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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2491-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ISAAC D. CANDELARIO,

Defendant-Appellant.

Submitted November 17, 2016 - Decided March 23, 2017

Before Judges Lihotz, O'Connor and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
11-08-1400.

Joseph E. Krakora, Public Defender, attorney
for appellant (Gilbert G. Miller, Designated
Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Erin M. Campbell,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Isaac D. Candelario appeals from a September 26,
2013 judgment of conviction for abusing a baby placed in his care.
After a nineteen-day trial, the jury found defendant guilty of two

counts of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2), (b)(7) (counts one and six), a lesser included offense than charged; fourth-degree possession of a weapon for an unlawful purpose (knife), N.J.S.A. 2C:39-5(d) (count two); and two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (counts four and seven). The trial judge imposed an aggregate eight-year sentence, and assessed applicable fines and penalties.

On appeal, defendant's challenges focus on the expert evidence. First, after conducting a pre-trial Rule 104 hearing, the judge denied defendant's request to admit deposition testimony from his expert witness, who was located in California and asserted he was medically unable to travel cross-country. Second, defendant asserts the State's expert was erroneously permitted to utilize prejudicial demonstrative evidence during her testimony. More specifically, defendant presents these arguments:

POINT I.

THE TRIAL COURT'S REFUSAL TO PERMIT [DEFENDANT] TO ELICIT DR. BARNES'S TESTIMONY AT TRIAL BY PRESENTING HIS VIDEOTAPED DEPOSITION TO THE JURY PURSUANT TO R. 3:13-2 AND THE COURT'S DENIAL OF [DEFENDANT'S] ADJOURNMENT APPLICATION TO OBTAIN A SUBSTITUTE EXPERT WITNESS DENIED [DEFENDANT] HIS STATE AND FEDERAL RIGHTS TO PRESENT A COMPLETE DEFENSE AND TO A FAIR TRIAL DERIVING FROM HIS RIGHTS TO COMPULSORY PROCESS AND DUE PROCESS OF LAW.

POINT II.

DR. AGRAWAL'S DRAMATIC VIOLENT DEMONSTRATION UPON A SPONGE DOLL OF THE SHAKING WHICH WOULD GIVE RISE TO SYMPTOMS OF THE SHAKEN BABY SYNDROME SHOULD HAVE BEEN PRECLUDED UNDER N.J.R.E. 403, AS ANY PROBATIVE VALUE THEREIN WAS SUBSTANTIALLY OUTWEIGHED BY THE POTENTIAL FOR UNDUE PREJUDICE.

POINT III.

DR. AGRAWAL'S TESTIMONY IMPERMISSIBLY INVADED THE PROVINCE OF THE JURY BY INFRINGING ON THE JURY'S CAPACITY TO DECIDE THE ULTIMATE ISSUES IN THE CASE.

Following our review of the record and applicable law, we affirm.

I.

The trial evidence reveals the following facts. On March 10, 2011, the four-month-old victim attended a "well baby" visit conducted by her regular pediatrician, Dr. Lina Cambria. Dr. Cambria observed two V-shaped first-degree and superficial second-degree burns on the victim's left abdomen and right leg. Defendant, the father of the victim, who provided care while the victim's mother worked from 7:30 a.m. to 3:30 p.m., told Dr. Cambria the victim accidentally rolled over onto a plate of food while he was watching her. He surmised the knife resting on the plate must have been hot and caused the burns. A note in the victim's file from a February 1, 2011 visit, stated the victim's

older sibling had fallen on her while defendant was watching the children.

In the course of her exam, Dr. Cambria noted the victim's head circumference had increased. The baby's mother, who was the victim's primary care provider from the time she returned from work until the infant went to sleep, requested further examination. Dr. Cambria ordered an ultrasound. When the ultrasound results were inconclusive, Dr. Cambria ordered an MRI.

The MRI detected the presence of subdural fluid suggestive of multiple subdural hematomas, that is, pools of blood outside the brain. As required, she notified the New Jersey Division of Child Protection and Permanency (the Division), which in turn contacted Lieutenant Honey Spirito of the Hudson County Prosecutor's Office Special Victims Unit. Lieutenant Spirito interviewed defendant and the baby's mother.

The Hackensack Medical Center intensive care unit conducted an extensive medical examination of the victim. An ophthalmologist determined the victim suffered recent diffuse retinal hemorrhages across both eyes. A full skeletal x-ray revealed multiple fractures of both collar bones and three left ribs, which were noted to be in various stages of healing, along with subdural hematomas and burns. There was no evidence of bone fragility disorder, disease, or deficiency, which would make the victim

susceptible to fractures. Following surgery, a "subtle" skull fracture was found.

Police arrested defendant on April 15, 2011. Subsequently, the grand jury issued an eight-count indictment. Following the lengthy trial, the jury acquitted defendant of several charged offenses, but convicted him of aggravated assault, endangering the welfare of a child, and possession of a weapon. This timely appeal followed.

II.

A.

Prior to trial, the judge conducted a hearing to determine whether Dr. Patrick Barnes, defendant's medical expert, could testify via deposition, in lieu of appearing at trial. Defendant asserted Dr. Barnes, of California, was medically incapacitated and could not endure a cross-country flight. In support of defendant's request, Dr. Barnes submitted a certification asserting his described degenerative back condition, necessitating use of a brace, impeded his ability to fly cross-country. Defendant also filed a certification from Dr. Barnes' treating physician, Kathy Anne Keller, M.D., stating Dr. Barnes must "restrict his travel to the western United States only[,] in order to maintain a satisfactory level of health."

Initially, the State agreed Dr. Barnes would testify at trial from California using VideoLink, which the trial judge rejected as impermissible. The State opposed using a videotaped deposition and insisted a Rule 104 hearing was necessary, when it learned Dr. Keller was Dr. Barnes' wife.

At the hearing, Dr. Barnes was questioned extensively as to the nature of his physical condition, the use and benefits of his back brace, the physical effects of travel, the treatment of his condition, his wife's role in administering that treatment, and any recommended physical therapy. Dr. Barnes also testified to the extent of his recent travel. Relevant to this matter, he testified in the summer of 2012 he travelled from California for a three-hour car trip, flew cross-country to Florida and New York for family events, and also flew to Chicago in December 2012. Further, he revealed plans to fly to Florida in the summer of 2013. Dr. Barnes acknowledged that while he could technically travel, he needed a day to recover from the flight, which would require additional time off from work.

At the conclusion of the hearing, the judge found Dr. Barnes does not constantly wear the back brace and the brace does not prevent him from engaging in long-distance travel in excess of two hours "because he can and has." Further, "[i]t's not that [Dr. Barnes] is physically unable to travel. It's his desire not to

travel[,] which may aggravate his condition." The judge concluded Dr. Barnes did not suffer from a physical incapacity that made him unable to testify, as required by Rule 3:13-2. The judge denied defendant's motion to allow Dr. Barnes to testify by deposition.

Defendant requested to stay the order, which the judge denied, as trial was two weeks away. This court denied the motion for leave to appeal. Defendant next requested the trial date be adjourned in order to obtain a replacement expert. Following briefing, the application was denied. Dr. Barnes did not appear at trial.

Defendant argues the judge erroneously rejected his application to allow Dr. Barnes to testify via deposition. Further, he maintains she abused her discretion by denying his request for an adjournment to locate a different expert, depriving him of the ability to present a complete defense.

We start by reviewing the plain language of the rule. Videotaped deposition testimony of a witness is authorized and may be used at trial in lieu of live testimony when:

If it appears to the judge of the court in which a[n] . . . indictment . . . is pending that a material witness is likely to be unable to testify at trial because of death or physical or mental incapacity, the court, upon motion and notice to the parties, and after a showing that such action is necessary to prevent manifest injustice, may order that a

deposition of the testimony of such witness
be taken

[R. 3:13-2(a).]

The requirements are repeated in the provisions of the rule discussing use of videotaped depositions at trial, which emphasize the witness must be "unable to testify because of death or physical or mental incapacity." R. 3:13-2(c).

The use of deposition testimony in criminal trials is not the generally accepted format. It is an exception. "As noted in the report of the Supreme Court Committee on Criminal Practice, 118 N.J.L.J. Index Page 139 (1986), '[t]he use of depositions should be tightly limited to those situations where it is truly necessary.'" Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 3:13-2 (2017). "The requisite finding of necessity must of course be a case-specific one" Maryland v. Craig, 497 U.S. 836, 855, 110 S. Ct. 3157, 3169, 111 L. Ed. 2d 666, 685 (1990).

Published case law interpreting the scope of the rule regarding the State's use of deposition evidence focuses heavily on the defendant's right to confront witnesses as provided by the Sixth Amendment's Confrontation Clause. We briefly discuss their holdings.

In State v. Rodriguez, 264 N.J. Super. 261 (1993), aff'd o.b., 135 N.J. 3 (1994), we affirmed the use of videotaped deposition testimony of a victim, who suffered a heart attack, shortly after his direct testimony. Then, despite postponement of cross-examination, he was unable to testify as he suffered a mild stroke, was again hospitalized, and suffered from high blood pressure. Id. at 270-73. The victim's physician confirmed the victim was unable to testify and was again hospitalized. Id. at 273. His deposition was taken at the hospital. Ibid. We concluded the defendant's right to confrontation, which is not absolute, was not violated based on the facts and circumstances of the case. Id. at 274; see also State v. Washington, 202 N.J. Super. 187, 191-93 (App. Div. 1985) (affirming use of videotaped deposition testimony when witness suffered heart attack prior to trial and medical testimony confirmed he was unable to attend trial).

On the other hand, we concluded the trial judge erred in permitting the use of videotaped deposition testimony in State v. Benitez, because the elderly victim was capable of traveling to the courthouse and could endure examination, demonstrated by the fact her deposition was conducted in the judge's chambers four days before trial. State v. Benitez, 360 N.J. Super. 101, 111 (App. Div. 2003). We concluded neither the witness's age nor anxiety in facing the defendants justified her unavailability to

testify necessitating the use of video depositions. Id. at 117-18. A preference for use of a deposition because the witness would "rather not" attend the court proceeding is insufficient to permit its use. Id. at 117.

In Benitez, we cited with approval this passage from Stoner v. Sowders, 997 F.2d 209, 212-13 (6th Cir. 1993):

To allow trial by deposition here (whether video or written) to substitute for regular trial testimony would over time invite trial by deposition in many, perhaps most, criminal cases. Many witnesses would prefer not to testify in a criminal trial and can often find a doctor who will provide a cursory "doctor's excuse," a statement that the witness's physical or mental health "could" be adversely affected by having to appear. A prosecutor will often prefer to offer deposition testimony because the witness need not be secured for trial and need not be subject to the vicissitudes of cross examination before the jury. The result of such a rule allowing trial by deposition violates both the literal language and the purpose of the Confrontation Clause, assuring the right of the accused: "in all criminal prosecutions . . . to be confronted with the witnesses against him." The Kentucky procedure used here may be easier and more efficient in terms of judicial and prosecutorial administration, and it may offer the same reliability that we require in civil cases.

But the deposition is a weak substitute for live testimony, a substitute that the Sixth Amendment does not countenance on a routine basis. The Constitution does not allow us to so water down the explicit requirement of live testimony in criminal cases.

[Benitez, supra, 360 N.J. Super. at 101-02.]

We recognize the attraction of defendant's argument suggesting the Confrontation Clause demands a stricter application of the rule when considering admission of deposition testimony of a victim in a criminal prosecution, than when defendant proffers a witness. Cf. id. at 119. ("The use of deposition testimony in criminal cases is highly disfavored, mainly because such use tends to diminish a defendant's Sixth Amendment confrontation rights."). However, we are disinclined to apply such a broad reading to the unambiguous language of the rule. Our conclusion results because protection of a defendant's constitutional interests are not the only concern at stake. In presenting prosecutions, the State represents not only the public interest in punishing those who commit criminal acts, but more importantly, the State represents the voice of crime victims, especially those who are unable to speak for themselves.

The literal mandate of Rule 3:13-2 requires a witness appear except when the witness is unavailable. The rule is not drawn for convenience but to address those instances when a necessary witness is unable to attend trial and present live testimony. The rule's provisions are designed to be "fair to all parties," Pressler & Verniero, supra, cmt. 1 on R. 3:13-2, and the preference for live testimony aligns with the objectives of fairness to "ensure that

testimonial evidence is tested in the crucible of cross-examination" and to allow the factfinder to determine each witness's credibility. State v. Michaels, 219 N.J. 1, 50 (2014) (Albin, J., dissenting).

In this matter, Dr. Barnes unquestionably had limitations resulting from his degenerative disc disease. However, as demonstrated by the factual findings of the trial judge, these problems did not preclude him from flying to the east coast. In fact, he had plans to visit family in Florida a few months after the hearing was held. Under these facts, defendant's request to use Dr. Barnes' deposition testimony was not premised on his unavailability, or a medical condition preventing him from flying, but rather was premised on Dr. Barnes' convenience and his self-imposed limitation of cross-country flights to avoid possible aggravation to his condition.

Defendant maintains the denial of the use of the exculpatory testimony was critical and impaired his ability to present a "complete defense." See Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146, 90 L. Ed. 2d 636, 644-45 (1986). We reject the suggestion that the denial of the use of deposition testimony equates to a barring of the witness's testimony. Dr. Barnes was able to appear; but he found it inconvenient and perhaps uncomfortable to do so.

We conclude the judge properly conducted a case specific review of the facts. We find no manifest injustice as defendant could not support a requisite condition of necessity. R. 3:13-2.

B.

Defendant next maintains his right to present a complete defense was further impaired by the denial of his adjournment request. Generally, "[t]he granting of trial adjournments rests within the sound discretion of the trial court. Absent an abuse of discretion, denial of a request for an adjournment does not constitute reversible error." State v. D'Orsi, 113 N.J. Super. 527, 532 (App. Div. 1970), certif. denied, 58 N.J. 335 (1971).

The judge did not rule immediately on the adjournment request made following the denial of permitting the use of Dr. Barnes' videotaped deposition testimony. She allowed the parties to submit simultaneous briefs and conducted oral argument. In denying defendant's motion for adjournment, the judge returned to whether Dr. Barnes was unavailable to testify, concluded the evidence showed Dr. Barnes, unassisted by a back brace, was ambulatory as he moved about his office. The judge also noted Dr. Barnes testified for a period in excess of two hours with no noticeable discomfort. She further identified the inaccuracies between Dr. Keller's certification describing Dr. Barnes' limitations and his testimony, acknowledging the accuracy of the medically imposed

travel restriction was "cal[led] into question." Thus, the judge concluded Dr. Barnes was able to testify, making an adjournment to locate a different expert unnecessary.

In his merits brief, defendant suggests Dr. Barnes would cast doubt on whether defendant was responsible for the victim's injuries by providing critical testimony. Specifically, he asserts Dr. Barnes would address the burns, perhaps the least serious of the victim's injuries described by the numerous State experts. The baby's mother's testimony contradicted defendant's version of these events. She explained defendant called on February 18, 2011, while she was working, to tell her the baby rolled on his plate and was burned. The baby's pediatrician testified the burns she examined on March 10, 2011, were days old, not weeks old. Therefore, Dr. Barnes' opinion the burns could result from accidental circumstances could not refute these facts.

Further, defendant states Dr. Barnes would address the baby's vitamin deficiencies as a cause of her injuries. We do note, the latter issue was acknowledged by some of the State's medical witnesses. Moreover, Dr. Barnes was not defendant's sole expert; he presented two others. Through these experts, extensive testimony was presented by the defense regarding the child's vitamin deficiencies, malfunctioning liver, and platelet production as coalescing to cause her injuries.

We are satisfied the trial judge did not abuse her discretion in denying defendant's motion to adjourn the trial and reject defendant's argument he was precluded from presenting a complete defense. As noted, Dr. Barnes was able to fly and available to attend trial; he was unwilling to do so. Defendant was not deprived by the court or the State's actions from presenting his defense and did so. We conclude no constitutional violation is presented.

III.

The State presented eight medical doctors, who examined or conducted tests for the purpose of diagnosing the victim's condition. The final witness was Dr. Nina Agrawal, a pediatrician employed by the Audrey Hepburn House and board certified in child abuse pediatrics, whose testimony was forensic. Dr. Agrawal examined the victim on April 1, 2011, while the baby was cared for in the hospital's pediatric intensive care unit, and she reviewed the infant's medical records and testing results. Dr. Agrawal was presented to discuss the specific conditions diagnosed, the victim's demonstrated symptoms, their causes, the types of force or actions necessary to cause the conditions, and the short and long-term effects of the conditions.

Outside the presence of the jury, defendant challenged Dr. Agrawal's qualifications and area of expertise as a "child abuse pediatrician" and a "board certified child abuse pediatrician."

After argument, the judge agreed such a designation might give undue weight to the expert's testimony and unfairly influence the jury regarding the ultimate issue of whether the victim was abused or accidentally injured while in defendant's care. Citing N.J.R.E. 403 (allowing the exclusion of relevant evidence when the risk of undue prejudice substantially outweighs its probative value), the judge permitted Dr. Agrawal to state her board certifications, but precluded her qualification as an expert in "child abuse pediatrics," limiting her expertise to pediatrics. Further, the judge repeated an earlier ruling, which precluded any testimony that touched on the ultimate issue, or a diagnosis that included any reference to "child abuse" or "opine[d] that the injuries allegedly sustained by the child were consistent with non-accidental trauma and/or that there were no plausible explanations for the injuries."

It was also proposed the witness would use a doll created and approved by the National Anti-Shaken Baby Foundation, "for doctors to use in aid of testimony" to assist in the jury's understanding. The State proposed the doll would be "used to demonstrate one incident of shaking, the method in which the baby was handled by the person who shook [the baby], the type of force and the type of mechanisms required to cause [specific] injuries." The defendant objected, was permitted to examine the doll, and renewed

the objection, arguing shaking a baby was something the jurors easily understood without being accompanied by a prejudicial demonstration. The judge permitted the demonstrative evidence.

On appeal, defendant argues Dr. Agrawal violently shook the doll when discussing the potential causes of the described injuries, a demonstration he characterizes as "graphic and dramatic." Importantly, a trial judge's evidentiary ruling will be set aside only if we find a clear error in judgment or conclude the ruling was "so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982); see also State v. McDougald, 120 N.J. 523, 577-78 (1990) (stating a trial judge holds considerable latitude in determining what evidence to admit). Judged by that standard, we reject defendant's argument. We provide these additional facts.

As Dr. Agrawal's direct testimony unfolded, the judge sua sponte called a sidebar when the expert stated there was nothing in the victim's medical records that rose to the type of "major trauma" she believed necessary to induce subdural hemorrhages. After a lengthy sidebar, the judge ordered the witness may not state "there is no plausible explanation for [the victim's] injuries" and told the jury to completely disregard the statement. Immediately thereafter, the judge excused the jury for a break,

but retained counsel and the witness. The judge issued this instruction to Dr. Agrawal:

You cannot opine that the injuries allegedly sustained by the child were consistent with non-accidental trauma and/or that there was no plausible explanation for her injuries, but you can be questioned as to whether the injuries were consistent with certain facts in evidence.

. . . .

Do you understand the ruling?

Testimony resumed with the expert describing the injuries diagnosed, the types of medical or trauma conditions that would cause the victim's injuries, differing diagnoses for the injuries, and noted medical testing revealed no identified medical condition associated with causing the injuries.

Dr. Agrawal testified the victim suffered subdural hematomas, retinal hemorrhages, and various fractures. At this point she requested to demonstrate using the doll, pre-marked for identification. Defendant's objection was overruled. The expert demonstrated the handling that would cause a compression force resulting in rib fractures. Later, over defendant's objection, Dr. Agrawal used the doll to demonstrate "the violent shaking and rotational forces . . . that could cause subdural hematomas and retina hemorrhages," as follows:

So, the type of shaking – violent shaking that's been associated with the injuries that we saw in this case: again, it's holding the baby upright and it's a severe rotational force that can be generated by violent shaking.

So, it's – so you can see the head is moving around in different directions. And that's a rotational force. And it's a violent shaking that other people would be – perceive it as dangerous and harmful to the infant.

In summation, the State discussed Dr. Agrawal's testimony and described the demonstration, stating:

And she showed you with that doll the mechanism and the force that would have to be used to cause the injuries that [the victim] had. You saw her shake that doll, and you saw its head move back and forth and left and right, and almost go around the body of the doll. And it was scary to watch her do that, to imagine that happening to [the] little [victim]. And she told you that this violent, repetitive activity could never be confused for the normal care giving activities.

She also told you, and you could see, that anyone who saw that activity and behavior and anyone who was doing that to a child would know that child was being harmed. It was the violent repetitive shaking that caused [the victim]'s subdural hematoma and retinal hemorrhages.

We consider the standards governing defendant's challenge to his evidence. "The admissibility of potentially prejudicial evidence falls largely within the discretion of the trial court,

and that discretion is broad." State v. Wilson, 135 N.J. 4, 20 (1994) (citation omitted).

The Supreme Court has guided admission of expert testimony, stating:

Pursuant to the New Jersey Rules of Evidence, "scientific, technical or other specialized knowledge" by a witness "qualified as an expert by knowledge, skill, experience, training, or education" may be admissible "in the form of an opinion or otherwise" if the expert testimony will assist the jury "to understand the evidence or to determine a fact in issue."

[State v. Townsend, 186 N.J. 473, 490 (2006) (quoting N.J.R.E. 702).]

Expert testimony, including demonstrations, must meet the following:

(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

[State v. Torres, 183 N.J. 554, 567-68 (2005) (quoting State v. Berry, 140 N.J. 280, 290 (1995)).]

A trial judge as gatekeeper, must also consider the framework for admission of any evidence, which starts with N.J.R.E. 401, requiring the evidence be relevant, that is, to "hav[e] a tendency in reason to prove or disprove any fact of consequence to the

determination of the action." Relevant evidence is admissible "[e]xcept as otherwise provided in these rules or by law" N.J.R.E. 402. One exclusionary rule which limits introduction of relevant evidence is N.J.R.E. 403. Thus, even if relevant, evidence "may 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) undue delay, waste of time, or needless presentation of cumulative evidence." N.J.R.E. 403. If this hurdle is vaulted, a foundation for admission must be properly laid.

A trial court's mistaken exercise of that discretion exists when the danger of undue prejudice outweighs the probative value of the evidence in that it would divert jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence. State v. Moore, 122 N.J. 420, 467 (1991) (citing State v. Sanchez, 224 N.J. Super. 231, 249-50 (App. Div.), certif. denied, 111 N.J. 653 (1988)). On that point, evidence of an inflammatory nature must be excluded under Evidence Rule 403 if probative, non-inflammatory evidence on the same point is available. State v. Davis, 116 N.J. 341, 366 (1989); State v. Lockett, 249 N.J. Super. 428, 433 (App. Div.), certif. denied, 127 N.J. 553 (1991).

[Ibid.]

In this matter, defendant was charged with second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2). A significant issue for the jury's determination of this question

was whether defendant's conduct caused the child "harm that would make the child an abused and neglected child as defined by [N.J.S.A. 9:6-1, N.J.S.A. 9:6-3, and N.J.S.A. 9:6-8.21]," or whether the victim suffered injury through a series of medical deficiencies and accidents. Ibid. Similarly, the assault charges required the State to prove defendant's conduct caused the victim "serious bodily injury," N.J.S.A. 2C:12-1(b)(1) or "bodily injury," N.J.S.A. 2C:12-1(b)(2), (b)(3); N.J.S.A. 2C:12-1(a)(1).

We are not persuaded by defendant's claim Dr. Agrawal's limited demonstration was "shockingly graphic," making its probative value outweighed by resulting prejudice. The demonstration was brief, and pointed. Her testimony included complex body mechanical terms – such as compression and rotational forces – which are beyond the ken of the average person. The use of the doll to show the necessary force to cause such mechanics and the diagnosed injuries aided the jurors' understanding of her testimony. In light of all facts and expert evidence presented in this trial, we conclude the demonstration was not so unduly prejudicial as to cause an unjust result warranting reversal.

We also note the verdict, acquitting defendant of some of the most serious charges, demonstrated the jury was very deliberate in evaluating all evidence presented by both sides. A review of

the entire record reveals substantial credible evidence to support the verdict beyond a reasonable doubt.

We reject as lacking merit defendant's related claims Dr. Agrawal's expert opinion was based on other's experiences amounting to inadmissible hearsay; the physical differences between the doll and the victim defeated the demonstration's relevance; and the demonstration exploited the emotions of the jury. R. 2:11-3(e)(2).

Defendant's final challenge argues Dr. Agrawal's testimony invaded the province of the jury, by giving opinion on the ultimate issue, that is, the victim's injuries were caused by defendant's conduct, not as a result of accidents. We disagree.

Both the necessity for and the admissibility of expert testimony are committed to the sound discretion of the trial judge. State v. Summers, 350 N.J. Super. 353, 363 (App. Div. 2002) (citing Berry, supra, 140 N.J. at 292). As demonstrated above, the trial judge restricted any evidence stating or even suggesting the victim's injuries were the result of child abuse. She issued instructions to witnesses in this regard, sustained defendant's objections, and struck testimony. Most important, she issued curative testimony for the jury to disregard any statements found to violate the proscriptions and provided a comprehensive final instruction clearly setting out the jury's obligation to find the

facts and assess credibility. The trial judge explained jurors were not bound by expert opinion but must individually accept or reject the testimony and are not to accept counsel's statements as facts. Berry, supra, 140 N.J. at 301.

Dr. Agrawal's testimony did not tell the jury the baby was a victim of child abuse. We reject defendant's claims reversal is required because the witness, during voir dire of her qualifications, stated she was employed as a "child abuse pediatrician" at the Audrey Hepburn Children's House at Hackensack University Medical Center, and on cross-examination stated her opinion was "based on my experience as a child abuse pediatrician and based on the scientific literature."

After the latter statement, the judge called a sidebar to advise Dr. Agrawal she was qualified as an expert in pediatrics but not child abuse pediatrics. The court then told the jury:

Dr. Agrawal has been qualified as an expert in pediatrics, not child abuse pediatrics. Whether the injuries allegedly sustained by [the victim] were the result of child abuse is within the exclusive purview of the jury to decide. The ultimate determination of whether or not the [State] has proven defendant's guilt beyond a reasonable doubt is to be made only by the jury.

This and the other examples recited in our opinion, unquestionably show how the trial judge vigilantly enforced her proscription against any opinion or testimony regarding the cause

of the diagnosed injuries or that the victim suffered child abuse. The judge's instructions were swift, thorough, detailed, and clear. Defendant's arguments suggesting they were insufficient are rejected. Juries are presumed to follow instructions, and ignore legal argument made by attorneys. See State v. Smith, 212 N.J. 365, 409 (2012), cert. denied, __ U.S. __, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013); State v. Patterson, 435 N.J. Super. 498, 511 (2014). Any remaining arguments not specifically addressed were found to lack sufficient merit to warrant discussion in our 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