

STATE OF NEW JERSEY

v.

**SHARPE JAMES,
Defendant - Appellant**

A-06-1234-T3

Superior Court, Appellate Division

Submitted August 21, 2006 - Decided September 7, 2006

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Cr-06-028.

Stuart J. Rabner argued the cause for the appellant (Menendez, Codey, & Booker, L.L.P., attorneys for defendant-appellant, Mr. Rabner of counsel and on the brief).

Christopher J. Christie, Assistant Hudson County Prosecutor, argued the case for the State of New Jersey (Thomas H. Kean, Jr., Hudson County Prosecutor, attorney; Mr. Christie of counsel and on the brief).

GRIM, J.A.D. joined by **REAPER, J.A.D.**

On March 10, 2006, following a four-day trial in Superior Court, Law Division, Hudson County, defendant, Sharpe James, was convicted of manslaughter in violation of N.J.S. 2C:11-4(b)(1). On April 5, 2006, the trial court sentenced defendant to a ten-year term of imprisonment, consistent with the mandates of N.J.S. 2C:43-6(a)(2) and the presumption of imprisonment of N.J.S. 2C:44-1(d).

In this appeal, defendant contends that the trial court erred in two respects. First, he claims that the trial court improperly allowed the prosecutor to cross-examine and comment in summation on defendant's silence at the time of arrest, in violation of his constitutional right to remain silent. Second, defendant contends that evidence regarding the defendant's post-shooting conduct should not have been permitted.

We disagree on both counts. We hold that the trial court properly allowed cross-examination and comment in summation, not into defendant's post-arrest silence, but rather as to the content and scope of defendant's statements at the time of arrest. Similarly, we hold that evidence regarding defendant's post-shooting conduct was properly admitted.

The Facts

James McGreevey, Golan Cipel and defendant, Sharpe James, were close friends. Each of them had experienced brushes with the law. McGreevey had resigned from a prestigious job under suspect circumstances, offering a dramatic public explanation that many believe concealed more insidious ethical problems. Cipel, a foreign national, had falsified credentials in an effort to obtain an influential state security position. Defendant was under investigation by the United States Attorney's Office for misuse of public funds. They were, until recently, able to avoid arrest and conviction. All three had recently lost their jobs and were faced with mounting bills in order to maintain their extravagant lifestyles. Defendant was several months behind on his payments for his Rolls Royce and had a large balance on his credit cards following a trip to Rio. McGreevey and Cipel, who lived together, were behind on mortgage payments and were unable to pay previously made pledges to various Democratic candidates and political organizations.

Collection agencies began to pursue all three. Each had their credit cards revoked by Mastercard and American Express. Defendant's Rolls Royce was repossessed and McGreevey and Cipel were threatened with eviction. Desperate for a solution, the friends met in late December 2005, at Don Pepe's in Newark to seek a solution to their problems.

The facts, as follow, are obtained from the transcript of the defendant's trial. Cipel, who had agreed to testify at trial against defendant and McGreevey in exchange for a reduction in charges against him, was the chief witness against defendant and had given an extensive post-arrest statement.

Cipel testified that, on January 7, 2006, at approximately 5:30 p.m., he, James McGreevey, and defendant entered a pawn shop in Hoboken owned and operated by Jon Corzine. All three approached Corzine while he was sitting behind the cash register. McGreevey pointed a handgun at Corzine's head and demanded money. McGreevey and Cipel then pulled the storekeeper from behind the counter and McGreevey struck him repeatedly in the face with the handgun. While Corzine was on the floor, defendant kicked him repeatedly in the stomach.

Defendant obtained the keys to the store and locked the entrance doors. Corzine was then tied up with duct tape while McGreevey continued to kneel on him, demanding money and making repeated threats to kill him. Corzine finally capitulated to the assailants' demands and gave defendant instructions on how to open the register. Dissatisfied with the amount of money in the register, defendant told McGreevey to "finish (Corzine) off."

At that point, however, McGreevey "flipped" the gun to defendant stating, "I'm in this for the money. If you want him finished off, you do it." Defendant caught the gun in such a way that it discharged immediately firing one round into Corzine's left temple, killing him instantly.

Defendant stated immediately after the shooting, "... what just happened my life is over ... I fucked up my life." Defendant then untied the victim, repositioned the body and placed the gun in Corzine's hand. He removed his fingerprints from the gun. He washed his hands repeatedly. He told McGreevey and Cipel that, if they were ever caught, they were to say that they had been at the pawn shop to pawn jewelry but that Corzine had gotten into an argument over the value of the goods and produced a handgun. He further told them to say the weapon had discharged when defendant struggled to take the gun away from the storekeeper. Defendant then unlocked the store doors.

Unknown to the assailants, Corzine had managed to trigger the silent alarm prior to being tied up. Officer Linda Garbaccio, of the Hoboken Police Department, was first on the scene. She observed defendant unlocking the front door with the other two assailants hovering behind him. She immediately ordered the three to the ground. Additional police officers arrived. Garbaccio handcuffed the defendant and placed him in the back of a police car while other officers dealt with McGreevey and Cipel. Garbaccio read defendant his Miranda rights.

Garbaccio gave the following account of what transpired after she placed the handcuffed defendant in her police car:

I began talking to James. I read him his Miranda rights again. I asked what happened. Defendant at first stated he didn't know, that he was simply a customer in the store when he heard a loud argument followed by a single gunshot. As he's telling me this, he's looking around. He appeared to be very nervous. He asked several times where McGreevey and Cipel were.

The Trial

Trial began on March 6, 2006. The principal witness against defendant was Cipel who gave testimony consistent with his post-arrest statement. During Cipel's testimony, the defense objected to any testimony regarding defendant's post-shooting conduct. This concern was addressed by the trial judge, Hon. Richard J. Williams, J.S.C. Immediately after the objection, the trial court excused the jury and conducted a N.J.R.E. 104 hearing to determine the admissibility of this post-shooting conduct in a manslaughter trial. Upon hearing the evidence, Judge Williams ruled it admissible.

Forensic and other technical evidence essentially comprised the balance of the State's case.

Defendant took the stand in his own defense. He asserted the affirmative defense of duress. He testified that he was never part of any plan to carry out the robbery and only entered the store to pawn his jewelry to help make his car and credit card payments. During his direct examination, he gave the following description of the events that transpired once inside the store:

- Q. What did you observe when you walked in the store?
- A. When I walked in the store, I saw McGreevey and Cipel. They were standing at the cash register, talking to the victim.
- Q. Okay. And what happened next?
- A. I walked to the front of the store to see what was going on. McGreevey and Cipel had the store guy on the floor and the gun was being pointed at me. McGreevey started yelling at me to come here. He kept yelling at the store owner to give him the keys to the store and the cash register.
- Q. Okay. And did Mr. Corzine give him the keys?
- A. No. McGreevey made him give the keys to me and, at gunpoint, made me lock the front door and take the money from the cash register.
- Q. And then what happened?
- A. McGreevey got really upset because there was so little money in the cash register. I got scared because I knew how crazy he could get at times. I tried to run out of the store but because the door was locked, he was able to stop me. We struggled. While struggling the gun went off and killed the store guy.

Upon cross-examination, the prosecution sought to question the defendant regarding the fact that his trial testimony differed from his post-arrest statements, as the defendant had testified that he had made exculpatory statements at the time of his arrest consistent with his affirmative defense of duress. The defense objected citing both the defendant's privilege against self-incrimination under the Fifth Amendment of the United States Constitution and his privilege under New Jersey law. The trial court overruled the objection and permitted the cross-examination.

The jury was charged with respect to the elements of manslaughter. The trial court reminded the jury, using clear and emphatic language, that (1) defendant had the right to remain silent; and (2) no inference of culpability could be drawn from any exercise of that right. On March 10, 2006, the jury returned a verdict finding the defendant guilty.

Defendant was sentenced on April 5, 2006 to a term of ten years imprisonment. He filed his notice of appeal to this court on May 22, 2006 and raises two issues: first, that by allowing the prosecutor to cross-examine and comment on summation regarding the defendant's post-arrest silence his federal and state constitutional rights were violated; and second, that the trial court incorrectly permitted testimony regarding his post-shooting conduct.

Discussion

We conclude, first, that the prosecutor was properly permitted to cross-examine and comment on summation regarding the content and scope of defendant's statements

post-arrest. This question requires us to consider the limits of prosecutorial inquiry as to defendant's post-arrest silence, in the context of testimony by a defendant at trial as to the substance of exculpatory statements he allegedly made at or near the time of his arrest. This issue pits defendant's constitutional right to remain silent against the State's right to challenge the credibility of defendant's testimony bearing directly on his affirmative defense of duress.

Once a defendant testifies about statements he made to the police at or near the time of his arrest, the State must be permitted to cross-examine him regarding whether or not these statements were actually made. Generally, the prosecutor may not ask questions in areas not covered by the defendant's direct testimony to suggest, even implicitly, that a defendant had an affirmative duty to come forward with exculpatory evidence. In the ordinary case, the State is not permitted to use omitted details or other indicia of the right to remain silent, for fear that such inquiry will shift the burden of proof to the defendant. See *State v. Galiyano*, 178 N.J. Super 393, 397 (App. Div.), *certif. denied* 87 N.J. 424 (1981).

Here, however, defendant "opened the door," see, e.g., *McGautha v. California*, 402 U.S. 183, 213 (1971), to inquiry into this otherwise protected area defendant asserted by asserting the affirmative defense of duress. Part and parcel of that defense is that "a defendant ha[s] a duty to escape from the control of the threatening person or to seek assistance from law enforcement authorities" at his earliest opportunity. *State v. Toscano*, 74 N.J. 421, 434 (1977). The question of whether defendant met that duty was put before the jury by the defendant himself and his credibility on that question was crucial to his defense. He testified that he was not part of any plans to carry out the robbery, and only entered the store to pawn his jewelry. He further testified that, immediately after he was arrested, his first concern was to avoid contact with the other defendants. He told the jury that, once he was sure he would not be exposed to any further intimidation or retaliation by the other defendants, he told Officer Garbaccio about the intimidation and coercion that occurred in the store. The following excerpt from his direct testimony is illustrative:

After I saw the officers take McGreevey and Cipel I was able to tell the officer what happened inside the store. I wasn't afraid any longer. I told her that I had to follow McGreevey's instructions because he was pointing a gun at me and threatening to kill me.

These post-arrest statements, allegedly made at the scene, without the opportunity to reflect or speak to counsel, were used to bolster the defendant's credibility by rebutting any implication of recent fabrication. Under these circumstances, the State must be given a fair and reasonable opportunity to cross-examine defendant as to what details he allegedly gave to the police.

The State is also entitled to present rebuttal testimony from the officer involved in these conversations. Such rebuttal evidence may include not only what the officer remembers the defendant saying, but also what she remembers him not saying. This kind of rebuttal testimony (what the witness remembers the defendant not saying) is

proper, so long as it is restricted to refuting the defendant's trial testimony. Rebuttal testimony impinges on a defendant's constitutional right to silence only when it suggests that the mere absence of a statement at the time of arrest is a basis to doubt the truth of the defendant's testimony.

We note that this case is fundamentally distinct from *State v. Lyle*, 73 N.J. 403 (1977), because the defense of duress is fundamentally distinct from the defense of self-defense. *State v. B.H.*, 183 N.J. 171 (2005).

The circumstances in this case may be distinguished from the facts in *State v. Muhammad*, 182 N.J. 551 (2005). In *Muhammad*, defendant lured his victim into his car, drove her to a secluded area and sexually assaulted her. *Id.* at 559. Defendant did not testify. *Id.* at 562. The prosecutor called a witness who testified about statements the defendant made to him and also about the lack of any mention by the defendant that the sex was consensual. Specifically, the prosecutor highlighted the fact that the defendant had not mentioned the victim was a prostitute. *Id.* at 562-563. The prosecutor emphasized this during his closing argument. The Court in *Muhammad* held that the prosecutor's repeated references to defendant's failure to state any facts that ultimately supported his defense strategy at or near the time of arrest was an unconstitutional infringement on the defendant's privilege against self incrimination. *Id.* at 573-574.

Here, although some of the prosecutor's questions came close to crossing the line between proper impeachment of defendant's credibility and unconstitutional comments on his right to remain silent, the thrust of the interrogation stayed with the proper boundaries of cross-examination. The following exchange between the prosecutor and defendant illustrates this point:

- Q. In fact, after Officer Garbaccio advised you of your rights, you didn't say anything else to her.
- A. I did. I tried to talk to her, but she wouldn't listen to me.
- Q. Is it true that on January 7, 2006 a gun was pointed at you?
- A. Yes.
- Q. But on January 7, you never told Officer Garbaccio about that.
- A. I did tell her. I tried to tell her. She wouldn't listen to me.

As this excerpt reveals, defendant repeatedly asserted he had told, or at least attempted to tell, Officer Garbaccio what had occurred in the store as evidencing his lack of volition to commit any criminal act. What distinguishes this from *Muhammad* is that the defendant affirmatively testified at trial that he had mentioned the details of his duress defense to the arresting officer.

"It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to

challenge the defendant's testimony as to his behavior following arrest." *Doyle v. Ohio*, 426 U.S. 610, 620, n. 11 (1976) citing *United States v. Fairchild*, 505 F. 2d 1378, 1383 (5th Cir. 1975). We conclude that once a defendant makes statements at trial that are inconsistent with those made after receiving the Miranda warnings, the *Doyle* rule is inapplicable. Accord, *Anderson v. Charles*, 447 U.S. 404, 408 ("*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements"). See also *State v. Barrios*, 162 Ariz. 146 (1989).

Through cross-examination, the State was not suggesting culpability based upon the defendant's post-arrest silence. Rather, the prosecutor properly attacked the defendant's credibility by suggesting his trial testimony was inconsistent with the description of the events testified to by the arresting officer. Because this line of questioning was proper on cross-examination, it was also permissible to refer to it during summation.

Defendant further contends that evidence regarding his post-shooting conduct should not have been permitted. We disagree. The State's case consists of a single count of second degree manslaughter. The critical issue facing the State is proof of the defendant's state of mind when he killed the victim with the handgun. Manslaughter is a crime requiring a reckless intent. Recklessness is defined in 2C:2-2b(3) as the conscious disregard of a known risk. As noted in *State v. Bowens*, 205 N.J. Super. 548, 553 (App. Div. 1985), *aff'd* 108 N.J. 622 (1987), the risk under this subsection must be a "substantial risk of death". The element of recklessness must be proved beyond a reasonable doubt. *State v. Bakka*, 176 N.J. 533, 550 (2003); *State v. Juinta*, 224 N.J. Super. 711 (App. Div.), *certif. denied* 113 N.J. 339 (1988). The jury here was properly charged as to these elements.

The evidence underlying the defendant's flagrant cover-up of the shooting, including tampering with both witnesses and evidence, demonstrates the defendant's awareness of the criminality of his actions and his consciousness of guilt, moments after the killing. N.J.R.E. 404(b) does not apply when evidence of other crimes or acts are part of the total criminal conduct occurring during the incident. Such acts are considered within the res gestae of the charged crime and are admissible in evidence. *State v. Martini I*, 131 N.J. 176 (1993), *cert. denied* 516 U.S. 875 (1995).

The dissent mischaracterizes the post-shooting conduct by the defendant as separate from the shooting incident itself, despite the fact that the conduct occurring immediately after the killing. "Generally, conduct after the commission of a crime which indicates consciousness of guilt, or actions inconsistent with innocence, is admissible in evidence." *State v. Rechtschaffer*, 70 N.J. 395, 413 (1976).

Other States which have considered this very issue have decided that post-offense conduct is admissible to prove the mens rea of recklessness as consciousness of guilt. The New York Court of Appeals upheld a conviction for reckless homicide based, in part, on the admission of post-crime evidence demonstrating the defendant's subjective state of mind. *People v. Roe*, 74 N.Y. 2d 20, 24 (1989). A similar recklessly based crime, manslaughter, was found to be supported by post-conduct evidence admitted to prove

the defendant's state of mind. *Nozza v. Florida*, 288 So. 2d 560 (Fla. Ct. App., 3rd Circuit, 1974).

An independent review of the record convinces us that the trial court conducted a fair and legitimate inquiry regarding the admissibility of evidence of post-shooting conduct. The trial judge properly concluded the evidence was related to the defendant's reckless state of mind. Since the defendant's state of mind, as shown by his immediate post-shooting conduct, is the critical material element in his trial for reckless manslaughter, it is axiomatic that evidence supporting his recklessness is admissible at trial.

Accordingly, the decision of the trial court is hereby ***affirmed***.

MERCY, J.A.D., dissenting

I find the majority's conclusions to be irreconcilable with Constitutional entitlements of a criminal defendant and, therefore, I respectfully dissent.

First, in my opinion, the defendant's right against self-incrimination was violated when the prosecutor cross-examined him regarding his alleged failure to give Officer Garbaccio the exculpatory explanation he testified to at trial in support of his duress defense - that McGreevey forced him at gunpoint to participate in the robbery. Because of the Fifth Amendment and its State common-law counterpart, there is virtually no situation imaginable where a defendant's post-arrest silence could be used against him for any purpose, even to impeach his own testimony at trial. As the Supreme Court explained in *Doyle v. Ohio*, 426 U.S. 610 (1976), it is fundamentally unfair to advise the defendant of his Fifth Amendment rights, including the right to remain silent, and then to penalize him for invoking them. Reversal in my view is therefore compelled by *State v. Muhammad*, 182 N.J. 551 (2005), *State v. Lyle*, 73 N.J. 403 (1977), and *State v. Deatore*, 70 N.J. 100 (1976).

The improper cross-examination of defendant began with the prosecutor's question about defendant's silence immediately before his arrest:

Q. Isn't it true, when the police arrived, that you did not run to the front door and explain McGreevey's role in the crime?

A. I couldn't. McGreevey was standing right next to me.

Q. In fact, isn't it true that after Officer Garbaccio arrested you, you didn't say anything else about what happened in the store?

A. I did. I tried to talk to her. She wouldn't listen.

Q. Isn't it true that you never told Officer Garbaccio that McGreevey had pointed a gun at you?

A. I did tell her. She didn't listen.

The circumstances in *Lyle* were similar and the Court, compelled by *Doyle* and *Deatore*, reversed the defendant's conviction for first degree murder. *Lyle, supra*, 73 N.J. at 405. At the scene Lyle admitted that he shot the victim, but later testified at trial that it was in self defense. The prosecutor cross-examined the defendant about his post-arrest omission and on summation argued that the omission suggested that the defendant was lying at trial. *Id.* at 408. Just like here, Lyle insisted that he told the arresting officer that it was self-defense. *Id.* The court held it was “manifestly improper to use defendant's silence to attack his self-defense theory as a fabrication.” *Id.* at 410.

Justice Albin, commenting on the Court's decision in *Lyle* in his majority opinion in *Muhammad*, wrote, “That the defendant gave only a partial account to the police at or near the time of his arrest did not open the door to prosecutorial questioning about what the defendant did not tell the police.” *Muhammad, supra*, 182 N.J. at 571. The Court was addressing the issue of pre-arrest silence as substantial evidence of guilt. Therefore, to try to distinguish *Muhammad* on the basis that the defendant did not testify is unpersuasive.

We followed *Deatore* in *State v. Micheliche*, 220 N.J. Super. 532 (App. Div.), *certif. denied* 109 N.J. 40 (1987). There, the defendant offered the affirmative defense of a coerced confession. *Id.* at 540. On cross-examination, the prosecutor asked the defendant if at any time prior to trial he had informed the prosecutor's office of the motivation for his confession. *Id.* The trial judge allowed this question over the defense's objection. *Id.* Judge Antell, writing for this court, concluded that “to highlight the defendant's failure to advise the State in advance of trial as to how he proposed to meet that evidence infringed upon his right to remain silent.” *Id.* at 542.

Furthermore, I disagree with my colleagues with regard to the admission of evidence regarding the defendant's post-shooting conduct. Evidence must be relevant and must satisfy the requirements of N.J.R.E. 403. Relevant evidence may be excluded, however, if its probative value is substantially outweighed by the risk of undue prejudice. This evidence must be barred because, under N.J.R.E. 403, the prejudice substantially outweighs any probative value. The admission of this evidence is a palpable abuse of the trial court's discretion.

The issues of relevance and undue prejudice may be analyzed under *State v. Cofield*, 127 N.J. 328 (1992). The *Cofield* factors require that the proffered evidence be relevant to some factor in dispute. Here, the claim is the evidence demonstrates a “consciousness of guilt.” Consciousness of guilt is easily inferred from post-crime conduct *when the crime involves intentional behavior*. I am unable to locate any reported decision allowing “consciousness of guilt” evidence when the requisite culpable mental state is less than “knowing”.

As the majority here concedes, manslaughter requires a showing of reckless conduct. Post-shooting conduct is not truly probative of defendant's guilt or consciousness of guilt as to reckless conduct. Culpability based upon recklessness must exist before or at the time of the shooting. *State v. Pindale*, 249 N.J. Super. 266 (App. Div. 1991) (highly

prejudicial to admit evidence of the defendant's lack of remorse for death and lack of sympathy for injuries suffered by others because not relevant to determine whether conduct at the time of the crime was reckless). As we held in *Pindale*, I would hold here that post-event conduct is not relevant to a reckless state of mind at the time of the crime.

I dissent.

**IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY**

A-50,346

STATE OF NEW JERSEY

v.

SHARPE JAMES,

Defendant-Appellant.

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ORDER

This matter having been brought before the Court on September 8, 2006, by the defendant-appellant, it is, on this 11th day of September 2006, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with the Court on or before November 29, 2006.

ROBERT TORRICELLI, Deputy Clerk
For the Court