SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1158-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLOS GREEN,

Defendant-Appellant.

Argued March 8, 2023 – Decided April 4, 2023

Before Judges Currier and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 15-10-2268.

Brian P. Keenan, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Brian P. Keenan, of counsel and on the briefs).

Steven A. Yomtov, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Daniel Finkelstein, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant appeals from an October 7, 2019 judgment of conviction after a jury found him guilty of first-degree vehicular homicide. He also challenges the sentence imposed. We affirm defendant's conviction but remand for resentencing.

We recite the facts from an evidentiary hearing and the trial testimony. On December 27, 2014, around 11:50 p.m., Keyona Barr was in a first-floor apartment located on the northeast corner of 19th and Ellis Avenues in Irvington.[1] After hearing noise from a car that sounded like "it was going fast," Barr looked out a window and saw a man, who appeared to be drunk, standing near the street. Barr knew the man, Billy Ray Dudley, from the neighborhood. According to Barr, she spoke to Dudley for about five minutes and told him to go home "cause he was intoxicated." Dudley then walked toward the intersection of 19th and Ellis Avenues. Barr described the intersection as dark and "bumpy" with no streetlights. However, she subsequently testified there was a streetlight illuminating the intersection and she saw the incident clearly.

[1] This intersection is located within 1,000 feet of a school, which resulted in defendant being charged with a first-degree crime rather than a second-degree crime.

Barr saw Dudley start to cross the street but turned her head away "[j]ust for like one second." When she turned her head back, Barr saw Dudley fall on his back while he was traversing the intersection. Five seconds later, Barr saw Dudley run over by a car. Barr watched as the driver of the car[2] "pull[ed] off to leave." According to Barr, "[e]verybody started coming out . . . screaming for the car to stop, to turn back around." After traveling about ten feet along neighboring Grove Street, the car stopped, drove in reverse, and returned to the accident scene.

Barr testified the driver of the car appeared intoxicated because he stumbled and slurred his speech. She further stated the crowd yelled at the driver and she screamed "look what you did, you killed him, you ran Billy over." Barr later identified the car that struck Dudley on a surveillance video.

Officer Shantay Porter of the Irvington Police Department arrived first at the accident scene. Upon arrival, Porter saw "an African/American male laying on his back with his head smashed in." When she checked, the man had no pulse. Officer Porter testified the area was well lit with street lighting. In addition, Officer Porter explained that the lights from the car that hit Dudley and her own patrol car also illuminated the scene.

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[2] The police identified the driver of the car as defendant Carlos Green.

The officer saw defendant standing next to the vehicle stopped in the intersection and asked him what happened. According to Officer Porter, defendant said "he was driving and he stopped to talk to a friend, and then someone told him that he had hit someone, so he went back to the incident location."

While speaking with defendant, Officer Porter noticed his eyes were "bloodshot red" and "he smelled of alcohol." As a result of her observations, Officer Porter concluded defendant drank alcohol "that day." After speaking with defendant while standing in the street, the officer decided to place him in her patrol car "[b]ecause the victim was known in the neighborhood, and [she] wasn't sure if it was safe for [defendant] to be standing outside at that particular moment."

After helping other officers at the scene, Officer Porter drove defendant to the hospital, where he signed a consent form for a blood alcohol content (BAC) test. The consent form did not explicitly state that defendant had the right to refuse the BAC test.

The blood draw occurred at 2:50 a.m. on December 28, 2014, just a few hours after the accident. Michael Baklarz, a forensic scientist with the New Jersey State Police, testified defendant's blood sample contained "0.210 percent

grams per deciliter of ethyl alcohol or drinking alcohol plus or minus 0.003 grams per deciliter."

Defendant also consented to a search of his car at the accident scene. During that search, the police discovered an open bottle of rum. The bottle was three-quarters full of alcohol.

On October 2, 2015, an Essex County Grand Jury returned Indictment No. 15-10-2268, charging defendant with first-degree vehicular homicide, N.J.S.A. 2C:11-5B(3)(a). Defendant filed a motion to suppress the blood draw evidence and alcohol found in his car.

The motion judge denied the suppression motion. Regarding the blood evidence, the judge found defendant voluntarily consented to the blood test. She further concluded that the absence of explicit language stating defendant could refuse to consent to the blood test was not dispositive because there was no legal requirement to provide such information. Additionally, the judge noted defendant had two prior convictions for driving while intoxicated, suggesting defendant fully understood his rights. Because defendant signed the form giving consent to the search of his car, the judge admitted the evidence found in the car.

Prior to trial, the State moved to admit defendant's statements to Officer Porter as a statement by a party opponent under N.J.R.E. 803(b)(1). A different judge conducted an evidentiary hearing on the State's motion.

At the hearing, Officer Porter testified that when she arrived on scene, someone identified the car positioned in the intersection as the vehicle that struck Dudley. Officer Porter stated she approached defendant and asked if the car stopped in the intersection was his and if he was the driver of that car. When defendant responded "yes" to both questions, Officer Porter asked what happened. According to the officer, defendant said someone told him he hit a person, so he returned to the scene. Officer Porter explained that due to the growing number of onlookers at the scene, and because she was concerned for defendant's safety, she placed defendant in her patrol car.

While seated in the patrol car, a different officer asked defendant if he had been drinking. Defendant replied he had two or three beers. During these inquiries, defendant was not free to leave because the police were actively investigating the accident.

On May 16, 2019, the judge granted the State's motion in part. She allowed the State to admit defendant's statements to the police limited to the statements he made before entering the police car. The judge found Officer

Porter to be "very candid in her testimony." The judge determined that the questions asked by Officer Porter prior to placing defendant in the patrol car were investigative and the probative value of defendant's responses substantially outweighed any potential prejudice. However, the judge suppressed defendant's statements made after he entered the patrol car.

The judge who decided the State's motion to admit defendant's statements also presided over the three-day jury trial. During opening statements, defense counsel told the jury that, at the time of the accident, both the street and victim's clothing were dark. Counsel described the events as "a tragic accident." Barr and Officer Porter testified as previously summarized.

Dr. Lyla Perez, a physician who conducted autopsies under the supervision of the State Medical Examiner, testified as an expert in forensic pathology. Dr. Perez performed Dudley's autopsy. She confirmed Dudley was wearing dark clothing on the night of the accident. Based on the toxicology test results, Dr. Perez testified that Dudley had "fairly high levels" of alcohol in his system at the time of the accident. Additionally, Dr. Perez described Dudley's "extensive injuries to the head area and face [and] a lot of blood coming from both ears, and also lacerations of the face and the chin and the hairline and the ear, the left side." She explained her findings were the result of a crush injury.

Dr. Perez further testified that some of Dudley's injuries appeared to be caused by a car tire and such injuries would not have produced a "large amount of blood splatter." Dr. Perez opined Dudley died of "[c]ranial, cerebral and rib injuries."

Lieutenant Cokelet from the Crash and Fire Investigations Unit in the Essex County Prosecutor's Office also testified. He described his specialized training regarding fatal motor vehicle accident investigations and told the jury he had investigated hundreds of fatal car crashes.

Lieutenant Cokelet testified that, on the night of the accident, he smelled alcohol on defendant's breath and heard defendant slur while speaking. He also described defendant's eyes as "glassy and bloodshot." Based on these observations, the lieutenant concluded defendant was "under the influence of alcohol."

Lieutenant Cokelet also testified there was surveillance video footage from two separate cameras affixed to a business located on the southwest corner of the intersection where the accident occurred. Lieutenant Cokelet described what he saw on the surveillance video for the jury. According to Cokelet, defendant's car travelled "westbound past the scene and then stop[ped], and then . . . reverse[d] eastbound back and return[ed] to the scene." The lieutenant

explained the surveillance video did not capture footage showing the car hitting Dudley.

On cross-examination, defense counsel asked Lieutenant Cokelet if there were "tire marks going across the body." The lieutenant responded, "[t]here [were] abrasions, yes, on his face" and the abrasions "appear[ed] to be going in that horizontal direction across his face."

Lieutenant Cokelet further testified he was not surprised there was no biological material discovered on defendant's car. Defense counsel objected to this testimony because "[Lieutenant Cokelet] wasn't qualified as an expert and he's giving his opinion." The judge asked if defense counsel wanted to examine Cokelet regarding his experience, but counsel declined. The judge then ruled the lieutenant "would be allowed to provide limited opinion, based on his experience." Cokelet explained, "the only biological material that was present at the scene had been some fluid that was leaking from [Dudley] after the incident," and thus it was unlikely there would have been any biological material on defendant's car.

Detective Frank Ricci with the Crime Scene Unit in the Essex County Prosecutor's Office testified that he searched defendant's car after defendant signed a form consenting to the search. The consent form advised that defendant

had the right to refuse to consent to a search of his car. During the search, the detective found an open bottle of rum that was three quarters full.

After impounding the car, the detective placed the vehicle on a garage lift and inspected the undercarriage of the car for biological material. Ricci testified he found no biological material on defendant's car.

During closing statements, defense counsel argued "everything boils down to one issue. Was this a tragic accident or was it a vehicular homicide?" In asserting the incident was a terrible accident, defense counsel highlighted testimony from witnesses who described the street as dark at the time of the accident. Because it was conclusively established during the trial testimony that Dudley wore dark clothing on the night of the accident, defense counsel argued it was difficult to see him lying in the road. After deliberating, the jury found defendant guilty of vehicular homicide.

At sentencing, the judge found aggravating factors three, six, and nine, and mitigating factor seven. She found aggravating factor three, the risk defendant would commit another offense, based on his two prior driving while intoxicated (DWI) convictions, six prior DWI arrests, and defendant's driving history. The judge found aggravating factor six, the seriousness of the offense, because defendant was convicted of a first-degree offense. Additionally, the

judge found aggravating factor nine, the need to deter defendant from violating the law, based on his past history of "driving under the influence." The judge imposed a fourteen-year sentence with an eighty-five percent parole disqualifier and five additional years of parole supervision under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

On appeal, defendant raises the following arguments:

POINT I

> THE MOTION COURT ERRED IN ADMITTING [DEFENDANT]'S DOUBLE HEARSAY STATEMENT OBTAINED UNDER COERCIVE CIRCUMSTANCES.
>
> A. The Motion Court Erred in Admitting, Pursuant to N.J.R.E. 803(b)(1), [Defendant]'s Alleged Double Hearsay Statement Indicating that Some Unknown Individual Said that he Hit Someone.
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> B. The Motion Court Erred in Concluding that [Defendant]'s Statement to the Police was Voluntary.

POINT II

> THE MOTION COURT ERRED IN DENYING [DEFENDANT]'S MOTION TO SUPPRESS EVIDENCE WITHOUT CONDUCTING AN EVIDENTIARY HEARING ON THE MOTION.

POINT III

> THE TRIAL COURT ERRED IN ALLOWING AN OFFICER TO PROVIDE IMPERMISSIBLE LAY

OPINION TESTIMONY OVER DEFENSE COUNSEL'S OBJECTION AND WITHOUT AN INSTRUCTION ON EXPERT WITNESS TESTIMONY.

POINT IV

THE SENTENCING COURT'S ERRORS IN FINDING AGGRAVATING FACTOR SIX BASED ON THE CURRENT OFFENSE AND IN UTILIZING PRIOR ARRESTS TO FIND AGGRAVATING FACTOR THREE REQUIRES A REMAND FOR RESENTENCING.

I.

We first consider defendant's argument that the motion judge erred in admitting his double hearsay statement to the police. We defer to a trial court's evidentiary rulings absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). We review the trial court's evidentiary ruling "'under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion.'" State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under this deferential standard, "[w]e will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" Garcia, 245 N.J. at 430 (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

"When a defendant does not object to an alleged error at trial, such error is reviewed under the plain error standard." State v. Singh, 245 N.J. 1, 13 (2021). "Under that standard, an unchallenged error constitutes plain error if it was 'clearly capable of producing an unjust result.'" Ibid. (quoting R. 2:10-2). "Thus, the error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached." State v. R.K., 220 N.J. 444, 456 (2015).

A.

Defendant argues the motion judge only found a hearsay exception for defendant's own statement to Officer Porter and not the embedded statement by an unidentified third-party that defendant hit a person. Defendant contends the judge erred in admitting defendant's entire statement based on the officer's credibility without explaining why the embedded hearsay was admissible. Defendant further asserts the judge never identified any probative aspect of the embedded hearsay statement in concluding its probative value was not substantially outweighed by undue prejudice. Based on the foregoing, defendant argues that the motion judge abused her discretion in admitting defendant's double hearsay statement. We disagree.

Because defendant admitted he failed to raise the double hearsay objection to the motion judge, we review for plain error. R. 2:10-2. The State contends that had defendant raised the argument, it would have sought to identify the declarant of the embedded hearsay statement. Further, the State claims the judge did not consider a hearsay exception for the embedded statement because defendant never raised the double hearsay issue.

Applying the plain error standard, we are satisfied the admission of the embedded hearsay statement did not alter the outcome of defendant's case. Here, defense counsel never argued defendant was not the driver of the car that struck Dudley. Rather, defense counsel argued to the jury that the incident was a "tragic accident," emphasizing the accident occurred on a dark street and that the victim wore dark clothing. Additionally, defense counsel highlighted inconsistencies in the testimony of the eyewitnesses who claimed to witness defendant's car strike Dudley, again focusing on testimony that the street was poorly lit and limited the ability of the eyewitnesses to make observations that night. Defense counsel further contended the police photographs failed to identify any artificial lighting illuminating the street that evening.

Defense counsel also noted defendant fully cooperated with the police that evening, including consenting to the vehicle search and blood draw and argued

that defendant's alcohol consumption thus did not impair defendant to the point of causing Dudley's death. Defense counsel also asserted defendant was not "that impaired" because defendant "backed up with a certain level of care or skill" to avoid hitting Dudley. Defense counsel specifically argued to the jury:

> But for the alcohol level, ladies and gentlemen, we wouldn't even be here. But I submit to you that under the circumstances, that the alcohol is not the reason. The reason is, is that it was a dark, dark roadway. 11:25, 11:30 at night. The visibility was one which would make it difficult for anybody to see what was in the roadway. [Defendant] fully cooperated with the authorities, even when he was asked to come in . . . . He fully cooperated.

Given the evidence and defense counsel's theory of the case, we are satisfied that the admission of defendant's double hearsay statement did not lead the jury to a conclusion it otherwise would not have reached. Defense counsel never argued defendant was not the driver of the vehicle that hit Dudley nor that Dudley died for reasons unrelated to being hit by a car.

B.

Defendant also argues the judge erred in admitting his statement to Officer Porter because his statement was not voluntary. Because Officer Porter believed the gathering crowd had the potential to become a dangerous situation and placed defendant in her police car, defendant argues his statement to the officer

was born out of his fear of the people assembled in the street and was thus inadmissible. He asserts the officer's questioning of him in front of an angry mob was "inherently coercive" and should have been suppressed. We reject this argument.

Because defendant never challenged the voluntariness of his statement to Officer Porter before the motion judge, we again review for plain error. R. 2:10-2.

Confessions are admissible if made voluntarily and knowingly. Jackson v. Denno, 378 U.S. 368, 385-86 (1964). The voluntariness of a confession is determined by the totality of circumstances. Withrow v. Williams, 507 U.S. 680, 693-94 (1993). The relevant factors regarding the voluntariness of a confession include "the suspect's age, education, intelligence, advice concerning constitutional rights, length of detention, whether the questioning was repeated or prolonged in nature, and whether physical punishment or mental exhaustion were involved." State v. Hreha, 217 N.J. 368, 383 (2014) (quoting State v. Galloway, 133 N.J. 631, 654 (1993)). "[U]ltimately, the question is whether the defendant's will was overborne." State v. Burris, 145 N.J. 509, 525 (1996).

