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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2660-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

B.H.M.,<sup>1</sup>

Defendant-Appellant.

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Submitted January 24, 2017 – Decided February 16, 2017

Before Judges Reisner and Koblitz.

On appeal from the Superior Court of New  
Jersey, Law Division, Hudson County,  
Indictment No. 11-08-1485.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Frank M. Gennaro, Designated  
Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor,  
attorney for respondent (Kerry J. Salkin,  
Assistant Prosecutor, on the brief).

PER CURIAM

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<sup>1</sup> We use defendant's initials to protect the confidentiality of  
the victim. R. 1:38-3(d)(9).

After a jury trial, defendant B.H.M. appeals from his July 30, 2013 conviction for third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7). He argues that reversal is warranted because: 1) the trial court's rejection of his plea agreement was an abuse of discretion, 2) The victim's surgeon provided expert testimony, but was never qualified as an expert, and 3) the prosecutor made improper statements during trial. After reviewing the record in light of the contentions advanced on appeal, we affirm.

I

Defendant originally pled guilty to the disorderly persons offense of simple assault, N.J.S.A. 2C:12-1(a), with a promise from the State that his sentence would not involve incarceration. He admitted that he struck his wife. At sentencing before Judge John A. Young, Jr., who had not presided over the guilty plea, the victim's sister appeared and read a statement from the victim, which included the following description of the continuing disability she suffered due to her husband's assault:

My vision has remained double . . . . [E]very day I'm dealing with massive pain throughout my face where I am unable to focus and it causes me to be out of balance.

After the statement, the victim's sister proffered three photographs of the victim's injuries that were taken after her first reconstructive surgery. The State moved to withdraw its

plea agreement. Judge Young denied the State's motion, but rejected the plea agreement based on his own discretion.

At trial both defendant and the victim testified. At the time of the incident they were married, but estranged. An argument broke out between them involving their son at the victim's home. The victim testified that defendant punched her multiple times in her right eye. Defendant admitted hitting her once, but claimed he did so in self-defense.

When the police arrived, they arrested defendant and took the victim to the hospital. An officer took pictures of her injuries. The victim received seven stitches in her upper right eye. She underwent two reconstructive surgeries to repair a shattered bone in her eye socket. The victim testified before the jury that she continued to suffer from double vision in her right eye, pain in her gums and lips, and sensitivity in her cheeks and head. A police officer who responded to the scene testified that he found blood in several locations in the apartment. He described the victim's injuries:

Besides the laceration[,] her eye was completely closed. It was so swollen that it was closed . . . There was skin over her whole eye. And then she complained, while I was photographing her, she complained of feeling dizzy. And then she started to vomit and I stopped taking photos at that point.

The officer also observed bruising on the victim's forehead and her neck.

Dr. Schiller, an ophthalmologic plastic surgeon practicing for over twenty years, performed both of the victim's reconstructive surgeries. Dr. Schiller operated on the victim's eye because "her eye wasn't moving properly" due to a fracture. In describing this type of injury he testified,

When you push on an eyeball hard enough, the bone underneath it breaks out. . . . So if you get a pretty decent size blow right on the square on the eyeball, it will push the floor of the orbit down into the sinus. And some of the tissue around the eye can get stuck in there.

Without objection, the State introduced into evidence a letter from Dr. Schiller stating that it was "entirely possible" that the victim would not regain normal eyesight. He explained:

her eye just wasn't moving even after two operations . . . . Double vision is very disabling. It . . . can cause nausea. It can cause dizziness. And it can make it very difficult to see things.

In summation, defense counsel argued that defendant punched the victim one time in self-defense as a reaction to her kicking him in the groin. Defense counsel referred to a simultaneous recording defendant made of the incident on his cell phone, which recorded his son's voice as well as defendant's:

[Defendant] is guilty of picking up [the victim]. He's guilty of slipping on that

floor and falling, and he's guilty of reacting to that kick and striking [her] one time.

. . . .

You heard what he said to his son shortly afterwards. I was defending myself, I overreacted, I lost my temper.

The prosecutor also addressed defendant's self-defense claim:

You know who knows the truth of this whole self defense thing? [the son]. . . . A six year old, seven year old boy, . . . knows unfortunately that his father wasn't supposed to hit his mother and give her a bloody eye. And [the son] wants to know why he punched her. And you know what the truth is? That tape. I lost my temper.

. . . .

Whether or not this was justified, that's the only issue. And the question I will leave you with is this. If a six year old, seven year old boy knows that this shouldn't have happened should you think it did?

The court sentenced defendant to four years of probation with the condition that he serve 270 days in jail, perform 100 hours of community service, undergo anger management and domestic violence counseling, pay \$7,500 in restitution, and be subject to random drug testing.

Defendant raises the following issues on appeal:

POINT ONE: THE REJECTION OF THE PLEA AGREEMENT WAS AN ABUSE OF DISCRETION

POINT TWO: THE ADMISSION OF IMPROPER LAY OPINION TESTIMONY CONSTITUTED PLAIN ERROR (Not raised below)

POINT THREE: THE PROSECUTOR MADE IMPROPER COMMENTS DURING CROSS-EXAMINATION OF DEFENDANT AND IN HIS SUMMATION (Not raised below)

II

In Point I of his brief, defendant argues that Judge Young abused his discretion by rejecting the plea agreement. A defendant does not have an "absolute right to have a plea accepted, and sound discretion may lead to the rejection of such a plea." State v. Salentre, 275 N.J. Super. 410, 419 (App. Div.) (quoting State v. Brockington, 140 N.J. Super. 422, 427 (App. Div.), certif. denied, 71 N.J. 345, cert. denied, 429 U.S. 940, 97 S. Ct. 357, 50 L. Ed. 2d 310 (1976)), certif. denied, 138 N.J. 269 (1994). We review the rejection of a plea agreement for an abuse of discretion. State v. Daniels, 276 N.J. Super. 483, 487 (App. Div. 1994), certif. denied, 139 N.J. 443 (1995).

A plea agreement is an executory agreement that requires the State and the defendant to have a "meeting of the minds." State v. Smith, 306 N.J. Super. 370, 383 (App. Div. 1997). The plea is not finalized, however, until the trial court approves. Ibid. The plea may be rejected when "the court determines that the interests of justice would not be served by effectuating the agreement." R. 3:9-3(e).

Even when the trial court has preliminarily indicated that it will accept a plea agreement, it is not precluded from ultimately rejecting that agreement in the interest of justice. See Daniels, supra, 276 N.J. Super. at 487. One of the reasons for this discretion is because "[a] fuller picture of the offender does not emerge until sentencing." Brockington, supra, 140 N.J. Super. at 427.

Once a plea offer "is made, accepted, and entered on the record, a defendant is entitled to a judicial assessment of that agreement grounded in a correct understanding of the law and the proper exercise of discretion." State v. Madan, 366 N.J. Super. 98, 115 (App. Div. 2004). In Madan, the trial court rejected the defendant's plea agreement because of the possibility that defendant would be convicted of a greater offense if he were sent to trial, an unsupported finding that the defendant killed the victim in an especially "depraved manner," and incorrect sentencing calculations. Id. at 110-113. We reinstated the defendant's plea agreement because we found that the judge's decision was based on "insufficient factual underpinning . . . and . . . legal mistakes in the court's rationale." Id. at 110.

Judge Young's rejection of defendant's plea agreement was not an abuse of discretion because he provided detailed reasoning based on the facts and applicable law. Judge Young determined

that the plea went against the interest of justice because of the severity of the victim's injuries as evidenced by her Social Security Administration (SSA) disability determination and Dr. Schiller's report. The judge referred to the possible permanency of the victim's injury and concluded that, at a minimum, she suffered a "significant bodily injury" per N.J.S.A. 2C:12-1(b)(7). The judge also cited defendant's criminal history and the applicable aggravating and mitigating factors under the sentencing statute, N.J.S.A. 2C:44-1.

### III

Defendant raises the second and third issues for the first time on appeal. We will disregard an error not raised in the trial court unless we find plain error "clearly capable of producing an unjust result." R. 2:10-2. Additionally, "[t]he possibility of an unjust result must be 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Williams, 168 N.J. 323, 336 (2001) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). Defendant bears the burden of establishing that the trial court's actions constituted plain error. State v. Weston, 222 N.J. 277, 294-95 (2015).

Defendant contends that the judge committed plain error by allowing Dr. Schiller to provide expert testimony despite his



failure to qualify the surgeon as an expert or include a limiting jury charge. We disagree.

The trial court has the authority to "admit the testimony of a treating physician regarding the diagnosis and treatment of a patient," without qualifying him or her as an expert. Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 563 (2016). Courts distinguish between treating physicians and other medical experts because treating physicians are not obtained in anticipation of litigation. Stigliano v. Connaught Lab., Inc., 140 N.J. 305, 313-14 (1995) ("Although . . . treating doctors are doubtless 'experts,' . . . they are more accurately fact witnesses.").

Dr. Schiller testified about his observations and procedures concerning his treatment of the victim and more generally about damage to the eye area caused by a substantial impact. Defendant failed to object to his testimony, his letter, or to the jury instructions, and admission of this evidence did not constitute plain error.

#### IV

In Point III of his brief, defendant contends as plain error that his right to a fair trial was violated by one of the prosecutor's questions during his cross-examination of defendant and two comments in the prosecutor's summation.

Although prosecutors have "considerable leeway" in their summations, they may not make "inaccurate legal . . . assertions during a trial." State v. Smith, 167 N.J. 158, 177-78 (2001). When summing up a prosecutor should "confine his comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence." State v. Bradshaw, 195 N.J. 493, 510 (2008) (citation omitted). We will not reverse a conviction unless the misconduct was "so egregious that it deprived the defendant of a fair trial." Smith, supra, 167 N.J. at 181.

If the defense failed to object to improper remarks at trial, generally "the remarks will not be deemed prejudicial. The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. The failure to object also deprives the court of an opportunity to take curative action." State v. Frost, 158 N.J. 76, 83-84 (1999) (citations omitted).

Although a prosecutor's factually inaccurate comments are inappropriate, courts consider "isolated instances . . . in the context of the entire trial proceedings." State v. Engel, 249 N.J. Super. 336, 381 (App. Div.), certif. denied, 130 N.J. 393 (1991). The prosecutor's summation discussion about Dr. Schiller's opinion contained a slight exaggeration. He said:

So Dr. Schiller says in December of 2011, that's nine months out from this incident, that it's likely that she might not ever regain normal functions of her eyes.

[Emphasis added.]

However, in Dr. Schiller's letter, which was submitted into evidence, he stated "it's entirely possible that her eyes might not ever be restored to normal functioning." (Emphasis added). Although the prosecutor's statement somewhat exaggerated the probability of the victim's permanent disability, the correct statement was testified to by Dr. Schiller and included in his letter that was in evidence. Moreover, the judge instructed the jury that attorney statements should not be considered as evidence. See Engel, supra, 249 N.J. Super. at 382.

Significantly, the jury found defendant not guilty of the more serious second-degree aggravated assault charge, which required proof of "serious bodily injury," convicting him only of the third-degree crime of causing "significant bodily injury." N.J.S.A. 2C:12-1(b)(1) and (7). N.J.S.A. 2C:11-1(b), in pertinent part, defines "serious bodily injury" as "bodily injury . . . which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." "Significant bodily injury" is defined in N.J.S.A. 2C:11-1(d) as "bodily injury which creates a temporary loss of the function of any bodily member or organ or temporary loss of any one of the five senses." Thus, the jury apparently did not find that

defendant caused the permanent or protracted impairment of the victim's vision in spite of the prosecutor's exaggeration.

Defendant also objects to the prosecutor's discussion of the parties' child in his summation. A court may find prosecutorial misconduct when a prosecutor urges the jury to convict the defendant for improper reasons. State v. Lockett, 249 N.J. Super. 428, 434-35 (App. Div.), certif. denied, 127 N.J. 553 (1991). However, the prosecutor is allowed to argue "graphically and forcefully," so long as the statements stay within proper bounds. Id. at 435 (quoting State v. Johnson, 31 N.J. 489, 510 (1960)). In Lockett, the prosecutor accused the defense of deceit, made false factual claims, and urged the jury to convict the defendant out of sympathy for the deceased victim. Id. at 434-35. We reversed defendant's conviction because the sum of those improper comments deprived the defendant of a fair trial. Id. at 436.

Here, the prosecutor's statements discussing the child in connection with defendant's self-defense claim, when reviewed in the context of his entire summation, did not extend beyond reasonable inferences based on the evidence. The prosecutor made the argument while discussing the cell phone recording, which was in evidence.

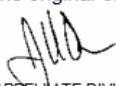
Finally, defendant contends that the prosecutor improperly commented on his prior criminal conviction by asking defendant

whether he had previously broken the law. N.J.R.E. 609 allows a witness's prior criminal conviction to be admitted for the purpose of impeaching his or her credibility, unless otherwise excluded by the trial judge. Defendant had just testified on redirect that he was being truthful and did not mean for the incident to happen. Immediately thereafter, the prosecutor asked if the defendant had a prior conviction. The question, on its own, did not exceed the bounds of impeaching defendant's credibility. The State's exaggeration of Dr. Schiller's opinion alone was not clearly capable of producing an unjust result.

Judge Young properly exercised his discretion in rejecting the plea agreement and admitting the doctor's testimony. The prosecutor's question and comments in summation did not deprive defendant of a fair trial.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION