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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4924-18**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN MILONE,

Defendant-Appellant.

Submitted November 14, 2022 – Decided December 13, 2022

Before Judges Whipple, Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. 17-07-1103.

John Milone, appellant pro se (Mario Apuzzo and John Milone, on the briefs).

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; William Kyle Meighan, Supervising Assistant Prosecutor, on the brief).

PER CURIAM

A jury convicted defendant, John Milone, of one count of third-degree neglect of an elderly or disabled person—his mother—under N.J.S.A. 2C:24-8(a). That statute imposes criminal liability on those who have "assumed continuing responsibility for the care of a person [sixty] years of age or older," yet "abandon[] the elderly person . . . or unreasonably neglect[to perform] any act necessary for the physical or mental health of the elderly person." On May 31, 2019, he received a sentence of two years' probation. After review of the record, we affirm defendant's conviction and sentence.

Defendant's mother suffered a stroke in 2017, when she was eighty years old. As a result, she was disabled to a degree which required "total care," meaning she was completely dependent on others for all her needs. However, despite suffering from aphasia, she remained alert and conscious.

Following her stroke, defendant's mother received care at various hospitals before being eventually relocated to the King Manor Care Center (King Manor). The King Manor staff informed defendant his mother required round-the-clock care and assistance, and discussed her options as to insurance, as well as her eligibility to stay at the facility via Medicare and Medicaid. Defendant refused to apply for Medicaid on her behalf, and instead insisted on bringing his mother to live with him. Defendant was residing at a motel.

On his mother's discharge from King Manor, defendant was given a home care plan detailing her need for full assistance, which included incontinence care, hygiene care, and meal assistance. She required supervision at all times. The staff reiterated to defendant they believed it to be in his mother's best interests to remain in professional care. Defendant refused, explaining if his mother applied for Medicaid, it would require her social security check to be turned over to a care facility—an outcome which he sought to avoid.

Defendant's mother was discharged on February 24, 2017. Defendant assured the facility he would care for her. However, over the course of the following two weeks, her condition deteriorated. The record contains the extensive testimony of those who checked in on her: Police officers, EMS personnel, homecare nurses, social workers, and health aides; all of which paint an unsanitary and alarming picture of her physical state. She suffered numerous lacerations, open sores, and skin tears. Her extremities swelled. The cramped motel room she shared with defendant was full of trash bags and had a foul odor. She was often left in her own excrement. Her mattress lacked sheets.

On March 9, 2017, after a number of check-ins revealed that his mother's state had not significantly improved, officers decided to arrest defendant because she "was in severe need of aid" and "at that time . . . she was suffering

from neglect" Officer James Albanese believed the victim was expressing distress: "[F]rom the moment we came into the room it was noises, you could see the gestures as she needed assistance but was not getting it properly."

Following his arrest, a grand jury returned an indictment charging defendant with one count of third-degree neglect¹ of an elderly or disabled person, N.J.S.A. 2C:24-8(a).

The trial was held between March 14 and 21, 2019. At the close of both the State's case and the conclusion of argument, defendant twice moved to dismiss under Rule 3:18-1. The court denied both motions. The jury found defendant guilty, and the court denied his post-trial motions for a judgment of acquittal under Rule 3:18-2 and for a new trial under Rule 3:20-1.

Defendant was sentenced to two years' probation with various mandatory evaluations, 180 days of community service, and costs and fees totaling \$155. He filed a timely notice of appeal and raises the following arguments.

I. THE JURY VERDICT IS AGAINST THE WEIGHT
OF THE EVIDENCE FOR THERE IS INSUFFICIENT
EVIDENCE IN THE RECORD FOR A
REASONABLE JURY TO FIND BEYOND A
REASONABLE DOUBT THAT DEFENDANT
UNREASONABLY NEGLECTED TO DO OR

¹ Although N.J.S.A. 2C:24-8(a) criminalizes both "abandonment of" and "unreasonable neglect of" an elderly or disabled person, defendant was only charged with unreasonable neglect.

FAILED TO PERMIT TO BE DONE ANY ACT NECESSARY FOR THE PHYSICAL OR MENTAL HEALTH OF [DEFENDANT'S MOTHER].

A. There Is Insufficient Evidence In The Record For A Reasonable Jury To Conclude Beyond A Reasonable Doubt That Defendant Engaged In A Gross Deviation With Respect To His Care Of His Mother.

1. There is insufficient evidence in the record for a reasonable jury to conclude beyond a reasonable doubt that defendant created a substantial and unjustifiable risk to his mother's physical or mental health.

