for imposition of a term of probation. The prosecutor would not consent to a post-verdict Graves Act waiver. Relying on the reasoning in State v. Mello, defendant contends the case should be remanded for resentencing to allow consideration of a waiver under N.J.S.A. 2C:43-6.2 in light of defendant's prior law abiding life. 297 N.J. Super. 452, 468 (App. Div. 1997). We disagree.

In Mello, the defendant had led a previously law abiding life. Id. at 467. At oral argument, "the prosecutor observed that this was [the] defendant's first brush with the law and, the crimes committed, while very serious, appeared aberrational." Id. at 467-68. Under those circumstances, we found "the interests of justice militate in favor of remanding the matter to the Law Division to afford defendant the opportunity to seek the


prosecutor's consent and move for leniency under N.J.S.A. 2C:43-6.2." Id. at 468.

Defendant was twenty-two years old at the time of sentencing. Unlike the defendant in Mello, who had previously led a law abiding life, defendant had been adjudicated delinquent, violated juvenile probation, violated a municipal ordinance, and committed a contempt of court for which he was placed on probation. In imposing the sentence, the judge stated the five-year prison term subject to a forty-two-month period of parole ineligibility "is in keeping with justice." This finding is in stark contrast to a finding by a sentencing court that it "believes that the interest of justice would not be served by the imposition of a mandatory minimum term." N.J.S.A. 2C:43-6.2.

We find no basis for concluding the prosecutor's decision not to endorse an application for a waiver under N.J.S.A. 2C:43-6.2 was arbitrary, capricious, or discriminatory.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION