SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2174-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICKY GREENE, a/k/a
RICKY L. GREENE,
RICHARD L. HOWARD,
and RICHARD L. GREEN,

Defendant-Appellant.

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Submitted January 9, 2024 – Decided June 17, 2024

Before Judges Sumners and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 17-06-0718.

Joseph E. Krakora, Public Defender, attorney for appellant (Stefan Van Jura, Assistant Deputy Public Defender, of counsel and on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (David Michael Liston, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant Ricky Greene was found guilty of second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1) and 15-1(a)(1), but found not guilty of three counts of first-degree robbery, N.J.S.A. 2C:15-1(a)(1), and two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1).[1] Defendant was sentenced as a persistent offender to an extended term of twelve years, subject to an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant appeals, arguing:

> POINT I
> THE CONSPIRACY CONVICTION MUST BE REVERSED BECAUSE THE JURY CHARGE ON THE UNDERLYING OBJECTIVE OF THE CONSPIRACY — I.E., ROBBERY — WAS BADLY MISHANDLED, ADDING A THEORY OF LIABILITY THAT WAS EXPRESSLY DISCLAIMED BY THE STATE AND NOT INDICTED, AND WHICH WAS PROVIDED AFTER THE JURY HAD BEGUN ITS DELIBERATIONS.

[1] Defendant was tried with co-defendant Larry Dukes, who is not involved in this appeal. Dukes was convicted of second-degree robbery, N.J.S.A. 2C:15-1(a)(1); first-degree robbery; second-degree conspiracy to commit robbery; disorderly persons simple assault, N.J.S.A. 2C:12-1(a)(1); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree controlled dangerous substances (CDS) possession, N.J.S.A. 2C:35-10(a)(1); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2). State v. Dukes, No. A-4668-17 (App. Div. Mar. 26, 2021) (slip op. at 2).

POINT II

THE TWELVE-YEAR NERA SENTENCE IS MANIFESTLY EXCESSIVE BECAUSE DEFENDANT WAS ACQUITTED OF ALL OFFENSES EXCEPT CONSPIRING TO COMMIT A ROBBERY.

We are unpersuaded by these arguments and affirm defendant's conviction and sentence.

I

The trial revealed the following facts and procedural history relevant to the issues on appeal. During the early morning hours of April 10, 2017, Alberto Rodriguez, Norma Ramos-Sanchez, and Suzanna Paz left a nightclub and walked to a restaurant. A nearby surveillance camera captured them passing by shortly before they were confronted from behind by two men, one wearing dark clothes and a cap. Rodriguez testified that a man wearing a cap punched him in the head, knocking him to the ground. Paz screamed for help, fell, broke her ankle, and rolled beneath a parked car. Rodriguez attempted to assist her but was struck down again by the man wearing dark clothes and a cap, this time with an object leaving a visible scar on his forehead. The man demanded Rodriguez's money and searched his pockets.

Paz recalled that as her group was walking, someone demanded their money. She thought the assailants, numbering three or four, were in front of the group, not behind them, but was uncertain.

Ramos-Sanchez said she saw two men approach from the rear and heard them demand money; she was sprayed in the face with an irritant. She immediately ran to an intersecting street, and the man chasing ceased pursuit. Ramos-Sanchez encountered pedestrians leaving a bar, who called the police on her behalf.

None of the victims, who had been drinking, could identify their attackers. However, a few days later, Dukes was arrested after two police officers saw him on the street and identified him as one of the men in the still photos from the surveillance video. Dukes admitted to police he was the man in the photo wearing a cap walking a few paces behind the victims moments before the robbery.

Two weeks after the incident, defendant was arrested and questioned by police.[2] He identified himself as the other man in the still photo.

During the jury charge conference, the trial judge asked defendant's counsel whether N.J.S.A. 2C:15-1(a)(2), "[t]hreatens another with or purposely puts him in fear of immediate bodily injury," (hereinafter threat of force) should be charged to the jury because it was not included in defendant's indictment. Counsel questioned whether there was any evidence of a threat of force. The State had no answer as to why the threat of force language was not included in

[2] The record does not detail the circumstances surrounding defendant's arrest.

the indictment and did not oppose omitting it from the jury charge. The judge indicated he would not include the language in the jury charge and, accordingly, only instructed the jury on N.J.S.A. 2C:15-1(a)(1) of the robbery statute, "purposely inflicted or attempted to inflict serious bodily injury."

During the first day of deliberations, the jury requested several readbacks. The following day, a juror was excused for personal reasons and replaced by an alternate juror, requiring the judge to instruct the jury to begin deliberations anew. It was only during that second day of deliberations with the newly constituted jury that the jury asked questions as to whether the word "force" requires physical contact.

In discussing the issue with the attorneys, the judge acknowledged the threat of force is a statutory element of first-degree robbery and with the parties' assent he did not charge it because defense counsels argued the language was not in the indictment. The judge did not give the jury new instructions. The jury, however, then posed more questions regarding the meaning of the word "force." It asked, "[i]f someone is injured during the course of a crime, is the defendant responsible?" It also asked whether it was necessary for actual physical contact to occur between perpetrator and victim to meet the statutory requirements for robbery.

After an extensive colloquy with counsel regarding the jury's questions, the judge decided to recharge the jury to explain that the threat of force could indeed constitute a basis for robbery. The judge stated his failure to have done so initially was an error of law he should correct. He said:

> What I told the jury is . . . an incomplete recitation of the law. And now I'm gonna give the jury a complete recitation of the law.
>
> . . . .
>
> [Someone] asked for money, struck my friend in the face. And I[, Paz,] tried to get away. He may have touched me. He may not have touched me. And I fell to the floor. Or fell to -- she said floor. Fell to the ground. And . . . I injured my ankle. It appears that it was a very serious . . . injury to the ankle.
>
> That's a threat of force. She alighted from the scene or attempted to leave the scene trying to avoid the robbers. And she got hurt in the process. As a result of the use of force. The . . . threat of force.
>
> Her friend was struck. She feared she was [going to] be next. It's in the case. I should have charged it. It['s] my obligation to . . . give the jury the law. Notwithstanding what the lawyers say. . . . it's my responsibility, not the lawyer's responsibility[,] to give the law.
>
> [M]y instruction was incomplete . . . . The fact that it . . . was brought to my attention by virtue of the numerous questions raised by the jury, I don't think is – of great significance.

When the jurors returned to the courtroom, the judge recharged them as follows:

> "In order for you [to] find the defendant guilty of robbery, the State is required to prove each of the following element[s] beyond a reasonable doubt:
>
> One, that the defendant was in the course of committing a theft.
>
> Two, that while in the course of committing that theft, the defendant knowingly inflicted bodily injury or used force upon another."
>
> In . . . actuality, . . . that's part of (a) . . . of two. Part (b) is, "Or threatened another with or purposely put another in fear of immediate bodily injury.["] All right.
>
> So, there's two elements. Just so we're clear. There are two elements to robbery. One that the defendant was in the course of committing a theft.
>
> Two, that either while in the course of committing a theft, the defendant knowingly inflicted bodily injury or used force upon another. Or, alternatively, threatened another with, or purposely put another in fear of bodily injury.
>
> Although no bodily injury need have resulted, the prosecution must prove that the defendant either threatened the victim with, or purposely put the victim in fear of such bodily injury. That's the addition. That's the incomplete part that I didn't give.
>
> Now, this is part and parcel of the entire twenty eight[-]page instruction. You . . . are to treat this instruction that I gave you . . . and give it the same

> consideration that you're gonna give to all the other instructions that I gave you. All right.
>
> I am not going to at this point, respond to those questions that you've given me in light of my additional instruction dealing with the incomplete version of the law that I gave to you two days ago. I'm gonna send you back into the jury room. If you have a question, in light of what I just told you, sen[d] it out to me.

The judge gave the threat of force instructions over defense counsel's objections and motions for mistrial. The judge cited State v. Parsons, 270 N.J. Super. 213, 224-25 (App. Div. 1994), for the principle that failure to assist the jury in "understanding issues it must decide" is error. He also added parallel language to a revised verdict sheet "that [defendant] did threaten with or purposely put in fear of immediate bodily injury" upon the three named victims. The judge reiterated to the jury the State had the burden to prove its case beyond a reasonable doubt. The attorneys declined the judge's offer to allow additional closing argument. After concluding their deliberations the next day, the jury found defendant guilty of second-degree conspiracy to commit robbery.

At sentencing, the judge found defendant met the statutory prerequisites as a persistent offender because of his "extensive criminal record," specifically a 2011 conviction for violating a 2009 drug court probation sentence and a 2006 CDS possession conviction. See N.J.S.A. 2C:44-3. The judge noted defendant

was arrested only two months after his parole ended for his CDS possession offense and the robbery at issue occurred less than two years after termination of his parole for his 2011 probation violation. The judge also acknowledged defendant's "long history . . . of arrests and convictions," including a juvenile adjudication for aggravated assault, twenty-two arrests, eleven convictions for various drug offenses, one conviction for a prohibited weapons offense, and absconding from a court-ordered drug program. As a result, the court found aggravating factors: three – "the risk that the defendant will commit another offense"; six – "the extent of the defendant's prior criminal record and the seriousness of the offenses of which [he] has been convicted"; and nine – "the need for deterring the defendant and others from violating the law." N.J.S.A. 2C:44-1(a)(3), (6), (9). Given the judge's finding that no mitigating factors existed, he determined "the aggravating factors clearly preponderate." Finally, the judge rejected defendant's argument that his involvement in the robbery was not directly related to any violence, determining the victims' injuries were a direct consequence of his conspiracy to commit first-degree robbery.

