SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1512-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROLLO A. BARKER, a/k/a
ROLLO NARKER,

Defendant-Appellant.

Submitted December 13, 2022 – Decided April 13, 2023

Before Judges Gilson, Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 18-04-0304.

Joseph E. Krakora, Public Defender, attorney for appellant (Simon A. Wiener, Assistant Deputy Public Defender, of counsel and on the briefs).

Robert J. Carroll, Morris County Prosecutor, attorney for respondent (Tiffany M. Russo, Assistant Prosecutor, on the brief).

Appellant filed pro se supplemental briefs.

PER CURIAM

During the afternoon of January 19, 2018, local police stopped a green Ford Explorer on Route 46 in Denville for motor vehicle infractions, including exceeding the speed limit by fifteen miles per hour. The car was driven by defendant Rollo A. Barker; the sole passenger was known to police from prior drug arrests.

Both occupants appeared to be under the influence of narcotics. Denville Police Officer Douglas Large observed fresh track marks on defendant's arm and drug paraphernalia in plain view. Citing physical ailments, defendant told Large he was unable to complete the field sobriety tests. Defendant initially denied Large's ensuing request for consent to search the car. Large requested a K-9 unit respond to the scene; defendant gave consent while the unit was en route. Large did not find drugs when he initially searched the car; the K-9 unit thereafter alerted to the presence of drugs. Police seized heroin and drug paraphernalia from beneath the center console.

Following his arrest, defendant was charged by complaint-warrant with two disorderly persons offenses: unlawful possession of drug paraphernalia, N.J.S.A. 2C:36-2; and unlawful possession of a hypodermic syringe, N.J.S.A. 2C:36-6a. Police also issued summonses for various motor vehicle infractions.

Thereafter, defendant was charged in a two-count Morris County indictment with third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1), and fourth-degree operating a motor vehicle with a suspended license, N.J.S.A. 2C:40-26(b).[1]

Prior to trial, defendant moved to suppress the evidence seized from the car. Large was the only witness called at the hearing. Following Large's testimony, defendant argued disparities reflected in the consent form regarding the time at which defendant signed the form rendered his consent invalid. The State attributed the disparities to a scrivener's error and, alternatively, argued police had probable cause to search the car under the automobile exception to the warrant requirement. The motion judge upheld the search under both theories.

The matter was assigned to another judge for trial. Defendant moved in limine to question Large about two different versions of the consent-to-search form. During the pretrial conference, the judge granted defendant's application, noting defendant could not otherwise challenge the motion judge's legal

[1] We glean from the record that the passenger was not charged with any offenses; she is not a party to this appeal.

determination that the consent search was valid. Defense counsel made clear defendant did not intend to challenge the legality of the search.

At trial, the State presented the testimony of two law enforcement officers, including Large. The State also called Michele Agosta, a supervisory forensic scientist employed by the laboratory that tested the substances recovered from defendant's car. Defendant neither testified nor called any witnesses on his behalf.

The jury convicted defendant of both offenses charged in the indictment. The trial judge thereafter found defendant guilty of both disorderly persons offenses, and two of the five motor vehicle infractions: driving with a suspended license, N.J.S.A. 39:3-40; and operating a motor vehicle while possessing controlled dangerous substances, N.J.S.A. 39:4-49.1. Defendant was sentenced to an aggregate prison term of five years with a parole disqualifier of two-and-one-half years.[2]

[2] Prior to sentencing, defendant pled guilty pursuant to a negotiated plea agreement to fourth-degree criminal mischief, charged in a separate indictment. Defendant was sentenced to time served on that charge. Defendant does not appeal from the dispositions on the disorderly persons and motor vehicle offenses in the present matter or the criminal mischief conviction under the separate indictment.

In his counseled brief on appeal, defendant raises the following points for our consideration:

POINT I

THE TRIAL COURT'S FAILURE TO REOPEN THE SUPPRESSION HEARING IN LIGHT OF THE SIGNIFICANT FACTUAL DIFFERENCE IN OFFICER LARGE'S TRIAL TESTIMONY WAS PLAIN ERROR. N.J. CONST. ART. I ¶ 7; U.S. CONST. AMEND. IV.
(Not raised below)

POINT II

THE TRIAL COURT ERRED BY ADMITTING THE DRUG-TEST REPORT THROUGH A SURROGATE WITNESS, DEPRIVING [DEFENDANT] OF HIS CONFRONTATION RIGHTS AND REQUIRING REVERSAL. N.J. CONST. ART. I, ¶ 10; U.S. CONST. AMEND. VI.
[(Partially raised below).]

POINT III

THE STATE'S ELICITATION OF TRIAL TESTIMONY ABOUT THE CONSPICUOUSLY HIGH NUMBER OF POINTS ON [DEFENDANT]'S LICENSE WAS PROSECUTORIAL MISCONDUCT REQUIRING REVERSAL. N.J. CONST. ART. I, ¶ 1; U.S. CONST. AMEND. XIV.

In his pro se submission, defendant largely reiterates the arguments advanced by appellate counsel – without citation to the record or supporting authority. In essence, defendant contends: (1) he was stopped because police

had prior encounters with his passenger; (2) the consent-to-search form was not completed at the scene; (3) the supervising forensic scientist could not recall observing the trainee test the drugs; and (4) the prosecutor misled the jury by claiming defendant owned the car.

Although defendant's four-paragraph pro se submission fails to comply with the mandates of Rule 2:6-2, we have considered the arguments and conclude either our disposition makes it unnecessary to address them or they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We focus, instead, on the arguments raised by appellate counsel. Finding those arguments unavailing, we affirm for the reasons that follow.

I.

Defendant contends the trial judge failed, sua sponte, to reopen the pretrial suppression hearing following Large's trial testimony that he first observed the drug paraphernalia when he entered the car to search it – not when defendant exited the car as Large stated during the suppression hearing. Defendant belatedly contends: "If the version presented at trial were . . . believed," police lacked reasonable suspicion to seek defendant's consent or request the assistance of the K-9 unit. Because defendant did not raise this issue prior to trial, we view his contentions through the prism of the plain error standard. R. 2:10-2

(providing, in pertinent part, "the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial . . . court" but shall disregard any error unless it was "clearly capable of producing an unjust result").

During the suppression hearing, Large testified that upon approaching the vehicle, defendant exhibited "droopy eyelids, pinpoint pupils, a fresh injection mark, [and a] low, slow, slurred . . . raspy voice." Defendant produced his credentials, and Large determined his driver's license was suspended for driving while intoxicated (DWI). Defendant complied with Large's request to exit the vehicle. As defendant exited the car, Large observed "a small rubber band" and "Chore Boy" scouring pad on the driver's side floor. Based on his training and experience, Large was aware small rubber bands are "used in the packaging of heroin," and "small portions of metal" from Chore Boys are placed inside crack pipes so the drug stays in place and its impurities are removed.

In his counseled brief, defendant asserts Large testified at trial that he observed the drug paraphernalia as he entered the car – after defendant consented to the search. To support his argument, defendant cites the following testimony: "As I entered the vehicle, I located one small rubber band which is consistent with the packaging of heroin. I also observed numerous pieces of Chore Boy on the passenger side floor."

That testimony, however, was offered in response to the prosecutor's question about "what, if anything, . . . th[e] search yield[ed]"; not when the officer first observed the paraphernalia. Those observations were elicited earlier in the prosecutor's direct examination of Large:

> [PROSECUTOR]: Now, . . . after terminating the standard field sobriety tests what, if anything, occurred?
>
> [LARGE]: I spoke with [defendant] about conducting a consent search of the vehicle based on indications that I was seeing from him, as well as indications of drug paraphernalia inside the vehicle.

At trial, as he did during the suppression hearing, Large clearly testified that his observations of drug paraphernalia prompted him to request defendant's consent to search. Also at trial, the prosecutor asked Large to describe the location of the paraphernalia when he conducted the search. Unlike the circumstances at issue in State v. Boston, cited by defendant on appeal, there were no new facts adduced at trial that were "not available to the judge at the suppression hearing." 469 N.J. Super. 223, 241 (App. Div. 2021). Because there was no discrepancy between Large's hearing and trial testimony, the trial judge had no basis to reopen the suppression hearing.

We turn to defendant's contention that the motion judge did not expressly determine Large had reasonable, articulable suspicion of criminal activity before

requesting defendant's consent to search the car and the assistance of the K-9 unit. On this record, however, it does not appear defendant raised the issue before the motion judge. Accordingly, the issue was not preserved for our review. See State v. Witt, 223 N.J. 409, 419 (2015).

We nonetheless note the motion judge alternatively held police had probable cause to search the vehicle pursuant to the automobile exception to the warrant requirement and the Court's decision in Witt. Id. at 447 (holding "the automobile exception authorize[s] the warrantless search of an automobile only when the police have probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous.")

The motion judge was satisfied the events "unfolded spontaneously" following the traffic stop. The judge credited Large's unrefuted testimony that defendant "exhibit[ed] signs of drug use," including "visible track marks on his right arm near his inner elbow." The judge also noted Large observed in plain view rubber bands and the "Chore Boy," which also were indicative of drug use. The record supports the judge's findings. We therefore discern no error, let alone plain error, in the motion judge's decision denying defendant's suppression motion.

II.

In his second point, defendant contends the trial judge erroneously admitted the laboratory report, which confirmed the substances seized from the car tested positive for heroin. The tests were conducted and recorded in the report by Donald Brown, a forensic scientist trainee. Brown did not testify at trial. Instead, the State called Agosta, the forensic scientist who supervised Brown. Agosta was qualified, without objection, as "an expert in the field of controlled dangerous substances."

Agosta testified that after Brown "did all the analysis, [she] thoroughly reviewed this case . . . before it was submitted to the peer reviewer and administrative reviewer." Agosta "reviewed all [Brown's] data," signed the report, and drew her own conclusion "[t]hat the sample [Brown examined] contained heroin." In addition, Agosta initialed the bottom of each page within the report, indicating she confirmed the data's accuracy.

Over defendant's objection, the judge admitted the laboratory report as a business record exception to the hearsay rule under N.J.R.E. 803(c)(6). Defendant did not expressly assert Agosta's testimony violated his Sixth Amendment right of confrontation, but twice argued "the issue [wa]s that she

didn't do the testing." During the ensuing Reyes[3] motion, defendant argued Agosta's testimony was a net opinion because, among other things, she could not recall whether she observed Brown conduct the drug testing. In its responding brief on appeal, the State does not contend defendant waived his objection to Agosta's testimony.

Defendant now argues that even if the laboratory report were admissible as a business record under N.J.R.E. 803(c)(6), the trial judge erroneously admitted the report without conducting a confrontation-clause analysis under Crawford v. Washington, 541 U.S. 36 (2004). In Crawford, the United States Supreme Court held "the admission of an out-of-court 'testimonial' statement permitted by state hearsay rules" unconstitutional "unless the person who made the statement is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine that person." State ex rel. J.A., 195 N.J. 324, 328 (2008). Nonetheless, the Sixth Amendment's confrontation clause does not require that "every analyst involved in a testing process . . . testify in order to satisfy confrontation rights." State v. Roach, 219 N.J. 58, 77 (2014).

> [A] defendant's confrontation rights are not violated if a forensic report is admitted at trial and only the supervisor/reviewer testifies and is available for cross-examination, when the supervisor is knowledgeable

[3] State v. Reyes, 50 N.J. 454, 458-59 (1967).

> about the testing process, reviews scientific testing data produced, concludes that the data indicates the presence of drugs, and prepares, certifies, and signs a report setting forth the results of the testing.
>
> [State v. Michaels, 219 N.J. 1, 6 (2014).]

Defendant acknowledges Agosta was "knowledgeable about the testing process" and "took steps to verify Mr. Brown's work," but asserts she "did not sufficiently demonstrate that she arrived at an independent conclusion." We disagree.

Although the State did not call Brown to testify at trial, it presented forensic scientist Agosta, who testified about the conclusions drawn in Brown's report. Agosta was responsible for overseeing and directly supervising other scientists in addition to her own case work. She had extensive familiarity with the drug testing process, recognized Brown's report as one she had reviewed, and opined the sample at issue contained heroin. Moreover, Agosta testified and was subjected to cross-examination. We conclude defendant's confrontation rights were not violated simply because Brown did not testify.

III.

Lastly, we consider defendant's claims of prosecutorial misconduct. Prior to trial, the State redacted portions of defendant's driver's abstract "to eliminate any potential prejudice to . . . defendant." The redacted abstract reflected three

DWI convictions. During direct examination of Large, however, the prosecutor elicited testimony that defendant had accumulated fifty-two points against his driver's license. Defendant contends this extraneous evidence was prejudicial and deprived him of a fair trial. The State acknowledges the error, but counters it was not "clearly capable of producing an unjust result" under Rule 2:10-2.

To place the objected-to testimony in context, we recite the exchange that preceded it:

> [PROSECUTOR]: And did you check the status of [defendant's] license?
>
> [LARGE]: Yes.
>
> [PROSECUTOR]: And what did that check reveal?
>
> [LARGE]: That [h]is driving privileges were currently suspended.
>
> [PROSECUTOR]: And did they indicate why they were suspended?
>
> [LARGE]: At this point I was just notified that he was suspended with multiple points. We later learned that [defendant] was suspended for driving while intoxicated. . . .
>
> [PROSECUTOR]: Do you recall how many points were on the defendant's license at this time?
>
> [LARGE]: I believe it was fifty-two.

Recognizing the impropriety of the prosecutor's final question in that line of inquiry, the trial judge sustained defendant's timely objection and immediately issued the following curative instruction:

> All right, ladies and gentlemen, the testimony in regard to the amount of points is to be disregarded by you. It is not to be considered by you. When you do begin your deliberations you're not to discuss it and the testimony is stricken.

The prosecutor's duty to ensure that justice is served is well established. See State v. Smith, 212 N.J. 365, 402-03 (2012). Even if the prosecutor exceeds the bounds of proper conduct, however, that finding does not end an appellate court's inquiry. "[I]n order to justify reversal, the misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" State v. Smith, 167 N.J. 158, 181 (2001) (quoting State v. Frost, 158 N.J. 76, 83 (1999)). "To justify reversal, the prosecutor's conduct must have been 'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 575 (1999) (quoting State v. Roach, 146 N.J. 208, 219 (1996)); see also State v. McNeil-Thomas, 238 N.J. 256, 276 (2019).

"In deciding whether prosecutorial conduct deprived a defendant of a fair trial, 'an appellate court must take into account the tenor of the trial and the

degree of responsiveness of both counsel and the court to improprieties when they occurred.'" State v. Williams, 244 N.J. 592, 608 (2021) (quoting Frost, 158 N.J. at 83). Reviewing courts should consider the following factors: "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." Ibid. (quoting Frost, 158 N.J. at 83).

"When inadmissible evidence is admitted in error by the trial court, a curative instruction may sometimes be a sufficient remedy." State v. Prall, 231 N.J. 567, 586 (2018). The Court has cautioned a curative instruction generally "must be firm, clear, and accomplished without delay" to alleviate potential prejudice from inadmissible evidence. State v. Vallejo, 198 N.J. 122, 134 (2009). Those criteria were met here: The fleeting testimony was promptly objected to, and the trial judge issued a curative instruction.

Moreover, during his final charge to the jury, the judge instructed:

> Any testimony that I may have had occasion to strike is not evidence and shall not enter into your final deliberations. It must be disregarded by you. This means that even though you may remember the testimony you are not to use it in your discussion or your deliberations.

"We presume the jury followed the court's instructions." Smith, 212 N.J. at 409.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION