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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1910-87T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CLARENCE McKINLEY MOORE,

Defendant-Appellant.

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Emile R. Cox, Esq.
Clerk

Argued February 19, 1991 - Decided APR -1 1991

Before Judges Bilder, Muir, Jr. and Brochin.

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

Marianne Rebel Montgomery, Designated Counsel, argued the cause for appellant (Wilfredo Caraballo, Public Defender, attorney; Ms. Montgomery, of counsel and on the brief).

Nancy A. Hulett, Deputy Attorney General, argued the cause for respondent (Robert J. Del Tufo, Attorney General, attorney; Ms. Hulett, on the brief).

PER CURIAM

Following a jury trial defendant was convicted of burglary (count 1), two counts of robbery (counts 2 and 3) and three counts of aggravated sexual assault (counts 5, 6 and 7). At sentencing the trial judge merged the robbery convictions and the aggravated sexual assault convictions. Defendant was sentenced to an extended term of life with a minimum of 25

years for the aggravated sexual assault, a concurrent term of 20 years for the robbery and a concurrent term of 10 years for the burglary; an aggregate sentence of life with a minimum of 25 years. Defendant appeals from the convictions and the sentence. The State cross-appeals from the merger of the aggravated sexual assault convictions.

In the early hours of January 14, 1986, sometime after 1:20 a.m., 25 year old MA was savagely raped, anally, vaginally and orally, in the bedroom of her small cottage in Somers Point. The assault was accomplished by a break-in to her home and was accompanied by the robbery of some $8. Although the lighting was poor, her myopic vision was limited and she was consumed with fear, with the aid of hypnotic enhanced memory she was able to positively identify defendant as her assailant in-court as well as in three prior out-of-court photographic line-ups. Her testimony, if accepted by the jury, was capable of establishing defendant's guilt beyond a reasonable doubt.

On appeal, defendant makes the following contentions:

POINT I

THE PROSECUTOR'S SUMMATION EXCEEDED THE BOUNDS OF PROPRIETY MAKING IT IMPOSSIBLE FOR THE DEFENDANT TO RECEIVE A FAIR TRIAL.

A. HIS RACIAL REMARKS VIOLATE THE DEFENDANT'S RIGHT TO EQUAL PROTECTION AND TO A FAIR TRIAL

B. HE IMPROPERLY IMPUTES PERSONAL RESPONSIBILITY TO THE JURY IF THEY FAIL TO CONVICT

C. HE IMPROPERLY HIGHLIGHTS THE DEFENDANT'S FAILURE TO TESTIFY

POINT II

THE TRIAL COURT ERRED IN RULING THE DEFENDANT'S PRIOR CONVICTIONS ADMISSIBLE TO ATTACK CREDIBILITY

POINT III

THE TRIAL COURT ERRED IN NOT GRANTING:

A. THE DEFENDANT'S MOTION FOR ACQUITTAL AT THE TERMINATION OF THE STATE'S CASE

B. THE DEFENDANT'S MOTION FOR JUDGMENT NOT WITHSTANDING VERDICT

C. THE DEFENDANT'S MOTION FOR A NEW TRIAL

POINT IV

THE TRIAL COURT ERRED IN ADMITTING IN COURT AND OUT OF COURT IDENTIFICATIONS OF THE DEFENDANT BY THE VICTIM

A. THE PROSECUTION FAILED TO MEET THE STANDARD IN THE HURD DECISION

B. THE PHOTO LINE UP AND IN COURT IDENTIFICATION SHOULD BE EXCLUDED DUE TO ITS UNRELIABILITY AND SUGGESTIVENESS

POINT V

THE SENTENCE IMPOSED BY THE TRIAL COURT WAS CLEARLY EXCESSIVE

POINT VI

THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR CHANGE OF VENUE OR IMPANELING A FOREIGN JURY DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

The Prosecutor's Summation

Defendant claims prosecutorial misconduct in the form of three allegedly improper comments made by the prosecutor during his summation. He contends the prosecutor injected

race into the case and appealed to racial prejudice; improperly commented on defendant's failure to testify, thus interfering with his fifth amendment rights; and improperly appealed to the emotions of the jury by suggesting an acquittal of the defendant would be an additional "assault" against the female victim. An examination of the summation in its entirety shows that the complained of comments represented a small portion of an extremely lengthy summation, are too broadly characterized by defendant and were in each case promptly and appropriately dealt with by a forceful curative instruction. See Williams v. James, 113 N.J. 619, 632 (1989).

During the testimony of his wife, the jury learned that defendant, a black man, was married to a white woman. The victim was a white woman. In his summation the prosector sought to suggest that defendant had a predilection for white women which the jury might consider in determining whether the state had proved its case.

> So I ask you this: What did we learn when we found out that Cheryl Moore was the wife of the defendant? I suggest to you in a nonracist way that what we found out was that Clarence McKinley Moore made a choice to be with a Caucasian woman --- [interrupted by objection].

The impropriety of the suggestion was forcefully expressed by the judge when he informed the prosecutor that " it is not a reasonable inference to draw from the fact that this defendant is married to a white woman that he selectively made that decision to rape or rob, [to commit] aggravated sexual assault

[upon], a white woman." He immediately gave a forceful and complete curative instruction which not only told the jury to disregard the prosecutor's remarks in this regard but told them it was an unfair and unreasonable inference and an improper argument. We are satisfied that action prevented the prosecutor's statement from substantially prejudicing defendant's right to a fair trial, see State v. Koedatich, 112 N.J. 225, 324-325, 338 (1988), cert. den., 488 U.S. 1017 (1989); that the jury can be relied on to have followed the curative instruction, see Williams v. James, supra.

No more had that instruction been given than the prosecutor made another argument which defendant contends was an additional appeal to racial prejudice. At the time of the attack on the victim, defendant's wife had recently given birth and in connection with the baby's feeding was suffering from mastitis, an inflammation of her breast glands. The prosecutor said:

> I ask you to consider that [the wife's physical condition] and infer that that would give believability to the fact that during that period of time, that is, on January 14, 1986 [the date of the attack], right in the middle of the time after the birth of the child and the disability of the wife, I ask you to infer that that is a period of time when this individual would have his greatest need for sexual release.

Defendant objected that this comment had no foundation in the evidence -- that there was nothing to indicate the parties were not having normal sexual relations. The trial judge gave another curative instruction in which he told the jury to

disregard the prosecutor's statement; that it was an unreasonable and improper inference. On appeal defendant renews that argument and adds the notion that this was a racial remark which "somehow [fed] into the stereotypical label of the black man who cannot control his sexual desires." We are satisfied that any possible prejudice was fully removed by the trial judge's prompt action. See State v. Koedatich, supra; Williams v. James, supra. The prosecutor's syllogism was a recitation of an ignorant misconception.

During his summation the prosecutor properly discussed the testimony of the defense witnesses. In the course of this he said there were two of them. Defendant contends this comment, made during the prosecutor's analysis of the testimony of the two witnesses, amounted to a comment on defendant's failure to testify. The argument is a non-sequitur. Apparently defendant did not perceive such an illogical inference at the time, for he did not object. See State v. Macon, 57 N.J. 325, 333 (1971).

Finally, at the end of the summation, the prosector closed with a plea which defendant contended when he objected at the time, and contends now on appeal, was an improper appeal to the emotions of the jury - an attempt to inflame and prejudice it.

> The last thing I have to say is that if you don't believe her [the victim] and you think she's lying, then you've probably perpetrated a worse assault on her.

Once again the jury was instructed to disregard the comment,

that it was improper. We are satisfied the judge's action here, as with the previous improprieties, prevented the prosecutor's statements from substantially prejudging defendant. See State v. Koedatich, supra; Williams v. James, supra.

Although we are persuaded that the prosecutor's conduct did not deprive defendant of a fair trial, we would be derelict if we did not express our disapproval in the strongest terms. The summation showed a disregard of the obligation of the prosecutor to play fair and see that justice is done. See State v. Johnson, 216 N.J.Super. 588, 610 (App. Div. 1987). Our role, however, is not to supervise or punish prosecutorial misconduct.[1] It is to examine the trial for fairness. Fortunately, the judge, unlike the prosecutor, was sensitive to the need for a fair trial and promptly and forcefully delivered curative instructions to the jury.

Sands

Following a Sands[2] hearing, the trial judge ruled that prior convictions of defendant for carnal abuse in 1968, burglaries in 1970 (eight convictions) and distribution and possession with intent to distribute marijuana in 1976 would

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[1]We do, however, consider that the prosecutor's outrageous conduct violated ethical principles and urge the Attorney General to bring the matter to the attention of the appropriate ethics body.

[2] State v. Sands, 76 N.J. 127 (1978).

be admissible for purposes of impeachment if he testified at the trial. Defendant contends the rulings deprived him of a fair trial and constituted reversible error. He argues the convictions were too remote in time to have probative value particularly when weighed against the prejudicial effect of the evidence on the minds of the jurors. See State v. Sands, 76 N.J. 127, 144 (1978). He also contends the carnal abuse conviction should have been excluded because the lenient sentence "may have reflected a reduction of the charge to a lesser charge which the [rap sheet] fails to reflect."

The contentions are without merit. As the trial judge noted, the defendant's repeated criminal conduct showed a lack of respect for law which would extend to a lack of respect for the oath, id. at 145, and clearly relate to veracity, ibid. Ordinarily, evidence of prior convictions should be admitted. Id. at 144. We are satisfied that defendant did not meet his burden of justifying exclusion. Ibid. Moreover, speculation cannot form the basis for an appeal. See State v. Wilkerson, 38 N.J.Super 166, 168 (App. Div. 1955).

Hurd, The Hypnotically Refreshed Recollection And The Subsequent Identifications

After the attack the victim was unable to give more than a minimal description of her assailant. She was able to say he was black, five feet ten inches tall, weighed about 175 pounds, was muscular and was wearing blue jeans. According

to her, the lighting was sufficient to see him and she obtained a good enough view[3] while he was in her room but her fear masked further recollection. She accordingly requested that her recollection be improved by hypnosis. While hypnotized she was able to recall the assailant's face and that he was wearing a tan suede jacket with a zipper. Thereafter she not only retained that recollection but found it improved sufficiently to bring to mind the fact there had been dirt around the jacket pocket.

Immediately after her recollection had been thus enhanced, the victim helped a police artist draw a composite drawing of her assailant. About a week later she was shown a photographic lineup and promptly made a positive identification of defendant. This was repeated on two subsequent occasions and in court where defendant was identified in person.

Defendant contends the hypnotically refreshed testimony should not have been admitted because the procedure did not meet the requirements of State v. Hurd, 86 N.J. 525, 544-547 (1981). He also contends the photo lineups were suggestive and that all the out-of-court and in-court identifications were infected by the alleged hypnotically refreshed recollection and the subsequent suggestive identification

[3]Although defendant suggests in his brief that the victim's vision was impaired by the fact she was not wearing her contact lenses, the victim clearly testified her vision problem affected distant objects; that she could see relatively near things without glasses.

procedures.

Defendant's contentions are without merit. Following a thorough Hurd hearing, the trial judge found that all the standards set forth by the Supreme Court had been fully complied with. Id. at 545-546. We are satisfied the use of hypnosis was appropriate for the victim's fear-induced traumatic neurosis, id. at 544, and that the trial judge's findings as to the procedures employed and adherence to the Hurd requirements were supported by substantial credible evidence in the record. See State v. Johnson, 42 N.J. 146, 162 (1964). On the other hand, defendant's contentions that Dr. Babcock was not independent of the prosecutor and the suggestions that discussions with Detective Gray and the victim were unrecorded and that Gray's presence in the outer office somehow intruded upon the privacy of the hypnotic session find no support in the record. Similarly unsupported are the contentions that there was insufficient light to see defendant and that the victim could "only see a blur without her contact lenses." The victim testified otherwise and the jury was free to believe her.

Defendant's contentions as to the photographic lineups are similarly without merit. We agree with the trial judge that there was no evidence of suggestiveness and that the victim's opportunity and ability to see her assailant at the time of the attack were established. See State v. Madison, 109 N.J. 223, 231-233 (1988). Here again, the trial judge's

findings are supported in the evidence. See State v. Johnson, supra.

Sufficiency of the Evidence

Defendant contends there was insufficient evidence to sustain a conviction. He argues that the poor lighting conditions, the victim's inability to see without glasses[4], and the fleeting look she took of her assailant foreclosed reliable identification - the critical factor in the State's case. He accordingly claims error in the denial of his motions for acquittal, for judgment n.o.v. and for a new trial.

In ruling on the motion for a new trial the trial judge made a careful analysis of the evidence with respect to the ability of the victim to have seen and identify her assailant. An examination of the record fully substantiates his recital and satisfies us that the conviction is supported by substantial credible evidence and does not constitute a manifest denial of justice. See State v. Carter, 91 N.J. 86, 96 (1982). The trial judge's view of the case should be given substantial weight. Ibid.

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[4] The victim was nearsighted and could not see more than a few feet without her contact lenses. At the time of the attack objects that were more than a couple of feet away were a blur.

The Motion for a Change of Venue or Foreign Jury

Defendant contends that pre-trial publicity prevented him from obtaining an impartial jury from among the members of the local jury panel. We are satisfied the denial of the motions for change of venue or a foreign jury was not error. See State v. Williams, 93 N.J. 39, 63 (1983). More importantly, we are satisfied that the voir dire insured an impartial jury. See State v. Gary, 229 N.J.Super 102, 111 (App. Div. 1988).

The Sentence

Defendant contends that the statutory criteria for the imposition of an extended term as a persistent offender, see N.J.S.A. 2C:44-3a, were not properly proved and that, in any event, the sentence imposed was clearly excessive. We are satisfied that the trial judge's findings with respect to the extended term were supported by proper evidence, see State v. Johnson, supra, and that defendant's contention as to the excessiveness of the sentence is without merit. See State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 365-366 (1984).

By cross-appeal, the State claims error in the merger of the three aggravated sexual assault convictions. We agree. See State v. Fraction, 206 N.J. Super. 532, 536-540 (App. Div. 1985), certif. den. 104 N.J. 434 (1986).

The merger of the three aggravated sexual assault

convictions is reversed and the matter remanded for resentencing as to those counts. The convictions and sentences are otherwise affirmed.

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

Clerk