The cases relied upon by defendant in support of his argument on this point are unavailing. In Payne v. Arkansas, 356 U.S. 560, 564 (1958), a police

officer told the defendant that the officer would "probably keep [the thirty or forty people gathering outside the prison] from coming in" to "get to [the defendant]," provided the defendant confessed to the crime. In Arizona v. Fulminante, 499 U.S. 279, 286-87 (1991), an undercover police officer promised to protect the defendant from "rough treatment from the guys" in exchange for a confession.

Here, upon arriving at the accident scene, Officer Porter saw defendant standing next to his car and asked him what happened. After defendant responded, Officer Porter placed him in her patrol car because a large crowd of people who knew the victim had gathered at the scene, and she "didn't know what the crowd was capable of."

Unlike the cases cited by defendant, there is no evidence Officer Porter promised defendant refuge in her police car in exchange for information about the incident. Officer Porter only moved defendant to her car after he explained what happened. Officer Porter never suggested relocating defendant to the safety of her vehicle before he responded to her question about the accident.

Additionally, Officer Porter simply speculated about the crowd's possible intentions. Nothing in the record indicated anyone in the crowd physically threatened defendant before or after Officer Porter's arrival at the scene. Nor is

there any evidence that defendant was attacked or harmed by the crowd prior to the officer's arrival.

While defendant was not free to leave the scene, likely intoxicated, and surrounded by a crowd of onlookers, there was no evidence demonstrating his will was overborne. On this record, we are satisfied the judge did not abuse her discretion in finding defendant's statements to Officer Porter were voluntary and therefore admissible.

II.

We next consider defendant's argument that the judge erred in denying his motion to suppress evidence absent an evidentiary hearing. Defendant sought to suppress evidence of his BAC level and the discovery of the open bottle of rum in his car. We disagree.

A motion judge's factual findings on a suppression motion must be upheld on appellate review so long as those findings are "supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007). We "should 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." State v. Johnson, 42 N.J. 146, 161 (1964). However, "a trial court's interpretation of the law and the legal

consequences that flow from established facts are not entitled to any special deference." State v. Buckley, 216 N.J. 249, 260 (2013). Review of a motion judge's legal conclusions is plenary. State v. Handy, 412 N.J. Super. 492, 498 (App. Div. 2010). Under Rule 3:5-7(c), "[i]f material facts are disputed, testimony thereon shall be taken in open court."

"[U]nder . . . the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of our State Constitution, searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." Elders, 192 N.J. at 246. However, there are several "well-delineated exceptions" to the warrant requirement. State v. Shaw, 213 N.J. 398, 409 (2012) (quoting State v. Frankel, 179 N.J. 586, 598 (2004)).

One exception to the warrant requirement is a defendant's voluntary consent to the search, determined by reviewing the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Under the United States Constitution, the motion judge must determine whether "consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, [] a question of fact to be determined from the totality of all the circumstances." Id. at 227. A "valid consent to a search must be clear, knowing, voluntary, unequivocal and express." State v. Sugar, 100 N.J. 214, 234 (1985). New

Jersey's Constitution imposes an additional burden on the State to prove the defendant knew he had the right to refuse consent. State v. Johnson, 68 N.J. 349, 353-54 (1975).

Another exception to the search warrant requirement is exigent circumstances. Under this exception, the circumstances "preclude expenditure of the time necessary to obtain a warrant because of a probability that the suspect or the object of the search will disappear, or both." State v. Deluca, 168 N.J. 626, 632 (2001) (quoting State v. Smith, 129 N.J. Super. 430, 435 (App. Div. 1974)). "To invoke that exception, the State must show that the officers had probable cause and faced an objective exigency." State ex rel. J.A., 233 N.J. 432, 448 (2018). The motion judge must evaluate the "totality of the circumstances" in determining the existence of exigent circumstances. Ibid.

A.

Defendant contends the judge erred in admitting evidence of the open alcohol bottle discovered after a search of his car because he was too intoxicated to consent to the search. Defendant raises his intoxication as a defense for the first time on appeal. Defendant also claims there were issues of material fact requiring an evidentiary hearing under Rule 3:5-7(c). In the absence of an

evidentiary hearing, defendant contends the State failed to establish his consent to the search of his car was voluntary.

We reject defendant's contention that he was too intoxicated to consent to the vehicle search. Our Supreme Court has held an act is involuntary due to intoxication when the defendant's "faculties" are so "prostrated" that the defendant cannot form an intent to commit the crime. State v. Mauricio, 117 N.J. 402, 418-19 (1990) (quoting State v. Cameron, 104 N.J. 42, 56 (1986)). Similarly, we have considered whether a defendant is too intoxicated to waive Miranda[3] rights. See State v. Warmbrun, 277 N.J. Super. 51, 64 (App. Div. 1994). There, we concluded that the defendant was not too intoxicated to provide a knowing and intelligent waiver of his Miranda rights, despite being uncooperative, antagonistic, and visibly intoxicated, because the defendant stated he understood his rights, explained the happening of the incident, reported the amount he had to drink, and continued to discuss the matter coherently with the police. Id. at 65-66.

Here, defendant displayed a similar level of intoxication as the defendant in Warmbrun. Defendant discussed the incident with Officer Porter and responded rationally to her questions. According to Officer Porter, despite signs

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

of intoxication, defendant voluntarily consented to both the blood draw and the search of his car.

In denying the motion to suppress, the judge found "defendant insisted repeatedly . . . that he wanted to volunteer for the blood test." Moreover, there was no evidence on this record that defendant was incoherent or failed to comprehend his interactions with the police that night.

We are satisfied there was no need for an evidentiary hearing because there were no disputed facts concerning defendant's level of intoxication or his signing of the consent forms. Based on the evidence, defendant had possession of his faculties to consent to the search and therefore, the judge properly denied the motion to suppress the physical evidence seized from his car.

B.

Defendant also argues the judge erred in denying his motion to suppress the BAC test results without an evidentiary hearing because he did not voluntarily and knowingly consent to the blood draw. He further claims he was unaware of his right to refuse the blood draw. He also contends the judge erred in declining to conduct a hearing on the issue of exigency because he contested the existence of any exigent circumstances in his suppression brief.

The judge found defendant knew he could refuse the blood draw because he was presented with a consent form, agreed to have his blood drawn, and had prior convictions for driving while intoxicated. She further found there was no legal requirement to notify defendant that he had the right to decline consent to the blood draw. Based on this ruling, the judge did not address whether there were exigent circumstances supporting the blood draw without a warrant.

We need not address whether defendant was advised he could decline consenting to a blood draw because there were exigent circumstances warranting the draw absent defendant's consent. While the judge did not address exigent circumstances, we review orders on appeal rather than the judge's legal reasoning. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 169 (App. Div. 2005) ("[A] correct result, even if predicated on an erroneous basis in fact or in law, will not be overturned on appeal.").

Police officers may obtain a blood sample without a warrant so long as they have probable cause to believe the driver was intoxicated and the sample was taken in a medically acceptable manner. State v. Dyal, 97 N.J. 229, 238 (1984). "The exigent-circumstances exception is frequently cited in connection with warrantless blood draws." State v. Zalcberg, 232 N.J. 335, 345 (2018). "[T]he reasonableness of a warrantless search under the exigency exception to

the warrant requirement must be evaluated based on the totality of circumstances." Missouri v. McNeely, 569 U.S. 141, 148 (2013); accord Zalcberg, 232 N.J. at 345. "[E]xigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." Mitchell v. Wisconsin, ____ U.S. ___, 139 S. Ct. 2525, 2537 (2019) (plurality opinion).

"[T]he dissipation of alcohol in the blood merits considerable weight in a totality of the circumstances analysis." State v. Jones, 437 N.J. Super. 68, 78 (App. Div. 2014). The attempt to "obtain[] a warrant will result in . . . delay," which will "'threaten' the destruction of evidence." Id. at 79.

Here, delaying a blood draw to obtain a search warrant at 2 a.m. risked the loss of important evidence concerning defendant's level of intoxication. The police officers had probable cause regarding defendant's intoxication because he displayed visible signs associated with drunkenness. Moreover, law enforcement personnel at the scene were actively investigating a homicide, which took priority over seeking a search warrant for a blood draw. Law enforcement had to interview witnesses, block traffic, control the gathering crowd, seek surveillance camera videos that may have captured evidence

associated with the incident, search defendant's car, and tow the car to the crime scene unit.

Defendant's blood was drawn around 2:50 a.m., three hours after the incident. Despite the passage of time, his BAC was .21%. Under these circumstances, we are satisfied that the police were justified in finding probable cause to draw defendant's blood and there were exigent circumstances justifying the blood draw absent a warrant.

III.

We next address defendant's argument that the trial judge erred in allowing Lieutenant Cokelet to testify regarding the absence of biological material on the vehicle and the marks on Dudley's face. He asserts the State offered the lieutenant as a fact witness, not an expert witness, and the officer's testimony constituted expert testimony. Additionally, he asserts the judge should have provided an instruction to the jury regarding expert witness testimony. We reject these arguments.

We review a trial court's evidentiary rulings for abuse of discretion. Prall, 231 N.J. at 580 (2018). "[T]he decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its

finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

N.J.R.E. 701 permits a lay witness to testify about opinions "if it (a) is rationally based on the witness' perception and (b) will assist [the jury] in understanding the witness' testimony or in determining a fact in issue." The offered opinion must be based on the witness' perceptions or senses and must assist the jury. State v. Sanchez, 247 N.J. 450, 466-70 (2021). When the testimony is offered by law enforcement personnel, "an officer is permitted to set forth what [was] perceived through one or more of the senses." Singh, 245 N.J. at 15 (quoting State v. McLean, 205 N.J. 438, 460 (2011)).

Here, Lieutenant Cokelet never used the phrase "tire marks." Rather, he corrected defense counsel's choice of words during cross-examination, and testified he observed "abrasions" in a horizontal direction on Dudley's face. We are satisfied that the lieutenant's observation of abrasions was properly admitted as a perception-based opinion under Rule 701, and the judge need not have given any special instruction to the jury regarding this testimony.

Nor did the judge err in permitting Lieutenant Cokelet to explain why he was not surprised at the lack of biological material on defendant's car. "Courts in New Jersey have permitted police officers to testify as lay witnesses, based

on their personal observations and their long experience in areas where expert testimony might otherwise be deemed necessary." State v. LaBrutto, 114 N.J. 187, 198 (1989). In LaBrutto, the Court upheld the admission of lay opinion testimony offered by a police officer about the point of impact between vehicles driven by the defendant and the decedent, even though they had come to rest before the officer arrived on the scene. Id. at 197-99.

Further, we note that the trial judge offered defense counsel an opportunity to voir dire Lieutenant Cokelet regarding his experience concerning biological material as part of a homicide investigation. However, defense counsel declined.

Defendant argues that conducting a voir dire regarding Lieutenant Cokelet's expertise on the issue would have further bolstered his impermissible expert opinion testimony because the jury would have heard his extensive credentials without being instructed how to weigh his testimony. We disagree.

First, defense counsel could have conducted the voir dire outside the presence of the jury on this limited issue. Thus, the jury would not have learned about the lieutenant's experience unless the judge determined he was qualified to offer an opinion related to biological material as part of his investigation of vehicular homicides.

Additionally, defense counsel extensively and effectively cross-examined Lieutenant Cokelet. Cross-examination is the "greatest legal engine ever invented for the discovery of truth," and defense counsel had more than ample opportunity to challenge the lieutenant's testimony and his experience. State v. Basil, 202 N.J. 570, 591 (2010) (citation omitted).

Further, any error in the admission of Lieutenant Cokelet's testimony on these issues was harmless. The lieutenant offered testimony addressing the cause of death, which defendant did not contest. Also, the medical examiner testified to the cause of Dudley's death.

Based on Lieutenant Cokelet's training and experience, we are satisfied the judge did not abuse her discretion in allowing his perception testimony concerning the abrasions on Dudley's face and the lack of biological material on defendant's car.

IV.

We next address defendant's argument that the sentencing judge erred in finding aggravating factor three, N.J.S.A. 2C:44-1(a)(3), and aggravating factor six, N.J.S.A. 2C:44-1(a)(6). Defendant claims the judge impermissibly relied on past arrests in finding aggravating factor three. He further asserts there was no basis for the judge to find aggravating factor six because he had no past

indictable offenses. He claims the judge also erred in relying on the present offense in support of aggravating factor six. Additionally, he argues the judge impermissibly double-counted the seriousness of the present offense in finding aggravating factor six because the judge sentenced him in the first-degree range, subject to NERA.

We review a trial court's imposition of a sentence for abuse of discretion. State v. Miller, 237 N.J. 15, 28 (2019). "Appellate review of a criminal sentence is limited; a reviewing court decides whether there is a 'clear showing of abuse of discretion.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)). We defer to the sentencing court's factual findings. State v. Case, 220 N.J. 49, 65 (2014).

However, our deferential standard of review applies "only if the trial judge follows the [New Jersey Administrative] Code and the basic precepts that channel sentencing discretion." State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting Case, 220 N.J. at 65). "Appellate courts must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of

the case 'shock[s] the judicial conscience.'" Bolvito, 217 N.J. at 228 (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Here, the sentencing judge found "aggravating factor number 3 is present" because "there is a risk defendant will commit another offense." N.J.S.A. 2C:44-1(a)(3). The judge stated, "defendant has two prior DWI convictions" and "six prior arrests," and "[t]he seventh would be the current . . . arrest for this charge."

The judge found "factor number 6 is also present." Aggravating factor six requires the sentencing court to consider "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted." N.J.S.A. 2C:44-1(a)(6). The judge stated that although "the defendant does not have any prior indictable convictions, the [c]ourt can consider the nature of the event. This is the seriousness of the offense of which he has been convicted." She noted defendant's conviction for "a first[-]degree offense which is the most serious of crimes in the State of New Jersey, and that is subject [to] the No Early Release Act."

Having reviewed the record, we agree the judge erred in her consideration of aggravating factors three and six, requiring a remand for resentencing. Beginning with aggravating factor three, the judge appeared to rely on past arrests in finding defendant was likely to commit another offense. The judge

cited two New Jersey Supreme Court cases in support of her reliance on defendant's past arrests in finding aggravating factor three. However, both cases, State v. Green, 65 N.J. 457 (1973), and State v. Brooks, 175 N.J. 215 (2002), were overruled by State v. K.S., 220 N.J. 190 (2015). In K.S., the Court explicitly prohibited sentencing judges from considering past arrests for any reason. Id. at 199. The Court expressly held "prior dismissed charges may not be considered for any purpose." Id. at 199-200.

While defendant has two prior DWI convictions, defendant's criminal history consisted of two disorderly persons convictions, two dismissed matters, and one acquittal. The presentence report confirmed defendant's lack of any prior indictable criminal history and reflected the present offense represented defendant's first indictable conviction. Thus, on remand, the judge should clarify the evidence relied upon in finding aggravating factor three.

We also agree that the judge erred in finding aggravating factor six. The plain language of N.J.S.A. 2C:44-1(a)(6) unequivocally states a defendant's "prior" criminal record may be considered. However, nothing in the statute allows consideration of the current offense in a sentencing decision. Here, the judge considered the current offense in finding aggravating factor six.

Further, we are satisfied that the judge's consideration of the present conviction in finding aggravating factor six constituted impermissible double-counting. "Elements of a crime, including those that establish its grade, may not be used as aggravating factors for sentencing of that particular crime." State v. Lawless, 214 N.J. 594, 608 (2013). To use the elements of the crime in formulating the aggravating factors results in impermissible double-counting. State v. Kromphold, 162 N.J. 345, 353 (2000).

Here, the vehicular homicide offense subjected defendant to the imposition of punishment within the first-degree range and NERA. Thus, the judge's consideration of the seriousness of the present crime in support of aggravating factor six resulted in double-counting.

For these reasons, we remand the matter for resentencing. On remand, the judge should clarify the information relied upon in finding aggravating factor three and re-evaluate the evidence in the record regarding aggravating factor six. We take no position on the sentence to be imposed on resentencing.

Affirmed as to the conviction. Remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.