SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3005-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARREN M. COMMANDER,

Defendant-Appellant.

Submitted May 17, 2022 – Decided May 31, 2022

Before Judges Fisher and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 13-06-1352.

Avram E. Frisch, attorney for appellant.

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Erin M. Campbell, Assistant Prosecutor, on the brief).

PER CURIAM

On February 23, 2012, J.S. was crossing the street in front of his brother's Bayonne home when a slowly approaching black Mercedes suddenly accelerated

and hit him. The front fender brushed against J.S.'s leg but, as the vehicle accelerated, its sideview mirror struck J.S. and entangled his sweatshirt, and the vehicle dragged him about seventy-five feet. Despite his shouts for the driver to stop, the vehicle continued to accelerate and made a sharp right turn, flinging J.S. aside.

J.S. and his brother told police they could identify the driver but not the vehicle's license plate number. Ten days later, J.S. selected a photo from an array, declaring he was "[a]bsolutely sure" the depicted person – defendant – was the Mercedes's driver. J.S. later affirmatively identified a Mercedes, which was registered to a company for which defendant worked, as the vehicle that struck him.

A jury convicted defendant of third-degree aggravated assault with a deadly weapon (a motor vehicle), N.J.S.A. 2C:12-1(b)(2), and acquitted him of third-degree possession of a deadly weapon (a motor vehicle) for an unlawful purpose, N.J.S.A. 2C:39-4(d). On June 26, 2014, the trial judge imposed a three-year probationary term.

Defendant appealed, arguing, among other things, that the part of the indictment charging him with aggravated assault with a deadly weapon should have been dismissed before trial or at least should have been the subject of

special jury instructions. We rejected defendant's arguments and affirmed the judgment of conviction. State v. Commander, No. A-5288-13 (App. Div. June 30, 2015).

Defendant filed a post-conviction relief (PCR) petition on June 24, 2019, nearly five years after the entry of the judgment of conviction, arguing his trial attorney's ineffectiveness. Without conducting an evidentiary hearing, the PCR judge rejected the argument that counsel "improperly consented to an amendment of the indictment" or that counsel otherwise failed to take appropriate action about how the case was presented to the grand jury. The judge conducted an evidentiary hearing on other issues and denied, for reasons set forth in a thorough written opinion, all aspects of defendant's PCR petition.

Defendant appeals, arguing:

> I. AN UNSIGNED INDICTMENT BY GRAND JURY FOREMAN IS NOT A "TRUE BILL" FORGED SIGNATURE ON LATER COPY OF INDICTMENT SHOWN.
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> II. AMENDING AND CHANGING A CHARGED COUNT OF AN INDICTMENT THE MORNING OF TRIAL WITHOUT THE DEFENDANT['S] KNOWLEDGE AND CONSENT IS NOT PERMITTED BY RULE AND IS UNCONST[IT]UTIONAL.
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> III. THE STATE WITHHELD EXCULPATORY EVIDENCE FROM THE JURY (Not Raised Below).

IV. MALICIOUS PROSECUTION (Not Raised Below).[1]

We find insufficient merit in these arguments to warrant further discussion in a written opinion, R. 2:11-3(e)(2), adding only a few brief comments about defendant's second point.

Since we determined in ruling on defendant's direct appeal there was no merit in the argument that the judge erroneously denied a motion to dismiss the charge of aggravated assault with a deadly weapon, the ineffectiveness argument posed in defendant's present appeal requires a narrower focus on the sufficiency of defense counsel's efforts to combat against the indictment's amendment.

To explain why we reject defendant's ineffectiveness argument, we must examine how the indictment came to be amended. In August 2012, the grand jury charged defendant with "purposely or knowingly [] caus[ing] bodily injury" with a deadly weapon, N.J.S.A. 2C:12-1(b)(2).[2] In June 2013, the grand jury returned a superseding indictment, replacing the aggravated assault charge in the earlier indictment with a charge that defendant "purposely did attempt to

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[1] The argument in this fifth point appears to us to be only a reworking of defendant's first point. Otherwise, it is not clear to us what defendant means by his unexplained claim that this prosecution was "malicious."

[2] The grand jury charged other offenses not relevant to our discussion.

cause bodily injury" to J.S. with a deadly weapon, while again citing N.J.S.A. 2C:12-1(b)(2) as the statute that criminalizes such conduct.

Defense counsel moved to dismiss the superseding indictment's charge that defendant purposely attempted to cause bodily injury with a deadly weapon. The judge denied the motion but permitted an amendment, transforming this particular charge back to what was contained in the original indictment.

The question posed by the motion to dismiss required a consideration of aggravated assault with a deadly weapon in the context where the deadly weapon was alleged to be a motor vehicle. This troublesome question about the application of N.J.S.A. 2C:12-1(b)(2) to assaults committed with a motor vehicle was thoroughly examined in State v. Parker, 198 N.J. Super. 272 (App. Div. 1984). After considering Parker and other authorities, the judge concluded that the indictment's allegation that defendant "purposely did attempt" to cause injury to J.S., with the understanding that the motor vehicle was the weapon utilized in that process, was sufficient to withstand defendant's motion to dismiss. As noted above, the sufficiency of defendant's motion and the judge's ruling on that motion is not before us.

What is before us is the fact that, after denying the motion to dismiss, the judge considered the State's request for an amendment of the superseding

indictment that would charge defendant with violating the same statute but in the manner described in the original indictment. Defense counsel acceded to the amendment, which the judge then readily granted.

The thrust of defendant's ineffectiveness claim is that defense counsel should have vigorously opposed rather than agreed to the amendment. We find no merit in this contention because even if defense counsel forcefully opposed the amendment, the judge undoubtedly would have permitted it and any appeal of that decision would have borne no fruit.

Section eight of the first article of our state constitution provides that "no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury," but amendments to indictments may be permitted subject to certain safeguards. Rule 3:7-4 allows amendments to indictments "to correct an error in form or the description of the crime intended to be charged . . . provided that the amendment does not charge another or different offense from that alleged" and the accused is not prejudiced in defending against the merits. The principles contained in the constitution and the rule are understood as permitting an amendment if the accused is sufficiently informed of the charge "so that he may adequately prepare his defense," State v. Lefante, 12 N.J. 505, 509 (1953), and so long as the amendment is "sufficiently specific" to enable

the accused to "avoid a subsequent prosecution for the same offense," State v. LeFurge, 101 N.J. 404, 415 (1986), while always precluding "the substitution by a trial jury of an offense which the grand jury did not in fact consider or charge," State v. Boratto, 80 N.J. 506, 519 (1979). See also State v. Dorn, 233 N.J. 81, 93 (2018).

Defendant correctly argues that these legal principles do not permit a defendant to be tried for an offense that the grand jury did not charge. But that did not occur here. The factual circumstances that gave rise to the indictment were the same, and all the amendment did was modify the description of the offense to that which the grand jury had originally charged. Since the original charge of purposely or knowingly causing bodily injury with a deadly weapon increased the difficulty for the State at trial,[3] and since defendant was already on notice of this charge via the original indictment, no prejudice resulted from permitting the amendment.

In considering defense counsel's agreement to the amendment in the context of an ineffectiveness claim, we are satisfied, for the reasons discussed above, that any opposition to the motion to amend would have been unavailing

[3] As the PCR judge correctly observed, "[t]he amendment to the indictment raised the State's burden in so far as it required the State to prove actual injury as opposed to [an] attempt to cause [an injury]."

even if professional norms compelled defense counsel to object, because the prejudice prong of the two-part ineffectiveness test[4] is not arguably present.

Affirmed.

[4] Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).