SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4388-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERICK P. UZCATEGUI,

Defendant-Appellant.

Submitted February 6, 2018 – Decided March 13, 2018

Before Judges Carroll, Leone and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 12-12-2451.

Joseph E. Krakora, Public Defender, attorney for appellant (Amira R. Scurato, Assistant Deputy Public Defender, and Margaret McLane, Assistant Deputy Public Defender, of counsel and on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent (Steven A. Yomtov, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Erick P. Uzcategui appeals his conviction and eight-year prison sentence for vehicular homicide. Based on our review of the record in light of the applicable legal principles, we affirm.

I.

We glean the following facts from the trial record.[1] At approximately 3:10 a.m. on Thanksgiving Day, November 25, 2010, defendant was driving northbound on the Garden State Parkway in Toms River. Defendant's BMW collided with the back of a Jeep Cherokee driven by Jason Marles, an off-duty Ocean Gate police officer, who died as a result of his injuries.

Approximately ten to fifteen New Jersey State Police (NJSP) Troopers responded to the scene, including Trooper Richard Herr. Fire and emergency medical personnel also responded, as did numerous police officers from local jurisdictions. The investigation was led by NJSP Detective Sergeant John Bentivegna.

Upon his arrival at 3:47 a.m., Herr observed defendant's BMW on the right shoulder of the roadway, with damage to its front end and driver's side. Herr also observed Marles's Jeep overturned and engulfed in flames, in the woods to the right side of the northbound lanes.

[1] Facts drawn from pretrial suppression hearings are more fully set forth under the pertinent issue headings.

Fifteen to twenty minutes later, Herr spoke with defendant and observed his breath smelled of alcohol. Herr asked defendant to perform two field sobriety tests, both of which he performed unsatisfactorily. The video of the tests was played for the jury. Herr placed defendant under arrest, and Trooper Alan Lewis, Jr. read defendant his Miranda[2] rights, advising him he was under arrest for driving while intoxicated (DWI), and that the person he hit was a police officer.

Detective Bentivegna instructed Herr to transport defendant to Community Medical Center in Toms River so defendant's blood could be drawn. Herr left the accident scene at about 4:34 a.m., driving first to the Pleasant Plains Barracks to retrieve a blood specimen kit, and then to the hospital for the blood draw.

At the hospital, Herr asked for defendant's consent for the blood to be taken. However, he did not have defendant sign a consent form. Rather, a blood draw form was signed by Herr and Janice Weber, the emergency room technician who drew defendant's blood. Weber recalled that defendant smelled very strongly of alcohol, and he was laughing and acting in a very strange and erratic manner.

Weber drew defendant's blood at 5:00 a.m. and provided Herr

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

with the vials. At 5:33 a.m., Herr transported defendant and the specimen kit to the Bass River Barracks. He placed defendant in a holding cell and secured the blood specimen kit in a refrigerated evidence locker. The blood vials were later taken to a laboratory in Pennsylvania for testing.

Defendant was questioned by NJSP Detective Colin McNulty and NJSP Sergeant Matt Razukas between 10:30 a.m. and 12:10 p.m. on the day of the accident. McNulty read Miranda warnings to defendant, and defendant signed the Miranda card. Defendant then gave a recorded statement, which was also played for the jury.

Defendant told the officers the previous night he went out with friends after work, first to a hotel room party and then to a bar in Seaside. He admitted consuming four or five drinks over the course of several hours, and some cocaine around 11:30 p.m. He stated he had his last drink about one hour before leaving the bar. He offered to drive his friends home because he did not feel impaired, and he was "definitely the best one to drive out of the group."

Defendant claimed he was driving northbound on the Parkway at about sixty-five or seventy-five miles per hour, in the center lane, when he was hit by a white vehicle (not the Jeep) from the right side. His vehicle then moved to the left, hit the median, spun around, and ended up on the right side of the roadway. He

did not recall the Jeep ever being directly in front of him. When he exited his vehicle he saw the Jeep on fire, in the woods on the right side of the roadway.

Defendant stated he lost his balance during the field sobriety tests because he was nervous and shaky from the accident, and he generally did not have great balance. He denied that his alcohol ingestion affected his performance on the tests.

Early in the questioning, defendant acknowledged being informed at the accident scene the other driver had died. At the end of the questioning, however, he expressed surprise when told he would be charged with vehicular homicide.

Defendant's blood samples were analyzed at Atlantic Diagnostic Laboratory in Pennsylvania. Dr. William E. Wingert, a forensic toxicologist and clinical chemist, certified the results of the blood testing performed by chemists who reported to him at the lab. Wingert testified defendant's blood test results showed a blood alcohol content (BAC) of .155 milligrams per deciliter, which exceeded the standard for driving under the influence in New Jersey. Defendant's blood also tested positive for 274 nanograms per milliliter of benzoylecgonine, a cocaine metabolite.

Robert Pandina, Ph.D., the Director of the Center of Alcohol Studies at Rutgers University, testified for the State as an expert in psychopharmacology, developmental neuropsychology, and the

effects of drugs and alcohol on human physiology and behavior. He opined that extrapolating from defendant's .155 BAC test result at 5:00 a.m., between 3:10 and 3:25 a.m. defendant's BAC would have been .185, plus or minus .01 percent.

Pandina further opined that this level of impairment would have affected defendant's judgment, as well as his physical abilities in a manner consistent with the video of his field sobriety tests. Pandina conceded, however, that environmental conditions, or a person's medical conditions, could affect his or her performance on such tests.

Pandina testified that the amount of cocaine metabolite found in defendant's blood was consistent with defendant's statement to the police about his use of cocaine earlier in the evening. Moreover, he opined that when cocaine and alcohol are taken together, the effect is "greater than taking either of the two drugs separately."

