SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5225-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DREU FERGUSON JR., a/k/a
DREW FERGUSON,

Defendant-Appellant.

Argued June 8, 2017 – Decided August 11, 2017

Before Judges Hoffman, O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 11-08-0708.

Marcia Blum, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Blum, of counsel and on the brief).

Danielle R. Pennino, Assistant Prosecutor, argued the cause for respondent (Jennifer Webb-McRae, Cumberland County Prosecutor, attorney; Ms. Pennino, of counsel and on the brief).

PER CURIAM

Defendant Dreu Ferguson, Jr., appeals from his conviction and sentence for aggravated manslaughter, desecrating human remains, and tampering with evidence. We affirm in all respects, but remand so the judgment of conviction may be corrected.

I

On March 18, 2015, a jury acquitted defendant of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2), but found him guilty of the lesser-included offense of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1); second-degree desecrating human remains, N.J.S.A. 2C:22-1(a)(1); and third-degree tampering with evidence, N.J.S.A. 2C:28-6(1). On May 18, 2015, he was sentenced to an extended life term, with a parole ineligibility period of sixty-three years and nine months.

We recount the salient evidence adduced at trial. In May 2009, defendant lived with his father, D.F. (father), and grandmother, V.F. (grandmother). The father worked at night and cared for the grandmother, who suffered from dementia, during the day.

One of the father's brothers, K.F. (Kevin),[1] testified the father called him three times on May 12, 2009. The first time

[1] To protect his privacy, we refer to him and other family members and acquaintances through the use of pseudonyms.

he called the father reported he had locked himself in his car because defendant and his girlfriend, A.H. (Anne), had threatened to kill him. Kevin told the father to call the police. Fifteen minutes later, the father called Kevin and sounded more relaxed, stating he was not going to call the police. About an hour and a half later, the father called Kevin and reported, "everything [is] going to be okay."

Kevin did not hear from the father again, which was "very out of the ordinary." On May 24, 2009, Kevin reached out to his brother, B.F. (Brian), and told Brian of his concerns. That same day, Brian went to and entered the father's house, and discovered he was not at home. However, Brian noticed the father's glasses, which "were normally on his face," were in the house and the father's car was parked outside.

Brian left the house and reported his brother missing to the police. The police searched the house, but did not find anything remarkable and left. Brian returned to the house the next morning and noticed the father's car was still parked on the property. Brian called out the father's name, and defendant emerged from and stopped Brian from entering the house. Defendant stated he did not know where his father was. Brian went to the police department and returned with a police officer.

The officer testified defendant informed him that he had not heard from or seen his father since Wednesday, May 20, 2009. Defendant then let the police officer and Brian into the house. Defendant's wallet and cell phone were found in the house. The officer asked and defendant admitted he and the father recently had an argument, but claimed the argument did not get "physical." At Brian's request, defendant moved out of the house that day.

The police decided to secure a search warrant of the house. When officers returned to the premises to acquire details about the property for the search warrant, they noticed a foul odor under the porch. After obtaining the warrant on May 26, 2009, the police searched the premises and discovered the father's body in a hole covered with a metal grate under the porch. The body was covered with lime. Defendant was immediately arrested and charged with desecrating human remains, N.J.S.A. 2C:22-1(a)(1), and terroristic threats, N.J.S.A. 2C:12-3.[2] In August 2011, defendant was indicted for first-degree murder.

Anne testified she had been dating defendant for about one month before the father's body was found. On Tuesday, May 19, 2009, she was in defendant's bedroom in the basement when she heard defendant and the father arguing in the living room. She

[2] The charge of terroristic threats was dismissed before trial.

heard the father say, "No, stop. Please don't. Help me." When she went upstairs to investigate, defendant intercepted her in the kitchen and told her to go outside. She complied and, approximately one hour later, defendant came outside. When she re-entered the house, the father was gone.

Over the next few days, Anne intermittently left the house for an hour or two, but otherwise remained at the house. During this period she did not see the father, although his car was always parked outside. She asked defendant where his father was, but he did not know and seemed unconcerned about his whereabouts.

Just before his disappearance, the father had hired a home-health aide to come to the house twice a week to help him care for the grandmother. When the aide arrived on May 22, 2009 to provide care, defendant told her his father "wasn't going to be [here] anymore," and that defendant had taken over his grandmother's care.

After his arrest on May 26, 2009, defendant was placed in the county jail. While there, another inmate, H.A., testified defendant told him: (1) the State would have a hard time convicting him because no one had seen him do "anything"; (2) the biggest mistake he made was not getting rid of his father's car because it was known the father disliked walking, even very

short distances, and thus never left home without his car; and (3) his father's body never smelled, so defendant never had to move it. H.A. admitted he contacted the Prosecutor's Office to report defendant's statements in the hope the State would be lenient in his own matter. However, H.A. also testified the State never made any promises to him about any of the evidence he revealed.

Ian Hood, M.D., forensic pathologist, conducted the autopsy of the father's body. Hood was unable to provide the final cause of death. Given the state of decomposition, he could not discern if the body sustained any external injury or trauma. However, he was able to determine on gross examination the father did not have any disease or condition to explain his death, such as cancer or heart disease, and had not had a stroke.

Although the condition of the body did preclude a histological examination, which can uncover the existence of certain diseases on a cellular level, Hood noted the father, fifty-eight years of age at the time of his death, appeared to be in overall good health. The father had some mild hypertension that was treated with medication, but this condition had not caused any damage.

Hood explained that even though he was unable to identify the cause of death, he was required to put a cause of death on the death certificate. He stated the final cause of death was "homicide by unspecified means - asphyxia not excluded." He also had to identify the manner of death, and was required to check-off one of the five selections provided on the death certificate under the category "manner of death." The selections from which to choose were natural, accident, suicide, homicide, and undetermined.

Hood determined the manner of death was homicide. He reasoned that, despite the degree of decomposition, he was able to ascertain the father was in good health before his death. In addition, the victim's body had been concealed, which was a "suspicious circumstance[]." However, he emphasized his opinion the manner of death was a homicide had no bearing on whether there was a homicide as a matter of law, stating:

> [The body was] secreted away under a porch, wrapped and covered with debris and covered with lime.
>
> In other words, there's been a distinct effort made to conceal his body. And generally when that has happened, it's because the body has met its end by other than natural or accidental means. . . . And usually, it's a young person who's found out in the Pinelands . . . buried in a shallow grave.

> Obviously that is suspicious enough that we assume they are homicides. But remember, as a medical examiner, I'm filling out a death certificate so that the state and federal government can keep some reliable statistics on how people died by manner. It doesn't mean that that's going to lead to a prosecution or that it meets the criteria the law would require for a homicide.
>
> My calling something a homicide has no bearing on what the law requires. I will call things homicides that in fact are not prosecuted. They're considered excused. So, it's a different situation for what a death certificate requires, it is completely different for what the law requires for a prosecution. . . .
>
> [Homicide is] what I put on a death certificate. And in this kind of case . . . I think most of my colleagues would fill it out that way. Because it's more likely to be a homicide than not. It doesn't mean someone is going to get prosecuted, though. . . .
>
> There were no specific findings on the body that would let me call it a homicide. . . . But I did not have an anatomic cause of death after completing his autopsy.

Significantly, Hood also testified he could not state within a reasonable degree of medical certainty a homicide had occurred.

Defendant called forensic pathologist Jonathan L. Arden, M.D., as an expert. Arden testified the term "cause of death" is "the underlying process that sets in motion an unbroken sequence of events that ends in the death of the person." He

defined "manner of death" as "the explanation for how the cause of death came about," which is "really largely dependent on circumstances" and is "highly dependent on investigation." He also observed the recognized categories for the manner of death are homicide, suicide, accident, natural, and undetermined. He added:

> Manner of death is an administrative ruling, an opinion that is used for purposes of keeping vital statistics. It's a concept that was actually invented in the United States, and it is a way of categorizing or classifying different deaths. One of the big reasons that we have cause of death and manner of death that get officially recorded on death certificates is because those go to your local vital statistics arm of your health department in your county, in your state. And eventually those statistics, causes and manners of death, and some other features, all funnel up to the Federal Government, and they're done on a national level.
>
> But the point of categorizing them, including manner of death, is so you can figure out how many people die, at what ages are people dying, how are they dying, why are they dying. It's a matter of, that's the heart of vital statistic[s].

Arden testified a medical examiner's opinion of the cause and manner of death is not a legal opinion.

> The manner of death is strictly for purposes of vital statistics. It has no force of law . . . It has no implication, ... It is not a determining factor for whether a crime has been committed, whether someone is

> guilty or not. . . . Homicide, or manner of death, simply means death at the hands of another person. It's not up to the medical examiner to decide if it's a crime.

Arden stated a body found in a crawlspace "like in this case" indicated there was a homicide, that "[a] death occurred at the hands of another person." He stated he would have certified the manner of death in this matter as a homicide. Finally, he testified he was unable to determine the father's cause of death.

II

On appeal, defendant asserts the following arguments for our consideration:

> POINT I — THE MEDICAL EXAMINER SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY THAT THE CAUSE AND MANNER OF DEATH WERE HOMICIDE BECAUSE: (1) HE ADMITTED THAT HE DID NOT KNOW THE CAUSE OF DEATH; (2) HE ERRED IN DESIGNATING "HOMICIDE" AS THE CAUSE BECAUSE THE CAUSE OF DEATH IS A MEDICAL FINDING; (3) HIS OPINION THAT HOMICIDE WAS BOTH THE CAUSE AND MANNER OF DEATH WAS NOT BASED ON EXPERT KNOWLEDGE; AND (4) THE JURORS DID NOT NEED AN EXPERT OPINION TO ASSESS THE CAUSE OF DEATH.
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> POINT II — THE COURT ERRED IN DENYING THE SPEEDY TRIAL MOTION, WHICH WAS FILED AFTER DEFENDANT HAD BEEN IN JAIL MORE THAN TWO YEARS WITHOUT BEING INDICTED.
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> POINT III — DEFENDANT WAS PREJUDICED BY THE ABSENCE OF A COOPERATING WITNESS CHARGE INSTRUCTING THE JURY THAT IT WAS REQUIRED TO GIVE CAREFUL SCRUTINY TO THE JAILHOUSE-SNITCH'S TESTIMONY.

POINT IV — THE EXTENDED LIFE TERM IS A GROSSLY EXCESSIVE SENTENCE.

POINT V — THE JUDGMENT OF CONVICTION MUST BE AMENDED TO REFLECT THE FACT THE JURY ACQUITTED DEFENDANT OF MURDER AND CONVICTED HIM OF THE LESSER-INCLUDED OFFENSE OF AGGRAVATED MANSLAUGHTER.

As for Point V, we agree, as does the State, the judgment of conviction is inaccurate and must be corrected. However, we are unpersuaded by the remaining arguments and affirm. We address each argument seriatim.

A

Defendant contends the admission of Hood's opinion there was a homicide was error. Defendant asserts such opinion not only exceeded the bounds of Hood's expertise as a physician, but also was one the jury was capable of reaching without the aid of an expert. Defendant argues by admitting this opinion, the court allowed Hood "to cloak his speculation about the cause and manner of death in the mantle of expertise." As we understand defendant's argument, Hood's opinion the father was the victim of a homicide improperly induced the jury to conclude the father died as the result of a homicide rather than of natural causes. We disagree with this contention.

We recited the relevant portions of Hood's and Arden's testimony to expose the frailties of defendant's argument. When

viewed in context, Hood did not proffer an opinion that exceeded the bounds of his expertise or improperly invade the jury's province of determining those facts that do not require expert testimony to understand. See N.J.R.E. 702. Hood made it eminently clear he did not know the cause of death. As for the manner of the death, for the purpose of providing statistical data to the government, Hood was required to check off the manner of death from a choice of five selections on the death certificate.

Hood concluded the most accurate choice under the circumstances was homicide. However, he acknowledged he could not state within a reasonable degree of medical certainty a homicide had occurred. Moreover, he made it clear his opinion of what constitutes a homicide is not the same as what constitutes a homicide under the law, and that his opinion had no bearing on the jury's task of determining whether a homicide had occurred.

Ironically, defendant's expert forensic pathologist shared the same opinions. Arden testified a medical examiner's opinion of the manner of a death is provided solely for providing vital statistics. More important, Arden noted a medical examiner's opinion a homicide has occurred is not a legal one and, further,

given the father's body was concealed, he would have certified the manner of death in this matter as a homicide.

The admissibility of evidence, including that of expert testimony, is a matter within the sound discretion of the trial court. State v. McGuire, 419 N.J. Super. 88, 123 (App. Div.), certif. denied, 208 N.J. 335 (2011). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling was so wide of the mark that a manifest denial of justice resulted.'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). For the reasons provided in our analysis of the experts' testimony, we are satisfied the court did not abuse its discretion in admitting the subject testimony provided by Dr. Hood.

B

On May 26, 2009, defendant was arrested and charged with desecrating human remains and terroristic threats. He was never released from custody thereafter. In August 2011, defendant was indicted for murder. Defendant filed a motion to dismiss all charges on the ground his rights to a speedy trial were violated. In opposition to the motion, the assistant prosecutor submitted a certification detailing the State's efforts to acquire evidence to substantiate the indictment for murder.

The court denied the motion, finding the certification provided an explanation for the delay and that it was not unreasonable. Among other things, the certification noted the evidence the State collected required extensive analyses by various laboratories, including an FBI laboratory in Virginia. Also contributing to the delay was some of the testing was going to destroy the evidence. The State was required to notify defendant and suspend testing until any issues he raised were resolved, causing further delay. Finally, although the trial court recognized there is an inherent prejudice if a defendant is in custody awaiting trial, defendant was not otherwise prejudiced by the delay.

Defendant contends the trial court erred when it denied his motion, asserting his rights to a speedy trial were violated, warranting a reversal. We disagree.

The United States and New Jersey Constitutions both guarantee a defendant a right to a speedy trial. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. In determining whether this right has been violated, courts must consider four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether and how the defendant asserted his right to a speedy trial; and (4) any prejudice to the defendant caused by the delay. Barker v. Wingo, 407 U.S. 514, 530-33, 92 S. Ct. 2182,

2192-93, 33 L. Ed. 2d 101, 116-19 (1972); State v. Szima, 70 N.J. 196, 200-01 (adopting the Barker test and noting that the right to a speedy trial is relative and depends upon the circumstances), cert. denied, 429 U.S. 896, 97 S. Ct. 259, 50 L. Ed. 2d 180 (1976).

No single factor under this four-part test is dispositive; rather, they are related and must be considered together, along with any "such other circumstances as may be relevant." Szima, supra, 70 N.J. at 201. The remedy for violating the right to a speedy trial is dismissal of the indictment. Barker, supra, 407 U.S. at 522, 92 S. Ct. at 2188, 33 L. Ed. 2d at 112.

Defendant bears the burden of establishing a violation of his speedy trial right. State v. Berezansky, 386 N.J. Super. 84, 99 (App. Div. 2006). In addition, a trial court's factual determination on a speedy trial issue "should not be overturned unless [it is] clearly erroneous." State v. Merlino, 153 N.J. Super. 12, 17 (App. Div. 1977).

Having fully considered the arguments, we affirm the denial of defendant's motion for substantially the same reasons expressed by the trial court. The court properly considered (1) the length of the delay, (2) the reasons for the delay, (3) whether and how the defendant asserted his right to a speedy trial, and (4) any prejudice to the defendant caused by the

delay, and correctly determined there was no basis to grant the motion. The explanation provided by the State in this complex matter put the delay in perspective and demonstrated why the delay was not unreasonable. Moreover, defendant failed to show the delay compromised his defense in any way.

C

Defendant contends H.A.'s testimony required the court to provide the cooperating witness charge. Defendant did not object to the jury charge at the time of trial. Accordingly, defendant's argument is subject to the plain error rule. R. 2:10-2.

The model cooperating witness charge states in relevant part:

> [The witness] has testified to facts which may show some involvement on [his] part in another criminal matter. The law requires that the testimony of such a witness be given careful scrutiny. In weighing his testimony, therefore, you may consider whether he has a special interest in the outcome of the case and whether his testimony was influenced by the hope or expectation of any favorable treatment or reward, or by any feelings of revenge or reprisal.
>
> If you believe this witness to be credible and worthy of belief, you have a right to convict the defendant on his testimony alone, provided, of course, that upon a consideration of the whole case, you are

> satisfied beyond a reasonable doubt of the defendant's guilt.
>
> [Model Jury Charge (Criminal), "Testimony of a Cooperating Co-Defendant or Witness" (2006).]

In other words, the cooperating witness instruction informs the jury a witness who has been implicated in a criminal matter may have provided testimony helpful to the State in exchange for the State's favorable treatment of his or her own criminal matter.

Here, the defense attorney skillfully cross-examined H.A., exacting from him he contacted the State to provide the evidence about which he testified solely to gain an advantage in his own matter. Moreover, the court instructed the jury on credibility, which adequately addressed any potential credibility issues raised by H.A.'s testimony. In light of the testimony that emerged during H.A.'s cross-examination and the charge on credibility, we reject defendant's contention the court committed plain error by failing to provide the cooperating witness charge.

D

Defendant maintains his sentence was excessive, but the record supports the findings challenged on appeal.

We review a "trial court's 'sentencing determination under a deferential standard of review.'" State v. Grate, 220 N.J.

317, 337 (2015) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)). We may "not substitute [our] judgment for the judgment of the sentencing court." Lawless, supra, 214 N.J. at 606. We must affirm a sentence if: (1) the trial court followed the sentencing guidelines; (2) its findings of fact and application of aggravating and mitigating factors were based on competent, credible evidence in the record; and (3) the application of the law to the facts does not "shock[] the judicial conscience." State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

At the time of sentencing, the court determined the following aggravating factors applied: three, N.J.S.A. 2C:44-1(a)(3) (the risk of reoffending); six, N.J.S.A. 2C:44-1(a)(6) (prior criminal record); and nine, N.J.S.A. 2C:44-1(a)(9) (the need to deter). The court also found mitigating factor four applied, N.J.S.A. 2C:44-1(b)(4) (substantial grounds existed to excuse or justify the conduct, but fail to establish a defense).

Defendant contends the court applied the first aggravating factor, N.J.S.A. 2C:44-1(a)(1) (the nature and circumstances of the offense, including whether it was committed in an especially heinous, cruel, or depraved manner), and maintains the consideration of such factor was error. However, the record

reveals that, although the court considered this factor, the court ultimately rejected it as inappropriate.

Defendant maintains the court failed to accord the appropriate weight to mitigating factor four. At sentencing, defendant argued he suffers from schizoaffective disorder. In support of this contention, defendant appended a partial transcript of the testimony of a psychologist who appeared on his behalf at a 2006 trial on a charge defendant committed voluntary manslaughter.

The court in the within matter considered the testimony and determined it would accord defendant's mental health history only "very slight weight" because, according to the psychologist's testimony, the disorder "waxes and wanes." The court also noted the information about defendant's condition was dated, and "[n]othing current" had been submitted. The court's comments revealed an understandable reticence to accord more weight to defendant's disorder because it affected defendant's behavior only intermittently, and there was no evidence this affliction played any role in the father's death.

Defendant's remaining arguments on sentencing are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

E

Finally, the judgment of conviction states the murder charge was amended to aggravated manslaughter. Both the State and defendant agree the judgment of conviction must be corrected to reflect the jury found defendant not guilty of first-degree murder and guilty of first-degree aggravated manslaughter. Accordingly, we remand this matter so the judgment may be amended to reflect the correct disposition of the murder charge.

We affirm defendant's convictions and sentence, but remand for the purpose of correcting the judgment of conviction in accordance with this opinion. We do not retain jurisdiction.