II

We review a trial court's instruction on the law de novo. Fowler v. Akzo Nobel Chems., Inc., 251 N.J. 300, 323 (2022). Claims regarding the instructions

are reviewed for harmless error because defendant objected to the jury instructions at trial. State v. J.R., 227 N.J. 393, 417 (2017). "The harmless error standard requires that there be some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. Lazo, 209 N.J. 9, 26 (2012) (alterations in original) (internal quotations omitted) (quoting State v. R.B., 183 N.J. 308, 330 (2005)). Courts consider the following factors in reviewing an alleged error in a jury charge:

> (1) the nature of the error and its materiality to the jury's deliberations; (2) the strength of the evidence against the defendant; (3) whether the potential for prejudice was exacerbated or diminished by the arguments of counsel; (4) whether any questions from the jury revealed a need for clarification; and (5) the significance to be given to the absence of an objection to the charge at trial.
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> [State v. Docaj, 407 N.J. Super. 352, 365-66 (App. Div. 2009) (internal citations omitted).]

"Because proper jury instructions are essential to a fair trial, 'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). Jury instructions are therefore

poor candidates for rehabilitation under the harmless error theory. Id. at 495-96.

Although the indictment charged defendant with first-degree robbery of each victim, the judge, after conferring with counsel, choose not to include threat of force language in the jury charge and the verdict sheet. Given the facts the State presented at trial, it is not surprising that the jury initially had questions during deliberations. Despite defendant's objection to the judge's decision to charge threat of force, it is ultimately a judge's responsibility to convey the law correctly. The judge correctly realized it was necessary to supplement the charge because the facts developed in the trial came within the greater scope of the robbery statute. In doing so, the judge fulfilled his "primary obligation" to charge correctly, even over a defense objection, State v. Garron, 177 N.J. 147, 180 (2003), and to remedy perceived errors including "erroneous, misleading, or confusing instruction[s]," McKinney, 223 N.J. at 497. Thus, the court's recharge to the jury was proper, as was the corresponding correction to the verdict sheet.

We also conclude the amended robbery jury instruction did not violate defendant's right to a fair trial. We reject his contention that it added an unindicted theory, constituting an inadequate notice of the crimes charged and

tainting his conviction. The judge's decision to charge threat of force did not invade the grand jury process. As we said in Parsons, it is not enough to merely recite the elements of the offense to the jury. 270 N.J. Super. at 224. "If a question discloses that the jury needs specific help in understanding issues it must decide, particularly issues related to the elements of the crime charged, and that help is not given," the failure to do so results in a reversible error. Id. at 224-25. And even assuming for the sake of argument that the judge's decision to recharge the jury on threat of force was effectively an amendment to the indictment, such amendments are permitted under Rule 3:7-4 if defendant had adequate notice of the allegations and would not be prejudiced thereby. See State v. Dorn, 233 N.J. 81, 96 (2018). The victims' descriptions of the robbery and their injuries put defendant on notice, separate from the indictment's language, both pre-and post-trial. The recharge did not charge defendant with a new offense. See R. 3:7-4. Accordingly, there is no merit to defendant's contention he had inadequate notice to properly defend against the theory that he agreed threats of force would be used prior to the robbery.

Finally, defendant's trial defense was there was reasonable doubt identifying him as one of the assailants. He argued inconsistencies in the victims' statements undermined the assertion that the surveillance video's

depiction of two men behind the victims moments before they were assaulted were guilty of robbery. That defense would not have changed even if the judge had initially charged threat of force. Since no prejudice inured to defendant from the charge, the judge did not err by fulfilling his primary obligation to correctly charge the jury.

III

Defendant's contention that his twelve-year NERA sentence is excessive because of his minor role in the incident, heroin addiction, and lack of prior violent conduct warrants resentencing, requires little comment. As the judge noted, defendant's prior criminal history warrants an extended term as a persistent offender. N.J.S.A. 2C:44-3; State v. Pierce, 188 N.J. 155, 162 (2006). There was no abuse of discretion in weighing the applicable sentencing factors, or in imposing a twelve-year prison sentence. State v. Torres, 246 N.J. 246, 272 (2021). The sentence imposed by no means shocks our conscience. State v. Roth, 95 N.J. 334, 364-65 (1984).

To the extent we have not specifically addressed them, any remaining arguments related to his conviction or sentence raised by defendant lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.