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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
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-3971-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLO COPPA,

Defendant-Appellant.

Argued October 23, 2017 — Decided December 14, 2017

Before Judges Sabatino, Ostrer and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Municipal
Appeal No. 15-067.

Michael R. Speck argued the cause for
appellant (Speck Law Offices, LLC, attorneys;
Michael R. Speck on the brief).

Mary R. Juliano, Assistant Prosecutor, argued
the cause for respondent (Christopher J.
Gramiccioni, Monmouth County Prosecutor,
attorney; Mary R. Juliano, of counsel and on
the brief).

PER CURIAM

Defendant Carlo Coppa appeals from his conviction, after a
trial de novo, of driving while under the influence of intoxicating

liquor (DUI), N.J.S.A. 39:4-50. He presents the following points on appeal:

POINT I

THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT'S ABILITY TO OPERATE HIS AUTOMOBILE WAS DELITORIOUSLY [sic] AFFECTED BY ALCOHOL.

POINT II

ALL MATTERS SHOULD BE DISMISSED ON THE FAILURE OF THE TRIAL COURT TO GIVE THE DEFENDANT A FAIR, IMPARTIAL TRIAL.

POINT III

THE STATE'S USE OF IMPROPER LEADING QUESTIONS VIOLATES THE EVIDENCE RULE 611(c) WHICH IN TURN VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

We affirm, substantially for the reasons set forth in the cogent written opinion of Judge Joseph W. Oxley.¹ There was sufficient credible evidence in the record to support Judge Oxley's finding that defendant was driving under the influence. See State v. Johnson, 42 N.J. 146, 162 (1964) (stating standard of appellate

¹ Defendant's brief before us focused on alleged errors by the municipal court. However, "[o]ur review of the factual record is . . . limited to determining whether there is sufficient credible evidence in the record to support the Law Division's findings," State v. Powers, 448 N.J. Super. 69, 72 (App. Div. 2016), certif. denied, ___ N.J. ___ (2017), although we are especially reluctant to disturb Law Division findings that are concurrent with those of the municipal court, State v. Robertson, 228 N.J. 138, 148 (2017) (citing State v. Locurto, 157 N.J. 463, 474 (1999)).

review of Law Division's trial de novo verdict). The Law Division credited the arresting officer's testimony that defendant ran a stop sign in Bradley Beach at around midnight. Defendant slammed on his brakes in the intersection as the officer approached from a cross-street without a stop sign. The officer followed defendant and conducted a traffic stop. Defendant brought his vehicle to a jerky halt.

Defendant admitted consuming "about three beers." He fumbled around very slowly in collecting his credentials; his eyes were watery and glassy; there was an odor of alcoholic beverages emanating from the car; and his speech was slurred. Upon exiting his vehicle, defendant was unsteady on his feet, and stumbled, with some difficulty, onto the sidewalk. These facts were significant to support a conclusion that defendant's admitted consumption of alcohol "so affected [his] judgment or control as to make it improper for him to drive on the highways." Id. at 165. Put another way, defendant was under the influence because he suffered "a substantial deterioration or diminution of the mental faculties or physical capabilities of a person" State v. Tamburro, 68 N.J. 414, 421 (1975).

Defendant challenges the reliability of the results of the field sobriety tests, contending the officer did not administer them properly, and he had a knee injury that interfered with his

performance. However, the Law Division ignored the "finger to the nose test" because of its method of administration, and was unpersuaded by defendant's proofs that his injury preceded the arrest.

We reject defendant's argument that the State bore the burden to prove his capacity to perform the field sobriety tests. The Law Division, in reaching its decision, did not improperly shift the burden to defendant to prove his innocence. Rather, the court found he provided no evidence of a knee injury at the time of the stop. We have held that a driver bears the burden to prove a physical impairment preventing performance of a chemical breath test; that is because, in part, a driver has greater access to relevant proofs about his or her condition. State v. Monaco, 444 N.J. Super. 539, 551 (App. Div.), certif. denied, 228 N.J. 409 (2016). It is reasonable to apply the same rule to a claimed physical impairment that allegedly interfered with a person's ability to perform a field sobriety test, particularly since performance of the test is only circumstantial evidence of guilt.

We also discern no merit in defendant's contention that he was denied due process because the municipal court permitted the prosecutor to ask some leading questions. A trial judge has broad discretion under N.J.R.E. 611(c) to permit leading questions. State v. Bueso, 225 N.J. 193, 206-07 (2016).

Applying Fed. R. Evid. 611(c), which N.J.R.E. 611 follows "almost verbatim," 1991 Supreme Court Committee Comment, Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence (2017), federal courts characterize subsection (c) as suggestive, not mandatory. See, e.g., United States v. Ajmal, 67 F.3d 12, 16 (2d Cir. 1995). Courts are also exceedingly reluctant to reverse on the basis of infractions of the rule, United States v. De Fiore, 720 F.2d 757, 764 (2d Cir. 1983), and will do so "only if 'the judge's action . . . amounted to, or contributed to, the denial of a fair trial.'" Miller v. Fairchild Indus. Inc., 885 F.2d 498, 514 (9th Cir. 1989) (quoting Cleary, ed., McCormick on Evidence, at 12 (1984)); see also 4-611 Weinstein's Federal Evidence § 611.06 (2017) (stating that "[r]eversal on the basis of non-compliance with Rule 611(c) is exceedingly rare, and will only occur if the district court's actions under the rule deprive a party of a fair and impartial trial").

This is consistent with the principle that we will defer to a trial court's evidentiary ruling, in the absence of an abuse of discretion that results in a manifest denial of justice. State v. Lykes, 192 N.J. 519, 534 (2007). Accordingly, we discern no basis for reversal here. Judge Oxley was satisfied that the questions were clarifying. We shall not disturb that discretionary determination. In any event, the leading questions fell far short

of denying defendant a fair trial, or resulting in a manifest denial of justice.


As did the trial court, we also reject defendant's challenge to his conviction based on alleged, but unspecified, improprieties by the municipal court judge. We acknowledge that the judge was suspended shortly after defendant's trial. However, the record includes no competent evidence of improprieties that undermine the fairness of defendant's trial. If such evidence does later come to light, defendant may seek collateral relief by a petition for post-conviction relief. We decline to address in advance the merits of such a petition.

To the extent not addressed, defendant's remaining points lack sufficient merit to warrant discussion in a written opinion.

R. 2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION