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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3559-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ISAIAH J. KNIGHT,

Defendant-Appellant.

Argued November 29, 2022 – Decided January 4, 2023

Before Judges Sumners, Geiger and Susswein.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 22-03-0585.

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

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

PER CURIAM

By leave granted, defendant appeals an interlocutory Law Division order compelling reciprocal discovery pursuant to Rule 3:13-3(b)(2). Defendant is facing prosecution for murder. Two eyewitnesses to the crime gave statements to police identifying defendant as the shooter. One of the witnesses later gave another sworn statement claiming he was held at gunpoint by defendant's relatives and forced to sign an affidavit recanting his prior identification of defendant. Judge Ronald Wigler granted the State's discovery motion to compel the defense to turn over any recantation affidavits that may be in its possession.¹ The judge found that any such affidavits were neither protected attorney work product nor the result of a confidential defense investigation within the meaning of State v. Williams, 80 N.J. 472 (1979). After carefully reviewing the record in light of the arguments of the parties, we affirm.

¹ The defense has not confirmed whether it is in possession of any witness affidavits purporting to recant prior identifications of defendant as the shooter. We note that if defense counsel is not in possession of such documents, the State's reciprocal discovery motion and this interlocutory appeal are academic, as counsel can only be required under the reciprocal discovery rule to turn over documents in his file. It bears emphasis the State has not issued or sought a subpoena. See also note 5.

I.

We briefly summarize the chronology of events leading up to the issuance of the reciprocal discovery order.² On June 1, 2021, Tyzier White was shot and killed outside a bar in Newark. Defendant was later identified as the shooter by two eyewitnesses, Zay and DJ.³ Both claim that immediately after the shooting, defendant forced them at gunpoint to drive him away from the crime scene. During the getaway and in the following days, defendant allegedly contacted the witnesses to intimidate them. Despite the threats, Zay and DJ gave sworn, electronically recorded statements to police. Both identified defendant as the shooter and selected his photograph from photo arrays. Defendant was arrested on June 16, 2021. He has been detained in county jail pending trial since September 2021.

On September 10, 2021, defendant was charged by indictment with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); second-degree unlawful

² Our recitation of the pertinent facts is based on unproven allegations made by the prosecutor as part of the pretrial record before us. We stress defendant is presumed innocent of all charges.

³ Because defendant and Zay share the same first and last names, we use the witnesses' nicknames to avoid confusion.

possession of a weapon, N.J.S.A. 2C:39-5(b); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a).

On December 21, 2021, defendant's sister, Aminah Anderson, allegedly drove Zay to a house on Hobson Street in Newark. Another woman opened the door for them. Once inside, Anderson took Zay into a bedroom and made sexual advances. Anderson then left the bedroom and allowed the other woman and two masked gunmen (collectively, "the group") to enter. Zay recognized one of the gunmen as Sylvester Richardson, who is defendant's cousin.

The group referred to a "discovery packet" and gave Zay a prewritten affidavit to copy by hand and sign. The prewritten affidavit purported to recant Zay's previous sworn statement and positive identification of defendant as the shooter. At gunpoint, Zay complied with the demand that he copy and sign the recantation affidavit. The group also asked Zay about DJ and another woman who they believed had given a statement to police regarding the murder. The group then released Zay.

The next day, Zay went to the police and gave a sworn, electronically recorded statement about what happened in the bedroom on Hobson Street. He showed the officers Instagram pictures of Anderson and Richardson.

On March 16, 2022, an Essex County Grand Jury returned a superseding indictment, adding to the existing charges one count of second-degree conspiracy to commit witness tampering, N.J.S.A. 2C:5-2 and 2C:28-5(a)(2); and two counts of second-degree kidnapping, N.J.S.A. 2C:13-1(b)(1).

Five days later, Zay received a text message threatening his parents. Zay showed the text message to police and gave another sworn statement identifying Anderson and Richardson as two of the four people who kidnapped him and held him at gunpoint.

The State thereafter moved to compel discovery of the alleged recantation affidavit signed by Zay and any similar affidavit signed by DJ. Defendant objected to the reciprocal discovery motion. Judge Wigler convened a hearing on June 9, 2022, after which he granted the State's motion, rendering a seven-page written decision.

We granted defendant's motion for leave to appeal the reciprocal discovery order.⁴ Defendant raises the following contentions for our consideration on appeal:

⁴ In our order granting leave to appeal, we sua sponte asked the parties to address "whether the trial court reviewed the disputed items in camera, and, if not, if the matter should be remanded for that purpose." Neither party seeks an in-camera review. See Section IV.

POINT I

THE MOTION COURT'S ORDER GRANTING THE STATE'S MOTION TO COMPEL DISCOVERY OF POTENTIAL AFFIDAVITS THAT THE DEFENSE HAS NO INTENTION TO INTRODUCE AT TRIAL DIRECTLY CONTRADICTS SUPREME COURT PRECEDENT, IS AN ABUSE OF THE DISCOVERY PROCESS, AND VIOLATES HIS RIGHTS TO COUNSEL, DUE PROCESS, AND TO REMAIN SILENT.

POINT II

NO SUCH AFFIDAVIT HAS BEEN PRODUCED BY THE DEFENSE AND IN-CAMERA REVIEW OF THE PURPORTED AFFIDAVIT WOULD NOT AID THE COURT IN RESOLVING THE STATE'S DISCOVERY MOTION.

II.

We begin our review by acknowledging that an appellate court's review of discovery rulings is limited. State v. Brown, 236 N.J. 497, 521 (2019). We "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Ibid. (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). "The abuse of discretion standard instructs us to 'generously sustain [the trial court's] decision, provided it is supported by credible evidence in the record.'" Id. at 522 (alteration in original)

(quoting Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010)).

"The criminal discovery rules are 'geared towards broader mutual discovery within constitutional limits.'" State v. Wyles, 462 N.J. Super. 115, 122 (App. Div. 2020) (quoting State v. Montague, 55 N.J. 387, 401 (1970)). Courts nonetheless "must strike a careful balance between the interests promoted by discovery and the need to preserve a defendant's constitutional rights." State v. Tier, 228 N.J. 555, 558 (2017) (citing State v. Cook, 43 N.J. 560, 563 (1965)).

Rule 3:13-3(b)(2) provides in relevant part, "defendant shall provide the State with all relevant material, including, but not limited to:"

(C) the names, addresses, and birthdates of those persons known to defendant who may be called as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements;

(D) written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the State may call as a witness at trial. The defendant also shall provide the State with transcripts of all electronically recorded witness statements by a date to be determined by the trial judge, except in no event later than 30 days before the trial date set at the pretrial conference.

[R. 3:13-3(b)(2)(C) and (D) (emphasis added).]

The purpose of Rule 3:13-3 is "to avoid having the State confronted at trial for the first time with written statements or summaries of oral statements of its own witnesses . . . used to attack the veracity of the witnesses' courtroom testimony." Wyles, 462 N.J. Super. at 122–23 (omission in original) (quoting Williams, 80 N.J. at 478).

The State intends to call both Zay and DJ as witnesses at trial. Accordingly, any of their written statements in possession of the defense fall under the rubric of Rule 3:13-3(b)(2)(D). However, Rule 3:13-3(d) expressly exempts from discovery "a party's work product consisting of internal reports, memoranda or documents made by that party or the party's attorney or agents, in connection with the investigation, prosecution or defense of the matter." That exception and the constitutional grounds upon which it is based are discussed in the case that defendant principally relies on, Williams, 80 N.J. at 478–82.

The gravamen of defendant's argument is that the defense is not obliged under the reciprocal discovery rule, as interpreted in Williams, to turn over potentially incriminating evidence that he does not intend to introduce at trial. He stresses that "the issue before this [c]ourt is not whether the State would be entitled to the type of allegedly incriminating evidence it believes is in defense

counsel's files if sought through the proper process,^[5] the question this [c]ourt must determine is whether the discovery process provides the means to do so."

Our Supreme Court in Williams imposed limitations on when the State can compel a defendant to disclose the fruits of the defense investigation pursuant to the rule governing reciprocal discovery. The trial court there granted the prosecutor's request for reciprocal discovery pertaining to information learned in an interview with the robbery victim that was conducted by defense counsel and his investigator. Id. at 476. During that interview, the victim identified a photograph of the defendant as the assailant. Id. at 475. The victim's statement and the photo she identified depicting defendant were thus inculpatory. The Court held that by extending the criminal reciprocal discovery rule to inculpatory material that defense counsel had in his file, the trial court "trespassed on defendant's [Sixth Amendment] right to effective assistance of counsel. The material was obtained during defense counsel's preparation for

⁵ We presume from the context of defendant's appeal brief that "proper process" refers to acquisition of the suspected recantation affidavits by search warrant or subpoena. Given the limited record before us and the narrow issue defendant frames on appeal, we do not address and offer no comment on whether and in what circumstances the State might be authorized to obtain the suspected recantation affidavits by means of a search warrant or a subpoena directed to defendant. See note 1.

trial and, since it was inculpatory, counsel obviously did not intend to use it at trial." Id. at 477.

The Supreme Court concluded that the reciprocal discovery rule

does not give the State access to statements or summaries of statements made by its witnesses to defense counsel during defense preparation for trial if defense counsel does not intend to use them at trial. To hold otherwise would infringe on a defendant's constitutional right to the effective assistance of counsel because of the chilling effect it would have on defense investigation. Defense counsel would be hesitant to make an in-depth investigation of the case for fear that inculpatory material would be disclosed which might have to be turned over to the State.

[Id. at 478–79.]

The Court added:

The investigative course selected by an attorney in order to prepare a proper defense for his client frequently entails a high order of discretion. This often calls for more than simple fact gathering. Evidential materials obtained in the exercise of this professional responsibility are so interwoven with the professional judgments relating to a client's case, strategy and tactics that they may be said to share the characteristics of an attorney's "work product." Blanket discovery of the fruits of this kind of legal creativity and preparation may impact directly upon the freedom and initiative which a lawyer must have in order to fully represent his client. Curtailment or inhibition of this attorney function by discovery, not otherwise justified to avoid trial surprise, would permit the State to undermine the effectiveness of an attorney in serving his client.

It is abhorrent to our concept of criminal justice to compel a defendant, under the guise of reciprocal discovery, to disclose to the State inculpatory evidence uncovered by defense counsel during his preparation for trial and then allow the State to use that evidence as part of its case in chief.

[Id. at 479 (citation omitted).]

Williams makes clear that a defendant's Sixth Amendment right to effective assistance of counsel would be undermined were the defense to be inhibited from conducting its own thorough investigation or trial preparation by the prospect of being compelled to disclose incriminating investigative results to the prosecutor. But as Judge Wigler correctly noted, the Sixth Amendment concerns that undergird the Williams holding are not implicated in the matter before us because no one is claiming the alleged recantation affidavits are the product of an investigation or trial preparation undertaken by defense counsel.

Indeed, the facts in this case are not remotely analogous to the situation in Williams where the defense attorney and his investigator were interviewing the State's witness. No one suggests defense counsel in this matter had prior knowledge of, much less countenanced or actively participated in, the alleged kidnapping incident. See RPC 1.6(b)(2) (requiring attorneys to "reveal such information to the proper authorities . . . to prevent the client or another person

. . . from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal").

The Williams Court referred explicitly to "[e]vidential materials obtained in the exercise of [defense counsel's] professional responsibility," suggesting the materials obtained as a result of defense counsel's witness interview were tantamount to the attorney's "work product." 80 N.J. at 479. Here, in stark contrast, the sought-after affidavits can hardly be characterized as attorney work product. Rather, they are the product of the alleged kidnapping and witness tampering activity undertaken by defendant's relatives outside his presence.

Given the manner in which the alleged recantation affidavits were created, their disclosure by means of reciprocal discovery would not chill defense counsel from conducting thorough defense investigations, thereby distinguishing this case from Williams and its progeny. See, e.g., Tier, 228 N.J. at 563 (noting that certain inculpatory evidence that the defense does not intend to use at trial has been held to be exempt from discovery so as to protect a defense counsel's ability to investigate the case, and thereby provide effective assistance) (citing Williams, 80 N.J. at 475).

III.

Defendant broadly contends the reciprocal discovery order deprives him "of his state and federal rights to effective assistance of counsel, due process and to remain silent." Defendant's appeal brief only mentions "due process" in a point heading and the above-quoted introductory sentence. So too, defendant's brief only refers to the Fifth Amendment right to remain silent in passing.

Aside from the point heading and introductory sentence, the only other mention of the right to remain silent is a citation to our decision in State v. Melvins, 155 N.J. Super. 316, 319 (App. Div. 1978), for the proposition that there is an "intrinsic connection between the attorney-client privilege, the right to remain silent and the right to effective assistance of counsel." Defendant cites no other case to address the Fifth Amendment implications of compelling a defendant to disclose incriminating evidence. Nor does defendant make any arguments that are specific to either the Due Process Clause or the Fifth Amendment. See Oasis Therapeutic Life Centers, Inc. v. Wade, 457 N.J. Super. 218, 234 n. 12 (App. Div. 2018) (declining to consider an issue that was not briefed); Weiss v. Cedar Park Cemetery, 240 N.J. Super. 86, 102 (App. Div. 1990) (stating that the failure to adequately brief an issue requires it to be dismissed as waived); State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977)

(noting the burden on parties to "justify their positions by specific reference to legal authority"). We believe any Fifth Amendment claim regarding compelled disclosure of incriminating documents is fact-sensitive and cannot be resolved in a factual vacuum without the benefit of specific arguments by the parties.

IV.

As we have noted, we directed the parties to brief whether an in-camera review of the alleged recantation affidavits by the trial judge is necessary and appropriate. See note 4. Cf. Payton v. NJ Turnpike Auth., 148 N.J. 524, 552 (1997) (holding that trial court "must evaluate the individual documents at issue in camera to determine what role an attorney may have had in the creation of those particular documents" (emphasis omitted)). Neither party believes in-camera review is necessary.⁶ Because there is no allegation that defense counsel had anything to do with the creation of the alleged recantation affidavits, we are satisfied there is no need for the trial court to conduct an in-camera review to determine whether documents subject to the reciprocal discovery order include information protected by the attorney-client privilege.

⁶ The State nonetheless argues as a fallback position that if we were to rule the affidavits are tantamount to protected attorney work product within the meaning of Williams, "at a minimum" the affidavits must be reviewed in-camera to determine whether they actually contain any privileged information.

Affirmed.

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

A handwritten signature in black ink, appearing to be 'AWD', is written over the text 'file in my office.' and partially over the title 'CLERK OF THE APPELLATE DIVISION'.

CLERK OF THE APPELLATE DIVISION