SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1033-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RANDY K. MANNING,

Defendant-Appellant.

Submitted October 31, 2017 – Decided February 7, 2018

Before Judges Fisher, Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 11-12-2005.

Joseph E. Krakora, Public Defender, attorney for appellant (Michael Confusione, Designated Counsel, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the brief.

PER CURIAM

Defendant Randy K. Manning appeals from his conviction for murder, N.J.S.A. 2C:11-3(a)(1), (2); possession of a weapon for

an unlawful purpose, N.J.S.A. 2C:39-4(a); unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); arson as a lesser-included offense of aggravated arson, N.J.S.A. 2C:17-1(b); two counts of desecration and disturbance of human remains, N.J.S.A. 2C:22-1(a)(1); two counts of hindering prosecution by concealing evidence and by giving false statements to the police, N.J.S.A. 2C:29-3(b)(1), (b)(4); and unlawful operation of a motor vehicle, N.J.S.A. 2C:20-10(b), for which he was sentenced to an aggregate term of life imprisonment. On appeal he argues:

> POINT 1
>
> THE TRIAL COURT ERRED IN DECLINING TO CHARGE ANY LESSER OFFENSES TO FIRST DEGREE MURDER.
>
> POINT 2
>
> THE TRIAL COURT ERRED IN NOT GRANTING SEVERANCE BECAUSE OF THE ANTAGONISTIC DEFENSES THAT DEVELOPED BETWEEN THE DEFENDANTS DURING TRIAL (plain error).
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> POINT 3
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS MADE TO POLICE.
>
> POINT 4
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED BY POLICE.
>
> POINT 5
>
> THE TRIAL COURT ERRED IN PERMITTING PAUL SCHWEDHELM TO TESTIFY AS AN EXPERT WITNESS.

POINT 6

THE TRIAL COURT ERRED BY PERMITTING LAY POLICE WITNESSES TO OFFER EXPERT TESTIMONY BEFORE THE JURY.

POINT 7

DEFENDANT'S RIGHT TO A FAIR JURY TRIAL WAS INFRINGED.

POINT 8

REFERENCE TO DEFENDANT'S REPRESENTATION BY A "PUBLIC DEFENDER" INFRINGED DEFENDANT'S RIGHT TO A FAIR JURY TRIAL.

POINT 9

DEFENDANT'S SENTENCE IS IMPROPER AND EXCESSIVE.

We agree with the thrust of defendant's arguments in Point 1 that the jury should have been instructed on lesser-included offenses to murder, and in Point 4 that the cell-phone records for the phone purportedly used by defendant should have been suppressed because police obtained them without judicial authorization. We therefore reverse.

I.

In his first point heading defendant contends, because he admitted in one of the statements to police that he accidently shot the victim, the trial judge erred when he declined his request to charge the jury on aggravated manslaughter and reckless manslaughter as lesser-included offenses to murder.

We recognize that proper jury charges are essential to a fair trial. State v. Green, 86 N.J. 281, 287 (1981). Courts must refrain from charging a jury on "an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." N.J.S.A. 2C:1-8(e). When a lesser-included instruction is requested by a defendant, we determine if the evidence provides a rational basis for a jury to acquit a defendant of the greater charge and find him or her guilty of a lesser offense. State v. Brent, 137 N.J. 107, 116-19 (1994). Although "sheer speculation does not constitute a rational basis," id. at 118, "the rational-basis test . . . imposes a low threshold," State v. Crisantos, 102 N.J. 265, 278 (1986), that warrants an instruction when the evidence "leaves room for dispute," ibid. (quoting State v. Sinclair, 49 N.J. 525, 542 (1967)). "A defendant is entitled to an instruction on a lesser offense supported by the evidence regardless of whether that charge is consistent with the theory of the defendant's defense." Brent, 137 N.J. at 118. See also Crisantos, 102 N.J. at 271; State v. Powell, 84 N.J. 305, 317 (1980). "A rational basis may exist, although the jury is likely to reject defendant's theory." State v. Mejia, 141 N.J. 475, 489 (1995). "[F]ailure to instruct the jury at the defendant's request on a lesser charge for which the evidence provides a rational

basis warrants reversal of the defendant's conviction." Brent, 137 N.J. at 118.

The State introduced the statement defendant made to Detective Lieutenant Robert Anzilotti during which defendant said he accidentally shot the victim. At trial, defendant testified that Anzilotti told him to admit the homicide by saying it was an accident, and that defendant did so to clear his girlfriend whom the police had threatened to arrest. Notwithstanding defendant's trial testimony that he resisted adopting Anzilotti's version because the number of shots militated against an accidental shooting and that "[f]our shots could never be an accident," the evidence in the record substantiated an instruction on lesser-included offenses to murder. In his statement, defendant denied pointing the gun at the victim, but admitted pointing it in his direction "[t]oward[] the door." He stated his intention was "to crank it" — meaning to rack the gun. He described the shots as "really quick" and "really fast." We conclude not that the testimony was truthful — that is a jury call — but that it was sufficient to compel lesser-included jury instructions. Instead of allowing the jury to determine if the statement was true, the judge concluded defendant repudiated the statement by testifying he gave it only because of Anzilotti's insistence and the threatened prosecution of his girlfriend. His ruling ignored the

threshold required for lesser-included offenses to be presented to the jury and removed a factual option the jury could have found. State v. Hampton, 61 N.J. 250, 271-72 (1972); State v. Boyle, 198 N.J. Super. 64, 73-74 (App. Div. 1984).

Unlike the cases cited by the State — which the trial judge echoed in ruling that the lesser-included charge was not warranted because the victim "was shot four times at close range, including three times in the head" — the medical examiner in this case presented no evidence of stippling or other proof of close-range shooting that would speak only of a purposeful or knowing murder. But see State v. Ramsey, 415 N.J. Super. 257, 271 (App. Div. 2010) (finding no rational basis for lesser included offenses to murder where victim was shot four times in the abdomen at close range — within five to ten feet). Indeed, the judge pointed to no evidence to support his conclusion that the victim was shot at "close range," and the State did not argue against the presentation of lesser-included offenses because there was evidence of close-range shots, but because the location of the wounds manifested only a purposeful or knowing state of mind. In light of the dearth of forensic evidence relating to the distance from which the shots were fired and the varying versions of events, a jury must decide which version to accept, and it must be instructed on the law that relates to all versions it might find.

We are constrained therefore to reverse defendant's conviction and remand the case for a new trial. We address some of the other issues raised by defendant that may be raised at or before that trial.

II.

We determine defendant's argument that the judge erred by failing to charge reckless or negligent injury or risk of injury to innocent persons is without sufficient merit to warrant discussion. R. 2:11-3(e)(2). The matter was not addressed to the trial court; we will not consider it. State v. Robinson, 200 N.J. 1, 20 (2009). Further, there is no evidence of an unintended victim so the charge is inapplicable to this case.

III.

Defendant contends on appeal, as he did before the motion judge, that he was misled about his status as a suspect; was unsure, in executing the Miranda[1] waiver form, of what he signed; did not ask for an attorney because he believed he did not need one; and did not know what he said could be used against him. He also alleges police misconduct.

After a two-day evidentiary hearing the motion judge found that, after police administered Miranda warnings to defendant, the

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

first interview session started at 12:44 p.m. and lasted until 6:29 a.m. Defendant took six breaks – lasting from fifteen minutes to nearly an hour – during that session, and "was given the opportunity for more breaks during this time, but defendant almost always declined." He was given food and drink. Defendant slept for eight hours in a holding cell after the first session ended and before he reinitiated the interview after again receiving Miranda warnings; the second session began at 2:27 p.m. and lasted just over one hour.

The motion judge considered both Miranda waiver forms and the video recording of defendant while the warnings were administered and as he signed the forms, and concluded the State met its burden of proving beyond a reasonable doubt defendant knowingly and voluntarily waived his Miranda rights prior to each interview session. The judge found "incredible and self-serving" "the sum of defendant's testimony" including his claims that "he was unaware of the nature of his interview, his rights, and the Miranda waiver form." He noted defendant "never expressed any questions or confusion while he was being administered his rights and executed the form without reservation. Additionally on cross-examination it was shown that defendant had previously been interviewed in conjunction with a 2004 criminal case, waived his Miranda rights through a written [form] and made statements to police." The

judge found defendant's claim that he did not know he was a suspect to be unimportant in determining whether the State met its burden.

The motion judge also rejected defendant's contentions that his statements were not voluntary because he was exhausted, received little food and water over the nearly twenty-hour interview, and because of the threats made to him and threats to prosecute his girlfriend, finding the actual questioning took place over only ten hours, and defendant was given "nearly [ten] breaks and [was] provided with food and drink." He also found telling defendant's appearance and demeanor during the recorded interviews: "awake and alert," "calm and relaxed and . . . joking and laughing with investigators throughout his interviews."

The judge also found the detectives' conduct as alleged by defendant — aggressively telling defendant they believed he was lying and continually challenging that his accounts were unbelievable — did "not rise to the level of police coercion or police deception." And the judge found defendant's allegation that police threatened his girlfriend with arrest if he did not confess to be incredible.

We must uphold the factual findings underlying the trial court's decision on a motion to suppress a statement so long as they are supported by sufficient credible evidence in the record. State v. Elders, 192 N.J. 224, 243 (2007). We should not disturb

a trial court's findings of fact because we might have reached a different conclusion. Id. at 244. The trial court's findings should only be disturbed if they are "so clearly mistaken" that the interests of justice demand their correction. Ibid. However, "[a] trial court's interpretation of the law . . . and the consequences that flow from established facts" are reviewed de novo. State v. Gamble, 218 N.J. 412, 425 (2014).

Because the record supports the motion judge's findings, and because we defer to his credibility findings, State v. S.S., 229 N.J. 360, 380-81 (2017), we affirm the denial of defendant's motion substantially for the reasons expressed by the motion judge in his thorough written opinion.

We add only that although defendant was not immediately told he was a suspect, police administered Miranda warnings before questioning him. The administration of Miranda warnings itself "strongly suggest[s], if not scream[s] out, that a person is a suspect." State v. Nyhammer, 197 N.J. 383, 407 (2009). See also State v. Roach, 146 N.J. 208, 226-28 (1996) (finding a knowing, intelligent, and voluntary waiver where defendant believed he was being questioned as a witness and not a suspect, but where defendant had experience with the criminal justice system and there was no evidence that his statements were extracted by unfair means). Defendant was promptly confronted with inconsistencies

in his initial version of events and evidence already uncovered by the police, signaling defendant was more than a person being questioned. Even if the detectives heatedly confronted defendant with their disbelief in his inconsistent statements, there is nothing in the record — as the motion judge found — to conclude the police used inappropriate psychological or physical coercion. See State v. Galloway, 133 N.J. 631, 654 (1993) (holding the use of "psychologically-oriented technique[s]" during questioning is not inherently coercive). The motion judge properly denied defendant's motion to suppress his statement.

IV.

On August 16, 2011, a Bergen County Prosecutor's Office detective submitted an AT&T Exigent Circumstances Form requesting subscriber, call records, and call records with location and precision location (mobile locator tool) from August 15, 2011 until the date and time of the request for a phone believed to have been used by defendant. On the form, the detective described the exigent circumstances: "Suspect is armed and considered extremely dangerous. Poses a threat to law enforcement."

Defendant's motion to suppress those records was denied. The State counters defendant's argument in Point 4 that the denial of his motion to suppress cell phone records was error, arguing the motion judge correctly ruled exigency justified obtaining that

evidence without a warrant, relying on State v. Earls, 214 N.J. 564 (2013).

The motion judge read Earls as leaving "the door open for exigent circumstances" and other recognized exceptions. He found the warrantless collection of evidence was justified because, at the point in the investigation when the data was requested, "the situation was extremely tense and dangerous" based on the evidence collected thus far. The judge noted that police knew the victim was shot and no gun had been found, "leading to the conclusion that [the suspect was] armed and dangerous." He also considered that officers "knew that they were dealing with an individual who attempted to conceal the gruesome crime" and found police had "legitimate concerns that evidence . . . in the hands of this individual or known to be at a location by this individual could be lost or destroyed if they failed to act," albeit without a warrant. The judge, relating his experience with the issuance of communications data warrants, said he understood "the length of time it takes to prepare [the necessary] affidavits" to obtain such a warrant, and concluded that "viewing the totalit[y] of the circumstances at the time the cell phone records were requested," and given the "potential harm to the well[-]being of the public" if a potentially armed suspect remained at large, "it [was]

objectively reasonable that detectives . . . request[ed] the cell phone records under [the] exigent circumstances exception."

A trial court's factual findings in deciding a motion to suppress must be upheld on appeal unless those findings are not supported by sufficient credible evidence in the record or are "so clearly mistaken" that the interests of justice require correction. Elders, 192 N.J. at 243-44. A court's conclusions of law, however, are reviewed de novo. Gamble, 218 N.J. at 425. We conclude the judge misapprehended Earls, and that a warrant was required for the records.

Our Supreme Court has long recognized that State constitutional privacy protections require law enforcement to obtain a warrant for telephone billing records.[2] State v. Hunt, 91 N.J. 338 (1982); State v. Mollica, 114 N.J. 329 (1989); see also State v. Lunsford, 226 N.J. 129, 136-141 (2016). Indeed, after Hunt, "the State took a cautious approach and consistently sought warrants to obtain telephone toll records." Lunsford, 226 N.J. at 140.

[2] "Call-detail information includes the phone numbers dialed out from defendant's cell phone, the phone numbers dialed in to that phone, and the date, time, and duration of those calls. That information is often referred to as 'telephone billing records' or 'telephone toll records.'" Lunsford, 226 N.J. at 133.

The Lunsford Court separately mentioned telephone toll records and cell-phone location data in holding both are entitled to "a constitutionally protected right to privacy." Id. at 136. The distinction is important because Earls was limited to exigent applications for cell-phone location information, recognizing the urgent need for such information when a person's life is endangered.[3] 214 N.J. at 589. The Court's 2013 holding was prospective only, instructing, "[f]or prior cases, the requirement in place at the time an investigation was conducted remains in effect. Starting January 12, 2010, law enforcement officials had to obtain a court order to get cell-site information under N.J.S.A. 2A:156-29(e)." Id. at 591.

The cited section is part of a statute governing access to "electronic communication service" providers' subscriber or customer records or information. N.J.S.A. 2A:156A-29(b). Law enforcement agencies may obtain records, location information for

[3] The police in Earls sought defendant's cell-phone location information because he threatened to harm his girlfriend after discovering she cooperated with police, and, in light of prior allegations of assault of the girlfriend by defendant, police wanted to protect her. Earls, 214 N.J. at 570-71.

a device or other subscriber or customer information — except for contents not applicable to this case[4] — when

> (1) the law enforcement agency has obtained a warrant;
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> (2) the law enforcement agency has obtained the consent of the subscriber or customer to the disclosure;
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> (3) the law enforcement agency has obtained a court order for such disclosure under subsection e. of this section;[5] or
>
> (4) with respect to only the location information for a subscriber's or customer's mobile or wireless communications device and not to a record or other subscriber or customer information, the law enforcement agency believes in good faith that an emergency involving danger of death or serious bodily injury to the subscriber or customer requires disclosure without delay of information relating to the emergency.
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> [N.J.S.A. 2A:156A-29(c).]

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[4] The exception under subsection (a) of the statute allows law enforcement agencies to obtain the contents of an electronic communication if they obtain a warrant; subsection (f) allows disclosure pursuant to a grand jury or trial subpoena of enumerated subscriber or customer information; "[b]ecause [subsection (f)] conflicts with the standard set in Hunt and Mollica, it has not been followed." Lunsford, 226 N.J. at 152.

[5] Law enforcement may obtain the records by court order, mentioned in subsection (c)(3), if an officer "offers specific and articulable facts showing that there are reasonable grounds to believe that the record or other information pertaining to a subscriber or customer of an electronic service . . . is relevant and material to an ongoing criminal investigation." N.J.S.A. 2A:156A-29(e).

As the Earls Court recognized, "[t]he statute contains an exception for location information for mobile devices when a 'law enforcement agency believes in good faith that an emergency involving danger of death or serious bodily injury to the subscriber or customer' exists." Earls, 214 N.J. at 588 (quoting N.J.S.A. 2A:156A-29(c)(4)). No section other than N.J.S.A. 2A:156A-29(c)(4) allows disclosure of subscriber information for an emergency — and that information is limited to location information.

In Lunsford,[6] the Court reviewed the historical protections accorded by New Jersey to citizens' privacy interest in telephone billing records, and noted its prior observation, in Hunt, that allowing "seizures" of telephone billing records "without warrants can pose significant dangers to political liberty." 226 N.J. at 138 (quoting Hunt, 91 N.J. at 347). The Lunsford Court declined to overturn Hunt and, instead, "retain[ed] direct judicial oversight as part of the process to obtain telephone billing records." Id. at 154 (emphasis added). Thus, judicial

[6] We recognize the motion judge denied defendant's motion to suppress prior to the 2016 Lunsford decision, and that Lunsford's holding is prospective only. 226 N.J. at 155. The historical perspective offered by the Court, however, aids our analysis of this issue.

authorization is still[7] required when law enforcement seeks records and information, except for location information if "an emergency involving danger of death or serious bodily injury to the subscriber or customer requires disclosure without delay of information relating to the emergency," N.J.S.A. 2A:156A-29(c)(4) — the only statutory exception to the warrant requirement. We conclude the detective did not follow the long-standing approach the attorney general said was followed since Hunt when he failed to obtain a warrant. The failure of the detective to apply for a warrant or court order requires the suppression of the cell-phone records supplied for the phone used by defendant.

V.

Our remand for a new trial obviates any need for us to address defendant's arguments in Points 2, 7, 8 and 9. We do not know who will testify at that trial and therefore will not address Points 5 and 6 except to note that a witness need not publish scholarly articles or serve on the faculty of an institution of higher learning to qualify as an expert. Under N.J.R.E. 702 a witness

[7] The Lunsford Court announced its prospective ruling that, instead of establishing probable cause, "law enforcement must demonstrate 'specific and articulable facts showing that there are reasonable grounds to believe that' the [telephone toll and billing] records sought are 'relevant and material to an ongoing criminal investigation.'" 226 N.J. at 155 (quoting N.J.S.A. 2A:156A-29(e)).

may be "qualified as an expert by knowledge, skill, experience, training, or education" and must have sufficient expertise to offer the intended testimony. To demonstrate "sufficient expertise," an expert witness "must possess the minimal technical training and knowledge essential to the expression of a meaningful and reliable opinion." State v. Frost, 242 N.J. Super. 601, 615 (App. Div. 1990). Expertise may be demonstrated "by occupational experience or by scientific study." Ibid. In other words, an expert "may be qualified 'by study without practice or by practice without study.'" Ibid. (quoting State v. Chatman, 156 N.J. Super. 35, 41 (App. Div. 1978)). Further, the "[e]vidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience." Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002). Typically, the courts take a "generous approach" when qualifying experts "based on training and experience." State v. Jenewicz, 193 N.J. 440, 454 (2008).

Any witness who testifies as a cell phone location data expert may demonstrate expertise by evidence of working for over a decade with cellular service companies with responsibility for installing, maintaining, and optimizing cell networks. See United States v. Banks, 93 F. Supp. 3d 1237, 1251-52 (D. Kan. 2015). We leave to the discretion of the trial judge whether a proffered

expert qualifies. State v. Berry, 140 N.J. 280, 293 (1995). We also note that a party calling an expert must comply with Rule 3:13-3(b)(1)(I), which requires discovery of

> names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except as otherwise provided in R. 3:10-3, if this information is not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial.

Finally, we recognize that the Supreme Court, in State v. Johnson, 120 N.J. 263, 294-95 (1990), explicitly rejected a defendant's argument that the failure to qualify a detective as an expert witness in footprint identification rendered that officer's comparison of a crime-scene print to defendant's shoe inadmissible. The Court noted that shoeprint patterns are often readily recognizable and within the capabilities of the average person to observe, without any scientific or similarly skilled determination. Id. at 294. It therefore adopted the rationale of courts in other jurisdictions that "footprint identification does not require qualification of an expert." Ibid. We note with approval that the shoeprint expert in this case did not give an

opinion whether the print found on the cardboard matched the sneakers recovered from the sewer grate. He testified only that they were a "class match," leaving to the jury the ultimate determination.

Reversed and remanded for a new trial. We do not retain jurisdiction.