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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1028-19
A-1031-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CASEY R. POWERS, a/k/a
CASEY ROBERTS,

Defendant-Appellant.

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Submitted February 28, 2023 – Decided July 28, 2023

Before Judges Messano, Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment Nos. 16-09-0817 and 18-05-0379.

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

Robert J. Carroll, Morris County Prosecutor, attorney for respondent (Paula Jordao, Assistant Prosecutor, on the brief).

PER CURIAM

After the court consolidated two indictments charging defendant Casey R. Powers with numerous crimes stemming from the burglary of a home in Mount Olive and the investigation that followed, a jury convicted defendant of: armed burglary; five counts of unlawful possession of a firearm; six counts of theft; criminal mischief; possession of a controlled dangerous substance (CDS), heroin; and hindering his own apprehension. Following a bifurcated trial, the same jury convicted defendant of five counts of possession of a firearm by certain persons previously convicted of a crime under N.J.S.A. 2C:43-7.2, the No Early Release Act (NERA).[1] The judge denied the State's motion for an extended term and imposed a ten-year term of imprisonment on the second-degree armed burglary conviction, subject to an 85% period of parole ineligibility under NERA, a concurrent fifteen-year term of imprisonment on one count of first-degree possession of a firearm by a person previously convicted of a NERA crime, N.J.S.A. 2C:39-7(j), and ran all other sentences concurrently.

[1] The initial indictment also charged John B. Scavone with three counts of receiving stolen property and one count of possession of CDS. Scavone is not a subject of this appeal.

Defendant raises the following points on appeal:

> POINT I
>
> THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS THE WARRANTLESS SEIZURE OF HIS VEHICLE AND CELL PHONE. [2]
>
> POINT II
>
> AS DEFENDANT'S STATEMENTS SUFFERED FROM CONSTITUTIONAL INFIRMITIES, THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS.
>
> POINT III
>
> THE TRIAL COURT ERRED WHEN IT DENIED, IN PART, DEFENDANT'S MOTION TO REDACT CERTAIN IRRELEVANT AND PREJUDICIAL STATEMENTS.
>
> POINT IV
>
> DEFENDANT SHOULD HAVE BEEN PERMITTED TO ADMIT [HIS] TEXT MESSAGES AS A HEARSAY EXCEPTION UNDER N.J.R.E. 803(c)(3) AS WELL AS IN THE INTERESTS OF FAIR PLAY AND JUSTICE.
>
> POINT V
>
> THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S REQUEST TO PROVIDE THE JURY

[2] We have eliminated the subpoints contained in defendant's brief.

WITH AN ADVERSE INFERENCE CHARGE AS RELATED TO JOHN S[C]AVONE'S FAILURE TO TESTIFY.

POINT VI

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A JUDGMENT[] OF ACQUITTAL.

POINT VII

THE TRIAL COURT'S CUMULATIVE ERRORS DENIED DEFENDANT A FAIR TRIAL. (Not raised below)

POINT VIII

THE IMPOSITION OF A FIFTEEN[-]YEAR SENTENCE[. . .]WAS MANIFESTLY UNFAIR AND EXCESSIVE GIVEN THE UNIQUE CIRCUMSTANCES OF THE CASE.

We have considered these arguments in light of the record and applicable legal principles and affirm.

I.

The court conducted pre-trial hearings on defendant's motions to suppress items seized from his van and the seizure and subsequent extraction of data from his cell phone, as well as statements defendant had provided to law enforcement. We describe in general terms the events that brought defendant to the attention

of police to place those motions in proper context. Our discussion is consistent with the State's proofs later adduced at trial before the jury.

On December 2, 2015, at approximately 10:30 a.m., Tracy Schweighardt returned to her Mount Olive home from an appointment and noticed a large van with aluminum ladders on top of it in her driveway. Not recognizing the van and feeling uneasy, she kept driving, stopped at a nearby landscaping business, and called her husband. Schweighardt then drove past her home again, and the van was gone. Schweighardt called the Mount Olive police, who responded and discovered the house had been burglarized and ransacked. Jewelry and five guns from Schweighardt's husband's gun collection were missing.

A surveillance video from a nearby landscaping business captured footage of the van after leaving the Schweighardt driveway. Mount Olive Police Sergeant Michael Zarro testified at the pretrial hearing that "the van was subsequently, possibly, identified. And, then, a suspect was developed from that." Defendant was that suspect.

Early in the morning of December 6, Morris Township police spotted the van parked in the driveway of a home in that town and advised Mount Olive police. Zarro responded to that address, but when he arrived, the van was not there. He established surveillance on the home waiting for the van to return,

which it did, at approximately 12:05 p.m. Zarro requested back-up assistance. Morris Township Police Officer Alvin Chan arrived, and together the two men approached the van, which was parked in the driveway with the engine running. Defendant was slumped over towards the steering wheel and asleep. Zarro saw "folding knives along the visor" of the vehicle.

Initially startled when Zarro tapped on the window, defendant responded in the negative to Zarro's inquiry about whether he had any other weapons. Zarro asked defendant to exit the van, and, as he did, defendant grabbed his cell phone, which had been "secured [n]ear the windshield of the vehicle, similar to like how a GPS was." Zarro then saw a machete "wedged" next to the driver's seat.

Zarro engaged defendant in conversation near his police vehicle, telling him about the burglary in Mount Olive, that defendant's van was seen there, and that guns were taken from the home. Defendant said someone "must have borrowed his vehicle," and he wanted to call that person. Zarro did not permit him to do so. After telling defendant he was not under arrest and there were no warrants outstanding for his arrest, Zarro read defendant his Miranda[3] rights from a pocket card he kept with him. Defendant agreed to speak with Zarro.

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

Defendant told Zarro that the day before the burglary he had been working at a job site in Jefferson Township, and, feeling very tired, he had slept at the home of Joan Keim, who lived in that town and was the grandmother of his friend Ricky Keim. He arrived there early in the morning. When defendant awoke the next day, he noticed his van was low on gas, which led him to believe someone had used the van while he was asleep. Defendant said he then went to buy heroin in Paterson. Defendant agreed to go with Zarro to the Morris Township Police Department to continue the conversation but wanted to call his mother first.

Standing close by, Zarro saw defendant was deleting something from his cell phone. He "retrieved the phone" from defendant and noticed the text messaging screen was open, but "there w[ere] no text messages in it." Zarro retained the phone and told defendant to lock his van; Officer Chan took defendant to headquarters in his police car. Most of the interaction between the officers and defendant was recorded on Chan's mobile video recorder (MVR), and the recording was played for the judge.

At the police station, Zarro again read defendant his Miranda rights, and defendant gave a statement that was recorded on video. Defendant denied being in Mount Olive on the day of the burglary and denied any knowledge of the

stolen guns. Defendant said his mother owned the van, although he primarily used it for his painting business. Defendant reiterated that he had slept the night before at Joan Keim's house and had left the keys in the van. Defendant also admitted he had deleted text messages from the phone, claiming they were from a drug dealer or Ricky Keim. Zarro told defendant that he was securing a search warrant for defendant's van and for his cell phone, but he did not arrest defendant, who left after completing his statement.

On December 8, 2015, Detective Corporal Craig Casaletto of the Mount Olive Police Department received a voicemail from defendant inquiring about the return of his seized van and cell phone. Casaletto returned the call and told defendant that police were still awaiting a search warrant. Defendant told Casaletto that he was not responsible for the burglary and reiterated he had been asleep at Joan Keim's home at the time of the burglary. Defendant also told the detective that he knew who was responsible, and that the stolen guns were still in Morris County.

At the pretrial hearing, Casaletto testified that police had obtained a warrant and searched defendant's van prior to December 18, 2015, when he

arrested defendant and next spoke with him.[4] They found "some drug paraphernalia and drugs," as well as "some items which [he] later determined . . . belonged to the victim of the burglary." Casaletto signed complaints against defendant.

Pretending to be a customer interested in employing defendant as a painter, Detective Anthony Gardner called defendant and agreed to meet him at a location in Jefferson Township. When defendant arrived, Gardner, Casaletto and two other officers arrested defendant, advised him of the "complaints" and brought defendant back to police headquarters. They again provided Miranda warnings to defendant, who again waived his rights and gave another recorded statement to police. Defendant claimed to have had a conversation with a friend, Rikki Bell, whose boyfriend, Scavone, admitted to committing the burglary and storing the firearms on his property in Jefferson Township.

Defendant told police that Scavone had committed the burglary using defendant's van, and that the missing firearms were stored in a shed at Scavone's mother's home. Defendant said that he had spoken to Scavone after the burglary, while buying drugs in Paterson, and had accused him of taking the van. Scavone

[4] The warrants were issued on December 10, 2015, and the searches were conducted shortly thereafter.

purportedly responded, "all right you're right, you got me." Defendant also signed a written consent to search his new cell phone. Casaletto testified that police had conducted a limited search of the phone at that time, which was captured on the video recording, trying to obtain Scavone's contact information.

Defendant agreed to call Scavone and allow police to record the conversation. Casaletto testified that defendant placed the call, Bell answered, and handed the phone to Scavone. The conversation was recorded. During this call, defendant told Scavone that he had a buyer for the guns and instructed Scavone to meet him, with the guns, at a local QuikChek to complete the sale.[5]

A.

The motion judge, who was not the trial judge, rendered an oral decision on February 5, 2018, concluding there was probable cause to seize the van because evidence linked it to the Mount Olive burglary. As to the cell phone, the judge found there was probable cause "linking the critical instrumentality of the van to the crime scene and tracing it and locating it," an apparent reference to the phone's GPS capabilities, and that defendant was deleting information

[5] The QuickChek meeting never occurred, but police subsequently seized three of the stolen guns from a shed on Scavone's mother's property, leading to Scavone's indictment. He apparently entered into a plea agreement, but the details of that agreement and Scavone's sentence are not in the record. Scavone did not testify at defendant's trial.

from the phone. The judge also found that the seizure of both the van and the cell phone was permissible, finding police had probable cause and exigent circumstances existed, and the later searches had been authorized by search warrants.

In considering whether exigent circumstances justified seizure of the van and cell phone, the judge discussed the five factors noted by the Court in State v. Valencia, 93 N.J. 126, 137 (1983). He found there was urgency because the burglary involved the theft of weapons and the resulting risk they might be "put into illegal commerce" and pose a threat to police and the public. He also noted the guns and other items taken in the burglary were "easily moved" or "secreted." Finally, the judge noted that the police had information linking the van to the crime. Based on the conversation with defendant, who now knew police were investigating his and the van's involvement, the judge said, "it would have been very poor judgment" to leave the van and its contents in the driveway. The judge denied defendant's motion to suppress the seizure and subsequent search of the van and cell phone.

Defendant argues the initial seizures were unconstitutional and, therefore, all evidence discovered during the subsequent searches, for which warrants were

obtained on December 10, 2015, must be suppressed as "fruit of the poisonous tree." We disagree.

"When reviewing a trial court's decision to grant or deny a suppression motion, appellate courts '[ordinarily] defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record.'" State v. Smart, 253 N.J. 156, 164 (2023) (alteration in original) (quoting State v. Dunbar, 229 N.J. 521, 538 (2017)). "We accord no deference, however, to a trial court's interpretation of law, which we review de novo." Dunbar, 229 N.J. at 538 (citing State v. Hathaway, 222 N.J. 453, 467 (2015)).

A warrantless search or seizure is presumed to be invalid; to overcome this presumption, "the State bears the burden of proving by a preponderance of the evidence not only that the [warrantless] search or seizure was premised on probable cause, but also that it 'f[ell] within one of the few well-delineated exceptions to the warrant requirement.'" State v. Bryant, 227 N.J. 60, 69–70, (2016) (second alteration in original) (quoting State v. Johnson, 193 N.J. 528, 552, (2008)). "One recognized exception to the warrant requirement is the presence of exigent circumstances." In the Interest of J.A., 233 N.J. 432, 448 (2018) (citing Johnson, 193 N.J. at 552). "To invoke that exception, the State must show that the officers had probable cause and faced an objective exigency."

Ibid. (citing State v. Bolte, 115 N.J. 579, 585 (1989)). Police safety and the preservation of evidence remain the "preeminent determinants of exigency." State v. Dunlap, 185 N.J. 543, 551 (2006).[6]

After the briefs were filed in this appeal, the Court decided State v. Miranda, 253 N.J. 461 (2023). In Miranda, police obtained a domestic violence search warrant to seize guns at the defendant's residential trailer. Id. at 468. The victim told police the defendant kept the guns in a bag, but police did not find the bag when they searched the trailer. Id. at 468–69. The victim and her family gave police consent to search a storage trailer on the property; police located the bag, which they opened, and found the guns inside. Id. at 469–70. The issue framed by the Court was: assuming the search of the storage trailer was valid by the victim's consent, was the search of the closed bag "warranted by the exigent circumstance[?]" Id. at 472.

The Court "identified a non-exclusive set of factors to be considered," id. at 481, in determining if exigency justifies a warrantless search:

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[6] The judge's reliance on Valencia was misplaced. There, the Court was considering "the necessity that the State must show in order to justify its use of the telephone" in securing a search warrant, 93 N.J. at 137, at a time when our Court Rules did not permit the issuance of telephonic search warrants, id. at 134–35. See R. 3:5-3(c) (now specifically permitting the issuance of telephonic search warrants).

> (1) the seriousness of the crime under investigation, (2) the urgency of the situation faced by the officers, (3) the time it would have taken to secure a warrant, (4) the threat that evidence would be destroyed or lost or people would be endangered unless immediate action was taken, (5) information that the suspect was armed and posed an imminent danger, and (6) the strength or weakness of the probable cause relating to the item to be searched or seized.
>
> [Ibid. (quoting State v. Manning, 240 N.J. 308, 333–34 (2020)).]

In weighing these factors, the Court concluded

> the State did not prove its claim that exigent circumstances justified the warrantless search of the black bag and the seizure of the weapons. With defendant under arrest, [police] had the opportunity to apply for and secure a warrant to search the bag and seize the weapons within it. The circumstances facing [police] were not so urgent as to obviate the need to obtain a warrant.
>
> [Id. at 483.]

Applying those factors to this appeal, we conclude the home burglary and theft of five firearms was serious, and police had probable cause to believe that the van contained either the weapons or other evidence of the crimes, and the cell phone contained critical evidence that could prove its proximity to the crime scene. If the van were not seized, the weapons and other evidence might have been lost or moved, posing a threat to the public; and if defendant were permitted

to delete data from his phone, crucial evidence might have been lost. There was no evidence presented regarding the time it would have taken to secure a warrant, but, unlike the circumstances in Miranda, defendant was not under arrest and, if the van and cell phone were not seized, he could have accessed them. Furthermore, police saw defendant deleting information from his cell phone. Defendant's immediate excuse, i.e., that someone had borrowed his van, in addition to all the other evidence police had accumulated, provided strong probable cause to believe both the van and defendant's cell phone would provide further evidence of the crime.[7]

We affirm the judge's decision that the warrantless seizure of both items was reasonable under all the circumstances presented and his denial of defendant's motion to suppress.

B.

The same motion judge rendered an oral decision on the admissibility of defendant's three statements to law enforcement.

[7] We recognize that the warrants to search both items were not secured for several days following the seizure. Defendant has not raised a separate argument that the delay in obtaining a search warrant for the van or the cell phone made their subsequent search pursuant to the warrants unconstitutional.

Regarding the December 6, 2015 statement defendant made by his van, the judge concluded defendant was not in custody at the time Zarro questioned him about the burglary. Nevertheless, the judge also credited Zarro's testimony that he had advised defendant of his Miranda rights, defendant had evidenced a willingness to answer the questions, and he had not invoked his right to remain silent.

Defendant was again given Miranda warnings at the police station prior to making a formal, recorded statement later that day. Defendant initialed the written rights statement indicating he understood those rights and agreed to speak with Zarro. At one point, defendant asked, "[W]hat if someone wanted to call a lawyer[?]" Zarro told him he could "stop and make a phone call," and then "we wait." The judge found that during some portions of the interview, defendant had put his head down on the interview table and had laid down on the table.

In the middle of the interview, defendant asked about leaving the police station. Zarro told him he was "being detained" but was free to leave and was not under arrest. Defendant requested a cigarette break and Zarro obliged, permitting him to briefly exit the police station. Zarro also offered to provide defendant with a ride home.

The judge concluded defendant was not in custody, finding there was "never anything done that would have created in the reasonably objective person, the feeling that he was not free to leave." Nonetheless, the judge again found that defendant was advised of his rights, acknowledged those rights, and was willing to cooperate with police. The judge found the encounter was not "extravagantly extended" or coercive in nature, and defendant's fatigue did not negate the voluntariness of his waiver and subsequent statement.

Defendant's December 18, 2015 statement took place at police headquarters after defendant had been arrested. He was given his Miranda rights, signed the waiver form, and expressed his desire to speak with officers. At one point in the interview, defendant requested Suboxone because he was "getting sick." Gardner replied, "Dude if you get sick, then we[']re sending you right to the hospital and you're not gonna do shit and you're gonna go straight to jail, but that's entirely up to you." The interview proceeded, and at its conclusion, defendant voluntarily participated in the consensually recorded phone call with Scavone.

Recognizing the "circumstances [had] changed" because defendant was now under arrest, the judge concluded he had voluntarily waived his Miranda rights. The judge found that defendant was "trying to convince the police that

he was not responsible for the serious crime under investigation" and defendant was willing to cooperate with them.

We apply a similar deferential standard of review to the motion judge's factual findings in determining the admissibility of defendant's statements to law enforcement and "consider whether those findings are 'supported by sufficient credible evidence in the record.'" State v. Tillery, 238 N.J. 293, 314 (2019) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). "Our deference recognizes 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. Bullock, 253 N.J. 512, 532 (2023) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). "A trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). "That standard governs appellate review even when the trial court's findings are premised on a recording or documentary evidence that the appellate court may also review." Tillery, 238 N.J. at 314 (citing S.S., 229 N.J. at 380–81).[8]

[8] Defendant did not supply us with any of the video recordings used during the pre-trial hearings or subsequently at trial. However, the motion judge considered all three recordings in making his findings. The appellate record includes transcripts of the video recordings.

The first van-side encounter

Defendant argues Zarro's questioning of him in his driveway near his van was a custodial interrogation. He also contends the judge's finding that Zarro had provided defendant with his Miranda rights, and defendant had voluntarily waived those rights and willingly cooperated with the officer's inquiries was unsupported by the evidence.

"Custodial interrogation" refers to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." State v. Hubbard, 222 N.J. 249, 265–66 (2015) (quoting Miranda, 384 U.S. at 444). "The critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom of action based on the objective circumstances . . . ." Id. at 266–67 (quoting State v. P.Z., 152 N.J. 86, 103 (1997)). Here, defendant's van was blocked by Chan's police vehicle, defendant was ordered out of the van and questioned in his driveway by two officers. He was taken to police headquarters shortly thereafter in Chan's police car. Considering the totality of the circumstances, the judge was clearly mistaken when he concluded that defendant was not in custody and Zarro's interrogation was not a "custodial interrogation."

However, the judge credited Zarro's explanation that Chan's MVR recording had not captured the entire encounter, and he had administered Miranda warnings to defendant, as well as Zarro's testimony regarding this portion of the encounter. We defer to those findings. Tillery, 238 N.J. at 314. The judge also concluded that defendant's willingness to cooperate with Zarro evidenced a clear waiver of his right to remain silent.

"Our law . . . does not require that a defendant's Miranda waiver be explicitly stated in order to be effective." Id. at 316. "Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." Ibid. (quoting Berghuis v. Thompkins, 560 U.S. 370, 384 (2010)).

We conclude that under the totality of the circumstances presented, defendant knowingly and voluntarily waived his Miranda rights and responded to Zarro's questions posed in the driveway. See State v. Sims, 250 N.J. 189, 211 (2022) (noting a court should consider the "totality of the circumstances" in determining whether a defendant "knowingly, intelligently, and voluntarily waived his right against self-incrimination in the setting of a custodial interrogation" (citing State v. Nyhammer, 197 N.J. 383, 402–03 (2009))).

Defendant's December 6, 2015 statement

Defendant contends the judge erred by not suppressing his stationhouse recorded statement because, contrary to the judge's finding, defendant was subjected to a custodial interrogation. He also argues that police engaged in an impermissible "'two-step' interrogation process."

Initially, we agree with defendant that the judge's determination that he was not in custody during Zarro's questioning at headquarters was a clear error. However, the judge also found that defendant had waived his Miranda rights, and we defer to that finding, which is supported by sufficient credible evidence.

In Missouri v. Seibert, 542 U.S. 600, 604 (2004), the Supreme Court rejected law enforcement's use of a "two-step interrogation technique," i.e., first interrogating a suspect, then providing the requisite Miranda warnings, and then "lead[ing] the suspect to cover the same ground a second time." Similarly, in State v. O'Neill, 193 N.J. 148 (2007), the Court rejected a "question-first, warn-later" technique, id. at 154, and suppressed the defendant's post-warnings statement because "detectives exploited defendant's admissions from the initial unwarned questioning," id. at 155.

Defendant's argument in this regard, however, is based on the faulty premise that Zarro's earlier questioning at the van took place without any

Miranda warnings, a fact the judge specifically rejected. Defendant's argument that the stationhouse statement should have been suppressed because it resulted from a violation of prohibited "two-step interrogation" techniques requires no further discussion. R. 2:11-3(e)(2).

The December 18, 2015 statement

Defendant contends the judge should have suppressed the statement he provided after his arrest on December 18, 2015, because it was the result of coercive circumstances and police conduct. Defendant argues that he was suffering from withdrawal symptoms, was denied the opportunity to call his mother and was cold. The motion judge found that defendant had voluntarily given the statement after waiving his right to remain silent.

A statement is voluntary if it is "the product of an essentially free and unconstrained choice" where the defendant's will has not been "overborne and his capacity for self-determination [has not been] critically impaired." P.Z., 152 N.J. at 113 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973)). When determining whether a statement is voluntary, the judge examines "the totality of the circumstances to assess whether the waiver of rights was the product of a free will or police coercion." Nyhammer, 197 N.J. at 402.

In Tillery, the Court observed that a defendant's "drug and alcohol problems" could be a factor in considering the voluntariness of a Miranda waiver. 238 N.J. at 317 (quoting 46 Geo. L.J. Ann. Rev. Crim. Proc. 3, 230–33 (2017)); see also State v. Granskie, 433 N.J. Super. 44, 56 (App. Div. 2013) (recognizing possible relevance of expert testimony regarding drug withdrawal symptoms and the voluntariness and reliability of a defendant's confession). However, the judge in this case assessed the totality of circumstances regarding the December 18 interrogation and concluded defendant was voluntarily and willingly cooperating with police. He noted defendant's subsequent agreement to participate in a consensual recording of a conversation with Scavone.

Detective Gardner's abrupt and insensitive response to defendant's request for Suboxone, the denial of defendant's request to call his mother, and the temperature of the room, individually or collectively, did not negate the judge's totality-of-the-circumstances analysis, or his finding that the statement was the product of defendant's free choice and not induced by a coercive atmosphere or by police conduct that overbore defendant's will.

II.

Before considering defendant's allegations of trial error, we recount additional evidence the State adduced at trial.

When Zarro discovered defendant asleep in his van, he noted magnetic signs on the door stating, "C. Powers Painting," with defendant's phone number. In the surveillance video that showed defendant's van leaving the area on the day of the burglary, however, there were no signs on the van.

A search of defendant's cell phone yielded a trove of incriminating evidence. Detective Thomas Joiner, of the Morris County Prosecutor's Office, testified that the phone utilized a cell tower close to the Schweighardt residence on the morning of the burglary. Joiner testified that defendant's phone had been used to send various text messages to a contact labeled "Mom" on the morning of the burglary, from 9:00 a.m. to 11:00 a.m., during the time defendant said he was sleeping at Joan Keim's home.

Joiner further testified that on the morning of the burglary, from approximately 10:00 a.m. until 10:15 a.m., defendant's phone had used an application called "[S]canner [R]adio," which monitored audio from nearby police scanners and had been downloaded months earlier. Additionally, on December 2, 2015, at 10:56 a.m., defendant's phone accessed a website, "GunBroker.com," which lists the value of various guns. The phone revealed that a search was conducted for the value of a "Walther PPK," the model of one of the guns taken from the Schweighardt home. Defendant exchanged phone

calls and text messages with a phone contact, "Little John," on December 7, 8, 15, and 18, 2015.

On cross-examination, Joiner admitted that on December 2, 2015, at 12:15 p.m., there was a text message sent from defendant's phone to a friend stating, "[j]ust woke up." Further, the phone was used to send a text message to Joan Keim at 1:57 a.m. on December 2, 2015.

A.

Defendant moved to redact portions of his December 6, 2015 statements to police. The prosecutor consented to some redactions and the trial judge granted others requested by defense counsel. Defendant focuses on two requests that were denied. During the van-side encounter with Zarro, defendant referenced knives that were in the van. Although defendant was charged with the unlawful possession of a weapon — the machete — he was not charged with the unlawful possession of the knives.[9] Later, in the formal statement he gave Zarro at police headquarters, defendant admitted to purchasing drugs in Paterson with Scavone and Bell.

Regarding references to the knives, the judge mused they were probably related to defendant's work as a painter and were not evidence of a crime.

[9] The jury acquitted defendant of the unlawful possession of the machete.

Nonetheless, he denied the request to redact those references from the statement, concluding they were part of defendant's conversation with Zarro and, under N.J.R.E. 403, any probative value was not "substantially outweighed by the risk of [u]ndue prejudice."

In opposing defendant's motion to redact his statements about drug purchases, the prosecutor argued that the statements were "intrinsic evidence" of one of the charged crimes, possession of CDS. See State v. Rose, 206 N.J. 141, 180–81 (2011) (defining intrinsic evidence and differentiating it from evidence of uncharged crimes or bad acts potentially admissible under N.J.R.E. 404(b)). The trial judge agreed and denied the redaction request.

Before us, defendant argues that the denial of his redaction requests resulted in the erroneous admission of evidence so prejudicial that reversal is required. We disagree.

"The admission or exclusion of evidence at trial rests in the sound discretion of the trial court." State v. J.M., 225 N.J. 146, 157 (2016) (citing State v. Gillispie, 208 N.J. 59, 84 (2011)). "That discretion is not unbounded. Rather, it is guided by legal principles governing the admissibility of evidence which have been crafted to assure that jurors receive relevant and reliable

evidence to permit them to perform their fact-finding function and that all parties receive a fair trial." State v. Willis, 225 N.J. 85, 96 (2016).

Although we question the relevance of defendant's admissions that he kept knives in his van, "Rule 2:10-2 directs reviewing courts to disregard '[a]ny error or omission . . . unless it is of such a nature as to have been clearly capable of producing an unjust result.'" State v. Scott, 229 N.J. 469, 483–84 (2017) (alteration in original). "Known as the harmless error doctrine, that rule 'requires that there be "some degree of possibility that [the error] led to an unjust result."'" Id. at 484 (alteration in original) (quoting State v. R.B., 183 N.J. 308, 330 (2005)). "In discussing the extent of error required for reversal, we noted '[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'" Ibid. (alterations in original) (quoting R.B., 183 N.J. at 330). In this case, admitting defendant's statements about the knives in his van was harmless error.

As to statements regarding defendant's earlier purchase of CDS, we agree with the judge's conclusion that they were admissible evidence intrinsic to the crime of possession of CDS charged in the indictment.

B.

As noted during Joiner's cross-examination, defendant elicited the existence of a text message from defendant's phone to Joan Keim's phone at 1:57 a.m. on December 2, 2015. When defense counsel asked Joiner to read the contents of the text to the jury, the prosecutor objected on hearsay grounds. Outside the jury's presence, defense counsel contended the text included defendant's request to sleep at the Joan Keim's house. Defense counsel argued the contents were referenced in Joiner's expert report and therefore were admissible. The judge sustained the prosecutor's objection, concluding the text message was hearsay and not subject to any exception.

Defendant argues before us that the content of the text message was admissible pursuant to N.J.R.E. 803(c)(3), the so-called state-of-mind exception to the hearsay rule, or otherwise should have been admitted "in the interests of fair play and justice." We again disagree.

Initially, defendant never asserted at trial this exception to the hearsay rule. But, more importantly, "[t]he governing principle is simply stated: to be admissible under the state of mind exception to the hearsay rule, the declarant's state of mind must be 'in issue.'" State v. McLaughlin, 205 N.J. 185, 206 (2011) (citing State v. Boratto, 154 N.J. Super. 386 (App. Div. 1977), aff'd in part, rev'd in part, 80 N.J. 506 (1979)). Here, defendant's intention to spend the night

before the burglary at Joan Keim's house was never an issue in the case, and none of the State's evidence contradicted defendant's claim, as contained in his statements to police, that he had slept there.[10]

C.

At the charge conference, defense counsel asked the judge to provide a Clawans[11] adverse inference charge because Scavone was on the State's witness list but was never called to testify. Defense counsel averred that as part of a plea bargain, Scavone said that defendant had given him the three guns recovered at his property and agreed to testify truthfully if called as a witness at trial. The prosecutor countered by arguing Scavone was not within the State's exclusive control and could have been called as a defense witness. Without any explanation, the trial judge denied the request. Before us, defendant reiterates the arguments made to the trial judge.

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[10] In her summation, the prosecutor questioned the credibility of defendant's claim that he could not have committed the burglary because he was asleep at the time at Joan Keim's house. But she never asserted that defendant had not spent the early morning hours at the home. Joan Keim apparently died prior to trial and could not be produced as a witness.

[11] State v. Clawans, 38 N.J. 162, 170 (1962).

In State v. Hill, the Court required trial judges considering a request to provide an adverse inference charge to make specific findings as to the following:

> (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts in issue [;] and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven.
>
> [199 N.J. 545, 561–62 (2009) (alteration in original) (quoting State v. Hickman, 204 N.J. Super. 409, 414 (App. Div. 1985)).]

In this case, the judge clearly failed to fulfill his obligations. Nevertheless, we do not hesitate to conclude that an adverse inference charge was unwarranted.

Scavone's appearance on the State's potential witness list provides no support for defendant's argument. See id. at 561 ("Care must be exercised because the inference is not invariably available whenever a party does not call a witness who has knowledge of relevant facts."). Furthermore, nothing in the record indicates that Scavone was unavailable to defendant. Most importantly, the predicate supporting an adverse inference charge is that the "failure of a

party to produce . . . proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him." Id. at 560 (quoting Clawans, 38 N.J. at 170). Nothing suggests that Scavone's testimony would have been unfavorable to the State; indeed, based upon defense counsel's representation of Scavone's plea allocution, the opposite would appear to be true.

D.

Defendant contends the judge erred by denying his motion for judgment of acquittal. He also argues that these cumulative trial errors undermined the fairness of the trial and require reversal. These arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm defendant's convictions.

III.

Lastly, defendant argues his sentence is excessive. At sentencing, the judge found aggravating factors three, six, and nine. See N.J.S.A. 2C:44-1(a)(3) (the risk of re-offense); (a)(6) (the extent and seriousness of defendant's prior convictions); and (a)(9) (the need to deter defendant and others).

Defense counsel urged the judge to find several mitigating factors, specifically arguing that defendant's participation in substance abuse treatment

supported those findings. The judge considered and addressed all the mitigating factors suggested and rejected all except mitigating factor nine, see N.J.S.A. 2C:44-1(b)(9) (defendant's "character and attitude" indicate it was unlikely he would commit another offense). As to factor nine, the judge said he thought "at present, th[is] was true," noting he was considering "not only [defendant's] past," which included numerous convictions, but also "the person who's sitting before me now." Regarding defendant's cooperation with law enforcement, the judge simply said it "was not present in this case."

Defendant contends the judge should have found mitigating factor twelve, see N.J.S.A. 2C:44-1(b)(12) (defendant's willingness to cooperate with law enforcement), and erred in finding aggravating factor three, see N.J.S.A. 2C:44-1(a)(3) (the risk defendant would re-offend). Defendant also argues the judge's findings of both aggravating factor three and mitigating factor nine were inherently contradictory.

We start by recognizing "[a]ppellate review of a sentence is generally guided by the abuse of discretion standard." State v. Miller, 237 N.J. 15, 28 (2019) (quoting State v. Robinson, 217 N.J. 594, 603 (2014)).

> The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and

> credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364–65 (1984)).]

"The general deference to sentencing decisions includes application of the factors set forth in N.J.S.A. 2C:44-1(a) and (b): appellate courts do not '"substitute [their] assessment of aggravating and mitigating factors" for the trial court's judgment.'" Miller, 237 N.J. at 28–29 (alteration in original) (quoting State v. Miller, 205 N.J. 109, 127 (2011)).

Defendant cites his cooperation with police in identifying Scavone and the location of some of the stolen guns. He argues that without his cooperation, "the guns would never have been recovered by the police." However, it is obvious that defendant's efforts in this regard were never motivated by his "willingness . . . to cooperate with law enforcement authorities," N.J.S.A. 2C:44-1(b)(12), but rather were wholly motivated by an attempt to shift blame to Scavone. In all his conversations with law enforcement officers, defendant never admitted his involvement in the burglary and theft of the weapons and other items. We do not think the judge mistakenly exercised his discretion by not finding mitigating factor twelve.

As to aggravating factor three, the judge cited defendant's numerous prior convictions as support for finding there was a risk defendant would re-offend. The judge said defendant "practically concede[d]" that "when he indicate[d] . . . should he not deal with his demons, he would probably . . . commit other offenses." We find no mistaken exercise of discretion in finding aggravating factor three.

We have recognized that aggravating factor three and mitigating factor nine are "related." State v. Towey, 244 N.J. Super. 582, 593 (App. Div. 1990); see also State v. Baylass, 114 N.J. 169, 177 (1989) (recognizing these two factors "overlap"). But we do not presume potentially inconsistent findings cannot coexist when adequately explained by "competent, credible evidence in the record." State v. Case, 220 N.J. 49, 67 (2014).

Here, the judge explained his finding of mitigating factor nine was based specifically on his evaluation of defendant as he stood before the court on sentencing date, an obvious reference to defendant's post-conviction efforts to address his substance abuse that were highlighted by defense counsel. The judge specifically recognized his obligation to consider such post-conviction efforts as they relate to mitigating factor nine. See State v. Jaffe, 220 N.J. 114, 124 (2014) (noting that sentencing court should consider "evidence of post-offense

conduct, rehabilitative or otherwise, . . . in assessing the applicability of, and weight to be given to, aggravating and mitigating factors"). We find no reason to disturb the judge's sentence.

However, despite the judge's clear finding of mitigating factor nine in his oral pronouncement of sentence, both the original and amended judgment of conviction in this case fail to include the judge's finding of mitigating factor nine. We remand the matter for the limited purpose of filing an amended judgment of conviction adding that mitigating factor. See State v. Abril, 444 N.J. Super. 553, 564 (App. Div. 2016) ("In the event of a discrepancy between the court's oral pronouncement of sentence and the sentence described in the judgment of conviction, the sentencing transcript controls and a corrective judgment is to be entered." (citing State v. Rivers, 252 N.J. Super. 142, 147 n.1 (App. Div. 1991))).

Affirmed. Remanded solely to file an amended judgment of conviction.

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

CLERK OF THE APPELLATE DIVISION