SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1323-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRIAN T. COOPER, a/k/a
POO COOPER and ZORRO COOPER,
and BRIAN COOPER,

Defendant-Appellant.

Submitted September 28, 2016 – Decided October 24, 2016

Before Judges Fuentes and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 13-01-0124.

Joseph E. Krakora, Public Defender, attorney for appellant (Laura B. Lasota, Assistant Deputy Public Defender, of counsel and on the brief).

Sean F. Dalton, Gloucester County Prosecutor, attorney for respondent (Joseph H. Enos, Jr., Senior Assistant Prosecutor, on the brief).

PER CURIAM

A grand jury indicted defendant Brian T. Cooper and his co-defendant, Delonce T. Hackley, for second-degree robbery, N.J.S.A. 2C:15-1(a)(1) (count one); second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1(a)(1) (count two); and third-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a) (count three). A jury found defendant guilty on counts one and three and not guilty on count two, and found Hackley not guilty on all counts. At sentencing, the trial judge imposed a discretionary extended-term sentence of eighteen years subject to an eighty-five-percent period of parole ineligibility and five years of parole supervision pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

The charges against defendant stemmed from his alleged involvement with Hackley in the robbery of N.B.-S.[1] in a room at a motel in West Deptford at approximately 11:28 p.m. on October 1, 2012. Defendant's entire defense was based on identification.

N.B.-S. knew Hackley, but she did not know defendant. She had briefly encountered defendant for the first time shortly before the robbery at Hackley's home in Paulsboro. After the robbery, N.B.-S. told the police about Hackley's involvement and said he was wearing tennis shoes, jeans, a T-shirt, and a blue, black or

[1] We use initials to protect the victim's identity.

gray sweat jacket with a hood. She also told the police that she was attacked by a man who was the same person she had encountered in Paulsboro. She said this man was "a little, skinny guy, dark-skinned" who was wearing jeans, a black jacket with a light hood attached to it, a T-shirt, a "do-rag" and black sunglasses. The police never asked N.B.-S. to participate in an out-of-court identification of defendant. However, she identified him in court, and there was DNA evidence connecting him to the crime scene.

There were several surveillance cameras around the motel that showed the parking lot area and sidewalk in front of the motel rooms. The parties stipulated that only some surveillance camera video had any evidential value, and thus, only that portion was shown to the jury. Before the jury viewed the video, Detective Jason Sherman of the West Deptford Police Department, who investigated the crime, described to the jury, without objection, what he observed on the video. As the jury viewed the video, Sherman narrated what it depicted. His narration varied with certain parts of N.B.-S.'s testimony about the incident. The jury later viewed the video a second time at a slower speed without narration.

The State sought to have Sherman identify defendant on the video, not based on his personal knowledge of defendant or N.B.-S.'s description, but on what a non-testifying police officer

from the Paulsboro Police Department, who was familiar with defendant, told him after the officer viewed the video as part of the investigation. Defense counsel objected on hearsay grounds and also argued it was improper lay opinion testimony. Defendant also argued that the jurors could review the video themselves and the probative value of an identification made by a police officer did not outweigh the prejudice to defendant, as it was likely that the jurors would view a law enforcement identification as a "stamp of approval" on the suspect's identification.

The trial judge overruled the objection. Sherman then testified as follows:

> [PROSECUTOR]: Detective, based upon the investigation that was conducted, without telling us what anybody said to you during the course of this investigation. But during the course of the investigation, were you able to identify the person in the dark clothes and wearing the dark sunglasses?
>
> [SHERMAN]: Yes, ma'am.
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> [PROSECUTOR]: And was that person identified as Brian Cooper?
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> [SHERMAN]: Yes, he was.

The judge did not give the jury Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (2012) with respect to either Sherman's identification of defendant or N.B.-S.'s identification.

On appeal, defendant raises the following contentions:

POINT I

> THE PROSECUTOR IMPROPERLY QUESTIONED DETECTIVE SHERMAN ABOUT AN IDENTIFICATION MADE BY A NON-TESTIFYING WITNESS, VIOLATING [DEFENDANT'S] RIGHT TO CONFRONTATION.

POINT II

> THE PROSECUTOR ELICITED IMPROPER LAY-WITNESS OPINION TESTIMONY AS TO THE CONTENT OF THE MOTEL SURVEILLANCE VIDEO. (Partially raised below).

POINT III

> THE OMISSION OF AN IN-COURT IDENTIFICATION INSTRUCTION WARRANTS REVERSAL OF [DEFENDANT'S] CONVICTIONS. (Not Raised Below).

POINT IV

> [DEFENDANT'S] SENTENCE IS MANIFESTLY EXCESSIVE AND MUST BE REDUCED.

We review a trial court's evidentiary determinations under an abuse-of-discretion standard. State v. Harris, 209 N.J. 431, 439 (2012). An abuse of discretion only arises on demonstration of "manifest error or injustice[,]" State v. Torres, 183 N.J. 554, 572 (2005) (citation omitted), and occurs when the evidence diverts jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence. State v. Moore, 122 N.J. 420, 467 (1991).

In addition, "appropriate and proper jury charges are essential to a fair trial." State v. Baum, 224 N.J. 147, 159

(2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). "The trial court must give a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Ibid. (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "Thus, the court has an 'independent duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case, irrespective of the particular language suggested by either party.'" Ibid. (quoting Reddish, supra, 181 N.J. at 613). "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." Ibid. (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)).

Applying these standards, we conclude that permitting Sherman to describe and narrate the video and identify defendant constitutes a mistaken use of discretion requiring reversal, and that the error is compounded by the failure to give an in-court and out-of-court identification jury charge.

"Lay witnesses may present relevant opinion testimony in accordance with Rule 701, which permits 'testimony in the form of opinions or inferences . . . if it . . . is rationally based' on the witness' 'perception' and 'will assist in understanding the

witness' testimony or in determining a fact in issue.'" State v. Lazo, 209 N.J. 9, 22 (2012) (alteration in original) (quoting N.J.R.E. 701). In State v. McLean, 205 N.J. 438 (2011), the Court described the boundary line that separates factual testimony by police officers from permissible expert opinion testimony as follows:

> On one side of that line is fact testimony, through which an officer is permitted to set forth what he or she perceived through one or more of the senses. Fact testimony has always consisted of a description of what the officer did and saw, including, for example, that defendant stood on a corner, engaged in a brief conversation, looked around, reached into a bag, handed another person an item, accepted paper currency in exchange, threw the bag aside as the officer approached, and that the officer found drugs in the bag. Testimony of that type includes no opinion, lay or expert, and does not convey information about what the officer "believed," "thought" or "suspected," but instead is an ordinary fact-based recitation by a witness with first-hand knowledge.
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> [Id. at 460 (emphasis added) (citations omitted).]

The Court explicitly rejected the argument "that there is a category of testimony that lies between [expert and lay opinions] that authorizes a police officer, after giving a factual recitation, to testify about a belief that the transaction he or she saw was a narcotics sale." Id. at 461. The Court reasoned that such an approach would "transform[] testimony about an

individual's observation of a series of events . . . into an opportunity for police officers to offer opinions on defendants' guilt." Ibid.

The Court's explanation of why the testimony in McLean was impermissible has resonance here:

> [T]he police officer in this matter was not qualified to testify as an expert. As a result, the reference in the question to his training and experience, coupled with the request that he testify about his belief as to what had happened, impermissibly asked for an expert opinion from a witness who had not been qualified to give one. . . . [A]s we made clear in [State v. Nesbitt, 185 N.J. 504, 514-16 (2006)], the implications of what he said he saw were not outside the common understanding of the jurors.
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> [Id. at 461-62 (emphasis added).]

As the Court stated, expert or lay opinion "is not a vehicle for offering the view of the witness about a series of facts the jury can evaluate for itself[.]" Id. at 462.

Sherman's testimony exceeded the bounds of permissible lay opinion testimony. He described what he believed he saw on the video and narrated it while the jury watched. This crossed the line from suspicion to fact, supported only by Sherman's interpretation of the video based on what he had observed, not any personal knowledge. He was in no better position than the jury to interpret what was shown on the video. Viewing this error through the plain error lens, we find it was clearly capable of

producing an unjust result. R. 2:10-2; State v. Macon, 57 N.J. 325, 333 (1971).

The admission of Sherman's identification of defendant also constitutes reversible error. Our Supreme Court has made clear that a law enforcement officer may not offer a lay opinion on identification from a surveillance photo where the officer did not witness the crime, did not know the defendant, and the officer's opinion stemmed entirely from the victim's description. Lazo, supra, 209 N.J. at 24. "In an identification case, it is for the jury to decide whether an eyewitness credibly identified the defendant. Guided by appropriate instructions from the trial judge, juries determine how much weight to give an eyewitness' account." Ibid. (citation omitted). "Neither a police officer nor another witness may improperly bolster or vouch for an eyewitness' credibility and thus invade the jury's province." Ibid. (citation omitted).

Sherman's identification of defendant was not based on prior knowledge. He had not witnessed the crime, did not know defendant, and his identification was not based on N.B.-S.'s description of defendant. Sherman's testimony, therefore, had no independent relevance; it merely served to improperly bolster the credibility of N.B.-S.'s in-court identification and invade the jury's province.

In addition, Sherman's identification was based on the out-of-court statement of a non-witness informer. Out-of-court statements offered to prove the truth of the matter asserted are inadmissible hearsay absent an exception. N.J.R.E. 801, 802. Hearsay testimony which leads the jury to infer that a police officer received information from an unknown source implicating the defendant in a crime is barred as hearsay and its allowance is reversible error. See State v. Branch, 182 N.J. 338, 349-51 (2005); State v. Irving 114 N.J. 427, 444-48 (1989); State v. Bankston, 63 N.J. 263, 271 (1973).

Stated unequivocally, "a police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant." Branch, supra, 182 N.J. at 351. The rare instance where our Supreme Court has suggested this type of testimony may be allowed is where the testimony is

> necessary to rebut a suggestion that [the officer] acted arbitrarily and only if the [testimony] does not create an inference that the defendant has been implicated in a crime by some unknown person. The exception would be the defendant who opens the door by flagrantly and falsely suggesting that a police officer acted arbitrarily or with ill motive. In such a circumstance, the officer might be permitted to dispel that false impression, despite the invited prejudice the defendant would suffer.
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> [Branch, supra, 182 N.J. 352.]

Sherman testified that during the course of the robbery investigation, he was able to identify defendant as the person in the dark clothes and sunglasses shown in the video. From this identification testimony a juror could infer that Sherman was privy to an unknown source that implicated defendant in the crime. The testimony was not elicited to rebut defendant's assertion that the police conducted the investigation in an arbitrary manner; rather, it was elicited as part of the State's case in chief. Accordingly, the testimony should have been barred as hearsay and its allowance constitutes reversible error because "it was clearly capable of producing an unjust result." R. 2:10-2.

Compounding the above errors is the failure to give an in-court and out-of-court identification jury charge. Identification was a key issue in this case. "It is well-established . . . that when identification is a critical issue in the case, the trial court is obligated to give the jury a discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." State v. Cromedy, 158 N.J. 112, 128 (1999). "When identification is a 'key issue,' the trial court must instruct the jury on identification, even if a defendant does not make that request." State v. Cotto, 182 N.J. 316, 325 (2005). Where eyewitness identification serves a critical role

in a prosecution, the failure to give an identification instruction constitutes plain error warranting reversal. State v. Frey, 194 N.J. Super. 326, 329 (App. Div. 1984). We conclude that the judge's failure to give an identification charge constitutes reversible error.

Having reached this determination, we need not address defendant's challenge to his sentence.

Reversed and remanded for a new trial.