SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0628-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ARIEL JAZMIN,

Defendant-Appellant.

Submitted May 5, 2022 – Decided May 16, 2022

Before Judges Mawla and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 16-03-0203.

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the briefs).

William A. Daniel, Union County Prosecutor, attorney for respondent (Milton S. Leibowitz, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Ariel Jazmin appeals from a September 28, 2018 judgment of conviction for third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (count one); first-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(1) (count two); second-degree possession of CDS with the intent to distribute within 500 feet of public property, N.J.S.A. 2C:35-7.1 (count three); and third-degree possession of imitation CDS with the intent to distribute, N.J.S.A. 2C:35-11(a) (count four). He also challenges his sentence. We affirm.

Defendant was jointly tried and sentenced with co-defendant Angel Cesar. Neither defendant testified nor presented any witnesses. At trial, the State presented the testimony of seven witnesses. Relevant to this appeal, Union County Prosecutor's Office (UCPO) Detectives Kevin Kolbeck, Vito Colacitti, Filipe Afonso, and Lieutenant Jorge Jimenez testified as fact witnesses regarding the underlying incident and the subsequent investigation. The State also offered expert testimony from UCPO forensic chemist Margaret Cuthbert and UCPO Sergeant Gary Webb, who testified about narcotics distribution.

In Cesar's appeal, we detailed the facts and evidence adduced and addressed and rejected many of the same issues defendant raises in this appeal. State v. Cesar, No. A-0831-18 (App. Div. Apr. 23, 2021) (slip op. at 2-9).

Detectives were surveilling defendant and Cesar as they sat in an SUV in Linden. Id. at 3. When detectives surrounded the vehicle, it sped off, leading detectives on a high-speed chase before crashing into a tree. Id. at 4. Defendant jumped out of the vehicle and ran; a detective saw him discard what appeared to be a kilo of suspected narcotics. Ibid. Defendant was apprehended and Cesar was found in the SUV along with a duffle bag containing rectangular shaped packages wrapped with brown tape. Id. at 6. The packages contained powder that looked like cocaine. Ibid.

Cuthbert's testing showed the item defendant discarded was positive for cocaine and boric acid. Id. at 7. Webb's testimony educated the jury regarding the packaging, handling, and distribution of narcotics. Id. at 8. He also explained how drug distributors use boric acid as a cutting agent to increase the amount of drugs they can sell and their profits. Ibid.

During deliberations the jury found razor blades in a jacket in evidence. Id. at 8-9. The trial judge instructed them they could only consider the items that were moved into evidence. Id. at 9. The judge also excused a juror who could not continue to serve, replaced the juror with an alternate, and instructed the reconstituted jury to deliberate anew. Ibid. Later that morning, the jury returned its guilty verdicts. Ibid.

On appeal, Cesar alleged: 1) he was deprived of the ability to defend himself because the judge excluded testimony regarding the quantity of the cocaine in the object defendant discarded and the items found in the SUV; 2) the judge improperly denied defendants' motion to admit their statements to police that the drugs were fake as statements against interest; 3) Webb could not offer expert testimony; and 4) the judge erred by substituting the juror and permitting deliberations to continue. We rejected these arguments and affirmed Cesar's convictions. Id. at 12-35.

Defendant raises the following arguments on appeal:

> I: THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE BY EXCLUDING EVIDENCE OR ARGUMENT AS TO THE ACTUAL AMOUNT OF COCAINE IN THE STATE'S EXHIBIT OFFERED TO PROVE THE FIRST[-]DEGREE DRUG CHARGE.
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> II: THE TRIAL COURT IMPROPERLY EXCLUDED DEFENDANT'S STATEMENT AGAINST INTEREST.
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> III: SERGEANT WEBB PROVIDED IMPROPER EXPERT TESTIMONY.
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> IV: THE REPLACEMENT OF A DELIBERATING JUROR AFTER THE DELIBERATIONS HAD PROGRESSED TO THE POINT AT WHICH THE NEW JUROR WAS UNABLE TO PLAY A

MEANINGFUL ROLE DENIED DEFENDANT A FAIR TRIAL.

V: THE TRIAL COURT'S LIMITING INSTRUCTION AS TO THE JURY'S CONSIDERATION OF ITEMS NOT IN EVIDENCE WAS INSUFFICIENT TO CURE THE UNDUE PREJUDICE CAUSED BY THE DISCOVERY OF RAZOR BLADES IN DEFENDANT'S JACKET.

VI: THE TRIAL COURT WRONGFULLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL.

VII: DEFENDANT WAS DENIED HIS RIGHT OF ALLOCUTION AT THE SENTENCING HEARING, AND THE AGGREGATE SENTENCE OF SIXTEEN YEARS WITH A PAROLE DISQUALIFIER OF EIGHT YEARS IS EXCESSIVE.

Defendant's arguments in points one through five are the same as those raised in Cesar's appeal. We decline to address them again here and instead incorporate our rulings from our decision in Cesar's case. See id. at 12-19, 24-31. We address the two remaining points.

I.

Defendant argues the prejudice resulting from the jury's discovery of the razor blades during deliberations could not be cured by the judge's limiting instruction and necessitated a new trial. We are unpersuaded.

Pursuant to Rule 3:20-1, a trial judge shall not set aside a jury verdict "as against the weight of the evidence unless, having given due regard to the

opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law." "The motion is decided in the court's discretion in light of the credible evidence and with deference to the trial judge's feel for the case and observation of witnesses." State v. Terrell, 452 N.J. Super. 226, 268-69 (App. Div. 2016), aff'd o.b., 231 N.J. 170 (2017).

On appeal, we apply the same standard as the trial court. State v. Brown, 118 N.J. 595, 604 (1990). However, we do not extend deference to the findings of the trial court if it "acts under a misconception of the applicable law[.]" Ibid.

The trial judge denied defendant's motion for a new trial, finding "[a]ny taint that could have resulted from the discovery of [the] razor blades during jury deliberations was cured by the limiting instruction granted by the trial court." In Cesar's appeal, he argued the motion judge erred when he denied his request for a mistrial following the discovery of the razor blades. Cesar, slip op. at 31. We discussed the limiting instruction the trial judge gave the jury at length, and concluded it was firm, clear, and prompt. Id. at 33-34. Further, the instruction "addressed any potential for undue prejudice that might arise from the discovery of the razor blades. The judge instructed the jurors that in reaching their verdict, they were only to consider evidence admitted during the trial." Id.

at 33.

For these same reasons, we conclude the motion judge did not abuse his discretion when he denied defendant's motion for a new trial. The trial judge's instruction addressed any potential prejudice to defendant arising out of the jury's inadvertent discovery. Considering the substantial evidence of defendant's guilt, including the eyewitness who saw him discard the CDS, the CDS discovered in the vehicle, and both experts' testimony, we are unconvinced the discovery of the razor blades would clearly and convincingly lead to a manifest denial of justice requiring a new trial.

II.

Defendant claims he was denied the right to allocution. He asserts the judge found aggravating factor N.J.S.A. 2C:44-1(a)(9), based on the supposition defendant "deserved a greater sentence due to his engagement in a conspiracy with [Cesar], a crime with which he wasn't charged." He argues the eight-year parole disqualifier was excessive because "the evidence supported [his] contention that the true intent was to distribute imitation CDS." Defendant points to Cuthbert's testimony that some of the laboratory samples tested showed a very low concentration of cocaine. He therefore contends the sentence should have been ten years with a forty-month parole disqualifier.

Our review of a sentence is limited and subject to an abuse of discretion standard. State v. Jones, 232 N.J. 308, 318 (2018). We defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). The deferential standard of review applies, however, "only if the trial judge follows the Code[1] and the basic precepts that channel sentencing discretion.'" State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting Case, 220 N.J. at 65). We will affirm unless the judge violated the sentencing guidelines, "the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or . . . 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Pursuant to Rule 3:21-4(b), prior to sentencing, "the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his or her attorney." "[W]hen a trial court fails to afford a defendant the opportunity to make an allocution, in violation of Rule 3:21-4(b), the error is structural and the matter

[1] The New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1 to :104-9.

must be remanded for resentencing without regard to whether there has been a showing of prejudice." Jones, 232 N.J. at 319.

The record shows defendant was afforded the right of allocution at sentencing, and he declined. Indeed, the judge stated: "I note that . . . both defense counsel have indicated . . . their clients['] intention not to speak so . . . I won't ask if they want to be heard unless something changes." Neither defendant nor his attorney objected or otherwise corrected the judge. This argument lacks merit. R. 2:11-3(e)(2).

Further, we discern no sentencing error. The judge concluded aggravating factors N.J.S.A. 2C:44-1(a)(3), (6), and (9), outweighed mitigating factor N.J.S.A. 2C:44-1(b)(11).

Regarding aggravating factor nine, the need for deterrence, the judge stated:

> It's very strong here. You can't do these things – you can't break the law. You can't think you're going to get away with it, and you can't let society think things go unpunished when . . . [the] law is broken. You need to understand it and make changes so that you don't break the law again. Society needs to feel safe that this kind of conduct . . . . Who knows, you being there might have been the only reason that that enabled . . . Cesar to actually do this plan. We didn't get into that. We didn't get into . . . what might have happened or would or could have should have. But just because you didn't drive the car doesn't mean that your presence

> didn't help enable him to be in the car, to get the car, to drive the car, to be involved in all this. You're . . . a team, and it's . . . just regrettable, all that we're talking about here.

This statement does not convince us the judge found there was a conspiracy. The judge merely explained defendant's role in the crimes committed. The judge's findings clearly addressed aggravating factor nine wherein he emphasized defendant broke the law and needed to be deterred from future criminal activity, as well as deterring others from breaking the law. See State v. Fuentes, 217 N.J. 57, 79 (2014) (noting aggravating factor nine includes general and personal deterrence considerations).

Aggravating factor three addresses "[t]he risk that the defendant will commit another offense[,]" and six addresses "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted[.]" N.J.S.A. 2C:44-1(a)(3) and (6). These factors were supported by the credible evidence found in the record.

The judge noted defendant had a gang-related conviction and a history of substance abuse. Defendant was also on federal parole when he committed the offense here. Therefore, the risk of reoffending was present.

Defendant also had a significant prior criminal record, namely: three criminal convictions in New York and a federal conviction. The instant offense

was serious, as it included a first-degree conviction for possession of CDS with intent to distribute.

Finally, defendant's sentence was not excessive. A defendant convicted of a first-degree offense is subject to imprisonment between ten and twenty years. N.J.S.A. 2C:43-6(a)(1). N.J.S.A. 2C:35-5(b)(1) states: "The term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, during which the defendant shall be ineligible for parole." The judge sentenced defendant to an aggregate term of sixteen years' imprisonment with eight years of parole ineligibility, which is in accordance with the sentencing range. Defendant's sentence does not shock the judicial conscience.

Affirmed.