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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2693-12T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAYMOND R. MARTIN, a/k/a
RALPH MARTIN,

Defendant-Appellant.

Submitted February 24, 2015 – Decided March 31, 2015

Before Judges Yannotti, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 05-06-0501.

Joseph E. Krakora, Public Defender, attorney for appellant (Brian P. Keenan, Assistant Deputy Public Defender, of counsel and on the brief).

Geoffrey D. Soriano, Somerset County Prosecutor, attorney for respondent (William A. Guhl, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Raymond Martin was convicted on three counts of distribution of controlled dangerous substances ("CDS") and one

count of resisting arrest. He appeals from a judgment of conviction entered on December 7, 2012. We affirm.

I.

In June 2005, a Somerset County grand jury returned Indictment No. 05-06-0501, charging defendant with third-degree distribution of CDS, in violation of N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(3) (counts one to three); and third-degree resisting arrest, in violation of N.J.S.A. 2C:29-2a (count four). Defendant was tried before a jury. He was convicted on all counts and sentenced to a custodial term of three years.

Defendant appealed and raised the following arguments:

> POINT ONE
> THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO TESTIFY BY FAILING TO SUFFICIENTLY INQUIRE AS TO WHETHER DEFENDANT HAD KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO TESTIFY.
>
> POINT TWO
> THE TRIAL COURT DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO TESTIFY BY REFUSING TO ALLOW DEFENDANT AN OPPORTUNITY TO CONSULT WITH HIS FAMILY BEFORE DECIDING WHETHER TO WAIVE HIS RIGHT TO TESTIFY.
>
> POINT THREE
> DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DUE TO TRIAL COUNSEL'S FAILURE TO AGAIN REQUEST THAT DEFENDANT BE ALLOWED TO TESTIFY ON HIS OWN BEHALF AFTER THE TRIAL COURT HAD PREVIOUSLY CONCLUDED THAT DEFENDANT WAIVED HIS RIGHT TO TESTIFY.

POINT FOUR
THE ASSISTANT PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT REQUIRING REVERSAL OF DEFENDANT'S CONVICTION DUE TO AN EGREGIOUS COMMENT IN THE STATE'S SUMMATION WHEN THE ASSISTANT PROSECUTOR COMMENTED ABOUT THE DEVASTATION THAT CRACK COCAINE HEAPS ON CRACK USERS, THEIR FAMILIES AND THE COMMUNITY. (Not Raised Below)

POINT FIVE
THE JUDGE'S CHARGE ON FLIGHT WAS ERRONEOUS BECAUSE IT DID NOT INFORM THE JURY OF THE DEFENDANT'S EXPLANATION FOR HIS FLIGHT. (Not Raised Below)

POINT SIX
THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL AND ERRONEOUSLY CONCLUDED THAT THE STATE HAD PROVEN EACH OF THE CHARGES BEYOND A REASONABLE DOUBT.

POINT SEVEN
THE THREE-YEAR PRISON TERM IMPOSED ON DEFENDANT'S FIRST INDICTABLE OFFENSES SHOCKS THE JUDICIAL CONSCIENCE. DEFENDANT MUST BE RESENTENCED TO A TERM OF PROBATION.

We determined "that the trial court [had] mistakenly exercised its discretion when it insisted at 4:00 p.m. that defendant could not ponder overnight whether to take the stand," reversed defendant's convictions and remanded for a new trial. State v. Martin, No. A-4341-07 (App. Div. April 29, 2009) (slip op. at 6-7).

Defendant was thereafter tried before a jury. During deliberations, the jury indicated that it was deadlocked, and

the judge declared a mistrial. Defendant was tried again, before the same judge who presided at the earlier trials.

The evidence presented at trial indicated that on February 21, 2005, defendant met with an undercover narcotics detective from the Somerset County Prosecutor's Office ("SCPO"), and gave him crack cocaine in exchange for two hundred dollars. The detective then asked defendant if he could call defendant on his cell phone to arrange similar transactions in the future. Defendant agreed and provided a cell phone number.

According to the testimony of a custodian of records for a cell phone company, the number provided to the detective was the number for defendant's phone. On March 31, 2005, the detective called defendant to arrange a second CDS transaction. Defendant later met the detective in the parking lot of a bar, and sold him crack cocaine for eighty dollars.

An SCPO narcotics task force then planned a so-called "buy bust" operation, during which defendant would be arrested following a prearranged third CDS sale. On April 19, 2005, the detective who had previously purchased CDS from defendant arranged to meet him again in the bar's parking lot. There, the detective purchased crack cocaine from defendant for two hundred dollars. Nearby, the task force members involved in the operation monitored the sale using a listening device. After the

sale was completed, the detective gave a verbal cue, signaling that it was time to arrest defendant.

Several officers converged on the scene. They wore accessories identifying themselves as police, and one of the officers was dressed in full uniform. According to the testimony of the State's witnesses, defendant observed the task force members moving into the area and began to flee. The officers verbally identified themselves as police and yelled for defendant to stop. They eventually apprehended defendant and handcuffed him on the ground, although he continued to resist.

Defendant denied having met any of the witnesses who identified him. He also denied that he was present for the previous drug transactions. He testified that he had been in the bar's parking lot on April 19, 2005, but he claimed he was there to advertise an internet-dating website.

Defendant said that when he saw the task force members who had entered the parking lot, he thought they were running away from something and tried to get out of their way. Defendant stated that the officers beat him and called him names. He also testified that the officers had searched his car and home, but found nothing related to the possession or sale of drugs.

The jury found defendant guilty on all counts. The trial court sentenced defendant to an aggregate term of three years of

incarceration, without any period of parole ineligibility.

Defendant appeals and raises the following arguments:

> POINT I
> THE TRIAL JUDGE'S CONDUCT DURING JURY SELECTION AND THE TRIAL DEPRIVED [DEFENDANT] OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL. (Partially Raised Below)
>
> POINT II
> THE TRIAL JUDGE'S IMPROPER DISMISSAL AND TREATMENT OF A HISPANIC-AMERICAN POTENTIAL JUROR CONTAMINATED THE IMPANELED JURY WITH RACIAL BIAS, UNFAIRLY DEPRIVED THAT JUROR OF HIS RIGHT TO SERVE, AND DEPRIVED [DEFENDANT] OF HIS RIGHT TO AN IMPARTIAL JURY. (Not Raised Below)
>
> POINT III
> SEVERAL OF THE TRIAL JUDGE'S EVIDENTIARY RULINGS VIOLATED THE RULES OF EVIDENCE AND THEREBY DEPRIVED MARTIN OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES ON CROSS-EXAMINATION.
>
> POINT IV
> THE TRIAL JUDGE ERRED IN STATING THAT EVIDENCE OF FLIGHT MUST BE USED BY THE JURY TO INFER CONSCIOUSNESS OF GUILT AND IN FAILING TO INCORPORATE MR. MARTIN'S EXPLANATION OF HIS ACTIONS INTO THE CHARGE. (Not Raised Below)
>
> POINT V
> THE TRIAL JUDGE ERRED IN ADMITTING THE T-MOBILE PHONE RECORDS PURSUANT TO THE N.J.R.E. 803(c)(6) EXCEPTION TO [THE RULE AGAINST HEARSAY].

POINT VI

THE TRIAL JUDGE'S DECISION TO ALLOW THE JURY TO TAKE THE AUDIO RECORDINGS OF THE UNDERCOVER OFFICER'S CALLS ARRANGING THE CDS PURCHASES INTO THE JURY ROOM UNSUPERVISED, CONSTITUTES REVERSIBLE ERROR. (Not Raised Below)

II.

We first address defendant's contention that the trial judge's conduct during jury selection and the third trial deprived him of his constitutional right to a fair trial. Defendant argues that the judge had an "unmistakable" bias in favor of the State, which "infected every aspect of the third trial."

"Great latitude is given to a trial judge in the conduct of a trial," although "[t]here are . . . bounds within which he must stay." State v. Zwillman, 112 N.J. Super. 6, 20 (App. Div. 1970) (citations omitted), certif. denied, 57 N.J. 603 (1971). A trial judge may not "throw [his or her] judicial weight on one side or the other." Id. at 21. Indeed, all criminal defendants have "an absolute constitutional right to a fair trial . . . before an impartial judge and an unprejudiced jury." State v. Rios, 17 N.J. 572, 590 (1955).

Here, defendant takes issue with certain comments the judge made during jury selection. The judge stated that the case was relatively simple, when compared with other cases for which juries were being selected in the vicinage. However, this

comment was merely an indication as to the length of time the jurors might be required to serve. The judge also stated that he would not be available on Monday of the following week because he had responsibility for drug court that day. The statement was not improper. The judge was merely informing the jurors of the anticipated schedule for the trial. In addition, the judge told the jurors that they should not engage in outside research or seek information on the internet concerning the case. There was nothing improper about that comment.

Defendant also takes issue with: certain limitations the judge placed on the cross-examination of some of the State's witnesses; the judge's refusal to allow defense counsel to approach the bench during cross-examination; a statement by the judge that purportedly bolstered the credibility of one of the State's witnesses; the judge's admonition of defense counsel during cross-examination of the State's rebuttal witness; the judge's request that one of the testifying police officers confirm that he is an "African American"; the judge's interventions during defendant's direct examination; and several evidentiary rulings that were allegedly not evenhanded.

We have carefully considered defendant's contentions regarding these actions and comments, and find that the arguments are without sufficient merit to warrant discussion in

a written opinion. R. 2:11-3(e)(2). We note, however, that the record does not support defendant's contention that the judge's actions and comments were improper or indicate that the judge was biased against the defense.

Defendant further argues that the judge should have recused himself from presiding at the third trial pursuant to Rule 1:12-1(g) because of his "prior dealing[s]" with defendant. According to defendant, the judge showed "apparent animus" towards him during the first trial, and improperly refused to allow him additional time to determine if he wanted to testify at that trial, as we determined in defendant's earlier appeal.

In addition, defendant contends that, before the second trial, the judge made a comment which indicated that he did not "accept the error he had committed during the first trial." According to defendant, the judge should have recused himself from the third trial because he could not provide "the constitutionally mandated fair trial."

We note that, prior to the third trial, defendant did not file a motion seeking recusal of the judge. A judge must recuse himself or herself sua sponte "when there is any . . . reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." R. 1:12-1(g). We are convinced that the judge's prior

involvement with the case did not preclude him from providing defendant with a fair and unbiased trial. Furthermore, counsel and the parties could not reasonably have believed that the judge could not preside fairly. We therefore reject defendant's contention that the judge should have recused himself from presiding at the third trial.

III.

Defendant argues that several of the trial judge's evidentiary rulings violated the rules of evidence and deprived him of his right under the Sixth Amendment to the United States Constitution to confront the State's witnesses. Defendant maintains that that the judge erroneously precluded him from cross-examining three of the State's witnesses concerning the searches of his home and motor vehicle.

N.J.R.E. 611(b) provides that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." The rule additionally provides that, "[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Ibid.

Here, the judge did not abuse his discretion by refusing to permit defense counsel to question the witnesses about the searches because such questions were beyond the scope of the

witnesses' direct examinations. Moreover, it is undisputed that the searches did not result in the recovery of any CDS, money or drug paraphernalia. Thus, defense counsel's questions sought information that had no direct bearing on the charges for which defendant was being tried.

Defendant argues that the fact that no drugs, money or drug paraphernalia were found in his residence or car was relevant to the credibility of the officers and the claims they made about him. Again, we disagree. The searches took place after the third CDS sale. The fact that no contraband was found at that time was not inconsistent with what the officers said about the first two CDS sales.

Moreover, as the State argues, even if the judge erred by precluding defense counsel from questioning the State's witnesses about the searches during cross-examination, the error was harmless. As the State notes, defendant testified about the warrants and the results of the searches. Thus, the jury could have considered defendant's testimony that the searches revealed no evidence of additional crimes, and taken that testimony into account when weighing the credibility of the State's witnesses.

IV.

Next, defendant argues that he was deprived of his right to an impartial jury because the judge dismissed a prospective

juror, who was identified as Juror 290. The juror had returned after the luncheon recess, but did not have the jury selection questionnaire that had been distributed to all prospective jurors. The following colloquy ensued between the judge and this juror:

> THE COURT: Good afternoon, sir.
>
> [JUROR 290]: Good afternoon.
>
> THE COURT: You've been patient and present and following along with your fellow prospective jurors with regard to the model jury selection questions. Would you be kind enough to take a look at that first page?
>
> [JUROR 290]: I don't have it. I left it in the car.
>
> THE COURT: Why don't you have it?
>
> [JUROR 290]: I was in a rush to get here.
>
> THE COURT: Okay, thank you, I'm going to excuse you. You can go back to the jury assembly room. This is serious business, sir.

Defendant notes that the judge chose not to dismiss two other jurors, who were identified as Jurors 293 and 057. These jurors also had forgotten to bring their jury selection questionnaires to court after the luncheon recess:

> THE COURT: Good afternoon, sir.
>
> [JUROR 293]: Good afternoon, your Honor.
>
> THE COURT: You've been patient and present, where is your —

[JUROR 293]: I left it [on] the seat when I left, and it's not there. I got it memorized though.

THE COURT: No.

[JUROR 293]: No, all right.

THE COURT: I've been doing this for 13 years, I haven't memorized it. Too many important questions involved. You've been patient, and present, [perhaps] following along with the model jury selection questions. Would you be kind enough to take a look at that first page, and are there any particular questions that you feel appropriate to respond to?

. . . .

THE COURT: Good afternoon to you . . . .

[JUROR 057]: I'm embarrassed to say I left the paper in my coat. I know it's important not to leave it out there.

THE COURT: You've been patient and present and following along as each of the prospective jurors with regard to the model jury selection questions. Would you be kind enough to take a look at that first page and answer any particular questions you feel appropriate to respond to?

We note that in defendant's appendix on appeal, he has included an affidavit from his trial attorney, which states that Juror 290 is "Hispanic American," and that Jurors 293 and 057 are white.[1] Defendant contends that the judge's disparate

[1] We have considered the affidavit, even though defendant did not file a motion to supplement the record on appeal. R. 2:5-5.

treatment of these prospective jurors was prejudicial, and that "the entire proceeding was irrevocably tainted" from the moment the white jurors were allowed to remain.

We also note that, during the trial court proceedings, defense counsel did not raise this issue. Defendant's trial counsel did not suggest that the judge's rulings regarding these three jurors were improper. Counsel did not assert that the judge's decisions regarding these three jurors "irrevocably tainted" the jury.

It is well established that trial judges "possess considerable discretion in determining the qualifications of prospective jurors." State v. DiFrisco, 137 N.J. 434, 459 (1994) (citing State v. Martini, 131 N.J. 176, 218 (1993); State v. Pennington, 119 N.J. 547, 589 (1990)). We will not reverse a trial judge's decision regarding a juror's qualifications unless the decision is shown to be a mistaken exercise of discretion. Ibid.

We are convinced that the judge's decisions to dismiss Juror 290 and not to dismiss the other two jurors were not improper. There is no indication on this record that the judge's decisions were based on the jurors' race or national origin. The judge reasonably determined that Juror 290 was not taking the process seriously enough, and that this was not the case with

regard to the other jurors. We conclude that defendant's contention that he was deprived of his right to a fair and impartial jury is entirely without merit.

V.

We next consider defendant's contention that the trial judge committed reversible error when instructing the jury on flight. Because defendant did not object to the charge at trial, we review the instructions for plain error. R. 1:7-2; R. 2:10-2.

"'Plain error in the context of a jury charge is [l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Brown, 190 N.J. 144, 160 (2007) (quoting State v. Torres, 183 N.J. 554, 564 (2005)). To determine if an error in the charge constitutes plain error, we consider the charge as a whole. Ibid. (citing Torres, supra, 183 N.J. at 564).

Here, the judge instructed the jury on flight as follows:

> There has been some testimony in this case from which you may infer that the [d]efendant fled shortly after the alleged commission of the crime. The question of whether the [d]efendant fled after the commission of the crime is another question of fact for you to determine. Mere departure

> from a place where a crime has been committed does not constitute flight.
>
> If you find that the [d]efendant hearing that an accusation or an arrest would be made against him on the charge involved in the indictment, took refuge in flight for the purpose of evading the accusation or arrest on that charge, then you must consider such flight in connection with all the other evidence in this case as an indication of proof of consciousness of guilt.
>
> Flight may only be considered as evidence of consciousness of guilt if you should determine the [d]efendant's purpose in leaving was to evade accusation or arrest for the offenses charged in the indictment.

The instructions were based upon the Model Jury Charge (Criminal), "Flight" (2010).

Here, the judge instructed the jury that it "must" consider evidence of flight along with other evidence in the case as an indication of proof of consciousness of guilt, rather than informing the jury that it "may" consider such evidence. However, the judge's misstatement does not rise to the level of plain error. As the State points out, the jury was provided with a printed copy of the instructions, which used the word "may." There is no indication that the jurors were guided by the judge's statement rather than the written instructions.

In addition, the judge did not provide the jury with an additional instruction noting that defendant had provided an

explanation for leaving the scene, and informing the jury that it should not draw any inference of a consciousness of guilt if it found defendant's explanation to be credible. The omission of this additional charge does not constitute plain error. The judge told the jury that "mere departure" from the scene of a crime "does not constitute flight." The judge also told the jury that it could only consider flight as evidence of a consciousness of guilt if it determined that defendant's purpose in leaving was to evade accusation or arrest.

As we noted previously, at trial, defendant testified that he did not engage in any illegal drug transactions, and that he ran from the scene because he saw six or eight men running towards him. He did not recognize the men as police officers, and thought some of them were bikers. Based on the charge provided, if it had determined that defendant's explanation was credible, the jury would not have found that defendant's purpose in leaving was to evade accusation or arrest.

VI.

We turn to defendant's argument that the trial judge erred by admitting a cell phone company subscriber record into evidence pursuant to the business records exception to the rule against hearsay, N.J.R.E. 803(c)(6). Defendant asserts that the

record was admitted without sufficient inquiry as to the "reliability" of its source and "how [the source] was searched."

N.J.R.E. 803(c)(6) applies to statements contained in writings or other records if "made in the regular course of business," where "it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy." Ibid. A decision to admit evidence pursuant to N.J.R.E. 803(c)(6) is "reviewed under the abuse of discretion standard." State v. Buda, 195 N.J. 278, 294 (2008) (citing Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008); Brenman v. Demello, 191 N.J. 18, 31 (2007)).

"A witness is competent to lay the foundation for systematically prepared computer records if the witness (1) can demonstrate that the computer record is what the proponent claims and (2) is sufficiently familiar with the record system used and (3) can establish that it was the regular practice of that business to make the record." Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 18 (App. Div. 1996) (citation omitted). "If a party offers a computer printout into evidence after satisfying the foregoing requirements, the record is admissible 'unless the sources of information or the method,

purpose or circumstances of preparation indicate that it is not trustworthy.'" Ibid. (quoting N.J.R.E. 803(c)(6)).

At trial, the State presented testimony from an individual who has worked for the cell phone company since 2003. He stated that he is familiar with the way the company stores its phone records, and that he is among a select group of persons with access to the company's corresponding database. He testified that it is possible to "search the data base for a phone number and the[n] . . . retrieve the name, address, and billing information for the person who owned that phone number." The witness further testified that the information is then "generated into a document." He confirmed that the subscriber record admitted into evidence, which indicated that the number called by the detective belonged to defendant, was generated in this manner.

We are convinced that the State laid the proper foundation for admission of the record into evidence pursuant to N.J.R.E. 803(c)(6). Defendant's arguments on this point are without sufficient merit to warrant further comment. R. 2:11-3(e)(2).

VII.

Defendant additionally argues that the judge erred by allowing the jury to have the audio recordings of the detective's phone calls in the jury room during deliberations.

Defendant did not raise this issue at trial. We therefore consider whether the judge erred and, if so, whether the error constituted plain error. R. 2:10-2.

In support of this contention, defendant relies upon State v. Miller, 205 N.J. 109 (2011). In that case, during deliberations, the jury asked the court to replay a videotape of the trial testimony of one of the victims. Id. at 114. The judge allowed the victim's direct and cross-examination to be replayed in open court. Ibid. The Court held that, when faced with such a request, the trial court should ordinarily grant the jury's request, allow both direct and cross-examination to be replayed, play the video recording in open court, and "take precautions to prevent juries from placing undue emphasis on the particular testimony that is replayed." Id. at 122-23 (citation omitted). The Court found no error in the trial court's decision to allow the playback of the victim's testimony. Id. at 125-26.

In State v. A.R., 213 N.J. 542, 546 (2013), a case involving allegations of child sexual abuse, the jury requested that it be provided with the statements of the victim and the defendant so that they could be reviewed during deliberations. The Court stated, "[w]e reiterate the need to take specific measures to avoid the dangers associated with video-recorded evidence and expressly disapprove permitting unfettered access

by the jury to video-recorded statements of witnesses or a defendant during its deliberations." Id. at 560.

The Court noted, however, that defense counsel had not only failed to object to providing the statements to the jury in the jury room, counsel had also "actively encouraged" the jury to consider the statements, and urged the court to submit the recordings to the jurors. Id. at 561. The Court concluded that while the trial judge may have erred in allowing the jury to have the recordings in the jury room, the error "was plainly invited and [did] not warrant reversal of [the] defendant's conviction." Ibid.

Here, the audio recordings permitted in the jury room were not witness testimony or pre-trial interviews with witnesses. The exhibits were recorded phone calls in which defendant arranged the unlawful sales of CDS, for which he was later arrested and charged. Thus, the concerns expressed in Burr and A.R. are not present here.

Moreover, in this case, as in A.R., defense counsel did not object to allowing the jury to hear the audio tapes. In his summation, defense counsel stated that, if the jury considered the calls, it would see that "there's not much there." Counsel noted that the calls involved "[v]ery little conversation." Counsel's failure to object to allowing the jury to have the

audio recordings in the jury room during deliberations suggests that counsel did not view the jury's access to the recordings as prejudicial.

We conclude that the judge did not err by providing the jury with the audio recordings of the phone calls for its consideration during deliberations. We further conclude that, even if the judge erred in giving the jury access to this evidence during deliberations, the error was not one "clearly capable of producing an unjust result." R. 2:10-2.

Affirmed.