NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1143-96T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN BAKER,

Defendant-Appellant.

Argued February 4, 1998 - Decided FEB 23 1998

Before Judges Baime and Brochin.

On appeal from Superior Court of New Jersey, Law Division, Camden County.

Edward J. Crisonino argued the cause for appellant (Crisonino & Burnhasm, attorneys; Mr. Crisonino, on the brief).

Kathleen M. Higgins, Acting Assistant Camden County Prosecutor, argued the cause for respondent (Lee A. Solomon, Acting Prosecutor, attorney; Ms. Higgins, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant Kevin Baker and his codefendant Sean Washington were found guilty of conspiracy to commit murder (N.J.S.A. 2C:5-2), two counts of purposeful or knowing murder (N.J.S.A. 2C:11-3a(1) and (2)), and possession of a firearm for an unlawful purpose (N.J.S.A. 2C:39-4a). The jury acquitted both Baker and Washington of possession of a handgun without a permit (N.J.S.A. 2C:39-5b). In a bifurcated

proceeding, the jury was unable to reach a verdict on additional counts charging possession of a weapon by a convicted felon (N.J.S.A. 2C:39-7). The trial court sentenced Baker to consecutive terms of life imprisonment with a parole disqualifier totalling sixty years on the convictions for murder. The remaining convictions were merged. Baker and Washington filed separate appeals. Washington's brief has yet to be filed. This opinion pertains only to Baker's appeal.

Baker contends: (1) the pretrial photographic identification was made under unnecessarily suggestive circumstances and tainted the in-court identification, (2) the trial court improperly curtailed cross-examination of the prosecution's chief witness, (3) the trial court erroneously precluded defense counsel from arguing that a third person committed the murders, (4) the prosecutor was guilty of misconduct, (5) the jury's verdict was inconsistent, (6) trial counsel was ineffective, and (7) the cumulative effect of the errors deprived defendant of a fair trial. Other than the point dealing with the prosecutor's conduct of the trial, these arguments clearly lack merit. R. 2:11-3(e)(2).

I.

We need not recount the facts at length. In the early morning hours of January 28, 1995, the police were summoned to the Roosevelt Manor Apartments. Upon their arrival, the police discovered the bodies of Rodney Turner and Margaret Wilson. Both victims had been shot. The police recovered three nine

millimeter shell casings, which were later tested and found to have been fired from the same weapon.

Denise Rand testified that she and her cousin, Tyrone Moore, were present at the time of the shooting. According to Rand, she heard several shots and then observed Baker and Washington running from the scene. Although Rand was initially uncertain as to which of the two defendants committed the homicides, she later recalled, after being confronted with her prior statement, that Baker shot Turner and Washington shot Wilson. Rand recounted that she was present in the apartment building in order to purchase drugs and that she had used crack cocaine earlier in the morning. Rand was nevertheless unequivocal in her identification of the perpetrators, having known Washington for many years and defendant for several years.

Baker neither testified nor presented witnesses. The defense asserted, however, that Rand was incorrect in her identification. It is against this factual backdrop that we address defendant's contentions.

II.

Most of defendant's arguments are wholly devoid of substance and do not require extended discussion. We offer the following brief comments pertaining to these points.

First, the record discloses ample evidence supporting the trial court's conclusion that the identification procedures employed by the police were not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.

State v. Madison, 109 N.J. 223, 232 (1988); see also Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253 (1968). In any event, Rand's identification of the perpetrators was plainly reliable. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977). Rand was well acquainted with both defendants and named them as the killers before she was even shown the photographs. The photographs were exhibited to Rand merely to confirm her prior identifications. Although Rand gave inconsistent testimony regarding whether she was shown a single picture of each defendant or a photographic array, we are entirely satisfied that the identification evidence was properly admitted.

Second, the trial court conscientiously exercised its discretion in limiting defense counsel's cross-examination of Rand. The court permitted counsel to explore fully the subject of Rand's use of drugs. Counsel was not entitled to elicit testimony concerning how Rand was able to acquire cocaine in light of her unemployment. This subject was wholly irrelevant to any material issue in the case and was properly barred by the trial court.

Third, the trial court did not abuse its discretion in precluding defense counsel from arguing that Tyrone Moore was the actual killer. Neither the evidence, nor any reasonable inference drawn from the evidence, supported such a claim. See State v. Loftin, 146 N.J. 295, 347 (1996); State v. Hill, 47 N.J. 490, 499 (1966). The record is barren of any evidence even

hinting that Moore committed the murders.

Fourth, whether or not the jury's verdict was inconsistent, there was substantial evidence supporting its findings of guilt on the counts charging conspiracy, murder, and possession of a firearm for an unlawful purpose. Inconsistency is not a ground for vitiating an otherwise valid verdict. United States v. Powell, 469 U.S. 57, 64-65, 105 S.Ct. 471, 476-77, 83 L.Ed.2d 461, 468 (1984); Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932).

Fifth, the record in no way supports defendant's claim of ineffective assistance of counsel. Indeed, the opposite is true. Trial counsel vigorously and ably defended defendant's rights. We reject defendant's unsupported claim that trial counsel was constitutionally ineffective because he did not present an expert witness on the issue of identification. We know of no authority permitting expert opinion evidence respecting the issue of identification. Nor was trial counsel ineffective because he did not present an expert witness on the question of the effect of crack. While such evidence would have been admissible if offered, the subject was developed at length at trial. Nor was trial counsel ineffective because he did not move for a severance. Had such a motion been made, it would undoubtedly have been denied. See State v. Laws, 50 N.J. 159, 175 (1967), cert. denied, 393 U.S. 971, 89 S.Ct. 408, 21 L.Ed.2d 384 (1968); State v. Manney, 26 N.J. 362, 365 (1958); State v. Scioscia, 200 N.J. Super. 28, 42 (App. Div.), certif. denied, 101 N.J. 277

(1985). We discern no professional error or errors on the part of defense counsel that could reasonably have impacted on the outcome of the trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Fritz, 105 N.J. 42 (1987).

Sixth, we find no error or series of errors having the capacity to lead to an unjust result. The trial court exercised admirable restraint in presiding over this hard fought trial. We are satisfied that defendant was fairly tried and fairly convicted.

III.

We treat separately defendant's claim that the trial was tainted by prosecutorial misconduct. Defendant argues that the prosecutor repeatedly interrupted defense counsel's summation by interposing frivolous objections. We note that many of the prosecutor's objections were well-founded, and in fact were sustained by the trial court. We are, nevertheless, struck by the stridency that marked many of the prosecutor's arguments. We add that the prosecutor was loud, boorish and rude during much of the trial. The trial court found it necessary to threaten to impose sanctions on the prosecutor.

We recognize that a criminal trial is "a swiftly moving dramatic contest which often evokes strong emotions in the participants." State v. Bucanis, 26 N.J. 45, 56, cert. denied, 357 U.S. 910, 78 S.Ct. 1157, 2 L.Ed.2d 1160 (1958). A prosecutor cannot be expected to present the State's case "in a manner

appropriate to a lecture hall." State v. Johnson, 31 N.J. 489, 511 (1960).

This much conceded, it is incumbent upon a prosecutor to refrain from straying beyond the bounds of fair play. State v. Marks, 201 N.J. Super. 514, 534 (App. Div. 1985), certif. denied, 102 N.J. 393 (1986). The primary duty of a prosecutor is not to obtain a conviction, but to see that justice is done. State v. Ramseur, 106 N.J. 123, 320 (1987), cert. denied sub nom., Ramseur v. Beyer, 508 U.S. 947, 113 S.Ct. 2433, 124 L.Ed.2d 653 (1993). As the representative of the State, the prosecutor's obligation to play fair "is as compelling as his responsibility to protect the public." State v. Marks, 201 N.J. Super. at 535. "He may prosecute with earnestness and vigor -- indeed, he should do so." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935). "But, while he may strike hard blows, he is not at liberty to strike foul ones." Ibid.

We are entirely satisfied that defendant was not prejudiced by the prosecutor's improper behavior. We, thus, have no occasion to reverse defendant's convictions. But we would be remiss were we to see only the case before us. We come then to an old topic. We recently had occasion to recall Justice Francis' lament made some thirty years ago in State v. Thornton, 38 N.J. 380, 400 (1962), cert. denied, 374 U.S. 816, 83 S.Ct. 1710, 10 L.Ed.2d 1039 (1963), that "[a]ppellate courts continue to be too much occupied in review of prosecutor's [misconduct]." See State v. Goode, 278 N.J. Super. 85, 89 (App. Div. 1994). The

problem persists. We are concerned that by affirming defendant's convictions despite the prosecutor's derelictions, we may be encouraging future misconduct. The prosecutor's errors were not so grave as to justify referring this matter to an ethics committee. See State v. Ramseur, 106 N.J. at 324. But his behavior was inconsistent with the high office he holds. We commend the matter to the attention of Camden County Prosecutor Lee Solomon for corrective action.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk