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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5195-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN C. EMILI,

Defendant-Appellant.

Argued January 17, 2018 – Decided March 8, 2018

Before Judges Hoffman, Gilson, and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 14-03-0379.

Alan L. Zegas argued the cause for appellant (Law Offices of Alan L. Zegas, attorneys; Alan L. Zegas and Judson L. Hand, on the brief).

Elizabeth R. Rebein, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Dennis Calo, Acting Bergen County Prosecutor, attorney; Elizabeth R. Rebein, of counsel and on the brief).

PER CURIAM

On a Sunday morning in July 2012, defendant John C. Emili was driving to church with his girlfriend and another passenger. He

cut off another vehicle and, thereafter, the two drivers began speeding down the parkway cutting in and out of lanes and in front of each other's vehicles. Defendant lost control of his vehicle, which hit a guardrail and repeatedly rolled over. The passenger was ejected and died as a result of her injuries.

A jury convicted defendant of second-degree vehicular homicide, N.J.S.A. 2C:11-5, and he was sentenced to six and one-half years in prison, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant appeals, seeking an acquittal or, alternatively, a reversal and remand. We affirm.

I.

On the morning of July 1, 2012, defendant was driving a gray Honda Pilot sports utility vehicle (SUV or Honda) with two passengers, his girlfriend and A.B.[1] Defendant had picked up A.B. and was giving her a ride to a church where defendant's father was the pastor.

As defendant pulled onto the Garden State Parkway, his SUV cut off a black Chevy Trailblazer driven by Thomas J. Vanderweit. Three witnesses, who also were traveling on the Garden State Parkway, testified that they saw the Honda and Trailblazer speeding along the parkway, repeatedly cutting back and forth between lanes

[1] We use initials for the victim to protect her privacy interests. R. 1:38-3(c).

to get in front of one another. Eventually, the Trailblazer suddenly slowed and began to exit the parkway. Defendant, driving just behind the Trailblazer, lost control of his vehicle. Defendant's Honda hit a guardrail, bounced across the lane, and repeatedly rolled over. As the Honda was flipping over, A.B., who had been sitting in the back seat of defendant's SUV, was ejected. The parties stipulated that A.B. died as a direct result of the injuries she suffered after being ejected from defendant's vehicle.

Shortly after the crash, multiple police and emergency personnel responded to the scene. Detective Mark Smith of the New Jersey State Police was the first State Police officer to arrive at the scene. After trying to "contain" the scene of the accident, Smith began to investigate the accident. Accordingly, Smith spoke separately with Vanderweit and defendant. Smith's conversations with both Vanderweit and defendant were recorded by a mobile audio and video recorder in Smith's police car.

Smith testified that when he spoke with Vanderweit and defendant on the roadside, he did not believe that he was at the scene of a crime. Smith then explained that when he spoke to defendant, defendant was not under arrest, appeared to be calm, did not indicate that he did not want to speak to Smith, and did not request to leave.

Defendant told Smith that he was the driver of one of the vehicles involved in the crash. Defendant then explained that he had picked up A.B. to go to church, that he was running late, and that he was speeding and lost control of his vehicle. When Smith asked defendant how fast he was going, defendant responded, "100 [miles per hour] maybe."

Another State Police officer, Trooper Russell Peterson, responded to the scene. Peterson separately spoke with defendant on the shoulder of the road. At a pretrial evidentiary hearing, Peterson testified that when he spoke with defendant, defendant was not under arrest, Peterson did not intend to arrest defendant, and Peterson did not have reason to believe that defendant had committed a crime. Peterson asked defendant what had happened. Defendant responded that he was speeding and as he was trying to exit the parkway, the vehicle in front of him applied its brakes, he then lost control of his vehicle, and his vehicle hit the guardrail, traveled back across the lane, and overturned.

Defendant and Vanderweit were then taken to a State Police barracks, where they were interviewed separately. Ultimately, a grand jury indicted defendant and Vanderweit for vehicular manslaughter.

Defendant and Vanderweit moved to suppress the statements they had given at the roadside and at the State Police barracks.

The trial court conducted two evidentiary hearings, and heard testimony from Trooper Peterson, Detective Smith, and Detective Christopher Kelly of the Bergen County Prosecutor's Office.[2] The court denied the motion to suppress the roadside statements, but granted the motion to suppress the statements given at the State Police barracks, because defendant and Vanderweit were not given their Miranda[3] warnings before their formal interviews.

In written opinions, the motion judge found both Trooper Peterson and Detective Smith to be credible. The judge then found that when Peterson and Smith spoke with defendant at the roadside, defendant was not in custody and not subject to a custodial interrogation. The judge based that finding on the facts that defendant was not under arrest, was not in handcuffs, was detained for less than an hour, and was not subject to coercive questioning. Instead, the judge found that both Peterson and Smith were trying to find out what had caused the accident, and defendant was questioned at the roadside, which was a public area. The judge also reasoned that although defendant was not free to leave because the police were investigating a fatal automobile accident,

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[2] Defendant and Vanderweit initially moved to suppress the statements they had given at the police barracks. Thereafter, they filed a second motion to suppress the statements they gave at the roadside.

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

defendant never asked to leave and was calm and cooperative when questioned at the roadside.

Defendant and Vanderweit were tried separately. At defendant's trial, the State presented expert testimony from Detective Sergeant Derek DiStaso, a certified accident reconstructionist for the State Police. DiStaso was called to the scene of the crash and reconstructed the events by considering a variety of information, including his observations at the scene, tire marks left at the scene, a speed analysis, and statements made by defendant and Vanderweit. DiStaso opined that the crash occurred when Vanderweit applied his brakes, defendant swerved his vehicle to avoid Vanderweit's vehicle, defendant's vehicle then "serpentin[ed]" on the roadway, began to spin, struck a guardrail, spun back onto the roadway, struck Vanderweit's vehicle, and repeatedly rolled over. DiStaso went on to opine that A.B. was ejected from defendant's vehicle when the Honda spun off the guardrail.

At the close of evidence, the trial court conducted a charge conference. The court thereafter charged the jury and gave them a written copy of the instructions. With regard to the substantive charge of vehicular homicide, the trial court instructed the jury using the model jury charges. In that regard, the court explained, in relevant part:

[I]n order for you to determine the defendant guilty of this crime, the State must prove the following three elements beyond a reasonable doubt:

1. That the defendant was driving a vehicle;

2. That the defendant caused the death of [A.B.]; and,

3. That the defendant caused such death by driving the vehicle recklessly.

So in order to find the defendant caused [A.B.'s] death, you must find that [A.B.] would not have died but for defendant's conduct.

. . . .

Causation has a special meaning in the law. To establish causation, the State must prove two elements, each beyond a reasonable doubt:

First, but for the defendant's conduct, the result in question would not have happened. In other words, without defendant's actions the result would not have occurred.

Second, for reckless conduct that the actual result must have been within the risk of which the defendant was aware. If not, it must involve the same kind of injury or harm as the probable result and must also not be too remote, too accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the defendant's liability or on the gravity of his offense.

Now in this case you may have heard evidence of the police questioning John Emili about whether or not [A.B.] was wearing a

> seatbelt. I instruct you that whether or not [A.B.] was wearing a seatbelt is not relevant to the causation issue.
>
> The issue of causation remains one that must be resolved by you, as instructed by the [c]ourt just earlier in my charge. However, the status of the seatbelt is not to be part of your consideration.

After being so instructed, the jury found defendant guilty of second-degree vehicular homicide, N.J.S.A. 2C:11-5.

II.

On this appeal, defendant makes seven arguments.

> POINT ONE – The Trial Court Erred By Denying The Defendants' Motion To Suppress Allegedly Inculpatory Statements Made By The Defendants To State Police Officers At The Roadside Shortly After The Crash
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> POINT TWO – The Trial Court Erred By Refusing To Charge The Jury On "But For" Causation, A Required Element Of Proof For Conviction On Vehicular Homicide Grounds And Instead Relied Upon A Confusing Stipulation Whose Scope Could Not Be Deciphered
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> POINT THREE – The Trial Court, Prosecutor And Expert Witness Erred By Repeatedly Telling The Jury That Mr. Emili Was Traveling 100 mph, When In Fact Each Of The Witness' Notes Indicated The Speed Was More Like 60-80. This 100 mph Theme Was Recited Repeatedly During The Trial Even Though There Was More Than A Reasonable Doubt Whether It Was Accurate
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> POINT FOUR – The Trial Court Erred In Not Granting Mr. Emili's Request To Be Permitted To Introduce Evidence Concerning the Circumstances Surrounding The Cause Of Death Of [A.B.] Whose Seatbelt Was Not Fastened

> POINT FIVE – The Trial Court Erred By Permitting The State To Distribute Brochures That Had The Effect, Whether Subconsciously Or Not, Of Causing The Jury To Hear A Statement By Mr. Vanderweit That He And Mr. Emili Were Traveling About 100 mph On The Garden State Parkway
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> POINT SIX – The Trial Court Violated Mr. Emili's State And Federal Constitutional Rights In Its Sentencing Of Mr. Emili, Its Misunderstanding Of Its Authority And Its Erroneous Consideration And Weighing Of The Mitigating And Aggravating Factors Relative To The Imposition Of Sentence.
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> POINT SEVEN – Even If Each Of The Above Arguments Were Individually Insufficient To Result In A Reversal And/Or Remanding Of The Ruling Below, The Cumulative Effect Of These Four Rulings So Tainted The Result That This Court Should Dismiss The Indictment On This Additional Ground

We are not persuaded by any of these arguments and we therefore affirm defendant's conviction and sentence. Points two and four are related. Accordingly, we will address defendant's arguments in six subsections.

1. Defendant's Roadside Statements

The Fifth Amendment of the United States Constitution guarantees all persons the privilege against self-incrimination. U.S. Const. amend. V. This privilege applies to the states through the Fourteenth Amendment. U.S. Const. amend. XIV; Griffin v. California, 380 U.S. 609, 615 (1965). Moreover, in New Jersey,

there is a common law privilege against self-incrimination, which has been codified in our statutes and rules of evidence. N.J.S.A. 2A:84A-19; N.J.R.E. 503; State v. Reed, 133 N.J. 237, 250 (1993). Accordingly, it has long been established that when a person is taken into custody or otherwise deprived of his or her freedom, that person is entitled to certain warnings before he or she can be questioned. Miranda, 384 U.S. 436.

The Miranda requirement is triggered by a "'custodial interrogation,' which is 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of . . . freedom of action in a significant way.'" State v. Smith, 374 N.J. Super. 425, 430 (App. Div. 2005) (quoting Miranda, 384 U.S. at 444). "[C]ustody exists if the action of the interrogating officers and the surrounding circumstances, fairly construed, would reasonably lead a detainee to believe he [or she] could not leave freely." State v. Coburn, 221 N.J. Super. 586, 596 (App. Div. 1987) (citing State v. Godfrey, 131 N.J. Super. 168, 176 n.1 (App. Div. 1974)). Under this objective test, courts consider the time, location, and duration of the detention, the nature of the questioning, and the conduct of the officers in evaluating the degree of restraint. E.g., Smith, 374 N.J. Super. at 431; State v. Pierson, 223 N.J. Super. 62, 67 (App. Div. 1988).

"Miranda is not implicated when the detention and questioning is part of an investigatory procedure rather than a custodial interrogation." Pierson, 223 N.J. Super. at 66. An investigatory procedure includes brief detention and questioning during a traffic stop or a field investigation. See Berkemer v. McCarty, 468 U.S. 420, 437-38 (1984) (holding that a traffic stop is "presumptively temporary and brief" and "public, at least to some degree" and, thus, does not automatically trigger the Miranda requirement); Terry v. Ohio, 392 U.S. 1 (1968) (holding that officers may briefly detain a person to investigate circumstances that provoke reasonable suspicion). While a person in either context is detained, Miranda warnings are only required if, under the totality of the circumstances, the detention becomes "the functional equivalent of an arrest." Smith, 374 N.J. Super. at 431 (quoting Berkemer, 468 U.S. at 442); see also State v. Nemesh, 228 N.J. Super. 597, 606-07 (App. Div. 1988) (holding that under Berkemer, "[i]t is obvious that an inquiry by an officer upon his [or her] arrival at the scene of an accident as to who was operating the involved vehicles is not custodial interrogation."). Thus, in the context of a field investigation or traffic stop, "[t]he question is whether a reasonable person, considering the objective circumstances, would understand the situation as a de facto arrest

or would recognize that after brief questioning he or she would be free to leave." Smith, 374 N.J. Super. at 432.

When reviewing a motion to suppress statements, we generally defer to the factual findings of the trial court if they are supported by credible evidence in the record. See State v. Hathaway, 222 N.J. 453, 467 (2015) (citing State v. Elders, 192 N.J. 224, 244 (2007)). Moreover, deference to a trial court's factual findings is appropriate because the trial court has the "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy[.]" State v. S.S., 229 N.J. 360, 374 (2017) (quoting Elders, 192 N.J. at 244). We review de novo the trial court's legal conclusions that flow from established facts. State v. Hamlett, 449 N.J. Super. 159, 169 (App. Div. 2017).

Based on the testimony and evidence presented at the pretrial evidentiary hearings, the motion judge found that the roadside questioning of defendant was not custodial in nature and, thus, Miranda warnings were not required. That finding was premised on additional findings of fact, which included that defendant was not under arrest, was not placed in handcuffs, and was not subject to coercive questioning. Instead, defendant simply was asked to explain what happened.

The motion judge also recognized that defendant was not free to leave the scene because the police were investigating a motor vehicle accident. The judge found, however, that under the totality of the circumstances, defendant's detention did not become the functional equivalent of an arrest. All of the motion judge's factual findings are supported by credible evidence. Moreover, the judge's application of those facts to the law was correct. Accordingly, we find no error in the decision to deny the motion to suppress defendant's roadside statements. Moreover, the statements used at trial were properly admitted.

2. The Jury Instructions on Causation

Causation is one of three elements that the State must prove beyond a reasonable doubt for the jury to find a defendant guilty of second-degree vehicular homicide. N.J.S.A. 2C:11-5; State v. Buckley, 216 N.J. 249, 262 (2013). "Causation is a factual determination for the jury to consider, but the jury may consider only that which the law permits it to consider." State v. Pelham, 176 N.J. 448, 466 (2003).

To find causation, the jury must engage in a multi-step analysis. Buckley, 216 N.J. at 263; see N.J.S.A. 2C:2-3. Initially, the jury must determine whether the State has established "but for" causation, by demonstrating that the event would not have occurred absent the defendant's conduct. N.J.S.A.

2C:2-3(a); Buckley, 216 N.J. at 263. Next, because the State also has to prove the mens rea of recklessness to establish vehicular homicide, the jury must conduct a "culpability assessment." N.J.S.A. 2C:2-3(c); Buckley, 216 N.J. at 263.

To find culpability in a vehicular homicide case, the jury must determine that "the actual result [either (1) was] within the risk of which the actor [was] aware or, . . . [(2)] involved the same kind of injury or harm as the probable result . . . ." N.J.S.A. 2C:2-3(c). Thus,

> the first prong of N.J.S.A. 2C:2-3(c) requires the jury to assess whether defendant was aware that his allegedly reckless driving gave rise to a risk of a fatal motor vehicle accident. . . . The second prong of N.J.S.A. 2C:2-3(c) . . . requires proof that the actual result -- in this case the victim's death -- "involves the same kind of injury or harm as the probable result" of the defendant's conduct.
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> [Buckley, 216 N.J. at 264-65 (quoting Pelham, 176 N.J. at 461).]

"If the jury determines that the State has proven beyond a reasonable doubt that the defendant understood that the manner in which he or she drove created a risk of a traffic fatality, the element of causation is established under the first prong of N.J.S.A. 2C:2-3(c)." Ibid. (citing State v. Martin, 119 N.J. 2, 12 (1990)).

The second prong requires "the jury to determine 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." Pelham, 176 N.J. at 461 (quoting Martin, 119 N.J. at 13). "'Intervening cause' is defined as '[a]n event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury.'" Ibid. (quoting Black's Law Dictionary (7th ed. 1999)); see also Buckley, 216 N.J. at 265 ("[An] 'intervening cause' denotes an event or condition which renders a result 'too remote, accidental in its occurrence, or dependent on another's volitional act' to fairly affect criminal liability or the gravity of the offense.").

In Buckley, our Supreme Court held that evidence that the deceased victim was not wearing a seat belt at the time of the motor vehicle accident "is irrelevant to both 'but for' causation under N.J.S.A. 2C:2-3(a)(1) and the jury's causation determination under the first prong of N.J.S.A. 2C:2-3(c)'s statutory test —— whether defendant was aware that the manner in which he drove posed a risk of a fatal accident." Buckley, 216 N.J. at 255. Additionally, this court has held that "[even] [i]f the careless driving of another or the victim's failure to wear a seat belt also were contributing causes of the accident and resulting

fatality, this would not absolve defendant of responsibility." State v. Radziwil, 235 N.J. Super. 557, 570 (App. Div. 1989), (citing N.J.S.A. 2C:2-3(c)), aff'd o.b., 121 N.J. 527 (1990).

In Pelham, the Court held that the victim's removal from life support, five months after a motor vehicle accident, was not "an independent intervening cause capable of breaking the chain of causation triggered by defendant's wrongful actions." Pelham, 176 N.J. at 468. Accordingly, the Court held that the jury could not consider a victim's removal from life support to negate a defendant's criminal liability. Id. at 467.

Here, defendant raises two arguments regarding causation. First, he contends that the trial court effectively negated the jury instruction on "but for" causation, by instructing the jury on a factual stipulation in which the parties agreed that A.B. died as a direct result of being ejected from defendant's vehicle. Second, defendant argues that the trial court erred in denying his request to admit evidence that A.B. was not wearing a seat belt. Both these arguments lack merit and we reject them.

Initially, we note that defendant did not object to the causation charge given at trial. Therefore, we review the charge for plain error. R. 2:10-2. Regarding the exclusion of the seat belt evidence, we afford deference to the trial court's evidentiary

rulings and, thus, review for an abuse of discretion. State v. Scharf, 225 N.J. 547, 572 (2016).

In this case, the trial court followed the model jury charges for vehicular homicide. Indeed, those charges track the law as set forth in Buckley. Consequently, the jury was told that they had to determine causation by first determining that defendant's conduct caused A.B.'s death, and second that if the jury determined that defendant had acted recklessly, A.B.'s death must have been within the risk of which defendant was aware. Those instructions were accurate and were in accordance with the law. Consequentially, we find no error with the jury instructions on causation.

Given the facts of this case, the trial court also did not err in precluding evidence that A.B. was not wearing a seat belt. Whether A.B. was wearing a seat belt was not relevant to "but for" causation or the jury's culpability determination under the first prong of N.J.S.A. 2C:2-3(c). Buckley, 216 N.J. at 254. Moreover, because A.B. failed to secure her seat belt before defendant's reckless driving, that failure could not constitute an intervening cause under prong two of N.J.S.A. 2C:2-3(c). See Pelham, 176 N.J. at 461. In other words, A.B.'s failure to wear a seat belt did not come between defendant's reckless driving and A.B.'s death.

The trial court here also instructed the jury that "whether or not [A.B.] was wearing a seat belt is not relevant to the causation issue." That instruction was correct. In Buckley, the Court explained that if evidence of the victim not wearing a seat belt is admissible for another relevant purpose, the jury must be instructed on what the seat belt evidence is not relevant to prove. Buckley, 216 N.J. at 255.

3. Testimony and References to Defendant Driving at 100 Miles Per Hour

Next, defendant argues that the trial court, the prosecutor, and the State's expert witness erred by repeatedly telling the jury that defendant had been driving at 100 miles per hour just before the collision. The testimony and references to the speed at which defendant was traveling were based on a statement defendant gave to Detective Smith when he was questioned at the roadside of the accident. In that regard, Smith testified as to those statements during defendant's trial. Accordingly, defendant's argument concerning the references to the speed at which he was traveling is dependent on his argument that those statements should have been suppressed. As we have already held that the statements were admissible, this argument also fails.

4. The State's Use of a Transcript of the Audio Recording of the Statement Defendant Made at the Roadside

As previously noted, when Detective Smith questioned defendant at the roadside their conversation was recorded by a mobile recording device. Portions of the recording were inaudible because of the traffic and background noise on the roadside of the Garden State Parkway.

The court conducted a Rule 104 hearing in accordance with State v. Driver, 38 N.J. 255 (1962). N.J.R.E. 104. At that hearing, Detective Smith testified that he performed a pre-operational check of the audio and video equipment used to record defendant's roadside statement to ensure that they were functioning properly. He also testified that he reviewed the transcript of the audio recording prepared by the Prosecutor's Office and confirmed that it was consistent with the audio recording and his recollection of his conversation with defendant. The trial court found Smith's testimony to be credible. The trial court also found that the audio recording was sufficiently reliable to be played for the jury. To assist the jury, the court also allowed the State to provide the jury with a transcript of the recording for reference, although the transcript itself was not admitted into evidence.

Defendant contends that the trial court erred in allowing the State to use the transcript of defendant's roadside statements made to Smith. We disagree.

A trial court's ruling on the admissibility of evidence is "subject to limited appellate scrutiny." State v. Buda, 195 N.J. 278, 294 (2008). We accord considerable deference to a trial court's findings based on the testimony of witnesses. State v. Elders, 192 N.J. 224, 244 (2007).

The standards for admissibility of an audio recording are set forth in State v. Driver, 38 N.J. at 287. An audio recording is admissible in a criminal trial if the speakers are identified and

> (1) the device was capable of taking the conversation or statement, (2) its operator was competent, (3) the recording is authentic and correct, (4) no changes, additions or deletions have been made, and (5) in instances of alleged confessions, that the statements were elicited voluntarily and without any inducement.
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> [Ibid.]

A trial judge should listen to the recording outside of the presence of the jury and decide if it is "sufficiently audible, intelligible, not obviously fragmented, and . . . whether it contains any improper and prejudicial matter which ought to be deleted." Id. at 288.

Here, the trial court conducted a proper Driver hearing, made the appropriate determinations, and found that the recording itself was admissible. The court also allowed the State to use a transcript of the recording to assist the jury. In that regard, the trial court instructed the jury that they were to base their factual findings on the actual audio recording, which was admitted into evidence. Specifically, the trial court instructed the jury that if they determined there was a difference between the transcript and the audio recording, they were to rely on the recording because the transcript was not in evidence and was merely "a guide." We discern no error or abuse of discretion in the court's decision to allow the use of the transcript.

5. The Sentence

Our review of sentencing decisions is "narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). We will affirm a sentence unless:

> (1) the sentencing guidelines were violated;
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> (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or
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> (3) "the application of the guidelines to the facts of [the] case make the sentence clearly unreasonable so as to shock the judicial conscience."

> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Whether a sentence violates sentencing guidelines is a question of law that we review de novo. State v. Robinson, 217 N.J. 594, 604 (2014).

Defendant was convicted of second-degree vehicular homicide. He was sentenced to six and one-half years in prison, subject to NERA. In imposing that sentence, the sentencing judge provided a detailed analysis and made specific findings concerning the aggravating and mitigating factors. In that regard, the court found aggravating factors three (the risk of re-offense), nine (the need to deter), and twelve (victim over sixty years old). N.J.S.A. 2C:44-1(a)(3), (9), (12). The court then found mitigating factors three (strong provocation), six (restitution), seven (no prior criminal record), eight (circumstances unlikely to reoccur), nine (good character), and ten (will respond well to probation). N.J.S.A. 2C:44-1(b)(3), (6) to (10). All of those factors were supported by evidence in the record with one exception. The exception is mitigating factor ten, which did not apply because defendant was being sentenced to incarceration. See State v. Sene, 443 N.J. Super. 134, 144-45 (App. Div. 2015) (holding that mitigating factor ten is not applicable where defendant did not receive a probationary sentence).

The sentencing judge then found that the aggravating factors and mitigating factors were in equipoise. He went on to explain that if he had to "tip the scales" he might find that the mitigating factors "slightly outweigh[ed]" the aggravating factors. The judge also stated, however, that he did not find that the mitigating factors substantially outweighed the aggravating factors. Accordingly, the judge imposed a sentence in the low range for a second-degree crime. N.J.S.A. 2C:43-6(a)(2) (setting forth the range for a second-degree crime of between five and ten years of incarceration).

Defendant contends that the sentencing judge erred by not imposing a sentence in the third-degree range. The record does not support such an argument. To sentence a criminal defendant in a lower range, the court must find that the mitigating factors substantially outweigh the aggravating factors and that there are unique circumstances warranting a departure from the sentencing guidelines. See Sene, 443 N.J. Super. at 145 (quoting N.J.S.A. 2C:44-1(f)(2)). Here, we find no abuse of discretion and no error in the application of the sentencing guidelines.

6. Whether There Were Cumulative Errors Warranting Reversal

Finally, defendant argues that if each of his arguments are insufficient to warrant a reversal, cumulatively, the errors should support a reversal. Here, however, we have found that

there were no errors and, thus, there was no cumulative effect justifying a reversal of the jury verdict. Instead, although the record reflects that this was a tragic situation, defendant received a fair trial and the jury's verdict is supported by the evidence.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION