SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4291-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GENO MCINTOSH, a/k/a/
GENE MCINTOSH,

Defendant-Appellant.

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Submitted March 30, 2022 – Decided June 9, 2022

Before Judges Gilson and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 19-01-0087.

Joseph E. Krakora, Public Defender, attorney for appellant (Alyssa Aiello, Assistant Deputy Public Defender, of counsel and on the brief).

Cary Shill, Acting Atlantic County Prosecutor, attorney for respondent (Alyssa M. Gilboy, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

On January 15, 2019, defendant was charged in a five-count indictment with second-degree aggravated assault by attempting to cause or causing serious bodily injury, N.J.S.A. 2C:12-1(b)(1) (count one); third-degree aggravated assault with a deadly weapon, N.J.S.A. 2C:12-1(b)(2) (count two); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count three); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count four); and fourth-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(a) (count five). Following a two-day bench trial, the trial judge found defendant guilty of all five counts and sentenced defendant to an aggregate term of eight years' imprisonment, subject to an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. A memorializing judgment of conviction was entered on May 7, 2020, from which defendant now appeals. Having reviewed the arguments advanced in light of the record and governing law, we affirm.[1]

I.

[1] Defendant was also sentenced to a concurrent prison term of eighteen months after entering a negotiated guilty plea to an unrelated one-count indictment charging fourth-degree throwing bodily fluid at a law enforcement officer, N.J.S.A. 2C:12-13. That conviction is not a part of this appeal.

The convictions stemmed from defendant stabbing a businessman in the neck with a knife in public view at approximately 5:30 p.m. on November 26, 2018. We recite only those facts relevant to the issues raised on appeal as gleaned from the bench trial conducted on January 27 and February 5, 2020, during which the State produced nine witnesses, including an eyewitness, the attending emergency room doctor, and law enforcement personnel. Defendant did not testify or call any witnesses.

On November 26, 2018, K.C., a representative for a cellphone vendor, was processing applications for low or no-cost cellphones outside a convenience store in Atlantic City.[2] That evening, D.K. and her twelve-year-old daughter were applying for a cellphone with K.C.'s assistance. According to D.K., she "had her head down for a second when . . . [her daughter] started screaming." D.K. "looked up" and saw that "a guy" had stabbed K.C. "in his neck," causing him to "f[a]ll to the ground."

D.K. explained that when her daughter "started screaming, [the weapon used to stab K.C.] was already in [K.C.'s] neck." At the time, D.K. thought the weapon looked like "a pen or . . . a pencil" because "[i]t was long, [and] round."

[2] We use initials for the victim and civilian witnesses to protect their privacy interests.

D.K. testified that "[i]t happened real fast," and, "after [the incident,] . . . the [assailant] calmly walked away" towards "the inlet." D.K. described the assailant as a "black male," with a "medium build," who was "taller than [her]," and had "short, curly hair," and "blank" eyes. D.K. stated that the assailant was wearing jeans and a "hoody" and "turned and looked at [her and her daughter]" as he walked away from the scene. At trial, D.K. identified defendant as the assailant.

According to D.K., police arrived immediately after the attack. In fact, Atlantic City Police Officer George Mancuso testified that when the stabbing occurred, he and Officer Valentine were inside the convenience store on an unrelated matter when K.C. came in "with a stab wound to his neck." According to Mancuso, while he tended to K.C.'s wound, Valentine called for emergency medical services personnel, who transported K.C. to the hospital for treatment. Mancuso testified that at the time, he was "wear[ing] a body camera," which was "activat[ed]." The video from Mancuso's body camera captured what occurred inside the convenience store immediately after the stabbing and was played at trial.

Atlantic City Police Officer Robert Reynolds testified that at the time in question, he was on patrol and "receiv[ed] information over a police radio . . . in

reference to a stabbing." He explained that he arrived on the scene "within a minute." Upon his arrival, almost immediately, D.K. and another witness, O.G-F., approached him. He testified that O.G-F. "seemed upset and a little scared and . . . a little excited, too." Reynolds testified that O.G-F. "gave [him] a . . . detailed description of the suspect," describing him as "a black male wearing a gray top, blue sweatpants and tan Timberland boots." Reynolds stated he promptly "radioed that information" through the department's communication system.

Atlantic City Police Officer Eric Knuttel testified that upon hearing Reynolds's transmission, he believed he "saw the described person walking . . . on Atlantic Avenue," approximately "two blocks" from the scene of the incident. According to Knuttel, he "stopped the individual," and asked him if he "had any weapons on him." The suspect, later identified as defendant, alerted Knuttel to "[a] folding pocket knife" "in [the] front right pocket of his hoody." Knuttel retrieved the "three inch[]" "serrated" knife and saw "there was blood on [it]."[3] Knuttel also testified that there "appeared to be dried blood . . . on [defendant's] right front pocket." Knuttel then alerted Reynolds to a "possible suspect in custody."

[3] The knife was never tested for blood.

Reynolds transported O.G-F. to Knuttel's location in order "to make [an] identification to make sure [they] had the correct person." When Reynolds and O.G-F. arrived, the officers had defendant "in custody" on "the sidewalk." Because O.G-F. did not testify at trial, his identification of defendant was not admitted into evidence based on defendant's objection. However, Reynolds testified that defendant was wearing a "[g]ray top with blue sweatpants and tan Timberland boots," "the exact clothing that [O.G-F. had] described to [him]." That night, O.G-F. "complete[d] a show[-]up identification form," which was admitted into evidence at trial for the sole purpose of showing that the officers "follow[ed] . . . procedure."

After denying defendant's motion for judgment of acquittal, R. 3:18-1, and reiterating that defendant had previously waived his right to trial by jury and executed the prescribed written waiver form without objection from the State, the judge made detailed factual findings and conclusions of law to support the guilty verdict. In a fifteen-page written decision, which he placed on the record on February 5, 2020, the judge credited the testimony of the State's witnesses and found beyond a reasonable doubt that defendant was guilty on all counts. In support, the judge relied on "the totality of the circumstances and . . . the identification of . . . defendant" as the assailant by D.K. The judge reasoned "it

was . . . defendant's conscious object to do bodily injury to [the victim] by stabbing him in the neck with [a] sharp, serrated, three-inch folding knife[]blade" which "was found" in defendant's possession "just a few minutes after the fact." The judge noted further that "[t]he blade still had traces of fresh blood on [it]."

On appeal, defendant raises the following points for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED IN GRANTING [DEFENDANT'S] REQUEST TO WAIVE HIS RIGHT TO A JURY TRIAL WITHOUT FIRST CONDUCTING THE PROBING COLLOQUY REQUIRED TO ENSURE A VALID WAIVER.
>
> POINT II
>
> [DEFENDANT'S] CONVICTIONS MUST BE REVERSED AND A NEW TRIAL ORDERED BECAUSE THE JUDGE'S DETERMINATION OF GUILT WAS BASED ON INADMISSIBLE HEARSAY AND UNSUPPORTED FACTUAL FINDINGS.
>
> > A. The Admission Of [O.G-F.]'s Description Of The Assailant Violated The Prohibition Against Hearsay And [Defendant's] Right To Confrontation, And Requires Reversal.
> >
> > B. Reversal Is Required Because The Trial Judge's Determination Of Guilt Was Based On Unsupported Factual Findings.

II.

We begin our analysis by stressing that the right to a jury trial is a fundamental right afforded by both the New Jersey and United States constitutions. See U.S. Const. amend. VI; N.J. Const. art. I, ¶ 9; see also State v. Dunne, 124 N.J. 303, 316 (1991) (explaining a "trial by jury is fundamental to the American system of criminal justice"). To maintain confidence in the criminal justice system, "[t]rial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact." Id. at 310 (quoting Patton v. United States, 281 U.S. 276, 312 (1930)). Accordingly, any waiver of that right must be made "voluntarily, knowingly, and competently." Id. at 317; see also State v. Campbell, 414 N.J. Super. 292, 301 (App. Div. 2010) (explaining that a waiver cannot be presumed).

Under Rule 1:8-1, governing jury trial waivers, criminal matters are required to be tried by a jury "unless the defendant, in writing and with the approval of the court, after notice to the prosecuting attorney and an opportunity to be heard, waives a jury trial." R. 1:8-1(a). When considering a waiver request, trial courts must:

> (1) determine whether a defendant has voluntarily, knowingly, and competently waived the constitutional right to jury trial with advice of counsel;

> (2) determine whether the waiver is tendered in good faith or as a stratagem to procure an otherwise impermissible advantage; and
>
> (3) determine, with an accompanying statement of reasons, whether, considering all relevant factors, . . . it should grant or deny the defendant's request in the circumstances of the case.
>
> [Dunne, 124 N.J. at 317.]

Relevant factors include but are not limited to: "the judiciary's obligation 'to legitimately preserve public confidence' in the administration of justice"; the "gravity of the crime" and "complexity" of the case; "the position of the State"; "the amenability of the issues to jury resolution, [and] the existence of a highly-charged emotional atmosphere." Id. at 315, 317 (quoting In re Edward S., 118 N.J. 118, 148 (1990)). The decision to permit a defendant to waive a jury trial "rest[s] in the sound discretion of the trial court," id. at 318, and, in making the determination, "a court must consider the competing factors that argue for or against jury trial," id. at 315.

Exercising its supervisory powers, in State v. Blann, 217 N.J. 517, 518 (2014), our Supreme Court established two mandates to ensure defendants possess a full understanding of their "choice" when waiving a jury trial. First, a "written waiver form" must be "signed" by a defendant, advising the defendant

> that (1) a jury is composed of [twelve] members of the community, (2) a defendant may participate in the selection of jurors, (3) all [twelve] jurors must unanimously vote to convict in order for a conviction to be obtained, and (4) if a defendant waives a jury trial, a judge alone will decide [his or her] guilt or innocence.
>
> [Ibid. (quoting State v. Blann, 429 N.J. Super. 220, 250 (App. Div. 2013) (Lisa, J., dissenting)).]

Second, the Court required "that trial judges engage in a colloquy with defendants that includes those four items, at a minimum, to assess the voluntariness of a waiver request." Ibid. A defendant who later disputes the validity of his or her waiver has the burden of making "a plain showing that such waiver was not freely and intelligently made." Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942); accord State v. Jackson, 272 N.J. Super. 543, 551 (App. Div. 1994).

Here, on December 5, 2019, when defendant appeared for a pretrial conference, the trial judge reviewed with the parties the State's proofs and potential defenses and inquired whether defendant was interested in resolving the matter by accepting the State's plea offer. The judge explained that under the terms of the proposed plea agreement, the State was recommending an aggregate sentence of eight years' imprisonment but if defendant proceeded with a jury trial, he would "lose control over the outcome" because his fate would be

"in the hands of [twelve] strangers." The judge pointed out that, generally, jurors "don't like stabbings" and "they're not going to like pictures of blood and that sort of thing."

After the discussion, the judge advised defendant to spend some time with his attorney to see if the case could resolve with a plea agreement. However, if defendant was "not interested" in resolving the case, the judge stated he would set a trial date. Although defendant was reluctant to discuss the case with his attorney, the judge advised defense counsel to take some time to speak to defendant during a short recess. Following the recess, defendant expressed his desire to waive his right to a jury trial and proceed to trial without a jury. The State did not object.

Once defendant was sworn, the following waiver colloquy between the judge and defendant ensued:

> [COURT]: Now, you do have the right, sir, to have your charges tried to a jury of your peers. And what that means here in New Jersey is that your case would be tried to a panel. Likely [fourteen] people, [twelve] of whom would be the deliberating jury, they would all have to unanimously agree whether you were guilty or not guilty of all of the charges in the indictment. They could return a partial verdict, they could return charges on lesser included offenses, but they'd be the ultimate decision-makers as to whether or not the State has proven beyond a reasonable doubt that you are guilty or not of the charges contained in the indictment.

Do you understand what that right means, sir?

[DEFENDANT]: Yes.

[COURT]: You could also decide that you can try the case without a jury to the court, that means that myself, the judge, would hear all the evidence. If you put on a case, I would hear the case that you put on and then I would decide whether or not in my judgment the State had proven its case beyond a reasonable doubt. It would be the same standard, but the State would only have to convince one person rather than convincing [twelve] people. Do you understand that?

[DEFENDANT]: Yes.

[COURT]: And do you understand that if you waive your right to a trial by jury, then I would be the judge that would decide the truth of the matters, and then should I find you guilty, I would be the one imposing sentence. Do you understand that?

[DEFENDANT]: Yes.

[COURT]: Understanding what your rights are, do you wish to waive your right and proceed to a trial to the court with me being the trial judge?

[DEFENDANT]: Yes.

Referring to the written waiver of trial by jury form, the judge advised defendant that if he "agree[d] with it," he should "go ahead and sign it." Defendant proceeded to sign the waiver form, which contained the four items specified in Blann, including defendant's right to "participate in the selection of

the jurors." The judge approved defendant's waiver, finding that it was "knowing, intelligent, and voluntary." The judge then set a trial date for January 27, 2020, but informed defendant that he could revoke his waiver at any time before jeopardy attached on January 27.

On appeal, defendant contends the judge erred in finding "a valid waiver," arguing his waiver was neither knowing nor intelligent because the judge failed to tell him he "ha[d] the right to participate in the selection of jurors." According to defendant, by omitting "that critical information," the judge provided "misleading" warnings and the "omission was particularly problematic in light of earlier remarks made by the court about the disadvantages of proceeding in front of a jury."

In approving defendant's waiver, the judge considered his questioning of defendant, his observations of defendant's "awareness" and "intelligence," the State's position, the nature of the proofs, defendant's execution of the waiver form, and the fact that defendant acted on the advice of counsel. See Jackson, 272 N.J. Super. at 550 ("That a defendant was represented by counsel is relevant in determining whether his waiver of a jury trial was knowing."). We are satisfied that the record supports the judge's determination that defendant validly waived his right to a jury trial.

Admittedly, during the waiver colloquy, the judge did not address defendant's right to participate in jury selection. However, the written waiver form clearly informed defendant of that right, and we are satisfied that neither the judge's omission nor the judge's earlier remarks about the disadvantages of a jury trial suffices to upend defendant's valid waiver. "Whether a waiver is given knowingly 'depends upon whether the totality of the circumstances supports that conclusion.'" Id. at 550 (quoting State v. Koedatich, 112 N.J. 225, 328 (1988)). Defendant's responses to the judge during the probing waiver colloquy, consultation with counsel, and execution of the written waiver form convince us that defendant waived his right to a jury trial "voluntarily, knowingly, and competently." Dunne, 124 N.J. at 317. "Moreover, defendant does not suggest that the bench trial conducted at his request was unfair." State v. Jackson, 404 N.J. Super. 483, 491 (App. Div. 2009).

III.

Next, defendant argues the judge's guilty verdict was based on "inadmissible hearsay" and "unsupported factual findings." According to defendant, the judge erroneously relied on "[O.G-F.]'s description" to support the conclusion that "[defendant] was the alleged assailant" and relied on Officer Knuttel's testimony that he observed "what appeared to be fresh blood on the

knife" to support the conclusion that "[defendant's] folding knife was the alleged weapon."

Our review of a judge's verdict following a bench trial is limited. The standard is not whether "the verdict was against the weight of the evidence," but rather "whether there is sufficient credible evidence in the record to support the judge's determination." State in the Int. of R.V., 280 N.J. Super. 118, 120-21 (App. Div. 1995). Moreover, we are obliged to "'give deference to those findings of the trial judge which are substantially influenced by [the] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Locurto, 157 N.J. 463, 471 (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Thus, "'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)).

Likewise, we "defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). We "will not substitute

our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" Ibid. (quoting State v. Medina, 242 N.J. 397, 412 (2020)). Even so, not "[e]very mistaken evidentiary ruling . . . will . . . lead to a reversal of a conviction. Only those that have the clear capacity to cause an unjust result will do so." Ibid.

Applying these standards, we are satisfied there is ample evidence in the record to support the judge's conclusion that defendant was guilty of the charges. At trial, Officer Knuttel testified that the knife he found in defendant's "front right pocket" had "blood on the actual knife itself." Knuttel apprehended defendant two blocks away from the crime scene approximately three-and-one-half minutes after the stabbing. The judge found the officer's testimony "credible" and reliable and determined beyond a reasonable doubt that defendant unlawfully possessed the knife, used it to attempt to inflict serious bodily injury by stabbing the victim in the neck, and, in fact, caused bodily injury to the victim. The judge based his determination "on the totality of the circumstances," including D.K.'s identification of defendant as the assailant and Knuttel's discovery of the knife in defendant's pocket "just a few minutes after the fact." The judge stated the "[knife] blade had the presence of suspected blood which appeared to be fresh."

Defendant argues because "there was no evidence that there was blood on the inside of the pocket in which the knife was found;" "the knife did not match the description of the weapon given by [D.K.];" and "no testing was done to establish that the substance on the knife was human blood, let alone [the victim's;]" the judge's "determination of guilt cannot stand." We disagree. Guided by the applicable standard of review, we are convinced the judge's factual findings are supported by sufficient credible evidence in the record.

Defendant also asserts the admission of O.G-F.'s description of the assailant "and the fact that [defendant] matched it constituted inferential hearsay, the introduction of which was a patent violation of the Confrontation Clause."

"The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee a criminal defendant the right to confront 'the witnesses against him.'" Medina, 242 N.J. at 412 (quoting U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). The right of confrontation, which is exercised through cross-examination, is "an essential attribute of the right to a fair trial." State v. Branch, 182 N.J. 338, 348 (2005).

"[B]oth the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a

non-testifying declarant to incriminate the defendant in the crime charged." Id. at 350; see also State v. Weaver, 219 N.J. 131, 151 (2014) (finding "testimony of a witness who directly or indirectly provides information derived from a non-testifying witness that incriminates a defendant" is "generally forbid[den]" at trial); State v. Bankston, 63 N.J. 263, 268-69 (1973) (holding detective's disclosure of information received from a non-testifying informant while explaining the reason for arresting defendant contravened defendant's Sixth Amendment right to confront witnesses against him).

"When the logical implication to be drawn from the testimony leads the [factfinder] to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." Bankston, 63 N.J. at 271. However, a police officer's explanation that he or she approached a suspect "upon information received" is admissible to rebut a suggestion that the officer was "acting in an arbitrary manner or to explain his [or her] subsequent conduct." Id. at 268 (quoting McCormick on Evidence (Cleary ed., 2d ed. 1972)).

Here, during the trial, in ruling on defendant's hearsay objection, the judge reversed an earlier ruling and stated he "[would] not consider any of the

purported hearsay related to [O.G-F.'s] purported identification."[4] During summations, the judge again clarified that he would not consider O.G-F.'s description "as an identification" of defendant "as the assailant." Instead, the judge would only consider the description "as evidence about who the officers were looking for."

In rendering his verdict, the judge elaborated on his ruling as follows:

> The [d]efense objected to certain elements of "hearsay" contained in the . . . apparent identification of . . . defendant by [O.G-F.] on the body camera video of Officer Knuttel. The court determined that it would not consider the apparent identification of [O.G-F.]. [O.G-F.] did not testify at trial. Further, the court did not consider the . . . statements . . . for the truth of the matter asserted. What was clear from the videos is that the immediate aftermath was fraught and fast-moving. The video revealed police investigation in real[-]time including the acquisition of information that led to the apprehension of a suspect whose appearance and clothing were consistent with the description that was communicated by dispatch to the officer on the street. As for the identification of the defendant as the assailant, the court has only considered the identification provided by [D.K.].

We are satisfied there was no constitutional or hearsay violation. "The rule against hearsay precludes the admission of a statement attributed to an out

[4] In the earlier ruling, the judge had ruled that O.G-F.'s identification was admissible under the excited utterance hearsay exception, N.J.R.E. 803(c)(2).

of court declarant 'to prove the truth of the matter asserted in the statement.'" State v. Gonzalez, 249 N.J. 612, 636 (2022) (quoting N.J.R.E. 801(c)). Thus, out-of-court statements that are not admitted for the truth of the matter asserted are not hearsay and are generally admissible. N.J.R.E. 802; Branch, 182 N.J. at 357. Here, the judge expressly stated he did not consider O.G-F.'s description "for the truth of the matter asserted." Therefore, we discern no abuse of discretion in the admission of O.G-F.'s description for the limited purpose for which it was admitted.

Further, O.G-F.'s description may be considered a nontestimonial statement made to help officers stop an ongoing emergency. See Davis v. Washington, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."); Michigan v. Bryant, 562 U.S. 344, 370–71 (2011) (holding that in determining whether a statement is testimonial, courts should look at the "primary purpose" of the interrogation, and "objectively evaluat[e] the statements and actions of the parties to the encounter, in light of the circumstances," and "[t]he existence of an emergency or the parties' perception that an emergency is ongoing . . . because statements made

to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation"). Indeed, O.G-F.'s description of the assailant was provided in the immediate aftermath of a public stabbing to assist police in apprehending the armed assailant.

Even if the admission of O.G-F.'s description was error, it was harmless error that did not impact the verdict. See Weaver, 219 N.J. at 154 ("When evidence is admitted that contravenes not only the hearsay rule but also a constitutional right, [we] must determine whether the error impacted the verdict."); Bankston, 63 N.J. at 273 ("The test of whether an error is harmless depends upon some degree of possibility that it led to an unjust verdict . . . , one sufficient to raise a reasonable doubt as to whether the error led the [factfinder] to a result it otherwise might not have reached.").

Affirmed.