SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0845-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL WEATHERS,

Defendant-Appellant.

Submitted January 18, 2023 – Decided February 16, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment Nos. 15-02-0088 and 17-03-0092.

Joseph E. Krakora, Public Defender, attorney for appellant (Molly O'Donnell Meng, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Amanda Frankel, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Michael Weathers of first-degree robbery for his part in stealing a stranger's purse while threatening to shoot her.[1] Minutes after Cecilia Fynn reported the crime, defendant was arrested about one mile away from the crime scene pursuant to Fynn's description of the two perpetrators and her ability to track the location of her cellphone via the "Find My iPhone" application. Shortly thereafter, Fynn identified defendant during a "showup" identification procedure. Police seized Fynn's purse containing her cellphone and identification cards from the car defendant was driving at the time of the stop. Defendant's ensuing Wade/Henderson[2] motion to suppress Fynn's out-of-court identification was denied.

Prior to trial, defendant was confined at Ann Klein Forensic Center for treatment of a mental illness and a competency evaluation. The medical staff

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[1] Following the incident, defendant and his co-defendant, Rashod Kates, were charged in a Somerset County indictment with second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a) and N.J.S.A. 2C:15-1(a)(2) (count one); and first-degree robbery, N.J.S.A. 2C:15-1(a)(2) (count two). The same indictment charged Kates with third-degree receiving stolen property, N.J.S.A. 2C:20-7(a) (count three). Prior to trial, the defendants' charges were severed and the conspiracy charge against defendant was dismissed. A jury acquitted Kates of counts one and two; he thereafter pled guilty to count three and was sentenced to a five-year prison term. Kates is not a party to this appeal.

[2] United States v. Wade, 388 U.S. 218 (1967); State v. Henderson, 208 N.J. 208 (2011).

found defendant displayed symptoms of malingering. Defendant was deemed competent to stand trial, but he remained confined at Ann Klein for treatment to maintain his competency.

Defendant asserted a diminished capacity defense at trial, N.J.S.A. 2C:4-2, supported by the testimony of his expert witness. Defendant's trial testimony contradicted his statements to police during the motor vehicle stop. In his closing arguments, the prosecutor characterized defendant's "story" as "absurd," described his testimony as "just part of his conniving, manipulative behavior," and called defendant "a perpetual liar."

After pleading guilty to violating his probationary term for a prior weapons conviction, defendant was sentenced to an aggregate prison term of fifteen years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on the present robbery conviction. This appeal followed.

Defendant now raises the following points for our consideration:

POINT I

> BECAUSE THE WITNESS'S UNRELIABLE OUT-OF-COURT IDENTIFICATION OF . . . DEFENDANT SHOULD HAVE BEEN SUPPRESSED, . . . DEFENDANT'S CONVICTION[] MUST BE REVERSED.

A. The Visual Identification Should Have Been Suppressed Because There Was A Substantial Likelihood Of Irreparable Misidentification.

[i.] The Suggestiveness of the Procedure.

[ii.] Other Factors Undermining the Reliability of the Identification.

POINT II

THE PROSECUTOR ENGAGED IN MISCONDUCT REQUIRING REVERSAL OF DEFENDANT'S CONVICTION[] WHEN, IN SUMMATION, HE REPEATEDLY CALLED DEFENDANT A LIAR AND DENIGRATED THE DEFENSE.

POINT III

DEFENDANT'S FIFTEEN-YEAR NERA SENTENCE MUST BE VACATED AND THE MATTER REMANDED BECAUSE THE COURT FAILED TO PROPERLY CONSIDER HIS SEVERE MENTAL ILLNESS AS A MITIGATING FACTOR.

Discerning no reason to disturb the motion judge's conclusion that the showup identification was reliable, we reject the contentions asserted in point I. However, because we conclude the prosecutor's remarks exceeded the bounds of proper comment, we are constrained to reverse defendant's conviction and remand for further proceedings. Accordingly, we do not reach defendant's sentencing argument.

I.

During the Wade/Henderson hearing, the State called three Franklin Township Police Department (FTPD) officers, who testified about their involvement in the investigation and the showup procedure administered to Fynn. The State also introduced into evidence motor vehicle recordings (MVR), depicting the identification procedure and the instructions given to Fynn prior to her identification. Defendant did not testify or present any evidence.

Around 12:31 a.m. on December 14, 2016, Officer Ryan Ellington responded to Fynn's apartment; she was "visibly upset," but communicative. Fynn told Ellington that as she was walking from her car to her apartment, two men "came out of nowhere."[3] One man held his hand behind his back and said he'd shoot Fynn if she did not give him her purse. She described this suspect as a "light-skinned Black male; early twenties; wearing a red hoodie and dark-colored pants." This man "pushed her prior to grabbing the purse off of her." The other suspect had a knife and was described as "a dark-skinned Black male wearing a blue hoodie with dark-colored pants; early twenties." The suspects fled on foot; Fynn did not recall their direction. But Fynn also told Ellington

[3] Although the actual time of the robbery was not stated at the hearing, the parties do not dispute the incident occurred between midnight and 12:30 a.m.

she had tracked her phone to 802 Easton Avenue using the Find My iPhone application. That location was about one mile away from her apartment complex.

Shortly thereafter, Officer Nicholas Gambino saw a light-skinned Black male driving a Volvo at the 900 Easton Avenue Plaza. Gambino followed the car and, around 12:41 a.m., stopped it for motor vehicle violations near 802 Easton Avenue. Gambino noticed defendant was only wearing a T-shirt even though the temperature was around thirty-two degrees Fahrenheit. Defendant was unable to provide the car's registration and insurance documentation. When back-up officers arrived, Gambino "observed a red sweatshirt tucked in the rear passenger side of the vehicle." No weapons were recovered during the ensuing frisk. Defendant was held at the scene.

Ellington testified that en route to the scene, he told Fynn: "[W]e had officers that had an individual that may or may not be involved, and I would be bringing her over there for her to take a closer look." Pursuant to FTPD policy, Sergeant Sean Hebbon as Ellington's supervisor, advised Fynn of the showup procedure.

At issue is the following instruction from Hebbon to Fynn, which was captured on MVR footage and played during the hearing:

> So now the officer has somebody there . . . This person might or might not be the person that did this to you. We're . . . not a hundred percent sure. That's why we need you to take a look and see if that person . . . if you recognize that person.
>
> [(Emphasis added).]

For the sake of completeness, we recite Hebbon's additional instructions:

> If you do recognize that person when we drive by, just . . . indicate that to the officer and then . . . at that point we're gonna want to know . . . how certain are you that it is the person. All right. And . . . whether you're a hundred percent sure; whether it's ten percent sure; whether you're not a hundred percent sure.
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> . . . .
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> And . . . just let us know. Just be advised . . . . So, we don't know if that's the right person. If it's not right the person [sic], we want to continue to find the right person.
>
> [(Emphasis added).]

Fynn acknowledged her understanding of the procedure. Defendant was standing outside the Volvo when Fynn identified him. MVR footage depicted her identification, which occurred around 1:22 a.m.:

> Fynn: That is him.
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> Ellington: That's the guy?
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> Fynn: That is him. He had a hoodie on, a red hoodie. He's the one who took my phone.

Ellington: Are you − what percent?

Fynn: I'm a hundred percent certain that's him.

On redirect examination, Ellington testified Fynn's race was Black and she was twenty-five years old.

Immediately following argument, the judge issued a cogent oral decision, denying defendant's motion. The judge acknowledged he granted the evidentiary hearing, having previously determined a showup identification procedure is "inherently suggestive," thereby shifting the burden to the State to demonstrate the procedure was reliable. See Henderson, 208 N.J. at 289. Recounting the testimony adduced at the hearing, in view of the legal framework revised by our Supreme Court in Henderson, the judge concluded the State's proffered evidence demonstrated "sufficient indicia of reliability to outweigh the potential corrupting effect of a suggestive showup identification[] procedure."

Before us, defendant maintains the victim's out-of-court identification was not sufficiently reliable. Citing State v. Herrera, 187 N.J. 493, 506 (2006), defendant claims Hebbon's pre-identification instructions to Fynn suggested police "believed they had the right person in custody and only needed confirmation from Fynn." Defendant also contends the motion judge

erroneously evaluated certain Henderson estimator variables and failed to consider other factors. Defendant's contentions are unavailing.

When reviewing an order denying a motion to bar an out-of-court identification, our standard of review "is no different from our review of a trial court's findings in any non-jury case," State v. Wright, 444 N.J. Super. 347, 356 (App. Div. 2016), and are "entitled to very considerable weight," State v. Adams, 194 N.J. 186, 203 (2008) (quoting State v. Farrow, 61 N.J. 434, 451 (1972)). We will not disturb those findings, provided they "could reasonably have been reached on sufficient credible evidence present in the record." Wright, 444 N.J. Super. at 356 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). We owe no deference to a trial court's interpretation of the law, which we review de novo. State v. Dunbar, 229 N.J. 521, 538 (2017).

In Henderson, the Court adopted a framework to determine whether the process utilized by police to obtain eyewitness identification of a perpetrator was reliable or improperly suggestive. 208 N.J. at 288-96. Under this framework, to obtain a hearing, "a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification" tied to a "system variable." Id. at 288-89. "System variables" are "variables

within the State's control," and include pre-identification instructions, showups, and multiple viewings. Id. at 248, 289-90.

As the term suggests, showups involve the witness's observation of a single suspect. Id. at 259. Generally, a showup identification occurs at the crime scene or shortly afterward. Ibid. Although, as the motion judge correctly determined, the procedure is inherently suggestive, "the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours." Ibid. However, officers "should instruct witnesses that the person they are about to view may or may not be the culprit." Id. at 261.

When, as in the present matter, a defendant makes a threshold showing for a hearing, the burden shifts to the State to "offer proof to show that the proffered eyewitness identification is reliable – accounting for system and estimator variables." Id. at 289. Estimator variables include: stress; weapon focus; duration of the incident; distance and lighting; the perpetrator's characteristics, memory decay; race-bias; opportunity to view the suspect at the time of the crime; and level of certainty at the confrontation; and accuracy of prior description of the suspect. Id. at 291-92.

The system and estimator variables set forth in Henderson "are not exclusive." Id. at 292. "[T]he ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification." Id. at 289.

The motion judge found the showup procedure here was conducted well within the two-hour time frame cautioned by the Court in Henderson, and police provided proper pre-identification instructions. The judge elaborated:

> In this case, Sergeant Hebbon advised the alleged victim that she would be exposed to an individual that they had come in contact with and who was in their custody that might be a possible suspect but that they, the police, were not sure, and they required her to take a look at this person who, as . . . Sergeant Hebbon indicated may or may not have been one of the perpetrators, who as he put it, "did this to her."
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> It was a showup, but it was a showup temporar[al]ly in proximity to the event and geographically in proximity to the event. It was a matter of minutes between the alleged armed robbery and the apprehension of . . . defendant and his identification by the alleged victim. It was not a situation in which hours had transpired. There were no multiple viewings. She received neutral pre-identification instructions, and she had – other than the description which she gave to the police – she had made no other identifications.

Defendant's reliance on Herrera is misplaced. Unlike Hebbon's pre-identification instructions in the present matter, prior to the identification in Herrera, the police told the witness "we found your car, we located your car with

somebody in it, we want you to come with us to identify the person." 187 N.J. at 506. By contrast here, Hebbon neither advised Fynn police had found defendant with the proceeds of the robbery nor influenced Fynn "to develop a firmer resolve to identify someone [s]he might otherwise have been uncertain was the culprit." See ibid. Unlike Herrera, this incident involved two perpetrators and Fynn specifically identified defendant as the man in the red hoodie who took her phone.

Moreover, Hebbon expressly stated police did not know whether the person Fynn was about to view was the "right person" and, if not, police "want[ed] to continue to find the right person." The judge credited those instructions. Because the motion record supports the judge's findings, Wright, 444 N.J. Super. at 356, we reject defendant's claim that Hebbon's pre-identification instructions demonstrated "a very substantial likelihood of irreparable misidentification." Henderson, 208 N.J. at 289.

Turning to the estimator variables, the motion judge presumed Fynn was under stress at the time of the incident but found her emotional state "did not prevent her from providing police with a cogent, economical, and precise description of the two perpetrators." Referencing the MVR footage, the judge found Fynn "had an unhesitating certainty in her identification." In view of that

certainty, the judge inferred Fynn "devoted a significant degree of attention to the event as it was occurring." The judge further noted the showup did not involve "a situation of cross-racial identification," thereby removing the race-bias variable from "the mix."

Defendant argues the judge failed to consider Fynn's weapon focus, her use of outside information to track her cellphone, and the duration of the incident. He further argues, and the State acknowledges, the judge erroneously considered the good lighting at the showup instead of the quality of lighting at the time of the incident.

Having considered defendant's contentions in view of the applicable law and the motion record, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons set forth by the motion judge in his well-reasoned decision. We simply add the judge's misstatement about the lighting did not undermine his well-reasoned decision, which thoroughly addressed the applicable factors based on the evidence adduced at the hearing.

Nor do we discern any error in the judge's omission of the estimator variables argued by defendant. As to the weapon-focus variable, Fynn told Ellington she never saw a gun and "could not describe the knife"; no testimony

was elicited at the hearing about the duration of the incident; and, although Fynn assisted police in electronically locating her phone, she immediately recognized defendant as the suspect who was wearing the red hoodie. Indeed, Fynn was "a hundred percent certain" of her identification.

II.

Defendant testified at trial, placing his credibility and mental health diagnoses squarely in issue. Defendant told the jury he served in the Marines for three years until he was honorably discharged due to mental health issues, including suicidal ideation. Thereafter, he self-medicated with illegal drugs.

Defendant's testimony concerning his whereabouts prior to the incident differed from the account he gave Gambino when he was stopped. According to his trial testimony, defendant drove Kates and "Anthony" to Fynn's apartment complex. Kates and Anthony left the car while defendant remained behind. When they returned, Kates and Anthony asked defendant to pop the hood, then removed their hoodies and placed them in the car. Defendant denied any involvement in the robbery and maintained he did not have a gun.

On cross-examination, the prosecutor questioned defendant about his conversation with Gambino at the time of the stop. Defendant was not sure whether he told Gambino he had only been with Kates that evening, but later

acknowledged he did not mention Anthony because they had just met. Defendant admitted he was not truthful when he told Gambino he was "just taking this car out to see how fast it could go."

Defendant's psychiatric expert, Dr. Marin Weinapple, testified defendant suffered "from a mental illness at the time of the incident, which interfered with his capacity to act knowingly and purposely." Dr. Weinapple opined defendant's diagnoses ranged from "schizophrenia to bipolar, to anxiety, different things." Dr. Weinapple concluded defendant's diagnoses of bipolar disorder with post-traumatic stress disorder were active at the time of this incident.

On rebuttal, the State presented the testimony of its psychiatric expert, Dr. Howard Gilman, who opined defendant had diagnoses of malingering, borderline personality disorder, and substance-abuse disorders. Dr. Gilman concluded defendant's diagnoses did not "have anything to do with whether or not he acted purposely or knowingly on the night of the incident."

The State also elicited testimony from defendant, both experts, and Detective Brandon Domotor on rebuttal that after defendant's arrest, he was administered his Miranda[4] rights and exercised his right to remain silent. The trial court instructed the jury that this evidence was admitted for the limited

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

purpose of assessing whether defendant had the ability to act purposely or knowingly at the time of the incident.

Defendant argues the prosecutor's remarks during summation rose to misconduct and denied him a fair trial by repeatedly characterizing his testimony as a "story" and "absurd," and calling him a "liar." For example, after referencing the inconsistencies in defendant's trial versions of the event, the prosecutor rhetorically asked the jury: "So why didn't he tell Gambino what he told you? Because what he told you was a lie just like the lie he told Gambino, just like all the stuff he makes up at Ann Klein and with Dr. Gilman. Folks, he's a perpetual liar."

Later, the prosecutor's remarks continued in the same vein, drawing an objection by defense counsel:

> You know, all this is part of just how easy it is for the defendant to not tell you the truth. Because we already know how easy it is for him to malinger and feign psychiatric symptoms, exaggerate his psychiatric symptoms because he wants to convince . . . [the doctors] that he is severely mentally ill when he is not. And I submit to you that is just part of his conniving, manipulative behavior.

The trial judge – who was not the motion judge – overruled defendant's objection, finding the prosecutor had not "crossed a line yet."

In its responding brief, the State argues the foregoing statements were proper comments on the testimony adduced at trial and did not denigrate the defense. The State further asserts any error was harmless. We think otherwise.

The prosecutor's responsibilities and duties are not complicated. Our Supreme Court has long recognized: "While 'prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries' and are 'afforded considerable leeway,' 'their comments [should be] reasonably related to the scope of the evidence presented.'" State v. Williams, 244 N.J. 592, 607 (2021) (quoting State v. Frost, 158 N.J. 76, 82 (1999)). It bears repeating "the primary duty of a prosecutor is not to obtain convictions but to see that justice is done." State v. Smith, 212 N.J. 365, 402-03 (2012); see also State v. Williams, 471 N.J. Super. 34, 43-45 (App. Div. 2022) ("reiterating seminal principles underscoring the prosecutor's responsibilities and duties").

Although a prosecutor "may point out discrepancies in a witness's testimony or a witness's interests in presenting a particular version of events," State v. Johnson, 287 N.J. Super. 247, 267 (App. Div. 1996), the prosecutor may not "express his personal opinion on the veracity of any witness," State v. Rivera, 437 N.J. Super. 434, 463 (App. Div. 2014). Nor may a prosecutor use derogatory epithets to describe a defendant. State v. Supreme Life, 473 N.J.

Super. 165, 174 (App. Div. 2022). "[B]y no stretch of the imagination can it be said that describing defendant as a 'coward,' 'liar,' or 'jackal' is not derogatory . . . ." Ibid. (quoting State v. Pennington, 119 N.J. 547, 577 (1990) (alteration in original)).

In the present matter, we have considered the prosecutor's remarks in the context of the evidence adduced at trial. See State v. Ates, 426 N.J. Super. 521, 536 (App. Div. 2012). We recognize defendant placed his credibility in issue and his inconsistent statements "were undoubtedly fair game for cross-examination and summation commentary." Supreme Life, 473 N.J. Super. at 174; see also State v. Tucker, 190 N.J. 183, 190 (2007) (stating a prosecutor may attempt "to impeach the validity of" inconsistencies between a defendant's trial testimony and pretrial statement). However, the State's "'use of such evidence [is limited] to issues of credibility and not substantive evidence on the issue of defendant's guilt or innocence.'" Ibid. (quoting Tucker, 190 N.J. at 191). "The court is required to give a limiting instruction." Ibid.; see also Model Jury Charges (Criminal), "Credibility — Defendant's Statements at or Near Time of Arrest (To Be Used Only When Defendant Testifies)" (approved June 21, 2020). The trial judge issued no such instruction here.

As we stated in Supreme Life, where the prosecutor also called the defendant a liar:

> [W]hile the prosecutor was entitled to draw the jury's attention to [the] defendant's false statements to police when assessing the credibility of [the] defendant's trial testimony, he was not permitted to tip the scale in the State's favor by repeatedly telling jurors that [the] defendant's trial testimony was not worthy of belief because [the] defendant lied before, was lying again and was, simply put, therefore a liar.
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> [(Id. at 175).]

In the present case the prosecutor's remarks likewise were out of bounds.

Moreover, the prosecutor's comments concerning defendant's invocation of his right to remain silent went much further than attempting to establish defendant acted purposely or knowingly. After pointing out that defendant was thinking clearly on the night of the incident, the prosecutor continued:

> Now, if he's somebody who's suffering from such a disease or defect that little old Rashod Kates could take advantage of him, don't you think he would have just said, . . . "Okay, I'll talk to you? What do you want to know? Sure, I did." He would have just been taken advantage of by Detective Domotor. But he wasn't because he knew what he was doing that night. And Detective Domotor scrupulously honored his request.
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> [(Emphasis added).]

The prosecutor improperly commented on defendant's right to remain silent. Together with the prosecutor's remarks concerning defendant's lack of veracity, the cumulative comments suggested to the jury defendant chose not to speak with police because he was lying. Those comments clearly violated defendant's Fifth Amendment right to remain silent. See State v. Muhammad, 182 N.J. 551, 568-69 (2005) ("If a defendant remains silent after being arrested and given Miranda warnings, both state and federal law prohibit a prosecutor from using that silence against him.").

"[Although] the prosecutor exceeded the bounds of proper conduct . . . that finding does not end our inquiry." Williams, 471 N.J. Super. at 45. We must decide whether "the prosecutor's misconduct was so egregious that it deprived the defendant of a fair trial." Frost, 158 N.J. at 83. In doing so, we evaluate whether (1) "defense counsel made timely and proper objections to the improper remarks"; (2) "the remarks were withdrawn promptly"; and (3) "the court ordered the remarks stricken from the record and instructed the jury to disregard them." Ibid.

In the present matter, defendant's sole objection to the prosecutor's remarks was overruled. Considering the prosecutor's summation as a whole, the cumulative errors were not harmless. Notwithstanding the substantial evidence

of defendant's guilt, credibility was a key issue at trial. "Even if the evidence were overwhelming, that could never be a justifiable basis for depriving a defendant of his or her entitlement to a constitutionally guaranteed right to a fair trial." Id. at 87. Because we conclude the prosecutor's misconduct deprived defendant of a fair trial, defendant's conviction cannot stand.

Reversed and remanded. We do not retain jurisdiction.