SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0520-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLOS MCCLEAN, a/k/a
CARLOS MCLEAN

Defendant-Appellant.

Argued January 10, 2023 – Decided September 18, 2023

Before Judges Gilson, Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 16-03-0894.

Brian P. Keenan, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Brian P. Keenan, of counsel and on the briefs).

Lucille M. Rosano, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Lucille M. Rosano, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Carlos McClean of felony murder, armed robbery, and weapons offenses for his part in the stranger-to-stranger, back-alley shooting death of Jonathan Matildes and armed robbery of Jaime Esteban during the pre-dawn hours of August 22, 2015, in Irvington. More particularly, defendant was convicted of four counts charged in an Essex County indictment: first-degree armed robbery of Esteban, N.J.S.A. 2C:15-1(a)(1); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1); second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and first-degree murder of Matildes during commission, or attempted commission, of a robbery, N.J.S.A. 2C:11-3(a)(3). The jury acquitted defendant of second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1); first-degree armed robbery of Matildes, N.J.S.A. 2C:15-1(a)(1); and first-degree murder of Matildes, N.J.S.A. 2C:11-3(a)(1). Defendant was sentenced to an aggregate prison term of forty years, subject to the No Early Release Act, 2C:43-7.2, on the felony murder conviction.

I.

During the multiple-day trial, the State presented the testimony of lay and expert witnesses and introduced into evidence surveillance video footage and

defendant's recorded statements to police. The State contended that Matildes, Esteban, and another man identified only as "Geraldo" were standing in the alley behind the pizzeria where they had been working overnight, when a gray Honda Civic circled the area multiple times. Surveillance video footage captured the vehicle. Through their investigation, police identified the Honda, tracing it to defendant's girlfriend.

The car was occupied by defendant, Dorian Moody, and Ahmad Newsome.[1] Esteban testified that two men exited the car and said, "Don't move." Defendant pointed a gun "close to [Esteban's] heart." The men demanded money. Esteban had no money but offered his phone. Defendant swiped the phone away, shattering it. The other man beat Matildes, who was shot as he tried to run away. No property was taken from the victims. Esteban identified defendant as the shooter. However, the pizzeria owner, Octaviano Buenaventura, identified Moody as "the person who committed the homicide."

On September 3, 2015, defendant gave the first of two statements to Detectives Carlos Olmo and Tyrone Crawley, who were assigned to the

[1] Moody was charged in the same indictment as defendant. According to defendant's merits brief, Moody pled guilty to first-degree robbery of Matildes and second-degree unlawful possession of a handgun. Newsome was not arrested or charged for his alleged involvement in the incident.

homicide squad of the Essex County Prosecutor's Office. Accompanied by his mother – and Moody – defendant denied all involvement in the incident, initially claiming he was in Georgia at the time of the homicide. The following day, Esteban gave his statement to police inculpating defendant.

On September 11, 2015, defendant was arrested and charged with crimes relating to the homicide and robbery. Later the same day, he gave another statement to Olmo and Crawley. Defendant eventually acknowledged he, Moody, and Newsome drove around looking to "jump out and do a quick robbery." Defendant told police that after Moody stopped the car, Newsome exited and began "beating the guy up." Defendant also acknowledged he was carrying a .22 semi-automatic handgun, but claimed he did not fire it. Defendant stated Newsome shot Matildes with a revolver. Esteban offered his cell phone, but defendant "slapped it," claiming he did not want the phone or money. Defendant's trial testimony was largely consistent with his statement.

Prior to trial, defendant moved to suppress his September 11, 2015 statement, arguing police failed to honor his invocation of the right to counsel. During the N.J.R.E. 104(c) hearing, the State called Olmo and played defendant's videorecorded statement. Defendant did not testify or present any

evidence on his behalf. Following the hearing, the court issued a written decision and a February 23, 2018 order, denying defendant's motion.

During jury deliberations, the trial court excused a juror after she asserted her mental health issues were aggravated by her interactions with the other deliberating jurors.[2] After questioning the juror, in the presence of the attorneys, the trial court replaced her with an alternate juror and denied defendant's motion for a mistrial.

On appeal, defendant raises the following points for our consideration:

POINT I

> THE MOTION COURT ERRED IN ADMITTING [DEFENDANT]'S STATEMENT WHEN, AFTER UNAMBIGUOUSLY INVOKING HIS RIGHT TO COUNSEL, THE POLICE FAILED TO IMMEDIATELY CEASE THE INTERROGATION, AND INSTEAD COERCED [DEFENDANT] INTO CONTINUING WITHOUT COUNSEL.
>
> A. The Detectives' Failure to Scrupulously Honor [Defendant]'s Clear and Unequivocal Assertion of His Right to Counsel Requires Reversal.
>
> B. [Defendant]'s Decision to Continue the Interview Without the Aid of Counsel, Following Multiple Requests to Speak With His Lawyer, Cannot be Deemed Voluntary When it was Prompted by the

[2] The suppression motion hearing and trial were conducted by two different judges.

Detectives Reminding Him of the Serious Charges He was Facing and Telling Him that He was Going to Jail.

POINT II

THE TRIAL COURT ERRED IN DENYING A MISTRIAL AFTER DISMISSING A JUROR WHO AFFIRMED HER ABILITY TO RENDER A FAIR VERDICT BUT COULD NOT CONTINUE DUE TO THE AGGRESSIVE AND INTIMIDATING BEHAVIOR OF OTHER JURORS.

POINT III

THE TRIAL COURT'S FAILURE TO DEFINE THE ELEMENTS OF CRIMINAL ATTEMPT IN ITS ROBBERY INSTRUCTION REQUIRES REVERSAL OF [DEFENDANT]'S ROBBERY AND FELONY MURDER CONVICTIONS BECAUSE THERE WAS NO JURY FINDING ON THE ELEMENTS OF ATTEMPT.
(Not raised below)

POINT IV

THE TRIAL COURT'S ERRONEOUS NON-SLAYER INSTRUCTION ALLOWED THE JURY TO FIND [DEFENDANT] GUILTY OF FELONY MURDER WITHOUT DETERMINING THAT [DEFENDANT] AND NEWSOME ACTED TOGETHER IN THE COMMISSION OF A COMMON PREDICATE FELONY.
(Partially raised below)

POINT V

THE TRIAL COURT ERRED IN FAILING TO MOLD THE FELONY MURDER, ROBBERY, AND WEAPONS POSSESSION JURY INSTRUCTIONS TO INCLUDE [DEFENDANT]'S TESTIMONY THAT HE WAS NOT INVOLVED IN EITHER ROBBERY; NEVER BRANDISHED THE INOPERABLE, ANTIQUE, UNLOADED HANDGUN; AND DISENGAGED FROM THE ALTERCATION PRIOR TO THE SHOT BEING FIRED BY NEWSOME.
(Not raised below)

POINT VI

A REMAND FOR RESENTENCING IS REQUIRED TO CORRECT [DEFENDANT]'S EXCESSIVE FORTY-YEAR TERM THAT WAS BASED IN PART ON IMPROPER CONSIDERATION OF CHARGED CONDUCT RATHER THAN CONVICTIONS ONLY, AND ARRESTS AS A JUVENILE THAT DID NOT RESULT IN JUVENILE ADJUDICATIONS - AND TO CONSIDER HIS AGE AT THE TIME OF THE OFFENSE PURSUANT TO N.J.S.A. 2C:44-1(b)(14).

Persuaded by the contentions raised in point I, we reverse and remand for a new trial excluding defendant's September 11, 2015 statement to police. In view of our disposition, we need not reach the contentions raised in the remaining points.

II.

A.

In his first point, defendant argues the motion court erroneously admitted his September 11, 2015 statement, contending: (1) the detectives failed to honor defendant's unambiguous invocation of his right to counsel; and (2) the detectives' continued dialogue after defendant requested counsel rendered his subsequent waiver involuntary. The State counters that the motion court correctly determined the detectives scrupulously honored defendant's invocation after clarifying his request for counsel and "[w]ithin one minute, defendant reinitiated the conversation about the crimes." Alternatively, the State argues "[a]ny error in the admission of defendant's statement was harmless beyond a reasonable doubt based on the State's overwhelming proofs."

At issue is the following exchange, which ensued after the detectives Mirandized[3] defendant, advised of the charges filed against him, and explained that the investigation they had conducted after they first spoke with defendant led them to believe he had lied during his September 3, 2015 statement. We underscore those questions and answers that were emphasized by defendant in his merits brief:

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

CRAWLEY: [S]o now we're giving you another opportunity to tell us the truth. We already know what had happened. We just need to hear it from you. You understand what I'm saying?

DEFENDANT: Uh-huh.

CRAWLEY: You're not here, like my partner said, there's no trick, no nothing. We're going to show you why we know what had happened.

DEFENDANT: Can you – can you call my lawyer because he told me to tell you to give him a call? Can you call my lawyer?
CRAWLEY: Who's your lawyer?

DEFENDANT: I gave – you had the number. He left a message on your phone and everything, so can you all call my lawyer, please, because this is just not happening. I just need my lawyer right here.

OLMO: Okay. So –

DEFENDANT: This is not cool.

OLMO: So am I to interpret that you want a lawyer at this time?

DEFENDANT: Yes.

OLMO: If that's the case, then we will stop questioning. I just want to ask you clearly is that what you want at this time?

DEFENDANT: Yes, I want my – yes, I want –

CRAWLEY: You want your lawyer. You've got to speak up.

DEFENDANT: Yes, yes, I want you to have a lawyer here, –

OLMO: Okay.

DEFENDANT: – please. Please and thank you.

CRAWLEY: All right. We're going to end this statement.

OLMO: So what we'll do is we'll end this statement at this point and then we'll move forward, okay. It's 2:06 p.m.
CRAWLEY: All right. We're going to end this statement, all right.

DEFENDANT: All right.

OLMO: All right. What's going to happen now is we're going to process you incident to the charges you're going to – you're facing, all right, we'll process you. There's a couple of things that we have to do administratively and then you'll be taken down to the county jail, okay. All right?

DEFENDANT: So I can't see my lawyer right now?

OLMO: Well, you'll have an opportunity. You'll be arraigned. You'll have your attorney at that point, okay.

DEFENDANT: Just continue. Can we continue, please.

OLMO: All right. So you don't want your attorney present?

DEFENDANT: No.

CRAWLEY: Are you sure?

DEFENDANT: Yes.

CRAWLEY: You're positive you do not want your attorney present?

DEFENDANT: Yes.

CRAWLEY: Okay.

At the end of the statement, defendant confirmed that he had spoken with the detectives of his "own free will" and stated, "I wanted to talk to you."

Olmo testified at the N.J.R.E. 104(c) hearing that he "believe[d]" "defendant or his mother [had his] cell phone and desk phone numbers," but no attorney – or anyone on defendant's behalf – contacted him before or after defendant gave his September 11, 2015 statement. On cross-examination, Olmo acknowledged that at the conclusion of his first statement on September 3, 2015, defendant indicated he was willing to take a lie detector test, but stated, "yes, absolutely, but I would like to have a lawyer and everything with me." Olmo denied that defendant requested counsel for "any further dealings with police" other than during the administration of a polygraph.[4]

[4] There is no indication in the record that a polygraph examination was administered to defendant.

The motion court found defendant's initial statement, "Can you call my lawyer," was "an ambiguous request for counsel . . . that needed clarification." Although the court determined defendant's statement, "Yes, yes, I want you to have a lawyer here," was a "clear invocation of the right to counsel," the court found the detectives did not "fail[] to provide him with his attorney at that time." The court was persuaded that the detectives "could not immediately provide defendant with his attorney because they did not know if anyone called" and "they were interviewing . . . defendant at the time." The court was convinced defendant initiated further conversation with the detectives after they "were prepared to end the interview." The court concluded "defendant's decision to proceed without his attorney was voluntary."

B.

Our review of a trial court's decision on a suppression motion is circumscribed. State v. Ahmad, 246 N.J. 592, 609 (2021). We defer to the court's factual and credibility findings provided they are supported by sufficient credible evidence in the record. State v. Dunbar, 229 N.J. 521, 538 (2017). "We ordinarily will not disturb the trial court's factual findings unless they are 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Goldsmith, 251 N.J. 384, 398 (2022) (quoting State v.

Gamble, 218 N.J. 412, 425 (2014)). Legal conclusions, however, are reviewed de novo. Dunbar, 229 N.J. at 538.

The right against self-incrimination is "[o]ne of the most fundamental rights protected by both the Federal Constitution and state law." State v. O'Neill, 193 N.J. 148, 167 (2007). Under federal law, police must halt a custodial interrogation when the suspect "unambiguously request[s] counsel." Davis v. United States, 512 U.S. 452, 459 (1994). By contrast, "[u]nder our state law privilege against self-incrimination, 'a suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel.'" State v. Rivas, 251 N.J. 132, 154 (2022) (quoting State v. Alston, 204 N.J. 614, 622 (2011)).

Accordingly, "[w]ords used by a suspect are not to be viewed in a vacuum, but rather in 'the full context in which they were spoken.'" State v. S.S., 229 N.J. 360, 382 (2017) (quoting State v. Roman, 382 N.J. Super. 44, 64 (App. Div. 2005)). Consistent with this principle, a defendant need not use any "talismanic words" or phrases to invoke the right to remain silent. Id. at 383. In fact, "[a]ny words or conduct that reasonably appear to be inconsistent with [the suspect's] willingness to discuss his case with the police are tantamount to an invocation

of the privilege against self-incrimination." State v. Bey, 112 N.J. 123, 136 (1988).

When a "statement is susceptible to two different meanings, the interrogating officer must cease questioning and 'inquire of the suspect as to the correct interpretation.'" S.S., 229 N.J. at 383 (quoting State v. Johnson, 120 N.J. 263, 283 (1990)); see also State v. Gonzalez, 249 N.J. 612, 631-32 (2022). When clarifying the meaning of a suspect's statement, an officer is limited to "neutral inquiries." Rivas, 276 N.J. at 154. Critically, these clarifying inquiries must not "operate to delay, confuse, or burden the suspect in [their] assertion of [their] rights." Alston, 204 N.J. at 623 (quoting Johnson, 120 N.J. at 283).

"[O]nce a suspect in custody invokes [the] right to counsel, the interrogation 'must cease,' and 'the individual must have an opportunity to confer with the attorney and to have [counsel] present during any subsequent questioning.'" State v. Wessells, 209 N.J. 395, 402 (2012) (quoting Miranda, 384 U.S. at 474). "[A] suspect who has invoked [the] right to counsel 'is not subject to further interrogation by the authorities until counsel has been made available [to the suspect], unless the accused . . . initiates further communication, exchanges, or conversations with the police.'" Id. at 403

(quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)); see also State v. Wint, 236 N.J. 174, 194 (2018).

"[I]nitiation . . . requires that any previous police-initiated interrogation have ended prior to the suspect's alleged initiatory remark; for, just as one cannot start an engine that is already running, a suspect cannot 'initiate' an on-going interrogation." Christopher v. Florida, 824 F.2d 836, 845 (11th Cir. 1987); see also Edwards, 451 U.S. at 484 (holding "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights."). "[I]n the interrogation context, [initiation] means that the suspect 'started,' not simply 'continued,' the interrogation." Christopher, 824 F.2d at 845. In addition, after initiating the interrogation, suspects must voluntarily waive their rights. Ibid.

To determine whether a suspect invoked the right to counsel, the court employs "a totality of the circumstances approach that focuses on the reasonable interpretation of [the] defendant's words and behaviors." State v. Diaz-Bridges, 208 N.J. 544, 564 (2012), overruled on other grounds by S.S., 229 N.J. 360. "[A]ny words or conduct that reasonably appear to be inconsistent with defendant's willingness to discuss his case with the police are tantamount to an

invocation of the privilege against self-incrimination." Alston, 204 N.J. at 622 (quoting Bey, 112 N.J. at 136). "[B]ecause the right to counsel is so fundamental, an equivocal request for an attorney is to be interpreted in the light most favorable to defendant." State v. Wright, 97 N.J. 113, 119 (1984).

Applying these principles to the totality of the circumstances surrounding defendant's September 11, 2015 statement to police, we conclude defendant unequivocally invoked his right to counsel. See Alston, 204 N.J. at 622. Even assuming, "Can you call my lawyer?" was, as the motion court found, an ambiguous question, defendant's response to the detective's follow-up question, "I just need my lawyer right here," required no clarification. Because defendant's assertions of his right to counsel were unambiguous, there was no need to seek further clarification. Ibid.

Nonetheless, Olmo made three additional inquiries, all of which prompted affirmative responses from defendant: (1) "So am I to interpret that you want a lawyer at this time?"; (2) "I just want to ask you clearly is that what you want at this time?"; and (3) "You want your lawyer. You've got to speak up." These attempts to clarify defendant's statements – after defendant repeatedly stated he wanted counsel – impermissibly disregarded defendant's assertion of his rights. See id. at 623.

Moreover, instead of ending the interview after defendant's request for counsel, the detectives repeatedly told defendant they would end it. But they continued to speak with defendant, advising of the ensuing administrative process. After Olmo stated defendant would be processed and detained in the county jail, defendant made yet another inquiry about his attorney. Olmo told defendant counsel would be present at his arraignment. At that point, defendant changed course and agreed to give a statement. Interpreting this additional dialogue "in the light most favorable to defendant," Wright, 97 N.J. at 119, the record establishes that the interrogation did not fully cease after defendant invoked his right to counsel and he did not initiate a new interrogation. Because the interrogation was ongoing, defendant's request to "continue" did not serve to "initiate" the statement. See Christopher, 824 F.2d at 845. Under these circumstances, we conclude defendant's waiver was not voluntary.

Reversed and remanded for a new trial.