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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-2587-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MOHAMMAD A. KHAN,

Defendant-Appellant.

Argued November 14, 2017 – Decided February 12, 2018

Before Judges Fisher and Sumners.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Indictment
No. 14-04-0326.

John S. Furlong, argued the cause for
appellant (Furlong and Krasny, attorneys;
Andrew M. Ferencevych, on the brief).

Sarah Lichter, Deputy Attorney General, argued
the cause for respondent (Christopher S.
Porrino, Attorney General, attorney; Sarah
Lichter, of counsel and on the brief).

PER CURIAM

Defendant Mohammad A. Khan was driving southbound on I-295
in West Deptford at 11:22 p.m. when his vehicle rear-ended another

vehicle causing the tragic death of one of that vehicle's four occupants. A jury found defendant guilty as a first-time offender of driving while intoxicated (DWI), N.J.S.A. 39:4-50(a), and second-degree vehicular homicide, N.J.S.A. 2C:11-5(a). He was later sentenced to a six-year prison term subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant appeals arguing:

POINT ONE

THE TRIAL COURT ERRED WHEN IT FAILED TO DEFINE NEGLIGENCE AFTER THE JURY SPECIFICALLY REQUESTED THAT DEFINITION DURING ITS DELIBERATIONS.

POINT TWO

THE TRIAL COURT ERRED IN ADMITTING STATEMENTS OF DEFENDANT MADE PRIOR TO BEING INFORMED OF HIS MIRANDA¹ RIGHTS.

POINT THREE

THE TRIAL COURT SENTENCED DEFENDANT WITHOUT PROPERLY WEIGHING THE AGGRAVATING AND MITIGATING FACTORS AND WHETHER IT WAS APPROPRIATE TO SENTENCE APPELLANT UNDER N.J.S.[A.] 2C:44-1[f](2).

We affirm regarding the admission of defendant's statement, but reverse and remand for retrial on the basis that the trial court should have responded to the jury's question seeking a definition of negligence before the jury reached its verdict.

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

In addressing defendant's contention in Point I, we focus on the evidence related to defendant's trial strategy, the jury's deliberations, and the court's response to the jury's question. In opening and closing arguments, defendant contended that he was not guilty of vehicular homicide because his conduct was negligent not reckless. Our vehicular homicide statute requires the State to prove that defendant drove recklessly and caused the death of another person. N.J.S.A. 2C:11-5(a). As defined by N.J.S.A. 2C:2-2(b)(3), "[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." Where the State proves a defendant was guilty of DWI, there is "an inference that the defendant was driving recklessly." N.J.S.A. 2C:11-5(a). A blood alcohol content (BAC) of 0.08 percent or more is a per se DWI violation. N.J.S.A. 39:4-50(a).

Defendant did not dispute the State's proofs that his blood drawn at the hospital four hours after the accident indicated his BAC was 0.081 percent with an uncertainty factor of plus minus 0.003 percent. According to testimony of the investigating state trooper, defendant stated the accident was caused when he fell asleep at the wheel moments before the collision. Because the trooper detected alcohol on defendant's breath, along with

defendant's slow, slurred speech, and droopy eyes, he asked defendant if he had been drinking. Defendant replied, that "he did not drink" because "[i]t was against his religion". Unswayed by the remarks, the trooper conducted three field sobriety tests on defendant, which he failed.

Defendant also posited the theory that the victim's car had just pulled onto the highway traffic from the shoulder lane through the testimony of another trooper, who testified for the State regarding an accident report he prepared based on his analysis of the accident. The trooper concluded the victim's car was traveling 51 mph, where the speed limit was 65 mph, with a pre-impact average speed of 48 mph prior to impact by defendant's vehicle. He stated defendant's vehicle was traveling between 105 mph and 113 mph prior to impact, with an average pre-impact speed of 96 mph. Defendant asserted the trooper's assessment of his vehicle's speed was exaggerated because a video depicts that seconds before the accident, his vehicle was travelling at the same rate of speed as other vehicles on the highway.

After deliberating for a few hours, the jury submitted a question to the court asking for the definition of negligence. Although defense counsel did not initially request such a charge, he proposed the court provide the jury "either the definition of civil negligence from the civil jury charge or, in the alternative,

an abbreviated version of [N.J.S.A.] 2C:2-3 causation charge. The court declined both the jury's request and counsel's alternative, with no objection from the State. The court explained that since the charge defined recklessness, an element of the vehicular homicide statute offense, it was not appropriate to define negligence, which was not an element of the offense. After the court advised the jury in a note stating, "no, I will not give you the definition of negligence," the jury continued deliberating for about eight minutes before retiring for the day. Before the jury left, the court instructed the jury that once all the jurors reported to the jury room the next morning, it could continue deliberations. Prior to dismissing the attorneys, the court informed them that, if they wanted to, they could submit briefs regarding the propriety of giving the jury the definition of negligence as it requested. Later that evening, the defense faxed a letter brief to the court.

While the jury resumed its deliberations at 9:00 the next morning, the court was conducting a conference in chambers with the attorneys to discuss defendant's legal submission concerning the jury's request for a definition of negligence. At some time between 9:10 a.m. and 9:15 a.m., the jury advised the court that it reached a verdict. Before the jury returned to the courtroom to announce its verdict, defendant made a motion for a mistrial

because the jury reached a verdict without receiving the requested guidance on negligence. The court denied the motion, determining it was unpersuaded by defendant's arguments to reverse its decision not to instruct the jury on negligence. The jury was then brought into the courtroom and rendered its guilty verdict.

A defendant's right to a fair criminal trial requires that the jury be given understandable jury instructions. State v. Galicia, 210 N.J. 364, 386 (2012). Consistent with that principle, erroneous instructions on material issues are presumed to be reversible error. State v. Marshall, 173 N.J. 343, 359 (2002). In some cases, the trial court must do more than read the elements of the offense being charged to enable the jury to fulfill its obligations. State v. Concepcion, 111 N.J. 373, 379 (1988). Thus, "[a]n instruction that is appropriate in one case may not be sufficient for another case." Ibid.

One such case is State v. Atwater, 400 N.J. Super. 319 (App. Div. 2008). There, the defendant was charged with vehicular homicide and was not allowed to argue negligence in summation, "nor did [the court] respond to the jury's questions by comparing recklessness with other mental states." Id. at 332. Evidence was presented by the two medical examiners that the victims' deaths were accidental. Ibid. And since the jury's questions "made it clear that they were confused on the mental state required for a

finding of guilt on vehicular homicide[,] " we concluded the trial court should have "clarif[ied] the jury's confusion on the requisite mental state" by distinguishing between recklessness and negligence. Ibid.

The situation before us calls for a similar result. In fact, even more so here, because the jury specifically requested the definition of negligence. While the court was correct in its reflection that negligence was not an element of vehicular homicide, it should have honored the jury's request given that it was not contrary to our court rules and evidentiary standards, and would have helped the jury determine if defendant's conduct was reckless, an element of the offense.

We disagree with the State's position that the court was correct in refusing to define negligence because it was irrelevant whether defendant's conduct amounted to negligence and the definition would have distracted the jury from considering defendant's proper state of mind. We view the jury's request as an effort to clarify the meaning of reckless, a required element of vehicular homicide. The fact that the jury deliberated for approximately twenty minutes after its request was declined, suggests that it may not have had an understanding of the recklessness element of vehicular homicide to properly consider whether the State had met its burden of proof and defaulted by

finding defendant guilty. Accordingly, we reverse and remand for a new trial. On remand, the definition of negligence should only be provided if requested by the jury.

Although our reversal on the jury charge disposes of the appeal, we will address the Miranda issue raised by defendant to provide guidance at the retrial.

As noted, when the investigating trooper arrived at the accident scene and asked defendant whether he had been drinking, defendant replied he does not drink because it is against his religion. Defendant filed a pre-trial motion sought to exclude the entire statement. After hearing the testimony of the trooper and defendant, as well as the arguments, the court only agreed to exclude defendant's reference to his religion.

Defendant argues the court erred because the trooper was conducting a custodial interrogation of an accident investigation, which under Berkemer v. McCarty, 468 U.S. 420 (1984), required that he be advised of his Miranda rights before he was questioned.

We disagree. Miranda protects a defendant's right against self-incrimination based upon "the Fifth Amendment to the United States Constitution and this state's common law, now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503." State v. S.S., 229 N.J. 360, 381 (2017) (citation omitted). Here, defendant's statement that he was not drinking was not

incriminating but exculpatory. Consequently, Miranda did not protect the statement.

Moreover, even if we somehow consider the statement was incriminating, the court properly allowed its admission. The court found that the trooper was investigating a serious motor vehicle accident, and upon observing that defendant appeared to be inebriated, the trooper had the right to ask defendant if he had been drinking. The court properly reasoned the trooper was not required to advise defendant of his Miranda rights to remain silent and not to incriminate himself until the trooper determined there was probable cause to arrest defendant after defendant failed the field sobriety tests.

Because we are remanding this matter for retrial, we need not address defendant's argument in Point III regarding the court's weighing of the aggravating and mitigating factors and decision not to sentence defendant in the third-degree range rather than the second-degree range.

Affirmed in part, reversed in part and remanded for retrial.

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


CLERK OF THE APPELLATE DIVISION