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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0289-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

VINCENT LAING,

Defendant-Appellant.

Submitted December 20, 2016 – Decided May 17, 2017

Before Judges Espinosa, Guadagno and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
11-01-0018.

Joseph E. Krakora, Public Defender, attorney
for appellant (Jay L. Wilensky, Assistant
Deputy Public Defender, of counsel and on the
brief).

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Monica do
Outeiro, Assistant Prosecutor, of counsel and
on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant was convicted of second-degree vehicular homicide, N.J.S.A. 2C:11-5(a) and N.J.S.A. 2C:11-5(b)(1), and third-degree possession of a controlled dangerous substance (alprazolam), N.J.S.A. 2C:35-10(a)(1). He appeals from his convictions and sentence, presenting the following arguments for our consideration:

POINT I

THE POLICE VIOLATED THE DEFENDANT'S RIGHT AGAINST UNLAWFUL SEARCH AND SEIZURE BY TAKING A BLOOD SAMPLE WITHOUT A WARRANT OR CONSENT. U.S. CONST., AMENDS. IV, XIV; N.J. CONST. (1947), ART. 1, PAR. 7.

POINT II

THE STATE COMMITTED SUBSTANTIAL AND PREJUDICIAL MISCONDUCT, NECESSITATING REVERSAL. U.S. CONST., AMEND. XIV; N.J. CONST., ART. 1, PARS. 9, 10 (PARTIALLY RAISED BELOW).

- A. STATE'S OPENING
- B. STATE'S SUMMATION
- C. QUESTIONING OF DETECTIVE KERECMAN

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO ADMIT THE DRIVING RECORD OF THE TAXI DRIVER INVOLVED IN THE INCIDENT.

POINT IV

THE TRIAL COURT IMPOSED AN EXCESSIVE SENTENCE, NECESSITATING REDUCTION.

In a supplemental pro se brief, defendant presents the following arguments:

POINT I

DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL WERE VIOLATED BY THE TRIAL COURT'S DENIAL OF HIS MOTION FOR JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE AND FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS FAILURE TO GIVE THE JURY A BALANCED RENDITION OF THE FACTS. (NOT RAISED BELOW).

POINT III

THE TRIAL COURT COMMITTED PLAIN ERROR IN ITS CHARGE TO THE JURY ON THE CRITICAL ISSUE OF CAUSATION BY FAILING TO DISCUSS THE EVIDENCE AND LAW IN THE CONTEXT OF THE MATERIAL FACTS INVOLVED IN THE CASE, DENYING THE DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A FAIR TRIAL. (NOT RAISED BELOW).

POINT IV

THE CUMULATIVE WEIGHT OF THE ERRORS DEPRIVED DEFENDANT OF A FAIR TRIAL.

After reviewing these arguments in light of the record and applicable legal principles, we conclude that none have any merit. We further conclude that the arguments raised by defendant in his pro se supplemental brief lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

I.

Defendant's convictions follow a fatal motor vehicle accident in Neptune at approximately 5:30 p.m. on June 24, 2009. According to witness accounts, the Honda Accord driven by defendant was traveling eastbound on Route 33 when it crossed over to the westbound lanes at a high rate of speed, causing a mini-van cab to turn into the eastbound lanes to avoid a collision. The Accord drove, nearly head-on, into a Ford Focus driven by an eighty-two-year-old woman, who was pronounced dead at the scene, having suffered a fractured neck that dislocated her spine as well as multiple fractures and lacerations. The impact of the collision caused both cars to "fly up in the air" six to seven feet off the ground. Defendant took no action to avert the accident or slow down.

Accident reconstruction experts testified that defendant was driving at approximately sixty-three to sixty-four miles per hour and that he was in the victim's lane of travel "for a good amount of time" prior to the collision. However, because the roadway

crested and curved prior to the scene of the accident, the victim would have had only seconds to react to defendant's car coming toward her. The experts opined she applied her brakes and turned her vehicle slightly but that defendant took "no avoidant action" before the collision.

A passing motorist who happened to be an EMT stopped to provide assistance. She found defendant to be "lethargic," with blood on his face, "underneath the dashboard" of his vehicle. She spoke to defendant, stabilized his head and, when first responders arrived approximately five minutes later, she turned his care over to them.

The first responders to the accident included the fire department, first aid, the Monmouth Ocean Hospital Service Corporation, the New Jersey State Police, Neptune Township Police, the Monmouth County Prosecutor's Office, the Serious Collision Analysis Response Team (SCART), the Department of Transportation and the Office of Emergency Medicine. The Fatal Motor Vehicle Accident Unit (Fatal Accident Unit) of the prosecutor's office was contacted at 6:10 p.m. Efforts to extricate the victim from her vehicle were abandoned when she was pronounced dead at 6:30 p.m. The on-scene investigation by SCART continued for at least two hours more as SCART made assessments, photographed and diagrammed

the roadway. Detective Eric Kerecman, a Fatal Accident Unit officer, remained on the scene until 9:30 p.m.

Defendant was treated at the scene by first aid members and paramedics, who provided him with intravenous fluids but no medications. He was transported to Jersey Shore University Medical Center.

The continuing investigation at the accident scene revealed no skid marks or deformity in the roadway or any road construction in the area. A search for items in defendant's car that might have contributed to the accident, such as food, drink or a cellphone, was fruitless. A subsequent test of the two vehicles showed they were in good mechanical working order prior to the accident.

Upon defendant's arrival at the hospital, a trauma unit nurse found him to be "[a]wake, alert, oriented times three," and "complaining of hip pain," which proved to be a dislocated hip.¹ Defendant was given medication, including five milligrams of morphine, two milligrams of Versed and one hundred milligrams of Diprivan.

¹ Defendant testified that he also had a broken left forearm, a fractured pelvis and a broken "ball and socket joint, the bone that holds your leg to your hip." Defendant remained hospitalized until July 3, 2009.

At approximately 7:20 p.m., a trauma technician drew samples of defendant's blood at the request of Brian Foy, a Neptune Township police officer.² Foy testified he read a consent form for the blood sample to defendant as required by the department's procedure, despite the fact that defendant was either unconscious or sedated at the time. Although defendant did not technically refuse his request for a blood sample, Foy completed the consent form as a refusal because he had not obtained defendant's consent.

An analysis of this blood sample revealed the presence of twenty nanograms per milliliter of alprazolam (Xanax), thirty-seven nanograms per milliliter of oxycodone,³ and 8.6 nanograms per milliliter of morphine. A forensic psychopharmacologist provided expert testimony, stating the concentration of these drugs in defendant's blood would have negatively affected his ability to perform "psychomotor and behavioral tasks," such as driving.

After confirming with defendant's nurse that he was able to speak to them, Sergeant Michael Zarro of the Neptune Township

² A blood sample had been drawn and tested earlier for medical purposes. No toxicological or alcohol content testing was done of this sample.

³ Defendant was not given oxycodone at the hospital until 11:00 p.m.

Police Department provided defendant with Miranda⁴ warnings and obtained his consent to be questioned. Defendant stated he drove from his home⁵ and was traveling eastbound on Route 33 when he approached an intersection west of where the accident occurred. Defendant told Zarro he did not remember anything from that point on until he received medical care. Defendant also stated he had taken thirty milligrams of oxycodone at 5:00 a.m. that day and one milligram of Xanax at 11:00 p.m. the prior evening. Defendant's testimony at trial was consistent with this statement.

II.

Defendant first argues his right to be free of unreasonable searches and seizures, U.S. Const. amends. IV, XIV; N.J. Const. art. 1, ¶ 7, was violated when the officer secured a blood sample from him without a warrant or his consent. We disagree.

The scope of appellate review of a motion judge's findings in a suppression hearing is limited. State v. Robinson, 200 N.J. 1, 15 (2009). An appellate court "must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record."

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁵ Defendant's mother testified she was familiar with defendant's symptoms when he was impaired by oxycodone and that he did not show such signs when he left the house that day.

State v. Elders, 192 N.J. 224, 243 (2007) (citation and internal quotation marks omitted). "A trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

In State v. Adkins, 221 N.J. 300, 311-12, 317 (2015), the Supreme Court reviewed the application of Missouri v. McNeely, 569 U.S. ____, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013),⁶ holding that a totality of the circumstances test applies to warrantless blood draws from drivers suspected of being under the influence. The McNeely Court clarified that the dissipation of alcohol in the blood did not establish a per se exigency that permitted blood to be drawn from drunk driving suspects without a warrant. 569 U.S. at ____, 133 S. Ct. at 1568, 185 L. Ed. 2d at 715. In State v. Jones, 437 N.J. Super. 68, 80 (App. Div. 2014), aff'd on remand, 441 N.J. Super. 317 (App. Div. 2015), we reviewed the "special facts" described in McNeely that would justify a warrantless blood draw and noted the "salient points" in the analysis as follows:

[T]he dissipation of blood alcohol continues to be an "essential" factor in analyzing the totality of the circumstances; that time spent investigating an accident and transporting an injured suspect to the hospital causes delay;

⁶ Although this trial was completed before McNeely was decided, its ruling is given retroactive effect. Adkins, supra, 221 N.J. at 313.

that obtaining a warrant will result in further delay; and that such additional delay will "threaten" the destruction of evidence. The Supreme Court did not require the State to show that the "further delay" would substantially impair the probative value of a blood sample drawn after a warrant was obtained or that it was impossible to obtain a warrant before the evidence was dissipated. In short, the Court did not require proof that evidence would be destroyed; it was sufficient to show that delays "threatened" its destruction.

[Id. at 79.]

Applying the totality of circumstances test in this case, there were sufficient facts to support the taking of a warrantless blood sample: a fatal accident that drew a massive response from first responders, injuries to defendant that required hospitalization, and a police investigation that lasted approximately four hours. In their totality, the circumstances presented an exigency that excused the officers from securing a warrant because the attendant delay could have threatened the destruction of the evidence of drugs in defendant's blood. There is no reason to disturb the trial judge's decision to deny defendant's suppression motion.

III.

Defendant argues that prosecutorial misconduct, in the form of comments made by the prosecutor in opening and closing

statements and in the questioning of a witness, deprived him of a fair trial. We disagree.

In our review of the prosecutor's comments, the factors to be considered include: "whether 'timely and proper objections' were raised; whether the offending remarks 'were withdrawn promptly'; . . . whether the trial court struck the remarks and provided appropriate instructions to the jury . . . [and] whether the offending remarks were prompted by comments in the summation of defense counsel." State v. Smith, 212 N.J. 365, 403-04 (2012) (citations omitted), cert. denied, ___ U.S. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013).

Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial. Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made. Failure to object also deprives the court of the opportunity to take curative action.

[State v. Timmendequas, 161 N.J. 515, 576 (1999) (citations omitted), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001).]

A.

Defendant cites the following excerpt from the prosecutor's opening statement:

[T]he cab driver, made an immediate left-hand turn to avoid Mr. Laing but [the victim] was not so lucky. He bore down on her relentlessly, without any attempt to stop,

without any attempt to get out of the way, and with an incredibly unimaginable horrifying collision of metal on metal he stopped the world and [the victim] was gone. She died instantaneously.

There was no objection to these comments at trial. Defendant now contends this comment improperly appealed to the jury's passion rather than presented an argument that focused on the facts to be proved. Certainly, the prosecutor used colorful language to introduce the jury to the facts that would be proven. But, this excerpt did not stray from the facts as they would be presented through the testimony of multiple witnesses who observed the collision or its aftermath. We discern no plain error. R. 2:10-2.

B.

In summation, the prosecutor referred to the defendant more than once as a "three-time convicted felon." Defendant argues these references constituted an impermissible personal attack. We disagree.

Defense counsel objected to the first of these references, interrupting the prosecutor mid-sentence. The judge overruled the objection.⁷ The prosecutor's subsequent references to defendant as a three-time felon were part of her attack on his credibility,

⁷ Because the sidebar conference was not recorded, we do not know what arguments were made.

most particularly his contention that he received the Xanax he took from a doctor as loose pills in an unlabeled bottle without a prescription. We note the second time she made this reference, there was no objection and the prosecutor accompanied the reference with a reminder to the jury that the judge had instructed them on the proper use of defendant's prior convictions. Defendant does not contend the trial judge failed to provide such appropriate instructions, albeit not during the summation.

Defendant concedes that the references to defendant's record were made to attack his credibility, a permitted use. Nonetheless, defendant argues that because the prosecutor did not phrase her reference in such a way as to convey that this was "its only permissible use – it reinforced the implication of [the] argument, that the defendant's guilt or innocence should be evaluated by the jury in light of his record." We are not persuaded by this argument.

Defendant also argues the prosecutor improperly denigrated the defense. In summation, defense counsel argued defendant did not consciously disregard the risk of driving after taking medication because his experience in driving after taking the drug was that he was not impaired. She also argued he did not cause the collision; that the accident was caused because the cab swerved into defendant's lane. This argument relied upon one description

by a passenger witness, stating the driver had swerved. Defendant's testimony did not provide support for this defense theory. In fact, when asked on direct examination if he recalled a van or cab driving in front of him, cutting him off before the accident, defendant testified, "No, I don't."

After reviewing evidence that supported the State's case, the prosecutor drew an objection after stating, "Now, if in fact, it was the fault of the cab driver, why would [the passenger witness] come in here and vouch for him? For the defense version to work, there would have to be a conspiracy of epic proportions between all of the State's witnesses." Because the recording of the sidebar conference that followed was inaudible, we do not know the arguments made before the trial judge overruled the objection.

Defense counsel objected on similar grounds a second time when the prosecutor stated, "So let's take a look at some of the detours that we had in terms of the evidence in this case." This time, the trial judge sustained the objection and promptly gave the jury a curative instruction, emphasizing the State's burden to prove guilt beyond a reasonable doubt, and directing the jury to "ignore any reference to any questions asked as detours."

Contrary to defendant's argument, the challenged comments did not suggest the defense was contrived, see, e.g., State v. Setzer, 268 N.J. Super. 553, 565-66 (App. Div. 1993), certif. denied, 135

N.J. 468 (1994). Rather, the argument countered the defense summation by exploring the improbability that the State's evidence was contrived.

Prosecutors "are expected to make vigorous and forceful closing arguments to juries," State v. Frost, 158 N.J. 76, 82 (1999), and "are afforded considerable leeway in that endeavor." State v. Jenewicz, 193 N.J. 440, 471 (2008) (quoting State v. Nelson, 173 N.J. 417, 460 (2002)). The prosecutor's comments here did not exceed permissible bounds.

C.

Defendant also argues the prosecutor committed misconduct in her direct examination of Detective Kerecman, the Fatal Accident Unit investigator, contending that the questions were designed to elicit expert opinion from a lay witness.

Detective Kerecman testified that his duties as a member of the Fatal Accident Unit were to respond to serious injury and fatal accident collision scenes and aid in the investigations. He received specialized training that included courses in crash investigation and vehicle dynamics at Northwestern University and an accident reconstruction course presented by the Institute of Police Technology and Management. As of the time of the accident in this case, Detective Kerecman had participated in the investigation of eighty-five to one hundred serious and fatal

crashes. He was not offered as an expert in accident reconstruction, however.

During the course of his testimony, defense counsel made repeated objections that were sustained by the judge, who expressly limited Detective Kerecman's testimony to what he observed, excluding opinion testimony. Nonetheless, defendant contends the posing of questions that tested the limits of lay opinion testimony, as to which objections were sustained, constituted misconduct that warrants reversal. This argument lacks any merit.

IV.

It is not disputed that the cab driver crossed lanes from the westbound to the eastbound lanes of Route 33. One of his passengers testified the cab driver did so after she warned that defendant's vehicle was coming at them and was going to hit the cab. The passengers also testified that, following the accident, it was agreed the cab driver would drive them to their destination because one of them had a curfew, and then return to the accident scene to provide a statement to the police officers and the contact information for the passengers. The driver did so.

Defendant contends his defense was that the collision was caused when he attempted to avoid the cab.⁸ He sought to introduce a certified abstract of the driving record of the cab driver, who died prior to the trial. According to defendant, the abstract showed that over the course of his driving career, the cab driver had accumulated fifty-six points but that, at the time of the accident, he had no points.

In furtherance of his theory that the cab driver was at fault, defendant contends the abstract supports an inference that the cab driver's departure from the accident scene reflected a consciousness of guilt and a desire to avoid possible consequences to his driver's license status as a result of the accident. He argues the trial judge abused his discretion in denying his motion. This argument lacks merit.

We accord a trial judge's evidentiary ruling "substantial deference," State v. Morton, 155 N.J. 383, 455 (1998), cert. denied, 532 U.S. 941, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001), and will reverse only when the trial judge's ruling was "so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

⁸ As we have noted, defendant did not testify that the accident was caused by his attempt to avoid the cab. He had no memory of the accident and, specifically, did not recall a van or cab cutting him off before the accident.

Citing State v. Weaver, 219 N.J. 131, 150 (2014), defendant argues a defendant's request to admit evidence of prior bad acts by third parties is viewed with greater liberality than a similar motion filed by the State and that the abstract here met the standard of relevance to warrant its admission. We disagree.

A defendant generally may introduce "similar other-crimes evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt." Id. at 150 (quoting State v. Garfole, 76 N.J. 445, 453 (1978)). Although the standard to be applied to the admissibility of the proffered evidence is "simple relevance to guilt or innocence," ibid. (quoting Garfole, supra, 76 N.J. at 452-53),

trial courts must still determine that the probative value of the evidence is not substantially outweighed by any of the Rule 403 factors, which are "undue prejudice, confusion of issues, or misleading the jury," and "undue delay, waste of time, or needless presentation of cumulative evidence." This determination is highly discretionary.

[Id. at 151 (citations omitted).]

The trial judge here acknowledged the correct standard for determining whether defendant's request should be granted. He carefully reviewed the logical steps in defendant's argument, agreeing there was evidence to support an inference that the cab driver's departure evinced a consciousness of guilt for causing

the accident. The judge observed, however, that defendant sought to admit the abstract to support the argument that the cab driver "was motivated to leave the scene . . . because he feared getting another motor vehicle ticket or violation in addition to those he had received in the past." The judge rejected this argument as "based upon speculation and conjecture," noting there was no evidence to support it. He noted further there was no evidence that the cab driver "would have suffered any enhanced penalty, a loss of license, a period of imprisonment, or anything else because of his prior record of motor vehicle violations." Although the judge found the proffered evidence was not "in any way probative of defendant's guilt or innocence," he stated further that any probative value was "substantially outweighed by the evidence's prejudicial effect," i.e., that the driving abstract "would create a substantial danger of confusing the issues or of misleading the jury."

Even when other-crimes evidence is relevant, the trial judge may still exclude the evidence where its probative value is minimal or outweighed by the Rule 403 factors. See Weaver, supra, 219 N.J. at 150-51; State v. Cook, 179 N.J. 533, 568-69 (2004). In his thoughtful analysis of the evidentiary issue, the trial judge properly applied the correct legal standard and concluded: the proffered evidence lacked any probative value and had a substantial

likelihood to confuse the jury. These findings were supported by the record. We discern no abuse of discretion.

V.

The State filed a motion that sought the imposition of a discretionary extended term pursuant to N.J.S.A. 2C:44-3(a) and N.J.S.A. 2C:43-7(a). Defense counsel did not dispute that defendant met the statutory criteria for a discretionary extended term but urged the court to either refrain from imposing an extended term or impose the extended term on the controlled dangerous substance (CDS) charge. After reviewing the standards applicable to the imposition of an extended term and defendant's record of convictions, the trial judge concluded that defendant qualified as a persistent offender for sentencing to a discretionary extended term.

The trial judge rejected the State's request to find aggravating factors one, two and twelve, N.J.S.A. 2C:44-1(a)(1),(2) and (12), found aggravating factors three, six and nine, N.J.S.A. 2C:44-1(a)(3), (6) and (9), and no mitigating factors. The judge made additional findings to support his conclusion that it was appropriate to consider the full sentence range available under N.J.S.A. 2C:44-3(a) and N.J.S.A. 2C:43-7(a), i.e., five to twenty years. The judge further noted he was mindful that any sentence on the vehicular homicide charge was subject to

the eighty-five percent parole ineligibility period of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and a three-year period of parole supervision. Although the judge found a mid-range sentence within the extended range appropriate, he elected to impose a moderately lower sentence because the underlying criminal conduct was not intentional. On the vehicular homicide charge, the sentence imposed was: eleven years, subject to NERA; a three-year period of parole supervision; a ten-year suspension of driving privileges to commence upon his release and appropriate fines and penalties. On the CDS charge, the sentence imposed was: a concurrent term of five years, a two-year suspension of driving privileges and appropriate fines and penalties.⁹

On appeal, defendant argues the trial judge erred in imposing an aggregate extended term sentence of eleven years subject to NERA. He does not dispute that the trial judge followed appropriate procedures in sentencing him but contends "the court's findings, while meticulous, were so wide of the mark as to constitute an abuse of discretion." We disagree.

We apply a deferential standard to our review of sentencing determinations. State v. O'Donnell, 117 N.J. 210, 215 (1989).

The appellate court must affirm the sentence unless (1) the sentencing guidelines were

⁹ Defendant was also sentenced on multiple motor vehicle charges related to the fatal accident that are not challenged on appeal.


violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

None of these reasons apply here. The sentencing determination will remain undisturbed.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION