SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1889-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDRE GRIFFITH,

Defendant-Appellant.

Submitted February 7, 2023 – Decided September 8, 2023

Before Judges Gilson, Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 16-04-0655.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Deborah Bartolomey, Deputy Attorney General, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Following adverse decisions on various pretrial motions, defendant Andre Griffith pled guilty to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), as amended from first-degree murder charged in a Middlesex County indictment. During the plea hearing, defendant admitted that on September 21, 2015, he strangled to death his live-in girlfriend, Samantha Ross. Pursuant to Rule 3:9-3(f), defendant reserved his right to appeal "[a]ll [l]itigated motions." Defendant was sentenced in accordance with the terms of the negotiated plea agreement to a twenty-eight-year prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

After defendant was indicted, the State moved to admit five domestic violence incidents between defendant and Ross in anticipation of defendant's potential self-defense, passion/provocation, or similar defense argument. Defendant sought to admit two other disputes between the parties as "reverse 404(b) evidence." Defendant also moved to preclude three categories of statements made by his aunt, Pamela Hall, to police, or at their behest, three days after the homicide. Those statements included Hall's: (1) 9-1-1 call to police for a wellness check on Ross; (2) recorded statement to police detailing her conversations with defendant on the day of the homicide; and

(3) consensually recorded calls to defendant. The State cross-moved to admit the statements. Among other arguments, defendant asserted Hall had died of natural causes prior to his application. Thus, admitting her statements would violate his right of confrontation. The judge conducted testimonial hearings on all the motions over the course of three days between April 2018 and July 2019, during which fourteen witnesses testified.

Defendant now appeals from the pretrial orders entered on: (1) December 11, 2018, granting the State's application to admit three of five domestic violence incidents under N.J.R.E. 404(b); (2) August 22, 2019, denying defendant's motion to admit reverse N.J.R.E. 404(b) evidence; and (3) October 22, 2018, granting the State's motion, in part, to admit the consensually recorded telephone calls between defendant and Hall. Defendant seeks reversal of these evidentiary orders, contending our reversal of even one order requires a remand to afford him the "opportunity to withdraw his . . . plea" under Rule 3:9-3(f).

More particularly, in his counseled brief, defendant raises the following points for our consideration:

POINT I

THE TRIAL COURT ERRONEOUSLY RULED THAT THREE SEPARATE INCIDENTS OF DOMESTIC VIOLENCE WERE ADMISSIBLE AGAINST DEFENDANT IN THE STATE'S CASE-

IN-CHIEF BECAUSE THEY WERE EXTREMELY PREJUDICIAL AND NO LIMITING INSTRUCTION COULD CURE THE IMPLICATION OF PROPENSITY FOR DEFENDANT TO HARM THE VERY SAME VICTIM.

A. The July 1, 2014, Incident.

B. The September 28, 2014, Incident.

C. The October 4, 2014, Incident.

POINT II

THE TRIAL COURT DENIED DEFENDANT HIS RIGHT TO PRESENT A COMPLETE DEFENSE IN RULING INADMISSIBLE TWO PRIOR ACTS OF VIOLENCE BY ROSS THAT WOULD SUPPORT THE DEFENSE THAT DEFENDANT DID NOT ACT PURPOSELY. U.S. Const. amends. V, VI, and XIV; N.J. Const. art. 1,[¶]. 1 and 10.

In his pro se supplemental brief, defendant asserts:

POINT I[II]

THE TRIAL COURT ERRONESLY ADMITTED THE RECORDED 4C[1] INTERCEPT CONVERSATIONS BECAUSE THESE STATEMENTS CONTAINED INCRIMINATING ASSERTIONS MADE BY PAMELA HALL, A WITNESS WHO IS DECEASED, AND CANNOT TESTIFY. THE ADMISSION OF THIS EVIDENCE VIOLATED [DEFENDANT]'S ["]RIGHT . . . TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM["] UNDER THE

[1] N.J.S.A. 2A:156A-4(c).

> CONFRONTATION CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS. [U.S. Const. amend. VI; see also N.J. Const. art. 1,¶ 10].

Having considered defendant's contentions in view of governing law and the record before the motion judge, we affirm in part, and reverse and remand in part. Because the judge applied the wrong balancing test under the fourth prong of the Cofield[2] test, we affirm the December 11, 2018 order, subject to a limited remand for the judge to apply the correct standard. Should the judge find the State failed to satisfy the fourth Cofield prong regarding any of the three domestic violence incidents, the judge shall conduct a hearing to determine whether defendant wishes to withdraw his guilty plea under Rule 3:9-3(f). Further, finding no merit in defendant's challenge to the August 22, 2019 order, we affirm substantially for the reasons stated in the judge's cogent decision that accompanied the order. However, we are persuaded by the contentions raised in defendant's pro se brief. We therefore reverse the October 12, 2018 order and remand for a hearing pursuant to Rule 3:9-3(f).

I.

As a preliminary matter, we address the terms of the conditional plea agreement. "Generally, a guilty plea constitutes a waiver of all issues which

[2] State v. Cofield, 127 N.J. 328 (1992).

were or could have been addressed by the trial judge before the guilty plea." State v. Davila, 443 N.J. Super. 577, 585 (App. Div. 2016) (quoting State v. Robinson, 224 N.J. Super. 495, 498 (App. Div. 1988)). There are, however, three exceptions to this general principle. State v. Knight, 183 N.J. 449, 471 (2005). Relevant here, a defendant may appeal adverse decisions specifically reserved by a conditional guilty plea entered in accordance with Rule 3:9-3(f). See ibid. Several requirements must be satisfied under the Rule prior to acceptance of a conditional guilty plea. Davila, 443 N.J. Super. at 586. As we explained in Davila:

> This reservation of "the right to appeal from the adverse determination of any specified pretrial motion" must be placed "on the record." R. 3:9-3(f). It must also specifically be approved by the State and by the court. In approving a defendant's preservation of issues for appellate review, the court should act as a gatekeeper to comply with the purpose of the Rule, by precluding agreements that preserve non-justiciable or non-dispositive issues. See, e.g., Pressler & Verniero, Current N.J. Court Rules, cmt. 7 on R. 3:9-3(f) (2016) (stating that "[t]he primary utility of the rule" relates to pre-trial issues encompassing disputes of a dispositive nature).
>
> [Ibid. (emphasis added).]

In Davila, we found insufficient "defense counsel's casual mention of 'all of the motions'" and a "difficult-to-read handwritten list included in the plea form." Ibid.

In the present matter, defendant's reservation of his right to appeal was similarly overbroad. Generally referencing "all litigated motions," the plea form failed to specify the pretrial motions preserved for appellate review. Moreover, none of the rulings defendant now challenges is dispositive. The State implicitly, albeit belatedly, recognizes this issue in its supplemental responding brief to defendant's pro se argument. Citing our decision State v. Cordero, 438 N.J. Super. 472, 484-85 (App. Div. 2014), the State now asserts, "[e]vidence problems . . . are best settled in the atmosphere and context of the trial because pre-trial evidentiary rulings must often be made in the abstract." However, because the State consented to the terms of defendant's conditional plea agreement, "[w]ith the approval of the court," R. 3:9-3(f), we consider defendant's arguments on appeal.

II.

In his first point, defendant challenges the admission of three domestic violence incidents allegedly committed around one year prior to the homicide, on July 1, 2014, September 28, 2014, and October 14, 2014, as evidence of prior

bad acts or other crimes under N.J.R.E. 404(b). To place defendant's contentions in context, we first review the applicable law. The Rule provides[3]:

> (b) Other Crimes, Wrongs, or Acts.
>
> > (1) Prohibited Uses. Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition.
> >
> > (2) Permitted Uses. This evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.

N.J.R.E. 404(b) is viewed restrictively as a rule of exclusion rather than inclusion. See State v. Willis, 225 N.J. 85, 100 (2016). The concern in admitting evidence of prior bad acts is that "the jury may convict the defendant because he is 'a bad person in general.'" State v. Cofield, 127 N.J. 328, 336 (1992) (quoting State v. Gibbons, 105 N.J. 67, 77 (1987)). In Cofield, our Supreme

[3] We quote the current version of N.J.R.E. 404(b), which was amended on September 16, 2019. The motion judge decided the State's application in 2018, and defendant was convicted in 2019, prior to the July 1, 2020 effective date of the amendment. However, the amendment did not change the substance of the Rule.

Court articulated a four-pronged test for the admission of evidence under the Rule:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [Id. at 338 (emphasis added) (quoting Abraham P. Ordover, Balancing the Presumption of Guilt and Innocence: Rules 404(b), 608(b), and 609(a), 38 Emory L.J. 135, 160 (1989)).]

Defendant challenges only the motion judge's decision on the first and fourth prongs for the July 1, 2014 domestic violence incident, and the fourth prong for the September 28, 2014 and October 4, 2014 incidents. As for the first Cofield factor, it is well-settled that "evidence of the prior bad act, crime or wrong [must] be relevant to a material issue that is genuinely disputed." State v. J.M., 225 N.J. 146, 160 (2016) (quoting State v. Covell, 157 N.J. 554, 564-65 (1999)). Stated another way, "to be relevant, the other-crimes evidence must bear on a subject that is at issue at the trial, for example, an element of the

offense or some other factor such as motive, opportunity, intent, or plan." State v. P.S., 202 N.J. 232, 255 (2010).

The fourth prong "is generally the most difficult part of the test." State v. Barden, 195 N.J. 375, 389 (2008). "Because of the damaging nature of such evidence, the trial court must engage in a 'careful and pragmatic evaluation' of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice." Ibid. (quoting State v. Stevens, 115 N.J. 289, 303 (1989)). The fourth prong thus "requires an inquiry distinct from the familiar balancing required under N.J.R.E. 403: the trial court must determine only whether the probative value of such evidence is outweighed by its potential for undue prejudice, not whether it is substantially outweighed by that potential as in the application of Rule 403." State v. Green, 236 N.J. 71, 83-84 (2018).

The party seeking admission of the other-crime or bad-act evidence bears the burden of establishing that the probative value outweighs the potential for prejudice. Willis, 225 N.J. at 100. In performing its analysis under prong four, the trial court must consider whether such evidence is necessary to prove the fact in dispute or whether less prejudicial evidence could be used to prove the same fact. See Green, 236 N.J. at 84. "Nevertheless, some types of evidence,

such as evidence of motive or intent, 'require a very strong showing of prejudice to justify exclusion.'" Ibid. (quoting State v. Garrison, 228 N.J. 182, 197 (2017)).

Against that legal backdrop, we summarize the three domestic violence incidents challenged by defendant. In support of its motion, the State called lay, police, and medical witnesses during the N.J.R.E. 104 hearing.

Regarding the July 1, 2014 incident, the State alleged that following a verbal dispute, defendant choked Ross causing her to lose consciousness. Shauna John was staying at the couple's home when the fight occurred. John testified that after "[a]bout five minutes" of shouting, there was "silence." Defendant "came down the steps and said, . . . 'See you later, Shauna.'" John then heard Ross "gasping." John entered the bedroom to find that Ross had "defecated . . . and vomited on her bed." Ross was "hyperventilating"; "still throwing up"; and "couldn't breathe." John observed "marks around [Ross's] neck," and called emergency services.

Officer Jason Gassman of the South Brunswick Police Department (SBPD) responded to the home on a report of domestic violence. Gassman noticed "red marks around [the victim's] neck; a little bit of blood behind her ear." Gassman testified that Ross had trouble speaking and her voice was "raspy,

like unable to . . . fully have regular sentences without stopping and . . . clutching at her throat for pain."

The State also called two medical personnel witnesses. Matthew Spille, an emergency medical technician, responded to the home. Referencing Ross's medical chart, Spille testified that Ross reported "he choked me out until I passed out." The emergency room nurse, Anna Schleifer, testified that the victim "told [her] that she was choked by her boyfriend." Defendant thereafter pled guilty to simple assault in municipal court. Ross was issued a temporary restraining order (TRO), but it was later dismissed at her request.

On September 28, 2014, defendant allegedly threatened to kill Ross following an argument about defendant's infidelity. Ross called police, and SBPD Detective Monica Posteraro responded to the residence. Ross told Posteraro defendant referenced a "package," causing her to believe he "had a weapon." Although defendant did not display a gun, Ross stated he told her, "the next time that he was going to go to jail, it was going to be for her murder." Posteraro then spoke with defendant, who denied the allegations and claimed Ross misinterpreted his slang reference to another woman. Defendant was not criminally charged, but Ross was issued a TRO.

On October 4, 2014, defendant entered Rutgers University Behavioral Health Center, where Ross was employed, in violation of the TRO. Rutgers Police Officer Malika McLaughlin responded to the Health Center after Ross pressed a panic button. McLaughlin testified that she observed defendant standing at the front desk and the victim requesting that he leave the premises. After defendant left the building, Ross told McLaughlin about the TRO. McLaughlin located defendant, who acknowledged the existence of the TRO, but claimed "he was there to bring food to Ms. Ross." McLaughlin arrested defendant, who was in possession of a folding knife, box cutter, and a Leatherman multi-purpose tool in his work belt. Defendant was charged with contempt for violating the restraining order and unlawful possession of a weapon. He thereafter pled guilty to the contempt offense and the weapon offense was dismissed.

Following oral argument, the judge reserved decision and thereafter issued a lengthy written decision that accompanied the December 11, 2018 order. The judge accurately set forth the Cofield factors, then applied the factors to the evidence adduced for each incident.

Regarding the July 1, 2014 incident, the motion judge determined the evidence adduced at the hearing satisfied all four Cofield prongs, finding the

"[e]vent and the statements of the victim . . . admissible, with limiting instructions." Pertinent to this appeal, the judge found the first prong was satisfied because the incident was relevant "to the material issues related to . . . defendant's state of mind." The judge elaborated:

> [D]efendant's intent is particularly critical in this case, where the prior strangulation of the victim shows the defendant's awareness of the high probability that the victim could be seriously injured or killed by such actions, directly related to the State's burden to prove the various homicide elements. A jury may infer that after this incident, . . . defendant was aware of how easily he could inflict serious bodily injury on the victim.

To support her decision, the judge referenced defendant's testimony during the final restraining order hearing before the Family Part judge, wherein he testified that he was "provoked by the victim" prior to the incident. Thus, the judge found: "The probative value of [prong one] w[ould] be elevated if . . . defendant assert[ed] certain justification defenses" at trial.

Regarding the fourth Cofield prong, the judge found the evidence "[wa]s highly prejudicial" because the allegations of the July 1, 2014 incident and the homicide "both involve[d] strangulation." But the judge also found the evidence was "highly probative of defendant's motive, state of mind, . . . intent to harm the victim . . . and his knowledge of the high probability that the victim could

be seriously injured or killed by such actions." Similar to the first prong, the judge found: "The probative value of this factor w[ould] be elevated if . . . defendant assert[ed] certain justification defenses" at trial. However, the judge found "the probative value is not substantially outweighed by undue prejudice."

Turning to the September 28, 2014 incident, the judge determined Ross's statement, "the next time [he] goes to jail, will be for [her] murder," was admissible because it was "offered to demonstrate the nature of the relationship." The judge admitted the statement subject to a limiting instruction to be crafted with the parties' input. The judge excluded the balance of the statement and the fact that an FRO was issued.

Pertinent to this appeal, in her assessment of the fourth Cofield prong, the judge found: "The prejudice [wa]s extremely high in that . . . defendant allegedly threatened to murder the victim, which is exactly what he was charged with." Although the judge recognized that defendant's prior threats to kill Ross "could lead to a foregone conclusion that of guilt," she was satisfied defendant's prior threats "demonstrate[d] the mosaic of the parties' relationship, which was deemed relevant in State v. Scharf," 225 N.J. 547, 573-75 (2016). However, the judge misapplied the balancing test under the fourth Cofield prong, specifically citing the N.J.R.E. 403 standard.

The judge limited the admission of the State's evidence regarding the October 4, 2014 incident. In that portion of her opinion addressing "Cofield Prong 4," the judge excluded the victim's allegations that defendant stated "on multiple occasions that no restraining order would protect her because he would get to her, and the October 4th appearance at her job was his way of proving that to her" as "clearly prejudicial." However, the judge concluded that if defendant testified at trial, "the fact that [he] showed up despite the restraining order [wa]s admissible . . . subject to sanitization." The judge further ruled that the State could present evidence that Ross pressed the panic button "if justification defenses [we]re raised, elevating the relevance of the victim's fear . . . subject to a limiting instruction." The judge did not, however, expressly address the balancing test required under the fourth Cofield prong.

We will disturb a trial court's "sensitive admissibility rulings regarding other-crimes evidence . . . '[o]nly where there is a clear error of judgment.'" Green, 236 N.J. at 81 (alteration in original) (quoting State v. Rose, 206 N.J. 141, 157-58 (2011)). We owe no such deference to the trial court when it fails to apply the four-prong test. See State v. Darby, 174 N.J. 509, 518 (2002). "In other words, appellate review is de novo when the court should have, but did not perform a Cofield analysis." Green, 236 N.J. at 81. Because the motion judge

in this case applied the Cofield test, we defer to her findings – to the extent she correctly applied the law.

Initially, we reject defendant's contention that the judge misapplied the first Cofield prong regarding the July 1, 2014 strangulation incident. Defendant argues that because "[t]he danger of strangulation is universally known fact," the judge incorrectly determined the evidence was relevant to his intent.

Our prior decisions support the admission of defendant's prior strangulation of Ross as relevant to his motive, intent, and state of mind on the murder count. See State v. Vargas, 463 N.J. Super. 598, 609-10, 612-18 (App. Div. 2020) (holding defendant's prior threat that "if you can't be with me, then you can't be with anyone," was admissible under N.J.R.E. 404(b) as relevant to his state of mind, motive, and intent to kill victim); State v. Baluch, 341 N.J. Super. 141, 191-93 (App. Div. 2001) (finding evidence of past domestic abuse of victim was relevant to establish motive, intent, and state of mind to harm victim and negate defense theory).

However, we part company with the balancing test employed by the motion judge under the fourth Cofield prong for the first two incidents and her failure to explicitly apply the test for the last incident. Because the judge accurately set forth the balancing test in her general recitation of the governing

N.J.R.E. 404(b) principles, we remand for the judge to apply the correct test, pursuant to the parameters stated above.

III.

In his second point, defendant argues the judge erroneously denied his motion to admit two prior bad acts allegedly committed by Ross on November 24, 2014 and March 4, 2014. The motion judge conducted an N.J.R.E. 104 hearing, during which four witnesses testified regarding the first incident and one witness testified about the March 4, 2014 incident.

Regarding the November 24, 2014 incident, defendant called SBPD Officer Matthew Skolsky, who responded to the residence on a report made by Ross that defendant was cutting himself with a knife or box cutter. Skolskly observed defendant standing calmly on the porch with injuries to his stomach, arm, and hand. Defendant claimed "his girlfriend had done it . . . with a screwdriver." Skolsky charged Ross with aggravated assault.

Defendant also called EMT Spille, who had responded to the July 14, 2014 incident. Spille said the injuries could have been caused by a screwdriver, but that determination would "require further investigation from law enforcement."

The State called Ross's neighbor, Niki Ivey, who testified Ross called the SBPD from her home. Ross rang Ivey's doorbell but hid in the bushes until Ross

came to the door. Ross was wearing a nightgown; she appeared "frantic." The State also called the 9-1-1 dispatcher, Brian Zimmer.

The testimony concerning March 4, 2015 incident was brief. Defendant called SBPD Officer Bryan Garrison, who was familiar with the parties, having been called to their residence for domestic disputes on prior occasions. Ross told Garrison they fought about car keys. Ross "just wanted her keys back" and defendant "to leave for the night." Defendant claimed Ross "attacked him specifically by hitting him with an open palm hand." Defendant showed Garrison a video on his phone, capturing the argument and Ross "swat[ting] the phone out of his hand." The video was not preserved; charges were not filed against either party.

After hearing argument on another day, the judge reserved decision and thereafter issued a cogent written opinion denying the motion. The judge rejected defendant's contentions that the incidents were admissible to support his argument that he lacked intent under N.J.R.E. 405(b) and N.J.R.E. 608 ("Evidence of Character for Truthfulness or Untruthfulness"). The judge was persuaded the evidence need not meet the Cofield standard but satisfied the "simple relevance" test for reverse 404(b) evidence. See State v. Weaver, 219 N.J. 131, 150-51 (2014) (holding that reverse 404(b) evidence only requires the

trial court to find "the probative value of the evidence is not substantially outweighed by any of the Rule 403 factors, which are 'undue prejudice, confusion of issues, or misleading the jury,' and 'undue delay, waste of time, or needless presentation of cumulative evidence.'"); see also Model Jury Charges (Criminal), "Proof of Other Crimes, Wrongs, or Acts – Defensive Use (N.J.R.E. 404(b))," at 1 n.3 (approved May 22, 2000) (recognizing the "lower standard of admissibility – simple relevance – is required for defensive use of the evidence than for its use against the defendant").

Relevant to defendant's contentions reprised on appeal, however, the judge found problematic defendant's reliance on specific incidents of Ross's alleged conduct that did not result in a conviction. See N.J.R.E. 405 (limiting evidence of a person's character or character trait to reputation, opinion, or a criminal conviction, unless the "person's character trait is an essential element of a . . . defense"). Notably, as part of her December 11, 2018 order, the judge had excluded the State's application to admit the November 24, 2014 domestic violence dispute as defendant's prior bad act, finding "there remain[ed] confusion as to what happened between the parties." The judge also found "scant" evidence to support the March 4, 2015 incident.

On appeal, defendant argues the judge's decision prevented him from presenting a complete defense. Having considered defendant's contentions in view of the law and the judge's decision, we conclude they lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons stated by the judge in her well-reasoned decision.

IV.

In his pro se supplemental brief, defendant maintains the motion judge erroneously admitted the consensually recorded telephone calls between him and Hall. He argues because Hall is unavailable and the "primary purpose" of her calls was for use in a criminal prosecution, the judge's decision violated the Confrontation Clause. We agree.

Following her review of the twenty-nine-page transcript of the calls the judge first determined defendant's statements were admissible as statements offered against a party-opponent pursuant to N.J.R.E. 803(b)(1). The judge then parsed Hall's statements and questions into two categories, recognizing the calls "were made at the direction of law enforcement"; recorded by police; and were made "with the purpose of proving past events potentially relevant to later criminal prosecution." Citing the Third Circuit's decision in United States v. Hendricks, 395 F.3d 173 (2005), the judge admitted Hall's statements and

questions that "provide[d] context" for defendant's admissions. Because Hall was deceased and, as such, unavailable to testify at trial, the judge redacted those statements and questions that "ma[d]e an assertion of truth and could not merely be offered for contextual purposes" as violating the Confrontation Clause.

Contending Hall attempted to "get him to admit the crime," defendant challenges ten questions posed by Hall. As the State observes, the motion judge redacted seven of those questions, with the following questions remaining:

- Ok, so after that happened you just left her there?
- You know you're on my cell phone, it's just the two of us, you always been able to talk to me.
- I know, I know but can you just like – could you say like, I don't want you to go into explanation or anything could you just say, "yes or no," did you hurt her?

The State argues the first question "provide[d] context [for] defendant's statement that he and the victim had 'bumped heads'" during their argument, and the remaining two questions were "failed attempts to elicit a confession."

Although not specifically cited by defendant, the judge also deemed admissible several similar inquiries, such as: "[W]hen [Ross] saw the picture [of the other woman,] what really happened? What happened?" The judge also

permitted numerous exchanges, with redactions we note by striking out the redacted language, including:

> [HALL:] ~~So, so don't - so your still gonna' like ok, you said you went downstairs but where was she when you kissed her?~~
>
> [DEFENDANT:] She was still upstairs Pam.
>
> [HALL:] No you just said you, you went downstairs.
>
> [DEFENDANT:] I said I went downstairs, I said she was upstairs.
>
> [HALL:] Was she awake?
>
> [DEFENDANT:] When I did that she was upstairs.
>
> [HALL:] [S]he was upstairs?
>
> [DEFENDANT:] Pam, I, Pam, I can't not tell, Pam stop asking, I don't know what's going on. I cannot tell you anything Pam. I can't not, honestly. I can[']t.
>
> [HALL:] But can I ask you one thing?
>
> [DEFENDANT:] Yes.
>
> [HALL:] ~~Was she awake when you kissed her?~~
>
> [DEFENDANT:] Pam, I don't, I wasn't looking for all that. I couldn't tell you.
>
> [HALL:] ~~Have you - since um, since this, the blow up and everything, did you talk to her?~~

> [DEFENDANT:] Pam I haven't spoke [sic] with Samantha at all.
>
> [HALL:] You haven't spoken to her?
>
> [DEFENDANT:] Samantha, I mean Pam I have not talked to Samantha.
>
> [HALL:] You didn't call her?
>
> [DEFENDANT:] Pam I called her twice. I have not spoken to Samantha. I don't know what's going on with Samantha[,] Pam. But like I said her sister was still calling me up until yesterday.
>
> [HALL:] So you don't have a clue where Samantha may be?
>
> [DEFENDANT:] Exactly, I have no idea. That's what. that's what I'm trying to say to you.

Notably, the motion judge deemed inadmissible Hall's recorded statement to police, given on the same day but prior to the police-monitored consensual calls. In her statement, Hall "described her conversations with . . . defendant on September 21, 2015." For example, defendant told Hall that he had argued with Ross regarding a photo she had seen of him with another woman; "the argument escalated"; defendant "choked [the victim] out"; and he "knew that he had hurt her." Noting "defendant was already a suspect" when police had spoken with Hall, the judge found admitting the statement violated defendant's right of confrontation because the "purpose" of the interview "was to document any

information" Hall had about defendant "for potential use in his prosecution." The judge ruled that because Hall died before defendant was "provided an opportunity to cross examine her," her statement was not admissible at trial.

Well-established principles guide our review. Both the United States Constitution and the New Jersey Constitution guarantee defendants the right to confront witnesses and to cross-examine accusers. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10; State v. Branch, 182 N.J. 338, 348 (2005). The Confrontation Clause reflects "a preference for the in-court testimony of a witness, whose veracity can be tested by the rigors of cross-examination." State ex. rel. J.A., 195 N.J. 324, 342 (2008). "Although the Sixth Amendment does not interdict all hearsay, it does prohibit the use of out-of-court testimonial hearsay, untested by cross-examination, as a substitute for in-court testimony." Ibid.

In Crawford, the United States Supreme Court held that the Confrontation Clause bars from a criminal trial all "testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. "The threshold issue is . . . whether the proffered statement is 'testimonial.'" State v. Wilson, 227 N.J. 534, 545 (2017). The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" to trigger

Confrontation Clause scrutiny, but held "it applie[d] at a minimum . . . to police interrogations." Crawford, 541 U.S. at 68.

Thereafter, in Davis v. Washington, 547 U.S. 813, 822 (2006), the Court explained that a declarant's statements to police were nontestimonial where "the primary purpose of the interrogation [wa]s to enable police assistance to meet an ongoing emergency," whereas statements would be testimonial if "the circumstances objectively indicate[d] . . . no such ongoing emergency," and "the primary purpose of the interrogation [wa]s to establish or prove past events potentially relevant to later criminal prosecution." Ibid. New Jersey courts follow the Davis "primary purpose" test regarding police interrogations. See State v. Basil, 202 N.J. 570, 598-99 (2010); J.A., 195 N.J. at 347-50. Whether a statement is testimonial under the primary purpose test is "a fact-specific analysis . . . based on the circumstances presented." State v. Bass, 224 N.J. 285, 317 n.9 (2016).

"Trial court evidentiary determinations are subject to limited appellate scrutiny," and are ordinarily "reviewed under the abuse of discretion standard." State v. Buda, 195 N.J. 278, 294 (2008); see also State v. Sims, 250 N.J. 189, 218 (2022). However, the question of whether a defendant's constitutional rights

to confrontation have been satisfied is a "question of law . . . review[ed] de novo." Wilson, 227 N.J. at 544.

In J.A., the Court addressed "whether statements made by a non-testifying witness to a police officer, describing a robbery committed ten minutes earlier and his pursuit of the robbers" were testimonial. 195 N.J. at 329. The Court noted the lack of an "ongoing emergency" and that "the primary purpose" of the interrogation of a non-testifying declarant was "to establish or prove past events potentially relevant to [a] later criminal prosecution." Id. at 350 (second alteration in original) (quoting Davis, 547 U.S. at 822). The Court held "a declarant's narrative to a law enforcement officer about a crime, which once completed has ended any 'imminent danger' to the declarant or some other identifiable person, is testimonial." Id. at 348 (quoting Davis, 547 U.S. at 827-28). Similarly, in Basil, the Court held the non-testifying declarant's statements to police, alleging that the defendant had threatened her with a shotgun, were testimonial and inadmissible because the officers' "primary purpose" in interrogating the declarant "was to investigate a possible crime." 202 N.J. at 599 (quoting Davis, 547 U.S. at 830).

In the present matter, the motion judge admitted portions of Hall's recorded, out-of-court assertions and inquiry, which demonstrated her

suspicions about Ross's death. Although she spoke directly with defendant, Hall questioned her nephew at the behest of the officers, who were listening to the calls. Yet the judge deemed inadmissible Hall's recorded statement to police because the purpose of the interview was to record her information about defendant for use against him a trial. Because the State would have been prohibited from playing Hall's recorded statement to police about defendant's suspected involvement in the homicide, we conclude there is nothing different in the testimonial character of the recording calls, during which Hall attempted to elicit incriminating responses from defendant. See Crawford, 541 U.S. at 51-52 (stating "an objective witness" observing the rehearsed recordings would "reasonably . . . believe" they were likely to be "use[d] at a later trial"). The judge's decision to admit the calls at trial violated the Confrontation Clause. See id. at 68.

Nor are we convinced by the judge's reliance on Hendricks to support her decision that Hall's words were offered "to provide context" and not "for the truth of the matter asserted." In Hendricks, the prosecution had sought to admit recorded face-to-face conversations between a confidential informant and various defendants, although the informant died prior to trial. 395 F.3d at 182. The Third Circuit held that "the Confrontation Clause d[id] not bar the

introduction of the informant's portions of the conversation as are reasonably required to place the defendant['s] or coconspirator's nontestimonial statements into context." Id. at 184.

However, Hendricks was decided in 2005, one year before the Court's decision in Davis and before both our state and the Third Circuit formally adopted the "primary purpose" test. See Lambert v. Warden Greene SCI, 861 F.3d 459, 470 (3d Cir. 2017) (holding that because co-defendant's statements to a psychiatrist that inculpated defendant were "made with the primary purpose of substituting for his in-court testimony about the crime," they were testimonial); State v. Michaels, 219 N.J. 1, 31 (2014) (noting New Jersey's continued adherence to the "primary purpose test" in Confrontation Clause challenges).

Seven years after Hendricks was decided, the Third Circuit clarified its Crawford analytical framework in United States v. Berrios, 676 F.3d 118, 124 (3d Cir. 2012), which also involved the surreptitious recording of criminal defendants but differed from this case because the declarants were not aware they were being recorded. Although the court determined the "conversation was not testimonial, and thus not subject to Confrontation Clause scrutiny[,]" id. at 127, it noted that, "there may be some instances, such as where the primary purpose of the declarant's interlocutor was to elicit a testimonial statement, such

that even if the declarant's purpose was innocent, the conversation as a whole would be testimonial" and therefore inadmissible. Id. at 128 n.5.

The present case fits within the Berrios example. Hall's primary purpose was to elicit incriminating admissions from defendant on behalf of law enforcement for later use at trial, thereby violating defendant's right of confrontation. See Crawford, 541 U.S. at 52.

Affirmed in part; reversed and remanded in part. We do not retain jurisdiction.