SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3951-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALLISON NASTA, a/k/a ALLISON BONNAR

Defendant-Appellant.

Argued November 10, 2016 – Decided February 23, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 13-09-2505.

Solmaz F. Firoz, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Firoz, of counsel and on the briefs).

John J. Santoliquido, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Diane Ruberton, Acting Atlantic County Prosecutor, attorney; Mr. Santoliquido, of counsel and on the brief).

PER CURIAM

Tried by a jury, defendant Allison Nasta was convicted of second-degree vehicular homicide, causing serious bodily injury while driving with a suspended or revoked license, and possession of a controlled dangerous substance (heroin). The charges stem from a 2012 motor vehicle accident, which resulted in the death of defendant's husband and injuries to her two daughters. At the accident scene, defendant's demeanor and slurred speech caused the police to suspect she was under the influence. Emergency medical technicians (EMTs) transported defendant to the hospital, where police obtained a sample of defendant's blood without a warrant. Blood tests revealed opiates related to heroin were present.

On appeal, defendant argues we should vacate her conviction and order a new trial, challenging the denial of her motion to suppress the blood test evidence, the denial of her motion to sever, the prosecutor's statements during closing, the denial of her motion for a new trial, and her counsel's assistance. Alternatively, she maintains the trial court imposed an excessive sentence.

We have reviewed the arguments presented in light of the record and applicable law. Finding no abuse of discretion or error, we affirm defendant's convictions but remand for correction of an error in the judgment of conviction.

We first summarize the relevant facts and procedural history. On August 28, 2012, at approximately 12:45 p.m., defendant crashed her minivan into a light pole while driving on the Black Horse Pike in Pleasantville. Defendant's husband, William Nasta, sat in the front passenger seat, and their two-month-old and five-year-old daughters occupied the rear seat. William died due to injuries sustained in this crash, and the daughters required hospitalization.

EMTs transported defendant to the hospital, where police obtained defendant's blood sample without a warrant at approximately 2:50 p.m. Months later, private lab testing revealed compounds related to heroin in defendant's bloodstream.

On September 19, 2013, an Atlantic County grand jury returned an indictment charging defendant with second-degree vehicular homicide, N.J.S.A. 2C:11-5 (count one); two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4 (counts two and three); fourth-degree[1] causing serious bodily injury while driving with a suspended or revoked license, N.J.S.A. 2C:40-22(b) (count four); third-degree hindering apprehension, N.J.S.A. 2C:29-

[1] Count four of the indictment specifically cites N.J.S.A. 2C:40-22(b), which refers to causing serious bodily injury while driving with a revoked or suspended license, a fourth-degree criminal offense. However, both the indictment and defendant's judgment of conviction list this charge as a third-degree offense.

3(b)(4) (count five); and third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1) (count six).[2]

Defendant moved, in relevant part, to suppress the blood test evidence and sever count six of the indictment. On August 8, 2014, the judge held a suppression hearing. Sergeant James Rosiello of the Atlantic County Prosecutor's Office (ACPO) testified that at approximately 2:00 p.m. on August 28, 2012, he responded to the intersection of the Black Horse Pike and Route 9 in Pleasantville, where he observed a van that appeared to have been in an accident stationed in the parking lot of an Exxon gas station. He met Sergeant Simons and Detective Sample of the Pleasantville Police Department at the scene, where he also observed a fire truck and "numerous other uniformed and non-uniformed" officers present. Defendant, her husband, and her children had been transported to the hospital before his arrival.

Sergeant Simons told Sergeant Rosiello the accident was a one-vehicle crash, where a minivan drove off the roadway of the Black Horse Pike, struck a light pole, continued through some bushes, and came to rest in the gas station lot. Although taken to the hospital, Sergeant Rosiello learned defendant could walk

[2] The police also charged defendant with four motor vehicle offenses and a disorderly persons offense for possession of a hypodermic needle, N.J.S.A. 2C:36-6.

on her own and was able to speak with EMTs about going to the hospital for treatment.

Sergeants Rosiello and Simons conducted a walk-through of the accident to gather evidence. Sergeant Simons discovered "a bundle of heroin" in a debris pile on the ground on the driver's side of the vehicle. Sergeant Rosiello said it appeared this heroin came from the vehicle and noted the driver's side window was open. He stated the heroin was not right outside the car, but was in "close proximity to the vehicle." The officers also observed hypodermic needles inside the vehicle. They proceeded to trace the path of the vehicle into the westbound lanes of the Black Horse Pike.

Sergeant Rosiello stated that Sergeant Simons, a drug recognition expert, said he believed defendant was under the influence of heroin. Sergeant Rosiello then went to the hospital to speak with defendant, and police obtained two recorded statements. At this time, defendant was aware her husband died and daughters were injured.

During the interviews, Sergeant Rosiello observed defendant would occasionally nod off or fall asleep, and at other points, she was active and emotional. He also noted defendant's eyelids looked droopy, and her speech was slow and slurred. The sergeant further observed "track marks" on defendant's arms, suggesting intravenous drug use. Based on his training and experience,

Sergeant Rosiello believed defendant was under the influence of heroin.

Sergeant Rosiello then testified regarding his understanding of the rate drugs dissipate in a person's system. He stated he was aware the "burn-off" rate for heroin in the system is faster than the burn-off rate for alcohol. He further stated he had been trained to understand heroin can burn off "quickly[,] [s]ometimes . . . within minutes," at which point it "starts breaking down to other metabolites."

Next, Sergeant Rosiello was asked why police obtained defendant's blood sample. He noted it is the standard policy of ACPO to take blood from any surviving party where an accident results in death. The sergeant noted he arrived at the hospital after another officer, Sergeant Mark Johns of the Pleasantville Police Department, obtained the sample. He did not know when Sergeant Johns obtained the sample, who instructed Sergeant Johns to draw the blood, or when Sergeant Johns was instructed to do so.

Police transported the blood to the New Jersey State Police Lab in Hammonton. Sergeant Rosiello stated the test results were "negative," so he took the same sample to NMS Labs, a private laboratory in Willow Grove, Pennsylvania. This second test revealed morphine and "heroin metabolites."

Sergeant Rosiello further stated he did not believe Sergeant Johns attempted to obtain a warrant to draw the blood. He also noted no law enforcement officer contacted him to discuss whether a warrant would be necessary in this case. Sergeant Rosiello stated he has applied for telephonic warrants in the past. He described the process as first calling an assistant prosecutor or a legal advisor to go over the facts, and then calling a judge to get the warrant. The sergeant stated nobody applied for a telephonic warrant in this case.

Sergeant Rosiello also noted police had not confined defendant after the crash, and she could have walked around freely. He further stated he would not have been able to stop her from leaving the hospital, since she was not in custody or under arrest.

Sergeant Simons' accident report was submitted to the court with defendant's motion. Sergeant Simons described the accident scene, stating he observed a male (William Nasta) partially ejected from the passenger side of the vehicle. He also observed a juvenile female lying on the ground bleeding heavily from her face and an infant with some bleeding from her face. EMTs arrived at the scene to tend to these individuals. The Pleasantville Fire Department had to extricate William Nasta from the vehicle using the "jaws-of-life." EMTs then placed William into an ambulance,

where he went into cardiac arrest and was later pronounced dead at the hospital.

Sergeant Simons' report also discussed the heroin packets, noting there were seven packets in total, which were stamped and held together with a rubber band. Sergeant Simons stated these packets were located in the vehicle's path, "to the left and back from the large pole the vehicle struck." Based on the force of impact, the fact the driver's window was down, and the proximity to the vehicle's path, Sergeant Simons concluded the heroin came from the van.

After the parties presented this evidence at the hearing, the judge found the police had probable cause to draw defendant's blood, but reserved his decision in order to consider the applicability of the recent United States Supreme Court decision in Missouri v. McNeely.[3] The judge noted, should McNeely apply, he would need to hear expert testimony on the dissipation rate of heroin compared to alcohol. In addition, after the parties concluded their suppression arguments at this hearing, defendant requested the judge sever count six of the indictment. Although the judge heard argument on this issue, the record does not reflect he rendered a determination.

[3] Missouri v. McNeely, 569 U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

After the hearing, the judge denied defendant's motion to suppress in a written letter opinion. The judge ruled on two issues: (1) whether McNeely applied to the police conduct regarding defendant's blood test, and (2) whether the State had to establish probable cause to have the private lab test the blood a second time. On the first issue, the judge relied on our decision in State v. Adkins, 433 N.J. Super. 479 (App. Div. 2013) [hereinafter Adkins I], rev'd and remanded, 221 N.J. 300 (2015), to determine McNeely did not apply because it was not retroactive. On the second, the judge found, because the initial sample was lawfully drawn, defendant did not have a reasonable expectation of privacy in any further testing of the blood.

The case proceeded to trial before a jury, beginning on January 14, 2015. During trial, Sergeant Rosiello testified to his observations of defendant's demeanor, stating he believed she was intoxicated based on her nodding off and slurred speech. Detective Sample also testified he believed defendant was intoxicated. Sergeant Simons testified regarding his examination of the crash scene, his conclusions as to the cause of the accident, and his discovery of the heroin packets. He further testified regarding his observations of defendan's demeanor and his belief she was intoxicated.

The parties presented detailed testimony regarding the blood tests. Defendant presented Michael Kennedy Jr., a forensic scientist for the New Jersey State police, who testified to the police lab blood tests. Kennedy stated the lab tested defendant's sample for both alcohol and drugs and used two procedures to screen for drugs. First, the lab used an instrument called ELISA, which screens for different categories of drugs. ELISA provides a preliminary determination of the contents of a sample, but the results are not "confirmatory in any way." When ELISA reveals a positive result, the lab uses a gas chromatography mass spectrometry (GCMS) to identify specific substances in the sample. The ELISA is more sensitive than the GCMS, meaning it can reveal indicators the lab would then have difficulty confirming on the GCMS.

Kennedy stated the ELISA test yielded a positive finding for benzodiazepines and general opiates, necessitating further testing with the GCMS. Kennedy explained, "[I]t's not a fact that [drugs are] in there. We haven't confirmed [drug] presence with additional testing. It's just a preliminary indicator that . . . there may be a drug present. And this particular sample was positive for benzodiazepines and additional for general opiates."

The GCMS test results concluded drugs were "not detected." Kennedy explained this result was not necessarily a negative

result, as drug levels could fall below what the instrument can detect. On cross-examination, Kennedy noted the ELISA test "picked up opiates, the general category for opiates," and noted other equipment, such as found in a private lab, might detect a substance where the GCMS failed.

After receiving these test results, the ACPO requested NMS Labs, a private laboratory, perform a second toxicology analysis. The State presented Dr. Wendy Adams, assistant laboratory director at NMS Labs, who testified heroin beaks down very quickly, but is still detectible as morphine. She stated the NMS Lab tests revealed cotetinine, codeine, and morphine in defendant's blood.

The State also presented Dr. John Brick, a forensic pharmacologist, who testified regarding his interpretation of the NMS Lab test results. Dr. Brick explained heroin is metabolized to morphine, and morphine is responsible for the primary effects of heroin on its users. Opioids such as heroin are depressants, decreasing a user's response to the environment. He confirmed the police observations of defendant's behavior (nodding off, slow movements, slurred speech, impaired attention) were consistent with the behavior of someone under the influence of opioids. Dr. Brick stated defendant's morphine concentrations were "significantly elevated" to the point they could affect the brain to change behavior.

The jury heard closing arguments on January 28, 2015. During the State's closing, the prosecutor made several remarks regarding the preliminary ELSIA screening, stating it showed defendant's blood was "positive for opiates," and defendant had "opiates in her system." Defense counsel objected at sidebar immediately after the end of the State's closing, arguing the prosecutor made "false statements or inaccurate statements." The prosecutor responded, "I think I commented exactly on what the witnesses testified to."

The judge agreed with the prosecutor, stating, "I think [the prosecutor's] closing or comments . . . were inviolate of what the evidence was[;]" nevertheless, the judge proceeded to instruct the jury "what the attorneys say in their closing arguments . . . is not to be considered as evidence." The judge then instructed the jury on the charges from the indictment, including count six, the possession of heroin charge defendant had moved to sever.

The jury returned its verdict on January 29, 2015. The jury found defendant guilty of count one (second-degree vehicular homicide), count four (causing serious bodily injury while driving with a suspended or revoked license), and count six (possession of a controlled dangerous substance). The jury acquitted defendant of the remaining charges.

Defendant moved for a new trial, again raising the issue of the prosecutor's statements during closing. The judge denied the motion, just before sentencing on March 13, 2015. The parties then presented their sentencing arguments: defendant requested mitigating factor eleven (hardship to others), N.J.S.A. 2C:44-1(b)(11), and the State requested aggravating factors three (risk of recidivism), six (prior criminal record and seriousness of offenses), and nine (need for deterrence), N.J.S.A. 2C:44-1(a)(3), (6), (9).

The judge found aggravating factors three and nine. He further found mitigating factors eleven, seven (no prior criminal history) and ten (defendant is likely to respond to probationary treatment), N.J.S.A. 2C:44-1(b)(7), (10). However, he gave factor ten little weight as defendant's sentence was subject to the No Early Release Act (NERA). The judge then found the aggravating factors preponderated over the mitigating factors and sentenced defendant to seven years of incarceration.

Defendant filed this appeal, presenting the following arguments:

> POINT I
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> TESTS THAT WERE CONDUCTED ON DEFENDANT'S BLOOD, WHICH WAS DRAWN WITHOUT A WARRANT, MUST BE SUPPRESSED GIVEN A RECENT LEGAL CHANGE THAT APPLIES RETROACTIVELY TO THIS CASE. FURTHER, SUPPRESSION OF THE TEST RESULTS NECESSITATES REVERSAL OF DEFENDANT'S CONVICTIONS.

POINT II

DURING HIS CLOSING STATEMENT, THE PROSECUTOR MISLED THE JURY AS TO THE STATE POLICE LAB BLOOD TEST RESULTS, A CRUCIAL PIECE OF EVIDENCE THAT WENT DIRECTLY TO DEFENDANT'S GUILT. THIS PROSECUTORIAL MISCONDUCT, PAIRED WITH THE LACK OF A PROPER CURATIVE INSTRUCTION FROM THE COURT, DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT III

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY FAILED TO SEEK ADMISSION OF HER STATEMENT FOR THE PURPOSE OF REBUTTING THE STATE'S ALLEGATION OF INTOXICATION. (Not Raised Below).

POINT IV

DEFENDANT WAS DENIED A FAIR TRIAL BECAUSE COUNT SIX, CHARGING HER WITH UNLAWFUL HEROIN POSSESSION, WAS NOT SEVERED FROM THE INDICTMENT.

POINT V

THIS CASE SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCING COURT IMPROPERLY WEIGHED THE AGGRAVATING AND MITIGATING FACTORS, RESULTING IN AN EXCESSIVE SENTENCE.

We address these points in the order presented.

I.

Defendant first argues her conviction should be reversed because the trial judge erred in failing to suppress the results of her warrantless blood draw pursuant to Missouri v. McNeely. We must uphold trial court's factual findings in a motion to suppress so long as the findings are "supported by sufficient credible

evidence in the record." State v. Watts, 223 N.J. 503, 516 (2015) (quoting State v. Elders, 192 N.J. 224, 243-44 (2007)). However, we review legal issues de novo. Ibid. (citation omitted).

Defendant argues the police were required to obtain a search warrant before directing the hospital staff to draw her blood. The United States and New Jersey Constitutions prohibit warrantless searches "unless they fall within a recognized exception to the warrant requirement." State v. Adkins, 221 N.J. 300, 310 (2015) [hereinafter Adkins II] (citation omitted). "One exception to that requirement is the presence of exigent circumstances." Ibid. (citation omitted).

The United States Supreme Court first addressed the constitutionality of a warrantless blood draw from a suspected drunk driver, in the context of the exigent-circumstances exception, in its 1966 decision in Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Adkins II, supra, 221 N.J. at 310. In Schmerber, the defendant was involved in an accident, suffered injuries, and was transported to a hospital for treatment. Schmerber, supra, 384 U.S. at 758, 86 S. Ct. at 1829, 16 L. Ed. 2d at 912. Without obtaining a warrant, police told hospital officials to draw a sample of the defendant's blood; that sample was used to determine the defendant's blood

alcohol content (BAC). Id. at 758-59, 86 S. Ct. at 1829, 16 L. Ed. 2d at 912-13.

The Court held the "compulsory administration of a blood test" is a search under the Fourth Amendment. Id. at 767, 86 S. Ct. at 1834, 16 L. Ed. 2d at 918. However, the Court further held that a warrantless seizure of the defendant's blood was reasonable because the officer "might reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a warrant . . . threatened 'the destruction of evidence,'" based on the fact alcohol naturally leaves a person's system over time. Id. at 770-71, 86 S. Ct. at 1835-36, 16 L. Ed. 2d at 919-20 (citation omitted). Most significantly, the Court held this draw was proper based on the "special facts" of this case, where police had no time to obtain a warrant because "time had to be taken to bring the accused to a hospital and to investigate the scene of the accident." Id. at 770-71, 86 S. Ct. at 1836, 16 L. Ed. 2d at 920.

New Jersey case law post-Schmerber permitted the police to obtain a blood sample without first obtaining a warrant, so long as they had probable cause to believe the driver was intoxicated and the sample was taken "in a medically acceptable manner at a hospital or other suitable health care facility." State v. Dyal, 97 N.J. 229, 238 (1984) (citing Schmerber, supra, 384 U.S. at 771-

72, 86 S. Ct. at 1836, 16 L. Ed. 2d at 920). Other courts believed Schmerber "created a rule that the dissipation of alcohol constituted a per se exigency justifying a warrantless search." Adkins II, supra, 221 N.J. at 311. In order to resolve a split in authority on this issue, the Court decided McNeely. Ibid.

In McNeely, the Court reaffirmed Schmerber as "fit[ting] comfortably within our case law applying the exigent circumstances exception," but held a different result applied in a simple DWI traffic stop. McNeely, supra, 569 U.S. at ___, 133 S. Ct. at 1560, 185 L. Ed. 2d at 706. Under the facts of McNeely, police stopped the defendant's vehicle for traffic violations. Id. at ___, 133 S. Ct. at 1556, 185 L. Ed. 2d at 702. After the defendant failed field sobriety tests and declined a breathalyzer, the officer transported him to a hospital for blood testing, without securing a warrant. Id. at ___, 133 S. Ct. at 1557, 185 L. Ed. 2d at 702.

The Court in McNeely held the natural metabolization of alcohol does not create a per se exigency for all drunk-driving cases, and that "exigency in this context must be determined case by case based on the totality of the circumstances." Id. at ___, 133 S. Ct. at 1556, 185 L. Ed. 2d at 702. "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly

undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Id. at ___, 86 S. Ct. at 1561, 185 L. Ed. 2d at 707.

The McNeely Court declined to engage in a detailed discussion of all the relevant factors for determining the reasonableness of acting without a warrant. Id. at ___, 133 S. Ct. at 1568, 185 L. Ed. 2d at 715. However, the Court noted the availability of telephonic warrants could be a factor in this determination. Id. at ___, 133 S. Ct. at 1562, 185 L. Ed. 2d at 708-09. The Court further noted the "metabolization of alcohol in the bloodstream," and the subsequent loss of evidence, is another factor. Id. at ___, 133 S. Ct. at 1568, 185 L. Ed. 2d at 715.

Here, the trial judge declined to apply McNeely because we had held it was not retroactive. See Adkins I, supra, 433 N.J. Super. at 493. However, in Adkins II, our Supreme Court found McNeely's "totality of the circumstances analysis would be given pipeline retroactivity."[4] State v. Jones, 441 N.J. Super. 317, 320 (App. Div. 2015) [hereinafter Jones II] (citing Adkins II, supra, 221 N.J. at 317). Because final adjudication of this case

[4] When a new rule of law is given "pipeline retroactivity," it applies to "pending cases where the parties have not yet exhausted all avenues of direct review." State v. Feal, 194 N.J. 293, 308 (2008) (quoting State v. Burstein, 85 N.J. 394, 402-03 (1981)).

was pending when McNeely was decided on April 17, 2013, our Supreme Court has determined:

> [W]e shall retroactively enforce the Supreme Court's declaration that the totality-of-the-circumstances examination applies to all blood draws from suspected drunk drivers, we hold further that law enforcement should be permitted on remand in these pipeline cases to present to the court their basis for believing that exigency was present in the facts surrounding the evidence's potential dissipation and police response under the circumstances to the events involved in the arrest. Further, the exigency in these circumstances should be assessed in a manner that permits the court to ascribe substantial weight to the perceived dissipation that an officer reasonably faced. Reasonableness of officers must be assessed in light of the existence of the McNeely opinion. But, in reexamining pipeline cases when police may have believed that they did not have to evaluate whether a warrant could be obtained, based on prior guidance from our Court that did not dwell on such an obligation, we direct reviewing courts to focus on the objective exigency of the circumstances that the officer faced in the situation.
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> [Adkins II, supra, 221 N.J. at 317.]

Applying this rule, we find there was an "objective exigency"[5] in the instant case sufficient to justify a warrantless blood draw on defendant approximately two hours after a severe accident that resulted in her husband's death. We find the facts here are

[5] We apply the "objective exigency" standard, as the officer testified during the suppression hearing it was ACPO policy to draw blood any time an accident resulted in a death.

analogous to the facts of our recent decision in Jones,[6] as well as the "special facts" warranting a warrantless blood sample in in Schmerber.

In Jones, the defendant caused a large three-vehicle crash at a busy intersection of Kings Highway in Cherry Hill. Jones I, supra, 437 N.J. Super. at 71. Eleven officers responded to the "very chaotic" scene, as did two EMS vehicles, two fire trucks, and an unknown number of firefighters. Ibid. Police had to block off traffic around the crash scene, and there was a "concern that the building [the] defendant had stuck might collapse." Ibid. The defendant was discovered unconscious and bleeding in her car, and EMTs took a half-hour to remove her from the vehicle. Ibid. The defendant was taken to the hospital, as was an occupant of another car. Id. at 72. The investigation of the accident took several hours. Ibid.

EMTs detected the scent of alcohol on the defendant's breath and police noted her slurred speech once she regained consciousness. Id. at 71-72. As a result, police ordered the

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[6] In State v. Jones, 437 N.J. Super. 68 (App. Div. 2014) [hereinafter Jones I], decided before the decision in Adkins II, we declined to determine whether McNeely would apply retroactively because "the application of McNeely to the facts of [the] case [did] not require the suppression of the results of defendant's blood test." Id. at 77-78. Our Supreme Court later summarily remanded the case to use for reconsideration in light of Adkins II, and we reached the same result. See Jones II, supra, 441 N.J. Super. at 320-21.

hospital draw her blood approximately one hour and fifteen minutes after the accident. Id. at 72. The police officer later testified that, pursuant to standard operating procedures at the time, he was not required to obtain a search warrant. Ibid. He also stated telephonic warrants were not available in their jurisdiction at the time of the accident. Id. at 72-73.

Reviewing this case in light of the "objective exigency" and the "totality of the circumstances" as directed by Adkins II, we declined to exclude the warrantless blood evidence. Jones II, supra, 441 N.J. Super. at 321. We noted the events did not involve "a routine motor vehicle stop," and the exigency "did not depend solely upon the fact that alcohol dissipates in the blood." Ibid. "Viewing the circumstances . . . objectively," we found the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence[.]'" Ibid. (quoting Schmerber, supra, 384 U.S. at 770, 86 S. Ct. at 1835, 16 L. Ed. 2d at 919-20).

The circumstances in the instant matter, as described in the suppression hearing and Sergeant Simons' report, are partially distinguishable from Jones. Here, in a single car accident, defendant drove her vehicle into a pole. Furthermore, defendant's car came to rest in a parking lot, meaning the road was open

despite the crash. Defendant was not seriously injured, while the defendant in Jones was unconscious and firefighters had to extract her from her car. Defendant urges we find Jones distinguishable, contending Jones "involved a more serious and urgent situation than this case."

We do not find defendant's arguments persuasive. Because the case under review was "not a routine motor vehicle stop" and involved Schmerber's "special facts" of an accident investigation and hospitalization of the accused, we find the circumstances here were comparably exigent to those in Jones. As in Jones, police, firefighters, and EMT personnel all arrived on the scene. Although defendant herself did not require a "jaws-of-life" extraction, her husband did. EMTs then transported defendant, her husband and their daughters to the hospital. Police conducted an investigation, involving surveying the left-hand lane of the Black Horse Pike and gathering evidence near the vehicle. We find the cases comparable in that police and Sergeant Johns "might reasonably have believed" they were involved in an emergency situation where the delay necessary to obtain a warrant risked the destruction of evidence. Jones II, supra, 441 N.J. Super. at 321 (quoting Schmerber, supra, 384 U.S. at 770, 86 S. Ct. at 1835, 16 L. Ed. 2d at 919-20).

Defendant also contends, citing Sergeant Rosiello's statements during the suppression hearing, that police drew defendant's blood not because of an exigency but because of ACPO policy. Defendant is likely correct that after McNeely, a policy cannot serve as the sole basis for a warrantless blood draw. However, under an "objective exigency" analysis given the circumstances of the accident, we find police and Sergeant Johns could have reasonably believed there was an emergency necessitating a warrantless blood draw. Jones II, supra, 441 N.J. Super. at 321.

Defendant further argues the differences between alcohol and heroin meant there were no exigent circumstances in this case. Specifically, defendant contends alcohol dissipates slowly in the blood, while heroin dissipates in a matter of minutes. Defendant asserts there could have been no exigency once these few minutes had passed, since any test not done immediately would show a negative result for heroin.

However, as Jones II instructs, the test we apply views the circumstances objectively to determine whether an officer "might reasonably have believed" there was an emergency. Ibid. Sergeant Rosiello testified during the suppression hearing he received training that heroin dissipates "quickly[,] [s]ometimes . . . within minutes" and "starts breaking down to other metabolites."

"As the United States Supreme Court has noted, traces of illegal drugs are continuously eliminated from the bloodstream. The delay in obtaining a warrant could result in the disappearance of the evidence of drug use." Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 191 (1993) (citing Skinner v. Railway Labor Execs.' Ass'n, 489 U.S. 602, 623, 109 S. Ct. 1402, 1416, 103 L. Ed. 2d 639, 663 (1989)). We conclude there was a reasonable basis for finding an exigency to draw the blood not for heroin itself, but before metabolites indicating heroin use dissipated from defendant's bloodstream. Evidence at the accident scene caused the police to suspect the driver was under the influence, and Sergeant Rosiello testified, based upon his training, that heroin dissipates quickly, sometimes within minutes.

Defendant argues officers could have requested a telephonic warrant to seize defendant's blood. Indeed, unlike in Jones I, supra, 437 N.J. Super. at 72-73, the police here were familiar with the telephone warrants. However, although McNeely considered the availability of telephonic warrants as a factor in a "totality of the circumstances" analysis, the Court stated, "We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process." McNeely, supra, 569 U.S. at ___, 133 S. Ct. at 1562, 185 L. Ed. 2d at 709.

To show that a telephonic warrant should have been obtained, defendant cites State v. Witt, 223 N.J. 409, 436 (2015), where our Supreme Court noted that in one test program the average request time for such a warrant could take between one and two hours. Defendant contends because the accident occurred at 12:45 p.m. and the draw at 2:50 p.m., police could have obtained a warrant during this time. However, this delay is likely a reflection of the time it took to transfer defendant to the hospital. As Sergeant Rosiello noted, the ACPO warrant process involves first contacting an assistant prosecutor and discussing the case, and then locating and phoning a judge to obtain a warrant.

Here, the police responded to a serious accident requiring "jaws-of-life" extraction of the front-seat passenger. The driver and two child passengers required hospital evaluation and treatment. As noted, the police suspected defendant was under the influence, and Sergeant Rosiello was trained that heroin dissipates quickly. Under these circumstances, we conclude Sergeant Johns could have reasonably believed he had insufficient time to complete the two-step process to secure a telephone warrant, given the emergency confronting him. See Jones II, supra, 441 N.J. Super. at 321.

Finally, defendant asserts, assuming arguendo the initial draw was proper, the second lab test by NMS labs was improper as

the police had no probable cause for the second test. Defendant cites the Third Circuit's case Reedy v. Evanson, 615 F.3d 197, 229 (3d Cir. 2010), cert. denied, 562 U.S. 1256, 131 S. Ct. 1571, 179 L. Ed. 2d 474 (2011), which stated, "[I]n Schmerber, while the Supreme Court noted that the taking of blood involves intrusion beyond the body's surface, it did not say that the blood, once drawn, is no longer subject to a reasonable expectation of privacy."

We disagree and find Reedy distinguishable. In Reedy, a rape victim consented to having her blood drawn as part of a rape kit, but law enforcement further directed the hospital to test it for drug use without the victim's consent and without a warrant. Id. at 204-05, 230. The court held the defendant only consented to the blood draw for the rape kit, and she therefore had a reasonable expectation of privacy in her blood for other uses. Id. at 230.

Here, police lawfully drew the blood, and the initial probable cause for heroin use, specifically defendant's slurred speech and demeanor, justified this second test. The positive ELISA screening also justified this test, even though the GCMS was negative. As was stated at trial, a negative result on the police equipment is not conclusive, and other equipment from a private lab may detect a substance where the police equipment cannot.

Moreover, in Dyal, supra, 97 N.J. at 239, our Supreme Court recognized where police accompany a drunk driver to the hospital and lawfully obtain a blood test for diagnostic purposes, they need not perform a new second test for investigatory purposes. Although the circumstances here are different, Dyal suggests once police lawfully obtain a blood sample of a suspected intoxicated driver, they need not take extra steps in order to conduct additional tests.

As we find the blood draw reasonable under the totality of the circumstances, we need not remand this case as authorized by Adkins II, supra, 221 N.J. at 317. Although the trial judge stated he intended to take testimony regarding the dissipation rate of heroin if McNeely applied, we find the suppression hearing record sufficient to establish a warrant was not needed in this matter.

II.

Defendant next argues the prosecutor's summation inaccurately related the State Police blood test results and deprived her of a fair trial. We disagree.

Summations, like jury instructions, must be read in the context of the trial as a whole. See State v. Morton, 155 N.J. 383, 416 (1998), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001). We do not evaluate a summation in isolation because the State is permitted to respond to allegations made by

defense counsel. State v. Engel, 249 N.J. Super. 336, 379-80 (App. Div.), certif. denied, 130 N.J. 393 (1991).

Prosecutors in criminal cases "are expected to make vigorous and forceful closing arguments to juries." State v. Frost, 158 N.J. 76, 82 (1999) (citation omitted). They are "afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." Ibid. (citations omitted). Prosecutors "may comment on facts in the record and draw reasonable inferences from them." State v. Lazo, 209 N.J. 9, 29 (2012) (citation omitted). Most importantly, "prosecutors should not make inaccurate legal or factual assertions during a trial." State v. Reddish, 181 N.J. 553, 641 (2004) (quoting State v. Smith, 167 N.J. 158, 178 (2001)).

Where prosecutorial misconduct has occurred, however, courts should not reverse unless the conduct was "so egregious that it deprived the defendant of a fair trial." State v. Wakefield, 190 N.J. 397, 438 (2007) (quoting Smith, supra, 167 N.J. at 181), cert. denied, 522 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008). In determining whether prosecutorial misconduct warrants reversal, courts should consider: "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed

the jury to disregard them." Smith, supra, 167 N.J. at 182 (citing State v. Timmendequas, 161 N.J. 515, 575 (1999)). Despite overwhelming evidence of guilt, a defendant cannot be deprived of the right to a fair trial. Frost, supra, 158 N.J. at 87.

Defendant challenges the following statements by the prosecutor during summation, quoted here, in relevant part:

> Because the fact of the matter is the State Lab expert said he did find opiates in her system, remember? There were two tests? The first test positive. What was it positive for? It was positive for opiates.
>
> The second test wasn't able to determine which opiates it was or in what quantity. And he was asked why would that be. And he said, well, our equipment sometimes isn't that sensitive. Other equipment might be more sensitive. It might be able to tell you. But absolutely that State Lab tech found opiates in this defendant's system.
>
> . . . .
>
> In minutes after taking heroin, it's just gone from your system and it's broken down into those metabolites, metabolites that the State Lab found, metabolites that NMS Labs described for you.
>
> . . . .
>
> And so I suggest to you both witnesses presented by the defense support the fact that this defendant was high.
>
> . . . .
>
> [N]obody was really all that surprised when her blood work came back with codeine and morphine in it; when her blood work came back

> from the State Police as being positive for opiates.

After defense counsel objected to these statements, the judge provided the following curative instruction:

> Now, we spent some time up here just before I [began] this charge to you speaking about alleged inaccuracies or incompletion of argument the attorneys have made to you. And I can only . . . reiterate to you, as I have probably two or three times before, that what the attorneys say in their closing arguments as well as their openings is not to be considered as evidence.

Defendant argues the prosecutor's comments were based on facts not in evidence, because although the ELISA test showed a positive result, it was not "confirmatory," and the GCMS and State Lab report revealed drugs were "not detected" in the sample. Defendant contends this deprived her of a fair trial, as the blood results were essential to establishing her guilt on the issue of driving while intoxicated. Last, she argues the trial judge's general curative instruction was insufficient to cure her prejudice, as it did not remind the jury that the ELISA test was only presumptive and not conclusive.

We are not persuaded. As quoted above, defendant's witness Kennedy testified although drugs were not confirmed in the ELISA sample, "this particular sample was positive for benzodiazepines and additional for general opiates." Kennedy also stated although the GCMS did not detect drugs, it was not necessarily a negative

result, as other equipment could potentially pick up drugs where the GCMS failed. He reiterated on cross-examination the ELISA "picked up opiates, the general category for opiates."

In light of this testimony, we find the prosecutor did not make inaccurate factual assertions. Had the prosecutor stated the State Police found "drugs" or "heroin" in defendant's system, it would have been cause for concern. However, stating defendant's blood was "positive for opiates" was a "reasonable inference[]" based on Kennedy's testimony. Lazo, supra, 209 N.J. at 29.

Furthermore, defense counsel had the opportunity during closing to stress an opposite interpretation of the tests, and did so at length. For instance, the defense stated, "The State Police performed tests on the blood and reported that no drugs were detected." He later stated, "Dr. Brick testified that the amount of morphine noted in the NMS test is high. Yet nothing was detected in the State test." Reading the summations in the context of the trial as a whole, Morton, supra, 155 N.J. at 416, we find defendant was not deprived a fair trial.

Finally, we note the judge's curative instruction was sufficient to cure any inaccuracies. Curative instructions must be specific, and "firm, clear, and accomplished without delay." State v. Vallejo, 198 N.J. 122, 134-35 (2009). However, a general charge can serve to ameliorate prejudice where improper remarks

are only "slightly improper." Frost, supra, 158 N.J. at 86-87 (citations omitted). General instructions that the jury should not consider prosecutor's statements as evidence can cure any "lingering potential for undue prejudice." Engel, supra, 249 N.J. Super. at 382.

The judge's general instruction was sufficient here. We decline to reverse on this basis.

III.

We decline to consider the ineffective-assistance-of counsel claim defendant raises in Point III of her brief. Claims attacking counsel's assistance "are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding." State v. Preciose, 129 N.J. 451, 460 (1992) (citing R. 3:22-4(a)). "Our courts have expressed a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record." Ibid. (citations omitted). Such is the case here.

IV.

Defendant next argues the trial court should have severed count six from the indictment, charging her with possession of a controlled dangerous substance. We disagree.

Mandatory joinder of charges is required where multiple criminal offenses are "based on the same conduct or arising from the same episode." R. 3:15-1(b). However, Rule 3:15-2(b) grants a trial judge the discretion to "order separate trials on counts of an indictment if a party is prejudiced by their joinder." State v. Oliver, 133 N.J. 141, 150 (1993).

"The test for assessing prejudice is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges.'" State v. Sterling, 215 N.J. 65, 73 (2013) (alteration in original) (quoting State v. Chenique-Puey, 145 N.J. 334, 341 (1996)). Our Supreme Court in State v. Cofield, 127 N.J. 328, 338 (1992), created a four-prong test for determining the admissibility of N.J.R.E. 404(b) evidence. "The admissibility of the evidence in both trials renders inconsequential the need for severance." State v. Davis, 390 N.J. Super. 573, 591 (App. Div.) (citation omitted), certif. denied, 192 N.J. 599 (2007).

Generally, this court reviews the trial court's severance determination for abuse of discretion. Ibid. Reviewing courts also determine admissibility rulings on other-crime evidence, N.J.R.E. 404(b), under an abuse of discretion standard. State v. Darby, 174 N.J. 509, 518 (2002). However, our Supreme Court has

held where the trial court does not recognize contested evidence is "other-crime evidence," and does not analyze it under the four-part test described in Cofield, this court's review is de novo. Ibid. This is arguably the case here; defendant moved to sever the indictment before trial, and the parties discussed whether the charge should be severed at the suppression hearing, but they did not explicitly cite Cofield. There is also no ruling on record as to the court's decision on the motion to sever, but the case proceeded to trial with count six included. Therefore, we will review this issue de novo.

The issue here is whether the evidence of the wrapped heroin bags at the scene of the accident would be admissible at trial under N.J.R.E. 404(b) in order to prove the other offenses charged, specifically defendant's intoxication. Sterling, supra, 215 N.J. at 73. N.J.R.E. 404(b) provides that evidence of other crimes or acts is "not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith," but may be used for other purposes including proof of "opportunity" and "absence of mistake." The four-part Cofield test governs admissibility of this evidence as follows:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;

> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [State v. Rose, 206 N.J. 141, 159-60 (2011) (quoting Cofield, supra, 127 N.J. at 338).]

First, under prong one, evidence is relevant if it makes an inference more probable and is related to a material issue in dispute. Id. at 160. Here, although defendant argues the packets were discovered unopened, they are relevant because they demonstrate defendant had the opportunity to use heroin, and also prove she was able to obtain the substance and had some on hand. N.J.R.E. 404(b).

Regarding prong two, our Supreme Court has noted it does not require universal application, as it is "limited to cases that replicate the circumstances in Cofield." Rose, supra, 206 N.J. at 160 (quoting State v. Williams, 190 N.J. 114, 131 (2007)). In Cofield, supra, 127 N.J. at 332-33, the question was whether evidence of a subsequent illegal drug incident several weeks after the one at issue in the case could come into evidence, and the prong is thus inapplicable here.

On prong three, the prosecution must establish the act occurred by "'clear and convincing' evidence." Rose, supra, 206 N.J. at 160 (quoting Cofield, supra, 127 N.J. at 338). Defendant argues the evidence she possessed the heroin was not "clear and

convincing" because there was some distance between the heroin on the ground and the car, meaning there was no conclusive evidence the heroin came from the inside the vehicle. However, as the trial judge suggested during the motion hearing, the proximity of the car, driven by a heroin user, to where the bags were found establishes clear and convincing evidence she possessed the heroin. Furthermore, Sergeant Simons' report stated, "Based on the force of the impact, the fact that the driver's side window was down, the proximity of where it was found to the path the vehicle took, I concluded that this contraband came from the inside of the van." Therefore, we find the evidence presented at the hearing was clear and convincing.

