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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-0109-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WARREN W. WILLIAMS, a/k/a  
WARREN MURPHY,

Defendant-Appellant.

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Submitted April 17, 2018 – Decided May 4, 2018

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Indictment  
No. 13-05-0423.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Amira R. Scurato, Designated  
Counsel, on the brief).

Gurbir S. Grewal, Attorney General, attorney  
for respondent (Regina M. Oberholzer, Deputy  
Attorney General, of counsel and on the  
brief).

PER CURIAM

Defendant Warren W. Williams appeals from his conviction for aggravated assault with a firearm and unlawful possession of a weapon, and from the sentence imposed, focusing on the following: an April 7, 2016 order denying his motion to suppress his statement to police; the judge's failure to refer the matter to the Assignment Judge for a waiver of the Graves Act, N.J.S.A. 2C:43-6(c); and the judge's reliance upon aggravating factor (2), N.J.S.A. 2C:44-1(a)(2), in sentencing. We affirm.

The facts are as follows. On October 4, 2012, Lieutenant Richard Shaughnessy of the Elizabeth Police Department was working off-duty as a security officer at a retirement home in Elizabeth. The officer heard gunfire around 11:00 p.m. and saw two men running down the street in his direction. The second man, eventually identified as defendant, was chasing the other man and pointing a gun. Defendant ran away after Shaughnessy told him to drop the gun. Defendant was located by other police officers, and suffered injuries while attempting to flee, losing his shoes, socks, and pants in the process. Defendant was taken to a hospital for his injuries.

Police officers also found the man defendant was chasing. The other man, identified as D.L.,<sup>1</sup> had gunshot wounds to his upper

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<sup>1</sup> We use initials to protect the victim's identity.

thigh, elbow, and armpit. D.L. told the police he was shot by an unknown assailant.

After being treated at the hospital, where he received staples for his wounds and pain medication, defendant was taken to the police station. Because he lost his pants while fleeing from the police, defendant arrived at the police station wearing a hospital gown. Defendant limped into the interview room and emitted a gasp when he sat in the chair.

In the interview room, defendant was informed of the charges against him. The detectives told defendant he was being charged on an outstanding warrant and unlawful possession of a weapon. The detectives also told defendant that he was being questioned about the shooting. Defendant was advised of his Miranda<sup>2</sup> rights, orally and in writing. Defendant stated that he understood and agreed to waive his rights before he gave a videotaped recorded statement to the detectives.

In the recorded statement, defendant said he and D.L. were acquaintances. According to defendant, he agreed to loan \$500 to D.L. After receiving the money, D.L. asked defendant for a ride to a building complex in Elizabeth. After he took D.L. to the requested destination, defendant said D.L. placed a gun to his

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

side, demanded he empty his pockets, and threatened to shoot if defendant did not comply. D.L. then took defendant's driver's license and car registration. D.L. demanded defendant return with \$1,000 or else D.L. would harm defendant's family. Defendant told the detectives he feared for his family's safety because D.L. had his home address from his driver's license.

Defendant told the detectives he went home intending either to provide the money demanded by D.L. or to "somehow scare" D.L. into returning defendant's belongings and staying away from defendant's family. Defendant went home and got a gun.

Defendant returned to the building where he left D.L. When D.L. approached, defendant did not see D.L. holding a gun. Defendant began shooting at D.L. and "blanked out." Defendant could not recall how many times he fired at D.L. Immediately after firing the gun, defendant was startled by a passerby<sup>3</sup> and ran away.

Defendant's trial testimony differed from his videotaped recorded statement to the detectives. Defendant testified that he did not bring a gun when he returned to meet D.L. According to defendant's trial testimony, the gun belonged to D.L., who lost the gun when he fell. Defendant testified that he picked up the

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<sup>3</sup> The passerby was identified as Lieutenant Shaughnessy.

gun and D.L. "came after" him. As D.L. moved toward him, defendant stated he fired the gun multiple times.

The jury found defendant guilty of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b), and fourth-degree aggravated assault with a firearm, N.J.S.A. 2C:12-1(b)(4). The trial court sentenced defendant to the mandatory term of five years in prison with a forty-two month period of parole ineligibility for unlawful possession of a weapon, with a concurrent term of eighteen months with an eighteen month period of parole ineligibility for aggravated assault.

On appeal, defendant argues:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE STATEMENT GIVEN TO POLICE IN VIOLATION OF HIS MIRANDA RIGHTS.

POINT II

THE TRIAL JUDGE ERRED IN FAILING TO REFER THE MATTER TO THE ASSIGNMENT JUDGE FOR A GRAVES ACT WAIVER.

POINT III

THE SENTENCING JUDGE'S RELIANCE UPON SENTENCING AGGRAVATING FACTOR N.J.S.A. 2C:44-1(a)(2) WAS MISPLACED.

I.

We afford "considerable latitude . . . [to] a trial court in determining whether to admit evidence, and that determination will

be reversed only if it constitutes an abuse of discretion." State v. Kuropchak, 221 N.J. 368, 385 (2015) (quoting State v. Feaster, 156 N.J. 1, 82 (1998)). In reviewing a motion to suppress, we "uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007) (citation omitted). This is true especially when findings of the trial court are "substantially influenced by [its] opportunity to hear and see the witnesses and to have the 'feel' of the case." Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). However, we apply the same deferential standard to the trial court's findings based on video recorded evidence. State v. S.S., 229 N.J. 360, 379 (2017). The trial court's legal conclusions are entitled to no special deference, and are reviewed de novo. State v. Gandhi, 201 N.J. 161, 176 (2010).

In reviewing a waiver of a defendant's Miranda rights, the State "must 'prove beyond a reasonable doubt that the . . . waiver [of rights] was knowing, intelligent, and voluntary.'" State v. A.M. 452 N.J. Super. 587, 596 (App. Div. 2018) (second alteration in original) (quoting State v. Yohnnson, 204 N.J. 43, 59 (2010)). A court reviews a Miranda waiver under the "totality of the circumstances." State v. Nyhammer, 197 N.J. 383, 402 (2009).

During the evidentiary hearing on defendant's motion, the trial judge viewed the videotaped recorded statement and heard the testimony of the interviewing detective. The judge found the detective's testimony to be credible and consistent with the judge's observation of defendant on the videotaped recorded statement. The judge also found defendant read, understood, and signed a form waiving his Miranda rights. The judge observed defendant "then willfully engaged in a conversation with police seemingly wanting to talk to the police." The judge noted defendant never indicated to the interviewing detectives that he was in pain or that his condition affected his ability to answer questions. The judge also remarked that defendant's physical condition – walking gingerly into the interview room and groaning when he sat in a chair – did not affect defendant's ability to answer questions.

After the evidentiary hearing, the judge denied defendant's suppression motion. Under the totality of the circumstances, including consideration of defendant's physical condition when he gave his videotaped recorded statement, the judge found that defendant's statements were voluntary and did not violate his Miranda rights. We find the judge's determination is supported by sufficient credible evidence in the record.

The judge also rejected defendant's argument that his statement should be suppressed because defendant invoked his Fifth Amendment right to remain silent when he said "I can't say anything" in response to a specific question mid-interview. The right to remain silent need not be expressed "with the 'utmost of legal precision.'" State v. Johnson, 120 N.J. 263, 281 (1990) (quoting State v. Bey, 112 N.J. 45, 65 (1988)). In this case, the judge did not find the statement "I can't say anything" to mean defendant "did not wish to participate in the [interview] anymore." Rather, the judge concluded defendant was responding to the detective's particular question. The record supports that conclusion.

For the first time on appeal, defendant claims he could not validly waive his Miranda rights because he was not properly informed of the charges against him. See State v. A.G.D., 178 N.J. 56, 68 (2002).

We reject this argument for two reasons. First, defendant failed to present this argument to the trial judge. "Appellate courts ordinarily decline to consider issues not presented to the trial court unless they 'go to the jurisdiction of the trial court or concern matters of great public interest.'" Kvaerner Process, Inc. v. Barham-McBride Joint Venture, 368 N.J. Super. 190, 196 (App. Div. 2004) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J.



229, 234 (1973)); see also State v. Witt, 223 N.J. 409, 418 (2015) (recognizing the unfairness and inefficiency of permitting the defense to raise new issues for the first time on appeal, and declining to address them). Second, based on our review of the transcript of the videotaped recorded statement, defendant was fully informed of the charges against him.

## II.

The Graves Act, N.J.S.A. 2C:43-6(c), imposes a mandatory minimum term of incarceration for a person who uses or possesses a firearm while committing, attempting to commit, or fleeing after the commission of certain crimes. N.J.S.A. 2C:43-6.2 authorizes a prosecutor to move before the assignment judge for a waiver of the Graves Act's mandatory minimum term of incarceration for certain first-time offenders. The statute also permits a sentencing judge to refer a case to the assignment judge for waiver of the Graves Act penalties. Ibid. However, because the prosecutor in this case did not consent to a waiver under the Graves Act, it was defendant's burden to file a motion for a reduction of the mandatory minimum term by demonstrating the prosecutor's refusal was a patent and gross abuse of discretion constituting a "manifest injustice." See State v. Alvarez, 246 N.J. Super. 137, 147-48 (App. Div. 1991). A defendant must show the prosecutor "arbitrarily or unconstitutionally discriminated

against a defendant in determining whether the 'interests of justice' warrant reference to the assignment judge." State v. Mastapeter, 290 N.J. Super. 56, 65 (App. Div. 1996) (quoting Alvarez, 246 N.J. Super. at 147).

At sentencing, defense counsel argued the case was appropriate for a Graves Act waiver and the State's refusal to grant a waiver was arbitrary and capricious. In response, the prosecutor explained a waiver was inappropriate based on the number of shots fired by defendant and his firing of a gun in a residential area. The prosecutor further stated

that[] when a weapon is not only found on a person but is utilized, we have a policy of not granting a Graves waiver. That would completely undercut the entire purpose of the law. The entire purpose is to keep guns off the streets and to keep the populus safe.

Although the sentencing judge was permitted to refer the case to the assignment judge for a waiver, the judge was not required to so direct the matter. Moreover, defendant had the opportunity to file a motion for a Graves Act waiver but failed to do so.

Even if defendant had properly challenged the prosecutor's denial of a waiver, he failed to submit evidence demonstrating the prosecutor's decision was arbitrary or unconstitutionally discriminatory. Mastapeter, 290 N.J. Super. at 65. Thus, we find

no error in the judge's denial of defendant's application for a Graves Act waiver.

III.

We affirm a sentencing court's findings of aggravating and mitigating circumstances if there is sufficient credible evidence in the record to support them. State v. O'Donnell, 117 N.J. 210, 216 (1989).


At defendant's sentencing, the judge found aggravating factor (2), N.J.S.A. 2C:44-1(a)(2), applied. The judge found:

Two is the gravity and seriousness [of harm] . . . inflicted on [D.L.]. And while [D.L.] in this case wasn't someone vulnerable as the aggravating factor points out, there was serious harm to [D.L.]. He was shot three times. He wasn't shot once. And again, that goes to the argument as to whether or not Mr. Williams acted as a reasonable person would have. I don't know why he felt that he needed to shoot more than once unless he actually intended to kill [D.L.] but he was not charged with attempted murder.

Defendant testified he fired multiple shots at D.L. It was because defendant fired multiple shots, with three shots hitting D.L., that the judge deemed aggravating factor (2) applicable. We find that the judge's determination to apply aggravating factor (2) is supported by the credible evidence in the record.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION