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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2809-22

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

WILLIAM A. BRANDON,

Defendant-Respondent,

and

CHRISTOPHER GARDNER,

Defendant.

Argued September 20, 2023 – Decided October 17, 2023

Before Judges Currier and Susswein.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Somerset County, Indictment Nos. 21-02-0117 and 22-12-0571.

Emily M. M. Pirro, Assistant Prosecutor, argued the cause for appellant (John P. McDonald, Somerset County Prosecutor, attorney; Emily M.M. Pirro, of counsel and on the brief).

Joshua David Altman argued the cause for respondent (Benedict, Altman & Netti, LLC, attorneys; Joshua David Altman, of counsel and on the brief).

PER CURIAM

This appeal arises in the context of an ongoing prosecution for murder, conspiracy to commit murder, and weapons charges. By leave granted, the State appeals from a March 3, 2023 Law Division order and written opinion denying the prosecutor's in limine motion to admit into evidence portions of six telephone calls between defendant, William Brandon, and his friend, Abubakarr King. While incarcerated, King called defendant from a recorded line at Middlesex County Adult Correctional Facility. One of the calls occurred a few weeks before the murder of Raphael Edwards, for which defendant is being prosecuted. During that call, defendant said "[i]f I see [the victim], I'm knocking him out." He continued, "I'm gonna do him dirty." The remaining recorded conversations occurred after the murder. They discussed defendant's relationship with the victim, accusations by others that defendant was involved in the murder, and aspects of the ongoing murder investigation by police.

Following a N.J.R.E. 104 hearing, the trial court found the conversations "do not clearly constitute an admission or even implicate [defendant]" and "amount to general discussion of the unsolved crime and not admission(s) of

guilt." The court concluded, "the references to 'street' language and profanity seems unnecessarily prejudicial if played at trial." On that basis, the court ruled that no portion of any of the recorded calls would be played to the jury.

After carefully reviewing the record in light of the governing legal principles and arguments of the parties, and notwithstanding the deference appellate courts generally accord to a trial court's evidentiary rulings, we are constrained to reverse the court's order. We disagree that the prejudice associated with defendant's use of "street" language and profanity substantially outweighs the probative value of the conversations. Although we accept—as does the prosecutor—that some words could be redacted, we conclude the trial court erred in excluding the recorded calls in their entirety based on defendant's manner of speech.

In addition, there are issues of references to "other crimes" inadmissible hearsay in the calls that should be addressed on remand. Therefore, in its consideration of the admission of the phone calls on remand, the trial court shall make findings with respect to defendant's N.J.R.E. 404(b) and hearsay contentions.

I.

Defendant was charged by a superseding indictment with first-degree murder, N.J.S.A. 2C:11-3(a)(2); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and second-degree unlawful possession of a firearm without a permit, N.J.S.A. 2C:39-5(b)(1).¹ In a related indictment, defendant was charged with second-degree certain persons not to possess firearms, N.J.S.A. 2C:39-7(b)(1).

The State filed an omnibus in limine motion seeking eight separate evidentiary rulings. The only matter in this appeal is the State's motion to admit portions of jailhouse calls that King placed to defendant.

On February 23, 2023, the trial court convened a Rule 104 hearing after which it reserved decision. On March 3, 2023, the court issued its rulings on all eight in limine motions in a sixteen-page written decision. We granted the State's motion for leave to appeal the trial court's holding that the recorded telephone conversations were inadmissible.

We briefly summarize the pertinent facts that we discern from the pretrial record, which includes transcripts of the portions of the telephone calls at issue.

¹ The indictment also charges co-defendant Christopher Gardner. Gardner is not a party to this appeal.

In reciting the facts, we stress defendant is presumed innocent of all charges. We note the State presented testimony from a law enforcement expert on street slang. The trial court ruled that such expert testimony would be admissible to help the jury understand the content of the telephone conversations if the calls were found to be admissible. We rely in part on the expert's testimony to interpret the conversations to ascertain their probative value.

First Telephone Call

King placed the first of the recorded calls to defendant on June 11, 2020, at 3:35 p.m. King mentioned a person known as “RB,” who is the murder victim, Raphael Edwards. Defendant was offended by an interaction he had with Edwards on Instagram. He told King that if he saw Edwards, “I’m knocking him out.” King mentioned that “shit going on and [Edwards] running around hiding and shit.” Defendant replied, “I’m doing him dirty, bro. I don’t give a fuck. I’m gonna do him dirty. I’m going to filthy this ni**a like.” Defendant also stated that he only trusts King and “Chris,” ostensibly referring to co-defendant Gardner.

The State’s expert opined that defendant was stating he was going to physically harm Edwards.

Murder and Initial Investigation

On July 7, 2020—three-and-a-half weeks after the first recorded telephone conversation—Edwards was murdered minutes before midnight as he was leaving his apartment. A witness at the scene stated he saw two men run past Edwards’ body. The men entered a dark colored car and fled at a high rate of speed with the headlights off. The witness used his phone to record a video of the car speeding away. However, the video does not show the vehicle's registration. The police investigation also discovered surveillance video showing the suspects moving Edwards’ car to a nearby apartment complex, returning to the murder scene, and then fleeing in the dark-colored car.

When officers canvassed the crime scene, they discovered Edwards’ keys, car, wallet, and cell phone were missing. The phone was tracked and eventually recovered approximately a mile from the murder scene. Police later discovered Edwards’ car, keys, and wallet in the parking lot of the adjacent apartment complex. Police determined that Edwards’ car was registered to his friend, Shawn King (Shawn).²

Second Telephone Call

² Because he has the same surname as Abubakarr King, to avoid confusion, we use Shawn's first name. We mean no disrespect in doing so.

On July 9, 2020—two days after the murder—King placed two calls to defendant. The first conversation on that date occurred at 3:08 p.m.

Defendant expressed annoyance that people in the community were claiming that he was involved in the murder. He told King that if anyone “throw my name in, I’m gonna knock you out, bro. What the fuck do you think this is?” Defendant then stated he would talk to “D Murder” because he heard that D Murder’s “baby mom,” Nayasia, was the one who was saying defendant was involved. Defendant said, “I’m gonna tell D Murder off the rip like yo bro, if I hear your baby mom bring my name up again, bro, I’m turning this shit upside down, bro.”

Referring to the murderer, King stated that someone who “came like that” is a “known shark out here,” to which defendant replied, “[t]hat’s a great white, right?” Later in the conversation, King asked, “You a shark?” Defendant replied, “I’m a great white.”

Third Telephone Call

At 7:36 p.m. on July 9, 2020, King placed another call to defendant. Defendant was still upset that people in the community were talking about how he was involved in the murder. Defendant stated, “[w]hy y’all keep putting my name in some shit, bro? I’m telling, I told Meno like next time you talk to them

tell 'em I said this, yo. If I hear anything, I'm coming crazy, bro." Defendant further states, "[l]ike, I'm not doing this back and forth weirdo shit with y'all ni***s, bro. I hunt shit, bro. I'm different. . . .I told Jawill before to his face, I put it to him bro, I don't wanna take you out, bro, like you, you sit easy, bro....I don't wanna do this, bro. But I will. . . .He seen God that day, bro."

Defendant explained that his accusers were claiming he was the last person to call Edwards before he was killed. Defendant admitted to being one of the last people to have called Edwards at approximately 8:00 p.m., roughly four hours before the murder.

Defendant also talked about Edwards' car or "whip," which was registered in Shawn's name. Defendant stated Shawn was angry and wanted the car back. Defendant told King the car had been found by police and "the whole story is just like super twisted, you feel me? That's the beauty of [it]." Defendant added the situation is "funny as hell."

At the end of the call, defendant and King discussed who else was "in tune." Defendant says, "you and Chris that's really it, bro. I ain't gonna lie."

Fourth Telephone Call

King called defendant again on August 12, 2020, at 2:43 p.m. For context, at this point in the murder investigation, the police had not yet identified

the suspect's vehicle shown leaving the scene in the witness' phone video. Nor had police yet identified defendant as a suspect.

Defendant began the conversation by stating, "[y]o, I'm, I'm such a fucking shark bro." He then explained he heard through his friends that someone saw a black Honda Accord leave the scene of the murder. Defendant stated he has three Hondas but none of them are Accords. He then described steps he took to make people believe he drives a black Lexus. He said, "[s]o, I did, I did some funny shit, right? I'm at work. Boss asked me to take a car to the car wash a black Lexus and shit. You feel me?" He continues, "[s]o, I'm, I'm in that shit flooring (inaudible) I'm dicking this car in. I post this shit [on social media] so, now everybody like, 'oh, you got a different whip?['] Like '[y]eah that shit clean, that shit clean." He further stated to King, "[t]he whole time I'm just a regular shark shit."

Fifth Telephone Call

On August 14, 2020, at 8:06 p.m., King placed another call to defendant. To provide context for this conversation, we note that the day before, the Somerset County Prosecutor's Office had issued a press release asking for the public's assistance in identifying: (1) the fleeing vehicle shown in the witness' video, and (2) the two people shown in the surveillance video, one of whom had

a distinctive gait. At the time, law enforcement believed the fleeing car in the video was a four-door vehicle.

Defendant and King discussed the press release. Defendant states someone he knows sent him the video, and “I guess n****s think it's me.” Defendant downplayed the significance of the video. King stated the individuals depicted in the video “could’ve been anybody.” Defendant agreed, replying, “that’s what I’m telling him.” He says, “[t]hey don’t got its nothing yo bro, it’s literally no evidence.” He continues, “[l]ike y’all don’t have no, no, nobody identified nothing, nothing.” He ends the call with, “[t]hey just guessing. Einny, meeney, minney mo.”

On August 15, 2020, two days after the press release, law enforcement received a tip that identified defendant as the person walking with a distinctive gait in the surveillance video. The tipster also identified the getaway car as defendant’s vehicle—a two-door BMW.

Law enforcement initiated a surveillance of defendant’s residence. They observed defendant driving a 2015 Jeep Grand Cherokee with a temporary registration. Subsequent investigation revealed that defendant had traded his BMW for the Jeep on the same day the tip was received. He provided his cell phone number on the bill of sale. Using that information, the prosecutor's office

determined³ that: (1) defendant's cell phone was at the crime scene at the time of the murder and (2) his phone had also been at the location where the victim's cell phone was discarded.⁴

Sixth Telephone Call

The last recorded call the State seeks to introduce at trial took place on August 17, 2020 at 9:27 a.m. Defendant told King he was "chillin," and talked about the prosecutor's press release. Referencing the vehicle in the video, defendant said, "[t]hat shit look like a four-door like, you feel me?" He added, "[b]ut little do they know that shit's not even in my name you feel me?" Defendant noted, while laughing, that he had "cross[ed] all t's and dot[ted] all I's." He also mentioned the suspect's distinctive gait, stating, "[a]re you serious?"

³ The trial court denied defendant's motion to bar expert testimony by an FBI special agent and an expert report by the FBI Cellular Analysis Survey Team concerning historical cell-site analysis. That evidence's admissibility is not before us in this pretrial appeal. We offer no opinion on whether and in what circumstances historical cell-site evidence would be admissible under the standard recently announced by our Supreme Court in State v. Burney, 255 N.J. 1 (2023).

⁴ The investigation revealed that Gardner's cell phone was also present at the crime scene at the time of the murder and was at the location where the victim's phone was discarded.

A distinctive walk? That's what y'all, that's what ya'll banking on? . . . That's fucking crazy."

On August 20, 2020, defendant gave a statement to police claiming he knew Edwards but had not seen him in a year and a half.⁵ He claimed he had no issues with Edwards and had no idea where Edwards lived. He acknowledged, however, that he was aware people were naming him as a suspect. He stressed his BMW was a different color than the one in the video, and while police believed the getaway car was a four-door sedan, his car was a two-door.

II.

After summarizing the parties' arguments, the trial court made the following findings, which we reproduce in their entirety:

The court listened to the jail calls at the [Rule] 104 hearing. The conversations between Mr. Brandon and Mr. King are rapid, slightly profane, and filled with 'slang' terminology. The conversations, in the court's view, do not clearly constitute an admission or even implicate Mr. Brandon. They do indicate his upset with being mentioned as a suspect by people in the community.

The court finds the jail calls between Mr. King and Mr. Brandon . . . amount to general discussion of

⁵ The trial court rejected defendant's contention the electronically recorded statement was not voluntary and the detectives' questioning was impermissibly deceptive with respect to defendant's status as the principal target of the murder investigation. The admissibility of that statement is not before us in this appeal.

the unsolved crime and not admission(s) of guilt. Furthermore, the references to 'street' language and profanity seems unnecessarily prejudicial if played at trial. Balancing the probative value of these calls against the fairly significant prejudice to Mr. Brandon, the court finds that these jail calls, shall not be admissible at trial.

The State raises the following substantive contentions for our consideration:

THE JAIL CALLS ARE HIGHLY PROBATIVE EVIDENCE WITH LIMITED, IF ANY, PREJUDICIAL VALE.

NO COURT RULE OR OTHER LEGAL REASON EXISTS TO EXCLUDE THE JAIL CALLS.

III.

We begin our analysis by acknowledging the foundational legal principles governing this appeal. The scope of our review is limited; we review a trial court's evidentiary rulings for abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021) (citing State v. Nantambu, 221 N.J. 390, 402 (2015)). Under that standard, we may “not substitute our judgment unless the evidentiary ruling is ‘so wide of the mark’ that it constitutes ‘a clear error in judgment.’” Garcia, 245 N.J. at 430 (quoting State v. Medina, 242 N.J. 397, 412 (2020)). A trial court is deemed to have abused its discretion “when a decision is ‘made without

a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.” State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). Evidentiary decisions are reviewed de novo, however, “whe[n] the trial court fails to apply the proper legal standard in evaluating the admissibility of evidence.” State v. Trinidad, 241 N.J. 425, 448 (2020).

As a general matter, evidence is admissible at trial if it is relevant and probative; for evidence to be relevant, it must have “a tendency in reason to prove or disprove any fact of consequence to the determination of the action.” Garcia, 245 N.J. at 431 (citing Rule 401); see also State v. Burr, 195 N.J. 119, 127 (2008) (Evidence is probative under Rule 401 “when it has a tendency ‘to establish the proposition that it is offered to prove.’”) (quoting State v. Allison, 208 N.J. Super. 9, 17 (App. Div. 1985)).

“A court may admit evidence it finds to be relevant, 'unless exclusion is warranted under a specific evidence rule.'” Trinidad, 241 N.J. at 449 (quoting Burr, 195 N.J. at 127). “One such rule . . . is N.J.R.E. 403.” Ibid. (quoting State v. Cole, 229 N.J. 430, 448 (2017)). Rule 403 provides that “relevant evidence may be excluded if its probative value is substantially outweighed by the risk of: (a) [u]ndue prejudice, confusion of [the] issues, or misleading the

jury; or (b) [u]ndue delay, waste of time, or needless presentation of cumulative evidence.”

The Court in Trinidad stressed that in deciding whether “undue prejudice” exists under Rule 403, a court must determine: whether the evidence’s probative value 'is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence.' Trinidad, 241 N.J. at 449 (alteration in original) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)).

A.

Probative Value of Pre-Murder Conversation

We first address the initial telephone call that took place a few weeks before the murder. The State argues defendant's statements about being upset with Edwards regarding an Instagram message and defendant's declaration he would inflict physical harm on Edwards if he saw him are relevant to prove defendant's motive and intent. We agree.

Our Supreme Court has long recognized “[a]ll evidentiary circumstances which are relevant to or tend to shed light on the motive or intent of the defendant or which tend fairly to explain his actions are admissible in evidence against him.” State v. Rogers, 19 N.J. 218, 228 (1955). In State v. Calleia, the

Court stressed that “[c]ase law and treatises have recognized the special role of motive evidence and its unique capacity to provide a jury with an overarching narrative, permitting inferences for why a defendant might have engaged in the alleged criminal conduct.” 206 N.J. 274, 293 (2011) (citing State v. Carter, 91 N.J. 86, 102 (1982)); see also Barbara E. Bergman et al., 1 Wharton on Criminal Evidence § 4:45, at 479 (15th ed. 1997) (explaining that motive evidence can “establish the identity of the defendant as the person who committed the offense” and that an “inquiry as to motive is often of great importance, particularly in a case based largely on circumstantial evidence.”).

The Court in Calleia reiterated that a "'a wider range of evidence' is permitted to prove motive, so long as it remains a material issue in a case." 206 N.J. at 293-94 (quoting State v. Covell, 157 N.J. 554, 565 (1999)). Importantly, the Court added,

In light of its unique probative function, a strong showing of prejudice is necessary to exclude motive evidence under the balancing test of N.J.R.E. 403. See State v. Koskovich, 168 N.J. 448, 486 (2001); Covell, supra, 157 N.J. at 570. Where the prosecution has a theory of motive that rests on circumstantial evidence, that evidence should not be excluded merely because it has some capacity to inflame a juror's sensibilities; to hold otherwise would preclude a jury from inferring a defendant's 'secret design or purpose.' See Rogers, supra, 19 N.J. at 228. A reasonably broad allowance for motive evidence permits jurors, in their role as fact-

finders and judges of credibility, to reject a given explanation for conduct as inconsistent with their understanding of human nature, or to accept a motive as a rational premise that could lead a defendant to criminality.

Time and again, courts have admitted motive evidence even when it did no more than raise an inference of why a defendant may have engaged in criminal conduct, and even in the face of a certain degree of potential prejudice stemming from the evidence.

[Id. at 294.]

Applying these legal principles to the present matter, we conclude the first recorded conversation is highly probative and admissible.⁶

B.

Probative Value of Post-Murder Conversations

We turn our attention next to the probative value of the recorded conversations that occurred after the murder was committed. The State argues these calls, individually and collectively, evince a consciousness of guilt, reveal defendant's awareness of the circumstances of the crime, and show the efforts defendant took to conceal his complicity.

⁶ As we discuss in subsection C, we do not preclude the trial court on remand from exercising its discretion to redact specific words.

The trial court found that none of the conversations "implicate" defendant, and that they "amount to general discussion of the unsolved crime and not admission(s) of guilt." But as we have already noted, evidence is deemed to be relevant if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." R. 401; see Garcia, 245 N.J. at 431. A defendant's statements concerning a crime need not be tantamount to an explicit confession to constitute relevant evidence of consciousness of guilt. Cf. State v. Cole, 229 N.J. 430, 454 (2017) ("Our jurisprudence regarding consciousness-of-guilt evidence derives from the principle that certain conduct may be 'intrinsically indicative of a consciousness of guilt,' and may therefore be admitted as substantive proof of the defendant's guilt.") (quoting State v. Phillips, 166 N.J. Super. 153, 160 (App. Div. 1979)).

In this instance, defendant's conversations suggest intense interest and substantial familiarity with the crime. They also recount defendant's efforts to throw persons who were accusing him—and police—off the trail. Those efforts include posing for pictures with a car that was not his, and selling his actual car two days after the prosecutor issued a press release asking the public for help identifying the getaway vehicle. See State v. Williams, 190 N.J. 114, 127-28

(2007) (noting post-crime evidence of a defendant's attempts at avoiding detection can be admitted as consciousness of guilt evidence).

In sum, although the statements defendant made in the post-murder phone calls are not as probative as the statements he made in the pre-murder phone call—where he explained why he was upset with the victim and announced his intention to harm him—the post-murder statements are sufficiently probative to satisfy the standard of relevance. That leads us to consider whether the probative value of those statements is substantially outweighed by the risk of undue prejudice.

C.
Assessment of Prejudice

The trial court concluded that "the references to 'street' language and profanity seems unnecessarily prejudicial if played at trial." In reaching that conclusion, the court did not apply the "substantially outweigh" test prescribed in Rule 403. Nor did the trial court explain why defendant's use of "street" language and profanity presented such "inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence." Trinidad, 241 N.J. at 449 (quoting Thompson, 59 N.J. at 421).

We conclude defendant's use of such language does not provide an adequate basis to exclude the recorded conversations in their entirety. See Williams, 190 N.J. at 133 (“The fact that the evidence casts defendant in an unflattering position is not reason enough to exclude it.”). We are aware of no precedent to support the proposition that defendant's coarse manner of speech provides independent and sufficient grounds to exclude relevant and otherwise admissible statements.

In State v. Tate, our Supreme Court recognized that “[c]onceptions of what constitutes a curse word—even ones that would debauch the morals of a minor—and off-color language may differ among reasonable people. What is profane or indecent may depend on social norms that are fluid.” 220 N.J. 393, 411 (2015). Applying current societal norms in New Jersey, we are unpersuaded that jurors would be diverted from a reasonable and fair evaluation of the basic issue of guilt or innocence because they heard defendant using coarse language during a telephone call.

We add two observations concerning the risk of undue prejudice. First, the jury that will hear the case has not yet been selected. In recent years, the New Jersey judiciary has undertaken concerted reform efforts to address the problem of juror implicit bias. In State v. Andujar, a recent case involving the

jury selection process, our Supreme Court recognized the nature and scope of that problem and adopted a new rule to address it. 247 N.J. 275, 302-03, 315 (2021). We believe any trial prejudice against defendant that might be attributed to his use of "street" language can be addressed by appropriate voir dire procedures and tailored jury instructions.

Second, at oral argument, the State expressed its willingness to delete certain words. We emphasize that nothing in our opinion should be construed to restrict the trial court's discretion to redact specific words or nicknames—such as D Murder—to address prejudice concerns, provided such redactions can be done without changing the meaning of defendant's statements.

IV.

The trial court acknowledged in its written opinion that defendant challenged the admissibility of the recorded jail calls on several distinct grounds, including that those conversations include references to what defendant characterizes as "other crimes." The trial court noted,

[t]he defense objects to the admission of the jail calls under N.J.R.E. 404(b) contending the calls are highly prejudicial because they refer to a "D-Murder" and "theft of a Lexus". The defense claims that the State is using the state of mind argument as a back doorway to admit hearsay.

However, the trial court made no findings with respect to defendant's Rule 404(b) and hearsay arguments. We therefore remand for the trial court to make findings of fact and law with respect to defendant's Rule 404(b) and hearsay contentions.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

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



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