Finally, defendant argues the evidence would not be admissible under the fourth Cofield factor because it was highly prejudicial. Defendant contends, because the State was able to try all of the offenses jointly, the heroin evidence "made it more likely that the jurors inferred she was intoxicated, even though there was no evidence that the heroin found had been opened and used."

Prong four is the "most difficult to overcome," and the court must engage in a "careful and pragmatic evaluation of the evidence" regarding probative value versus prejudice. Rose, supra, 206 N.J. at 160 (quoting State v. Barden, 195 N.J. 375, 389

(2008)). Most importantly, "[i]f other less prejudicial evidence may be presented to establish the same issue, the balance in the weighing process will tip in favor of exclusion." Id. at 161 (quoting Barden, supra, 195 N.J. at 392 (2008)). However, evidence should be excluded "only when its probative value is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of jurors from a reasonable and fair evaluation of the issues in the case." State v. Gillispie, 208 N.J. 59, 90 (2011) (alteration in original) (quoting State v. Koskovich, 168 N.J. 448, 486 (2001)).

Defendant argues the prejudicial value of this evidence outweighed the probative value, as it "characterized her as a bad person who had the propensity to commit the crimes charged." However, we find the probative value of the evidence was high. Under the vehicular homicide statute, proof defendant was under the influence of drugs gives rise to an inference she was driving recklessly. N.J.S.A. 2C:11-5(a). Although the evidence of the blood tests and police observation of defendant's demeanor was available to suggest intoxication, the heroin evidence was necessary in order to connect the metabolites in her bloodstream to the opportunity to obtain and use drugs. Therefore, we find the probative value of the heroin outweighed the prejudice to defendant.

Since the heroin evidence meets the four prongs of Cofield, we conclude the trial judge's failure to sever count six did not deny defendant a fair trial.

V.

Last, defendant argues she received an excessive sentence, contending the judge improperly weighed the aggravating and mitigating factors. We disagree, but we vacate and remand for correction of an error in the final judgment of conviction.

Our review of sentencing decisions is governed by an abuse of discretion standard. State v. Blackmon, 202 N.J. 283, 297 (2010). Our role is to ensure the aggravating and mitigating factors applied by the sentencing judge "were based upon competent credible evidence in the record." State v. Miller, 205 N.J. 109, 127 (2011) (quoting State v. Bieniek, 200 N.J. 601, 608 (2010)). We will modify a sentence only where the judgment of the court is such that it "shocks the judicial conscience." State v. Roth, 95 N.J. 334, 364 (1984) (citing State v. Whitaker, 79 N.J. 503, 512 (1979)).

In reviewing aggravating and mitigating factors, the trial judge should not just "quantitatively compare" the number of aggravating versus mitigating factors, but should assess each in a "case-specific balancing process." State v. Fuentes, 217 N.J. 57, 72-73 (2014) (citations omitted). "The factors are not

interchangeable on a one-to-one basis. The proper weight to be given to each is a function of its gravity in relation to the severity of the offense." Roth, supra, 95 N.J. at 368. "[I]f the aggravating factors and mitigating factors are in equipoise, the midpoint will be an appropriate sentence[,]" but, "when the mitigating factors preponderate, sentences will trend toward the lower end of the range." Fuentes, supra, 217 N.J. at 73 (quoting State v. Natale, 184 N.J. 458, 488 (2005)).

Here, the judge found aggravating factors three (risk defendant will reoffend) and nine (need for deterrence). N.J.S.A. 2C:44-1(a)(3), (9). The judge further found mitigating factors seven (risk of recidivism), ten (defendant is likely to respond to probationary treatment), and eleven (hardship to others), but gave factor ten little weight as the sentence was subject to NERA. N.J.S.A. 2C:44-1(b)(7), (10), (11). The judge found the aggravating factors preponderated over the mitigating factors. Defendant argues the judge's sentencing determination was "inexplica[ble]," as he found three mitigating factors, but only two aggravating factors.

We discern no mistaken exercise of discretion in the judge's weighing of the aggravating and mitigating factors and his imposition a seven-year sentence. Defendant suggests the judge erred based on the numerical advantage of the mitigating factors

versus the aggravating factors. However, we note the factors are essentially equal, as the trial judge appropriately gave mitigating factor ten little weight. Furthermore, trial judges review the factors on a case-by-case basis. Fuentes, supra, 217 N.J. at 72-73. A conviction on count one, second-degree vehicular homicide, carries a sentence between five and ten years. N.J.S.A. 2C:43-6(a)(2). Here, the seven-year term was just below the midpoint of the sentencing range. We will not disturb the judge's finding on this basis.

However, we remand this matter to the Law Division to correct a mistake in the judgment of conviction. Defendant was convicted on count four of violating N.J.S.A. 2C:40-22(b), causing serious bodily injury while driving with a suspended or revoked license, a fourth-degree offense. At the sentencing hearing, the judge imposed a term of imprisonment of nine months for this offense, concurrent with the seven-year sentence for count one. The judgement of conviction, however, lists count four as a third-degree offense[7] and states the term of imprisonment for this offense is three years. The judgment of conviction should have

[7] Conversely, N.J.S.A. 2C:40-22(a), causing death while driving with a suspended or revoked license, is a crime of the third-degree. Because the indictment, the trial judge's instructions to the jury, and the verdict sheet all contained reference to "serious bodily injury" rather than death, we presume the lesser offense was the intended charge.

stated defendant was convicted of a fourth-degree offense on count four with a term of imprisonment of nine months. We therefore remand for the limited purpose of entering a corrected judgment of conviction.

Affirmed, but remanded for amendment of defendant's judgment of conviction.