SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3998-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TERRENCE O'BRIEN,

Defendant-Appellant.

Argued October 31, 2017 – Decided April 23, 2018

Before Judges Reisner, Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. 12-09-1977.

Stephen W. Kirsch, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Stephen W. Kirsch, of counsel and on the brief).

Jennifer E. Kmieciak, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Jennifer E. Kmieciak, of counsel and on the brief).

PER CURIAM

Defendant Terrence O'Brien appeals from his October 23, 2014 conviction for aggravated manslaughter, N.J.S.A. 2C:11-4, and from the sentence of fifteen years in prison, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. The conviction arose from an incident in which defendant struck the victim, James Hunsinger, with his truck. Hunsinger died of his injuries at the hospital, a few hours after the incident. The State charged defendant with first-degree murder, contending that defendant intentionally ran the victim over twice, intending to kill him. Defendant claimed that his truck struck the victim once, and it was an accident. The jury found defendant guilty of the lesser included offense of aggravated manslaughter.

On this appeal, defendant presents the following points of argument:

> POINT I: THE STATE'S WINTESSES' PERSISTENT, AND OFTEN DETAILED, REFERENCES TO DEFENDANT'S ALLEGED LACK OF REMORSE AFTER THE INCIDENT WERE, UNDER STATE V. PINDALE, EITHER COMPLETEY INADMISSIBLE OR, IF SOMEHOW ADMISSIBLE ON A VERY LIMITED BASIS, WORTHY OF A DETAILED LIMITING INSTRUCTION REGARDING THEIR IRRELEVANCE TO THE ELEMENT OF AGGRAVATED MANSLAUGHTER WHICH FOCUSES ON WHETHER CIRCUMSTANCES INDICATED AN EXTREME INDIFFERENCE TO HUMAN LIFE. (PARTIALLY RAISED BELOW)
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> POINT II: TWO ERRORS IN THE JURY INSTRUCTION, TOGETHER AND INDEPENDENTLY, TAINTED THE JURY'S DELIBERATIONS IN THE CASE: (1) THE JUDGE'S REFUSAL TO INSTRUCT THE JURY THAT NEGLIGENT

HOMICIDE IS NOT CRIMINAL AND (2) THE JUDGE'S REFUSAL TO REMOVE LANGUAGE FROM THE INSTRUCTION THAT IMPLIED THAT THE DEFENDANT'S DEFENSE WAS THAT HE HAD BEHAVED RECKLESSLY.

POINT III: THE DEFENSE TWICE WAS IMPROPERLY BARRED FROM INTRODUCING EVIDENCE REGARDING THE BIASES OF IMPORTANT STATE WITNESSES.

POINT IV: THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE.

After reviewing the record we affirm the conviction. However, we are constrained to vacate the sentence and remand for a new sentencing hearing, because the trial court did not consider and rule on some of the mitigating factors defendant raised.

I

Hunsinger and defendant were neighbors in a two-family house that defendant owned with two of his sisters. Defendant, who was in his early sixties, lived alone downstairs. Hunsinger lived upstairs with defendant's sister Carolyn and her children. At the time of the incident, the real estate taxes were in arrears, and defendant was trying to sell the house, over Carolyn's objections. The police had previously directed Hunsinger to move his large recreational vehicle (RV) off the street, and on the day of the incident Hunsinger moved the RV into the parties' shared driveway. A few hours later, when it was still daylight, defendant struck and killed Hunsinger with his truck.

Beginning with the opening statements, counsel for each side made it abundantly clear to the jury that the State's theory was that defendant murdered Hunsinger and the defense theory was that defendant hit Hunsinger with his truck by accident. The State asserted that defendant believed Hunsinger was undermining his efforts to sell the house, and was infuriated that Hunsinger had parked his large RV in the parties' shared driveway. The State contended that, as Hunsinger stood in the driveway, defendant purposely hit Hunsinger with his truck, pinning Hunsinger against the back of the RV, and then backed up and hit him again.

The defense contended that defendant ran into Hunsinger once, by accident. Although defendant did not testify and did not attend the trial, his description of the incident was placed before the jury through his recorded call to 911, and his statement to the police shortly after the accident.[1] Defendant reported to the 911 operator that he "accidentally backed over uh my sister's boyfriend. . . . I hit him; I hit him with my truck." He stated that "just as soon as I hit him I pulled in back in the driveway and I just called ya . . . ."

[1] The 911 recording and the DVD of the statement were played for the jury, who thus could hear and evaluate defendant's tone of voice and demeanor.

In his statement to the police, defendant gave a somewhat different version. He recounted that as he was backing his truck out of the driveway, he saw Hunsinger standing next to some garbage cans to defendant's right, and defendant "overcompensated" by backing out to the left in an effort not to hit him. According to defendant, he accidentally backed too close to the RV, which was on his left, and hit it on his way out of the driveway. He told the police that due to the hard impact of the collision, he "freaked out . . . and just lost it."

Defendant claimed that, in his distraught state, he then pulled back into the driveway to check the damage to the RV. Defendant stated that, as he was pulling back into the driveway, Hunsinger darted toward the back of the RV, crossing in front of defendant's truck, and defendant accidentally hit him. Defendant freely admitted that he and Hunsinger did not get along and that he resented the fact that Hunsinger and his sister opposed his efforts to sell the house. However, at the beginning of his statement he asked the officer if Hunsinger was "okay" and later in the interview he stated, "I hope he's okay."

The State presented testimony from an accident reconstruction expert to support the theory that defendant's truck struck the RV twice, not once. The State also presented two eyewitnesses, one of whom saw defendant hit Hunsinger twice and the other of whom

saw defendant pulling in and out of the driveway multiple times at high speed. Witnesses also testified that defendant had a hostile relationship with his sister Carolyn and Hunsinger.

In an effort to establish that defendant purposely or knowingly killed the victim, or acted with intent to cause serious bodily injury, and to rebut the defense theory that it was an accident, the State presented testimony about defendant's angry demeanor before the incident, and his unemotional response to Hunsinger's injuries after the accident. The State also presented police testimony about defendant's expressions of anger after the incident, when he described Hunsinger's interference with his efforts to sell the house.

According to Detective Nash, who interviewed defendant at the scene, defendant seemed unemotional in talking about the accident, but "his face got red and he started to . . . shout and flail his arms" when he told Nash that someone in his sister's household kept ripping up the fliers defendant put out to advertise the house for sale. Nash testified that several hours later, after defendant was told that Hunsinger had died, he asked Nash, "so Jim is really dead." According to Nash, at that point defendant's demeanor was "[c]hillingly calm. He was almost indifferent." Nash also testified that defendant expressed more concern for who would

care for his pet bird while he was in jail than he did for the fact that Hunsinger had died.

There was no objection to any of that testimony about defendant's demeanor.[2] Instead, on cross-examination, defense counsel got Nash to admit that older people who are involved in auto accidents are sometimes emotionally stunned and "may look indifferent when they look stunned." He also confronted Nash with his own statement to defendant that "you seem a little bit beat up about the whole thing."

On redirect, the prosecutor asked Nash about his experience dealing with drivers who had been in accidents in which they had hit a pedestrian and their typical reactions. Over a defense objection, Nash was permitted to testify that the drivers were typically remorseful and upset about hitting the pedestrian. However, he saw no such reaction from defendant.

The State presented testimony from Mrs. Toner, defendant's next door neighbor, that on the afternoon of the incident, she and her husband were helping Hunsinger to push his RV into the

[2] At the beginning of Nash's testimony, defense counsel objected to Nash's description of defendant as having a "furrowed brow" and seeming "annoyed" after the accident. However, counsel did not object that the testimony was irrelevant or prejudicial, but that Nash was not qualified to opine about "the emotions" of a person he was observing. The judge overruled the objection. The judge later overruled a similar objection to testimony from an eyewitness to the incident.

driveway. Defendant kept circling the block in his truck, approaching them and then speeding away. He finally stopped and asked when they would be finished. She testified that defendant seemed "angry" and "very upset" that Hunsinger was taking a long time to position the RV in the driveway.

Toner also testified that after dinner, she heard defendant's truck engine revving outside and then heard a "crushing and then a smashing sound." When she looked out of her kitchen window, she saw defendant's truck up against the trash cans near the driveway. Toner testified that she next saw defendant rev his engine and very quickly reverse his truck into the street, then rev his engine and drive forward into the trash cans twice. According to Toner, defendant "gunned it like we were going to have a . . . drag race or something."

Toner then saw defendant get out of his truck and rush into his house, and she remarked to her husband that defendant's "tantrum" seemed to be over. She had not seen Hunsinger during the incident. However, when she saw the police arrive, she went outside and observed Hunsinger lying on the ground behind his RV.

Mr. Victoria, who lived across the street from defendant, testified that on the day of the incident, he was in his bedroom when he looked out his window and saw defendant's truck stopped in the street. He saw Hunsinger standing next to his RV, and saw

defendant drive into the driveway, then back up and strike Hunsinger with his truck. After defendant struck Hunsinger the first time, "[Hunsinger] did like half a turn," but remained standing by his RV. Victoria then saw defendant's truck back up and go forward to strike Hunsinger a second time, pinning him between the truck and RV. Hunsinger fell to the ground and defendant drove "right over him." Victoria described the truck as being driven in a "crazy" manner.

After seeing Hunsinger hit the second time, Victoria left his bedroom and told his housemates what happened. The three of them went outside and saw Hunsinger lying on the ground and defendant's truck parked in front of his house. On cross-examination, Victoria confirmed that he saw defendant hit the victim twice with his truck.

Victoria's housemate, Mr. Damien, testified that after the incident, he crossed the street and saw the victim lying on the ground bleeding. Damien knocked on defendant's door and, when no one answered, he called 911. He then encountered defendant, who seemed "very calm, like not worried." Defendant said he had called an ambulance. However, the State presented evidence that Damien's 911 call came in before defendant's call.

The State also presented testimony from defendant's nephew, who lived upstairs with Carolyn and Hunsinger. The nephew

testified that he was present when Hunsinger was moving the RV into the driveway, and he observed that defendant appeared to be angry and "mumbling to himself" about the amount of time it was taking. The nephew also testified about the longstanding tension between defendant and his sister Carolyn over the possible sale of the house and defendant's belief that Hunsinger was encouraging Carolyn to block the sale.

The nephew admitted that on one occasion, he got into a fistfight with defendant, which resulted in the nephew being required to attend alcohol rehabilitation. The judge sustained an objection to a question about whether defendant filed criminal charges against the nephew after the fistfight. The nephew testified that he felt very close to Hunsinger, who was "an angel" to his mother, but stated that he also still liked defendant. The nephew was not home when Hunsinger was killed.

Dr. Hood, a medical examiner, testified that Hunsinger's extensive and horrendous injuries were consistent with his having been upright, struck by a vehicle, then knocked down and run over. Dr. Hood saw evidence of injuries indicating that the undercarriage of a vehicle had passed over the victim's body. However, he could not state with medical certainty whether defendant's vehicle struck Hunsinger once or twice.

Based on his examination of the truck, the RV, and other evidence, Michael O'Connor, a collision reconstruction specialist, opined that defendant's truck struck the RV in two different places. He also opined with "a reasonable degree of scientific certainty" that defendant's truck struck Hunsinger at least two different times. He opined that the first impact "occurred as the defendant was driving into the driveway toward the parked recreation vehicle" and "the second impact . . . occurred at the right rear corner of the RV as the defendant was driving back into the driveway. . . ." He also opined, based on the location and configuration of the damage to the RV, that the damage to the RV could not have occurred as defendant was backing out of the driveway.

O'Connor also opined that because it was light out at the time, defendant could have seen Hunsinger in the driveway before the first impact, and defendant had ample time to stop the truck and "assess the victim's condition after the first impact." On cross-examination, O'Connor admitted that he previously worked for the prosecutor's office and that the prosecutor hired him to testify in the case. However, the trial court sustained an objection to a question as to the amount of O'Connor's fee.

Defendant declined to attend the trial. The defense presented one witness, defendant's brother, who ultimately did not provide

any testimony helpful to the defense. He confirmed that there was conflict between defendant and the sister over whether the house should be sold, and he admitted that the nephew currently had a good relationship with defendant.

II

Relying on State v. Pindale, 249 N.J. Super. 266 (App. Div. 1991), defendant argues that evidence of defendant's alleged lack of remorse after the accident was inadmissible on the issue of whether he committed reckless manslaughter. Alternatively, he argues that if the evidence was admitted, the court should have sua sponte given the jury a limiting instruction that the evidence was irrelevant to whether defendant acted with extreme indifference to human life. Both arguments are presented for the first time on appeal.[3] We find no error, much less plain error, with respect to either contention. See R. 1:7-2; R. 2:10-2.

First, unlike this case, Pindale was tried as an aggravated manslaughter case, with no murder charge. The defendant led the police on a high-speed chase, during which his car crashed, killing two people. 229 N.J. at 273. The objectionable evidence involved the defendant's failure to visit one of the surviving victims in

[3] As we previously indicated in footnote 2, defense counsel did not raise this issue at the trial. We cannot agree with defendant's current contention that this issue was "partially raised" in the trial court.

the hospital while he was recovering from his injuries. Id. at 280. In the context of that case, the evidence was prejudicial, by presenting the defendant as uncaring, and was not relevant to whether his actions manifested extreme indifference to human life at the time of the accident. Id. at 282-83.

By contrast, this was a murder trial, conducted with no emphasis whatsoever on manslaughter. Both sides presented the case to the jury as involving either murder or an accident. The evidence about defendant's statements and demeanor, both before and after the incident, were admitted to support the State's theory that defendant murdered Hunsinger. The evidence was clearly relevant to show defendant's hatred and disdain for Hunsinger, and thus to show his motive for intentionally killing him. Nothing in the State's presentation would have confused the jury into believing that the evidence was relevant to the aggravated manslaughter charge.

In particular, the prosecutor never argued or implied that defendant's lack of remorse was pertinent to the manslaughter charge or to any element of that offense. In fact, in her summation, she argued to the jury that "recklessness is nowhere in this case" because defendant acted intentionally with the purpose of killing Hunsinger. Ironically, her argument described

for the jury a theory which the State eschewed, but which the jury most likely accepted:

> At the end of this charge, . . . the Court is going to instruct you on what are called lesser-includeds . . . and the idea is that there is a degree of culpability that is lesser than intent and it's reckless. Now, I submit to you . . . that that's not in this case . . . because reckless suggests, right, a haphazard, a wild driving all over the place. Oh, oh, goodness I was driving like a nut and I just, you know, ran him over when I should have been looking forward.
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> . . . .
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> [T]his was not reckless behavior. This was intentional behavior. . . . [T]here is no errant or wild operation of this vehicle. It was focused, it was purposeful and it was intentional. And there is no coincidence that on April 4th, 2012, Terrence O'Brien managed to strike and damage irretrievably at some point the two things [the RV and Hunsinger] that on that date he hated the most in the world.

Further, the judge did give the jury a limiting instruction about the way it could use the evidence of defendant's hatred or disdain for Hunsinger. He told them that it was exclusively relevant to the murder charge. The judge instructed the jury:

> Such evidence may be considered by you to determine whether Terrence O'Brien had the intent to cause the death of James Hunsinger or whether he had the intent to cause James Hunsinger serious bodily injury which resulted in his death due to the fact that [defendant] had such disdain for the victim at the time he struck him with his motor vehicle.

. . . .

> I have admitted the evidence only to help you decide the specific question of whether defendant . . . purposely or knowingly caused the death or James Hunsinger or purposely or knowingly caused James Hunsinger serious bodily injury which resulted in his death. You may not consider it for any other purpose . . . .

The judge also told the jury that they could consider the evidence insofar as it would "rebut" defendant's claim "that his conduct was accidental" or to rebut an inference that his conduct was "reckless in nature." In light of those instructions, and in light of the way the case was tried, we perceive no likelihood that the jury would have been confused into believing that the evidence was pertinent to whether, for purposes of the aggravated manslaughter charge, defendant "acted under circumstances manifesting an extreme indifference to human life." In fact, in the aggravated manslaughter charge, the judge specifically instructed the jury that the "phrase . . . does not focus on defendant's state of mind, but rather on the circumstances under which you find he acted."

III

Defendant's next two points warrant only brief discussion. The judge was not required to instruct the jury that "negligent" homicide was not criminal. See State v. Reyes, 50 N.J. 454, 464-

65 (1967); State v. Reed, 211 N.J. Super. 177 (App. Div. 1986). Unlike State v. Atwater, 400 N.J. Super. 319, 331-32 (App. Div. 2008), on which defendant relies, here nothing in the charge, or in the presentation of this case, would have caused the jury to be confused on that point. In fact, without objection, defense counsel told the jury in summation that when someone such as defendant causes an accident without meaning to do so, "it's what is called an accident, negligence. Civil lawsuits for negligence, not criminal indictments for murder." See Atwater, 400 N.J. Super. at 328. In the context of this case, the jury would have understood that if defendant acted only negligently, such that the incident was an accident, defendant was not guilty of murder or any of the charged lesser included offenses. See Reyes, 50 N.J. at 464-65.

The judge did not err in including an instruction that evidence of defendant's hatred for Hunsinger was not relevant either to defendant's claim that the incident was an accident, or to whether defendant acted recklessly. The judge specifically modified the original version of the charge to remove language suggesting that defendant was offering recklessness as a defense. Further, in the context of this case, the jurors would not have been confused into believing that defendant was asserting such a defense.

Defendant next argues that the judge erred in precluding him from questioning the nephew about the fact that defendant had filed criminal charges against him, and erred in precluding defense counsel from asking O'Connor how much he was paid for his testimony. We review the judge's evidentiary rulings for abuse of discretion. State v. J.A.C., 210 N.J. 281, 295 (2012). We agree that the judge mistakenly exercised discretion as to both those rulings, but we conclude the errors were harmless. Neither error had a clear capacity to produce a miscarriage of justice. R. 2:10-2.

Whether or not the charges against the nephew were dropped, the fact that defendant went so far as to file criminal charges against the nephew due to the fistfight was relevant to the nephew's possible bias. However, the nephew's testimony was not particularly critical to the case. The nephew did not see the accident, and defendant admitted in his recorded statement that there was hostility between himself and Hunsinger. Further, defendant's very able defense counsel succeeded in placing the information before the jury in his summation, when he told the jury that although the nephew and defendant had a fistfight, defendant "dropped the charges" because the nephew agreed to go to "rehab." There was no objection from the State.

In his opening statement, defense counsel told the jury that O'Connor was paid a lot of money for his testimony. After the opening, the prosecutor objected and the judge overruled the objection, noting that defense counsel would be able to ask O'Connor about his fee on cross-examination. It is not clear why the judge later sustained the prosecutor's objection when defense counsel asked O'Connor how much he was paid for testifying. However, O'Connor did testify that the prosecutor hired him to testify in this case, and knowing the amount of his fee would not have changed the outcome of the case. Additionally, without objection, defense counsel told the jury in summation that O'Connor was "well-compensated."

IV

Lastly, we are constrained to remand for resentencing for two reasons. First, the trial court did not consider and address two of the mitigating factors that defendant raised — factors eleven and twelve, N.J.S.A. 2C:44-1(b)(11) and (12). Additionally, the trial court did not consider defense counsel's arguments concerning the real time impact of the fifteen-year NERA sentence on defendant, who was sixty-six years old at the time of sentencing. See N.J.S.A. 2C:44-1(c)(2). Where the court has not considered and ruled on a defendant's arguments concerning mitigating factors, the appropriate remedy is to vacate the

sentence imposed and remand for a new sentencing hearing. See State v. Case, 220 N.J. 49, 68-70 (2014).

In light of the time elapsed since the original sentencing, a new presentence report must be prepared, and the trial court shall determine the sentence anew, giving "full consideration to all relevant evidence and all relevant sentencing factors as of the day defendant stands before the court." Id. at 70 (citing State v. Randolph, 210 N.J. 330, 354 (2012)). We imply no view as to the appropriate sentence to be imposed on remand.

Affirmed as to the conviction; vacated and remanded as to the sentence. We do not retain jurisdiction.