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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1491-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KELISEN O. BREWLEY,

Defendant-Appellant.

Argued March 29, 2022 – Decided April 12, 2022

Before Judges Fisher, Currier and Berdote Byrne.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 20-10-0726.

Jessica Kitzman, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Morgan A. Birck, Assistant Deputy Public Defender, and Jessica Kitzman, of counsel and on the briefs).

William P. Miller, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; William P. Miller, of counsel and on the brief; Catherine A. Foddai, on the brief).

PER CURIAM

Defendant was arrested in connection with the stabbing death of Vanden Carter in Hackensack on January 26, 2020. A grand jury declined to charge defendant with manslaughter, charging him instead with fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(3); defendant was also charged with fourth-degree evidence tampering, N.J.S.A. 2C:28-6(1), and third-degree hindering apprehension, N.J.S.A. 2C:29-3(b)(1). Because of the grading regimen for hindering contained in N.J.S.A. 2C:29-3(b), defendant moved for a dismissal or downgrading of the third-degree hindering apprehension charge because of the degree of the assault charge. The trial judge denied the motion, we granted leave to appeal, and we now reverse.

The grand jury heard evidence about a verbal disagreement between two women, A.H. and B.J., that grew physical. Carter and defendant attempted to intervene and, at some point, Carter went into the kitchen, retrieved a knife, and stabbed defendant twice. Defendant managed to disarm Carter, and A.H. picked up the knife. Carter took the knife from A.H. and the melee continued. During their continuing struggle, defendant gained possession of the knife and stabbed Carter. Defendant, B.J., and two small children then left the apartment.

Police were called in to investigate and arrived at defendant's residence the next day with a search warrant. The knife used in the fatal stabbing was not found in defendant's residence but was found in a nearby storm sewer. An examination revealed that defendant's and Carter's blood was on the knife's blade.

In presenting the case to the grand jury, the prosecutor sought an indictment of defendant for aggravated assault by recklessly causing bodily injury, passion/provocation manslaughter, possession of the knife for an unlawful purpose, tampering with physical evidence, and hindering. As noted, the grand jury returned an indictment charging defendant with fourth-degree aggravated assault, fourth-degree tampering, and third-degree hindering. The fact that the jury did not charge defendant with a second-degree offense fuels defendant's argument that the third-degree hindering charge must be dismissed since, generally, a hindering charge is a degree lower than the charge the accused sought to cover up. In this interlocutory appeal, defendant argues the judge erred in denying his motion to dismiss or downgrade the hindering count because of the prosecutor's instructions to the grand jury.

In reversing, we disagree to the extent defendant argues that the grand jury could not charge defendant with third-degree hindering. Even though it did not

charge defendant with a second-degree or higher offense that prompted the hindering conduct, the grand jury could still charge third-degree hindering if, as the last paragraph of N.J.S.A. 2C:29-3(b) (emphasis added) requires, "the conduct which the actor knows has been charged or is liable to be charged against him would constitute a crime of the second degree or greater." See also State v. D.A., 191 N.J. 158, 169-70 (2007). The evidence presented to the grand jury could have supported such a second-degree charge even though it wasn't charged.

But we agree with defendant's argument that the prosecutor did not provide the grand jury with the tools to make that determination. In instructing the grand jury about the elements of hindering, the prosecutor quoted portions of the statute, stating:

"A person commits an offense if with purpose to hinder his own detention, apprehension, investigation, prosecution, conviction or punishment for an offense he or she," in this case he, "suppresses by way of concealment or destruction any evidence of the crime or tampers with a document or other source of information regardless of its admissibility in evidence which would aid in his discovery or apprehension with the lodging of a charge against him." We're asking you to consider whether the hiding of the knife, the alleged hiding of the knife, was in fact an act to suppress evidence and obstruct evidence. The mental component, folks, again is purpose. I read it to you in two other statutes.

These instructions failed to include that part of N.J.S.A. 2C:29-3 that concerns the grading of hindering, which constitutes:

a crime of the third degree if the conduct which the actor knows has been charged or is liable to be charged against him would constitute a crime of the second degree or greater. The offense is a crime of the fourth degree if such conduct would constitute a crime of the third degree. Otherwise it is a disorderly persons offense.

Without being advised of this portion of the statute, the grand jury was left without guidance about how to determine the degree of the hindering offense with which it was charging defendant. For that reason, defendant was entitled to relief from the indictment.

Contrary to defendant's argument, however, it is not for either the trial court or this court to downgrade the hindering offense to a lower degree. As we have already mentioned, the grand jury could have charged defendant with third-degree hindering if it believed he anticipated being charged with and was attempting to cover-up a second-degree offense. Or, as defendant suggests, if the grand jury had been told that the degree of the hindering charge should be a degree less than the charge defendant sought to cover-up, it could have merely indicted defendant with a disorderly-persons hindering charge. The determination rests solely within the grand jury's discretion, not ours and not the

trial judge's. The proper remedy for the mistaken omission in the prosecutor's legal instructions is to dismiss the hindering count and allow the prosecutor, if he so chooses, to present the hindering matter to the grand jury again, only this time with adequate legal instructions.

The order under review is reversed and the matter remanded for further proceedings. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION