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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3503-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALAN R. FRATELLO, a/k/a
ALAN R. FRATELLO, JR.,

Defendant-Appellant.

Argued August 16, 2022 – Decided March 3, 2023

Before Judges Messano and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-08-1157.

Joyce L. Nadipuram, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Alison Perrone, Deputy Public Defender, and Joyce L. Nadipuram, on the briefs).

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

The opinion of the court was delivered by
SMITH, J.A.D.

After a trial, defendant was acquitted of second-degree aggravated assault but convicted of second-degree eluding. Defendant was found to be extended term eligible, and he was sentenced to an eleven-year term of incarceration with a five-year period of parole ineligibility. He appealed, contending that the trial court erred by denying his motion for acquittal and by improperly answering jury questions during deliberations. We affirm.

I.

On June 12, 2018, defendant Alan Fratello was driving a Kia Sorrento erratically and at a high rate of speed heading east on Route 32 in South Brunswick. His girlfriend Jacqueline Smith (Smith) sat in the front passenger seat of the Kia. Driving an unmarked police vehicle, Detective Eric Tighelaar pulled up behind defendant and signaled for him to pull over. Defendant complied. Detective Tighelaar and his partner Detective Monica Posteraro were returning to the police station from off-site training around 3:40 p.m. Both detectives were dressed in plain clothes.

The detective observed defendant weave in and out of traffic and decided to conduct a traffic stop. He pulled defendant over and then positioned his car

behind defendant's. Detective Tighelaar got out and approached defendant's car, observing the driver's side window was rolled down. During this time, Detective Posteraro remained in the police car.

At trial, Detective Tighelaar, Smith, and defendant testified in great detail about the ensuing events.

Detective Tighelaar's Testimony

Detective Tighelaar testified that he approached the driver's side of defendant's car, wearing a suit jacket and tie. He asked defendant for his license, registration and insurance. Defendant did not have a valid license and handed over his vehicle registration and insurance. Defendant, appearing to be in an excited state, told the detective he wanted to get Smith to the hospital because she was going to have a c-section. Detective Tighelaar advised defendant he would get an ambulance.

The detective instructed his partner to call for backup, and he prepared to write a ticket. Detective Tighelaar testified at that moment defendant reached out of the vehicle, grabbed the detective's tie, and started to pull him into the car. The detective testified that he next dropped the documents and punched defendant in order to free himself. He told defendant he was under arrest and ordered him to let go of the tie. Detective Tighelaar continued to punch

defendant through the car window in an effort to free his tie from defendant's grip. The detective testified defendant began to drive the car away while simultaneously holding the detective's tie. Defendant drove the car across the highway median while Detective Tighelaar ordered him to stop. Detective Tighelaar testified he took a few steps alongside defendant's car until defendant released him. After defendant let go of the tie, the detective testified defendant drove across the median and entered Route 32 the wrong way, heading towards Route 130. The two detectives did not pursue defendant.

Jacqueline Smith's Testimony

Jacqueline Smith testified she and defendant had been together for sixteen years. Smith said she had a c-section five weeks before the incident. She noted defendant was driving her aunt's Kia, and that he was driving erratically when he was pulled over by the police. Smith said she saw Detective Tighelaar ask for defendant's license, and defendant respond that he did not have one. Smith said Tighelaar punched defendant twice in the side of the head. Smith testified that this frightened defendant, who put the car in gear and drove away.

Smith testified defendant did not grab the detective's tie or touch him in any way. She said Detective Tighelaar walked alongside the car, yelling at them

to pull over as defendant crossed the median, cut off traffic, and drove away. Smith testified that when defendant drove away, he drove "normally."

Smith testified that she said knew Tighelaar was a police officer and she and defendant knew they were not free to leave.

Defendant's Testimony

Defendant testified he was on probation for multiple offenses when this stop occurred. He acknowledged he had a criminal history, which included three convictions for second and third-degree crimes. Defendant admitted he was driving erratically on Route 130 and that he did not have a valid license. Defendant admitted that he recognized Detective Tighelaar was a police officer. He testified Tighelaar approached the Kia and asked for defendant's license and registration. According to defendant, Detective Tighelaar cursed at him, asking why he was driving erratically. When Detective Tighelaar asked defendant to turn over his license, defendant handed over the registration and insurance. Defendant testified that when the detective continued to curse at him and call him names, he pulled the paperwork back from the detective. The detective then punched defendant twice in the head. After being struck, defendant put the Kia in gear and drove away. Defendant did not take Smith to the hospital, instead he drove to his father's house and turned himself in to the police the next day.

Defendant denied hitting the detective or grabbing his tie. Defendant further testified that he did not drag Detective Tighelaar as he drove away. Defendant said that he drove away because Detective Tighelaar was striking him through the car window, and he wanted to escape the detective's blows. Defendant admitted that he fled the scene despite being told to stop.

Procedural History

A Middlesex County grand jury charged defendant with second-degree eluding, N.J.S.A. 2C:29-2(b) (Count One); and second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (Count Two). After a jury trial, defendant's motion for a judgment of acquittal was denied. Defendant was then convicted of second-degree eluding and acquitted of second-degree aggravated assault. The sentencing court granted the State's motion for an extended term and imposed an eleven-year term of incarceration with five years of parole ineligibility.

On appeal, defendant contends the trial court erred in two ways:

POINT I

DEFENDANT SHOULD BE ACQUITTED OF ELUDING BECAUSE THE TRIAL JUDGE ERRED IN DENYING [DEFENDANT'S] MOTION FOR ACQUITTAL. (PARTIALLY RAISED BELOW)

POINT II

IN THE ALTERNATIVE, THE TRIAL COURT ERRED BY FAILING TO ASSURE ITSELF THAT IT UNDERSTOOD THE JURY'S QUESTIONS AND BY FAILING TO CLEAR THE JURY'S CONFUSION ON DURESS.

POINT III

IN THE ALTERNATIVE, THE [ELEVEN]-YEAR SENTENCE FOR ELUDING IS EXCESSIVE AND MUST BE REDUCED.

II.

"When a defendant moves for a judgment of acquittal after the verdict, [we] consider the evidence in its entirety, including the evidence that defendant presented." State v. Lodzinski, 249 N.J. 116, 141 (2021) (quoting State v. Lodzinski, 246 N.J. 331, 340 (2021) (Patterson, J., concurring)). See also State v. Fuqua, 234 N.J. 583, 590-91 (2018) (an appellate court "will deny a motion for a judgment of acquittal if the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt").

The scope of our review is "limited and deferential." State v. Reddish, 181 N.J. 553, 620 (2004). In reviewing a decision on a motion for acquittal, "the trial judge is not concerned with the worth, nature[,], or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." State v. DeRoxtro, 327 N.J. Super. 212, 224 (App. Div. 2000) (quoting State v. Kluber, 130 N.J. Super. 336, 342 (App. Div. 1974)). Furthermore, "credibility issues . . . [should] not be resolved by the judge when ruling on [a motion for acquittal]" because such issues must be decided by the jury. State v. Pickett, 241 N.J. Super. 259, 265 (App. Div. 1990).

Rule 3:18-1 provides "[a]t the close of the State's case . . . the court shall, on defendant's motion or its own initiative, order the entry of a judgment of acquittal of one or more offenses charged in the indictment or accusation if the evidence is insufficient to warrant a conviction." A trial court must afford the State the benefit of all favorable testimony and inferences to be drawn from the testimony and determine whether a reasonable jury could find defendant guilty beyond a reasonable doubt. Lodzinski, 246 N.J. at 340 (Patterson, J., concurring).

III.

Defendant argues that the State failed to satisfy its burden to disprove duress beyond a reasonable doubt. Because this step is a necessary element to sustain the eluding conviction on these facts, defendant posits the eluding conviction must fall.

N.J.S.A. 2C:29-2(b) reads in pertinent part:

b. Any person, while operating a motor vehicle on any street or highway in this State . . . who knowingly flees or attempts to elude any police or law enforcement officer after having received any signal from such officer to bring the vehicle or vessel to a full stop commits a crime of the third degree; except that, a person is guilty of a crime of the second degree if the flight or attempt to elude creates a risk of death or injury to any person.

[N.J.S.A. 2C:29-2(b).]

The affirmative defense of duress excuses the commission of a criminal act. See State v. B.H., 183 N.J. 171, 188 (2005). A defendant is not required to prove duress. State v. Galiyano, 178 N.J. Super. 393, 397 (App. Div. 1981). Where the defendant proffers evidence tending to establish the defense, the burden shifts to the State to disprove the defense beyond a reasonable doubt. State v. Romano, 355 N.J. Super. 21, 35–36 (App. Div. 2002). See N.J.S.A. 2C:1-13.

Defendant suggests that the jury's acquittal of defendant on aggravated assault compels acquittal on eluding as a matter of law, at least on this record. This contention appears to be built on the premise that if the jury rejected the detective's testimony that defendant grabbed his tie and dragged him alongside the car, the State somehow failed to disprove duress. We disagree.

As the Court has repeatedly made clear:

We accept inconsistent verdicts in our criminal justice system, understanding that jury verdicts may result from lenity, compromise, or even mistake. We therefore must resist the temptation to speculate on how the jury arrived at a verdict. Rather, "we determine whether the evidence in the record was sufficient to support a conviction on any count on which the jury found the defendant guilty."

[State v. Goodwin, 224 N.J. 102, 116 (2005) (quoting State v. Muhammad, 182 N.J. 551, 578 (2005)).]

The evidence in the record is more than sufficient to satisfy the State's burden on disproving duress. At trial, the State introduced two phone calls between defendant and his passenger, Smith. Both calls took place after the fateful traffic stop between defendant and Detective Tighelaar. In the first call, defendant told Smith: "I should have just stopped the car. I should have just got out. We would have been just locked up. That would have been it. Our car wouldn't have got impounded." In the second call, two days later, defendant

explained to Smith why he "took off." He told her, "because I didn't want them having Janet's truck and I didn't want you to go to jail."

The record shows that the State offered sufficient proof to disprove duress. Defendant, in his own words, explained why he fled the scene after he had been stopped by Detective Tighelaar. The jury chose to believe the statements made by defendant in his two phone calls to his longtime girlfriend explaining why he left the scene. We find no error in the trial court's denial of defendant's motion to acquit.

Defendant next argues that, during deliberations, the trial court erred by failing to provide the jury with "clear instructions" after they posed a two-part question about the verdict sheet, the charge of eluding, and the affirmative defense of duress. The verdict sheet read in pertinent part:

1. How do you find the defendant, Alan Fratello, on the charge of Eluding in that on the 12th day of June, 2018 he did knowingly flee or attempt to elude Detective Eric Tighelaar of the South Brunswick Police Department after being ordered to bring his vehicle to a full stop?

NOT GUILTY

GUILTY

If you find the defendant "NOT GUILTY," please go on to question 2 [on the lesser included offense of Resisting Arrest].

If you find the defendant "GUILTY," please answer the following question.

Did the State prove beyond a reasonable doubt said flight or attempt to elude created a risk of death or injury to any person?

NO

YES

The verdict sheet relating to the eluding charge contained no reference to the affirmative defense of duress; however, the trial court gave the jury the standard charge on duress:

In defense of the charge of eluding, [defendant] contends he is not guilty because at the time of the offense, he acted under duress. In other words, he was coerced to commit the offense due to the use of unlawful force against him. Our law provides in pertinent part that it is an affirmative offense that a defendant engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of unlawful force against him, which a person of reasonable firmness in his situation would have been unable to resist. Before conduct which would otherwise be criminal can be excused on the ground that such conduct was a direct result of force used upon the defendant, the evidence must indicate that the following conditions existed at the time. Those conditions are that there was use of unlawful force against the defendant, and the force would be of such a type that a person of reasonable firmness in a similar situation would have been unable to resist. Unlawful force means force which is employed without consent of the person against whom it is directed. In determining whether the defense of duress has been established, you should consider the factor of immediacy. That is, the force posed a danger of present, imminent, and impending harm to the defendant, as well as the gravity of the harm; the seriousness of the

crime committed, the identity of the person endangered, and the possibility for escape or resistance, and the opportunity for seeking official assistance if realistic. Remember, the standard used here is that when a person of reasonable firmness in the defendant's situation would have been unable to resist. The State has the burden of proving beyond a reasonable doubt each element of the offense of eluding. The State also has the burden of disproving beyond a reasonable doubt the defense of duress. If you find the State has proven beyond a reasonable doubt each element of the offense charged, and that the State has disproved beyond a reasonable doubt the defense of duress, you must find the defendant guilty of eluding. If, however, you determine the State has failed to prove beyond a reasonable doubt one or more elements of the charge of eluding or has failed to disprove the defense of duress, you must find the defendant not guilty.

[See Model Jury Charges (Criminal), "Duress (N.J.S.A. 2C: 2-9)" (approved May 5, 1982).]

During deliberations, the jury posed two questions simultaneously. "If we answer yes to all seven statements for question [one], does the presence of duress affect those answers? If there is presence of duress, is it still considered eluding?" In response to the questions, trial counsel made two requests of the trial court: "clarify" the standard duress charge; and provide supplemental instructions to the jury on how to complete the verdict sheet. The trial court rejected both requests. The court called the jury in, read their question back, and then read the following:

If you find the State has proven to you beyond a reasonable doubt each element of the offense of eluding and that the State has disproved beyond a reasonable doubt the defense of arrest, you must find the defendant guilty. If, however, you determine that the State has failed to prove beyond a reasonable doubt one or more elements of eluding or has failed to disprove the defense of duress, you must find the defendant not guilty of eluding.

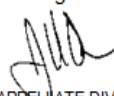
The court repeated this instruction and told the jury where they could find it in their jury instruction packet.

The record shows no objection by trial counsel to the original jury instructions on eluding or duress, to the verdict sheet as composed, or even to the trial court's answer to the jury's questions. Viewing defendant's arguments through the lens of plain error, we cannot say that the court's response to the jury's two questions was "clearly capable of producing an unjust result." Rule 2:10-2.

We find no error by the trial court with regard to either of defendant's theories. To the extent that we have not addressed any remaining arguments by defendant, it is because they lack 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