Finally, Pandina opined that, given defendant's blood test results, at the time of the accident defendant "was under the acute effects of alcohol and . . . his abilities to operate a motor vehicle, including his perceptual motor abilities, his cognitive thinking abilities and his affective emotional ability necessary to operate a motor vehicle safely were clearly and significantly impaired." It was also "probable to a reasonable

degree of scientific certainty" that defendant "was at a minimum in the post-acute phase of cocaine ingestion and subject to the crash effects . . . that result from cocaine ingestion."

Razukas, who was a member of the NJSP Fatal Accident Investigation Unit, testified for the State as an expert in motor vehicle accident reconstruction. Razukas opined that the cause of the accident was an offset rear-end crash, in which the front passenger side of defendant's BMW impacted the driver's side rear of Marles's Jeep. Thereafter, Marles's Jeep tripped over the guide rail and overturned onto the right side of the road, while defendant's BMW rotated counter-clockwise to the left, hit the concrete barrier in the center of the roadway, and then traveled to the right shoulder.

Razukas further opined that the crash involved substantial force, as evidenced by the fact that the Jeep's leaf spring was embedded in the BMW's front bumper. Also, based on the location of the leaf spring in defendant's front bumper, Razukas opined that defendant's vehicle went underneath the back bumper of Marles's Jeep, with an overlap of sixteen inches.

In his report, Razukas quoted factory specifications regarding the two vehicles, including tire size, height, and tip-over stability. However, Razukas did not take actual height measurements for either vehicle, nor did he measure the actual

size of the Jeep's tires, or calculate the Jeep's actual tip-over stability based upon its actual measurements. Razukas also did not know whether Marles's vehicle met factory specifications in terms of tire size or height, or if the Jeep had been "lifted" or modified in any way. Regardless, in his opinion, the Jeep would have gone over the guide rail no matter its height.

On July 10, 2014, following a six-day trial, the jury found defendant guilty of second-degree vehicular homicide, N.J.S.A. 2C:11-5. On November 12, 2014, defendant was sentenced to an eight-year prison term, subject to an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.[3]

Defendant appeals, arguing:

> POINT I
>
> IN LIGHT OF [STATE v.] ADKINS, 221 N.J. 330 (2015), THE MATTER MUST BE REVERSED AND REMANDED FOR FURTHER FINDINGS REGARDING THE FORCIBLE BLOOD DRAW.
>
> POINT II
>
> DUE TO MIRANDA VIOLATIONS, THE MATTER MUST BE REVERSED AND ALL STATEMENTS BY [] DEFENDANT SUPPRESSED AS THEY WERE TAKEN IN VIOLATION OF

[3] At sentencing, the judge found defendant guilty of DWI, N.J.S.A. 39:4-50, and reckless driving, N.J.S.A. 39:4-96, and imposed the appropriate penalties for those motor vehicle offenses. The judge also found defendant guilty of following too closely, N.J.S.A. 39:4-89, and merged that offense with the reckless driving conviction.

DEFENDANT'S RIGHTS. U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. (1947) ART. 1, PARS. 1, 9, 10.

POINT III

THE TRIAL JUDGE'S RULING BARRING THE DEFENSE FROM CROSS-EXAMINING REGARDING THE ILLEGAL MODIFICATION OF THE JEEP CONSTITUTED A GROSS AND PATENT ABUSE OF DISCRETION AND VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. (1947) ART. I, PARS. 1, 9, 10.

POINT IV

DEFENDANT'S RIGHTS TO CONFRONT WITNESSES, DUE PROCESS OF LAW AND A FAIR TRIAL WERE VIOLATED BY THE ADMISSION OF EVIDENCE BY ABSENTEE WITNESSES IMPLICATING DEFENDANT IN THE CRIME OF VEHICULAR HOMICIDE. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. (1947) ART. I, PARS. 1, 9, 10.

POINT V

THE EXPERT'S ULTIMATE-OPINION TESTIMONY IMPERMISSIBLY INTRUDED INTO THE JURY'S SINGULAR ROLE AS TRIER OF FACT AND VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. (1947) ART. I, PARS. 1, 9, 10.

POINT VI

THE CUMULATIVE EFFECT OF THE TRIAL ERRORS DEPRIVED DEFENDANT OF A FAIR TRIAL AND WARRANTS REVERSAL OF HIS CONVICTION. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. (1947) ART. I, PARS. 1, 10.

POINT VII

THE TRIAL JUDGE FAILED TO FIND MITIGATING FACTORS BASED UPON COMPETENT AND CREDIBLE

EVIDENCE IN THE RECORD AND IMPOSED AN EXCESSIVE SENTENCE.

We address each of these arguments in turn.

II.

A.

Defendant moved before trial to suppress evidence of his BAC derived from the warrantless blood draw. Among other things, he contended the State failed to prove that sufficient exigent circumstances existed to allow the blood draw to be conducted without the prior issuance of a warrant. After an evidentiary hearing on August 29, 2013, Judge James M. Blaney issued a written decision on September 4, 2013, denying defendant's motion.

In denying the motion, the judge applied the principles enunciated by the United States Supreme Court in Schmerber v. California, 384 U.S. 757 (1966), and in Missouri v. McNeely, 569 U.S. 141 (2013), which had recently been decided on April 17, 2013. In McNeely, the Court made clear that probable cause that a driver had consumed alcohol and may have been driving while intoxicated, resulting in natural metabolism of alcohol in the bloodstream, standing alone, does not constitute a per se exigent circumstances exception to the warrant requirement; instead, it is a factor to be considered in a totality of circumstances test. Id. at 165.

On December 20, 2013, in State v. Adkins, 433 N.J. Super. 479 (App. Div. 2013), rev'd, 221 N.J. 300 (2015), we declined to give retroactive application to McNeely. On May 14, 2014, the New Jersey Supreme Court granted certification. State v. Adkins, 217 N.J. 588 (2014). On May 4, 2015, the Court held that McNeely must be followed in New Jersey under the Supremacy Clause of the United States Constitution, and it should be given pipeline retroactivity to cases such as this one, where the blood draw was conducted prior to McNeely and the case is still under direct review. Adkins, 221 N.J. at 313. The Court also set forth guidelines to be followed by courts considering suppression motions in these pipeline cases. Id. at 317.

On appeal, defendant argues that a remand is required for the trial court to reconsider its findings on exigency in light of the Supreme Court's decision in Adkins. The State in turn responds that Judge Blaney already considered the totality of the circumstances of the blood draw and properly found that exigent circumstances permitted the warrantless search.

B.

Trooper Herr and Detective Sergeant Bentivegna testified at the suppression hearing. Herr stated there were three NJSP vehicles patrolling the southern end of the Parkway at the time of the accident, with each car containing two Troopers, and each

car assigned to a specified patrol area: the northern, central, and south ends. The Troopers assigned to the northern third of the patrol area, who normally would have responded to the crash, did not respond because they were occupied with a motor vehicle stop and consent search of a vehicle.

Herr arrived at the crash scene at 3:47 a.m., alone, because his partner was busy processing someone they had arrested earlier for DWI. When Herr arrived there were multiple police cars already on the scene, including Tactical Patrol Units from the NJSP, and units from the Toms River and Ocean Gate Police Departments, as well as EMS units and various fire companies. Eventually, a detective from the Ocean County Prosecutor's Office (OCPO) also arrived. Herr estimated that a total of forty to fifty police and emergency responders were present.

The NJSP had jurisdiction over the crash, with the Toms River police assisting by searching for two of the four passengers from defendant's vehicle who had fled the scene. Detective Bentivegna arrived at 4:15 a.m. and assumed responsibility for the accident investigation. He was advised that there was an individual trapped in the Jeep, believed to be Ocean Gate police officer Jay Marles. Bentivegna recognized immediately that this was going to be a vehicular homicide investigation. Therefore, his priority was to secure blood samples from the driver of the BMW. He requested

that three additional detectives be dispatched to assist in the investigation, from the crime scene investigation unit and the fatal accident unit. He also contacted the OCPO and the Medical Examiner's Office.

Defendant, who had been identified as the driver of the BMW, was handcuffed and in the custody of Trooper Lewis. Herr observed that defendant smelled strongly of alcohol, and his eyes were bloodshot and watery. Therefore, Herr decided to administer field sobriety tests, which, as noted, defendant failed to perform satisfactorily. Based on his observations and defendant's poor performance on the field tests, Herr believed defendant was intoxicated and had driven while under the influence.

At 4:12 a.m., Herr placed defendant under arrest for DWI, and Trooper Lewis issued defendant Miranda warnings. Consistent with his trial testimony, Herr recounted that defendant was thereafter transported to the hospital for the warrantless blood draw, and then to NJSP barracks where he was questioned and processed.

Bentivegna did not direct any officer to obtain a warrant to take defendant's blood, notwithstanding that both he and Herr had cell phones at the scene. Bentivegna explained he did not obtain a warrant because the priority was to secure the blood as evidence, and there were many other tasks to accomplish, including processing the crash scene, collecting physical evidence, and conducting

interviews. Bentivegna further stated that obtaining a search warrant "wasn't even part of the thought process" because county policy at the time was to obtain blood samples based upon probable cause and not a warrant.

C.

In his written decision, Judge Blaney discussed the relevant criteria for establishing exigent circumstances, with particular reference to Schmerber and McNeely. As we have stated, at the time of his decision, neither we nor the New Jersey Supreme Court had yet decided Adkins. The judge then listed the totality of the factual circumstances that supported his conclusion that sufficient exigent circumstances existed to justify a warrantless blood draw:

> First, this case involves a fatal accident involving more than one motor vehicle (clearly not a routine DWI stop).
>
> Second, the scene of the accident involved a vehicle leaving the roadway, flipping over and being on fire.
>
> Third, the accident required emergency vehicles, including first aid responders, State Police, fire vehicles and towing vehicles.
>
> Fourth, the investigators at the scene learned that two individuals had fled the scene, further complicating the investigation.
>
> Fifth, the accident occurred in the early morning hours of Thanksgiving weekend. There

> were limited State troopers on duty and other calls were being attended to.
>
> Sixth, there were reports of a weapon on the scene.
>
> Seventh, there were conflicting stories being told by the passengers in . . . defendant's vehicle.

Defendant later moved for postponement of the trial after we issued our opinion in Adkins, 433 N.J. Super. at 479, and the Supreme Court granted certification, 217 N.J. at 588. Denying that motion, Judge Blaney reiterated the circumstances he believed allowed for a warrantless blood draw from defendant, including the seriousness of the accident, the time and date of the accident in the early morning hours on Thanksgiving, and the limited number of State Troopers on duty. Essentially, the judge was satisfied that his prior written decision fully complied with McNeely, regardless of whether it applied retroactively.

Our review of a trial court's decision on a suppression motion is circumscribed. We must defer to the trial court's factual findings as long as those findings are supported by sufficient credible evidence in the record. State v. Elders, 192 N.J. 224, 243 (2007). A reviewing court should especially "give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot

enjoy." Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Those findings should only be disregarded when they are clearly mistaken. State v. Hubbard, 222 N.J. 249, 262 (2015) (citing Johnson, 42 N.J. at 162). "A trial court's findings should not be disturbed simply because an appellate court 'might have reached a different conclusion were it the trial tribunal.'" State v. Handy, 206 N.J. 39, 44-45 (2011) (quoting Johnson, 42 N.J. at 162). However, a reviewing court owes no deference to the trial court's legal conclusions or interpretation of the legal consequences flowing from established facts. State v. Watts, 223 N.J. 503, 516 (2015) (citing State v. Vargas, 213 N.J. 301, 327 (2013)).

Applying these principles, it is clear to us that Judge Blaney's factual findings are more than amply supported by the record, and we defer to them. Although we owe no deference to the judge's legal conclusion that the totality of the circumstances made it impractical for the police to obtain a warrant before obtaining a blood draw from defendant, we do agree with that conclusion.

In McNeely, the United States Supreme Court made clear the rationale it had applied forty-seven years earlier in Schmerber:

> Our decision in Schmerber applied this totality of the circumstances approach. In that case, the petitioner had suffered

> injuries in an automobile accident and was taken to the hospital. While he was there receiving treatment, a police officer arrested the petitioner for driving while under the influence of alcohol and ordered a blood test over his objection. After explaining that the warrant requirement applied generally to searches that intrude into the human body, we concluded that the warrantless blood test "in the present case" was nonetheless permissible because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"
>
> In support of that conclusion, we observed that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." We added that "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." "Given these special facts," we found that it was appropriate for the police to act without a warrant.
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> [McNeely, 569 U.S. at 150-51 (citations omitted) (alteration in original).]

Notably, the Schmerber Court did not elaborate on the "special facts" upon which it rested its decision, saying nothing more than the McNeely Court set forth in the passage quoted above.

In McNeely, the Court discussed why there should be no per se exception, but instead an analysis of the totality of the circumstances, and commented: "We do not doubt that some

circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." Id. at 153. The Court provided an example to illustrate why a per se exception should not be adopted, even in cases where an accident causes injury to the suspected drunk driver, namely "a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." Ibid.

The Court also acknowledged the significant advances that had transpired in the decades since Schmerber was decided allowing for the more expeditious processing of warrant applications through telephonic or other reliable electronic means. Id. at 154-55. Along these lines, New Jersey has adopted a Rule authorizing telephonic warrants upon compliance with a set of specific procedures. R. 3:5-3(b).

However, the Court further acknowledged that the availability of a telephonic warrant procedure does not create a panacea eliminating the need for warrantless searches when time is of the essence to preserve evidence, in cases like this one:

> We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-

> application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. See Fed. Rule Crim. Proc. 4:1(b)(3). And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest.
>
> [Id. at 155.]

The Court also noted that although the facts in the McNeely case might be categorized as a "routine DWI case," even in such a case that

> does not involve "special facts," such as the need for the police to attend to a car accident, does not mean a warrant is required. Other factors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search.
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> [Id. at 164 (citation omitted).]

Thus, McNeely instructs that there is no per se exception, that additional special facts must be present, and those additional special facts, combined with the fact of inherent dissipation, must make it impractical for the police to have time to obtain a warrant to avoid the destruction or compromise of the evidence

sought, namely a blood draw to determine the BAC of a driver as close in time as possible to the time of operation. These special facts may include procedures in place for obtaining a warrant, which we take to mean the time required to comply with those procedures or, by implication, the absence of such procedures.

As previously noted, in Adkins, the New Jersey Supreme Court held that pipeline retroactivity must be accorded McNeely for blood draws that occurred before McNeely was decided in cases that were still active in the trial court or on direct appeal. Adkins, 221 N.J. at 313. Although New Jersey courts never expressly announced that Schmerber authorized a per se exception, significant New Jersey "case law contains language that provides a basis for such a belief." Adkins, 221 N.J. at 316. The Adkins Court provided a number of examples. Ibid. Accordingly, the Court "accept[ed] that our case law played a leading role in dissuading police from believing that they needed to seek, or explaining why they did not seek, a warrant before obtaining an involuntary blood draw from a suspected drunk driver." Id. at 317.

In light of that background, the Court enunciated certain guidelines to be applied in the totality-of-the-circumstances analysis in these pipeline cases. Ibid. Among these are that "the exigency in these circumstances should be assessed in a manner

that permits the court to ascribe substantial weight to the perceived dissipation that an officer reasonably faced." Ibid. Further, reviewing courts should "focus on the objective exigency of the circumstances that the officer faced," recognizing that the "police may have believed that they did not have to evaluate whether a warrant could be obtained, based on prior guidance from our Court that did not dwell on such an obligation." Ibid.

Applying the principles enunciated in McNeely and Adkins, we are firmly convinced that the additional "special facts" in this case, combined with the inherent fact of natural dissipation of alcohol in an individual's blood, provided a totality of circumstances justifying a warrantless search. These "special facts" are aptly identified in Judge Blaney's written decision, and include the fatal and fiery nature of the accident on the Parkway, the serious criminal consequences that could (and did) result, the flight of two of defendant's passengers, and the limited personnel available and their delayed arrival because the accident occurred early on the Thanksgiving holiday.

As expressed in Schmerber, this was a case in which the police "might reasonably have believed that [they were] confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" Schmerber, 384 U.S. at 770 (citation omitted). The

exigency existing under the totality of circumstances here rendered impractical the obtaining of a warrant in time to prevent the dissipation of alcohol from defendant's bloodstream, thus justifying the warrantless blood draw.

III.

Defendant also filed a pretrial motion to suppress his statements to police. The court held a hearing on the motion on October 2, 2013, at which Troopers Lewis, Herr, and McNulty testified.

Lewis testified he was notified at the accident scene that the driver of the BMW was in an ambulance. He removed defendant from the ambulance, handcuffed him, and brought him to Herr.

After defendant's field sobriety tests, Herr re-handcuffed defendant and placed him under arrest for driving under the influence. At that point, 4:12 a.m., Lewis read defendant his Miranda rights, and defendant indicated he understood them. However, defendant did not sign the Miranda card because he was handcuffed.

Defendant was not told he would be charged with vehicular homicide, and no questioning occurred at that time. Lewis signed the Miranda card and gave it to Herr, who then brought defendant to the hospital for his blood to be drawn.

At the hospital, at about 5:00 a.m., prior to defendant's

blood being drawn, Herr questioned defendant using the Drinking Driver/Operator Questionnaire, and read him Miranda warnings from the card Lewis had given him, which defendant then signed. Herr advised defendant he was being charged with DWI, and did not mention a charge of vehicular homicide. Defendant appeared to understand what Herr said, and did not seem confused in any way. When Herr asked whether defendant had consumed any alcoholic drinks, defendant responded he drank two to three vodka and cranberry drinks between 10:30 p.m. and 2:30 a.m.

McNulty testified to the questioning that followed at NJSP barracks. He stated that at 10:39 a.m., before he interviewed defendant, he advised defendant of his Miranda rights. Defendant responded he understood those rights, and signed the Miranda card.

The interview lasted about ninety minutes, ending at 12:10 p.m. During the interview, defendant never asked for food, water, or a bathroom break. Also, defendant was alert, did not appear tired, and never indicated he was tired.

Toward the end of defendant's statement, McNulty told him the OCPO had approved a charge of vehicular homicide, which McNulty knew was the crime he was investigating. Defendant then questioned whether he needed a lawyer. Contrary to what McNulty told defendant, however, defendant was not charged with vehicular homicide until after his interview was concluded.

Judge Blaney denied the motion in a written opinion dated October 30, 2013, which was subsequently memorialized in a November 20, 2013 order. The judge found defendant's statements were admissible because defendant made a knowing, intelligent, and voluntary waiver of his Miranda rights, and his statements were not coerced. Distinguishing State v. A.G.D., 178 N.J. 56 (2003), upon which defendant relied, the judge wrote:

> I find in this case that at the time of the questioning of the defendant by Detective McNulty there is no proof that a complaint, an arrest warrant or any authorization for either had been issued. Therefore, no "veil of suspicion" was draped on the defendant that would have heightened his risk of criminal liability. See, A.G.D. at 68. The defendant's true status as one being questioned about his activities prior to the accident was revealed to him. He had not had a complaint signed nor warrant issued prior to his being questioned.

On appeal, defendant argues that the court erred in denying his motion to suppress his statements to police. He contends the statements were taken in violation of his state and federal constitutional rights because: (1) although police read him his Miranda rights, they never asked whether he agreed to waive his rights; and (2) all warnings were issued with respect to an arrest for DWI and not vehicular homicide. Therefore, defendant argues, the statements must be suppressed, his conviction reversed, and the matter remanded for a new trial.

We review a trial judge's factual findings in support of granting or denying a motion to suppress to determine whether "those findings are supported by sufficient credible evidence in the record." State v. Gamble, 218 N.J. 412, 424 (2014). Where the judge determines whether a defendant waived his right to remain silent based solely on a video-recorded statement or documentary evidence, our Supreme Court recently held that we defer to a trial court's factual findings. State v. S.S., 229 N.J. 360, 374 (2017).

Here, the record supports the trial court's conclusion that defendant's statements to the police were taken in accordance with his constitutional rights, and his decision to waive his rights was knowing, intelligent, and voluntary, and not the product of coercion. After the officers issued the Miranda warnings, defendant spoke freely with them and answered their questions. He made no statements indicating an unwillingness to speak with them. He thereby waived his right against self-incrimination. See State v. Burno-Taylor, 400 N.J. Super. 581, 590 (App. Div. 2008) ("[T]he police may continue their questioning so long as the person's words or conduct could not reasonably be viewed as invoking the right to remain silent."); see also S.S., 229 N.J. at 382-84 (stating that interrogating officer must honor any statement reasonably understood to be an invocation of right to remain silent).

Contrary to defendant's first argument, after issuing the Miranda warnings, the police were not obligated to inquire whether defendant chose to waive his rights, nor was defendant required to utter any specific words in order to choose to waive his rights. State v. Hartley, 103 N.J. 252, 313 (1986). Rather, "[t]he waiver need not be express or explicit. The question of waiver is to be determined on the basis of the particular facts and circumstances of each case, including the background, experience, and conduct of the accused." Ibid.

"Any clear manifestation of a desire to waive is sufficient. The test is the showing of a knowing intent, not the utterance of a shibboleth. The criterion is not solely the language employed but a combination of that articulation and the surrounding facts and circumstances." State v. Kremens, 52 N.J. 303, 311 (1968); see also State v. Warmbrun, 277 N.J. Super. 51, 62 (App. Div. 1994) ("Miranda does not require a written waiver.").

Turning to defendant's second argument, in A.G.D., 178 N.J. at 58, 68, the Court held that a suspect's waiver of his right against self-incrimination is invalid when the police fail to inform him that a criminal complaint or arrest warrant has been filed or issued against him and he otherwise does not know that fact.

Here, the police advised defendant he was under arrest, and

being charged with DWI. When he chose to speak with the police, defendant was aware he was the target of the police investigation concerning a fatal accident and facing potential criminal liability. See State v. Nyhammer, 197 N.J. 383, 407 (2009) ("In the typical case, explicit knowledge of one's status as a suspect will not be important for Miranda purposes. However, explicit knowledge of one's suspect status, in some unusual circumstance, might be a useful piece of information in exercising a waiver of rights under our state-law privilege against self-incrimination.").

The police did not inform defendant he was under arrest for vehicular homicide because at the time of his interrogations no such complaint was authorized or issued. Consequently, the rule set forth in A.G.D. was not violated.

IV.

A.

Defendant retained Mark I. Marpet, Ph.D., a mechanical engineer, to conduct an analysis of the fatal accident. Marpet inspected Marles's Jeep and found it had been modified, in that it was "jacked up significantly" so that the truck body was "completely above the wheels." He opined this modification compromised the Jeep's safety and crashworthiness by reducing its handling and increasing its rollover propensity.

Citing N.J.A.C. 13:20-37.5, Marpet noted that "New Jersey strictly limits raised vehicles for on-road use. The vehicle must undergo a testing procedure that scrutinizes, among other items[,] weight transfer with the vehicle tipped to the side." Moreover, "[i]f a vehicle is raised, then increased crashworthiness becomes mandatory. This is accomplished through the use of a roll cage that ties to the frame of the vehicle."

Marpet further opined that lifting the Jeep compromised its fuel system crashworthiness by exposing the fuel tank, thereby allowing it to be punctured in the collision, which was "not particularly severe." Citing N.J.A.C. 13:20-37.2(a)(9), Marpet noted that fuel tanks that have become exposed as a result of raising the vehicle must be protected against damage from collision by some means of encasement. Also according to Marpet, Marles's Jeep "reportedly" was never inspected for roadworthiness, as required under New Jersey law.

Marpet ultimately concluded that "[h]ad the Jeep not been modified, this accident would, in all probability, been nothing more than a fender-bender." In Marpet's opinion, "[t]he rear-end impact did not cause Marles'[s] death." Rather, his death "was caused by the rollover and/or by the fire."

The State made a pretrial motion to preclude defendant from presenting this expert evidence at trial, which the court granted.

Relying on State v. Buckley, 216 N.J. 249 (2013), the court concluded that the facts and expert testimony regarding customization of Marles's Jeep were not relevant to the issue of causation. N.J.R.E. 401. The court stated:

> Here, . . . the State must demonstrate nothing more than that the fatal accident would have been avoided had the defendant not driven his vehicle in the reckless manner of which he is accused. The facts and expert evidence that . . . the victim's vehicle was customized and may have exacerbated the vehicle's chances of rolling over in a collision are irrelevant.
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> Therefore, the proffered testimony of the defendant's expert[] on this issue of the victim's vehicle's alterations, customization, vulnerability or susceptibility of rolling over are irrelevant to the threshold but for causation . . . inquiry.
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> . . . .
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> Additionally, the jury's determination of whether a fatal accident was within the risk of which the defendant was aware does not implicate the condition of the defendant's vehicle. The allegations in this case derive from the description in the defendant's own expert's report do not break the chain of causation that began with the defendant's alleged reckless driving resulting in the striking of the rear of the victim's vehicle on the Garden State Parkway.
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> Therefore, the State's request to bar the testimony of the defendant's expert Dr. Marpet concerning the condition of the victim's vehicle is granted, as well as any testimony as to whether the victim would have survived

> the collision of his vehicle had it not been elevated.

However, over the State's objections, the court permitted the defense to cross-examine the State's expert, Razukas, regarding the quality of his investigation, and the validity of his conclusions, in particular noting Razukas's failure to investigate the actual height of the Jeep and its actual rollover stability, and using photographic evidence of Marles's vehicle prior to the crash.

B.

On appeal, defendant argues that the trial court erred by granting the State's in limine motion to preclude the defense from arguing that the Jeep's modified status was a factor in the fatality, and barring Marpet's expert testimony. He contends the Jeep's lifted status was relevant to the issue of causation under N.J.S.A. 2C:2-3(c), specifically, "whether or not the significant modifications to the Jeep constituted an intervening cause such that the deadly chain of events which followed the impact were too remote, accidental or dependent upon another's volitional act to be able to fairly hold [defendant] criminally liable for the death of the victim."

Defendant further contends the Jeep was modified in such a way that it was not roadworthy, in violation of State law. He

argues that the Jeep's lifted status, and not simply the impact with defendant's vehicle, caused the Jeep to rollover and ignite, thereby causing Marles's death.

Defendant submits that the court's evidentiary error was particularly damaging because Razukas used incorrect factory specifications data to reach his conclusions about the accident. Based on Razukas's testimony, the State was permitted to argue that the accident was particularly severe because a piece of the Jeep's leaf spring became embedded in the BMW's bumper. However, defendant argues, the leaf spring became embedded only because the Jeep had been modified in such a way that made it unsafe for travel on the roadway, allowing defendant's vehicle to travel under it.

C.

Our standard of review on evidentiary rulings is abuse of discretion. We only reverse those that "undermine confidence in the validity of the conviction or misapply the law." State v. Weaver, 219 N.J. 131, 149 (2014); State v. J.A.C., 210 N.J. 281, 295 (2012). Simply stated, we do "not substitute [our] own judgment for that of the trial court, unless 'the trial court's ruling is so wide of the mark that a manifest denial of justice resulted.'" J.A.C., 210 N.J. at 295 (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

"Criminal homicide constitutes reckless vehicular homicide when it is caused by driving a vehicle or vessel recklessly." N.J.S.A. 2C:11-5(a). N.J.S.A. 2C:2-3(c) provides:

> When the offense requires that the defendant recklessly or criminally negligently cause a particular result[:] [1] the actual result must be within the risk of which the actor is aware or, in the case of criminal negligence, of which he should be aware, or, [2] if not, the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or dependent on another's volitional act to have a just bearing on the actor's liability or on the gravity of his offense.

Our Supreme Court recently considered this statute in the context of a vehicular homicide case in Buckley, 216 N.J. at 254-55, stating:

> The statute initially requires the jury to determine whether there is "but for" causation. N.J.S.A. 2C:2-3(a)(1). If that threshold determination is made, and the offense requires the mens rea of recklessness, the causation inquiry is governed by the two-pronged standard of N.J.S.A. 2C:2-3(c). Under the first prong of that test, the statute predicates a finding of causation upon proof that "the actual result" was "within the risk of which the actor is aware." N.J.S.A. 2C:2-3(c). Alternatively, causation may be proven under the second component of the statutory test: whether "the actual result" involves the "same kind of injury or harm as the probable result," and whether it is "too remote, accidental in its occurrence, or dependent on another's volitional act to have a just

> bearing on the actor's liability or on the gravity of his offense."

In Buckley, the State moved before trial to exclude from evidence the facts that the accident victim was not wearing a seat belt, and the utility pole struck by the defendant's vehicle was positioned in a location that was contrary to Department of Transportation recommendations. Id. at 255. The defendant proposed to argue that absent these two facts, the victim would have survived the accident. Id. at 258.

Addressing the causation issue, the Supreme Court performed a relevancy analysis, considering the elements of vehicular homicide, and interpreting the language of N.J.S.A. 2C:2-3. Id. at 261-70. Ultimately, the Court held

> that fact and expert testimony about the victim's failure to wear a seat belt is irrelevant to both "but for" causation under N.J.S.A. 2C:2-3(a)(1) and the jury's causation determination under the first prong of N.J.S.A. 2C:2-3(c)'s statutory test -- whether defendant was aware that the manner in which he drove posed a risk of a fatal accident. To ensure the jury's complete understanding of the circumstances of the accident, the trial court may admit evidence that [the victim's] seat belt was not fastened when he was found in the vehicle's passenger seat after the accident. If the trial court admits such evidence, it must give the jury an appropriate limiting instruction. We further conclude that the position of a utility pole, off the roadway on an asphalt berm, is similarly irrelevant to the "but for" causation inquiry under N.J.S.A. 2C:2-3(a)(1) and to defendant's

> awareness of the risk of his conduct under the first prong of N.J.S.A. 2C:2-3(c).
>
> [Id. at 255.]

In reaching that conclusion, the Court examined the differences between the culpability assessments under the two prongs of N.J.S.A. 2C:2-3(c). Id. at 264-65. It found that in the context of a vehicular homicide case, under the first prong of N.J.S.A. 2C:2-3(c), the State must prove beyond a reasonable doubt "that the defendant understood that the manner in which he or she drove created a risk of a traffic fatality[.]" Id. at 264.

By contrast, the second prong of N.J.S.A. 2C:2-3(c) would require proof beyond a reasonable doubt "that the actual result — in this case the victim's death — 'involve[s] the same kind of injury or harm as the probable result' of the defendant's conduct." Id. at 264-65 (alteration in original). In other words, an analysis under the second prong of N.J.S.A. 2C:2-3(c) requires a consideration of the fairness of holding a defendant responsible for the victim's death. See State v. Campfield, 213 N.J. 218, 235 (2013) ("When the result of the defendant's conduct falls outside of the parameters of the contemplated risk of defendant's conduct [prong one of subpart (c)], the foreseeability of that result is evaluated under a standard of fairness.").

In the present case, the proposed testimony was not admissible

under the first prong of N.J.S.A. 2C:2-3(c). Defendant was driving at . . . hour while highly intoxicated. That was the "but for" cause of the crash, and plainly created the risk of striking another vehicle and causing a fatal crash. The evidence was sufficient for the jury to find the actual result – the death of another person in an accident – was within the risk of which defendant was aware, or involved the same kind of injury or harm as the probable result.

It is true, as defendant points out, that Buckley did not address prong two of N.J.S.A. 2C:2-3(c). Nonetheless, the same result should apply. Here, the alleged modification of the Jeep occurred prior to the accident. It is not alleged that the modification caused the accident; rather, it only reduced the Jeep's crashworthiness. Thus, the modification is not an intervening cause such as in State v. Jamerson, 153 N.J. 318, 335-36 (1998) (pushing defendant's argument that the victim caused the accident by running a stop sign) and State v. Eldridge, 388 N.J. Super. 485, 491-93 (App. Div. 2006) (noting defendant's argument that the accident was caused by the passenger/victim pushing her head to the left). The evidence that Marles was more vulnerable because he illegally modified the Jeep was as irrelevant as the evidence in Buckley that the victim was more vulnerable because he illegally failed to wear a seatbelt. In both cases, the

evidence did not address what caused the crash.

Nor do we find it unfair to hold defendant responsible for Marles's death. Drivers and their passengers who are struck while riding in smaller, poor-handling, less crashworthy, more flammable, top-heavy, disabled, or uninspected vehicles, all fall within the protection of the vehicular homicide law.

Finally, defendant argues the exclusion of Marpet's testimony was particularly prejudicial because Razukas testified based on the belief that the Jeep had not been modified, but defendant was allowed to cross-examine him to expose that assumption. Defendant also complains that Razukas testified the accident had to involve substantial force to get the Jeep's leaf spring embedded in the BMW's bumper, but Razukas testified the nose of the BMW went under the Jeep just as Marpet believed. Thus, we do not believe defendant was prejudiced by the exclusion of Marpet's factual testimony. Moreover, defendant does not argue the trial court should have revisited the admissibility of Marpet's testimony after or based on Razukas's testimony. Accordingly, for all these reasons, the trial court properly granted the State's motion in limine to exclude Marpet's testimony.

V.

Defendant next argues that the court erred in permitting the laboratory supervisor, Wingert, to testify to the blood test

results, and not compelling testimony from the analysts who actually performed the tests. This argument warrants little discussion.

Consistent with both the state and federal constitutions, the State may present testimony from a qualified expert who supervised the testing and/or conducted an independent observation and analysis regarding the test results. State v. Bass, 224 N.J. 285, 291-92, 319-20 (2016); State v. Michaels, 219 N.J. 1, 6, 45-46 (2014); State v. Roach, 219 N.J. 58, 61, 79-80 (2014).

> [A] defendant's confrontation rights are not violated if a forensic report is admitted at trial and only the supervisor/reviewer testifies and is available for cross-examination, when the supervisor is knowledgeable about the testing process, reviews scientific testing data produced, concludes that the data indicates the presence of drugs, and prepares, certifies, and signs a report setting forth the results of the testing.
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> [Michaels, 219 N.J. at 6.]

Here, the trial court conducted an N.J.R.E. 104 hearing, at which Wingert testified he did not perform the testing and was not present while the testing was performed. However, as director of the laboratory, he supervised the technicians, reviewed the test results, and certified their accuracy. The trial court's decision to admit Wingert's testimony thus comported with Michaels and was not an abuse of discretion.

VI.

Defendant argues that the State's expert, Dr. Pandina, improperly testified to the ultimate issue for the jury to determine — that defendant's ability to safely operate a motor vehicle was impaired at the time of the accident. We disagree.

N.J.R.E. 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." However, "[e]xpert testimony is not necessary to tell the jury the 'obvious' or to resolve issues that the jury can figure out on its own." State v. Simms, 224 N.J. 393, 403 (2016) (citing State v. Nesbitt, 185 N.J. 504, 514 (2006)).

Pursuant to N.J.R.E. 704, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." However, "[e]xpert testimony that 'embraces an ultimate issue to be decided by the trier of fact,' N.J.R.E. 704, is not admissible unless the subject matter is beyond the ken of the average juror." Simms, 224 N.J. at 403. Also, an expert may not express an opinion regarding a defendant's guilt or innocence. State v. Cain, 224 N.J. 410, 426 (2016).

Here, the indictment charged defendant with vehicular homicide, N.J.S.A. 2C:11-5, by recklessly operating a motor vehicle while in violation of N.J.S.A. 39:4-50 (DWI), thereby causing Marles's death. N.J.S.A. 39:4-50 in turn makes it unlawful for a person to "operate[] a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood . . . ."

Here, Pandina testified defendant was under the influence and his ability to operate a vehicle was impaired. Although that was an issue in the case, it was not the ultimate issue, which was whether defendant was driving recklessly. Even if it was the ultimate issue, Pandina's testimony about the effects of alcohol and cocaine were admissible under N.J.R.E. 702, as relevant to the issues presented and beyond the ken of the jury. Admissible for the same reason was Pandina's testimony regarding the calculation of defendant's BAC at the time of the accident (extrapolated from the BAC at the time of the blood draw), and the likely effects of that BAC and prior cocaine ingestion on one's ability to operate a motor vehicle. Accordingly, Pandina's testimony was properly admitted.

VII.

Defendant also argues that the "cumulative effect" of the errors at trial "undermined [his] constitutional rights to due process and a fair trial." However, we are satisfied that none of the errors alleged by defendant, individually or cumulatively, warrant the granting of a new trial. State v. T.J.M., 220 N.J. 220, 238 (2015); State v. Orecchio, 16 N.J. 125, 129 (1954).

VIII.

Finally, defendant argues that his eight-year sentence with a NERA parole disqualifier is excessive, and that the court erred in failing to find that certain statutory mitigating factors applied. We are not persuaded.

Our review of sentencing determinations is limited. State v. Roth, 95 N.J. 334, 364-65 (1984). We will not ordinarily disturb a sentence imposed which is not manifestly excessive or unduly punitive, does not constitute an abuse of discretion, and does not shock the judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16, 220 (1989). In sentencing, the trial court "first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." State v. Case, 220 N.J. 49, 64 (2014). The court must then "determine which factors are supported by a preponderance of [the] evidence, balance the relevant factors, and explain how it

arrives at the appropriate sentence." O'Donnell, 117 N.J. at 215. We are "bound to affirm a sentence, even if [we] would have arrived at a different result, as long as the trial court properly identifie[d] and balance[d] aggravating and mitigating factors that [were] supported by competent credible evidence in the record." Ibid.

Here, at sentencing, the trial court found two aggravating factors: the risk that defendant would commit another offense, N.J.S.A. 2C:44-1(a)(3), and the need for deterring defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). The court also concluded the aggravating factors far outweighed the non-existing mitigating factors.

Regarding aggravating factor three, the court noted defendant's prior convictions for DWI and possession of cocaine. The court determined defendant "was already cognizant of the dangers involved in driving while intoxicated, but still drove after drinking, and, by his own admission in his statement, by partaking of drugs." Moreover, defendant had not been deterred from criminal activity. Finally, the court noted that early in defendant's statement to police he attempted to conceal his use of drugs and the amount of alcohol he consumed, indicating that "he did not appreciate the danger his actions posed to others and . . . the distinct possibility of another offense."

Regarding aggravating factor nine, the court stated: "A message needs to be sent to this defendant, as well as to the public. That message needs to be clear that when one drives under the influence of drugs and/or alcohol, the consequences will be a jail sentence, and that that is almost universally applied, particularly when there are injuries or a fatality, as in this case."

Defendant contends the court erred in not finding: (1) mitigating factor two, that he "did not contemplate that his conduct would cause or threaten serious harm," N.J.S.A. 2C:44-1(b)(2); (2) mitigating factor five, that "[t]he victim of defendant's conduct induced or facilitated its commission," N.J.S.A. 2C:44-1(b)(5), because Marles's modifications of the Jeep contributed to his death; (3) mitigating factor seven, "[t]he defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense," N.J.S.A. 2C:44-1(b)(7), because this was defendant's first indictable offense, and his prior criminal history occurred many years earlier; and (4) mitigating factors eight and nine, "defendant's conduct was the result of circumstances unlikely to recur," N.J.S.A. 2C:44-1(b)(8), and "[t]he character and attitude of the defendant indicate that he is unlikely to commit another offense," N.J.S.A.

2C:44-1(b)(9), because defendant was gainfully employed and supporting his family, and he was remorseful for his conduct.

Our review of the record convinces us that the trial court properly considered and rejected all of the mitigating factors proposed by defendant. With respect to mitigating factor two, the court found defendant should have realized that by driving under the influence he was subjecting others on the road to the risk of serious bodily injury. As to mitigating factor five, the court noted it did not permit defendant to introduce evidence regarding the condition of Marles's Jeep, and in the court's opinion Marles "played no part in being hit in the rear of his vehicle." The court found mitigating factor seven did not apply because defendant had a prior conviction. Finally, the court found mitigating factors eight and nine did not apply because "defendant obviously did not learn from his prior [DWI] and a prior possession of cocaine charge."

In sum, the sentence imposed was manifestly appropriate and by no means shocks our judicial conscience.

Affirmed.