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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1244-13T1

STATE OF NEW JERSEY,

Plaintiff-Appellant/
Cross-Respondent,

v.

MEGAN PLANK,

Defendant-Respondent/
Cross-Appellant.

Argued March 7, 2017 – Decided February 28, 2018

Before Judges Fisher, Ostrer and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No. 10-
11-1145.

Kimberly L. Donnelly, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued
the cause for appellant/cross-respondent
(Grace H. Park, Acting Union County
Prosecutor, attorney; Milton S. Leibowitz,
Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

Jay L. Wilensky, Assistant Deputy Public
Defender, argued the cause for respondent/
cross-appellant (Joseph E. Krakora, Public

Defender, attorney; Jay L. Wilensky, of counsel and on the brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

A jury found defendant Megan Plank guilty of distributing heroin, which caused the deaths of Christopher Coppola and Sara Malaker. The issue of causation was controversial, because Malaker had health problems, and Coppola ingested other substances as well as heroin. The State's key witness on causation, the county's new medical examiner, relied on the victims' autopsies. But, he did not perform, observe, or supervise them. The autopsies were the work of his predecessor, who was living out of state by the time of trial. On appeal, defendant principally argues the medical examiner's testimony violated her constitutional right of confrontation. We agree and reverse her convictions of two counts of first-degree strict liability for causing drug-induced death. N.J.S.A. 2C:35-9(a). However, we affirm her conviction of third-degree distribution of heroin. N.J.S.A. 2C:35-5(a)(1), -5(b)(3).

I.

Proof of defendant's heroin distribution was circumstantial. The jury heard from no one who saw defendant possess or distribute the drug. The State introduced a series of text messages between defendant and Malaker in which, the State contended, the two agreed

to meet to transfer the heroin, which they referred to only as "it." According to the texts, defendant arranged to meet Malaker, who was in a car with Coppola, at the house of "fat boy Jon" in the Finderne section of Bridgewater. Malaker wanted to meet elsewhere, but defendant declined, saying she did not want to "drive with it." Malaker texted she felt uncomfortable "doing it" in front of others, and asked if she could pull defendant aside and "do this privately." Defendant agreed. The text messages ended as Malaker approached her destination.

Malaker's mother testified her daughter and Coppola borrowed her car shortly before defendant and Malaker texted. Cellphone tower records showed that Malaker travelled in the evening rush hour between her mother's home in Union County and Bridgewater. Before the trip, Coppola withdrew \$260 from an ATM. The State argued Malaker used part of that to buy the heroin.

The next day, Malaker's mother found the lifeless bodies of her daughter and Coppola in her daughter's bedroom. Coppola was sprawled on the bed. Malaker was hunched over a trash basket. There were heroin packets in the room – five empty and five full. Coppola had only \$165 in his wallet.

Although defendant did not testify, she relied on the second of two recorded police interviews that the State introduced. In the second interview – on the day of her arrest and almost a year

after the deaths – she admitted she met Malaker at Fat Boy Jon's house, but she thought Malaker wanted "weed." After Malaker arrived and defendant realized she wanted heroin, defendant told her she did not have it and she should get it elsewhere. The defense suggested that Malaker may have obtained heroin from a person she called repeatedly after she met defendant, or that Coppola, who had a history of heroin abuse, may have already possessed it.

The State challenged defendant's credibility. In her initial statement, she denied any contact with Malaker or Coppola shortly before their deaths. Even after she was confronted with the texts, she denied making them, stating someone borrowed her phone while she was at Fat Boy Jon's house. The State contended defendant and Malaker expressed caution in their texts because their transaction involved a more serious drug than marijuana. The State also argued the numerous voice conversations between defendant and Malaker made it unlikely that defendant misunderstood what Malaker wanted.

Shortly after the deaths, the county medical examiner at the time, Zhongxue Hua, M.D., wrote in Coppola's and Malaker's autopsy reports that the causes of death were "[p]ending further studies" and their manner of death was "[p]ending investigation."¹ After

¹ The reports stated the autopsies were performed the day after the victims were found, but were signed nine days later.

receiving toxicology reports from an outside laboratory, Dr. Hua amended his autopsy reports with one-page addenda. He simply stated that Coppola's cause of death was "[a]cute intoxication of heroin, Xanax, Clonazepam and cannabinoids"; and that Malaker's cause of death was "[a]cute morphine intoxication", and the "contributory cause" was "[b]ronchial asthma." The manner of death in both cases was "Accident."²

By the time of trial almost four years later, Junaid Shaikh, M.D., had succeeded Dr. Hua as county medical examiner and testified as to the cause of death. Although Dr. Hua was living in New York, the State declined to call him as a witness, claiming it was a matter of cost. Dr. Shaikh testified Dr. Hua had been asked to leave his position, but did not elaborate about the reasons.

Dr. Shaikh did not observe or supervise the autopsies, nor did Dr. Hua consult with him. He explained that he reviewed the case for the first time several months before the trial. He reviewed Dr. Hua's autopsy reports; the autopsy photographs; Dr. Hua's histopathology reports; the chief medical investigator's

² Dr. Hua's autopsy reports were marked for identification, but not introduced into evidence.

Reports of Investigation by Medical Examiner (RIMEs);³ photographs of Malaker and Coppola in the bedroom where Malaker's mother found them; and the toxicology reports of the outside laboratory.⁴

In presenting his opinion, Dr. Shaikh repeated Dr. Hua's gross findings and observations of Malaker and Coppola. Asked to explain the internal examinations of the two victims, Dr. Shaikh paraphrased for the jury Dr. Hua's findings as to each major body area and system. He included Dr. Hua's findings that Malaker's brain was swollen, there was mucous in the bronchi, and the lungs were hyperinflated. In addition to Dr. Hua's findings, Dr. Shaikh found independent evidence of lividity in Malaker from scene photographs he reviewed.

Dr. Shaikh repeated Dr. Hua's findings in his histopathology reports. In particular, Malaker had bronchial asthma, which was consistent with Dr. Hua's gross findings regarding her lungs. There were no significant histopathology findings regarding Coppola. Notably, Dr. Shaikh criticized Dr. Hua's histopathology reports as conclusory, explaining that he should have described in detail what he observed on the slides. Yet, Dr. Shaikh did not

³ Although the chief medical investigator, Mark Bannworth, prepared the RIMEs, Dr. Hua apparently reviewed them, as there are initials, although indiscernible, on the "M.E." line.

⁴ The RIMEs, the toxicology reports, the histopathology reports, and the autopsy photographs, were also marked for identification, but not introduced into evidence.

review those slides himself, and stated they contained no information that affected the cause of death.

Dr. Shaikh reviewed the effect of heroin on the body, as well as its interaction with bronchial asthma. He also discussed the interaction of heroin, benzodiazepines and cannabinoids, with respect to Coppola. Dr. Shaikh explained that heroin breaks down in the body into a metabolite, 6-monoacetylmorphine or 6-MAM, and then into free morphine. Both 6-MAM and free morphine were found in Coppola, reflecting heroin use. Only free morphine was found in Malaker, which could have come from heroin, or morphine itself – Dr. Shaikh did not know. However, no morphine was found in the bedroom where the victims died.

Dr. Shaikh testified that he "agree[d] with the finding" of Dr. Hua that Malaker died of acute morphine intoxication, although bronchial asthma contributed to her death. He stated that "[a]s a routine practice, we use the drugs as the primary cause of death and list any other contributory causes that might be there." Dr. Shaikh noted that the amount of free morphine in Malaker's system was .026 milligrams per liter, or 26 nanograms per milliliter, and the toxic level was .5 milligrams per liter, roughly twenty times that. He also conceded that Malaker had in her system less than half the amount of a therapeutic dose of morphine. He added that the toxic effect of certain drugs, including morphine, often

depends on other factors personal to the drug user. He explained that he viewed Malaker's bronchial asthma as an ongoing condition and the morphine as a "triggering factor." He conceded that Malaker's hyperinflated lung could have been a sign of a bronchial asthma attack.

Dr. Shaikh also joined Dr. Hua's conclusion, quoted above, regarding Coppola's cause of death. Dr. Shaikh reviewed the quantities of other drugs in Coppola's system, and concluded: "[W]hen there are multitudes of drug present in the system, it's always appropriate as a convention of medical examiners that it implicates all of them, as long as there are drugs that can cause a person's demise. So, we use that as the cause of death"

He declined to opine as to the significance of the level of drugs in Coppola's blood, stating repeatedly he was not a toxicologist. However, he also stated that: "some of the levels are high"; the free morphine in Coppola's system, .100 milligrams per liter, which was roughly four times that of Malaker, was in the toxic range (although he earlier had testified that the "usual toxic level" was .5 milligrams); and the drugs in Coppola's system had a synergistic effect. He agreed that the "combination of the[] four drugs [in his system] . . . caused him to die" and he could not say that "it was just the morphine."

A forensic pathologist from the outside testing laboratory, Wendy Adams, Ph.D., discussed the toxicology test results. She conceded that the level of free morphine in Malaker's system was below that found in people who received morphine therapeutically, but that a person with less tolerance could succumb to lesser quantities. She noted a study of two reported fatalities in which free morphine levels were 70 and 350 nanograms per milliliter – Coppola's level was 100 – but admitted that the two fatalities did not describe a lethal range. She cited another study of eight fatalities, in which the blood level was 360 nanograms per milliliter. She also opined that the benzodiazepines in Coppola's system were within or below therapeutic levels. She agreed that use of the cited ranges was an insufficient basis to determine cause of death in a particular person. Contrary to Dr. Shaikh, she asserted that the drugs in Coppola's system had an additive – as opposed to a synergistic – effect.

The sole witness for the defense was forensic pathologist, Charles Wetli, M.D., who addressed Malaker's cause of death, but not Coppola's. In addition to the documents Dr. Shaikh reviewed, Dr. Wetli reviewed the slides from Malaker's histopathology examination, and Malaker's medical records, which showed a history of bronchial asthma, anxiety, and panic attacks. Dr. Wetli opined, based on the state of Malaker's lungs, her body's position at time

of death, and her medical history, that she died not from a heroin overdose, but succumbed instead to acute asthmatic bronchitis. He opined that the asthma attack was triggered by the panic and anxiety of seeing her boyfriend overdosing. He asserted the level of free morphine in her body was too low to have been listed as a contributing cause. On cross-examination, the State confronted Dr. Wetli with two studies that reported cases of asthma attacks precipitated by snorting heroin.

The jury found defendant guilty of distributing heroin, and distributing heroin that Malaker and Coppola ingested, causing their deaths. At sentencing, the court was satisfied defendant met the prerequisites for a downgraded sentence, and imposed concurrent five-year terms for the two first-degree counts, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and a concurrent flat four-year term on the third-degree count.⁵

The State filed an appeal of the sentence. Defendant cross-appealed, raising the following points:

POINT I

THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS VIOLATED BY THE TRIAL COURT PERMITTING THE STATE TO PRESENT ITS MEDICAL EVIDENCE VIA A WITNESS WHO HAD NO INVOLVEMENT IN THE INVESTIGATION OF THE DEATHS. U.S. CONST., AMENDS. VI, XIV; N.J. CONST. (1947), ART. 1, PARS. 9, 10.

⁵ The court granted defendant bail pending appeal.

POINT II

THE TRIAL COURT ERRED TO DEFENDANT'S GREAT PREJUDICE BY DECLINING TO CHARGE THE JURY AS TO JOINT POSSESSION.

POINT III

THE TRIAL COURT ERRED IN DENYING BOTH DEFENDANT'S MOTION FOR DISMISSAL AT THE CONCLUSION OF THE STATE'S CASE AND FOR A NEW TRIAL. U.S. CONST., AMEND. XIV; N.J. CONST. (1947), ART. 1, PARS. 9, 10.

- A. The State Failed to Sustain Its Burden of Introducing Sufficient Evidence to Support the Charges.
- B. The Verdict was Manifestly Against the Weight of the Evidence.

POINT IV

THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE IN DENYING DISCOVERY AS TO THE DECEDENTS' MEDICAL RECORDS. U.S. CONST., AMEND. XIV; N.J. CONST. (1947), ART. 1, PARS. 9, 10.

POINT V

THE STATE PRESENTED INCOMPLETE AND MISLEADING TESTIMONY TO THE GRAND JURY, AND PROVIDED DEFICIENT LEGAL INSTRUCTIONS, NECESSITATING VACATION OF THE CONVICTIONS AND DISMISSAL OF THE INDICTMENT. U.S. CONST., AMEND. XIV; N.J. CONST. (1947), ART. 1, PAR. 8.

- A. The State Presented Incomplete and Misleading Testimony As to a Crucial Issue.
- B. The State's Legal Instructions to the Grand Jury Were Insufficient and Misleading.

II.

The principal issue on appeal is whether Dr. Shaikh's testimony violated defendant's right of confrontation.⁶ We are guided by principles our Supreme Court enunciated in Bass, 224 N.J. at 285. The Bass Court applied Confrontation Clause principles established in Crawford v. Washington, 541 U.S. 36 (2004), to a case in which an assistant county medical examiner testified based on the autopsy of a recently deceased county medical examiner. Bass, 224 N.J. at 311-21. Bass was charged

⁶ Although defense counsel did not expressly reference the Confrontation Clause in objecting to Dr. Shaikh's testimony, she preserved the issue by seeking to exercise her rights and objecting as necessary. See State v. Wilson, 227 N.J. 534, 543 (2017) (noting Confrontation Clause issue preserved under similar circumstances); State v. Bass, 224 N.J. 285, 312 (2016). Before trial began, defense counsel objected to Dr. Shaikh's testimony because the State provided no report of his opinion. The court overruled the objection. With the prosecutor's concurrence, the court ruled Dr. Shaikh could do no more than "rubber stamp what Dr. Hua said" and "not deviat[e] from that one iota." Before Dr. Shaikh testified, the defense renewed its objection, contending that by presenting Dr. Hua's opinions through Dr. Shaikh, the State would impermissibly rely on hearsay, and deprive the defense of its ability to cross-examine Dr. Hua. The court overruled the objection, stating that Dr. Shaikh could rely on Dr. Hua's findings, consistent with N.J.R.E. 703, and the defense could call Dr. Hua if it wanted, which defense counsel responded it was not obliged to do.

with the fatal shooting of one victim, Jessica Shabazz, and the non-fatal shooting of another, James Sinclair. Id. at 290. The assistant medical examiner, Dr. Frederick DiCarlo, read significant portions of the report of the deceased examiner, Dr. Jay Peacock, who opined that Shabazz bled as she ran away from the defendant, and died from a single gunshot wound to the back. Id. at 318.

As in Bass, we must first decide whether the absent medical examiner's report was "testimonial." Id. at 316. That is a threshold question because the United States Supreme Court held in Crawford that the confrontation right applies to a "testimonial statement" against a defendant. 541 U.S. at 68. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 68-69. A prosecutor may introduce "testimonial" hearsay statements only if the criminal defendant is able to cross-examine the declarant, or the declarant is unavailable and the defendant had a prior opportunity to cross-examine. Id. at 53-54.

Applying a "fact-specific analysis," Bass, 224 N.J. at 317 n.9, the Bass Court noted an active homicide investigation had already begun when the autopsy was performed; an investigator for the county prosecutor observed the autopsy; and the medical

examiner transmitted evidence to the investigator. Id. at 316-17. Based on those facts, the Supreme Court held that the autopsy report was testimonial because its "primary purpose . . . was to establish facts for later use in the prosecution of [the] case." Id. at 317; see also Davis v. Washington, 547 U.S. 813, 822 (2006).

We reach the same conclusion here. As the RIMes noted, the reason for the investigation was the "suspicious" circumstances of the two deaths. Drug use was obvious, as the RIMes stated an empty glycine bag and a straw were found on a shiny disk on the bed near Coppola's body. Virtually any fatal drug overdose case raises the specter of a violation of N.J.S.A. 2C:35-9. The medical examiner was required to perform an autopsy because the deaths were suspicious. See N.J.S.A. 52:17B-86 (mandating investigation of human deaths "under suspicious circumstances"); N.J.A.C. 13:49-1.1(a)(2) (same). Dr. Hua provided his autopsy report to the county prosecutor. See N.J.S.A. 52:17B-87, -88. Dr. Shaikh explained that "[a]ll the medical/legal autopsies or the autopsies performed by the medical examiner are done . . . in a forensic setting. . . . cognizant of preserving evidence and chain of custody." At least by the time Dr. Hua amended his reports to conclude that heroin or morphine intoxication was a cause of death, the primary purpose was to establish facts for later use at a trial.

In Bass, Dr. DiCarlo reviewed Dr. Peacock's autopsy report and photographs, inspected the crime scene, and examined the clothing Shabazz wore when she died, but Dr. DiCarlo did not write his own report. 224 N.J. at 317-18. Rather, he wrote a one-sentence letter to the prosecutor stating that he reviewed Dr. Peacock's "post-mortem examination and autopsy report" and agreed with his findings. Id. at 318. Over objection, the State prompted Dr. DiCarlo at trial to "read the contents of various portions of Dr. Peacock's autopsy report, as if [he] had been present at the autopsy and Dr. Peacock's findings were his own." Ibid. Included among Dr. DiCarlo's readings was Dr. Peacock's ultimate conclusions as to cause and manner of death. Ibid.

The Court found this violated the defendant's right of confrontation.⁷ The Court began with the premise established in State v. Michaels, 219 N.J. 1 (2014), that "a truly independent reviewer or supervisor of testing results can testify to those results and to his or her conclusions about those results, without violating a defendant's confrontation rights, if" the independent reviewer or supervisor meets three requirements. Bass, 224 N.J. at 315 (quoting Michaels, 219 N.J. at 45-46). The testifying

⁷ However, the Court did not reverse the defendant's convictions on that ground because it had already found the trial court committed reversible error in limiting the defendant's cross-examination of Sinclair. Id. at 291.

reviewer must (1) be "knowledgeable about the testing process"; (2) "independently verif[y] the correctness of the machine-tested processes and results"; and (3) "form[] an independent conclusion about the results." Ibid. (quoting Michaels, 219 N.J. at 45-46). The Court found those principles applied in Bass, notwithstanding that Michaels and a companion case, State v. Roach, 219 N.J. 58 (2014), involved "the evaluation of machine-generated data" – blood analysis in Michaels and DNA analysis in Roach – and Bass involved an autopsy. Bass, 224 N.J. at 316.

The Court held that Dr. DiCarlo's testimony did not meet the Michaels standard. Id. at 318. Dr. DiCarlo "was permitted to engage in precisely the type of 'parroting' of the autopsy report that has been held to violate the Confrontation Clause." Id. at 319. The Court reached that conclusion notwithstanding that "Dr. DiCarlo was asked to generally comment about autopsy techniques based on his own expertise, and offered independent observations and conclusions on several autopsy photographs." Id. at 318. "[A] testimonial report that is not admitted into evidence can engender a violation of the Confrontation Clause if that report is 'integral' to the testimony of a substitute witness." Id. at 317. The Court noted that "Dr. DiCarlo could have testified as an independent reviewer of the information generated by the autopsy," and offered an opinion "entirely on the basis of his own review

of the evidence." Id. at 319. His failure to do so offended the Confrontation Clause. Ibid.⁸

Applying the principles set forth in Bass, we conclude that Dr. Shaikh's testimony violated defendant's confrontation rights. Like Dr. Peacock's opinion in Bass, Dr. Hua's opinion was integral to his successor's testimony. Dr. Shaikh did not even write a one-sentence report, as did Dr. DiCarlo. He headlined his testimony by expressing his agreement with, and adopting verbatim, Dr. Hua's conclusion as to the cause and manner of death of each victim. Dr. Shaikh also paraphrased at length Dr. Hua's findings regarding his external and internal examinations.

Dr. Shaikh did not independently verify the correctness of Dr. Hua's results; notably, he failed to view the histopathology slides, contending they would not have changed his conclusions. Although Dr. Shaikh, like Dr. DiCarlo, offered independent observations and conclusions, Dr. Shaikh's opinion was intertwined with Dr. Hua's. In summation, the prosecutor highlighted that "Dr. Shaikh said he reviewed the autopsy report that was . . .

⁸ The Court recognized medical examiners may sometimes become unavailable when "a medical examiner who conducted an autopsy dies, becomes incapacitated or relocates out of state before trial." Ibid. However, with proper planning, a substitute expert can still comply with the command of the Confrontation Clause. Id. at 320.

done by Dr. Hua, and he agreed with his findings" In sum, the State presented the opinions of two experts. Yet, confrontation of the first was denied entirely, and confrontation of the second was limited by the second's reliance on the first.⁹

As defendant preserved her confrontation clause claim, we must reverse the conviction unless we are persuaded that the error was "harmless beyond a reasonable doubt." See Bass, 224 N.J. at 307-08 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). Although the evidence of heroin ingestion was overwhelming, we are not satisfied, beyond a reasonable doubt, that the violation of defendant's confrontation rights was harmless.

Once the jury determined that defendant distributed heroin, the critical issue was causation. The State was required to prove that the ingestion of the heroin was "an antecedent but for which the death would not have occurred"; and the death was not "too remote . . . to have a just bearing on the defendant's liability", or it was not "too dependent upon conduct of another person which was unrelated to the . . . ingestion of the [heroin] or its effect as to have a just bearing on the defendant's liability." N.J.S.A.

⁹ We note that the court, in delivering the model charge on consideration of expert opinion in its final instructions to the jury, identified all the experts who testified at trial except Dr. Shaikh. No apparent explanation was given. However, the omission only exacerbates the prejudice of Dr. Shaikh's testimony.

2C:35-9(b). The State's proof of causation rested upon the dual opinions of Dr. Shaikh and Dr. Hua.

As a result of the deprivation of defendant's right of confrontation, neither opinion was fully tested. Dr. Shaikh repeated the causation opinions of Dr. Hua, which lacked the "why and wherefore" that supported them. See Townsend v. Pierre, 221 N.J. 36, 54 (2015). Dr. Hua's autopsy addenda simply provided his revised conclusions without any explanation or discussion.

Also problematic was Dr. Shaikh's statement regarding the medical examiner's standard operating procedure for cases involving multiple causes of death. Regarding Malaker, he stated that "as a routine practice" medical examiners cite drug use as the principal cause of death, and any underlying health condition as a contributing cause. Dr. Shaikh did not expressly state that heroin use was a "but for" cause of death in Malaker's particular case.

In connection with Coppola, he stated "it's always appropriate as a convention of medical examiners" to blame all of the drugs in a person's system, "as long as there are drugs that can cause a person's demise." Dr. Shaikh did not expressly state that heroin was a "but for" cause of Coppola's death. Thus, we are not persuaded, beyond a reasonable doubt, that denial of defendant's confrontation right was harmless. We reverse

defendant's two first-degree convictions for causing drug-induced deaths, and remand for a new trial.

III.

Defendant's remaining points deserve relatively brief discussion. We are unpersuaded by defendant's argument that the trial court was obliged to charge joint possession as a lesser-included offense of distribution. There was no "rational basis . . . in the evidence for a jury" to acquit defendant of distribution and convict her of joint possession. See State v. Savage, 172 N.J. 374, 396 (2002). In her recorded interview, defendant denied possessing heroin at all. The State's circumstantial evidence was that she possessed it, and then sold it to Malaker, who used Coppola's funds. There was no evidence in the record for the jury to conclude that defendant jointly possessed the heroin with Malaker or Coppola. Defendant misplaces reliance on State v. Morrison, 188 N.J. 2, 19-20 (2006), where the evidence supported a joint purchase by the defendant and a cohort, who later died.

We also do not disturb the trial court's denial of defendant's motion for acquittal at the close of the State's case, and for a new trial after the verdict. Applying the familiar and indulgent standard of State v. Reyes, 50 N.J. 454, 458-59 (1967), the court decided that the State had presented sufficient evidence on all

three counts for the case to go to the jury, although the judge acknowledged that the evidence of distribution was marginal. We apply the same standard of review as does the trial court. State v. Dekowski, 218 N.J. 596, 608 (2014). We agree with the trial court's assessment that the evidence of distribution was far from overwhelming. Yet, the circumstantial evidence was sufficient, substantially for the reasons the trial judge set forth. As for the first-degree counts, putting aside the confrontation right violation, a reasonable jury could find causation and guilt based on the favorable opinions of Drs. Hua, Shaikh and Adams, and the "favorable inferences which reasonably could be drawn therefrom." Reyes, 50 N.J. at 459.

We also discern no error in the trial court's denial of defendant's pretrial motion to compel the State to produce Coppola's medical records, and Malaker's psychological and medical records (with the exception of records of her asthmatic condition for one year prior to her death, which the court ordered released). We lack the benefit of defendant's written motion and supporting certification, if any. See Cmty. Hosp. Grp. v. Blume Goldfaden, 381 N.J. Super. 119, 127 (App. Div. 2005) (stating an appellate court is not "obliged to attempt review of an issue when the relevant portions of the record are not included"). There also is no indication that the State possessed or controlled the

requested records, or that defendant provided notice to the victims' estates, which likely possessed them. See State v. Kane, 449 N.J. Super. 119, 132-34 (App. Div. 2017) (finding State was not obliged to produce medical records of victim that it did not possess or control, and suggesting that victim was entitled to notice of defendant's request for her mental health records); N.J.R.E. 506(a) (noting that physician-patient privilege may be claimed by the personal representative of a deceased patient); N.J.R.E. 505 (by incorporating N.J.R.E. 504 standard, providing that psychologist-patient privilege may be claimed by personal representative of deceased patient).¹⁰

In any event, defendant did not demonstrate that the requested production of privileged medical records was essential to protect her constitutional right to a fair trial. See Kane, 449 N.J. Super. at 135 (stating that privilege is not subject to a general equitable balancing with the requester's need; rather, the court may pierce it "only in the most narrow of circumstances, such as where a privilege is in conflict with a defendant's right to a constitutionally guaranteed fair trial" (quoting State v. Mauti, 208 N.J. 519, 538 (2012))). In sum, we discern no abuse of discretion. Id. at 132.

¹⁰ Trial preceded adoption of N.J.R.E. 534, which consolidated the privileges of mental health patients.

We also reject defendant's contention that the trial court erred in denying her motion to dismiss the indictment. Defendant contends that a prosecutor's office detective mischaracterized, before the grand jury, statements made by the man known as Fat Boy Jon, who gave numerous – in some respects conflicting – statements to law enforcement about defendant's possession and distribution of heroin at his house.¹¹ The motion to dismiss is "directed to the sound discretion of the court." State v. Williams, 441 N.J. Super. 266, 272 (App. Div. 2015). Furthermore, "dismissal of an indictment is a draconian remedy and should not be exercised except on the clearest and plainest ground." Id. at 271-72 (quoting State v. Peterkin, 272 N.J. Super. 25, 38 (App. Div. 1988)). Even assuming the detective mischaracterized Fat Boy Jon's statements by presenting them as coherent, instead of inconsistent and equivocal, that is not sufficient to warrant reversal. Even absent those statements, the "grand jury could reasonably believe that a crime occurred and the defendant committed it." State v. Nicholson, 451 N.J. Super. 534, 541-42 (App. Div. 2017) (quoting State v. Feliciano, 224 N.J. 351, 380-81 (2016)). Indeed, the

¹¹ Although the prosecutor expressed the intention to call him as a witness at trial, he reportedly was prepared to invoke his right to remain silent, and the State did not call him.

petit jury reached that conclusion beyond a reasonable doubt without Fat Boy Jon's testimony.

IV.

The State contends the court erred in imposing a sentence in the second-degree range, citing State v. Megargel, 143 N.J. 484, 496-97 (1996). We may not reach the issue, as the State's notice of appeal was not filed within ten days, as required by N.J.S.A. 2C:44-1(f)(2). The time limit is strictly enforced. State v. Sanders, 107 N.J. 609, 616 (1987); State v. Watson, 183 N.J. Super. 481, 484 (App. Div. 1982). After oral argument, the State filed a motion to relax the deadline, but the time-frame is jurisdictional. Ibid.; see also State v. Gould, 352 N.J. Super. 313, 318-19 (App. Div. 2002) (vacating for lack of jurisdiction court's prior order granting State's motion to file late notice of appeal and dismissing appeal). Therefore, we are constrained to deny the motion, despite the minor deviation from the deadline.

V.

In sum, we affirm the conviction of third-degree distribution of heroin; reverse the convictions of first-degree strict liability causing drug-induced deaths; and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION