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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1651-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.K.,[1]

Defendant-Appellant.

Submitted September 18, 2023 – Decided October 19, 2023

Before Judges Sabatino and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 90-08-0994.

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

[1] We use initials and pseudonyms to protect the privacy of the victim and juror and preserve the confidentiality of these proceedings. N.J.S.A. 2A:82-46(a); R. 1:38-3(c)(9).

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Andre R. Araujo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant, R.K., appeals the trial court's October 21, 2020 order denying his motion for a new trial filed over twenty-five years after his 1992 trial that resulted in his conviction of numerous offenses. Following our review of the record and the applicable legal principles, we affirm.

I.

Because we write primarily for the parties, who are familiar with the extensive record in this case, we summarize the underlying facts, procedural history, and trial court decisions. We need not recount the details underlying the sexual assault and other charges, which are discussed in our prior decisions.

In 1992, defendant was tried and convicted of second-degree sexual assault of minor, N.J.S.A. 2C:14-2(b), fourth-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a), and third-degree terroristic threats, N.J.S.A. 2C:12-3(a). In 1993, the trial court sentenced defendant to ten years in prison.

In 1995, this court affirmed defendant's conviction and the sentence imposed.[2] In 1997, defendant moved for a new trial arguing one of the child victims had recanted. The trial court denied the motion and in 1999, we affirmed the order denying the motion.[3] In 2000, the trial court denied defendant's petition for post-conviction relief (PCR).[4] We denied the PCR appeal.[5]

In August 2018, defendant filed a pro se PCR petition, asserting, among other things, he had been advised "a deliberating juror failed to disclose during voir dire that she was a victim of sexual assault and, therefore, should not have been allowed to sit as a juror." The trial court summarily denied the PCR application as time barred, and defendant did not appeal.

In September 2018, defendant filed a pro se motion for a new trial advancing the same arguments set forth in the recently denied PCR petition.

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[2] State v. R.K., No. A-5368-92 (App. Div. June 6, 1995). The Supreme Court denied defendant's petition for certification in 1999. 161 N.J. 150 (1999).

[3] State v. R.K., No. A-6105-96 (App. Div. Mar. 25, 1999).

[4] On August 20, 2010, the trial court entered a change of judgment of conviction, amended for degree, and resentenced defendant to an aggregate term of fifteen years in prison, with a seven-and-a-half-year period of parole ineligibility.

[5] State v. R.K., No. A-3902-99 (App. Div. Nov. 7, 2021). We noted in that decision this was defendant's second PCR petition, but the date of the initial PCR application is not referenced in that decision or by the parties in this appeal.

Defendant later provided an investigation report dated November 14, 2018, summarizing a statement from Anthony Lewis. Lewis advised the investigator he had an intimate relationship with a person named V.M. in 1990. During that time, Lewis learned V.M. was a juror in a case, but she did not reveal the identity of the defendant, or what the case was about. However, once the trial ended, V.M. allegedly advised Lewis that R.K. was the defendant in the case, which involved allegations of sexual assault. Although V.M. did not reveal to Lewis whether she thought defendant was guilty, Lewis assumed V.M. found defendant guilty. Upon learning V.M. was on the jury, Lewis told V.M. she should not have served because she had previously revealed to him she was sexually molested by her father when she was a teenager.[6]

The trial court initially heard oral argument on the motion for a new trial in July 2019. The court noted defendant needed to "present a prima facie case, beyond a hearsay statement, that [V.M.] was actually on this jury."

[6] The State filed a response to defendant's motion asserting the investigator's report summarizing Lewis' statements was unreliable hearsay-within-hearsay. See N.J.R.E. 805. The State also added that the allegations in the report did not constitute newly discovered evidence for a new trial because the allegations did not affect the facts regarding the sexual assault allegations against defendant.

Furthermore, the court requested defendant to obtain information—other than Lewis' hearsay statement—from other people who knew about the facts regarding V.M. The court also expressed its hesitancy to "disturb a [twenty-seven]-year-old verdict predicated upon information that is unverified." With the State's consent, the court offered defendant the opportunity to withdraw his application without prejudice so he could have some time to secure additional missing information. The court provided defendant a year to re-file the motion.

In July 2020, defendant re-filed his motion for a new trial and a motion to interview V.M. However, he did not provide additional information beyond the investigator's report. The trial court heard oral argument in October 2020, and, again, expressed it had a "fundamental problem with [defendant's] application [because] there [was] no credible evidence that [V.M.] was actually on this jury . . . ."

Defendant appealed. While the appeal was pending, defendant moved for a remand based on newly obtained evidence showing V.M. was a deliberating juror. Defendant had located a portion of the trial file "which had been misplaced in storage" and found the roster of jurors from the trial.

V.M.'s name was on that list. On March 3, 2022, we issued an order remanding the matter back to the trial court, stating:

> On remand, we leave to the discretion of the judge the details of whether to grant defendant's renewed request to question one of the jurors. Our remand is not intended to signal a position on the merits of the remand proceedings, which should be concluded within sixty days of this order. The judge should make an appropriate remand record including findings and conclusions of law. We do not retain jurisdiction, and the appeal will continue before the merits panel.

On April 20, 2022, the trial court heard oral argument pursuant to the remand. In the interim, the trial court had also located notes from the court clerk and found V.M. was a juror.[7] The trial court explained:

> [T]o clarify my order . . . my position was . . . that before I would bring in . . . a deliberating juror to question them about something like this[,] I would have to have a couple of fundamental pieces of information.
>
> First and foremost is were they on the jury?
>
> . . . .
>
> The second order of business is were there questions elicited that would have required that type of a response?

[7] The transcripts from the 1992 trial are apparently no longer available.

> And[] third, was there a response given?
>
> [L]ast time I said I think it would be very important to get a transcript of the voir dire for this particular juror.
>
> Now, I am[] also[] aware and I know the date that on the fifth of May of 1992[,] there was a second voir dire of that same juror . . . . What was that issue? I do not know.
>
> . . . .
>
> [T]he point is . . . there would have to be a substantial reason beyond a hearsay statement to compel that kind of an inquiry.

The court also reiterated its hesitancy to disturb the verdict on a "matter [that] has been thoroughly vetted through the Appellate Division" because of the possibility that in a span of thirty years, recollections and motivations change.

The court scheduled a continuation of the hearing for May 2, 2022, and, thereafter, rendered an oral and subsequent written decision. The court noted the evidence presented did not go to the substance of the case for which defendant was on trial. Therefore, the court determined defendant had not met the standard set forth in State v. Carter[8] for a new trial based on newly discovered evidence. The trial court also noted the kind of issue raised by

[8] 85 N.J. 300 (1981).

defendant's motion was more suitable for a PCR application. Ultimately, the trial court denied both the motion to interview V.M. and the motion for a new trial based on newly discovered evidence. This appeal followed.

II.

Defendant raises the following points on appeal:

> POINT I
>
> IT WAS PREMATURE AND UNFAIR FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTION FOR A NEW TRIAL WITHOUT FIRST TAKING TESTIMONY FROM V.M., ANTHONY LEWIS[,] AND TRIAL COUNSEL.
>
> POINT II
>
> THE TRIAL COURT FAILED TO CONSIDER DEFENDANT'S MOTION FOR A NEW TRIAL UNDER THE "INTERESTS OF JUSTICE" STANDARD PURSUANT TO RULE 3:20-1.
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> POINT III
>
> AS THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S REQUEST TO SUBPOENA V.M. TO TESTIFY AT AN EVIDENTIARY HEARING, THIS MATTER SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING.
>
> POINT IV
>
> FUNDAMENTAL FAIRNESS AND FAIR PLAY REQUIRE THE RELAXATION OF ANY PROCEDURAL BARS AS THE ISSUE IS

WHETHER DEFENDANT'S RIGHTS TO AN UNBIASED JURY AND FAIR TRIAL ARE AT STAKE. (Partially raised below).

A.

More particularly as to the first two points, defendant contends Lewis' assertions, under Carter, were "newly discovered evidence that called into question whether the verdict was the product of a fair and impartial jury" and that the trial court's analysis was overly rigid and formulistic. Defendant further asserts the court did not analyze his claim under the "interest of justice standard" under Rule 3:20-1. Relatedly, as to the third point, defendant argues the trial court erred by not interviewing V.M. pursuant to Rule 1:16-1.

The State counters that V.M.'s alleged statements did not implicate any issues regarding defendant's guilt and was "not material to his trial and therefore not proper[] fodder for a [m]otion for [a] [n]ew [t]rial under Carter, but rather grounds for a [PCR]." The State further contends defendant previously attempted to raise the same issue in a PCR application, which was denied, and the new motion is an "inappropriate attempt at a second bite at the apple."

"A trial court's ruling on a motion for a new trial 'shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.'" State v. Armour, 446 N.J. Super. 295, 305 (App. Div. 2016) (quoting R. 2:10-1). "[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse [of discretion] has been shown." Id. at 306 (first alteration in original) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)).

Rule 3:20-1 states: "The trial judge on defendant's motion may grant the defendant a new trial if required in the interest of justice." "[P]ursuant to Rule 3:20-1, the trial judge shall not set aside a jury verdict unless 'it clearly and convincingly appears that there was a manifest denial of justice under the law.'" Armour, 446 N.J. Super. at 305-06. Generally, a motion for a new trial must "be made within [ten] days [of] the verdict or finding of guilty." R. 3:20-2. However, "[a] motion for a new trial based on the ground of newly-discovered evidence may be made at any time . . . ." Ibid.

"[T]o qualify as newly discovered evidence entitling a party to a new trial, the new evidence must be (1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and

not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Fortin, 464 N.J. Super. 193, 216 (App. Div. 2020) (citing Carter, 85 N.J. at 314). "All three [prongs of the] test[] must be met before the evidence can be said to justify a new trial." Ibid. (alterations in original) (quoting Carter, 85 N.J. at 314). "The defendant has the burden to establish each prong is met." Ibid. (quoting State v. Smith, 29 N.J. 561, 573 (1959)).

The first and third prongs of the Carter test "are inextricably intertwined." State v. Nash, 212 N.J. 518, 549 (2013); see also State v. Behn, 375 N.J. Super. 409, 432 (App. Div. 2005) (recognizing the "analysis of newly discovered evidence essentially merges the first and third prongs of the Carter test"). Under the first prong, "[m]aterial evidence is any evidence that would have some bearing on the claims being advanced." Nash, 212 N.J. at 549 (alteration in original) (quoting State v. Ways, 180 N.J. 171, 188 (2004)). As such, "evidence that supports a defense, such as [an] alibi, . . . would be material." Ways, 180 N.J. at 188. However, "[d]etermining whether evidence is 'merely cumulative, or impeaching, or contradictory,' necessarily implicates prong three, 'whether the evidence is "of the sort that would

probably change the jury's verdict if a new trial were granted."'" Nash, 212 N.J. at 549 (quoting Ways, 180 N.J. at 188-89).

Whether there was good cause to permit the post-trial interrogation of jurors pursuant to Rule 1:16-1 is a question of law which we review de novo. State v. Griffin, 449 N.J. Super. 13, 18-19 (App. Div. 2017). However, deference is given to the factual findings of a judge when that judge has made their findings based on the testimonial and documentary evidence presented at an evidentiary hearing or trial. State v. Hubbard, 222 N.J. 249, 269 (2015).

Rule 1:16-1 provides: "Except by leave of court granted on good cause shown, no attorney or party shall directly, or through any investigator or other person acting for the attorney[,] interview, examine, or question any grand or petit juror with respect to any matter relating to the case." We have long recognized the strong public interest underpinning the need to protect the confidentiality of the jury's deliberative process. State v. Young, 181 N.J. Super. 463, 468-69 (App. Div. 1981). Protecting the jury's deliberative process during and after the trial is an indispensable part of creating an environment that allows individual jurors to express their views of the evidence freely and without fear of retribution. Recalling a juror for a post-verdict voir dire is an "extraordinary procedure" that should be invoked only

when good cause is demonstrated. State v. Athorn, 46 N.J. 247, 250 (1966); see also R. 1:16-1.

Here, in addressing defendant's motion for a new trial, the trial court found the following facts: V.M. was a juror in defendant's trial; defendant was made aware of Lewis' allegation in 2012 (twenty years after the alleged statements were made and approximately six years before he filed a PCR petition or motion for a new trial); no information has been provided regarding the voir dire used during the trial or V.M.'s responses; the facts alleged in defendant's certification would not be admissible before a jury in a re-trial; and defendant's application is predicated only upon a motion for a new trial based on newly discovered evidence.

The court next addressed whether it should interview V.M. in the context of analyzing the Carter test. The court held V.M.'s alleged statements were not evidence that would be admissible at trial because it would "never go before a jury, and therefore could not alter the verdict."[9] We agree the information regarding the potential bias of a juror does not go to a material

[9] The court also commented this issue was better suited for a PCR application but noted the most recent PCR application, filed shortly before the motion for a new trial, was denied and not appealed. We take no position on the court's comments concerning the PCR issues, as the issue is not before us.

issue of defendant's case under Carter because it does not have a substantive bearing on the sexual assault claims against defendant and is not the type of evidence that would alter the evidential support for defendant's verdict. To be sure, we recognize the constitutional importance of a fair and impartial jury, see State v. Andujar, 247 N.J 275, 310 (2021), and do not suggest that a timely and adequately substantiated contention of juror bias based on competent evidence can never be remedied. Here, however, the extremely dated and belated application and its hearsay deficiencies do not justify intervention.

Defendant argues the trial court failed to analyze his claims under the "interest of justice standard" under Rule 3:20-1 given defendant filed his motion pursuant to both Rule 3:20-1 and Rule 3:20-2. However, as discussed above, motions for new trials are governed by Rule 3:20-1. Rule 3:20-2 merely provides the time frame for filing a motion under Rule 3:20-1; it is not a separate avenue of relief. The thrust of defendant's application for a new trial was based on newly discovered evidence and, therefore, defendant referenced Rule 3:20-2 because motions based on newly discovered evidence under Rule 3:20-2 may be "made at any time." Accordingly, the trial court correctly analyzed this motion as one for a new trial based on newly

discovered evidence. The court was not addressing a PCR application, which the court noted had previously been filed based on the same theory. That application was dismissed and not appealed. In short, we conclude the court did not misapply its discretion in denying the motion for a new trial.

The trial court denied defendant's motion to interview V.M. because defendant did not proffer sufficient evidence to support his motion. The court deemed Lewis' hearsay statement regarding V.M.'s alleged statement—conveyed twenty years after it was purportedly made, and then not raised by defendant for approximately six additional years—as an insufficient basis to warrant bringing V.M. to court for an interview. Given that recalling a juror for a post-verdict voir dire is an "extraordinary procedure" that should be invoked only when good cause is shown, Athorn, 46 N.J. at 250, we discern no error in the court's determination to deny the request under the contentions presented in this case.

B.

Lastly, defendant submits he is entitled to relief under the doctrine of fundamental fairness.[10] We decline to address this argument as this issue was

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[10] "The doctrine of fundamental fairness 'is an integral part of due process, and is often extrapolated from or implied in other constitutional guarantees.'" State

not directly raised before the trial court. "For sound jurisprudential reasons, with few exceptions, '[we] will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'" State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Indeed, our Supreme Court has long held appellate courts do not "consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quotations omitted). "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012).[11]

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v. Miller, 216 N.J. 40, 71 (2013) (quoting Oberhand v. Dir., Div. of Tax'n, 193 N.J. 558, 578 (2008)). "The doctrine effectuates imperatives that government minimize arbitrary action, and is often employed when narrowed constitutional standards fall short of protecting individual defendants against unjustified harassment, anxiety, or expense." Ibid. (quoting Doe v. Poritz, 142 N.J. 1, 109 (1995)). "'Fundamental fairness is a doctrine to be sparingly applied.' The doctrine is 'applied in those rare cases where not to do so will subject the defendant to oppression, harassment, or egregious deprivation.'" Id. at 71-72 (citations omitted) (quoting Doe, 142 N.J. at 108).

[11] Defendant also contends we should consider this appeal under the fundamental injustice standard for a PCR petition pursuant to Rule 3:22-12. As

To the extent we have not otherwise addressed defendant's arguments, they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION

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noted previously, this is an appeal from a motion for a new trial not a PCR application. Therefore, we do not consider this argument for the same reasons noted above under Nieder.