2. There is no evidence that defendant caused his mother any harm or impairment.

3. There is insufficient evidence in the record to prove beyond a reasonable doubt that defendant should have been aware of a substantial and unjustifiable risk to his mother's physical or mental health.

II. THE TRIAL COURT COMMITTED NUMEROUS LEGAL ERRORS WARRANTING A NEW TRIAL.

A. The Trial Court Erred In Not Granting Either One of Defendant's Two Motions to Dismiss the Indictment.

1. The State failed to present exculpatory evidence to the grand jury.

2. The State failed to provide the grand jury with a definition of "knowingly."

3. The State failed to present to the grand jury evidence that defendant acted "knowingly."

4. The indictment is defective as it does not fairly inform the defendant of the charge in that while it contains the elements of the offense, it does not provide a statement of the essential facts constituting the offense.

B. The Conduct Of The Defense Was Prejudiced By Lack Of Fair Notice And Surprise Caused By The Court's Erroneous Denial Of Defendant's Motion For A Bill Of Particulars.

C. The Trial Court Erred In Not Granting Defendant His Motions For A Judgment Of Acquittal.

1. The defendant was denied a fair trial through the [S]tate introducing certain inflammatory pictures into evidence.

2. Allowing Charlotte Knighton to testify as to the hearsay statements of Lisa M. Zizmont as stated on page [sixty-two] of the [Visiting Nurse Association's] records.

3. The trial judge abused his discretion when he allowed the prosecutor on cross-examination of Angelina Cortez to ask her about how she saw defendant walking on Mantoloking Road.

4. The trial judge abused his discretion when he erroneously and unfairly limited

defense counsel's right to cross-examine officer Bennett, thereby depriving him of the right to confront the witnesses against him and due process.

5. The trial judge abused his discretion when he erroneously prevented defense counsel to question the defendant regarding a picture that he took of his mother which showed the condition of both of [her] arms while she was in Robert Wood Johnson University Hospital in October and November 2016.

E. The Trial Judge's Excessive Involvement And Questioning Of Trial Witnesses Warrants Reversal As Plain Error.

F. The Trial Court Erred In Refusing Defendant's Various Requested Jury Instructions and Verdict Sheet Language.

1. The trial judge erred in refusing the defense's request to include in its jury charge that defendant had to act "knowingly."

2. Failure of the [c]ourt to include as defendant requested "knowingly" in the jury instructions and jury verdict sheet which was included in the indictment and the State's initial proposed jury verdict sheet violated defendant's reasonable expectation as to what the State's burden of proof would be at trial and is therefore a violation of his due process rights.

3. The trial judge erred in refusing the defense's request that the jury charge include a definition of "gross deviation."
4. The trial judge erred in refusing the defense's request that the jury charge include the definition of civil negligence.
5. The trial judge erred in refusing the defense's request that the jury charge include a definition of causation.
6. The jury instructions and verdict sheet on the one count of elder neglect allowed for a non-unanimous verdict, depriving defendant of his right to a unanimous verdict and due process of law.
7. The court failed to tailor the instructions to the facts of the case and thereby committed plain error.

III. THE PROSECUTOR COMMITTED MISCONDUCT IN HER CLOSING ARGUMENT TELLING THE JURY THAT SHE "GUARANTEED" THERE WERE SHEETS ON DEFENDANT'S BED BUT NOT ON HIS MOTHER'S BED AND THAT THE STATE WITNESSES WERE HONEST.

I.

We begin with defendant's contention the verdict was against the weight of the evidence. Specifically, defendant argues there was insufficient evidence in the record for a jury to conclude beyond a reasonable doubt that: (1) he created a substantial and unjustifiable risk to his mother's physical or mental

health; (2) he caused her any harm or impairment; or (3) he should have been aware of substantial risks to her physical or mental health. He asserts that expert testimony was required in this case to establish a baseline level of care – and without such, the jury cannot properly evaluate his actions. Defendant claims this supposed deficiency should have been rectified by the trial judge on his motions for judgment of acquittal or a new trial.

A post-trial motion for judgment of acquittal is governed by Rule 3:18-2. The motion judge may consider all of the evidence, direct or circumstantial, presented by the State and the defendant, giving the State the benefit of all the favorable evidence and all the favorable inferences drawn from that evidence, and then determine whether a reasonable jury could find guilt beyond a reasonable doubt. State v. Lodzinski, 249 N.J. 116, 144 (2021); State v. Fuqua, 234 N.J. 583, 590-91 (2018); State v. Williams, 218 N.J. 576, 594 (2014). "The evidence should be sifted to determine whether any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present." State v. Carter, 91 N.J. 86, 96 (1982). A court must recognize "jurors 'may draw an inference from a fact whenever it is more probable than not that the inference is true . . .'" Lodzinski, 249 N.J. at 144 (quoting State v.

Brown, 80 N.J. 587, 592 (1979)). We apply the same standard on appellate review. Id. at 145.

A similar standard governs motions for a new trial under Rule 3:20-1. Our intervention is warranted only to correct an "injustice resulting from a plain and obvious failure of the jury to perform its function." State v. Johnson, 203 N.J. Super. 127, 134 (App. Div. 1985). Moreover, when the jury's verdict was grounded on its assessment of witness credibility, the reviewing court may not intercede, absent clear evidence on the face of the record that the jury was mistaken or prejudiced. State v. Haines, 20 N.J. 438, 446-47 (1956).

With these standards in mind, we turn to defendant's argument whether expert testimony was required to establish a baseline standard of care for the jury to consider. N.J.R.E. 702 states "[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." "The primary justification for permitting expert testimony is that the average juror is relatively helpless in dealing with a subject that is not a matter of common knowledge." State v. Kelly, 97 N.J. 178, 209 (1984) (citing Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 85 (App. Div. 1961)).

We are satisfied the State provided sufficient evidence in this case to support a guilty verdict and expert testimony was not required. It was undisputed that defendant's mother was over sixty years of age, she suffered from aphasia, had no control of her bowels or bladder, was bedridden, and required twenty-four-hour assistance in every aspect of her life including grooming, bathing, dressing, and eating. It was also undisputed defendant knew she was older than sixty and had those impairments, and that defendant assumed continuing responsibility for her care on February 23, 2017, at the discharge meeting from King Manor. At that time, he was given a home care plan, which he acknowledged and signed, containing information and instructions on how to perform the required care. Over the period of time defendant was responsible for his mother's care, professionals repeatedly instructed him on how to take care of her. These same professionals presented and explained the home care plan to the jury, which was admitted into evidence.

Giving the State the benefit of all the favorable evidence and favorable inferences, a reasonable jury could properly find defendant guilty of elder neglect based on the evidence presented to it.² Therefore, there was no manifest

² Together, N.J.S.A. 2C:2-2(a) and N.J.S.A. 2C:2-2(c)(1) require that a specific culpable mental state applies to each of the material elements of an offense, and

denial of justice when the judge denied defendant's post-trial motion for acquittal, and the judge's decision denying defendant a new trial was not a miscarriage of justice.

II.

Defendant next asserts the prosecutor committed reversible misconduct by telling the jury in her closing that she "guaranteed" there were sheets on defendant's bed, but not his mother's bed. We note this issue was not raised below, so these remarks must be evaluated by the plain error standard, under which we inquire whether the misconduct was so egregious as to deprive defendant of a fair trial, given the record as a whole. State v. Smith, 167 N.J. 158, 181-82 (2001).

Prosecutors are "'not permitted to cast unjustified aspersions' on . . . the defense." State v. Frost, 158 N.J. 76, 86 (1999) (quoting State v. Lockett, 249 N.J. Super. 428, 434 (App. Div. 1991)). However, a prosecutor's summation

a person is not guilty of that offense unless the individual acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element.

Over the years, there has been some discord about whether the proper mental state applicable to the material elements of N.J.S.A. 2C:24-8(a) should be "knowingly" or "negligently." However, we need not decide this issue here as the evidence in this case clearly supports a jury's determination of "guilty" under either standard.

can "draw[] any reasonable inferences supported by the proofs." State v. Bauman, 298 N.J. Super. 176, 207 (App. Div. 1997) (quoting State v. Zola, 112 N.J. 384, 426 (1988), certif. denied, 489 U.S. 1022 (1989)). Prosecutors commit misconduct if they "impl[y] to the jury that [they] possess[] knowledge beyond that contained in the evidence presented, or if [they] reveal[] that knowledge to the jury." State v. Feaster, 156 N.J. 1, 59 (1998).

Defendant's claim hinges on the meaning of the word "guarantee" in this context. If the prosecutor chose that word to express that she possessed unadmitted evidence which demonstrated defendant's bed had sheets, or to cast an unjustified aspersion on defendant, then that would likely be impermissible and warrant reversal. See ibid. However, "guarantee" can also mean "to express or declare with conviction"—in other words, the phrase "I guarantee that . . ." can simply signal a strong assertion. American Heritage Dictionary of the English Language 584 (William Morris ed., Houghton Mifflin Company 1975).

The prosecutor made an impassioned argument. In the context of the summation as a whole, this does not rise to the standard of egregiousness which necessitates reversal on a plain error basis.

To the extent we have not addressed defendant's remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION