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March 8, 2024

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LETTER IN LIEU OF BRIEF AND APPENDIX
ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex - CN 006
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Movant) v.
Thomas J. Dinapoli (Defendant-Respondent)

Criminal Action: On Motion for Leave to Appeal from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Union County, Granting Defendant's Motion to Preclude Expert Testimony

Sat Below: Hon. Thomas K. Isenhour, J.S.C.

Honorable Judges:

Pursuant to R. 2:6-2(b), and R. 2:6-4(a), this letter in lieu of a formal brief is submitted on behalf of the State.

TABLE OF CONTENTS

TABLE OF JUDGMENTS, OPINIONS, ORDERS BEING APPEALED

INDEX TO APPENDIX

1 The video will be sent under separate cover.

STATEMENT OF PROCEDURAL HISTORY[1]

On January 8, 2020, a Union County Grand Jury returned Indictment No. 20-01-00016-I, charging defendant-respondent Thomas J. DiNapoli with second-degree Vehicular Homicide (re: victim Michelina Mele), contrary to N.J.S.A. 2C:11-5 (count one); fourth-degree Assault by Auto (re: victim Maria Murray), contrary to N.J.S.A. 2C:12-1c(2) (count two); and fourth-degree Assault by Auto (re: victim Ana Vasquez-Briones), contrary to N.J.S.A. 2C:12-1c(2) (count three). (Pa1 to 2).

On January 21, 2020, the Honorable Candido Rodriguez, Jr., J.S.C., arraigned defendant and a not guilty plea was entered. (Pa3 to 4).

On June 10, 2020, defense filed a Motion to Suppress defendant's statement. (Pa5). On April 19, 2021, defense supplemented the motion and sought the suppression of the blood/toxicology evidence as fruit of the poisonous tree. The State opposed and, on June 13, 2022, the Honorable Thomas K. Isenhour, J.S.C., issued an order denying defendant's Motion to Suppress, inter alia, "toxicology results." (Pa6).

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[1] "Pa" refers to the State's Appendix to this brief.
"1T" refers to the transcript of proceedings on May 11, 2023
"2T" refers to the transcript of proceedings on May 23, 2023.
"3T" refers to the transcript of proceedings on May 25, 2023.
"4T" refers to the Transcript of proceedings on May 30, 2023.
"5T" refers to the Transcript of proceedings on December 1, 2023.

On September 26, 2022, defense and the State executed a Trial Memorandum; trial was scheduled for February 6, 2023. (Pa7 to 9). Thereafter, the trial date was adjourned, and on April 10, 2023, the parties appeared for a pretrial conference. At the end of the conference, jury selection was scheduled for April 25, 2023. (Pa10).

On April 4, 2023, defendant filed a Motion to Preclude the admission of blood evidence, alleging an insufficient chain of custody and asserting the evidence was not reliable. (Pa11). The State opposed and, on April 25, 2023, Judge Rodriguez denied defendant's motion. (Pa12). On May 5, 2023, the Honorable Thomas K. Isenhour, J.S.C., issued an Omnibus Order, wherein the court held that "the State's motion to admit defendant's toxicology results is to be resolved during trial subject to the State laying the proper foundation and establishing relevancy." (Pa13 to 14).

Defendant was tried before Judge Rodriguez and a jury. The State presented its case-in-chief from May 11, 2023, through May 30, 2023. Pertinently, on May 23, 2023, Donna Papsun, a forensic toxicologist for the State testified at an N.J.R.E. 104 hearing to determine the admissibility of her opinion and testimony regarding serological evidence. (2T3-13 to 17; 2T48-20 to 50-3). At the conclusion of the hearing, Judge Rodriguez denied defendant's Motion to Preclude Ms. Papsun's testimony, noting "It's an

element of the offense." (2T50-1 to 2).

On May 25, 2023, Ms. Papsun testified at another N.J.R.E. 104 hearing, again to determine the admissibility of her opinion and testimony regarding serological evidence. (3T4-23 to 5-1). At the conclusion of that hearing, Judge Rodriguez again denied defendant's Motion to Preclude Ms. Papsun's testimony. (3T33-25 to 38-9). Ms. Papsun then testified before the jury. (3T42-20 to 68-17). On May 30, 2023, Ms. Papsun completed her testimony before the jury and the State rested. (4T).

Defense presented until June 1, 2023, and then moved for a continuance/mistrial, alleging newly discovered evidence materially altered their experts' opinions. Judge Rodriguez granted defendant's request for a mistrial and dismissed the jury.

On July 26, 2023, a Union County Grand Jury returned superseding Indictment No. 23-07-00473, keeping the original charges and adding the lesser-included/related third-degree Strict Liability Vehicular Homicide, contrary to N.J.S.A. 2C:11-5.3a, as well as third-degree Witness Tampering, contrary to N.J.S.A. 2C:28-5a, for facts discovered immediately prior to trial and testified to at trial by Julio Ortiz. (Pa15 to 17).

On September 29, 2023, defendant filed a Motion to Preclude the testimony of Donna Papsun relative to defendant's use of and/or impairment

by cocaine and/or Klonopin/Clonazepam. (Pa18). The State also filed a Motion to Preclude that day, seeking to preclude defendant's experts on the grounds that their opinions are contrary to accepted medical standards and legally impermissible under the model jury charge for causation. (Pa19). On December 1, 2023, the parties argued the motions before Judge Isenhour. (5T). The court denied the State's motion and asked for additional briefing on defense's motion. (5T51-22 to 53-5).

On December 19, 2023, the State filed a Motion for Leave to Appeal the trial court's denial of the State's motion to preclude. (Pa20 to 21). On January 4, 2024, the trial court heard additional argument relative to the supplemental briefing by the parties. On January 9, 2024, this Court granted the State's Motion for Leave to Appeal. (Pa23). On February 16, 2024, the State filed its merits brief for that appeal.

On February 20, 2024, the trial court granted defendant's Motion to Preclude testimony regarding defendant's use of and/or impairment by cocaine or benzoylecogonine. (Pa24 to 34). This Motion for Leave to Appeal follows.

STATEMENT OF FACTS[2]

Vehicular Homicide Facts:

On June 4, 2019, at about 3:44 p.m., defendant drove at about 40 miles per hour in the right eastbound lane on Morris Avenue, when he drifted across the four lanes of traffic into the right westbound lane and crashed head-on into the vehicle driven by Maria Murray and further occupied by Michelina Mele and Ana Vasquez Briones. (Pa35 to 44). Ms. Murray sustained bruising commensurate with her seatbelt positioning during the crash, with pain in her left shoulder and across her chest. (Pa39). As a result of the crash, Ms. Vasquez sustained a laceration requiring stitches to her left hand, as well as bruising and pain commensurate with her seatbelt positioning during the crash. (Pa39 to 40). Ms. Mele, who was the front seat passenger, was transported to Trinitas Hospital, where, approximately twenty-six hours later, she died. (Pa54). Dr. Beverly Leffers conducted an autopsy of Ms. Mele and ruled the cause of death to be blunt impact injuries, and the manner of death to be an accident. (Pa55 to 59).

At the scene, defendant stated that he fell asleep and did not know what

[2] Because this is an appeal from a pretrial motion and the trial has not occurred, the "Statement of Facts" are derived from police reports and investigative reports and are the facts that the State intends to prove at trial.

happened. (Pa37). At the hospital, defendant said he lost control of his vehicle. (Pa45). In subsequent statements, defendant again admitted that he fell asleep. (Pa35 to 44). Defendant's blood was drawn at the hospital about one hour after the crash and contained cocaine metabolites (Benzoylecgonine, "BZE"), as well as Clonazepam (an anti-anxiety, muscle relaxer, Benzodiazepine) in an amount far-exceeding any therapeutic dosage/purpose. (Pa42 to 44; Pa46 to 53).

The State intends to prove that defendant was intoxicated at the time of the crash through the results of his blood test, text messages to his wife, testimony of a co-worker, testimony of an eye witnesses, and body worn-camera video.

Specifically, at about 5:12 a.m., defendant texted his wife: "I tried driving into work but I did not drink yesterday and my head is so dizzy and I am having trouble walking. I need to go home." (Pa60 to 61).

According to defendant's coworker, Julio Ortiz, defendant also was disoriented at lunch. Mr. Ortiz testified that, at about noon, he went to lunch with defendant at a pizzeria. (1T4-18 to 6-7). Defendant drove, as he usually did. (1T5-19 to 25). During their lunch break, Mr. Ortiz observed defendant to be driving "erratical[ly]"; defendant was "swerving" to and from the pizzeria and "almost got into an accident." (1T7-8 to 8-9; 8T9-9 to 11; 1T10-

17 to 22). More specifically, defendant almost struck a parked vehicle while exiting the pizzeria parking lot. (1T9-9 to 10-8). When Mr. Ortiz asked defendant about defendant's condition, defendant admitted to taking medication, "muscle relaxers," in an amount "more than prescribed." (1T8-7 to 21; 1T9-12 to 22; 1T10-17 to 22). Defendant further stated that "he wasn't feeling well" and was "leaving early that day." (1T10-17 to 22). When they got back to work from lunch around 1:00 p.m., Mr. Ortiz "advise[d] [defendant] that he should not be driving in the condition [he] observed." (1T10-23 to 11-5). Mr. Ortiz "told [defendant] that he should call an Uber. Call someone to come pick him up." Id. Mr. Ortiz informed police that he believed defendant was out the night before, partying. (Pa71 to 72). Mr. Ortiz further testified that, a few weeks after the crash, defendant approached him and told Mr. Ortiz, "if [the police] come interviewing people, don't say anything." (1T12-5 to 7; 1T63-12 to 21).

An eye-witness to the accident, Cara Bradshaw, also observed defendant's status that day. (Pa38). Immediately after the accident, defendant emerged from his car and asked Ms. Bradshaw how the accident occurred. Ibid. He then stated that he must have fallen asleep following a long shift; however, that "long shift," according to defendant and his employer, was shortened at defendant's request for him to obtain an MRI. Ibid.

Lastly, body worn camera footage depicts defendant after the crash. Additionally, it shows Ms. Bradshaw and Ms. Murray repeatedly wondering aloud to officers as to whether defendant was intoxicated/impaired/"drunk." (Pa79).

Expert Testimony Relevant to Issue on Appeal:

On May 23, 2023, Donna Papsun, a forensic toxicologist, explained that BZE is the metabolite of cocaine that may be "present from up to a day from use." (2T15-17 to 23). While BZE has a longer half-life presence in the blood compared to the active form of cocaine, Ms. Papsun noted that the blood evidence collected by the hospital (not police) was done so using lavender-top tubes, expediting the metabolization of cocaine and/or dissipation of BZE. (2T15-24 to 16-3). Still, toxicological blood results revealed the remaining half-life of the BZE in defendant's blood was 160 nanograms per milliliter. (2T15-11 to 14).

Ms. Papsun explained the bell-curve representation of how more cocaine leads to more BZE and how its dissipation is contingent on the timing and amount of cocaine consumed. (2T39-16 to 40-3). While at a different rate, both the cocaine and BZE follow a bell-curve as it relates to their presence in the blood. Id. Ms. Papsun explained that a drug introduced into the system (e.g., cocaine) will be absorbed and eventually reach peak concentration before

dissipating. (2T17-15 to 18-24).

On May 30, 2023, Ms. Papsun further elaborated that defendant ingested cocaine prior to the crash for it to have metabolized as it did. (4T17-18 to 19-13). When asked whether defendant's conduct at the scene was consistent with onset effects of cocaine, Ms. Papsun said "no," in which case we would have expected defendant to be stimulated, not drowsy. (2T42-14 to 21; 2T16-10 to 18). Conversely, Ms. Papsun explained that a person on the "crash side" of cocaine would have a depression of the central nervous system and be "uncontrollably sleepy or disorientated." (2T16-19; 2T19-17 to 23; 4T133-18 to 134-13). When asked about defendant at the time of the crash, Ms. Papsun stated "[t]he behaviors and the observations of disorientation, confusion, the involvement of an accident including traveling to the other side of the road, crossing double yellow lines, lack of evasive maneuvers, memory loss, drowsiness, sedation, all of that is consistent with impairment by central nervous system depress[ion]." (4T17-7 to 15). Ms. Papsun made clear, "[t]he crash side [of cocaine] can make someone dysphoric as well as really sleepy so that can mimic what you would see for a central nervous system depression." (4T134-11 to 13).

Ms. Papsun explained she could not opine about cocaine impacting defendant during the crash because that stimulant was not found in defendant's

blood. (4T135-23 to 136-8; 1T16-8 to 17-5). Ms. Papsun further explained that, while BZE was detected in defendant's blood, BZE is inactive and itself does not affect the central nervous system; rather, "it's a marker of cocaine exposure." (4T17-18 to 18-2; 1T19-2 to 23).

LEGAL ARGUMENT

POINT I

THE STATE'S MOTION FOR LEAVE TO APPEAL MUST BE GRANTED IN THE INTEREST OF JUSTICE BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REVERSED THE LAW OF THE CASE AND GRANTED DEFENDANT'S MOTION TO PRECLUDE EVIDENCE RELATED TO THE PRESENCE OF BZE IN HIS BLOOD. (Pa24 to 34).

Ordinarily, once an issue has been fully and fairly litigated, it is not subject to relitigation between the same parties either in the same or in subsequent litigation. Nevertheless, Judge Isenhour revisited an evidentiary ruling made by Judge Rodriguez, and ruled that Ms. Papsun's expert opinion and testimony about BZE would no longer be admissible at trial. In doing so, the trial court erred in analyzing the relevancy of the evidence, its probative value, and the prejudicial effect of same. The trial court's ruling was an abuse of discretion and cannot stand. As this may be the only opportunity the State

can seek appellate review, the State's Motion for Leave to Appeal must be granted in the interests of justice.

Parties do not have a right to appeal an interlocutory order under the Rules of Court. In re Pa. R.R. Co., 34 N.J. Super. 103, 107-08 (App. Div. 1955), aff'd, 20 N.J. 398 (1956). Rather, leave to file an interlocutory appeal of a trial court's order only is permitted "in the interest of justice." R. 2:2-4; Brundage v. Estate of Carambio, 195 N.J. 575, 598-99 (2008). See R. 2:2-2(b) (providing that this Court may take appeals from interlocutory orders to "prevent irreparable injury"). An interlocutory appeal is not appropriate to "correct minor injustices […]." Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div.), certif. denied, 22 N.J. 574 (1956), cert. denied, 353 U.S. 923 (1957). When leave is granted, it is because there is the possibility of "some grave damage or injustice" resulting from the trial court's order. Id. at 568. The moving party must establish, at a minimum, that the desired appeal has merit and that "justice calls for [an appellate court's] interference in the cause." Romano, 41 N.J. Super. at 568.

Here, the interests of justice call out for an appellate court's intervention. The State submits the trial court abused its discretion by precluding the State from introducing factual evidence, namely, the presence of BZE, and an expert opinion regarding same. The State cannot seek review

of this ruling after an acquittal and, therefore, this may be the only opportunity for appellate review. Accordingly, the State's Motion for Leave to Appeal should be granted to permit this Court to consider this issue of public interest.

A trial court's ruling on the admissibility of evidence is "subject to limited appellate scrutiny." State v. Buda, 195 N.J. 278, 294 (2008). A trial court's findings based on the testimony of witnesses is afforded deference, State v. Elders, 192 N.J. 224, 244 (2007). 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. Handy, 206 N.J. 39, 45 (2011); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995); State v. Mann, 203 N.J. 328, 337 (2010). Here, where the trial court did not preside over the evidentiary hearings, but rather relied upon cold transcripts, the review is de novo.

The law-of-the-case doctrine "is a non-binding rule intended to 'prevent relitigation of a previously resolved issue'" in the same case. Lombardi v. Masso, 207 N.J. 517, 538 (2011) (quoting In re Estate of Stockdale, 196 N.J. 275, 311 (2008)); see also Arizona v. California, 460 U.S. 605, 618 (1983) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."); State v. Reldan, 100 N.J. 187, 208 (1985 (O'Hern, J., dissenting) ("[T]he 'law of the

case' rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case." (internal quotation marks omitted)). Law of the case is a discretionary rule that calls on one court "to balance the value of judicial deference for the rulings of a coordinate [court] against those 'factors that bear on the pursuit of justice and, particularly, the search for truth.'" Lombardi, 207 N.J. at 538-39 (quoting Hart v. City of Jersey City, 308 N.J. Super. 487, 498 (App. Div. 1998)).

In this case, Judge Rodriguez presided over the first trial. During that trial, the court was presented with Ms. Papsun's report and her expert testimony regarding same. After an N.J.R.E. 104 hearing, Judge Rodriguez found her testimony was admissible. Specifically, the court stated,

> We had the benefit of hearing Ms. Papsun on her report and the reasons for what she based her opinion on. She clearly indicates in her report that cocaine, as she read it and the sentence that I had her read, it clearly indicates that it was in his system. However, because of the variables and the way this blood draw was kept and preserved by using the wrong purple -- lavender tops could have quickly dissolved the cocaine.
>
> However, she indicates that the BZE is definitely in there and so the report speaks for itself. She gives an opinion as to how she reached at it. I'm sure that the defense is going to cross her on that and you're going to bring out the fact that she said that the only conclusion reached is that the BZE was in the

> collection blood sample, was exposed to cocaine at some point prior to the blood collection which could have been, according to her, 12 to 48 hours. He got into the hospital two hours after the accident. Thereafter, the blood draw was obtained.
>
> The State has the burden to prove that the defendant acted recklessly as an element of the offense and, therefore, the jury should have all the actions that may have been taken by the defendant, including the use of cocaine, if she opines that she believed it was, but she can't definitely give an opinion that that, in fact, caused the accident.
>
> The jury is not stupid. The jury is able to -- I don't think they'll be confused at what happened here and how she makes her opinion. There is absolutely no confusion in my mind whatsoever and I think this jury will see it as well when explained by Ms. Papsun. It's an element of the offense and my opinion, as written, allowing the testimony of the cocaine will remain.
>
> [2T48-21 to 50-3]

Although the law of the case doctrine is a discretionary rule and not an inflexible requirement, the proper application of the rule called for deference in this matter. As previously stated, the law of the case doctrine calls on one court to balance the value of judicial deference for the rulings of a coordinate court against those factors that bear on the pursuit of justice and, particularly, the search for truth. Balancing those factors here, it is clear that Judge Rodriguez's opinion, based on the live testimony of Ms. Papsun, was sound

and should not have been disturbed. Accordingly, Judge Isenhour's ruling was an abuse of discretion that cannot stand on appeal.

Indeed, as argued herein, Judge Isenhour's ruling also was an abuse of discretion because it is legally erroneous. Specifically, the court erred in finding the BZE evidence and Ms. Papsun's testimony regarding same were not relevant. (Pa31 to 34). It also erred in finding the probative value was substantially outweighed by the potential for prejudice. Accordingly, the court's evidentiary ruling must be reversed on appeal.

N.J.R.E. 401 defines "relevant evidence" as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Relevant evidence "need not be dispositive or even strongly probative in order to clear the relevancy bar." State v. Cole, 229 N.J. 430, 447 (2017) (quoting State v. Buckley, 216 N.J. 249, 261 (2013)). Instead, the relevancy threshold is met "[o]nce a logical relevancy can be found to bridge the evidence offered and a consequential issue in the case." Id. at 448, (quoting State v. Burr, 195 N.J. 119, 127 (2008)). Under N.J.R.E. 402, "all relevant evidence is admissible" subject to exceptions provided for elsewhere in the rules.

Here, the trial court held that it "does not find the BZE evidence the State seeks to introduce to be relevant under Rule 401. It does not have the

tendency to prove or disprove any fact under consideration in this case." (Pa33). This ruling is clearly erroneous. Defendant is facing a charge for second-degree vehicular homicide, contrary to N.J.S.A. 2C:11-5, and a charge for third-degree strict liability vehicular homicide, contrary to N.J.S.A. 2C:11-5.3a. To find defendant guilty of violating N.J.S.A. 2C:11-5, the jury will be required to consider defendant's state of mind. Specifically, the State has to prove that defendant caused the victim's death by driving the vehicle recklessly. In evaluating whether defendant is guilty of violating N.J.S.A. 2C:11-5.3a, the State will have to prove that defendant caused the victim's death by driving a vehicle while intoxicated in violation of N.J.S.A. 39:4-50. The BZE evidence, and Ms. Papsun's testimony regarding same, directly relates to these elements. Importantly, when considered in conjunction with the testimony of eye witnesses, the testimony of defendant's co-worker, his text messages from earlier in the day, and the body worn camera video that will be admitted at trial, this evidence will enable the jury to properly evaluate whether defendant was driving the vehicle recklessly and/or whether he was driving his vehicle while intoxicated. There is no other way about it, this evidence is relevant to the jury's analysis.

Nevertheless, the trial court found the evidence was not relevant because Ms. Papsun was not opining whether defendant's cocaine ingestion affected

his driving and, thus, "any arguments the State might make to the jury would require the jury speculate what effect, if any, defendant's cocaine ingestion had on his driving." (Pa32). That finding inaccurately narrows the definition of what is relevant. Of course, an opinion that affirmatively stating defendant's cocaine ingestion affected his driving would be clearly relevant and probative; however, the absence of that opinion does not mean the subject opinion cannot still be relevant.

Indeed, it is hard to reconcile the trial court's relevancy finding with the trial court's recognition that the State's theory of the case may be what occurred, exactly:

> [t]he State's argument is that defendant's clonazepam intoxication, which caused drowsiness, was exacerbated by the fatigue caused by the 'crashing' effects of coming down after the stimulant effect of cocaine dissipated. That may be exactly what occurred here and based upon a review of all the evidence in the case, it is reasonable for the State to suspect it.
>
> [Pa31 (emphasis added).]

The court characterizes the State's theory as speculation; however, the State's theory truly is an interpretation of facts based on the evidence. There was BZE in defendant's blood after the car crash. BZE unequivocally establishes defendant had cocaine in his system prior to the blood draw. The

jury should be permitted to consider that significant fact and the luminating expert testimony regarding what information can be derived from it. As evidenced by Ms. Papsun's testimony, defendant's behavior at the scene was "consistent with the [e]ffects of central nervous system depression," which may be expected during the "crashing" effects of cocaine and/or the active effects of clonazepam. (4T16-10 to 22; 17-7 to 15). Thus, not only is this evidence relevant, it is highly probative and the jury should be able to consider it when evaluating the proofs in this case. The trial court erred in finding the BZE evidence and Ms. Papsun's testimony regarding same were not relevant. The trial court's evidentiary ruling was an abuse of discretion.

Of course, even when evidence is relevant, it may still "be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) […] needless presentation of cumulative evidence." N.J.R.E. 403 (emphasis added). However, evidence should only be barred under N.J.R.E. 403 if "the probative value of the evidence 'is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the' issues." Cole, 229 N.J. at 448 (alteration in original) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)). The party urging the exclusion of evidence under N.J.R.E. 403 retains the burden "to

convince the court that the N.J.R.E. 403 considerations should control." Rosenblit v. Zimmerman, 166 N.J. 391, 410 (2001) (quoting Biunno, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 403 (2000)).

Applying this test, the probative value of the evidence is not substantially outweighed by the risk of undue prejudice. The trial court found there was "great potential for undue prejudice" because of the evidence's "inherently inflammatory potential." (Pa33). Specifically, the court stated that "[t]he mere fact that defendant was exposed to cocaine would lead any reasonable jury to conclude that defendant is a drug user and therefore they would view his use of prescribed clonazepam in a different manner than they would without that evidence." (Pa33). The trial court's concern is sheer speculation and could be resolved by a curative instruction.

The State maintains that the evidence is intrinsic evidence of the crimes charged and N.J.R.E. 404 does not apply. Still, the trial court could still provide a N.J.R.E. 404 limiting instruction to eliminate its concern about the potential prejudicial effect of the BZE evidence. Jurors are presumed to follow jury instructions. See State v. Loftin, 146 N.J. 295, 390 (1996). Informing the jurors of the discrete purpose of the evidence and Ms. Papsun's testimony and that they cannot consider the introduction of the evidence as proof that defendant misused clonazepam or that he is a bad person and must

be guilty of the present crimes, would eliminate the court's concern. Accordingly, the probative value of the BZE evidence would not be "substantially outweighed" by the potential for undue prejudice and, therefore, the trial court's ruling was erroneous and an abuse of discretion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the State's Motion for Leave to Appeal be granted.

Respectfully submitted,

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s/James C. Brady

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STATE OF NEW JERSEY Plaintiff-Movant v. THOMAS J. DINAPOLI Defendant-Respondent	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION ON MOTION FOR LEAVE TO APPEAL THE INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, UNION COUNTY DOCKET NO.: AM-000344-23 Sat Below: Thomas K. Isenhower, J.S.C.

RESPONDENT BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT THOMAS J. DINAPOLI

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TABLE OF CONTENTS

Table of Judgments, Orders, and Rulings Being Appealed

Table of Authorities

Cases

New Jersey Court Rules

Table of Appendix

STATEMENT OF PROCEDURAL HISTORY

The defendant adopts the State's procedural history included in its March 8, 2024 brief.

STATEMENT OF FACTS

On June 4, 2019, Defendant was involved in a motor vehicle accident after his automobile went across the line of traffic and collided with another automobile in which the alleged victims were traveling. (Pa 24-25). Alleged victim, Michelina Mele, was transported to Trinitas Hospital in Elizabeth, NJ where she received treatment for her injuries. (Id.). Several days later, she was placed under hospice care and died. (Id.). The precise cause of her death is one which is vehemently disputed by the Parties in this case. Two other passengers in Ms. Mele's automobile were also injured and would also be treated for their injuries. (Id.).

In its motion papers, the State implies that Defendant was intoxicated at the time of the crash based upon the less than credible testimony of Mr. Ortiz who asserted that Defendant admitted to "hav[ing] intentionally taken too much medication." (1T 77:17-20). Even assuming *arguendo* that any of what Mr. Ortiz testified to is true, the actual testimony reads more accurately as Defendant acknowledged the possibility that he took too much medication that day as opposed to some intentional abuse of a prescription drug. (1T 48:21-49:25).

At the scene of the accident, Defendant was examined by law enforcement who did not administer standardized field sobriety tests ("FSFTs") and released him. (4T 77:16-25; 78:1-3). Defendant would try to continue to a physician's appointment, to which he was traveling to prior to the crash, but would instead travel

to the hospital when his injuries worsened in route to his other appointment. (Pa 45).

Questions about Defendant's impairment would continue to remain unasked by the healthcare providers at the hospital. (Id.). Defendant is recorded as having been alert and orientated and there are no mentions of signs of impairment relative to central nervous system depression or sedation. (Id.). Moreover, the hospital records available indicate that Defendant was negative for drugs and alcohol and no tests were ordered relative to the detection of drugs in blood or urine, rather other routine tests were requested and conducted. (Id.). Specifically, the report indicates that he was negative for: nausea, vomiting, diarrhea, trauma, dizziness, diaphoresis, paraesthesias, slurred speech, and/or drug or EtoH use. (Id.).

While it is true that during the course of his treatment at the hospital, two blood samples were taken from Defendant for ordinary medical testing purposes, the first blood draw was made at about 5:52 p.m. and a second was taken at about 8:31 p.m. (4T 38:25; 39:1-25; 40:1-6). It was entirely unclear which sample was in fact tested and, as State's own expert testified, the lab received two lavender vials both dated June 4, 2019 and bearing 8:31p.m. as the time of collection. (Id.). In addition, per hospital records, the Defendant was administered morphine at 7:46 p.m. (Da 3). Despite this medication presumably being present in the Defendant's system by the time of the second draw, there is no positive findings for morphine or its metabolites

by NMS Laboratory. (Pa 46-53). This, in addition to the absence of records as to what happened between the date of the samples collection by hospital staff and their being obtained by the State, begs the question of whether or not the samples at issue are even of Defendant's blood.

Defendant was discharged from the hospital at 8:44 p.m. on June 4, 2019. (Da 23-24). Defendant was discharged with prescriptions for muscle spasms and pain and was instructed to follow up with his own primary care provider in two days. (Id.). These prescriptions included a prescription to take a 10 mg tablet of Cyclobenzaprine, 2 times per day up to 8 doses. (Id.). Cyclobenzaprine is a powerful muscle relaxant with sedative hypnotic side effects, including drowsiness, dizziness and blurred vision. (Id.). It is hardly the type of drug that medical professionals would be expected to give an individual who would be toxic for Clonazepam if the State's lab results are to be trusted.

The blood samples taken from Mr. DiNapoli were then tested by NMS Labs on or about June 18, 2019. (Pa 46-53). State's expert, Donna Papsun, M.S., D-ABFT-FT (hereafter "Dr. Papsun" or "State's Expert"), issued a report on August 22, 2022 which opined that the blood sample(s) from Defendant yielded positive results for clonazepam and benzoylecgonine ("BZE"), an inactive metabolite indicative of prior cocaine consumption. (Id.). In said report, Dr. Papsun explained that BZE was a primary inactive and chemical breakdown product of cocaine and

conceded that the parent drug, cocaine, was not found as a result of the toxicological analysis of Defendant's purported blood samples. (Pa 51). Dr. Papsun would opine that the only conclusion that can be reached with regard to the positive results for BZE is that Defendant was exposed to cocaine at some point prior to blood collection. (Id.).

At trial, Dr. Papsun testified that Defendant's cocaine exposure could have been up to forty-eight (48) hours prior to the collection of the blood samples and admitted that she could not state within a medical degree of certainty as to what point in time during said forty-eight (48) hour period that Defendant would have had exposure to cocaine. (4T 102:8-25; 103:1-20; 104:4-25; 105:1-20). Donna Papsun further testified that she was aware that clinical laboratories, such as Labcorp, will not accept a blood sample that has been out for five days or more. (DPT 53:9-16). Ms. Papsun acknowledged that her laboratory is a clinical laboratory. (Id.) Ms. Papsun also testified that the blood drawn from the defendant was not analyzed by her lab until between fourteen (14) and twenty-four (24) days after the blood was drawn. (4T 58:6-25).

As to Clonazepam, Dr. Papsun concluded that there were of concentrations of 300 and 380 ng/mL in Defendant's purported blood samples. (Pa50). Dr. Papsun relied in her report on studies that found that

> Clonazepam blood concentrations ranged from 2-510 ng/mL with an average of 27 ng/mL in a population of 1200 individuals arrested for impaired

> driving… [and] blood Clonazepam concentrations in 164 persons arrested for impaired driving performance averaged 50 ng/mL.

(Pa 52). Dr. Papsun went on to opine that the blood concentration of 300 ng/mL clonazepam found in the toxicological analyses of Defendant's purported blood samples were well above the average concentrations reported in studies of impaired driver populations. (Id.). Dr. Papsun went on to concede that she did not have sufficient information to identify how often Defendant was using his Clonazepam prescription but nevertheless opined that if defendant was using clonazepam on an "as needed basis" that he would have developed a tolerance to such medication which would increase his risk for adverse effects of the same. (Id.).

At trial, Dr. Papsun was confronted with a periodical from the National Institute of Health ("NIH") which held that the therapeutic concentration range for clonazepam was 20-80 ng/mL, and further held that anything above that range is considered toxic. (4T 62:7-25; 63:1-2). Dr. Papsun did not disagree with the findings of the NIH and went on to opine that tolerance plays a significant role in terms of how the effects the drug manifest in one person as opposed to another. (4T 60:1-18). In fact, Dr. Papsun clearly admitted that she "never" can say with certainty what effects the drug will have on a person's behavior based upon the observed concentrations of the drug. (Id.).

Ms. Papsun further testified that she acknowledged that a "toxic" level of clonazepam would have been 80mg. (4T 62:15-25; 63:1-2). Ms. Papsun then acknowledged that when a person was experiencing toxic levels of clonazepam, possible symptoms would have been somnolence (excessive sleepiness), diplopia (double vision), slurred speech, and motor impairment. (4T 63:19-25; 64:1-18). Ms. Papsun then agreed that "severe presentation" was overdosing and could result in symptoms such as respiratory depression (depressed lung function) leading to cardiac issues. (4T 64:19-25; 65:1-7). Other symptoms could include hypoxemia (low oxygen/oxygen exchange), apnea (temporary cessation of breathing), and hypotension (low blood pressure). (4T 65:25; 66:1-13). She also agreed that other symptoms could include bradycardia (low heart rate), cardiac arrest, pulmonary aspiration (vomiting in the lungs), and prolonged unconsciousness. (4T 6624-25; 67:1-24).

When questioned about the defendant's condition at the time of the accident, Ms. Papsun acknowledged that he was not exhibiting slurred speech. (4T 70:1-3). She further acknowledged that the defendant's medical records indicated that he was "alert and oriented times four," that he had "clear speech and judgment," and that there was no notation of any motor impairment. (4T 71:8-20). In addition, Ms. Papsun testified that she was aware that the defendant did not have symptoms of cardiac arrest, pulmonary aspiration, or of going into a coma. (4T 75:20-25).

Based upon this, Ms. Papsun testified that, according to the medical records, there was no indication that the defendant was clonazepam toxic on June 4, 2019. (4T 76:23-25; 77:1-11). Indeed, Ms. Papsun testified that she was aware that the doctor who saw the defendant on June 4, 2019 administered morphine to him and that the combination of morphine with clonazepam could be fatal (particularly the level of clonazepam alleged to be in the defendant's blood stream). (4T 83:13-23). Thus, Dr. Papsun could not opine conclusively as to any substances found in the defendant's system, let alone a cocaine metabolite.

LEGAL ARGUMENT

POINT I. THE TRIALC OURT PROPERLY PRECLUDED DR. PAPSUN'S TESTIMONY AS TO BZE ALLEGEDLY FOUND IN THE DEFENDANT'S SYSTEM BECAUSE THIS EVIDENCE HAD VERY LITTLE PROBATIVE VALUE, WOULD MISLEAD THE JURY, AND WOULD GREATLY PREJUDICE THE DFENDANT. (Pa 24)

Appellate courts afford substantial deference to a trial court's evidentiary rulings. State v. Covell, 157 N.J. 554, 564 (1999). As a result, the Appellate Division reviews evidentiary rulings for an abuse of discretion. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011). This means that a trial court's evidentiary rulings must be upheld, "unless it can be shown . . . 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). Stated otherwise, "Absent a manifest denial of justice, [an appellate court will] not disturb a trial judge's reasoned exercise of his or her broad discretion when making relevance and admissibility determinations." New Jersey Div. of Youth & Family Services v. N.S., 412 N.J. Super. 593, 622 (App. Div. 2010). Because the trial court's decision as to the defendant's motion to preclude testimony by the State's expert as to cocaine exposure was sound, this Court should not disturb its order.

As the Court correctly opined in its February 20, 2024 decision, evidence against a defendant is not admissible when it is irrelevant, barred by the rules of evidence, and/or when it violates the defendant's state or federal constitutional

rights. State v. Johnson, 118 N.J. 639, 651 (1990); N.J.R.E. 401. Even if evidence is relevant, it is still inadmissible if its probative value is substantially outweighed by the risk of its undue prejudice, confusion of issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. N.J.R.E. 403. Where the evidence being offered has low probative value and will instead confuse the jurors and mislead them from the issues in the case, that evidence should be excluded. State v. Koskovich, 168 N.J. 448, 486 (2001). Since Dr. Papsun could offer no testimony other than that the defendant may have ingested cocaine at some point prior to the accident, allowing her testimony as to that alleged fact would only mislead the jurors and would greatly prejudice the defendant. The trial court has an obligation as a gatekeeper to ensure that no such misleading and unreliable evidence be admitted. State v. Chen, 208 N.J. 307, 318 (2011). Because the evidence in question is both misleading and unreliable, the trial court properly excluded it, and this Court should deny the State's motion for leave to appeal.

In the present matter, Dr. Papsun opined that BZE is an inactive metabolite of cocaine. (Pa 51). She also conceded that, in her opinion, the defendant could have been exposed to cocaine at any point in the forty-eight (48) hours prior to blood collection and that she could not confirm, with any degree of medical certainty, when during that period, the exposure took place. (4T 102:8-25; 103:1-

20; 104:4-25; 105:1-20). Dr. Papsun confirmed that only the inactive metabolite, BZE was allegedly found in the defendant's blood and that the parent drug, cocaine, was not found. (Pa 51). As such, the only testimony being proffered by Dr. Papsun as to cocaine consumption is that the defendant may have been exposed to cocaine prior to the accident in question. Since no active form of cocaine was found in the defendant's blood, his alleged exposure to cocaine in the past will do little to prove that he was under the influence of elicit substances when he crashed into the alleged victim's automobile. This evidence will only serve to prejudice the jury against him and to encourage them to make the inappropriate conclusion that because the defendant may have been exposed to cocaine in the past, he must have been exposed to some elicit substance when his automobile collided with the alleged victim's automobile. It will also confuse the jurors and potentially lead them to believe that because BZE was found in the defendant's system, he was high on cocaine at the time of the incident in question.

The Court "has a responsibility to ensure that evidence admitted at trial is sufficiently reliable so that it may be of use to the trier of fact who will draw the ultimate conclusions of guilt or innocence. State v. Michaels, 136 NJ 299, 316 (1994). In the present matter, Dr. Papsun's testimony as to the BZE allegedly found in the defendant's blood is not reliable because at best, it only proves that the defendant was exposed to cocaine at any point forty-eight hours prior to the

accident that led to this indictment. There is no proof whatsoever that the defendant was high on cocaine when the accident took place. Therefore, this evidence will be of no use whatsoever to the jurors other than to cloud their judgment and mislead them into believing that either the defendant was high on cocaine at the time of the accident or that because he may have used cocaine in the past, he was high on some other elicit substance at the time of the accident. As such, the trial court correctly precluded this testimony, and this Court should deny the State's motion for leave to appeal.

POINT II. THE TRIALC OURT PROPERLY PRECLUDED DR. PAPSUN'S TESTIMONY AS TO BZE ALLEGEDLY FOUND IN THE DEFENDANT'S SYSTEM BECAUSE ITS INTRODUCTION ONLY SERVED AS EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS FOR THE PURPOSE OF PROVING THE DEFENDANT'S GUILT. (Pa 24)

Pursuant to N.J.R.E. 404(b), "…evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." The New Jersey Supreme Court has adopted a four-part test to determine the admissibility of other crime or civil wrong evidence. State v. Cofield, 127 N.J. 328, 338 (1992). Specifically, the "other crime or civil wrong evidence" must be:

(1) Admissible as relevant to the material issue;
(2) Similar in kind and reasonably close in time to the offense charged;
(3) Clear and convincing; and
(4) Of sufficient probative value not outweighed by its apparent prejudice.

Id. Since the testimony as to the BZE allegedly found in the defendant's system is irrelevant, unclear, and its probative value is greatly outweighed by its apparent prejudice, the trial court properly excluded it.

"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. N.J.R.E. 401. The primary inquiry of a relevancy determination regarding evidence is determining the logical connection between the evidence and the fact at issue. State v. Richardson, 452 N.J. Super. 124, 132 (App. Div. 2017).

Here there is no logical connection between the anticipated testimony of State's expert relative to the detection of BZE (and Defendant's alleged cocaine usage) and the issue of the defendant's intoxication. Dr. Papsun testified that she cannot state with any reasonable degree of scientific certainty that cocaine or BZE in any way impaired or affected Defendant's ability to operate a motor vehicle on June 4, 2019. Nor could she provide an opinion with any certainty as to when the alleged cocaine exposure would have occurred to result in the BZE findings with the blood samples said to have been obtained from Defendant. Simply put, at most, the testimony at issue can only be offered as to the issue of whether the blood sample(s) tested positive for BZE.

However, the issue is not whether there was BZE present in Defendant's system, but whether Defendant was intoxicated at the time of the accident in question. Dr. Papsun could not opine as to whether the defendant was intoxicated due to active cocaine in his system and, were she to do so, it would be based on her speculation rather than the evidence. Accordingly, she would be testifying to a net opinion. Townsend v. Pierre, 221 N.J. 36, 54 (2005) (holding N.J.R.E. 703 requires expert opinions be grounded in facts and data). Accordingly, because the testimony at issue is not admissible as relevant to Defendant's intoxication, it was properly excluded.

For these same reasons, the evidence was not clear and convincing. Dr. Papsun cannot state whether there is a connection between the presence of BZE and Defendant's alleged status of intoxication. However qualified Dr. Papsun may be, her testimony could not be clear and convincing evidence of Defendant's intoxication when she could not state how substantial the exposure was to the purported cocaine; when in fact the cocaine exposure occurred; or even whether the exposure impaired Defendant's ability to operate a motor vehicle on June 4, 2019. As such Dr. Papsun's testimony as to the defendant's alleged cocaine exposure was not clear and convincing evidence, and it was properly excluded.

Finally, not only is the probative value of the evidence at issue outweighed by its prejudicial effect, there is absolutely no probative value to the testimonial evidence at issue. In State v. Carlucci, the New Jersey Supreme Court reversed a defendant's conviction for crack cocaine possession on the basis that the Trial Court erred in admitting the defendant's statements that she used crack in the past and that she used crack cocaine two days prior to the incident at issue. 217 N.J. 129 (2014). In overturning her conviction, our State's highest court found that such statements were not relevant to any material issue in dispute and, even if they were, the minimal relevance would be substantially outweighed by the unfair prejudice. Id. at 143. In deciding the matter, the Carlucci Court reasoned that the statements would likely lead jurors to the conclusion that the defendant must have possessed the crack

cocaine on the date at issue because she had a propensity for having used crack cocaine. Id.

Similarly, the testimonial evidence at issue here is of no relevance to the material issue in dispute – the defendant's intoxication level. As set forth above, Dr. Papsun cannot state whether such purported exposure impaired the defendant's ability to operate a motor vehicle on the day in question. In other words, she cannot opine as to whether the defendant was intoxicated due to exposure to cocaine. The only purpose that the introduction of this evidence could achieve is to put into the Jurors' minds the phantom of cocaine intoxication without actual evidence of it. Since the introduction of this evidence would provide no probative value in comparison to its prejudicial effect, the trial court properly excluded it, and this court should deny the State's motion for leave to appeal.

Conclusion

For the foregoing reasons, this Court should deny the State's motion for leave to appeal.

Respectfully submitted,
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