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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3813-13T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NATHANIEL JAMISON,

Defendant-Appellant.

Argued April 18, 2016 – Decided May 2, 2016

Before Judges Fasciale and Higbee.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 12-02-0152.

Daniel S. Rockoff, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Rockoff, on the brief).

Sara E. Ross, Deputy Attorney General, argued the cause for respondent (Robert Lougy, Acting Attorney General, attorney; Ms. Ross, on the brief).

PER CURIAM

Defendant appeals from his convictions for third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1); second-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1); and fourth-degree

maintaining a narcotics nuisance, N.J.S.A. 24:21-21(a)(6). We reverse and remand for a new trial.

The State produced testimony from four witnesses at trial: Officer Matthew Bledsoe; Officer Michael Schiaretti; co-defendant, who previously pled guilty to drug and weapons offenses[1]; and Detective Brian Kiely, who the court qualified as an expert in drug trafficking, including identification, use, methods of distribution, packaging, and street value of cocaine. Defendant did not testify.

Police obtained a search warrant for defendant and a residence (the residence) police suspected defendant used to stash drugs for distribution. Before executing the warrant, Officer Schiaretti surveilled the residence. He observed defendant and co-defendant arrive and enter the residence. The officer alerted Officer Bledsoe, who was waiting nearby with other officers, to execute the warrant.

The police entered the residence, secured defendant and co-defendant, and seized a Tupperware container containing 2.94 ounces of powder cocaine; a loaded handgun and ammunition; a

[1] For her role in this case, co-defendant pled guilty to second-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(2); and second-degree certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b). The court sentenced co-defendant to an aggregate prison term of five years with a five-year period of parole ineligibility.

coffee pot suspected for use in making crack cocaine; a purse and wallet containing Ziploc bags with what police suspected to be crack cocaine inside; two additional Ziploc bags containing suspected crack cocaine; glass pipes; digital scales; a hand-held sifter and various packaging material for crack cocaine; and cash in the amount of $60 from defendant and $385 from co-defendant. The defense stipulated the contents of the Tupperware container, which was admitted into evidence as S-16, tested positive for cocaine powder; the State did not test any other seized items.

Detective Kiely testified that one could take the powder cocaine in S-16, cook it into crack cocaine, and sell it in individual dosage units for $5 to $10. On direct examination, the detective rendered the following opinion testimony without objection:

> Assistant Prosecutor: Going back to S-16, the powder cocaine, approximately 2.94 ounces, in your experience[,] is that amount in that kind of cocaine consistent with personal use?
>
> Detective: No.
>
> Assistant Prosecutor: Why do you say that?
>
> Detective: Just the amount alone. . . . I've never seen an individual[,] who[has] explained to me they were a drug user[,] have this much cocaine.

The detective opined based solely on his visual observations that several of the seized items contained evidence of crack cocaine. Officer Bledsoe — who was the evidence officer[2] for the search — testified as a lay witness that various seized items contained suspected crack cocaine.

After co-defendant pled guilty, the State produced her as a witness. She testified defendant drove her to the residence to pick up "more drugs." Co-defendant explained she intended to sell drugs for defendant as part of an arrangement she had with him.

During his summation, the assistant prosecutor commented on the testimony he elicited from Officer Bledsoe and Detective Kiely when addressing the State's theory that defendant intended to distribute crack cocaine.

> Detective Kiely was offered as an expert . . . [H]e tailored his testimony to the evidence that was presented to him. . . . He has no choice but to testify about what all of this suggests because there's only one conclusion to draw.
>
> . . . .
>
> I direct your attention to all of the evidence on the table in front of you to discern what [defendant's] state of mind [was] as to the cocaine in S-16. . . . [H]e

[2] Officer Bledsoe explained an evidence officer would "note . . . where the evidence is and . . . secure it, mark it[,] and take it . . . for turning it in as evidence."

> knew what it was because he was using it to cook up some crack to distribute it.
>
> Now, I mentioned before that I'd talk a little bit more about this S-16 being tested, the rest of the cocaine [was] not [tested]. . . . What [defendant] did with [the untested cocaine] informs you on what [defendant] intended to do with [S-16], cook it up, weigh it, package it, [and] distribute it.

The court sentenced defendant to a prison term of thirteen years with six and one-half years of parole ineligibility.

On appeal, defendant raises the following points:

> POINT I
> OPINION TESTIMONY BY OFFICERS THAT [DEFENDANT] INTENDED TO DISTRIBUTE THE POWDER COCAINE IN THE TUPPERWARE CONTAINER LABELED S-16 WAS IMPROPER BECAUSE: (1) THE OPINION TESTIMONY WAS NOT EXPRESSED HYPOTHETICALLY TO AVOID OPINING DIRECTLY ON [DEFENDANT'S] INTENT TO DISTRIBUTE, AS REQUIRED BY STATE V. ODOM[3]; AND (2) THE OFFICERS SPECULATED THAT THE PRESENCE OF CRACK COCAINE DEMONSTRATED [DEFENDANT'S] INTENT TO COOK AND DISTRIBUTE THE POWDER, BUT THE STATE FAILED TO PROVE CRACK WAS PRESENT. (Not Raised Below)[.]
>
> A. THE STATE'S EXPERT WITNESS INAPPROPRIATELY OPINED DIRECTLY ON [DEFENDANT'S] INTENT TO DISTRIBUTE THE CONTENTS OF THE TUPPERWARE CONTAINER LABELED EXHIBIT S-16, WHICH VIOLATED ODOM'S REQUIREMENT THAT EXPERTS MAINTAIN A HYPOTHETICAL VENEER IN ORDER TO AVOID DIRECTLY OPINING UPON AN ULTIMATE ISSUE.

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[3] State v. Odom, 116 N.J. 65 (1989).

B. OFFICERS BLEDSOE AND KIELY SPECULATED THAT MANY OF THE ITEMS SEIZED DURING THE RAID CONTAINED CRACK COCAINE, WHICH WAS INAPPROPRIATE OPINION TESTIMONY BECAUSE THE PRESENCE OF CRACK COCAINE WAS A DISPUTED FACT NOT ORDINARILY ASCERTAINABLE BY VISUAL OBSERVATION. THE PROSECUTOR USED THEIR SPECULATION TO ARGUE, IN THE ABSENCE OF ANY SCIENTIFIC TESTING CONFIRMING THE PRESENCE OF CRACK COCAINE, THAT THE PRESENCE OF "COOKED" DRUGS PROVED [DEFENDANT'S] INTENT TO COOK AND DISTRIBUTE THE POWDER COCAINE.

POINT II

THE JURY CHARGE ON CONSTRUCTIVE POSSESSION WAS OVERBROAD BECAUSE IT DID NOT WARN THE JURY THAT MERE PRESENCE IS INSUFFICIENT TO ESTABLISH CONSTRUCTIVE POSSESSION. THE COURT COMPOUNDED THE ERROR BY FAILING TO ISSUE A CURATIVE INSTRUCTION AFTER AN OFFICER VOUCHED THAT [DEFENDANT'S] RESIDENCY HAD BEEN ESTABLISHED PRIOR TO TRIAL BY UNDISCLOSED EVIDENCE. (Not Raised Below)[.]

A. THE STATE FAILED TO PROVE THAT [THE RESIDENCE] WAS [DEFENDANT'S] RESIDENCE OR THAT THE TUPPERWARE CONTAINER MARKED S-16 OTHERWISE BELONGED TO [DEFENDANT].

B. ALTHOUGH THE CONSTRUCTIVE POSSESSION JURY CHARGE DID NOT WARN JURORS THAT A SUSPECT'S "MERE PRESENCE" IN A PLACE WHERE CONTRABAND IS FOUND IS INSUFFICIENT TO ESTABLISH CONSTRUCTIVE POSSESSION, THE PROSECUTOR ERRONEOUSLY TOLD THE JURY THAT [DEFENDANT'S] MERE PRESENCE IN THE KITCHEN WAS SUFFICIENT TO ESTABLISH CONSTRUCTIVE POSSESSION OF S-16.

C. AFTER OFFICER BLEDSOE INAPPROPRIATELY VOUCHED THAT [DEFENDANT'S] RESIDENCY AT [THE RESIDENCE] WAS ESTABLISHED IN HIS MIND PRIOR TO TRIAL BY EVIDENCE NOT PRESENTED TO THE JURY, THE JUDGE ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY COULD NOT USE BLEDSOE'S

TESTIMONY TO FIND THAT [DEFENDANT] CONSTRUCTIVELY POSSESSED S-16.

D. CONCLUSION.

POINT III

AFTER [DEFENDANT'S] ATTORNEY GAVE THE COURT GOOD CAUSE TO POSTPONE SENTENCING BY ANNOUNCING THAT THE ATTORNEY-CLIENT RELATIONSHIP HAD SUFFERED A "BREAKDOWN"; THAT HIS REPRESENTATION WOULD NO LONGER BE "EFFECTIVE"; AND THAT HE WOULD BE UNABLE TO REPRESENT [DEFENDANT] ON A SEPARATE INDICTMENT, THE COURT WRONGLY DECIDED TO PROCEED WITHOUT CONSULTING [DEFENDANT]. (Not Raised Below)[.]

POINT IV

BECAUSE THE COURT IMPOSED A FAR HARSHER SENTENCE ON [DEFENDANT] THAN HIS CO-DEFENDANT, EVEN THOUGH SHE PLED GUILTY TO A FAR MORE SERIOUS COMBINATION OF OFFENSES; SUGGESTED [DEFENDANT'S] DECISION TO GO TO TRIAL MERITED A LONGER TERM; CITED [DEFENDANT'S] UNEMPLOYMENT AND ADDICTION AS AGGRAVATING FACTORS; AND REFUSED TO ACKNOWLEDGE THE SUBSTANTIAL PERIOD OF TIME SINCE [DEFENDANT'S] LAST OFFENSE, THIS MATTER MUST BE REMANDED FOR RESENTENCING. (Not Raised Below)[.]

Applying the plain-error doctrine, R. 2:10-2, we are persuaded by defendant's first contention as to the opinion testimony of Detective Kiely without the use of a hypothetical question and Officer Bledsoe's improper lay opinion testimony that crack cocaine existed in the residence. As a result, we reverse and remand for a new trial. Consequently, we need not reach defendant's remaining arguments.

At the outset, we acknowledge the Court recently issued two opinions dealing directly with expert testimony in drug-distribution cases. See State v. Cain, ___ N.J. ___ (2016) and State v. Simms, ___ N.J. ___ (2016). In Cain and Simms, the Court held "[g]oing forward, in drug cases, an expert witness may not opine on the defendant's state of mind." Cain, supra, ___ N.J. at ___ (slip op. at 25); see also Simms, supra, ___ N.J. at ___ (slip op. at 2) (explaining "[e]xpert testimony that a defendant possessed a controlled dangerous substance with the intent to distribute is nothing less than a pronouncement of guilt" and "not necessary to assist the jury"). The Court decided Cain and Simms during the pendency of this appeal. We need not address whether Cain and Simms are accorded pipeline retroactivity[4] because we base our ruling on the existing law at the time of the trial. That is, because we reverse based on the more lenient prior standard, we need not consider whether to apply the more exacting rule the Court detailed in Cain and Simms.

We now apply the then-existing standard to the case before us. Since the seminal decision of State v. Odom, supra,

[4] When we accord a case pipeline retroactivity, we apply the holding from an opinion of the Court decided while the case before us is on direct appeal. See State v. Natale, 184 N.J. 458, 494 (2005).

116 N.J. 65, courts have applied N.J.R.E. 702 to expert opinion testimony in drug-offense prosecutions. State v. McLean, 205 N.J. 438, 450 (2011). Only expert testimony concerning "relevant subject[s] that [are] beyond the understanding of the average person of ordinary experience, education, and knowledge" are admissible. Ibid. (alterations in original) (quoting Odom, supra, 116 N.J. at 71). In a drug-distribution case, an expert generally may testify about distinguishing characteristics of drugs possessed for distribution and those kept for personal use. Odom, supra, 116 N.J. at 76. This expert testimony aids ordinary jurors who may not appreciate the significance of these characteristics to the issue of whether they were possessed for distribution purposes. Ibid.

After the State has laid a proper foundation and introduced at trial certain evidence, such as the manner of packaging, processing for use or distribution, the significance of quantities and concentrations of narcotics, the roles of drug paraphernalia, and the circumstances surrounding possession, among other pertinent information, the expert should be presented with a hypothetical question limited to this evidence. Id. at 81-82. Through this hypothetical, the expert may advise the jury how these facts relate to the issue of possession. Id. at 82. "Having set forth this information in the form of a

hypothetical, the expert may be asked if, based on these assumed facts, he or she has an opinion whether the drugs were possessed for personal use or for the purpose of distribution." Ibid.

Here, Detective Kiely was not asked a hypothetical question; he was specifically asked if the amount of cocaine in S-16 is consistent with personal use. The import of this non-hypothetical question went directly towards defendant's state of mind. After our review of the direct examination leading up to this question, which focused on the transformation of powder cocaine into crack cocaine, we find it too does not reflect the type of hypothetical questioning contemplated in Odom and subsequent case law.

The failure to ask proper hypothetical questions of Detective Kiely is further exacerbated by the opinion testimony of Officer Bledsoe, especially considering the State's theory that defendant intended to distribute crack cocaine. Officer Bledsoe rendered improper opinion testimony when he testified that several seized items contained evidence of suspected crack cocaine.

Unlike expert opinion testimony, factual testimony "is an ordinary fact-based recitation" that relates an officer's first-hand perceptions and does not include opinions or "information about what the officer 'believed,' 'thought' or 'suspected.'"

McLean, supra, 205 N.J. at 460 (emphasis added). Lay opinion testimony falls between these ends of the spectrum and is governed by N.J.R.E. 701. Lay opinion testimony "may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." N.J.R.E. 701.

Officer Bledsoe's testimony was not merely an ordinary factual recitation; he explained he "suspected" several items contained evidence of crack cocaine, an inference based in part on his training and experience. Officer Bledsoe's testimony was also not proper lay opinion testimony. To be rationally based on perception, "a lay opinion must be the product of reasoning processes familiar to the average person in everyday life." State v. Brockington, 439 N.J. Super. 311, 322 (App. Div. 2015) (citation omitted). But the average person generally cannot determine whether a package contains cocaine; rather, this requires training and experience. Ibid.; see also McLean, supra, 205 N.J. at 462-63 (relying on an officer's training, education, and experience may result in impermissible expert opinion testimony).

Although the testimony at issue did not draw an objection, its cumulative effect was "clearly capable of producing an unjust result," R. 2:10-2, requiring a reversal of defendant's

convictions. See State v. Weaver, 219 N.J. 131, 155 (2014) (explaining a court should reverse a conviction "[w]hen legal errors cumulatively render a trial unfair" (citing State v. Orecchio, 16 N.J. 125, 129 (1954))). Undoubtedly, Kiely's expert testimony directly opining defendant's cocaine was not for personal use impacted the jury, laymen who may not understand the significance of the quantity of a drug. See Odom, supra, 116 N.J. at 76, 81-82. Likewise, this error was compounded by Bledsoe's improper opinion testimony that various other — untested — seized items contained suspected crack cocaine, statements which surely influenced the jury on the issue of possession and further buttressed Kiely's opinion defendant intended to distribute cocaine.

Reversed and remanded for a new trial.