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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4894-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JORGE TORRES,

Defendant-Appellant.

Submitted December 12, 2017 – Decided February 5, 2018

Before Judges Yannotti, Carroll and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
11-03-0418.

Joseph E. Krakora, Public Defender, attorney
for appellant (Michele A. Adubato, Designated
Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Frances Tapia Mateo,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant was charged in Hudson County Indictment No. 11-03-
0418 with first-degree murder of Edwin Acosta, N.J.S.A. 2C:11-

3(a)(1) or N.J.S.A. 2C:11-3(a)(2).¹ Defendant was tried before a jury, which found him not guilty of murder and aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), but guilty of the lesser-included offense of second-degree reckless manslaughter, N.J.S.A. 2C:11-4(b)(1). The trial court sentenced defendant to six years of incarceration and required that he serve eighty-five percent of that term, pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant appeals from the judgment of conviction dated January 7, 2015. We affirm.

I.

At trial, evidence was presented, which indicated that in October 2010, defendant was working as a bartender at a bar in Union City, where he had been employed, from time to time, for more than twenty years. Acosta was a regular patron of the bar. Previously, defendant and Acosta met at the bar and had several sexual encounters thereafter.

On October 2, 2010, at around 12:30 a.m., Acosta arrived at the bar, and it appeared he was under the influence of alcohol or drugs. Acosta spent time with defendant until the bar closed. They sat together on a sofa behind the bar, drank beer, hugged, and

¹ We note that defendant is a male, but identifies as a woman and refers to himself as Sandra. Because defendant has never legally changed his name and was identified as Jorge Torres in the indictment, we refer at times to defendant as "he."

were affectionate with each other. After the bar closed, the owner's stepson gave defendant, Acosta, and one of the bar's dancers a ride home. Along the way, the group stopped at another bar, where defendant and Acosta picked up more beer. They also stopped at a bank and Acosta withdrew money from a cash machine. Defendant and Acosta were dropped off at defendant's apartment shortly before 3:00 a.m.

Later that day, at approximately 5:35 p.m., Officer Mauro Astudillo of the Union City Police Department and emergency medical technicians (EMTs) responded to defendant's apartment after receiving a report of a possible sudden death at that location. Defendant met Astudillo and the EMTs at the door and led them to the bedroom, where they found a man, who was later identified as Acosta, lying dead and naked on his back beside the bed, his head resting on a pillow.

Detective Michael Crowe of the Hudson County Prosecutor's Office (HCPO) arrived at the scene later that evening. Crowe observed bruising around Acosta's neck and petechial hemorrhaging in his eyes. He also observed brown stains on the floor and a noticeable odor of fecal matter throughout the apartment. In the kitchen, the detective found garbage bags holding empty beer cans and paper towels with brown stains; and in the living room, he found Acosta's wallet. Crowe took photographs of the scene and a

DNA sample from defendant. He noticed "some kind of marking" near defendant's right wrist. Defendant gave two statements to Detective Jose Diaz of the HCPO.

On October 3, 2010, Dr. Lyla Perez, who is employed at the Division of Medical Examiners in Newark, conducted a post-mortem examination of Acosta's body. The autopsy revealed bruises to the right side of Acosta's neck and scattered above his collar bone, other bruises to his back and face, petechial hemorrhages in his eyes and near his vocal cords, and contusions on both sides of the head. A toxicology report confirmed the presence of alcohol, Xanax, cocaine, and cocaine metabolites in Acosta's system.

Dr. Perez testified that the injuries to Acosta's neck were round and consistent with fingertips. She stated that Acosta's neck injuries were deep and severe. These injuries reached all the way to the larynx and would have required considerable compression. Dr. Perez opined within a reasonable degree of medical certainty that the cause of Acosta's death was asphyxia due to compression of the neck and the manner of death was homicide.

On cross-examination, Dr. Perez acknowledged that Acosta was obese and had an enlarged heart, an enlarged liver, and fluid in his lungs and other organs, which was suggestive of congestive heart failure. She explained that Acosta's condition itself could have enhanced his potential for death. The condition also could

have hastened his death due to the compression of the neck. She nonetheless opined that the ultimate cause of Acosta's death was compression of the neck. She reached the same conclusion notwithstanding the potential effects of Acosta's alcohol and cocaine use and his hypothetical breathing disorder. She discounted each as the cause of death.

Dr. Perez acknowledged that Acosta's trachea had not been substantially injured and his hyoid bone, which often fractures with compression of the neck, had not been broken, but she attributed the absence of such fractures to Acosta's young age and the elasticity of his bones and cartilage. She also acknowledged that some of the bruises could have been sustained in a fall to the floor and some during sexual activity, and that forceful vomiting could have caused petechial hemorrhaging in his eyes.

She stated, however, that not all of the bruises could have resulted from a single fall and that vomiting would not have explained the bruises on the neck. Finally, Dr. Perez acknowledged that she had found no indication of a struggle, but noted that that circumstance simply suggested that the compression of Acosta's neck likely occurred either during sexual activity or while he was unconscious.

Defendant testified on his own behalf. He stated that after he and Acosta arrived at his apartment, they sat for a while on

the couch in the living room drinking and kissing, and then retired to the bedroom, where they engaged in sex for about an hour. Acosta went to sleep and began to snore loudly. Defendant said he tried to sleep despite the noise but noticed that Acosta had urinated in the bed, so he pushed Acosta and told him to go to the bathroom. After Acosta sat up at the edge of the bed, defendant pushed him again. This time, Acosta wound up on the floor and resumed his "extremely loud" snoring.

At around 6:00 a.m., defendant got up and left the apartment to go the laundromat and check his account balance on a cash machine. He returned to the apartment not long thereafter. Defendant shut the bedroom door to stifle the sound of Acosta's snoring. He laid down on the couch in the living room. Defendant's upstairs neighbor and close friend M.U. arrived about an hour and a half later.²

M.U. and defendant sat in the living room, talking and drinking beer for what M.U. recalled was about four or five hours. M.U. said she was unaware anyone else was in the apartment and she never heard any noise coming from the bedroom. At around 1:45 p.m., M.U. paid a second visit to defendant's apartment to let defendant know she would be babysitting her granddaughter, but she

² We use initials for M.U. and other individuals involved in this matter in order to protect their identities.

soon left, believing defendant was not in the apartment.

Defendant testified, however, that he fell asleep after M.U.'s first visit and did not wake up until around 3:30 or 4:00 p.m. Defendant had to get ready for work that evening and he returned to the bedroom to wake Acosta up, but found Acosta had defecated on the floor. Defendant cleaned Acosta with some paper towels from the kitchen. He then attempted to wake Acosta up, but there was no response.

Defendant initially thought Acosta was only "playing" but became increasingly nervous as he continued trying to rouse him. Defendant said he grabbed Acosta "with both of his hands" and banged his head on the floor, hit him in the face, and put his right hand on Acosta's neck and shook him. Defendant called A.T., a family friend, for help. Initially, A.T. advised defendant to call 9-1-1 but ultimately agreed to make the call on defendant's behalf because defendant has limited fluency in English.

On cross-examination, the prosecutor questioned defendant about certain inconsistencies between his trial testimony and the statements he gave to Detective Diaz of the HCPO. Defendant admitted that he failed to tell the detective about some of his more aggressive efforts to wake Acosta. Defendant also did not tell the detective that he had gone to the laundromat early in the morning or that M.U. had visited the apartment for several hours.

Defendant stated that he did not mention these facts because Detective Diaz did not ask for those details.

Defendant appeals and raises the following arguments:

POINT I

THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY THE TRIAL COURT'S PRECLUDING THE ADMISSION OF CERTAIN EVIDENCE.

POINT II

THE FAILURE OF THE STATE TO MAKE TIMELY DISCLOSURE OF HEALTH INSURANCE INFORMATION REGARDING THE VICTIM VIOLATED THE RULES OF DISCOVERY AND DEFENDANT'S RIGHT TO A FAIR TRIAL.

POINT III

THE LIMITATION OF THE CROSS-EXAMINATION OF DETECTIVE CROWE DEPRIVED DEFENDANT OF [HIS] RIGHT TO CONFRONT THE WITNESS AGAINST [HIM].

POINT IV

IT WAS ERROR FOR THE COURT TO DENY DEFENDANT'S REQUEST FOR A CONTINUANCE TO OBTAIN MEDICAL RECORDS OF THE VICTIM.

POINT V

THE COURT'S DENIAL OF DEFENDANT'S MOTION FOR DISCOVERY OF RECORDS RELATING TO A PRIOR PROSECUTION WHERE DEFENDANT WAS A VICTIM WAS ERROR.

POINT VI

THE COURT'S CONDUCT TOWARD THE DEFENSE WAS IMPERMISSIBLY PREJUDICIAL AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT VII

IMPEACHMENT OF [M.U.] BY USE OF A PRIOR CONVICTION WITHOUT THE UNDERLYING INFORMATION

ABOUT THE CRIME WAS IMPROPER. (Not raised below).

POINT VIII

THE DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE STATE ARGUED THAT [M.U.] HAD PERFORMED A PRAYER OR RITUALISTIC BLESSING AT DEFENDANT'S APARTMENT DOOR WITHOUT SUPPORTING TESTIMONY.

POINT IX

THE INSTRUCTIONS TO THE JURY ON RECKLESS MANSLAUGHTER WERE INCOMPLETE AND ERRONEOUS AND MANDATE REVERSAL OF DEFENDANT'S CONVICTION. (Partially raised below).

POINT X

DENIAL OF THE DEFENDANT'S MOTION FOR A NEW TRIAL WAS ERROR.

POINT XI

THE AGGREGATE ERRORS DENIED DEFENDANT A FAIR TRIAL. (Not raised below).

II.

As noted, defendant argues that he was deprived of his right to a fair trial and due process because the trial judge precluded him from presenting opinion testimony from two witnesses, Dr. Jonathan Penek and Dr. Robert Gross.

The record shows that in May 2013, defense counsel initially notified the State that the defense planned to present expert testimony from Drs. Penek and Gross. Defense counsel advised that Dr. Penek was to testify as an expert in pulmonology "regarding a medical disorder known as [s]leep [a]pnea and its relationship, to a degree of reasonable medical certainty, to [Acosta's] death."

Defense counsel indicated that Dr. Penek would rely on the statement from Acosta's spouse about the breathing mask that Acosta wore and evidence that Acosta snored and was intoxicated on the night of his death. Defense counsel also advised that Dr. Gross would testify as a traumatologist and orthopedic surgeon regarding a prior injury to defendant's hand. Defense counsel indicated this testimony would show that defendant did not have the strength to inflict Acosta's injuries.

The State moved to bar Drs. Penek and Gross from testifying because the defense had not provided expert reports from these witnesses or summaries of their anticipated testimony. Following argument and briefing by both parties, the trial judge concluded that neither doctor should be permitted to testify as an expert.

The judge found that Dr. Penek could not be expected to testify within a reasonable degree of medical certainty as to whether Acosta's purported sleep apnea caused or contributed to his death, since the doctor had neither examined Acosta nor reviewed his medical records. The judge also noted that defendant had not provided more than "sparse and ambiguous" personal and professional information that would confirm Dr. Gross's qualifications as an expert.

The judge stated that defendant had not provided the State with an adequate proffer of the testimony of either witness at

least thirty days prior to the previously scheduled trial date, as required by Rule 3:13-3(b)(2)(E), despite the State's request that he do so. Defendant's failure to comply with the rule justified exclusion of the testimony.

Later, on the eve of trial, defense counsel indicated that he intended to present Dr. Gross and Dr. Paresh Shukla as fact witnesses. According to counsel, both doctors treated defendant for his hand injury. Defense counsel argued that these witnesses should be allowed to testify concerning their diagnoses and treatment. The judge found, however, that Drs. Gross and Shukla would essentially be offering expert testimony and reaffirmed his earlier ruling barring such testimony.

On appeal, defendant does not argue that the judge erred by precluding Drs. Gross and Penek from testifying as experts. He argues, however, that the judge should have permitted the doctors to testify as fact witnesses regarding their diagnoses and treatment. Although defendant directs his arguments only to the admissibility of testimony from Drs. Gross and Penek, he also appears to be challenging the exclusion of Dr. Shukla's testimony.

N.J.R.E. 701 provides that a court may admit the testimony of any lay witness in the form of opinion if that testimony "(a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining

a fact in issue." Although a treating physician may possess the necessary qualifications to testify as an expert, N.J.R.E. 701 allows the physician to offer medical testimony regarding his or her diagnosis and treatment of a patient. Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 576-78 (2016).

The permissible scope of such testimony is, however, limited. Id. at 579. To the extent a particular matter in issue requires medical testimony beyond testimony about diagnosis and treatment of a patient, expert testimony may be required. Ibid. That is so when the subject matter of the testimony is beyond the ken of the average juror. State v. Kelly, 97 N.J. 178, 208-09 (1984). The determination of whether expert testimony is required and admissible is committed to the trial court's sound discretion. State v. Berry, 140 N.J. 280, 293 (1995).

Here, the trial judge did not err by precluding defendant from presenting expert testimony from Drs. Gross, Penek, and Shukla. We note that although defendant's attorney did not indicate that defendant intended to call Dr. Penek as a fact witness, the doctor could not testify in that capacity because he never reviewed Acosta's medical records or treated him. Drs. Gross and Shukla could, however, testify as fact witnesses, but only to their diagnoses and treatment of defendant years before. Nevertheless, neither Dr. Gross nor Dr. Shukla could offer opinions as to the

impact, if any, the condition of defendant's hand would have had on his ability to cause Acosta's injuries, which was the reason defense counsel intended to call these witnesses.

As the trial judge correctly determined, expert testimony was required for any such opinions. Because defendant had not provided the State with the discovery regarding expert witnesses required by Rule 3:13-3(b)(2)(E), the judge did not mistakenly exercise his discretion by finding that the doctors could not testify as experts.

III.

Next, defendant argues he was denied his right to a fair trial because the State failed to make timely disclosure of Acosta's medical insurance card. Defendant contends that by doing so, the State violated its duty under Brady v. Maryland, 373 U.S. 83 (1963), to provide him with all favorable evidence material to his defense. Defendant further argues that the trial judge erred by denying his request for a continuance so that his attorney could obtain Acosta's medical records.

As we noted previously, defendant thought that Acosta may have suffered from sleep apnea, and he wanted a defense expert to review his medical records to determine whether that condition caused or contributed to his death. The State advised the defense that it did not have those records.

In April 2012, defendant filed a motion to compel the State to obtain Acosta's medical records, arguing that it would be difficult for the defense to obtain those records, except by asking Acosta's family for them. Defendant's counsel asserted that the State would have a better chance than he would of obtaining the records. The judge denied the motion, finding that the State had no obligation to obtain the records. The judge noted that there was nothing in the autopsy report or other evidence that might compel the State to investigate an alternative cause of death.

In the months that followed, the defense hired an investigator and sent two letters to Acosta's spouse requesting Acosta's medical information but received no response. Defendant then renewed his motion, citing these unsuccessful efforts. Defendant pointed to evidence that purported to show that Acosta suffered from sleep apnea, specifically a statement Acosta's spouse gave to the police indicating that Acosta slept with a mask to address his snoring.

Defendant's attorney informed the court that the defense had consulted with certain experts who agreed that they could not make a determination as to whether Acosta had a condition that contributed to his death without reviewing his medical records. Defense counsel argued that Acosta's medical condition presented a legitimate avenue for the defense and reiterated that defendant was unlikely to obtain the evidence without some assistance by the

State.

Counsel asked the court to order the State to ascertain the identity of Acosta's treating physician, his employer, or his insurance company. The judge denied the motion for the reasons previously stated and issued an order memorializing that decision on March 8, 2013. Defendant filed a timely motion for leave to appeal with this court. The court denied the motion, but noted in its order that defendant was not "precluded from subpoenaing the desired medical records."

After several postponements, the trial was scheduled to begin on April 21, 2014. The next day, defense counsel looked for the first time in Acosta's wallet and found his medical insurance card. Defense counsel claimed the State had failed to disclose evidence material to the defense and moved for an adjournment to permit the defense time to issue a subpoena to Acosta's insurance company for his medical records. The following day, defense counsel asked the judge to address the motion before the jury was sworn, but the judge denied the request.

After the jury was sworn and charged, defense counsel again sought an adjournment of the trial. Counsel asserted that the defense had been seeking Acosta's medical information for years and this information was crucial to establishing a legitimate defense. Counsel also asserted the court's only rationale for

having refused to require the State to produce Acosta's medical information was that the State did not have the information, which was not the case.

In response, the prosecutor asserted that the State had not inventoried the contents of Acosta's wallet; however, the defense knew about the wallet and never availed itself of the opportunity to request an inventory or inspect it. The prosecutor also asserted that even if Acosta had sleep apnea, as defendant claimed, this would not have any bearing on the medical examiner's opinion as to the cause of death, which was asphyxiation due to compression of the neck.

The judge found no Brady violation, finding that Acosta's insurance card was neither exculpatory nor likely to lead to exculpatory evidence, and that the card had never actually been "hidden" from the defense. In a supplemental written opinion, the judge stated that defendant would suffer no undue prejudice from the denial of an adjournment. The judge noted that defense had the opportunity to inspect the wallet for several years, but failed to do so until after the trial had already been twice delayed and was about to begin.

The judge also wrote that a delay of the trial would not "guarantee" the discovery of any additional information, and the medical examiner could always "answer any questions on cross-

examination as to sleep apnea being the possible cause of death." Defendant filed an application with this court, seeking leave to file an emergent motion for leave to appeal. The court denied the application.

On appeal, defendant does not challenge the trial judge's decisions denying his requests to compel the State to obtain Acosta's medical information. Rather, defendant argues he was denied a fair trial as a result of the claimed Brady violation and the trial court's refusal to remedy that violation by adjourning the trial.

We are convinced, however, that the judge correctly determined that the State did not violate its obligation under Brady by failing to provide the defense with Acosta's medical insurance card. "In order to establish a Brady violation, the defendant must show that: (1) the prosecution suppressed the evidence; (2) the evidence is favorable to the defense; and (3) the evidence is material." State v. Martini, 160 N.J. 248, 268 (1999).

Here, the State did not suppress evidence. Rather, the State made its evidence, including the wallet, available for inspection from the inception of the case, but defense counsel did not look at the contents of Acosta's wallet until the day jury selection began, at which point, defense counsel found Acosta's medical

insurance card. As noted, the State represented it did not inventory the contents of Acosta's wallet, and there is nothing in the record indicating that the State knew about the insurance card until defense counsel found it.

Moreover, defendant failed to show that he took all reasonable steps to obtain Acosta's medical records. As noted, the defense wrote to Acosta's spouse seeking the medical records and did not get a response, but the defense did not take any further action to obtain the information from Acosta's spouse or any other source.

In addition, defendant failed to establish that Acosta's medical records were material to his defense. Evidence is material if there is a "reasonable probability" that if disclosed, "the result of the proceeding would have been different." Id. at 260 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

As the State notes, sleep apnea would not explain Acosta's extensive injuries, which included bruises on the neck, thyroid cartilage, and clavicle. Furthermore, at trial, Dr. Perez testified that Acosta's alleged sleep apnea could not and did not cause his internal and external injuries. Thus, defendant has not established that medical evidence could have been discovered, which would have substantially undermined Dr. Perez's testimony.

We also reject defendant's contention that the judge erred by denying his request for an adjournment of the trial. Such relief

may be granted on a showing of good cause. State v. Hayes, 205 N.J. 522, 537-38 (2011). In determining whether to grant an adjournment, the court should consider the relevant circumstances, including:

the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; . . . [and] whether denying the continuance will result in identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature

[State v. Furquson, 198 N.J. Super. 395, 402 (App. Div. 1985) (quoting United States v. Burton, 584 F.2d 485, 490-91 (D.C. Cir. 1978)).]

A trial court's decision on an adjournment request will not be disturbed on appeal "unless it appears from the record that the defendant suffered manifest wrong or injury." Hayes, 205 N.J. at 537 (quoting State v. Doro, 103 N.J.L. 88, 93 (E. & A. 1926)).

Here, the jury had been sworn and charged when the defense sought the adjournment, and the court previously had adjourned the trial twice. The requested continuance would have been of indeterminate duration because defense counsel had to contact the insurer, locate the medical providers, obtain the medical records,

and have an expert review the records. The expert then would be required to issue a report or summary of the facts and grounds for his or her opinion. Moreover, there was no assurance any of Acosta's medical information would support a legitimate defense about the cause of death.

Therefore, defendant failed to establish the denial of his request for an adjournment would result in identifiable prejudice. We conclude the denial of defendant's adjournment request was not a mistaken exercise of discretion.

IV.

Defendant further argues that the trial judge erred by denying his motion to compel the State to produce records pertaining to the prosecution in 2004 of an assault, during which defendant's hand was injured. Defendant argues he was entitled to the records under the Open Public Records Act (OPRA), N.J.S.A. 47:1A to -13, and the common law.

OPRA states in pertinent part that

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by [this act] as amended and supplemented, shall be construed in favor of the public's right of access.

[N.J.S.A. 47:1(a)-1.]

OPRA provides, however, that certain records shall not be subject to public access, including "criminal investigatory records," which the Act defines as any "record[s] which [are] not required by law to be made, maintained or kept on file that [are] held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1. The records defendant was seeking fall squarely within that exemption.

Defendant argues that the trial court should have ordered the State to provide access to the criminal investigatory file because the records do not pertain to an ongoing investigation. In support of that argument, defendant relies on N.J.S.A. 47:1A-3, which under appropriate circumstances exempts from OPRA's disclosure requirements any materials pertaining to an "investigation in progress by any public agency." We reject this argument because OPRA provides a specific exemption for "criminal investigatory records" and N.J.S.A. 47:1A-3 pertains to other investigations by public agencies. The records at issue here are records of a criminal investigation.

Defendant also relies upon the decision in Asbury Park Press v. Lakewood Township Police Department, 354 N.J. Super. 146 (Law Div. 2002). In that case, the judge found that recordings of 9-1-1 calls made to a police department were public records under the

Right to Know Law, formerly N.J.S.A. 47:1A-1 to -4 (repealed), because they were required by law to be made, maintained, or kept on file. Id. at 156-58 (citing N.J.A.C. 17:24-2.4(a)(1)). The judge noted that the Governor had issued an Executive Order, which excludes certain records from public disclosure, including records of certain criminal investigations. Ibid. The judge held that 9-1-1 recordings do not fall within the definition of criminal investigatory records under the executive order. Id. at 157.

Defendant's reliance upon Asbury Park Press is, however, misplaced. The Right to Know Law has been superseded by OPRA. Mason v. City of Hoboken, 196 N.J. 51, 62 (2008). In any event, as we have explained, the records defendant was seeking in this matter are clearly "criminal investigatory records," which are exempt from disclosure under OPRA.

In the trial court, defendant did not seek the records pursuant to the common law. In any event, the court did not err by failing to address the common law *sua sponte*. Moreover, defendant was not entitled to disclosure of the records under the common law. OPRA does not limit the common law right of access to public records. N.J.S.A. 47:1A-8. Under the common law, a public record is defined as a "written memorial . . . made by a public officer, and . . . the officer [must] be authorized by law to make it." Nero v. Hyland, 76 N.J. 213, 222 (1978) (quoting Josefowicz

v. Porter, 32 N.J. Super. 585, 591 (App. Div. 1954)).

Nevertheless, the right to access to public records is not absolute. Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 499 (App. Div. 2011) (quoting S. N.J. Newspapers, Inc. v. Twp. of Mt. Laurel, 141 N.J. 56, 72 (1995)). A party seeking access to the records must demonstrate an interest in the subject matter of the documents, and the court should only order disclosure if the party's right to access, when balanced against the government's interest in preserving the confidentiality of the material, weighs in favor of disclosure. Mason, 196 N.J. at 67-68 (citing Keddie v. Rutgers, 148 N.J. 36, 50 (1997)).

Here, defendant failed to establish an interest in obtaining the State's file pertaining to the 2004 assault prosecution. Defendant asserted that in that assault, he suffered a severe injury from hammer blows to his hand, which required several surgeries and thereafter affected his ability to use his hand. Defendant acknowledged, however, that he had already obtained the medical records relating to his hand injury and provided those records to the State and to his proposed expert.

On appeal, defendant argues that the State has no interest in preserving the confidentiality of records from a criminal matter dating back to 2004, but defendant has not made the required

threshold showing that he has a legitimate interest in obtaining the records. Defendant has not shown that the information he is seeking was essential to his defense, when compared with defendant's own description of the assault, the medical records which he already has, or, more importantly, an expert's personal examination of his hand.

V.

Defendant also argues that the trial judge erred by permitting the assistant prosecutor to impeach M.U. by asking her about a prior criminal conviction. Because defendant did not object to the questions at trial, he must show that the judge erred by allowing the prosecutor to ask the questions, and if so, whether the error was "clearly capable of producing an unjust result." R. 2:10-2.

The record shows that during her direct examination, the prosecutor asked M.U. whether she had previously been arrested. M.U. replied that she had been arrested, but she had never been "detained" or "jailed." M.U. admitted that she pled guilty to committing a crime; however, she could not recall when. The prosecutor made no further comment on M.U.'s prior conviction during her examination or summation. In his charge to the jury, the judge instructed the jury it could only consider this evidence in weighing the credibility of the witness's testimony.

The evidence rule in effect at the time of the trial stated

that "[f]or the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes." N.J.R.E. 609 (2013) (emphasis added).³ Thus, a court could exclude such evidence only if it found that the conviction was sufficiently remote, either in time or in the nature of the offense, or that the risk of undue prejudice from its admission outweighed its relevance to credibility. State v. Spivey, 179 N.J. 229, 243 (2004) (quoting State v. Sands, 76 N.J. 127, 147 (1978)).

Defendant argues that the judge erred by allowing the State to elicit testimony about the conviction because the judge did not consider the nature of the offense, the date of the conviction, or the sentence imposed. He contends the State never established whether M.U. pled guilty to an indictable offense. Defendant claims the State brought up the conviction only to show that he "socialized with felons," thereby attempting to undermine his credibility and that of other persons who testified on his behalf as character witnesses.

In response, the State asserts that M.U. had been convicted of an indictable offense, and records pertaining to the conviction

³ The rule was amended effective July 1, 2014, two months after trial ended. Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, note to N.J.R.E. 609 (2017).

previously had been provided to defense counsel. In any event, the State was not required to provide the court with a certified copy of the judgment of conviction. N.J.R.E. 609 explicitly provides that proof of the conviction could be made "by examination." In this case, proof of the conviction was established in that manner.

Furthermore, defendant has not shown he suffered any undue prejudice by the State's impeachment of its own witness with her prior conviction. The record does not support defendant's claim that the State elicited testimony about the conviction to suggest that he consorted with felons. Moreover, as noted, the judge instructed the jury that it could consider the conviction only for the purpose of evaluating M.U.'s credibility.

We therefore conclude that the judge did not err by allowing the prosecutor to question M.U. about her prior conviction, and even assuming the judge erred by doing so, the error was not "clearly capable of producing an unjust result." R. 2:10-2.

VI.

Defendant contends that the trial judge's rulings limiting her counsel's cross-examination of Detective Crowe infringed his rights to confrontation and a fair trial.

Criminal defendants are guaranteed both a state and federal constitutional right to confront any witnesses against them at trial. State v. Budis, 125 N.J. 519, 530 (1991) (citing U.S. Const.

amend. VI; N.J. Const. art. I, ¶ 10). A defendant's right to cross-examine witnesses against him should be free from any unreasonable restrictions to ensure the defendant has a "meaningful opportunity to present a complete defense." Id. at 531 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

The trial courts nevertheless "retain wide latitude" in imposing reasonable limits on examination to bar, among other things, unnecessarily repetitive or marginally relevant testimony. Id. at 531-32 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). The proper scope of cross-examination is committed to the sound discretion of the trial judge. State v. Harvey, 151 N.J. 117, 188 (1997) (citing State v. Martini, 131 N.J. 176, 263 (1993)).

Here, the State presented testimony from Detective Crowe to provide a description of the scene and to explain the photos he took of the scene. Defendant's attorney cross-examined Crowe at considerable length. Defendant argues that the judge erred by limiting the cross-examination with regard to certain items recovered from the crime scene, specifically hair extensions, a pack of cigarettes, a cell phone, and Acosta's wallet.

The judge permitted defense counsel to ask Crowe some questions about the hair extensions but after the State objected, precluded counsel from asking further questions on this subject.

The judge ruled that although the hair extensions had been recovered from the crime scene, further testimony about these items had no evidential value.

Defense counsel also asked Crowe about a package of cigarettes recovered from the crime scene and the State objected. At a sidebar, defense counsel explained that these questions were intended to elicit testimony that the cigarettes had been placed in the package backwards. Counsel asserted that this fact might "have some significance that this jury has a right to know about," but counsel did not explain what that significance might be. The judge sustained the State's objection.

Defendant's counsel also began to question Crowe about a cell phone recovered from defendant's bedroom. Counsel asked Crowe if a charging cord had been found with the phone. The State objected. The judge asked counsel to explain the relevance of the charging cord, and counsel replied that the defense believed it was Acosta's phone. The judge noted that no evidence had been presented establishing that the phone belonged to Acosta or some other person. The judge ruled that the evidence was irrelevant and sustained the State's objection.

In addition, the judge permitted defense counsel to question Crowe about Acosta's wallet, but the State objected to questions about the contents of the wallet. The judge sustained the

objection, finding that testimony on that subject was irrelevant.

On appeal, defendant argues that all questions about the items found at the crime scene were relevant because they supported his claim that he and Acosta did not engage in any struggle. The State never asserted, however, that defendant and Acosta struggled on the night Acosta died.

Defendant asserts that the placement of the cigarettes backwards in the pack suggests that Acosta was drunk or high on drugs at some point during the evening, but the State never disputed that was the case. Indeed, as noted previously, the State introduced the toxicology report which established that alcohol, Xanax, and cocaine were present in Acosta's system when he died.

Defendant also contends testimony about the contents of Acosta's wallet was relevant because his insurance card "could have confirmed his health issues." However, the mere possession of an insurance card only could establish that Acosta had medical insurance coverage, not that he suffered from any particular condition. We note that on appeal, defendant advances no specific arguments as to the relevance of the hair extensions or cell phone.

Therefore, we conclude the trial judge did not mistakenly exercise his discretion by limiting defense counsel's cross-examination of Crowe. Defendant's arguments on these issues lack sufficient merit to warrant further comment. R. 2:11-3(e)(2).

VII.

Next, defendant argues that he was denied his right to a fair trial due to alleged prosecutorial misconduct. Defendant asserts that during her summation, the assistant prosecutor improperly commented that M.U. appeared to offer a prayer or blessing at defendant's door when she left the apartment after her second visit.

It is well established that a prosecutor is "afforded considerable leeway" during summation, although "a prosecutor must refrain from improper methods that result in wrongful conviction." State v. Smith, 167 N.J. 158, 177 (2001) (citing State v. Frost, 158 N.J. 76, 82 (1999); State v. Harris, 141 N.J. 525, 559 (1995); State v. Farrell, 61 N.J. 99, 105 (1972)). A prosecutor must confine his or her comments to "evidence revealed during the trial and reasonable inferences to be drawn from that evidence." Id. at 178 (citing Frost, 158 N.J. at 86; State v. Marks, 201 N.J. Super. 514, 534 (App. Div. 1985)). However, "'not every deviation from the legal prescriptions governing prosecutorial conduct' requires reversal." State v. Jackson, 211 N.J. 394, 408-09 (2012) (quoting State v. Williams, 113 N.J. 393, 452 (1988)).

A reviewing court evaluates challenged remarks in the context of the summation as a whole. State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008) (citing State v. Carter, 91 N.J. 86, 105

(1982)). Reversal is warranted only if the remarks were "clearly and unmistakably improper" and "substantially prejudiced the defendant's fundamental right to have a jury fairly evaluate the merits of his or her defense." State v. Ingram, 196 N.J. 23, 43 (2008) (quoting State v. Harris, 181 N.J. 391, 495 (2004)).

During M.U.'s testimony, the prosecutor showed M.U. surveillance footage to refresh her recollection regarding her visits to defendant's apartment. The footage was recorded in the hallway outside defendant's apartment. According to the descriptions in the record, the footage showed that after one of her visits to the apartment, M.U. paused briefly and touched defendant's door. The footage was admitted into evidence.

Over the objection of defense counsel, the prosecutor asked M.U. about the footage. M.U. acknowledged that she appeared to be touching the door. She stated that she might have been knocking, but later said, "but if I'm leaving[,] why would I knock?" The prosecutor asked, "Were you -- was that a prayer or something that you were doing over the door?" Defense counsel objected to the question, but before the judge ruled on the objection, M.U. replied, "No."

In her summation, the prosecutor alluded to this exchange. She asserted that M.U. had likely learned of Acosta's death during her first visit to defendant's apartment and that her actions at

the door after the second visit betrayed that knowledge. The prosecutor stated "[w]e watched her leave the apartment at 1:45, you watched the door close, and you watched her stand outside that door and engage in some kind of prayer or ritualistic blessing."

Defense counsel objected on the ground that the comment was contrary to M.U.'s testimony and therefore a matter of speculation, but the judge overruled the objection, noting that as shown on the video recording, M.U. had done "something." The judge observed that the jury was not bound by the prosecutor's recollection and could always "look at the tape again."

The prosecutor continued her summation and referred to M.U.'s testimony. She stated:

But, again, I asked her what she was doing to the door. She said -- ultimately, she said, I -- I -- I don't know what I was doing. She said maybe I was knocking on the door.

And I said you were knocking on the door? You were leaving the apartment. And she said, yeah, that wouldn't make sense. And then she denied that it was a -- a blessing, ladies and gentlemen, or a prayer, or whatever it was.

But I submit to you that that shows you that she knew exactly what was going [on] inside of the defendant's apartment at that time. She knew that [Acosta] was dead, she did her prayer, and she left.

We reject defendant's assertion that the prosecutor's comments about M.U.'s actions were not supported by the evidence.

As noted, the surveillance footage was admitted into evidence, and the judge commented that the footage showed M.U. doing "something" with her hands when she left the apartment. Based on the evidence, the prosecutor reasonably inferred that M.U.'s gesture was a blessing or prayer, which indicated M.U. knew what had happened in the apartment and that Acosta was dead.

VIII.

Defendant argues for the first time on appeal that the judge's instructions to the jury on reckless manslaughter were incomplete and misleading. He contends the errors require reversal of his conviction.

Instructions should serve as a "road map to guide the jury" in its deliberations, State v. Martin, 119 N.J. 2, 15 (1990), and provide an accurate, "comprehensible explanation of the questions that [it] must determine, including the law of the case applicable to the facts that [it] may find," State v. Green, 86 N.J. 281, 287-88 (1981). In so doing, the instructions must address every element of the offense. State v. Vick, 117 N.J. 288, 291 (1989). However, not every inaccuracy in the jury charges warrants reversal of a criminal conviction. State v. Jordan, 147 N.J. 409, 422 (1997).

In the absence of a timely objection to an instruction, a reviewing court may reverse only for plain error. State v.

Afanador, 151 N.J. 41, 54 (1997). Reversal is warranted only where the error, considered in the context of the charge as a whole, "prejudicially affect[s] the substantial rights of the defendant sufficiently grievous[ly] to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." Jordan, 147 N.J. at 422 (quoting State v. Hock, 54 N.J. 526, 538 (1969)).

Here, the judge instructed the jury regarding aggravated manslaughter using the model jury charge. The judge explained in part:

One element that the State must prove beyond a reasonable doubt is the defendant acted recklessly. A person who causes another's death does so recklessly when he is aware [of] and consciously disregards a substantial and unjustifiable risk of death - - risk that death will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of defendant's conduct and the circumstances known -- known by defendant, his disregard of that risk is a -- a gross deviation from the standard of conduct that a reasonable person would follow in the same situation.

In other words, you must find the defendant was aware of and consciously disregarded the risk of causing death. If you find defendant was aware of and disregarded the risk of causing death, you must determine whether the risk that he disregarded was substantial and unjustifiable.

In going -- in doing so, you must

consider the nature and purpose of defendant's conduct, and the circumstances known to defendant, and you must determine whether, in light of those facts, defendant's disregard of that risk was a gross deviation from the conduct a reasonable person would have observed in defendant's situation.

After addressing the other elements of that offense, the judge addressed the lesser-included offense of reckless manslaughter, the offense for which defendant was convicted. The judge explained:

A person is guilty of reckless manslaughter if he recklessly caused the death of another person.

In order for you to find the defendant guilty of reckless manslaughter, the State is required to prove each of the following elements beyond a reasonable doubt:

- 1) defendant caused Edwin Acosta's death; and,
- 2) that the defendant did so recklessly.

One element that the State must prove beyond a reasonable doubt is the defendant acted recklessly.

I have already defined the term recklessly for you.

The other element the State must prove beyond a reasonable doubt is defendant caused Edwin Acosta's death.

You must find that Edwin Acosta would not have died but for defendant's conduct.

If after consideration of all the

evidence you are convinced beyond a reasonable doubt that the defendant recklessly caused Edwin Acosta's death, then your verdict must be guilty of reckless manslaughter.

If, however, after consideration of all the evidence you are not convinced beyond a reasonable doubt that the defendant recklessly caused Edwin Acosta's death, you must find the defendant not guilty of reckless manslaughter.

[Emphasis added.]

Defendant's attorney did not object to these instructions and defendant does not argue on appeal that they were legally inaccurate. On appeal, defendant argues that the judge erred by failing to repeat its full explanation of recklessness in the context of the reckless manslaughter charge. We disagree.

Here, the judge gave the jury a thorough explanation of recklessness in the context of the aggravated manslaughter charge and explicitly incorporated that explanation by reference in the reckless manslaughter charge. The instructions were legally correct considered as a whole, and, given that the jury was provided a copy of the relevant charges to aid in its deliberations, the manner in which they were structured was not clearly capable of producing an unjust result.

Defendant further argues that the judge erred by failing to offer a more comprehensive explanation of the element of causation in light of the defense's theory that decedent's health condition

could have contributed to his death. Again, we disagree.

As to the element of causation, the Criminal Code provides:

a. Conduct is the cause of a result when:

(1) It is an antecedent but for which the result in question would not have occurred; and

(2) The relationship between the conduct and result satisfies any additional causal requirements imposed by the code or by the law defining the offense.

. . . .

c. When the offense requires that the defendant recklessly or criminally negligently cause a particular result, the actual result must be within the risk of which the actor is aware . . . or, if not, the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or dependent on another's volitional act to have a just bearing on the actor's liability or on the gravity of his offense.

[N.J.S.A. 2C:2-3.]

The Code therefore requires a determination that the conduct constituting the offense was a "but-for" cause of the result, and if applicable, a determination that the defendant was sufficiently culpable for that result. State v. Pelham, 176 N.J. 448, 460 (2003) (citing Martin, 119 N.J. at 11-13). Accordingly, a jury must consider

whether intervening causes or unforeseen conditions lead to the conclusion that it is

unjust to find that the defendant's conduct is the cause of the actual result. Although the jury may find that the defendant's conduct was a "but-for" cause of the victim's death . . . it may nevertheless conclude . . . that the death differed in kind from that designed or contemplated [or risked] or that the death was too remote, accidental in its occurrence, or dependent on another's volitional act to justify a . . . conviction.

[Id. at 460-61 (quoting Martin, 119 N.J. at 13).]

At trial, the defense argued that Acosta's health condition might have contributed to his death and defense counsel questioned the medical examiner on the issue. However, the medical examiner remained steadfast in her conclusion as to Acosta's cause of death, which was asphyxia due to compression of the neck, and there was no expert testimony to the contrary. As quoted above, the judge specifically instructed the jury it could convict defendant of reckless manslaughter only if "defendant caused Edwin Acosta's death." The jury was told it must find Acosta "would not have died but for defendant's conduct." Based on the evidence presented at trial, an expanded charge on causation was not warranted, and its absence was not "clearly capable of producing an unjust result." R. 2:10-2.

IX.

Defendant contends the judge's conduct toward the defense was impermissibly prejudicial and deprived him of a fair trial.

A trial judge possesses wide discretion in his or her administration of a criminal trial, State v. Tilghman, 385 N.J. Super. 45, 53-54 (App. Div.) (quoting Sullivan v. State, 46 N.J.L. 446, 447 (Sup. Ct. 1884)), remanded in part on other grounds, 188 N.J. 269 (2006). However, the judge must exercise that authority with great care. State v. Guido, 40 N.J. 191, 207-08 (1963) (citing Ridgewood v. Sreel Inv. Corp., 28 N.J. 121, 132 (1958)). To ensure a fair trial, the judge must always maintain an atmosphere of impartiality and be "careful not to throw [its] judicial weight" on either side of the dispute or otherwise stray into the realm of advocacy. State v. Ray, 43 N.J. 19, 25 (1964) (first quoting Ridgewood, 28 N.J. at 132; and then citing People v. Mahoney, 258 P. 607 (Cal. 1927)).

On appeal, defendant argues that the trial judge improperly informed potential jurors that Acosta had died from "strangulation." He claims the judge improperly limited defendant's cross-examination of Detective Crowe and restricted defense counsel's questioning of other detectives involved in the investigation. Defendant argues that the judge improperly instructed defense counsel he would not allow her to recall any of the State's witnesses without a valid proffer.

In addition, defendant contends the judge indicated to the jury that he did not think highly of defense counsel or her

competence. He contends the judge limited summations to one hour and interrupted defense counsel when she spoke ten minutes longer than permitted.

Defendant argues that because the State's case turned on circumstantial evidence, the judge's alleged partiality could have tipped the scales in favor of a guilty verdict and against an outright acquittal, thereby depriving him of a fair trial. We are convinced these arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

We add, however, that the judge's statement that the medical examiner would testify that the victim died "by strangulation" did not prejudice defendant, and the judge's limits on the questions of defense counsel were a proper exercise of the judge's discretion. Also, the judge did not err by requiring defense counsel to justify recalling any of the State's witnesses, and the judge did not mistakenly exercise his discretion by limiting summations to one hour and reminding defense counsel of that limitation.

We agree that the judge should not have said that defense counsel was acting unprofessionally. However, the judge's remarks followed defense counsel's failure to comply with the judge's rulings and instructions. In any event, we are not convinced that the comments suggested to the jury that the judge was biased in

favor of the State. The comments merely reflected the judge's lack of patience with defense counsel.

Moreover, in his final instructions, the judge commended both counsel on the professional manner in which they had handled the case and noted that any evidentiary ruling he made "was not an expression or an opinion by [the judge] on the merits of the case." The judge added that the jury should not view any other rulings he made as "favoring one side or the other."

We therefore reject defendant's contention that the aforementioned rulings or remarks deprived him of a fair trial.

X.

Defendant argues that the trial judge erred by denying his motion for a judgment of acquittal notwithstanding the verdict.

Such relief is available under Rule 3:18-2; however, relief is not warranted if, "viewing the evidence in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all favorable inferences therefrom, the evidence is sufficient to enable a jury to find" the defendant guilty "beyond a reasonable doubt." State v. Ball, 268 N.J. Super. 72, 133 (App. Div. 1993) (citing State v. Reyes, 50 N.J. 454, 459 (1967)).

A court's determination of whether to grant a judgment of acquittal is ordinarily confined to the State's evidence. State

v. Sugar, 240 N.J. Super. 148, 152-53 (App. Div. 1990). However, where, as in this case, a defendant is convicted of a lesser-included offense, the court should determine whether his or her conviction is sustainable based on the entire record, including the evidence adduced in the course of his or her defense. Id. at 153. That standard applies on appeal. Ibid.

Here, the trial court found that the evidence presented a sufficient basis for defendant's conviction of reckless manslaughter. The court noted that the medical examiner had testified that Acosta's death was a homicide, the cause of death was asphyxiation due to compression of the neck, the injuries to Acosta's neck were deep and severe given their location, and the injuries were round and consistent with fingertips. Furthermore, on cross-examination, the medical examiner discounted other possible causes of death, such as Acosta's purported breathing disorder or his use of alcohol and cocaine.

The court noted that the evidence presented at trial, including defendant's own testimony, established that defendant had a relationship with Acosta, and defendant had sex with him on the night he died. The record allowed the jury to conclude that defendant had done something to Acosta, including putting his hands around Acosta's neck, whether during sex, in anger, or in an attempt to wake him.

The court acknowledged that it was impossible to know precisely what occurred that night in defendant's apartment. The court found, however, that a jury could nonetheless infer from the circumstances that "something happened" to cause Acosta's death, and that "it was reckless" on defendant's part.

On appeal, defendant argues that a judgment of acquittal was warranted essentially on the basis of the other arguments raised on appeal, including the State's failure to produce Acosta's insurance card, the judge's disputed evidentiary rulings, the judge's restrictions on the time for summations, and the charge to the jury on reckless manslaughter. However, none of those contentions meet the standard for relief. Reyes, 50 N.J. at 458-59.

Therefore, we conclude the court did not err in denying defendant's motion for a judgment of acquittal notwithstanding the verdict. Defendant's arguments to the contrary lack sufficient merit to warrant further discussion. R. 2:11-3(e)(2).

XI.


Defendant also argues that even if we conclude that the individual errors complained of did not deny him a fair trial, the cumulative effect of those errors warrant reversal of his conviction and a remand for a new trial. Again, we disagree.

The court may reverse a conviction when the cumulative effect

of a series of errors is harmful, even if each error is harmless in itself. State v. Jenewicz, 193 N.J. 440, 474 (2008). None of the errors complained of warrant reversal, even when considered cumulatively.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION