SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5157-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TERRENCE L. STROTHERS,

Defendant-Appellant.

Submitted October 11, 2022 – Decided November 15, 2022

Before Judges Sumners and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 17-04-0495.

Joseph E. Krakora, Public Defender, attorney for appellant (Brian Plunkett, Designated Counsel, on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a fifteen-day trial, a jury agreed with the State's claims that defendant Terrence L. Strothers' year-long dispute over a woman with another man, Shane Stevens, resulted in defendant assaulting Shane by firing a flare at Shane's car; and later that same day recruiting some friends—to aid in his retribution—who fired two flares at Shane's family's home, causing its destruction. In reaching its verdict, the jury found defendant guilty of eleven of the State's thirteen charges.[1]

Defendant was convicted of third-degree conspiracy to commit arson, N.J.S.A. 2C:5-2a(1), as a lesser-included offense of second-degree conspiracy to commit aggravated arson, N.J.S.A. 2C:17-la(1) and/or N.J.S.A. 2C:17-la(2); third-degree arson, N.J.S.A. 2C:17-1b(1), as a lesser-included offense of second-degree aggravated arson, N.J.S.A. 2C:17-la(l) and/or N.J.S.A. 2C:17-la(2); third-degree conspiracy to commit criminal mischief, N.J.S.A. 2C:5-2a(1) and N.J.S.A. 2C:17-3a(1); third-degree criminal mischief, N.J.S.A. 2C:17-3a(1); third-degree conspiracy to commit aggravated assault, N.J.S.A. 2C:5-2a(1) and/or 2C:12-lb(7), as a lesser-included offense of second-degree

[1] At the close of the State's case, the trial court granted defendant's motion for directed verdict to dismiss count nine, fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5d, and count ten, third-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4d.

conspiracy to committed aggravated assault; third-degree aggravated assault, N.J.S.A. 2C:12-lb(7), as a lesser-included offense of second-degree aggravated assault; second-degree aggravated assault, N.J.S.A. 2C:12-lb(l); two counts of third-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4d; and three counts of fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5d.

Following merger, defendant received an aggregate eleven-year sentence for second-degree aggravated assault subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, consecutive to a four-year sentence for third-degree arson, third-degree criminal mischief, and the third- and fourth-degree weapons offenses. Defendant was also ordered to pay $50,000 in restitution to the Stevens.

Defendant appeals his convictions and sentence. For the reasons that follow, we affirm.

I

Defendant raises four challenges to his convictions. He contests the trial judge's: (1) denial of defendant's motion for judgment of acquittal; (2) admission of the State's fire expert testimony; (3) decision not to substitute a deliberating juror; and (4) jury instruction on the conspiracy to commit

aggravated arson and aggravated arson charges. We address the contentions in the order stated, limiting our recitation of the relevant trial testimony and rulings specific to those respective arguments.

A. Judgment of Acquittal

Defendant contends the trial judge erred in denying his Rule 3:18-1 motion for judgment of acquittal of all charges against him. He maintains the State failed to produce any evidence that he agreed with anyone to intentionally set fire to or damage the Stevens' home. He contends the State's witnesses testified they only intended to fight Shane and denied wanting to damage the Stevens' home. Accordingly, defendant contends no reasonable inference could be drawn that he conspired to commit arson. He asserts the use of a flare gun was "a spur of the moment occurrence as no one expected Stevens and his friends to drive past . . . defendant's house." The only "weapons" brought were a bat and a two-by-four in case he and his friends were outnumbered in the fight. Defendant stresses co-defendant Markez Barnes' testimony that he was not recruited by defendant, and that he fired the flare gun on his own accord to make things more exciting.

Defendant argues the State did not prove his intent to commit aggravated assault—cause death or permanent disfigurement—by merely establishing he

fired a flare gun towards Shane's moving car. The judge, according to defendant, ignored this evidence, thereby lacking a rational basis to deny his acquittal motion.

Rule 3:18-1 provides a defendant may, at the close of evidence, move for the entry of a judgment of acquittal on the grounds that "the evidence is insufficient to warrant a conviction." Applying a de novo standard of review, we conclude "based on the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all the favorable inferences drawn from that testimony, a reasonable jury could find guilt beyond a reasonable doubt" of the charges defendant sought to dismiss. State v. Williams, 218 N.J. 576, 593-94 (2014).

In denying defendant's motion for acquittal, the judge reasoned:

> all the . . . co-conspirators had met earlier at the [defendant's] residence and at some point proceeded over to the Stevens' residence, . . . to accompany [defendant] in his, I guess, vendetta for [] and retribution for damage to his car. That, in conjunction with . . . the phone conversation where [defendant] threatens Shane . . . that even though he may be going [back to school] to California, his house isn't, at least creates the inference that he was going there to do something to the home. And as it turned out, he went there with others who had flare guns and . . . it was obvious to [defendant] that others had flare guns. [Co-defendant Joshua] Maldonado fired a flare gun. He . . .

> recruited Barnes to accompany him. []Barnes . . . fired a flare gun.
>
> The inference clearly is that . . . there was an agreement here and . . . []Toscano admitted to having a bat for protection, because he intended to engage in some sort of assault . . . in the event things got out of hand. And . . . damage was done to the [Stevens'] home. I mean . . . there's evidence of all the elements here with regard to all of the crimes.

We agree with the judge's reasoning. To convict defendant of conspiracy to commit a crime, the State had to satisfy N.J.S.A. 2C:5-2(a), which provides in pertinent part:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Defendant was charged with second-degree conspiracy to commit aggravated arson. Under N.J.S.A. 2C:17-1a, a crime of second-degree aggravated arson occurs when a person "starts a fire or causes an explosion, whether on his own property or another's: (1) Thereby purposely or knowingly

placing another person in danger of death or bodily injury; or (2) With the purpose of destroying a building or structure of another."

Although we agree with defendant there was no direct evidence that he agreed with his co-conspirators to set the Stevens' house afire with a flare gun, the State's case was supported by circumstantial evidence. See State v. Phelps, 96 N.J. 500, 509-11 (1984). Our Supreme Court has defined circumstantial evidence by using

> the rules of ordinary reasoning such as govern mankind in the ordinary affairs of life. While certain actions of each of the defendants, when separated from the main circumstances and the rest of the case, may appear innocent, that is not significant and undoubtedly appears in every case of criminal conspiracy.
>
> [State v. Samuels, 189 N.J. 236, 246 (2007) (quoting State v. Graziani, 60 N.J. Super. 1, 13-14 (App. Div. 1959)).]

Defendant sent text messages and phone calls to Shane threatening him with physical violence. In addition, Shane testified defendant told him, "[y]ou going back to California [to go to school] but your house isn't pussy." Giving the State the benefit of all favorable inferences, the jury could reasonably infer Shane's house was the target of defendant's animosity against Shane. The fact that defendant's co-conspirators aided his vendetta against Shane, went to Stevens' house armed with a flare gun, and used it in setting the house on fire, suggest

furtherance of an agreement with Shane to inflict the damage. Moreover, prior to the incident, Frederick Deensie testified he was a passenger in a car with defendant when defendant fired the flare gun shot at Shane's car. This provided the jury with sufficient evidence to find that firing a flare gun at Shane's car was part of the plan to retaliate against Shane, which included firing the flare gun at Shane's home. See State v. Kamienski, 254 N.J. Super. 75, 94 (App. Div. 1992) (holding "[a]n implicit or tacit agreement may be inferred from the facts and circumstances"); State v. Cagno, 211 N.J. 488, 512 (2013) (acknowledging co-conspirators generally act in silence and secrecy). Accordingly, the denial of defendant's motion for judgment of acquittal of the arson, assault, and related weapon charges was appropriate.

B. State's Fire Expert Testimony

Defendant contends he was denied due process and a fair trial because Middlesex County Prosecutor's Office Detective Thomas O'Malley, the State's fire expert, testified the fire which burned downed the Stevens' home was arson because it was "intentionally set" and "not accidental." Defendant maintains the "testimony infringed on the jury's fact-finding role, foreclos[ing] the defense that the fire was unintended, and unfairly bolstered the prosecution in violation of N.J.R.E. 702 [and] State v. Cain, 224 N.J. 410 (2016)." He asserts O'Malley's

testimony failed to address a contested matter that was beyond the jury's understanding, since the cause of the fire was never in question.

Because defendant did not object to O'Malley's testimony and did not request a curative instruction, we review his contention for plain error. See R. 2:10-2 ("Any error or omission shall be disregarded by [this court] unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ."). There was none.

The admission of O'Malley's testimony did not create the possibility of an unjust result "sufficient to raise a reasonable doubt as to whether the [admission of O'Malley's testimony] led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971). O'Malley was qualified, without objection, as an expert in arson investigation and the origin and cause of fires. He opined the fire—caused by a flare gun—originated outside the house by the chimney chase. The trial issues were the identity of the flare gun shooter(s); whether defendant reasonably conspired with the shooter(s) to fire the flare gun; and whether the shooter(s) realized the house would catch fire if flares were shot at the house. O'Malley did not testify who fired the flare gun, what the shooter(s) realistically expected to happen, or about defendant's involvement in the incident. Although the cause of the fire was undisputed and

arguably making expert testimony unnecessary, defendant has not shown he was prejudiced by O'Malley's testimony. See State v. Morton, 155 N.J. 383, 421 (1998).

C. Juror Substitution

Defendant contends he "was deprived of the right to due process of law and a fair trial by an impartial jury [that] should lead to the reversal of his convictions" because the judge "undu[ly] interfere[d] with the [jury's] deliberative process". After the jury had begun its deliberations at approximately 2:55 p.m., it sent a note to the judge at 3:16 p.m., asking to discuss when it would come back to continue deliberations. The jury knew it would not be deliberating the next day, a Friday, because two jurors had prior commitments, and the following Monday was a holiday. Juror number nine was going on vacation that Wednesday, leaving only one day, a Tuesday, to deliberate before she returned a week later. Consequently, the judge excused juror number nine out of concern she or the other jurors might rush to reach a verdict to accommodate her schedule. Defendant neither objected to the removal of juror number nine nor argued it was too late to start with a new jury at the time.

Defendant now maintains the judge was premature in dismissing juror number nine because she could have continued to deliberate before her scheduled vacation and wanted to do so. He further asserts it was evident that based on its notes on the verdict sheet, the jury had reached the stage where judgments had been made before the substitution of the alternate and the judge's direction. Defendant contends despite the judge's direction to the jury that it renew deliberations, "it is highly doubtful that the reconstituted jury started deliberations again from the beginning."

We first point out defendant invited the juror substitution and should not benefit from the substitution by claiming it was an error. See State v. Jenkins, 178 N.J. 347, 358 (2004). He should not be able to argue "that an adverse decision [by the trial judge] was the product of error, when [he] urged the [judge] to adopt the proposition now alleged to be error." Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996).

Even if the alleged error was not invited, the plain error rule applies because defendant neither objected to the removal of juror number nine nor argued it was too late to reconstitute the jury. There was no plain error.

Once a jury begins its deliberations, the trial judge may not substitute an alternate juror unless "a juror dies or is discharged by the court because of illness

or other inability to continue." R. 1:8-2(d)(1). When a substitution is made, the jury must be instructed to start deliberations anew and be given "such other supplemental instructions as may be appropriate." Id. The substitution here did not have a clear capacity to affect the jury's deliberations, and, in fact, avoided such a problem. See Macon, 57 N.J. at 338 (1971). The trial judge did not abuse his discretion. See State v. Valenzuela, 136 N.J. 458, 470 (1994).

The jury had only been deliberating for twenty-one minutes with less than one hour to deliberate the rest of the day, thereby allowing juror number nine to deliberate only for a full day before she went on vacation. The judge prudently determined that, with the amount of time the jury had to deliberate before juror number nine went on vacation, the juror should be excused and reconstituted with an alternate without the pressure to render a verdict within a day. To delay the jury's deliberation for an entire week until juror number nine returned from vacation was not a practical alternative given the availability of an alternate to replace juror number nine. A lengthy, unexpected delay of this sort had the capacity to taint deliberations due to the jurors' fading memories.

In sum, the substitution of juror nine was consistent with Rule 1:8-2(d)(1) and did not violate defendant's due process rights by denying him a fair trial.

D. Jury Instructions

Defendant argues he was denied due process and a fair trial because the repeated ambiguous use of "and/or" in the jury instructions allowed for a non-unanimous verdict for the offenses of conspiracy to commit aggravated arson and aggravated arson. Since the argument was not raised before the trial judge, defendant maintains the instructions allowed the jury to convict him of multiple crimes "without unanimously agreeing on what he did[,]" thereby "creat[ing] the real possibility of a patchwork verdict." Defendant thus contends the convictions for the lesser-included counts of conspiracy to commit arson and arson should be reversed. Because this argument was not raised before the trial judge, we review for plain error.

After giving the model jury charges on aggravated arson and the lesser-included count of arson, trial judge explained the difference between the two crimes:

> aggravated arson and arson is that in proving the crime of arson the State must prove beyond a reasonable doubt that when defendant purposely started the fire he recklessly, recklessly placed another person in danger of death or bodily injury or recklessly placed [the Stevens' home] in danger of damage or destruction instead of purposely or knowingly placing another person in danger of death or bodily injury, or exhibiting a purpose to destroy [the Stevens' home] as is required in the charge of aggravated arson.

Even though "and/or" is repeatedly used in the model jury instructions, and the jury is directed to consider alternative options, defendant fails to show how the phrase was improperly used in this instance. We are not faced with the abundant use of "and/or" in jury instructions in the context of "robbery and/or aggravated assault," as occurred in State v. Gonzalez, 444 N.J. Super. 62, 72-75 (App. Div. 2016). In that case, we held the jury charge failed to require unanimity in determining whether the defendant's participation in the crimes of robbery and aggravated assault were the product of duress. While the jury instructions here repeated the use of "and/or," the phrase was not applied in connection with the charges of conspiracy to commit aggravated arson and aggravated arson. For the most part, eleven times to be exact, the phrase was used in "unlawful possession of a weapon, and/or aggravated assault." Thus, we cannot conclude the jury's verdict lacked unanimity by convicting defendant on the lesser-included counts of conspiracy to commit arson and arson.

Defendant's reliance upon State v. Gentry is misplaced and does not support reversal of his convictions. 183 N.J. 30 (2005). There, the defendant's conviction was reversed due to the use of "and/or" in the jury instruction for robbery. Id. at 33. The unanimity rule mandates unanimous agreement on each element of the offense. Id. at 30. The jury must unanimously agree "on which

acts were committed against which victim." Ibid. The defendant was charged with robbery, and the evidence supported two alternative theories for a conviction based upon separate acts using force against two different persons. Id. at 31-32. The indictment and verdict sheet charged the defendant with robbery against either/or the two victims. Id. at 31. Since the use of force against a person is an essential element of robbery, it was necessary for the State to prove that element as to a specific victim. Id. at 33. A note from the jury advised the court that although the jury was unanimous in finding the defendant had used force against a victim, it could not agree on which person the defendant had knowingly used force against. Id. at 31. In response to the jury's note, the trial court instructed that agreement as to the use of force would constitute a unanimous verdict. Id. at 32-33. Our Supreme Court found this instruction clearly erroneous, because after the jury advised the trial court it was unable to reach unanimity on an essential element, the court sanctioned a verdict that failed to achieve unanimity. Ibid.

We favor the State's argument that Gentry is distinguishable because in this case, the State did not argue alternative theories of defendant's guilt. The State's theory was that there was a continuous, unbroken course of criminal conduct against Shane by shooting flares in his car and at his occupied home.

As to defendant's guilt, the State argued he fired the flare gun at Shane's car, and his conspiracy with others directly led to them firing the flare gun at Shane's home. This did not present "a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory." State v. Parker, 124 N.J. 628, 635 (1991) (citations omitted). Unlike in Gentry, the jury here did not ask the judge questions indicating it could not reach unanimity on any of the essential elements of aggravated arson. Significantly, the jury acquitted defendant of the aggravated arson offenses, thus understanding the judge's instructions that the State needed to prove defendant's mental state to make his or co-conspirators' acts of arson an aggravated offense.

II

Defendant contends at sentencing that the trial judge gave too much weight to aggravating factors, failed to consider mitigating factors, misapplied State v. Yarbough, 100 N. J. 627 (1985), in imposing a consecutive sentence, and lacked a factual basis in apportioning him $50,000 of the $138,065.27 in outstanding expenses incurred by the Stevens.

After merger, defendant was sentenced to an aggregate prison term of eleven years: a seven-year sentence for second-degree aggravated assault

subject to NERA, and a consecutive four-year sentence for third-degree arson, third-degree criminal mischief, and the third- and fourth-degree weapons offenses. With respect to the sentencing factors, the judge found aggravating factors three (the risk that defendant will commit another offense) N.J.S.A. 2C:44-1a(3), and nine (the need for deterring defendant and others from breaking the law), N.J.S.A. 2C:44-1a(9). The judge found no mitigating factors, rejecting defendant's request that mitigating factor eleven (hardship on his family), N.J.S.A. 2C:44-1b(11), be considered because he was expecting a child who needed his support.

In imposing consecutive sentences, the judge considered Yarbough, finding the aggravated assault and arson charges were two separate criminal acts involving distinct actions. The first occurred when defendant shot a flare gun at Shane's car. The second happened when defendant and others went to Shane's home to fight, and a flare gun was fired at his home, burning it down. The judge also focused "on the fairness of the overall sentence." State v. Cuff, 239 N.J. 321, 352 (2019) (citing State v. Miller, 108 N.J. 112, 121 (1987)).

We discern no abuse of discretion in the judge's weighing of the aggravating and mitigating sentencing factors. See State v. Bolvito, 217 N.J. 221, 228 (2014). Defendant's sentence was based upon competent evidence in

the record, in accord with our sentencing guidelines, and does not shock our judicial conscience. See ibid.

Lastly, defendant objects to the judge's order to pay restitution towards the Stevens' expenses of $138,065.27, which were uncompensated by insurance coverage. The judge assessed defendant's ability to pay restitution, considering his wage earnings at the time of sentencing and his anticipated employment after serving his sentence. The judge also determined defendant's proportionate share of the expenses, based upon his culpability among his co-defendants, equaled $50,000. State v. Newman, 132 N.J. 159, 169 (1993); State in Interest of R.V., 280 N.J. Super. 118, 121-22 (App. Div. 1995). The judge's restitution order was not an abuse of discretion. State v. Martinez, 392 N.J. Super. 307, 318-19 (App. Div. 2007). A hearing was not necessary because the Stevens' losses were adequately supported in the record, and there is no dispute as to the amount or defendant's ability to pay. N.J.S.A. 2C:44-2(c); State v. Orji, 277 N.J. Super. 582, 589-90 (App. Div. 1994). Defendant had the opportunity to challenge the losses at sentencing but chose not to do so. The record supports the trial judge's order requiring defendant pay $50,000 restitution.

To the extent we have not addressed any of defendant's arguments, it is because we have concluded they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION