SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1602-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PEPE THOMAS,

Defendant-Appellant.

Argued November 30, 2022 – Decided March 8, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 18-03-0254.

Taylor L. Napolitano, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Taylor L. Napolitano, of counsel and on the briefs).

Ali Y. Ozbek, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Ali Y. Ozbek, of counsel and on the brief).

PER CURIAM

Defendant Pepe Thomas appeals from his convictions and sentence after a jury found him guilty of several possession and distribution of controlled dangerous substance (CDS)-related offenses. He challenges the denial of his motions to suppress evidence and for a new trial. Defendant also contends the court should have given the jury additional instructions. He also asserts the court improperly merged several counts and incorrectly weighed the aggravating and mitigating factors in imposing sentence. We affirm defendant's convictions. As to the sentence, we agree the court did not properly merge the counts. Therefore, we remand solely for re-sentencing.

I.

On November 2, 2017, Paterson police officers Jovan Candelo and Thomas Giaquinto[1] were on patrol in a marked police vehicle at about 2:55 a.m. when they observed defendant and another individual engage in a drug transaction. When the officers got out of the car, defendant attempted to flee and both officers restrained him, allowing the second individual to escape. After arresting and searching defendant, the officers found CDS, cash, and drug paraphernalia.

[1] Candelo and Giaquinto were promoted to detective prior to the trial.

Defendant was charged in an indictment with third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of cocaine with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count two); third-degree possession of cocaine with the intent to distribute within one thousand feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a) (count three); second-degree possession of cocaine with the intent to distribute within five hundred feet of a public building, N.J.S.A. 2C:35-7.1 and N.J.S.A. 2C:35-5(a) (count four); third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1) (count five); third-degree possession of heroin with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count six); third-degree possession of heroin with the intent to distribute within one thousand feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a) (count seven); second-degree possession of heroin with the intent to distribute within five hundred feet of a public building, N.J.S.A. 2C:35-7.1 and N.J.S.A. 2C:35-5(a) (count eight); third-degree possession of ecstasy, N.J.S.A. 2C:35-10(a)(1) (count nine); third-degree possession of ecstasy with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count ten); third-degree possession of ecstasy with the intent to distribute within one thousand feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a) (count

eleven); second-degree possession of ecstasy with the intent to distribute within five hundred feet of a public building, N.J.S.A. 2C:35-7.1 and N.J.S.A. 2C:35-5(a) (count twelve); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2) (count thirteen).

II.

Defendant moved to suppress the evidence, contending it was seized following an improper warrantless search. The suppression hearing took place over two days.

During the first day of the hearing, Candelo testified he was on patrol with Giaquinto when they saw two individuals "exchang[e] what looked like drugs for money." Candelo stated that as defendant was facing the officers, he reached into his right pocket and retrieved "small objects that looked like . . . drugs, crack cocaine, [and] heroin." Candelo explained that the small objects he saw looked like CDS, which often "come in small cylindrical objects or small envelopes and [are] usually loose. They come in certain colors." The officers then saw defendant hand the items that he retrieved from his pocket to a "dark skinned" man wearing a green coat. Upon witnessing this, the officers got out of their car to approach the two men.

According to Candelo, when defendant saw the officers approaching, he declared "I'm not doing anything" and then began to sprint away from the officers when Candelo tried to speak to him. Candelo gave chase and grabbed defendant by his upper body; Giaquinto remained "speaking to the other suspect" but noticed the struggle and then assisted Candelo in detaining defendant. The officers then placed defendant in handcuffs and searched his person, finding in his front right pocket "[a] plastic bag which had what, at the time, looked like crack cocaine" and "[s]mall glassine envelopes that looked like heroin." They also found a scale.

On cross-examination, Candelo agreed the incident report erroneously stated the arrest took place on October 11, 2017 instead of November 2, 2017. However, the error only appeared once in the report; the correct date was otherwise listed throughout the report. Defense counsel also questioned Candelo about his notation on a "use[-]of[-]force" report that the type of incident was a "suspicious person" rather than a "crime in progress." Candelo explained he made that notation because he saw defendant hand what he "thought were drugs to the other man." He could not be 100% certain it was CDS being exchanged until the evidence was tested and found positive for heroin and crack cocaine. Candelo stated he did not attempt to obtain surveillance footage of the

incident after the arrest. Nor did he attempt to recover fingerprints from the bags that contained the CDS, but he said he was unaware of any case where latent fingerprints were recovered from drug packaging.

Officer Giaquinto also testified. He confirmed he was on patrol with Candelo on November 2, 2017 when they observed defendant, "standing near . . . [a] driveway . . . wearing a black knit hat, black jacket, [and] black sweat pants. He was standing with another dark-skinned male wearing a green jacket and [blue jeans]." Defendant then "hand[ed] the other dark-skinned male wearing the green jacket multiple small, yellow tinted objects in exchange for paper currency." As the officers drove closer in their vehicle, the men noticed them and began to walk away. Candelo and Giaquinto then got out of the patrol car and ordered the men to stop; Giaquinto said he approached the suspected buyer and Candelo approached defendant. Giaquinto testified he heard a "commotion," turned, and saw Candelo struggling with defendant. He then assisted Candelo with restraining defendant. The other individual fled the scene.

According to Giaquinto, the officers found "[e]ight glassines of heroine, one chunk of crack cocaine weighing approximately five grams and five [e]cstasy pills, one Digiweigh [s]cale and a plastic bag containing empty [b]aggies commonly used to package CDS" on defendant's person. Giaquinto

explained it is common for drug dealers to have CDS, drug paraphernalia, and money on their person.

In an oral decision issued January 24, 2019, the judge denied the suppression motion, finding the officers' testimony was consistent in their observations of defendant and the other individual before they stopped and approached them, in what occurred at the scene, and in describing the items recovered in the search after arrest.

The court described the officers as "calm, respectful, cooperative and [nonconfrontational.]" When the officers were confronted with facts they were unsure about, their recollection was refreshed. The judge found both officers were "credible witnesses to the events giving rise to the underlying charges brought against [] defendant." She further found the officers witnessed defendant "remov[e] small yellow objects that resembled CDS and pass[] them off to another individual in exchange for paper currency" in an area that was known for narcotics activity. The court stated, "the underlying circumstances . . . support the officer's reasonable and articulable suspicion to stop and interrogate [] defendant." The court concluded there was probable cause to arrest and then search defendant incident to arrest.

III.

The trial took place on several dates in August and September 2019. Both officers described, consistent with the testimony during the suppression hearing, the events leading up to defendant's arrest and the subsequent search.

When defense counsel asked Candelo about the lack of video surveillance footage, Candelo stated there were cameras in the area, but they might not have been fixed on the scene at the time of the incident. He conceded he did not attempt to obtain any footage.

Defendant moved for a judgment of acquittal at the close of the State's case. Defendant contended there was no evidence to corroborate the officers' testimony regarding their observations of the interaction between defendant and the other individual. In denying the motion, the judge stated "[after] giving all reasonable inferences to the State . . . the case . . . survive[s] the motion." The court noted defense counsel "ma[de] inviting arguments with respect to the credibility issue of the officers and the acts of . . . defendant and the officers leading up to his arrest," but the judge could not find the officers were not credible.

During the charge conference, defense counsel requested the court give the jury the third-party guilt instruction. Counsel stated: "we have testimony

that the unnamed individual, who the State characterizes as the suspected buyer . . . fled when the police approached." In addition, counsel argued that the officers testified that individuals in narcotics transactions sometimes drop the CDS when fleeing from a scene. Counsel further asserted that because "the police officers did[] [not] get any corroborating evidence . . . other than their testimony[,] an inference can be drawn that [defendant] was not the individual who committed these crimes."

The court declined to give the instruction, finding the theory was "speculative" because the drugs were found on defendant. In addition, the officers testified that defendant passed something to the other individual that "was not money" and it was "the other person who allegedly gave the money." The court found no other "inference could be drawn that it . . . was[] [not] . . . defendant."

The jury found defendant guilty of all counts, except counts ten through thirteen relating to the possession and distribution of ecstasy and resisting arrest. The jurors were individually polled and agreed on the unanimity of the verdict.

Immediately after excusing the jury, a court officer notified the judge that five of the jurors had stayed behind and wanted to ask the court a personal question. After discussion with counsel, the court decided the jurors could

submit a written question. The subsequent question read: "[w]here do we go to address the inefficiency of the work ethic paperwork in the [a]dministrative side of the [p]olice [d]epartment?" The judge advised the jurors he could not answer the question.

IV.

Defendant subsequently moved for a new trial under Rules 2:10-1 and 3:20-1. He asserted the verdicts were inconsistent because he was found not guilty of the distribution charges for ecstasy but found guilty of the distribution charges for heroin and cocaine. In addition, he was found not guilty of the resisting arrest charge. Therefore, he asserted the jury had found the officers' testimony was not credible. Defense counsel remarked she was "a bit troubled by what the jurors had said after the verdict was returned." In addition, defendant contended he was deprived of his due process rights when the court refused to charge the third-party guilt instruction.

The court denied the motion and found "the jury clearly could have found [] defendant guilty of all of the crimes from Count 1 through Count 9." The judge also stated he could only guess the reason for the jury verdict, but it was not against the weight of the evidence because the jury could have found "for whatever reason" defendant possessed the ecstasy for personal use. The judge

also stated he permitted the jurors' post-verdict question as a courtesy. He reiterated the fourteen jurors were polled and confirmed their agreement with the verdict. The court again found there was insufficient evidence for the third-party guilt instruction.

V.

During the sentencing hearing, defendant requested the court find mitigating factor four, "there are substantial grounds tending to excuse or justify [defendant]'s conduct though failing to establish a defense," N.J.S.A. 2C:44-1(b)(4). Counsel noted defendant's diagnosis of delusional disorder. Although the judge did not find this or any other mitigating factor, he did note the diagnosis constituted a non-statutory mitigating factor, and while he considered it, he found defendant refused to undergo treatment or take medication for the mental health issue.

In sentencing defendant, the court noted his prior record including possession and distribution convictions which subjected him to a mandatory extended term. The court found aggravating factors three—risk of reoffending, six—extent of prior record and seriousness of offenses, and nine—need for deterrence, N.J.S.A. 2C:44-1(a)(3), (6), (9). The court merged counts one, two, and four into count three, and counts five, six, and eight into count seven.

On count three, the court sentenced defendant to ten years' incarceration with five years of parole ineligibility. On count seven, the court imposed a term of ten years' incarceration with a five-year period of parole ineligibility to run concurrent with count three. As to count nine, the judge sentenced defendant to a three-year prison term to run concurrent with count three.

VI.

On appeal, defendant presents the following arguments for our consideration:

> POINT I
> BECAUSE POLICE TESTIMONY THAT THEY OBSERVED A TRANSACTION BETWEEN THOMAS AND ANOTHER UNIDENTIFIED INDIVIDUAL WAS NOT CREDIBLE, THE STOP, ARREST AND SEARCH INCIDENT TO ARREST WERE INVALID AND THE ITEMS SEIZED MUST BE SUPPRESSED.
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> POINT II
> IN THE ALTERNATIVE, THE VERDICT ON THE INTENT-TO-DISTRIBUTE COUNTS WAS AGAINST THE WEIGHT OF THE EVIDENCE GIVEN THAT POLICE TESTIMONY WAS NOT CREDIBLE OR COMPETENT, AND THE JURY DISREGARDED IT WITH RESPECT TO THE INTENT-TO-DISTRIBUTE ECSTASY AND RESISTING ARREST COUNTS.
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> POINT III
> IN THE ALTERNATIVE, THOMAS WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE COURT

FAILED TO DELIVER (A) A THIRD-PARTY GUILT INSTRUCTION REGARDING THE ALLEGED BUYER; AND (B) AN ADVERSE INFERENCE INSTRUCTION REGARDING THE SURVEILLANCE VIDEO.

A. The Third-Party Guilt Instruction.

B. The Adverse Inference Instruction.

POINT IV
THOMAS IS ENTITLED TO RESENTENCING BECAUSE THE COURT MISAPPLIED MERGER PRINCIPLES AND, GIVEN HIS DELUSIONAL DISORDER DIAGNOSIS, IMPROPERLY ANALYZED THE MITIGATING AND AGGRAVATING FACTORS TO ARRIVE AT AN EXCESSIVE 10-YEAR SENTENCE.

A.

We begin by considering the suppression order. Our review of a motion to suppress is limited. We "must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Robinson, 200 N.J. 1, 15 (2009) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). "A trial court's findings should be disturbed only if they are so clearly mistaken that the interests of justice demand intervention and correction." Ibid. (quoting Elders, 192 N.J. at 244). We do not reverse the trial court's findings simply because we might have reached a different conclusion. Elders, 192 N.J. at 244. But the legal conclusions of the

trial court "and its view of 'the consequences that flow from established facts' are reviewed de novo." State v. Goldsmith, 251 N.J. 384, 398 (2022) (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

Defendant asserts the trial court erred in finding the officers' "conflicting" testimony credible; therefore, it was error to conclude there was probable cause to arrest defendant and conduct a search incident to arrest. We disagree.

"Searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." State v. Lentz, 463 N.J. Super. 54, 69 (App. Div. 2020) (quoting Elders, 192 N.J. at 246). One exception to this rule is the search incident to arrest which "was limned for two specific purposes—the protection of the police and the preservation of evidence." Ibid. (quoting State v. Eckel, 185 N.J. 523, 524 (2006)). It allows an arresting officer to search "the arrestee's person" and the area subject to his immediate control. Ibid. (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

However, to fall within the exception, a court must find probable cause existed for the arrest—"a 'well grounded suspicion' that an offense has been or is being committed." State ex rel. R.M., 408 N.J. Super. 304, 309-10 (App. Div. 2009). A well-grounded suspicion requires "a practical, common-sense decision

whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Dangerfield, 171 N.J. 446, 456 (2002) (quoting State v. Demeter, 124 N.J. 374, 380-81 (1991)).

Our Supreme Court has held that experienced narcotics officers witnessing a transaction that appears to be a CDS sale is sufficient to create a well-grounded suspicion. State v. Moore, 181 N.J. 40, 43-44, 46-47 (2004). There, detectives in an unmarked car witnessed through binoculars the defendant and a companion, in a vacant parking lot in a high-crime area, hand currency to an individual who then handed back small items that the two men immediately pocketed. Id. at 43. The detectives moved closer, and the defendant grabbed his pocket and began to walk away. Ibid. The detectives subsequently arrested the defendant and the other individual; a search uncovered cocaine on both men. Id. at 44. The seller escaped. Ibid.

The Court applied the totality of circumstances test, crediting the experience of the testifying detective, the fact he had previously made arrests in the area—which was known for heavy drug trafficking—and his witnessing of the transaction, and found there was probable cause to arrest the defendant. Id. at 46-47.

Here, both officers testified they were in a marked vehicle and saw defendant receive money and hand small items to another individual. The motion judge found the officers credible and determined there was probable cause to stop and search defendant because the officers witnessed objects resembling CDS being passed to another individual in exchange for money. We discern no reason to disturb this conclusion. The police demonstrated probable cause to stop and then arrest defendant. The search incident to arrest was valid. The motion to suppress the evidence was properly denied.

B.

We next turn to defendant's contentions regarding the denial of his motion for a new trial. Under Rule 2:10-1, we will not reverse a trial court's ruling "unless it clearly appears that there was a miscarriage of justice under the law." See State v. Sims, 65 N.J. 359, 373-74 (1974). A trial court considering a motion will not set aside the verdict unless it "clearly and convincingly appears that there was a manifest denial of justice under the law." R. 3:20-1.

Defendant asserts he is entitled to a new trial as against the weight of the evidence because the officers' "testimony ran counter to common sense, was riddled with contradictions, did not match their paperwork, and contained

moments where the officers were demonstrably less than candid." We are not persuaded.

In addressing these assertions, the court stated the jury heard the officers' testimony and ultimately found them credible. Defendant has not demonstrated a miscarriage of justice. The jurors heard testimony from both officers regarding their observations prior to approaching defendant; they heard the officers address the errors in the report and other inconsistencies during cross-examination; evidence was presented regarding the CDS, drug paraphernalia, and cash that was found pursuant to a search of defendant; and the jurors reached a unanimous verdict. Given the deference accorded the fact-finding abilities of a jury, and all favorable inferences to the State, a reasonable jury could find defendant guilty of the charges beyond a reasonable doubt. See State v. Reyes, 50 N.J. 454, 458-59 (1967).

Defendant further asserts that a new trial is warranted because the verdict was inconsistent. He contends that because the jury found he was not guilty of resisting arrest and intending to distribute ecstasy, this demonstrates the jury rejected the officers' testimony.

An inconsistent jury verdict is not per se invalid. See State v. Fierro, 438 N.J. Super. 517, 528 (App. Div. 2015). Such a verdict is "upheld on appeal if

the evidence is sufficient to establish guilt on the count of conviction." Id. at 528-29 (citing United States v. Powell, 469 U.S. 57, 67 (1984)). A court reviewing a jury verdict may not speculate whether the verdict was the result of "mistake, compromise, or lenity." Id. at 529 (citing State v. Muhammad, 182 N.J. 551, 578 (2005)).

Defendant has not established an inconsistent verdict. The State presented evidence to the jury which the jurors were free to accept or reject. That the jury found defendant guilty of some of the charges of possession and distribution and not guilty of others does not support the grant of a new trial. The trial judge properly advised he was not speculating as to the verdict, but considering the evidence, the jury could very well have determined the small amount of ecstasy pills found on defendant were for his personal use and not distribution. If any conclusion can be drawn from the verdict, it is that the jury carefully considered the evidence in light of each charge.

C.

We turn to defendant's assertions that the trial court erred in not giving the jury a third-party guilt and an adverse inference instruction. We find the assertion meritless.

Because defendant did not request the adverse inference charge, we review for plain error, and see none. R. 2:10-2. Defendant has not established that any surveillance footage of the incident existed, nor there was any evidence that any surveillance footage was destroyed. Moreover, the State presented two witnesses who corroborated one another's testimony. There was no rational basis in the record to charge the jury with an adverse inference instruction.

Defendant did request a third-party guilt instruction. He reiterates on appeal there is a possibility that the buyer in the transaction was in fact the seller, thereby justifying the charge. We disagree.

A defendant may attempt to prove their innocence by showing someone else committed the crime for which the defendant is charged. State v. Koedatich, 112 N.J. 225, 297 (1988). However, the evidence must be more than conjecture or speculation. See id. at 305. It cannot be only a "possible ground of possible suspicion against another person." Ibid. (citation omitted).

In declining to charge the jury on third-party guilt, the court found defendant's argument too speculative. We cannot disagree. The two officers testified regarding their observations of the interaction between defendant and the other individual and the passing of specific items. Moreover, the CDS, cash

in varying denominations, and a scale were found on defendant's person, not on the ground.

D.

We turn to defendant's contentions regarding his sentence. He asserts the judge improperly analyzed the aggravating and mitigating factors and erroneously merged the charges.

We review a trial court's imposition of sentence for an abuse of discretion. State v. Torres, 246 N.J. 246, 272 (2021); State v. Jones, 232 N.J. 308, 318 (2018). We will affirm a sentence unless the trial court violated the sentencing guidelines, the court did not find aggravating and mitigating factors based on competent and credible evidence in the record, or "'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). We do not substitute our own judgment for that of the trial court unless the trial court violated sentencing guidelines. State v. Miller, 237 N.J. 15, 28 (2019) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)).

After a careful review of the record, we are satisfied the sentencing judge properly weighed the aggravating and mitigating factors. The court explained why it declined to find mitigating factor four. But he nevertheless considered

defendant's mental health diagnosis as a non-statutory factor. The judge also made findings regarding the applicable aggravating factors.

We do find error in the merger of the counts. We note the State agrees the merger was improper. Therefore, we remand for resentencing. We provide the following guidance.

A third-degree violation of N.J.S.A. 2C:35-5 must be merged into a violation of N.J.S.A. 2C:35-7 to not run afoul of the protection against double jeopardy. State v. Dillihay, 127 N.J. 42, 54 (1992). This procedure cannot be used for first- and second-degree Section Five offenses as it would "create [an] anomalous result," because "[a] crime of greater degree or culpability cannot merge into [a] crime of lesser degree or culpability." Ibid. (citing State v. Hammond, 231 N.J. Super. 535, 545 (App. Div. 1989)). An exception is the unique case where there are Section Five offenses and Section Seven school-zone offenses. Id. at 54-55. In that situation, the school-zone offense merges into the higher-degree Section Five offense, but the mandatory minimum sentence of the school-zone offense must survive. Id. at 55.

Here, the second-degree offense was merged erroneously into the third-degree offense. Although the State contends this is harmless error, defendant asserts this is prejudicial because it leaves unclear whether he received an

extended sentence for a second- or third-degree offense; thus, he was either improperly given a mandatory extended term or "inappropriately" sentenced to the top of the range for a third-degree offense. Under the extended term statute, defendant is subject to a term between ten and twenty years for a second-degree crime and a term between five and ten years for a third-degree crime. N.J.S.A. 2C:43-7(a)(3)-(4). While it is possible the aggregate sentence will not change on resentencing, it is conceivable that the improper merger led to an unjust sentence. See Willner v. Vertical Reality, Inc., 235 N.J. 65, 79 (2018) (quoting State v. Lazo, 209 N.J. 9, 26 (2012)) (alteration in original) ("An error cannot be harmless if there is 'some degree of possibility that [the error] led to an unjust result.'").

We affirm the convictions but remand to the trial court for a new sentencing hearing solely taking into consideration the merger of the counts.

Affirmed in part and remanded for proceedings in accordance with this opinion. We do not retain jurisdiction.