SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5586-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT L. HAYES, JR.,

Defendant-Appellant.

Submitted February 7, 2017 – Decided March 5, 2018

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 13-06-0880.

Joseph E. Krakora, Public Defender, attorney for appellant (Lon Taylor, Assistant Deputy Public Defender, of counsel and on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Steven A. Yomtov, Deputy Attorney General, of counsel and on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Defendant Robert L. Hayes, Jr. pled guilty during trial to first-degree murder, N.J.S.A. 2A:11-3(a)(1)-(2), second-degree burglary, N.J.S.A. 2C:18-2, second-degree aggravated arson, N.J.S.A. 2C:17-1(a), and second-degree desecrating human remains, N.J.S.A. 2C:22-1(a)(1)-(2). He was sentenced to thirty years in prison with a thirty-year period of parole ineligibility. Pursuant to his conditional plea, he appeals the denial of his motion to suppress physical evidence collected, and statements he made while in jail, while he was in jail. We affirm his April 23, 2014 judgment of conviction.

I.

Defendant appeals, arguing:

> POINT I — THE WARRANTLESS SEIZURE OF HAYES' CLOTHES AND FINGERNAIL CLIPPINGS AS WELL AS DNA OBTAINED FROM THE CLOTHING, WHILE HE WAS CONFINED AT JAIL, WAS IMPROPER SINCE THERE WAS NO EXIGENCY TO SEIZE THAT MATERIAL.
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> POINT II — HAYES' THIRD STATEMENT MUST BE SUPPRESSED SINCE POLICE INITIATED THE INTERVIEW IN VIOLATION OF AN EARLIER AND UNEQUIVOCAL RIGHT TO COUNSEL, NOTWITHSTANDING RENEWED MIRANDA WARNINGS. U.S. CONST. AMEND. V and XIV; N.J. CONST. (1947) Art. I, pars. 1, 9, 10.

We must hew to our standard of review. "Appellate review of a motion judge's factual findings in a suppression hearing is highly deferential." State v. Gonzales, 227 N.J. 77, 101 (2016). "Those findings warrant particular deference when they '"are

substantially influenced by [the trial court's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy."'" State v. Rockford, 213 N.J. 424, 440 (2013) (citations omitted). "'[A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record.'" Ibid. (citation omitted). "Thus, appellate courts should reverse only when the trial court's determination 'is so clearly mistaken "that the interests of justice demand intervention and correction."'" State v. Gamble, 218 N.J. 412, 425 (2014) (citations omitted). However, "a trial court's legal conclusions are reviewed de novo." Ibid.

II.

We first address defendant's motion to suppress physical evidence. On appeal, he challenges the seizure of the sweatpants and underwear he was wearing on arrest, and his fingernail clippings. We derive these facts from the transcripts of the three-day suppression hearing and the factual findings of the motion court.

The motion court found Sergeant Paul Miller testified credibly to the following.

At about 7:15 a.m. on April 8, 2010, the Old Bridge Police Department (OBPD) received a 9-1-1 call from the victim's daughter reporting that the fifty-two-year-old victim, Petra Rohrbaugh had been killed in her home. The OBPD contacted Sergeant Miller of the homicide unit of the Middlesex County Prosecutor's Office (MCPD). Miller and other members of the MCPD responded to the victim's home. Miller found the victim's rear door had been damaged, indicating entry had been forced. Inside, furniture had been knocked over. He entered the master bedroom, and found the victim's body naked from the waist down, with her knees on the floor and her torso face-down on the bed. Her torso and the bed had been set on fire and were badly burnt. The top half of victim's body appeared to be melted into the bed.

Sergeant Miller saw victim's wrists were tied with cloth, suggesting her wrists had been tied together. There was a cloth gag tied around her head and mouth. It was later discovered her cause of death was asphyxia due to strangulation and smothering. It appeared she had been sexually assaulted.

Sergeant Miller interviewed the victim's daughter, who had last seen the victim on the evening of April 6, had been unable to reach her on April 7, and had discovered the body on April 8, and who told officers that she felt an individual named "Rob" was responsible. She said that "Rob" was squatting in a home next

door to victim's home, that the victim let defendant do some work for her, and that "Rob" had "push[ed] himself too much on her, tried to force his way into her house, yelled and cursed at her, and spit on her car, and that the victim was afraid of defendant. Miller confirmed "Rob" was in fact defendant after speaking with the owners of the house next door. With the owner's consent, Miller searched that house, and found defendant's belongings, as well as a cinder block placed next to the victim's fence which could aid climbing it. A neighbor related how the victim was afraid of defendant, who had made sexual comments to her and tried to get in her house. The neighbor said he had seen defendant near the victim's house on April 7 between 9:00 and 9:30 p.m.

Sergeant Miller reviewed defendant's criminal history. He learned defendant had convictions for aggravated arson, by setting a girlfriend's bed on fire, aggravated assault against her, and criminal mischief. He also learned there were outstanding arrest warrants for defendant.

Officers were able to track defendant to his friend's house in Cliffwood. With the friend's consent, they looked through the house and found defendant hiding in a closet. The officers asked defendant if he was Robert Hayes and he denied it. Only after being showed a picture of himself with his name on it did defendant reveal his identity. At 6:00 p.m., the officers arrested

defendant, who had outstanding warrants, and brought him to the OBPD for questioning.

After defendant received and waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966), at 6:40 p.m. defendant told Sergeant Miller he knew the victim, he did some work for her, and sometimes they read the Bible together. He denied being responsible for her death, denied having a sexual relationship with her, and denied being anywhere near her home in the last four days. He said that during the last week he had been staying at his friend's house in Cliffwood. Defendant said he had been with his girlfriend there. Defendant asked to speak to an attorney, and Miller terminated the interview. At about 8:00 p.m., defendant was charged with hindering his own apprehension, and obstruction of justice.

During defendant's interview, Sergeant Miller noticed there were fresh scratch marks on defendant's wrists that resembled defensive wounds. Moreover, Miller saw defendant and his clothes were filthy, and that defendant's filthy sweatpants bore "stains that could have been consistent with blood stains."

At 9:00 p.m., Sergeant Miller interviewed defendant's girlfriend. She said defendant told her on April 6 that he was

"helping an old lady move" to Maryland on April 7.[1] Later that night, defendant told his girlfriend that he was already on his way to Maryland but defendant's girlfriend realized he was lying when she saw him on April 7, and he admitted he was in Old Bridge the entire time. She believed defendant did not sleep at the Cliffwood house the night of April 6 or 7. When she awoke the morning of April 8, defendant told her he could not go back to Old Bridge, but would not tell her why. She said that for the last three days defendant had been wearing the same clothes including the same sweatpants.

Sergeant Miller also interviewed defendant's friend at 9:50 p.m. The friend reported defendant had left the Cliffwood house at about 8:00 p.m. on April 7. Miller then interviewed the friend's girlfriend, who confirmed that defendant had not slept at the Cliffwood house on the night of April 7, but had unusually appeared there at about 8:30 a.m. on April 8. Both the friend and his girlfriend said defendant had been talking before he left their house on the night of April 6 about moving the lady next door, and acted oddly when informed of her murder.

The interview of defendant's friend's girlfriend ended at about 11 p.m. on April 8. At that time, Sergeant Miller went to

[1] The victim was from Maryland and kept furniture in a storage unit there.

defendant's cell and obtained the clothes defendant was wearing, including his sweatpants and underwear. Miller believed that defendant had been wearing those clothes at the time of the murder, and that fluids or hairs from the victim might be on the clothes.

Also at around 11 p.m., Sergeant Miller began cutting fingernail clippings from defendant. Defendant assisted by biting off the tips of his fingernails and spitting them into the envelope. Miller sought the clippings because in a violent sexual assault the victim's DNA might be under defendant's fingernails.

A.

We first address the warrantless seizures of defendant's fingernail clippings and clothing. Both the United States Supreme Court and the New Jersey Supreme Court protect against "unreasonable searches and seizures" and generally require a warrant issued on "probable cause." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "Warrantless searches are presumptively unreasonable and thus are prohibited unless they fall within a recognized exception to the warrant requirement." State v. Pena-Flores, 198 N.J. 6, 18 (2009), overruled on other grounds, State v. Witt, 223 N.J. 409, 450 (2015). One is "the search incident to a lawful arrest exception articulated in Chimel v. California, 395 U.S. 752 (1969)." State v. Dangerfield, 171 N.J. 446, 455-56 (2002).

"Under the search incident to arrest exception, the legal seizure of the arrestee automatically justifies the warrantless search of his person and the area within his immediate grasp." Pena-Flores, 198 N.J. at 19 (citing Chimel, 395 U.S. at 762-63). "So long as there is probable cause to arrest, the ensuing search is valid even if there is no particular reason to believe that it will reveal evidence, contraband, or weapons. The justification for the search of an arrestee is to preclude him from accessing a weapon or destroying evidence." Ibid. (citing, e.g., Chimel, 395 U.S. at 762-63).

Although the arrest and search are usually contemporaneous, see, e.g., State v. O'Neal, 190 N.J. 601, 634 (2007), "a search incident to an arrest may be valid under some circumstances even though it is not conducted contemporaneously with the arrest." State v. Oyenusi, 387 N.J. Super. 146, 156 (App. Div. 2006) (citing United States v. Edwards, 415 U.S. 800 (1974)). "[O]nce an officer lawfully arrests a suspect, he has the right and duty to search him for weapons and contraband before placing him in a patrol car," and "[i]t also follows that the police have the authority to [perform such a search] at headquarters." State v. Gibson, 218 N.J. 277, 299 (2014); accord, e.g., State v. Paturzzio, 292 N.J. Super. 542, 550 (App. Div. 1996); State v. Johnson, 274 N.J. Super. 137, 155 (App. Div. 1994).

"It is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." Edwards, 415 U.S. at 803; accord State v. Malik, 221 N.J. Super. 114, 121 (App. Div. 1987). The United States Supreme Court in Edwards, upheld the warrantless seizure of a defendant's clothes in jail as a search incident to a lawful arrest. Edwards was arrested at 11:00 p.m. for attempting to break into a post office. Approximately ten hours later, the police took "the clothing which he had been wearing at the time and since his arrest," and determined his clothing bore paint chips from the post office's window. Id. at 801-02.

The United States Supreme Court in Edwards held a search conducted nearly half-a-day after the initial arrest was a valid search warrant:

> [O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.
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> [Id. at 807.]

The Court had no "doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial." Id. at 803-04. The Court ruled "[t]he result is the same where the property is not physically taken from the defendant until sometime after his incarceration." Id. at 807-08.

The principles of Edwards are equally applicable here. Malik, 221 N.J. Super. at 121. Our Supreme Court "has applied the same test to determine the validity of searches incident to arrest [of persons] under the New Jersey Constitution as applies under the Fourth Amendment." Oyenusi, 387 N.J. Super. at 153. Our Supreme Court has "not afforded greater protection regarding the scope of a search incident to a lawful arrest [for a crime] under our State Constitution than that provided in Chimel's interpretation of the Fourth Amendment." Dangerfield, 171 N.J. at 462.

Indeed, even before Edwards our Supreme Court reached a similar result in State v. Mark, 46 N.J. 262 (1966). In Mark, a state trooper arrested defendant, and almost two days later seized his clothing from the jail because the trooper had noticed a bloodstain. Id. at 266, 268, 270. Our Supreme Court found "[t]he taking of the clothing and the examination of the trousers for bloodstains were clearly proper police procedures and were neither

unreasonable nor violative of any of the defendant's constitutional rights." Id. at 277.[2] The Court did not "find any legal significance in" the time "between his arrest and the taking of his clothing at the jail." Id. at 278. "[I]t would make no sense to insist that a defendant's clothes be removed immediately at the time of his arrest though facilities [for re-clothing him] are not available, rather than after his delivery to jail where facilities are available." Ibid. The Court held "the seizure of the trousers at the jail [was] clearly supportable in law" despite the absence of a warrant. Id. at 279.

Under Edwards and Marks, Sergeant Miller did not need a warrant to seize defendant's clothes because the search and seizure were incident to defendant's arrest. It is undisputed that defendant's arrest was valid and supported by probable cause, as set forth in the motion court's opinion. Since arrest, defendant and his clothes were in continuous custody for five hours, a shorter period than in Edwards or Marks. Moreover, defendant's clothes were "immediately associated with the person," and thus could be "searched even a substantial period of time after the

[2] Our Supreme Court in Marks, 46 N.J. at 277-78, relied on Robinson v. United States, 283 F.2d 508 (D.C. Cir. 1960), which was later cited in Edwards, 415 U.S. at 803 & n.4.

arrest." Oyenusi, 387 N.J. Super. at 156-57; see Riley v. California, 573 U.S. __, 134 S. Ct. 2473, 2484 (2014).

Similarly, the police were justified in taking fingernail clippings from defendant as part of the search incident to arrest. In Cupp v. Murphy, 412 U.S. 291, 292 (1973), Murphy was suspected of strangling his wife. When Murphy was at the police station, officers scraped his fingernails and took samples from his fingernails that proved incriminating. Ibid. The United States Supreme Court held that "this search was constitutionally permissible under the principles of Chimel," which "recogniz[ed] an exception to the warrant requirement when a search is incident to a valid arrest." Id. at 295. The Court found "[t]he rationale of Chimel, in these circumstances, justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails." Id. at 296. The Court concluded: "considering the existence of probable cause [to arrest], the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments." Ibid.; see Birchfield v. North Dakota, 579 U.S. __, 136 S. Ct. 2160, 2177 (2016).

In Murphy, the United States Supreme Court approved the fingernail scraping even though the police did not arrest Murphy until about one month later. 412 U.S. at 294. Here, where defendant was validly arrested, "the taking of fingernail scrapings from him were permissible as part of a search incident to a lawful arrest." People v. Costello, 460 N.Y.S.2d 636, 637 (App. Div. 1983). Under Edwards, the police can take fingernail samples incident to arrest even if a defendant has been in jail for several hours. State v. Magnotti, 502 A.2d 404, 407 (Conn. 1985). "A warrantless seizure of . . . the fingernail clippings . . . was reasonable under the facts of this case to protect possible evidence connected with the foul deeds." Commonwealth v. Cross, 496 A.2d 1144, 1150 (Pa. 1985). Therefore, under the search-incident-to-arrest exception, no warrant was required to take fingernail clippings.

Defendant attempts to distinguish Murphy by arguing he was less likely to destroy evidence because he was in jail, while Murphy was not. Defendant's argument stands Murphy on its head.

In Murphy, the Court emphasized that where, as here, a defendant is arrested and taken into custody, "it is reasonable for a police officer to expect the arrestee . . . to attempt to destroy any incriminating evidence then in his possession." 412 U.S. at 295. However, the Court was concerned that "[w]here there

is no formal arrest, as in the case before us, a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person." Id. at 296. The Court had to examine the facts and found, "[t]hough he did not have the full warning of official suspicion that a formal arrest provides, Murphy was sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy what evidence he could without attracting further attention." Ibid. Such an examination was unneeded here, because defendant was formally arrested.[3]

In any event, here defendant had the full warning, both from his formal arrest and from the police interrogation about whether he committed the crimes against the victim, giving him a strong motive to destroy such incriminating evidence. He had already shown his willingness to destroy incriminating evidence more clearly than Murphy, because he had set fire to the victim's body.

Defendant also had the opportunity to destroy the DNA evidence while in jail. The motion court found defendant could "bite his fingernails or wash his hands causing the [DNA] evidence to be ingested, discarded, destroyed, or compromised." See Magnotti, 502

[3] "[A]rresting officers need not determine that the defendant . . . actually intend[s] to destroy evidence before conducting a search incident to arrest." Oyenusi, 387 N.J. Super. at 156 (quoting United States v. Nelson, 102 F.3d 1344, 1347 (4th Cir. 1996)).

A.2d at 407; Cross, 496 A.2d at 1150. Moreover, Miller testified defendant could flush his nail clippings down the toilet, and "could take his underwear, tear it up, throw it in the toilet, flush it down the toilet. He could urinate in his pants, in his underwear which would contaminate the DNA. It wouldn't be hard to destroy that [DNA] evidence." The motion court found the DNA evidence "was readily compromised by urination, tearing and discarding of the cloth, washing of the hands and clothes, or by flushing down the toilet."

Finally, the DNA evidence could be lost even if defendant washed his hands or urinated on his clothes without ill intent. The State has an interest "not just in avoiding an arrestee's intentional destruction of evidence, but in 'evidence preservation' or avoiding 'the loss of evidence' more generally." Birchfield, 579 U.S. at __, 136 S. Ct. at 2182.

Defendant also tries to distinguish Murphy because "the police noticed a dark spot on [Murphy's] finger" which the police suspected "might be dried blood." 412 U.S. at 292. However, the Murphy Court emphasized the police also knew "evidence of strangulation is often found under the assailant's fingernails." Ibid. Here, the police were aware the victim had been asphyxiated as in a strangulation. Moreover, Sergeant Miller had noticed defendant had fresh scratch marks on his wrists that resembled

wounds inflicted by the victim in an attempt to defend herself, as might occur during a strangulation. "The right to scrape the fingernails of one arrested for a fresh murder by strangulation" is "a commonplace incident of the arrest." Franklin v. State, 308 A.2d 752, 761 (Md. Ct. Spec. App. 1973). The motion court correctly found this information gave probable cause to believe defendant's fingernail clippings would produce evidence of crime.

"Probable cause merely requires 'a practical, common sense determination whether, given all of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found[.]"'" State v. Myers, 442 N.J. Super. 287, 301 (App. Div. 2015) (citations omitted).

Similarly, Sergeant Miller had probable cause to believe defendant's filthy, apparently bloodstained clothing would bear evidence of crime. As Miller testified:

> [B]ased on our training and experience we believe that the victim had been sexually assaulted and violently murdered. And as a result of that there could be biological fluids, hairs, tissue from the victim that could have been onto [defendant's] clothes, blood. Again, any type of saliva, bodily fluids, et cetera. We knew that could be on [defendant's] clothes. . . . He was filthy. So we had reason to believe whatever he was wearing he was wearing at the time of the murder.

In addition, during the continued investigation between the arrest and the search, defendant's girlfriend told Miller defendant had been wearing the same clothes throughout the period when the crime occurred. As in Edwards, "the police had probable cause to believe that the articles of clothing he wore were themselves material evidence of the crime[s]" they were investigating. 415 U.S. at 805. Thus, "it was similarly reasonable to take and examine them as the police did, particularly in view of the existence of probable cause linking the clothes to the crime." Id. at 806.

Additionally, the trial court properly found the five-hour gap between defendant's arrest and the search was reasonable. During that time, Sergeant Miller and other law enforcement officers were continuing their investigation of the victim's rape and murder, and interviewing defendant and the persons he claimed "could support his alibi." Those interviews negated defendant's claimed alibi. They also produced additional evidence that defendant interacted with the victim in the period of her murder, and that defendant behaved suspiciously after her death. This evidence, coupled with the evidence obtained before defendant's arrest and in defendant's interview gave police probable cause to believe defendant committed the crimes against the victim. Thus, the "reasonable delay in effectuating [the search incident] does

not change the fact that [defendant] was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention." Edwards, 415 U.S. at 805.

Defendant lastly argues that even if the police did not need a warrant to seize defendant's clothing and nail clippings, the police should have put them in storage and gotten a warrant to test them for DNA. It does not appear defendant raised this argument before the trial court, so we need not entertain it. See Witt, 223 N.J. at 419. In any event, the cases discussed above show that evidence seized under the search-incident-to-arrest exception to the warrant requirement may be subjected to scientific analysis without a warrant. See, e.g., Edwards, 415 U.S. at 805; Murphy, 412 U.S. at 292; Marks, 46 N.J. at 277; Malik, 221 N.J. Super. at 122. There is no reason to require warrants for scientific analysis looking for the victim's DNA.

Defendant cites Riley, but its rationale has no application to searches for a victim's DNA. Riley's rationale was that modern smartphones contain "vast amounts of private personal information" and thus "may reveal 'the privacies of life,' [so] the Court held that law enforcement officers must get a warrant before they may search the contents of a [defendant's] cell phone seized incident to arrest." State v. Lunsford, 226 N.J. 129, 151 (2016) (quoting

Riley, 573 U.S. at __, 134 S. Ct. at 2494-95, and refusing to extend it to telephone records). The United States Supreme Court has held that Riley does not require a warrant for a breath test because it "is no more intrusive than" "scraping underneath a suspect's fingernails" under Cupp. Birchfield, 579 U.S. at __, 136 S. Ct. at 2176-78, 2182-84.

Therefore, we conclude defendant's clothes, his fingernail clippings, and the resulting DNA evidence were legally obtained under the search-incident-to-arrest exception to the warrant requirement. The motion court properly denied the motion to suppress.

B.

In addition, the motion court properly found that defendant's clothing and fingernail clippings were also legally obtained under the exigent-circumstances exception to the warrant requirement. As the discussion above indicates, the seizure of defendant's clothing and fingernail clippings were justified by exigent circumstances.

At the very least, "exigent circumstances will be present when inaction due to the time needed to obtain a warrant will create a substantial likelihood . . . that evidence will be destroyed or removed from the scene." State v. Johnson, 193 N.J. 528, 553 (2008).

> [S]ome factors to be considered in determining whether law enforcement officials faced such circumstances are the urgency of the situation, the time it will take to secure a warrant, the seriousness of the crime under investigation, and the threat that evidence will be destroyed or lost . . . unless immediate action is taken.
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> [Id. at 552-53]

"[N]o one factor is dispositive and exigency must be assessed on a case-by-case basis under a totality-of-the-circumstances standard." State v. Adkins, 221 N.J. 300, 310 (2015).

Here, the crimes under investigation were very serious. Once the officers had completed their interviews on the night of April 8, they had probable cause to believe defendant's clothing and fingernails contained evidence of victim's rape and murder.

Moreover, "there was a reasonable belief that the evidence was about to be lost or destroyed." State v. Walker, 213 N.J. 281, 296 (2013). There was a real danger that any evidence of the victim's DNA on defendant's clothing, or under his fingernails, would be destroyed or lost if not quickly secured.

The urgency of the situation was increased because Sergeant Miller and the other investigating officers were occupied with interviewing witnesses concerning defendant's claimed alibi throughout the period between the arrest and the search, and sought

to secure the DNA evidence as soon as those witnesses refuted his alibi.

Finally, the evidence could have been destroyed in the time it took to obtain a warrant. The interview process did not end until 11 p.m. Preparing a warrant affidavit, going to a judge's home, and returning with the warrant would have taken a substantial time. The evidence could have been lost even during the "time-consuming" process of securing a telephonic warrant. Witt, 223 N.J. at 415, 436. Sergeant Miller testified he believed the exigencies necessitated seizing the evidence without a warrant.

Thus, the exigent-circumstances exception provided another basis for the seizure of defendant's clothing and fingernail clippings. We need not address the motion court's finding that defendant's clothing was also properly seized under the inevitable-discovery doctrine, or the State's arguments that the inventory-search exception also applied to defendant's clothing, and that he had no legitimate expectation of privacy in them.

III.

Defendant next argues the motion court erred when it denied suppression of statements he made on April 10 and 14, 2010, after he invoked his right to counsel on April 8. The motion court found that defendant freely and voluntarily reinitiated

conversation with law enforcement, and therefore his statements should not be suppressed. We agree.

Defendant does not appeal the motion court's denial of his motion to suppress his April 8 statements, but the April 8 interview provides necessary background to his challenge to his April 10 and 14 statements. On April 8, Sergeant Miller read defendant his constitutional rights from a standard Miranda rights card.[4] After reading each line, Miller asked defendant if he understood, and he said he did. Defendant then read the back side of the card.[5] He signed the waiver on the back side of the card, acknowledging he was being advised of his rights and understood them. Defendant said he was willing to speak to Miller, and he gave a statement to the officers.

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[4] Sergeant Miller testified the Miranda card stated: "[B]efore we ask you any questions you must understand your rights. You have the right to remain silent." "Anything you say can and will be used against you in a Court of law." "You have the right to talk to a lawyer and have a lawyer present while you are being questioned." "If you can not afford to hire a lawyer one will be appointed to represent you before any questioning if you wish." "You can decide at any time to exercise these rights and not to answer any questions or make any statements."

[5] Miller testified the back side of the card stated: "I have been advised of my rights as found on the reverse side of this card and I understand what my rights are. I will voluntarily speak with you and answer questions."

The motion court reviewed the video and found that defendant was alert, aware, and responsive while he reviewed and signed the Miranda card, and that "[a]t no time did defendant indicate that he did not understand the line by line recitation." The court found the officers "immediately stopped the interrogation" when defendant requested a lawyer.

On April 10, the police obtained a court order to collect a buccal DNA swab from defendant. Sergeant Miller went to the jail and handed the court order to defendant. Defendant read the order and then said: "good luck. My DNA will not be on her body." Without any prompting, when defendant asked Miller "what happens if you find my DNA?" Miller told defendant he could not answer defendant's questions because he had asked for an attorney. Defendant kept asking questions, including "how many years am I looking at?" The officers did not answer defendant's questions or ask him any questions.

The motion court found that on April 10 the officers "did not instigate any conversation." Rather, defendant on his own initiative "freely and voluntarily made statements and asked questions to [the] officers" that "were not solicited by any words or action by the officers." The court declined to suppress defendant's comments.

On April 14, the prosecutor's office told Sergeant Miller it had received a letter from the jailed defendant addressed to the assistant prosecutor handling defendant's case. In the letter, defendant said, "I want to know did my DNA match the victim . . . [bec]ause I really want to go home and live my life." Defendant asked the prosecutor to "[p]lease, write me back soon." The motion court found defendant initiated this contact and "freely and willingly indicated a desire to engage in discussion."

Later, on April 14, complaints were issued charging defendant with murder, arson, burglary, and sexual assault.[6] Sergeant Miller and two other detectives traveled to the jail conference room to serve the complaint on defendant. Defendant reviewed the complaint and again began asking the officers questions about the case. Miller said he could not answer defendant's questions. Miller told defendant if he wanted to speak with the officers, the officers would need to read him his rights once more. Defendant replied: "Alright, read me my rights." As before, Miller read the same Miranda rights line by line, defendant acknowledged he understood every line, signed the same waiver on the back of the Miranda card acknowledging he understood his rights and would

[6] These charges were filed after DNA testing confirmed victim's blood was on defendant's underwear, and after the police had gathered additional incriminating information from witnesses, including that defendant had confessed to his girlfriend.

voluntarily speak to the officers. Miller asked if defendant was willing to speak to the officers, and he said he was.

Defendant then gave a lengthy interview. The motion court found that "defendant voluntarily, knowingly, and intelligently waived his Miranda rights," and that his "statements were freely and voluntarily given." The court denied the motion to suppress defendant's statements, but redacted unduly prejudicial material.

Defendant argues that his statements when his buccal swab was collected on April 10, in his letter, and when he was served with the complaint on April 14, should have been suppressed because they came after his April 8 invocation of his right to counsel. However, as the trial court found, defendant initiated those communications. In Edwards v. Arizona, 451 U.S. 477, 484-85 (1981), the United States Supreme Court held that a suspect who invokes the right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Our Supreme Court likewise holds that "once a request for counsel has been made, an interrogation may not continue until either counsel is made available or the suspect initiates further communication sufficient to waive the right to counsel." State v. Alston, 204 N.J. 614, 620 (2011) (citing Edwards, 451 U.S. at 484-85). A

suspect initiates such communication if he is "inviting discussion of the crimes for which he was being held." State v. Chew, 150 N.J. 30, 64 (1997) (quoting State v. Fuller, 118 N.J. 75, 82 (1990)).

"If an accused does initiate a conversation after invoking his rights, that conversation may be admissible if the initiation constitutes a knowing, intelligent, and voluntary waiver of the accused's rights." Id. at 61 (quoting Miranda, 384 U.S. at 444). "The State bears a 'heavy burden' of demonstrating that the waiver was knowing, intelligent, and voluntary." Ibid. "[T]he State must demonstrate beyond a reasonable doubt that the accused made a knowing, intelligent, and voluntary waiver." Id. at 65.

We agree with the motion court that defendant's statements after April 8 did not violate the Edwards rule because he initiated the communications about the crimes. In making that determination, we consider whether defendant's statements were elicited by police interrogation. "[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." State v. Hubbard, 222 N.J. 249, 267 (2015) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). "[T]he latter part of this

definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." Innis, 446 U.S. at 301; accord State v. Yohnnson, 204 N.J. 43, 65 (2010) ("the officer's state of mind is not the issue"); see, e.g., Arizona v. Mauro, 481 U.S. 520, 522, 528-29 (1987) (finding no interrogation even though the officers were aware the defendant might incriminate himself and tape-recorded the meeting).

Defendant's statements on April 10 were not elicited by police interrogation merely because the officers came to take a buccal swab from defendant. As "police words or actions 'normally attendant to arrest and custody' are not included within the definition of 'interrogation,'" courts have ruled "asking a suspect to submit to a blood-alcohol test falls within this exception to the definition of 'interrogation.'" State v. Stever, 107 N.J. 543, 553, 561 (1987) (quoting Innis, 446 U.S. at 301); accord South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983) ("It is similar to a police request to submit to fingerprinting or photography."). Seeking a buccal swab falls into the same exception. State v. Powell, 971 N.E.2d 865, 891 (Ohio 2012); State v. Juntilla, 711 S.E.2d 562, 569 (W. Va. 2011). "When a defendant initiates communications with law enforcement officers 'nothing in the Fifth and Fourteenth Amendments prohibits the police from merely listening to his voluntary, volunteered

statements and using them against him at the trial.'" State v. Carroll, 242 N.J. Super. 549, 566 (App. Div. 1990) (quoting Edwards, 451 U.S. at 485).

Similarly, by writing to the prosecutor asking about the DNA results, defendant initiated communication about the crimes. See State v. McKnight, 52 N.J. 35, 41-42 (1968) (finding the defendant initiated the subsequent interrogation when he sent a note saying he would like to see the prosecutor); see also State v. McCloskey, 90 N.J. 18, 29 (1982) (ruling McKnight comports with Edwards). "As he initiated the conversation himself, he does not fit within the Edwards rule," and his letter could be used against him. State v. Perry, 124 N.J. 128, 152 (1991).

Defendant argues the police initiated the conversation with him on April 14. He cites that, after he entered the jail interview wearing handcuffs, Sergeant Miller asked him "[y]ou cool to take those [handcuffs] off? Huh?," to which defendant replied "yea." However, we have held an officer asking a suspect if his handcuffs were uncomfortable are "words normally attendant to arrest and custody," and are "'not "reasonably likely' to evoke an incriminating response." State v. Lozada, 257 N.J. Super. 260, 268-69 (App. Div. 1992) (quoting Innis, 446 U.S. at 303).

Defendant stated then Sergeant Miller gave defendant the complaints and said "Alright man read those." These too were

"police words or actions 'normally attendant to arrest and custody' [and thus] not included within the definition of 'interrogation.'" See Stever, 107 N.J. at 553 (quoting Innis, 446 U.S. at 301). Our court rules require the issuance of a criminal complaint "'to inform a defendant of the charges he must defend against.'" State v. Fisher, 180 N.J. 462, 468 (2004) (citation omitted); see R. 3:2-1(a). The complaint must be served on the defendant by an officer. R. 3:3-3; see Pressler & Verniero, Current N.J. Court Rules, history of R. 3:2-1, www.gannlaw.com (2018) ("pursuant to amended R. 3:2-2 and 3:2-3, the summons and warrant, respectively, will be on the same form as the complaint, and thus service of the summons and execution of the warrant will necessarily include service of the complaint").

"Service of an arrest warrant is a routine police procedure. It does not require any response from a suspect; nor can it be reasonably expected to elicit an incriminating response." Everett v. State, 893 So. 2d 1278, 1286 (Fla. 2004); see United States v. Blake, 571 F.3d 331, 340-41 (4th Cir. 2009). Similarly, telling defendant to read the charges did not constitute interrogation. State v. Conover, 537 A.2d 1167, 1169, 1171 (Md. 1988). Even where officers read the charges to an accused or inform the accused of the charges, that is not interrogation under Innis. State v.

Mallozzi, 246 N.J. Super. 509, 516 (App. Div. 1991); see State v. Wright, 444 N.J. Super. 347, 366 (App. Div. 2016).

Thus, "it is clear under both Miranda and Innis that [defendant] was not interrogated." Mauro, 481 U.S. at 527. No actions by the officers violated the Edwards rule's purpose "to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." State v. Wessells, 209 N.J. 395, 403 (2012) (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)). "There is no allegation that the police applied pressure of any kind to override defendant's will." Fuller, 118 N.J. at 82.

By asking whether the complaints were based on statements, defendant "invit[ed] discussion of the crimes for which he was being held." Chew, 150 N.J. at 65 (quoting Fuller, 118 N.J. at 82). Thus, he "initiate[d] further communication sufficient to waive the right to counsel." Alston, 204 N.J. at 620.

Even though officers are not required to give renewed Miranda warnings when a defendant re-initiates communication, Sergeant Miller followed the "prudent" course and re-administered the Miranda warnings. Chew, 150 N.J. at 66. Defendant's responses showed he understood and waived his Miranda rights. The motion court properly found defendant knowingly, intelligently, and

voluntarily waived his Miranda rights and gave his subsequent statement freely and voluntarily.

Defendant's remaining arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.