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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1580-11T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEPHEN F. SCHARF,

Defendant-Appellant.

Argued May 20, 2014 – Decided August 11, 2014

Before Judges Reisner, Alvarez and Higbee.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 09-08-1485.

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

Catherine A. Foddai, Senior Assistant Prosecutor, argued the cause for respondent (John L. Molinelli, Bergen County Prosecutor, attorney; Ms. Foddai, of counsel and on the brief).

PER CURIAM

Tried by a jury, defendant Stephen F. Scharf was convicted of first-degree purposeful and knowing murder, N.J.S.A. 2C:11-3(a)(1) and N.J.S.A. 2C:11-3(a)(2). On October 21, 2011, he was

sentenced to life in prison, subject to thirty years of parole ineligibility. Defendant appeals, and we reverse.

The facts are taken from the trial record. On September 20, 1992, defendant's wife Jody Scharf was found dead at the bottom of the Englewood Cliffs in Bergen County. On the evening in question, defendant guided the police over the top of the cliffs through a wooded area, beyond a green cable fence meant to keep visitors out, and, ultimately, to a flat rock, shaped like a bench, from which he told police that his wife had fallen. The victim's pocketbook was on a ledge about eight feet below.

It was some time before Scharf's body was located. Initially, although defendant was questioned, he was not taken into custody. One officer at the scene recalled seeing defendant kneeling by the patrol car and praying. As another officer drove defendant to the police station before the discovery of the body, defendant told him: "[W]e were walking and she said to me to go back to the car and get the blanket, and she slipped and I didn't see her anymore."

Later that evening, defendant told a third police officer that he and his wife had been headed towards a comedy show in New York City. They ended up at Rockefeller Lookout, which defendant described as "their spot." Defendant said that he and

Scharf had been drinking in his car, left the vehicle, and walked to the cliff's edge, climbing through the fence onto the rock. The victim was sitting on defendant's lap, and the couple was kissing and hugging. Defendant became uncomfortable and told his wife that he was going to go to the car to get a blanket and some wine. He described seeing Scharf starting to get up and, then, falling forward, telling him, "No, don't go." In his oral and written statement, defendant claimed that after she fell forward, he neither heard nor saw Scharf again.

Once her body was located, Scharf was pronounced dead by the medical examiner over the telephone. She was later found to have a blood alcohol content of .12 percent.

After discovery of the body, defendant consented to the search of his vehicle, which was still parked at Rockefeller Lookout. In the back seat of the car, police found a red nylon bag, which contained a blue nylon bag and a Coleman cooler. Inside the cooler was a wine glass, one full and one empty bottle of wine coolers, and a steak knife. Inside the blue bag was a green blanket, ace bandages, two white towels, a candle, a plastic bag with a receipt, including one for cheese purchased that afternoon, a box of crackers, and a small jewelry box containing a chain and gold cross. At the bottom of the blue bag was a claw hammer.

When defendant was interviewed on the following day, September 21, 1992, he reiterated that he and Scharf had intended to go to a nightclub and ended up at Rockefeller Lookout. The parties' son, Jonathan, who was ten years old when his mother died, corroborated that on that night his parents drove him to a friend's house because they planned to go to a comedy club in New York City. The night before, he accompanied his parents to a late dinner. His mother had asked him to join them because she did not want to be alone with defendant.

Returning to defendant's statement to police, he also acknowledged being served about two weeks earlier with divorce papers, in which Scharf alleged he was abusive and unfaithful. Defendant told the officers that he and Scharf had an open marriage but that he hoped that they could reconcile. The trip to Englewood Cliffs was part of his reconciliation plan.

Defendant told police that for that reason he had broken off his relationship with two women he had been seeing, K.S. and T.S. He allegedly ended his relationships, with T.S. on Labor Day, and with K.S. on September 18.

When the officer asked defendant about the presence of the hammer in the bag, defendant explained that he mistakenly left it there after repairing a kitchen drawer. He had put the hammer in the bag on his way out of the house so that he could

put it back in the garage but had forgotten about it. He also told the officer that the gold chain was a reconciliation present for his wife.

An officer from Washington Township Police Department kept defendant company during the search of his home two days after the death. The officer reported that, at one point, defendant turned to him and asked: "[Y]ou don't believe this was an accident?" or "[Y]ou don't believe me?" The officer responded that he did believe that an accident had occurred, at which point defendant said "no" and put his head down. Shortly thereafter, he asked to speak to a priest. The officer reported the conversation, which was not followed up on by the investigators.

A surveyor measured distances from the point where Scharf's body was found. He testified that the fall from the cliff to the ground covered 119 feet, 2 inches vertically, and that Scharf's body landed, horizontally, a distance of 52 feet, 5 inches away from the face of the cliff. Defendant called as his expert a civil engineer who testified that Scharf's body had to have been projected out some 52 feet from the cliff to strike the tree through which her body travelled before it struck the ground. He testified: "[F]rom an engineering standpoint, I can't figure out any manner . . . that a body can get

accelerated to [thirteen] miles an hour and be projected out unimpeded to hit that tree. . . . I can't come up with anything." He speculated that her body had projected out that distance because of "deflect[ing] off the edges, and be[ing] projected out each time."

The parties' son Jonathan testified that, when his mother died, his parents no longer shared a bedroom. His father had introduced him to other women that he was seeing. Jonathan acknowledged that his mother drank, which his father did not condone. Jonathan also said that his mother was terrified of heights and that he therefore did not find believable his father's explanation of their presence on the cliff. Scharf's brother also testified about her fear of heights.

In 2003, defendant finally processed the paperwork to collect the payout on the life insurance proceeds on Scharf's life, a $300,000 policy with a $200,000 accidental death benefit. Since defendant did not initially claim the money, the insurance company actually paid the funds into the Unclaimed Property and Trust Fund of the State of New Jersey where they remained from 2000 to 2003, by which time the proceeds grew to $730,154.27. When defendant collected the money, the funds came to $770,650.83. Jonathan is the contingent beneficiary, meaning

that, if defendant is found guilty, Jonathan would have a claim to the money.

The matter was reinvestigated in 2004, including a visit by the medical examiner to the site where the body was found. As a result, she amended the death certificate to reflect that the cause of death was homicide, as opposed to "could not be determined." The State then retained a forensic pathologist, as did defendant.

The State's expert confirmed the medical examiner's opinion that the death could only have been the result of something other than an accidental fall. Defendant's pathologist testified to the contrary, that the unusual pattern of injuries that led to Scharf's death were the result of her striking only one side of her body at an "intermediary point" on the way down.

K.S. and T.S., the two women with whom defendant was romantically involved prior to his wife's death, denied his claim that he had told them that the relationships were over and that he wanted to reconcile with his wife. To the contrary, K.S. testified that defendant said he was considering a divorce. T.S. reported that defendant told her that he was under a lot of pressure but that if she would "give [him] to the end of September [] everything w[ould] be okay."

I.

The heart of the appeal is a challenge to the judge's admission of multiple hearsay statements made by Scharf's counselor and Scharf's friends. Pre-trial, the judge denied defendant's motion to suppress hearsay testimony regarding Scharf's statements, such as that if she were to be found dead, it would have been at defendant's hands, and that she was afraid of him. We summarize the relevant testimony. The admission of virtually all of the testimony we find to have been prejudicial error.

M.D., a friend of Scharf, testified that she had a conversation with her on September 19, 1992, after Scharf filed for divorce. According to Scharf, defendant had threatened her life. Further, Scharf told M.D. that defendant said that he "would see [her] dead before he'd . . . sign [the divorce papers]."

Scharf spoke with another friend, M.G., on September 19, 1992. That day, Scharf passed her a note indicating that defendant was unhappy about the divorce and that she was afraid.

M.H. testified that Scharf expressed that she "was frightened, very, very frightened of her husband," "that [defendant] was going to really hurt her," and that she was "very afraid for her life." On another occasion, Scharf told

M.H. that she was "frightened" that something was going to happen to her following service of the divorce papers because defendant "want[ed her] gone."

Scharf's counselor, Patricia Teague, said that in August 1992, approximately one month before Scharf's death, Scharf told her that she had refused defendant's invitation to accompany him to a picnic at the Palisades. Scharf also said that she had never been to that spot before. Teague repeated that Scharf was afraid of defendant and that he assaulted her in the past.

The judge admitted the friends' statements in reliance upon State v. Benedetto, 120 N.J. 250 (1990), and N.J.R.E. 803(c)(3). He opined that the victim's state of mind was relevant and admissible to refute the defense of accident. He also ruled that Teague's testimony was admissible hearsay in reliance on the N.J.R.E. 803(c)(4) exception for statements made by a declarant "for purposes of medical diagnosis or treatment." Additionally, he considered Teague's statements regarding the relationship between defendant and Scharf to be admissible as part of the "mosaic" of the event, pursuant to State v. Machado, 111 N.J. 480 (1988), and State v. Dreher, 251 N.J. Super. 300 (App. Div. 1991), certif. denied, 127 N.J. 564 (1992).

II.

Defendant raises the following points of error:

> POINT I
> DAMAGING HEARSAY STATEMENTS BY THE DECEDENT WERE IMPROPERLY ADMITTED INTO EVIDENCE OVER OBJECTION. THE DECEDENT'S STATEMENTS INDICATING FEAR OF DEFENDANT WERE PLAINLY INADMISSIBLE UNDER THE "STATE OF MIND" HEARSAY EXCEPTION; OTHERS OF HER STATEMENTS WERE SIMPLY HER INADMISSIBLE HEARSAY RECITATIONS OF DEFENDANT'S CONDUCT OR STATEMENTS; FINALLY, HER STATEMENTS TO HER THERAPIST WERE INADMISSIBLE UNDER THE "MEDICAL TREATMENT" HEARSAY EXCEPTION.
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> POINT II
> THE NEED FOR A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF RECKLESS MANSLAUGHTER WAS CLEARLY INDICATED FROM THE RECORD. (Not Raised Below).

We do not address defendant's second point, made moot by this reversal.

III.

Generally, a trial court is vested with substantial discretion to admit or exclude evidence. State v. Torres, 183 N.J. 554, 567 (2005); State v. Nelson, 173 N.J. 417, 470 (2002). On appeal, such decisions are reviewed for abuse of discretion. State v. Rose, 206 N.J. 141, 157 (2011). This means that the ruling will be sustained "unless it can be shown that the trial court['s] . . . finding was so wide [of] the mark that a manifest denial of justice resulted." State v. Lykes, 192 N.J.

519, 534 (2007) (second alteration in original) (internal quotation marks omitted).

The first question, of course, is whether the evidence is relevant. As formulated in N.J.R.E. 401, relevant evidence is evidence "having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Next, in this context, we ask whether the proffered evidence is hearsay and if so whether it is admissible under an exception to the hearsay rule. See State v. Coder, 198 N.J. 451, 463-68 (2009). N.J.R.E. 801(c) defines hearsay in the familiar language: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

In a case similar to this one, State v. Calleia, 206 N.J. 274, 277-78 (2011), the Supreme Court revisited the admissibility of hearsay statements made by a deceased victim about her relationship to the defendant charged with her murder. In Calleia, the hearsay statements at issue were the victim's discussions regarding her intent to end the marriage and obtain a divorce from defendant. Id. at 284, 286. The Court specifically declined to adopt a per se rule "that hearsay statements by a deceased victim may never be admitted under the state-of-mind exception to prove motive." Id. at 295.

In Calleia, the Court described in some detail the analysis to be followed in deciding whether to admit a victim's hearsay statements as motive evidence. See id. at 288-95. The Court began its discussion by stating that bald statements of fear, when introduced "in conjunction with a defendant standing trial for a violent crime, [] create an unsubstantiated inference that violence permeated the relationship between the victim and the defendant." Id. at 292. The Court differentiated that situation, however, from one in which hearsay statements were being introduced purely to establish a defendant's motive. See id. at 295. Motive evidence is admissible where "it remains a material issue in a case." See id. at 293-94.

Nevertheless, even in those circumstances, such evidence may be excluded upon a strong showing of prejudice under the balancing test contained in N.J.R.E. 403, which states: "[R]elevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." See Calleia, supra, 206 N.J. at 296-97. In making that separate determination, the party urging exclusion must establish that the potential for prejudice "substantially" outweighs the potential probative value. State v. Morton, 155 N.J. 383, 453

(1998). The evidence can be excluded when its probative value "is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation" of the basic issues of the case. See State v. Thompson, 59 N.J. 396, 421 (1971). In sum, "trial courts should remain vigilant to ensure that an evidentiary submission's probative value is not substantially outweighed by prejudicial effect." Calleia, supra, 206 N.J. at 297.

In order to bear its burden to demonstrate admissibility in light of N.J.R.E. 403, the State must show that "the accused probably knew the facts that are alleged to have given rise to the motive." Calleia, supra, 206 N.J. at 296. Only then does the "statement satisf[y] the threshold for relevance." Id. at 296. So long as the State can demonstrate that an accused was aware of the information included in hearsay statements of the decedent, it will have met its burden. Ibid. The evidence is then subject to the balancing test found in N.J.R.E. 403. Id. at 296-97.

In Calleia, to establish that the victim intended to divorce the defendant, several of her statements to others were admitted. Id. at 297-300. They were admitted because they established her state of mind and were, therefore, probative of

the declarant's conduct, i.e., that she intended to file for divorce. Id. at 301. Additionally, the defendant himself admitted to police and friends that he knew his wife was unhappy and considering a divorce. Ibid. As the Court observed, "it takes no great leap of intuition to understand that divorce could motivate a person to kill." Ibid. And, it is a proper jury consideration whether a defendant "might be driven to kill to avoid a divorce, with its attendant costs, or whether the prosecution has failed to show that the asserted motivating factors could in fact drive the defendant to commit the acts alleged." Ibid.

In its discussion, the Court noted that "the victim's hearsay statements [did] not contain otherwise unfounded statements of fear, which would be prejudicial and could potentially inflame jurors." Ibid. The hearsay statements in Calleia did not include language regarding the victim's fear of the defendant, which would have raised prejudice while having no probative value. See id. at 301-02. Even when such statements are relevant, and do have probative value, they are potentially so prejudicial that rigid, strict limitations including clear limiting instructions are necessary in order to avoid the possibility that a defendant's "ability to be assessed fairly by a jury" not be prejudiced. See id. at 302.

In this case, the Court's cautionary language implicates virtually all of the testimony we have described given by the victim's friends and therapist. Scharf's expressions of fear of defendant were neither relevant nor material. The statements were highly prejudicial and clearly cumulative.

The statements were not relevant because Scharf's state of mind was not an issue in the case. Her alleged fear did not keep her from spending time with defendant, as the parties' son testified that his parents had gone to dinner with him the night before her death and that the night that she died she told him they planned to go to a comedy club in New York City. In other words, her state of mind was not relevant to her conduct. Scharf's fears were not a motive for defendant to kill his wife, nor were they admissible to prove something about his state of mind and future conduct.

Contrary to the trial judge's view, Scharf's fear of defendant, even if based on their past history, simply does not make it more or less likely that, once having gone to the Englewood Cliffs with defendant, while she was under the influence of alcohol, an accident could not have occurred. There is no reason that the victim's fear of defendant would have made it less likely that an accident occurred. The State cannot explain how Scharf's fear in any way logically

compromised defendant's defense or bolstered its own case. The State argues that Scharf's fear of defendant would make her less likely to go to the Cliffs with him, but there is no evidence that he forced her to go with him, and there was no evidence of a struggle at the scene. The prejudicial impact of this evidence outweighed its probative value.

We reach the same conclusion as to the counselor's testimony with regard to Scharf's fear of defendant and any history of domestic violence. It is not admissible under N.J.R.E. 803(c)(4), nor were the statements relevant in the first place. Scharf's state of mind, her fear, and the alleged abuse inflicted by defendant were not probative on any issue in the case. See N.J.R.E. 401, 403. Scharf's statement to her counselor that she had never been to Englewood Cliffs is not admissible under N.J.R.E. 803(c)(4) either.

The State's evidence was by no means overwhelming, and we find that the error in this case was "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. We have "a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." State v. Macon, 57 N.J. 325, 338 (1971).

Reversed and remanded for retrial.