

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-1533-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC R. SHAW a/k/a KENNETH
WILLIAMS, and TYRONE
JOHNSON,

Defendant-Appellant.

Argued January 17, 2018 — Decided March 13, 2018

Before Judges Fuentes, Manahan, and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No. 14-
05-0433.

Tamar Y. Lerer, Assistant Deputy Public
Defender, argued the case for appellant
(Joseph E. Krakora, Public Defender, attorney;
Tamar Y. Lerer, of counsel and on the briefs).

Jane C. Schuster, Deputy Attorney General,
argued the cause for respondent (Gurbir S.
Grewal, Attorney General, attorney; Jane C.
Schuster, of counsel and on the brief).

PER CURIAM

A Grand Jury indicted defendant Eric Shaw on one count of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b). The court denied defendant's motion to suppress a statement he gave to the police. At trial, a jury convicted defendant and the judge sentenced him to an eight-year term of imprisonment with five years of parole ineligibility. In this appeal, defendant contends the trial court erred by denying his motion to suppress his videotaped statement. We disagree and affirm. We gather the following facts from the record developed at the suppression motion.

City of Plainfield Police Officer Christopher Donovan testified that on the night of October 29, 2013, he was advised a gunshot victim was in the emergency room of the Muhlenberg Medical Center. He responded to the hospital with the intent of interviewing the person whom he believed was the victim of this crime. Defendant was in pain from a gunshot wound to his leg. Donovan testified that despite this, defendant was able to understand and respond to his questions. Donovan spoke with defendant for about thirty minutes, but not continuously, because medical personnel were attending to him. Donovan testified that defendant's account of events changed several times before saying what actually happened.

Plainfield Detective Thomas Collina testified that he also went to the hospital in response to the report that a gunshot victim was there. Upon arrival, Officer Donovan told him that defendant's "story was a little off. Something wasn't making sense. He was changing his story a bit." Collina also noted that defendant was in pain. Collina spoke with defendant for about thirty seconds before he and Detective Jean Calvin recorded defendant's statement on a cell phone. Defendant told Collina that he was a passenger in a car; he said the shooting was a "mistake." According to defendant, "the weapon had gone off in the car" and hit him in the leg. He claimed "his friend[,] who was driving[,] had shot the gun."

Defendant did not tell the detectives that he did not want to make a statement at any time during this interview. The police officers did not restrain defendant's movements nor advise him he was not free to leave the hospital. The record also shows the officers did not give defendant Miranda¹ warnings before taking his recorded statement. The hospital records in evidence reported that defendant had been administered morphine at 11:12 p.m., which was before his statement was recorded from 11:46 pm to 11:52 p.m.

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

Lieutenant Kevin O'Brien testified he also responded to the hospital because of the report of a gunshot victim. He was aware there had been reports of shootings in the east and west ends of Plainfield that evening. While driving into the hospital parking lot, he saw a male, whom he identified as Mitchell Britton, standing by a car. The car "looked like [the] description of a car that was . . . involved in a shooting earlier." Britton told O'Brien that he was there because a friend had been shot. Britton went into the hospital to visit him. After Britton came back out, O'Brien advised Britton about the east end shooting and asked for consent to search his vehicle. Britton said he would sign the consent but then went back into the hospital. O'Brien looked into the car from the outside and saw what appeared to be a bullet hole around the center console area. He went into the hospital briefly, saw the wound on defendant's leg and went back outside. When Britton again came out of the hospital, he consented to a search of the vehicle. A gun was found in the trunk.

The trial judge denied defendant's motion to suppress. The judge found the officers' were "credible and believable witnesses[.]" The judge determined that a Miranda warning was not needed because defendant was not in custody when he gave his statement to the police. The judge observed "the only thing that kept him wired to that hospital setting was the IV that was in his

arm." Defendant was not arrested, charged or incarcerated at that time. Although there were inconsistencies in his statement, the police officers did not doubt that the shooting was accidental. Defendant's concern was about his friend and not that he would be charged. The judge found the videotaped statement showed defendant to be in pain, but that "his will was not overborne," concluding therefore, that defendant's statement was freely and voluntarily given.

Before the trial commenced, the trial judge discussed how his "preliminary comments to the jury would introduce the subject matter of this case." Defendant's counsel offered to stipulate that defendant "is among a class of persons who is forbidden from owning a firearm." The State rejected the stipulation because "it's important for jurors to be informed during voir dire the person is charged with possession of a weapon by a convicted felon so it will be questioned adequately." The court suggested telling the jury that "this defendant had previously been convicted of a criminal offense which would preclude him from ever possessing a handgun." Defense counsel observed that because defendant's prior conviction was for a nonviolent drug offense, the conviction should not be "sanitized." At trial, the court instructed the jury that the parties entered three stipulations.

The parties agree that the defendant was convicted of possession of a controlled dangerous substance with intent to distribute prior to this indictment. The parties also agree that the gun recovered by police in this case is an operable handgun. The parties further agree that Mitchell Britton has previously pled guilty to possession of this gun and has been sentenced on this charge.

The jury returned a guilty verdict on the certain persons not to have weapons offense.

On appeal, defendant raises these issues:

I. BECAUSE DEFENDANT'S STATEMENT WAS ELICITED IN VIOLATION OF HIS RIGHTS AGAINST SELF-INCRIMINATION, WAS INVOLUNTARY, AND WAS UNRELIABLE, THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE CONFESSION.

A. Introduction.

B. Because Defendant Was Subjected To Custodial Interrogation At The Hospital, The Failure to Inform Him of His Miranda Rights Renders The Statement Inadmissible.

C. Because The Effect of Both The Severe Pain And The Pain Medication On Defendant's Cognitive State Rendered His Statement Involuntary And Unreliable, It Should Have Been Suppressed.

D. Conclusion.

II. THE TRIAL COURT'S ERRONEOUS AND MISLEADING INSTRUCTION TELLING THE JURY IT MAY INFER THAT IF THE GUN WAS IN THE CAR IT BELONGED TO ALL OF THE OCCUPANTS — EVEN IF IT ALSO FOUND FACTS GIVING RISE TO THE INFERENCE THAT THE GUN BELONGED SOLELY TO THE DRIVER — NECESSITATES REVERSAL OF DEFENDANT'S CONVICTION.

III. THE TRIAL COURT'S DENIAL OF THE DEFENSE REQUEST TO FULLY SANITIZE THE FACT OF DEFENDANT'S PRIOR CONVICTION WAS ERRONEOUS, PREJUDICIAL, AND NECESSITATES REVERSAL OF DEFENDANT'S CONVICTION.

IV. THE CUMULATIVE IMPACT OF THE ERRORS DENIED DEFENDANT A FAIR TRIAL.

V. DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE.

The defendant raises the following points in his reply-letter brief:

I. POLICE OFFICERS CANNOT AVOID MIRANDIZING A PERSON WHO THEY ARE INTERROGATING AND WHO IS UNABLE TO LEAVE THE SCENE OF THE INTERROGATION MERELY BY LABELING THAT PERSON A "VICTIM" INSTEAD OF A "SUSPECT."

II. THE STANDARD OF REVIEW FOR INSTRUCTIONAL ERRORS NOT OBJECTED TO BELOW IS PLAIN ERROR. MOREOVER, AN INSTRUCTION IS NOT SHIELDED FROM REVIEW SIMPLY BECAUSE IT STEMS FROM THE MODEL CHARGE.

III. THE TRIAL COURT'S REJECTION OF THE DEFENSE STIPULATION THAT DEFENDANT WAS PROHIBITED FROM POSSESSING A WEAPON REQUIRES REVERSAL OF HIS CONVICTION.

Defendant appeals the trial court's order denying his suppression motion. We defer to the trial court's factual findings on a motion to suppress unless they were "clearly mistaken" such that appellate intervention is necessary in "the interests of justice." State v. Elders, 192 N.J. 224, 244 (2007) (quoting

State v. Johnson, 42 N.J. 146, 162 (1964)). Our review of "purely legal conclusions" is plenary. State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010). There is no merit to defendant's contention that the court erred in rejecting defendant's motion to suppress.

"[T]o safeguard a suspect's Fifth Amendment right against self-incrimination, confessions obtained during custodial interrogations are inadmissible as evidence unless the defendant has been advised of his or her constitutional rights." State v. Hubbard, 222 N.J. 249, 265 (2015) (quoting Miranda, 384 U.S. at 492). Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 265-66 (quoting Miranda, 384 U.S. at 444). "[I]f the questioning is simply part of an investigation and is not targeted at the individual because she or he is a suspect, the rights provided by Miranda are not implicated." Id. at 266 (quoting State v. Timmendequas, 161 N.J. 515, 614-15 (1999)).

In determining whether a custodial interrogation has occurred, a court must examine all circumstances surrounding the interrogation. State v. O'Loughlin, 270 N.J. Super. 472, 477 (App. Div. 1994). "The critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom

of action based on the objective circumstances." Ibid. (quoting State v. P.Z., 152 N.J. 86, 103 (1997)). The inquiry is "'how a reasonable [person] in the suspect's position would have understood his situation.'" Ibid. (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)). The State must also prove that defendant's statement was freely and voluntarily given. State v. Hreha, 217 N.J. 368, 383 (2014).

We agree with the trial court here that when the police questioned defendant at the hospital he was not in custody. A hospital room generally lacks the "compelling atmosphere inherent in the process of in-custody interrogation." State v. Zucconi, 50 N.J. 361, 364 (1967) (quoting Miranda v. Arizona, 384 U.S. 436, 478 (1966)). Defendant was not restrained, arrested or detained by the police. The questioning was relatively short and the nature of the questions were to elicit what had occurred. Defendant could not leave because of his injuries, not because of the police.

Defendant's reliance on State v. O'Loughlin, 270 N.J. Super. 472, 485 (App. Div. 1999) is misplaced. In that case, defendant was under "continuous police supervision" for nearly three hours before being interrogated while she was sitting on a gurney. By that time, the officers had permitted defendant's passenger to leave, thereby singling defendant out for special treatment. A

reasonable person in defendant's circumstances would have believed that he or she was not free to leave. Id. at 488.

That was not the case here where there was no supervision or singling out of defendant. There was ample support for the conclusion that defendant was not in custody when he gave his statement to the police.

For the first time on appeal, defendant alleges that the statement was not freely and voluntarily given because defendant was in pain and had been given morphine. Whether a statement is "voluntary" is a finding of fact to be determined under the totality of circumstances. State v. Galloway, 133 N.J. 631, 654 (1993) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). That a person is in the hospital does not preclude them from giving a voluntary statement. See State v. Figueroa, 212 N.J. Super. 343, 350 (App. Div. 1986) (admission of statements made by defendant while in hospital bed deemed appropriate where there was no "overbearing or overreaching" during the interrogation).

The trial court's factual findings must be upheld if they are "supported by sufficient credible evidence in the record." State v. Handy, 206 N.J. 39, 44 (2011) (quoting Elders, 192 N.J. at 243). Here, the court relied on the testimony of the officers and on its review of the videotaped statement, concluding that the

police questioning did not overbear defendant's will. The trial court considered that defendant was in pain and had been given medication. However, defendant was able to understand and answer the questions and it did not appear to the court that his will was overborne. We have no reason to disagree with these findings. See State v. S.S., 229 N.J. 360, 375 (2017).

Defendant contends the trial court's jury instruction about the possession of a weapon in a vehicle was confusing because it did not explain how the three inferences in N.J.S.A. 2C:39-2(a) "interacted and specifically that they were mutually exclusive." This objection was not raised at trial, but the defense did object to instructing the jury on the "presumptions" under N.J.S.A. 2C:39-2. The court overruled the objection, explaining that these were inferences not presumptions.

Because the issue raised here was not raised to the trial court, we review defendant's contentions under a plain error standard, meaning that our inquiry is to determine whether this was an error that was "clearly capable of producing an unjust result." R. 2:10-2. Under that standard, reversal is required if there was error "sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." State v. Green, 447 N.J. Super. 317, 325 (App. Div. 2016) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

"[A]ppropriate and proper jury charges are essential to a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016). We consider the charge as a whole in determining whether it was prejudicial. State v. Figueroa, 190 N.J. 219, 246 (2007). Model jury charges are often helpful to trial courts performing this important function. See Moquill v. CB Commercial Real Estate Grp., 162 N.J. 449, 466 (2000) (holding that instructions given in accordance with model charges, or which closely track model charges, are generally not considered erroneous).

There was nothing prejudicial about the judge's charge to the jury in this case. The portion of the charge at issue tracked the model charge for N.J.S.A. 2C:39-2. See Model Jury Charges (Criminal), "Possession Of Firearms, Weapons, Destructive Devices, Silencers or Explosives In A Vehicle (N.J.S.A. 2C:39-2)" (approved Mar. 1993).

Looking at the challenged charge, it was accurate on the law and it did not misinform or mislead the jury. This charge was not confusing or "clearly capable of producing an unjust result." R. 2:10-2.

Defendant contends the trial court erred by rejecting its request to fully sanitize the fact of defendant's prior conviction. The Supreme Court recently addressed this issue in State v. Bailey, __ N.J. __ (2018). There, the Court considered,

the propriety of [a] conviction under the Certain Persons Not to Have Weapons Statute, N.J.S.A. 2C:39-7, when the redacted evidence prevented the jury from confirming that defendant's prior conviction was indeed an enumerated offense under the statute.

[Id. at 9.]

In Bailey, defendant would not agree to stipulate that he was convicted of an offense that would have prohibited him from possessing a weapon. The court held that:

a certain persons conviction cannot stand without proof that a defendant has been previously convicted of an offense specifically enumerated in the certain persons statute. When a defendant refuses to stipulate to a predicate offense under the certain persons statute, the State shall produce evidence of the predicate offense: the judgment of conviction with the unredacted nature of the offense, the degree of the offense, and the date of conviction.

[Id. at 31.]

However, where there is a stipulation, "evidence of the predicate offense is extremely limited: '[t]he most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that . . . bar a convict from possessing a gun[.]'" Ibid. (quoting Old Chief v. United States, 519 U.S. 172, 190-91 (1997)).

Defendant's initial request would not have instructed the jury that defendant had a prior conviction that brought him within

the certain persons statute. N.J.S.A. 2C:39-7. This was the same issue addressed in Bailey. Without information about a qualifying conviction, the State would not have met its burden of proof with respect to one of the elements of the offense. When the State rejected this proposed stipulation, the defense suggested identifying the nature of the prior conviction because it had not involved an act of violence. That was a strategic choice by the defense, not an error by the court.

Defendant contends the trial suffered from "cumulative errors" that deprived him of a fair trial. See State v. Simms, 224 N.J. 393, 407 (2016) (reversing conviction based on the "cumulative effect of the errors"). In light of our opinion, this argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

We reject defendant's contention that his sentence was excessive. Our review of a sentencing determination is limited. State v. Roth, 95 N.J. 334, 364-65 (1984). We review a judge's sentencing decision under an abuse of discretion standard. State v. Fuentes, 217 N.J. 57, 70 (2014). We must determine whether:

- (1) the sentencing guidelines were 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.'

[Ibid. (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

The sentencing guidelines were not violated in this case. Defendant concedes that he was sentenced within the range, but that it was near the maximum. Where the aggravating factors predominate, the sentence imposed can be toward the higher end of the range, giving appropriate weight to all the factors. State v. Case, 220 N.J. 49, 64-65 (2014).

Here, the court found aggravating factors: N.J.S.A. 2C:44-1(a)(3) the risk of re-offense; (6) the extent of defendant's prior criminal record and the seriousness of the offenses; and (9) the need to deter. Defendant contends that the court focused on defendant's record and not the seriousness of the offense. Also, defendant argues that the court should have found mitigating factors: N.J.S.A. 2C:44-1(b)(1), that defendant did not cause or threaten to cause serious harm; and (2) that defendant did not contemplate that his conduct would harm or threaten to cause serious harm.

We perceive no mistake of discretion by the court. The trial court considered the two suggested mitigating factors and rejected their application. The court reasoned that defendant's conduct caused serious harm that should have been contemplated.

Similarly, the court's analysis of the aggravating factors was not mistaken given the offense and defendant's past criminal record. There was nothing erroneous about the analysis nor did the sentence shock one's conscience, given the nature of the offense.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION