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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1757-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DENIS A. CATANIA, a/k/a
DENNIS CATANIA,

Defendant-Appellant.

Argued March 13, 2017 – Decided March 27, 2017

Before Judges Nugent, Haas and Currier.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
13-03-0859.

James K. Smith, Jr., Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Mr. Smith, on the briefs).

Steven A. Yomtov, Deputy Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney; Mr.
Yomtov, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

On December 21, 2011, an Atlantic County grand jury returned an indictment¹ charging defendant Denis Catania, his girlfriend Diana Camacho, and their friend Damien Leo² with a number of offenses including first-degree murder, first-degree conspiracy to commit murder, and first-degree felony murder. Thereafter, defendant and Camacho filed several joint motions. On June 13, 2012, the trial court denied their motion to dismiss the indictment. On November 29, 2012, the court denied their motion to suppress evidence seized from defendant's home pursuant to a search warrant, and to exclude evidence concerning their flight to Cuba after the police executed the search warrant.

On March 20, 2013, an Atlantic County grand jury returned a thirteen-count superseding indictment³ charging defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and/or (2) (count one); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3(a)(1) and/or (a)(2) (count two); two counts

¹ Indictment No. 11-12-3059.

² On May 3, 2012, Leo pled guilty to an amended charge of second-degree aggravated manslaughter and, as part of his plea agreement, he agreed to give truthful testimony if called as a witness at defendant's and Camacho's trial. After the charges against defendant and Camacho were resolved, the trial court sentenced Leo to eight years in prison, subject to the 85% parole ineligibility provisions of the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2.

³ Indictment No. 13-03-0859.

of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1) and (b)(2) (counts three and four); second-degree conspiracy to commit kidnapping, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:13-1(b)(1) and/or (b)(2) (count five); two counts of first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (counts six and seven); second-degree aggravated arson, N.J.S.A. 2C:17-1(a) (count eight); second-degree conspiracy to commit aggravated arson, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:17-1(a) (count nine); fourth-degree tampering with physical evidence, N.J.S.A. 2C:28-6(1) (count ten); third-degree hindering apprehension, N.J.S.A. 2C:29-3(b)(1) (count eleven); second-degree desecration of human remains, N.J.S.A. 2C:22-1(a)(2) (count twelve); and third-degree possession of a weapon (a starters pistol), N.J.S.A. 2C:39-4(d) (count thirteen).⁴

On June 27, 2013, the trial court denied defendant's and Camacho's motions to dismiss the superseding indictment. On July 11, 2013, the court granted the State's motion to admit evidence of defendant's prior bad acts at trial pursuant to N.J.R.E. 404(b).

On July 11, 2013, defendant pled guilty to one count of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), as a lesser-included offense of first-degree murder under count one. In return for defendant's guilty plea, the State agreed to

⁴ Camacho was named as a co-defendant in counts one through twelve of the indictment.

recommend that the trial court impose a custodial sentence between twenty-two and twenty-five years, subject to NERA, and a five-year period of parole supervision upon release. The State also agreed to dismiss the remaining charges against defendant.

On August 22, 2013, the trial judge sentenced defendant to twenty-five years in prison, subject to NERA, with a five-year period of parole supervision. The judge ordered defendant to pay the victim's family \$2500 as restitution to cover "the damage to the victim[']s vehicle." The judge also imposed appropriate fines and penalties.⁵ This appeal followed.

On appeal, defendant through counsel raises the following issues:

POINT I

THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE POLICE SEIZED HIS HOUSE WITHOUT PROBABLE CAUSE OR EXIGENT CIRCUMSTANCES AND HELD IT FOR SEVEN HOURS UNTIL A WARRANT WAS FINALLY OBTAINED.

- A. Defendant Has Standing To Challenge The Seizure of His Residence In Florida.
- B. The Burden Of Proof Is On The State To Justify The Warrantless Seizure Of Defendant's House.

⁵ On July 8, 2013, Camacho pled guilty to first-degree conspiracy to commit murder and, pursuant to her plea agreement, the trial judge sentenced her on August 22, 2013 as a second-degree offender to nine years in prison, subject to NERA, with a five-year period of parole supervision upon release.

- C. The Police Violated Defendant's Fourth Amendment Rights By Following Defendant To His Bedroom And Conducting A Protective Sweep Of His House Without Any Reason To Believe That There Were Weapons Or Other Persons Present Who Might Endanger Them.
- D. Because The Police Had Neither Probable Cause Nor Exigent Circumstances, The Seizure Of Defendant's House Cannot Be Justified As Maintaining The Status Quo Prior To Obtaining A Warrant.
- E. Because The Warrants Were Issued In Part Based Upon Information Learned During The Illegal Seizure Of Defendant's House, The Items Seized During the Warrant Searches Must Also Be Suppressed As Fruit Of The Poisonous Tree.

POINT II

THE CASE MUST BE REMANDED FOR RESENTENCING DUE TO THE SENTENCING COURT'S INCORRECT AND UNSUPPORTED FINDINGS ON AGGRAVATING AND MITIGATING FACTORS.

Defendant raises the following issues in his pro se supplemental brief:

POINT I

THE DEFENDANT'S RIGHT TO INDICTMENT BY GRAND JURY AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I PARAGRAPHS 1 AND 8 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S FAILURE TO DISMISS THE INDICTMENT DUE TO THE PROSECUTOR WITHHOLDING CLEARLY EXCULPATORY EVIDENCE FROM THE GRAND JURY AND MISREPRESENTING THE TRUTH TO BOLSTER ITS PRIMA FACIE CASE.

POINT II

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE [TRIAL] COURT'S DENIAL OF HIS MOTION TO BAR ANY ARGUMENT, TESTIMONY, AND EVIDENCE BY THE STATE ALLEGING FLIGHT AS DEFENDANT'S CONSCIOUSNESS OF GUILT.

POINT III

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S RULING THAT EVIDENCE OF THE ALLEGED AUGUST 23, 2010, INCIDENT INVOLVING THE DEFENDANT AND TIMOTHY ERWIN WAS ADMISSIBLE AS OTHER CRIME EVIDENCE UNDER N.J.R.E. 404(b).

POINT IV

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE AS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I PARAGRAPHS 1 AND 7 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S DETERMINATION THAT FLORIDA LAW AND JURISPRUDENCE GOVERNED THE DISPOSITION OF HIS MOTION TO SUPPRESS EVIDENCE SEIZED IN FLORIDA BY THE JOINT OPERATIONS AND COOPERATIVE INVESTIGATIONS OF NEW JERSEY AND FLORIDA LAW ENFORCEMENT OFFICERS.

POINT V

THE DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURES AS GUARANTEED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I PARAGRAPH 7 OF THE

NEW JERSEY CONSTITUTION WAS VIOLATED BY THE WARRANTLESS SEARCH AND SEIZURE OF THE GPS DEVICE FROM THE PURSE/PERSON OF DIANA CAMACHO DURING THE SEARCH OF THE DEFENDANTS' MOTOR VEHICLES IN FLORIDA ON NOVEMBER 19[,] 2010.

POINT VI

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AND TO BE FREE FROM AN ILLEGAL SEARCH AND SEIZURE AS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I PARAGRAPHS 1 AND 7 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE USE OF AN ILLEGALLY OBTAINED STATEMENT FROM THE DEFENDANTS' MINOR CHILD TO SUPPORT PROBABLE CAUSE TO SEARCH THE DEFENDANTS' VEHICLES AND SEIZE TWO GPS DEVICES.

After reviewing the record in light of the contentions advanced on appeal, we affirm defendant's conviction and sentence.

I.

The State's theory underlying the superseding indictment was that after defendant learned that Camacho was having an affair with the victim, Ross Heimlich, he conspired with Camacho and Leo to lure Heimlich to defendant's home where defendant killed the victim. The State developed the following proofs in support of its application for a search warrant to search defendant's home in Florida, where he was residing after the murder.⁶

⁶ The trial court conducted a two-day evidentiary hearing on defendant's motion to suppress the evidence seized under the authority of the search warrant.

At 3:19 a.m. on September 29, 2010, the Hammonton police and fire departments responded to the scene of a reported vehicular fire. They found a four-door car that was fully engulfed in flames. After extinguishing the fire, the police found the charred remains of a human in the back seat of the car. The body was so badly burned that the police could not even determine the victim's gender.

However, the police found the vehicle identification number of the burned car and recovered its front license plate. With this information, the police determined that Heimlich's grandfather was the registered owner of the car. The police contacted the grandfather, who told them that Heimlich lived with him and his wife. The grandfather stated that he gave Heimlich permission to use the car at approximately 8:00 p.m. on September 28, 2010. Heimlich "never returned home and was never heard from again."

Heimlich's grandfather also told the police that Heimlich used a cell phone, but had not returned the grandfather's calls. Heimlich was enrolled at a community college, but had not gone to class on September 29, 2010.

The police located video surveillance footage of the area where the car was found from a security camera at a nearby gift shop. The footage revealed that, at 2:53 a.m. on September 29,

2010, Heimlich's car was driving east on the White Horse Pike while being followed by an unidentified dark-colored vehicle. Both cars made a right turn and then stopped. At 2:57 a.m., a bright flash could be seen in Heimlich's car and it was quickly engulfed in flames. The other car then left the scene.

Detective Joseph Rauch of the Atlantic County Prosecutor's Office ("ACPO") was the lead investigator on the case. He tried to call Heimlich's cell phone several times, but there was no response and the voice mail system was full. On September 29, 2010, Detective Rauch obtained Heimlich's cell phone records for the period between September 27 and September 29, 2010. The detective found a series of calls and text messages exchanged on September 28, 2010 "between Heimlich and person(s) believed to be a female identified in one of the text messages only as 'Diana,'" at a cell phone number ending in 4955.

The text messages were recovered, and Detective Rauch learned that "Diana" arranged to meet with Heimlich on the evening of September 28, 2010 "with the promise of a sexual encounter." "Diana" told Heimlich to go to her house at 9:00 p.m. and she would meet him when she returned from Philadelphia. "Diana" also stated that she would call Heimlich when she was ten minutes away from her home. Heimlich and "Diana" exchanged numerous calls and text messages throughout the rest of the day.

The last exchange occurred at 9:28 p.m. and lasted twenty-four seconds. According to "cell site information" Detective Rauch obtained from the Heimlich's phone records, Heimlich's cell phone was near defendant's and Diana Camacho's home in Voorhees when this call occurred.

Other detectives interviewed one of Heimlich's friends, who stated that he sent a text message to Heimlich at 7:45 p.m. on September 28, 2010 to ask where he was. Heimlich responded that he was in Voorhees. At 9:22 p.m. that evening, Heimlich called the friend and said "he was pulling up outside 'the girl's' house." The friend recalled that about a month earlier, Heimlich told him that "he was having a sexual relationship with a married woman whose husband was not around."

On September 30, 2010, Heimlich's aunt reported that Heimlich "may have been having an affair with 'Diane Camacho,' a woman who was possibly married." The aunt also stated that Camacho and Heimlich were co-workers at a department store in Voorhees.

Other detectives spoke to the store's loss prevention associate, who reported that Camacho had attempted to file a criminal complaint against Heimlich on August 5, 2010. The detectives obtained Camacho's complaint, which alleged that Heimlich "sexually assaulted her numerous times at work and at her residence and as a result she contracted a sexually[-]transmitted

disease (STD)." On August 16, 2010, a Voorhees municipal court judge dismissed Camacho's complaint after finding "there was insufficient evidence to sustain the sexual assault charges."

The detectives interviewed another department store employee. This employee stated that he had called and texted Camacho several times in the past. The phone number the employee gave the police for Camacho was not the 4955 number that "Diana" used to contact Heimlich on September 28, 2010.

The employee told the detectives that, on August 23, 2010, defendant came to the store and confronted him. Defendant stated, "why did you text my girlfriend and propose to her? I have the text [and] I will find you." The employee reported the matter to the police, but refused to press charges against defendant.⁷

The store employee also told the police that Heimlich and Camacho "advised him that they had been engaging in a sexual relationship since approximately April of 2010." Camacho told the employee "that her boyfriend was very controlling and jealous." Camacho also stated that Heimlich gave her a STD "and that she in turn gave the STD to her boyfriend." In addition, Camacho told

⁷ As noted above, the trial court later granted the State's motion to admit the employee's testimony at trial concerning defendant's threats to establish defendant's intent and motive pursuant to N.J.R.E. 404(b).

the employee that her boyfriend drove a dark green four-door Toyota, that was possibly a Camry.

The ACPO obtained Heimlich's computer from his residence. A forensic examination of the device revealed that Heimlich and Camacho had communicated with each other by computer.

Once defendant was identified as Camacho's boyfriend, the police were able to locate a record of a 911 call that defendant made on August 25, 2010 concerning a dispute he was having with a moving company at his home. The number defendant used to call the police on that date was not the 4955 number that "Diana" used on September 28, 2010 to contact Heimlich.

On October 1, 2010, detectives went to defendant's and Camacho's home in Voorhees and found that it was vacant. There was a "for sale" sign on the lawn. The realtor advised a detective that defendant had listed the house for sale about seven months earlier. The realtor stated that defendant and his girlfriend had moved to Florida.

Detective Rauch obtained defendant's cell phone and E-Z Pass toll records, which disclosed that defendant had left New Jersey on July 9, 2010 and arrived in Florida on July 19, 2010. Defendant obtained a Florida driver's license on July 19, 2010 and now lived at a home in Cape Coral. Further investigation revealed that on

August 26, 2010, Camacho left New Jersey with her children and was also living in Florida.

On October 5, 2010, ACPO Detective William Anton contacted Special Agent Matthew Walsh of the Florida Department of Law Enforcement seeking assistance in locating defendant and Camacho. The next day, Agent Walsh went to defendant's home and found a white Cadillac parked in front of the home. The ACPO detectives were able to determine that defendant was the registered owner of this car. In addition, Agent Walsh found a dark green Toyota registered to defendant outside a nearby apartment complex. Further investigation revealed that Camacho lived in the apartment complex.

On October 29, 2010, the State's forensic odontologist confirmed that Heimlich was the victim after comparing his dental records to the charred remains found in the burning vehicle on September 29, 2010.

Agent Walsh subsequently reported that both defendant and Camacho had left their original Florida residences and had moved in together at another house in Cape Coral.

The ACPO detectives obtained a search warrant for defendant and Camacho's home in Voorhees. They were not able to find any cell phones or other electronic devices in the home.

The detectives next obtained the cell phone records for the 4955 number that "Diana" used to contact Heimlich on September 28, 2010. The detectives learned that the phone was manufactured by Tracfone Wireless, Inc. ("Tracfone"), a prepaid wireless service provider. Tracfone reported that a cell phone with the 4955 number had been sold to the CVS corporation for resale. Tracfone also stated that the phone had been activated on September 28, 2010 at 10:47 a.m. by someone who had called Tracfone from a Verizon telephone number. In response to a subpoena, Verizon reported on November 12, 2010 that the activation call had been placed from a pay phone located outside a convenience store in Marlton, New Jersey.

The detectives contacted CVS, which was able to determine that the cell phone with the 4955 number was sold to a customer at its Gibbsboro, New Jersey store. This store was near defendant's home in Voorhees. CVS reported that the phone was sold to the customer on September 27, 2010 at 9:44 a.m. and that there was a surveillance tape of the transaction.

On November 16, 2010, ACPO Detective Michael Mattioli obtained a copy of the surveillance video and some still photographs of the transaction. The man in the video who purchased the cell phone used by "Diana" to contact Heimlich appeared to be defendant.

After assembling all of this information, Detective Rauch decided to go to Florida to verify that defendant was the man shown purchasing the Tracfone in the video and that he was living in the Cape Coral home. The detective also wanted to attempt to interview defendant and Camacho concerning Heimlich's death. ACPO detectives Rauch, Anton, Mattioli, and Frederico went to Florida on November 16, 2010, the same day they saw defendant in the surveillance video.

Once in Florida, the ACPO detectives partnered with Agent Walsh and members of the United States Marshall's Task Force ("USMTF"). They placed defendant's home under surveillance. In the morning, Camacho left the home in the dark green Camry and drove her son to a day care facility. Once Camacho left the facility, Detectives Rauch and Mattioli approached her and told her they wanted to speak to her about Heimlich. Camacho agreed to accompany the detectives to the Fort Meyers Police Department. Once there, the detectives read Camacho her Miranda⁸ rights. At that time, Camacho declined to answer any questions and the detectives returned her to her car.

About ten minutes after Camacho left defendant's home, Detectives Anton and Frederico, together with Agent Walsh and

⁸ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

USTMF member Leslie Green, approached defendant's home and then knocked on the door. Defendant, who was not wearing a shirt, opened the door. The officers identified themselves and told defendant they "were there for a homicide investigation involving Ross Heimlich." At the evidentiary hearing on defendant's motion to suppress, Agent Walsh and Detective Anton testified that defendant then invited the officers to come inside the home. Upon seeing defendant, Detective Anton positively identified him as the man who purchased the Tracfone in the CVS surveillance video.

Defendant led the officers into the kitchen, where the ACPO detectives remained for the entirety of their visit. The house had an "open-floor plan" and, from the kitchen, Detective Anton could see into the living room. Looking into the living room, the detective saw a laptop computer.

At first, the officers and defendant engaged in small talk about restaurants in the area. Defendant then "requested to get a shirt from his bedroom." Officer Green followed defendant "for safety purposes" and stood outside the doorway of the bedroom as defendant got a shirt. He then walked back to the kitchen area with defendant. Officer Green did not search any of defendant's rooms and there is nothing in the record to indicate that he made any observations of anything in the house.

The officers and defendant continued to make small talk, with the topic now turning to a cruise defendant was planning to take. Detective Anton then asked defendant if he would agree to an interview concerning Heimlich's death. Defendant stated he would like to speak to his attorney. The officers did not question defendant after that point.

Detective Anton called Detective Rauch and told him that he had identified defendant as the man in the CVS surveillance video. Detective Anton also stated that he saw a laptop in defendant's living room. Detective Rauch decided to proceed to get a search warrant to search defendant's home and advised Detective Anton of this decision.

Detective Anton told Agent Walsh that the ACPO detectives were going to apply to a Florida judge for a search warrant. Agent Walsh arranged for two other agents to guard defendant's home from the outside to make sure no one entered while the search warrant was obtained. Agent Walsh also told defendant that he could not stay in the house because it needed to be secured while the search warrant was sought. Defendant complied. As he left, defendant attempted to take a cell phone that was in the home with him, but an officer told him it had to remain in the house. The officers also left the house. Agent Walsh and Detective Anton testified

that no search was conducted until later that day after the search warrant was obtained.

Police headquarters was approximately thirty minutes from defendant's home. Once all the detectives arrived there, Detective Rauch completed the probable cause section of the search warrant affidavit by including all of the information discussed above, which took about ninety minutes.⁹ Among other things, the affidavit sought permission to search for the Tracfone that was used to call Heimlich, other cell phones, computers, any clothing worn by defendant when he purchased the Tracfone, and any medications used to treat STDs.

The detective then sent the paperwork to an ACPO assistant prosecutor for review. Once the assistant prosecutor approved the application, the ACPO detectives and Agent Walsh made an appointment with the emergent duty judge. The judge arranged to meet with them at 4:00 p.m. The judge reviewed and approved the search warrant and the detectives returned to defendant's house. The agents who had been guarding the house were still parked in the driveway.

The search warrant was executed at 5:00 p.m. and the search ended at about 8:30 p.m. Approximately ten hours had elapsed

⁹ Detective Rauch had prepared the bulk of the search warrant affidavit prior to leaving New Jersey.

between the time defendant left his house and the conclusion of the search. Among other items, the detectives seized a laptop computer, a personal computer, two cell phones, and a cell phone charger.

By this time, the ACPO detectives had hypothesized that defendant and Camacho moved to Florida in July 2010, but then returned to New Jersey on or shortly before September 27, 2010, the date defendant bought the Tracfone used to lure Heimlich to their home. The detectives surmised that defendant and Camacho left their cell phones behind in Florida when they returned to New Jersey so that their location could not be tracked. However, the detectives surmised that the couple may have used a GPS device during the trip and, if it could be located, it would assist the detectives in ascertaining when defendant and Camacho had returned to New Jersey.

Thus, on November 18, 2010, Detectives Rauch and Mattioli accompanied Agent Walsh to the school where Camacho's children attended. The detectives interviewed the older child,¹⁰ who was eight years old, in the presence of the school principal and a counselor, who had already been working with the children regarding

¹⁰ The detectives also spoke to the younger child, who was six years old. However, the child did not add any relevant information to the investigation.

educational issues. The detectives did not seek permission from Camacho prior to the interview because the child was not a suspect, but merely a possible witness. Detective Rauch testified that the child was "very comfortable, very cooperative." The detectives only spoke to the child about travel issues and there was no mention of the ongoing homicide investigation.

The child told Detective Rauch that he had missed school when the two children, Camacho, and defendant went on a trip to New Jersey to visit the children's grandfather in New Jersey and their grandmother in Philadelphia.¹¹ The family made the trip in a minivan that defendant rented "because their other car was broken." The child told the detective that defendant took the GPS device from one of the family's cars and put it in the van. The device had a suction cup on it that stuck to the window of the car. The child stated that the family slept in the Voorhees home during the visit, and that the two children and Camacho stayed one night in Philadelphia with the grandmother.

On November 19, 2010, Detective Rauch prepared a second probable cause affidavit seeking permission to search defendant and Camacho's vehicles for, among other things, GPS devices, maps,

¹¹ On September 28, 2010, "Diana" sent a text message to Heimlich stating she was in Philadelphia and would meet him later at her home in Voorhees.

toll records, the Tracfone, other cell phones, computers, other electronic devices, and clothing worn by Heimlich or defendant. The same Florida judge who approved the first search warrant application, approved the second one.

Later that day, the detectives found defendant and Camacho in a parking lot with the two cars. They executed the search warrants and recovered two GPS devices, including one that Camacho was holding in her hand as she got out of the white Cadillac. The other device was found on the floor of the dark green Camry.

On December 14, 2010, defendant and Camacho traveled to Cuba.¹² An arrest warrant was issued on March 7, 2011. Defendant and Camacho were arrested in Cuba in September 2011, and extradited to New Jersey. As previously noted, a grand jury indicted defendant, Camacho, and their friend, Damien Leo, on December 21, 2011.

In support of the superseding indictment the grand jury returned on March 20, 2013, Detective Rauch told the grand jury that in May 2011, a woman who worked at a convenience store in Philadelphia called the ACPO. The woman stated that one of her customers, who she identified as Damien Leo, told her that he was

¹² At the time of his plea, defendant represented that he was "a dual citizen" and a "citizen of Malta," which may explain why he was able to enter Cuba.

involved in Heimlich's murder. Detective Rauch and another detective went to Philadelphia and interviewed the woman, who told them that Leo brought a copy of a newspaper article about the murder into the store and told her he was in trouble and would be "going away to jail for a long time."

The detectives later interviewed Leo. After waiving his Miranda rights, Leo agreed to give a statement. Leo told the detectives that in the fall of 2010, defendant called him on the telephone and asked Leo "to help 'rough a guy up[.]'" Leo agreed and defendant picked him up and brought him to defendant's home. Camacho was in the house. Defendant told Leo that Camacho had contacted Heimlich and told him to come to the house. Leo said that he did not know Heimlich, but was friends with both defendant and Camacho.

Heimlich arrived at the home and knocked on the door. Camacho answered it and let Heimlich in. Defendant then rushed out of a back room brandishing a starters pistol and ordered Heimlich to get on the floor. Heimlich complied, but then got up and started fighting with defendant. Defendant hit Heimlich with the pistol several times "and then got him in a choke-hold." Leo also "got in a few blows" as defendant continued to choke Heimlich until he stopped moving. Defendant then said, "He's fucking dead."

Defendant went outside and backed Heimlich's car into the garage. He rolled Heimlich in a sheet, dragged him to the garage and then, with Leo's help, put Heimlich in the back seat of the car. Defendant left Heimlich's car in the garage and then he and Camacho drove Leo home. On the way, defendant asked Leo if he wanted to help him dispose of Heimlich's body by burning his car. Leo stated that he refused.

Detective Rauch also testified before the grand jury that the Atlantic County Medical Examiner found that a toxicology report of Heimlich's charred body "revealed a mildly elevated level of carboxyhemoglobin^[13] . . . and the lungs were mildly enervated and edematous, suggesting that [Heimlich] was incapacitated but not dead when the fire was set." The detective also told the grand jury that another pathology expert retained by the State had opined that Heimlich's carboxyhemoglobin levels were "consistent with levels commonly seen in motor vehicle fire deaths[,]" where the victim "dies from the thermal effects of the fire and the vitiated air, and not due to carbon monoxide poisoning." This expert also stated that "[t]he absence of any identifiable, partially fatal injuries, other than the burning, is also consistent with the deceased being alive at the time of the fire." Finally, Detective

¹³ The detective stated that "carboxyhemoglobin" is "carbon that gets into your bloodstream as a result of inhaling smoke[.]"

Rauch testified that a defense expert had opined that Heimlich "was dead when the fire was started" because there was "no gross evidence of soot" in Heimlich's "airway."

II.

As noted above, defendant filed a pre-trial motion challenging the search warrants the Florida judge issued for the search of his house. In opposition to that motion, the State presented the testimony of Agent Walsh, Detective Rauch, and Detective Anton, and their testimony at the two-day evidentiary hearing was summarized above.

Defendant did not present any witnesses on his behalf. However, defendant did submit an affidavit in which he asserted that the officers "entered [his] property without any invitation." He asserted that one of the officers followed him into his bedroom when he went to get a shirt. Defendant also claimed that he tried to put two cell phones in his pockets, but the officer took them from him. He stated that the officers then "began to question [him] about a homicide in New Jersey" and told him that Camacho was already in custody. He stated that the officers continued to attempt to question him before ordering him to leave the house. Defendant did not testify at the hearing or subject himself to cross-examination concerning the claims made in his affidavit.

In a thorough written decision, Judge Bernard DeLury, Jr. denied defendant's motion to suppress the evidence seized pursuant to the search warrant.¹⁴ The judge found that both Detective Rauch and Detective Anton, who testified before him, gave "highly credible testimony[.]" Although Agent Walsh testified on the first day of the hearing, the judge reviewed the transcript and stated that "[e]ven from a cold record, [he] was able to discern the internal consistency of his evidence and how well it stood up to the rigors of cross-examination." Against this highly credible testimony, the judge stated that he did not find defendant's affidavit "to be persuasive or credible."

After reviewing all of the evidence, Judge DeLury concluded that "the law enforcement officers involved in this case acted reasonably and lawfully in obtaining and executing the search warrants." The judge found that Detective Rauch's probable cause affidavit "fairly and accurately represented the facts and circumstances" of the investigation and, therefore, "permit[ted] a reasonable fact[-]finder to determine probable cause to search for the items, including a computer, being sought."

¹⁴ A different judge presided at the first day of the evidentiary hearing. After this judge recused himself, Judge DeLury reviewed the transcript of that proceeding and completed the hearing with the consent of defendant, Camacho, and the State.

Judge DeLury found that defendant invited the detectives into the house. He further found that Detective Anton saw a laptop computer in the living room from his vantage point in the kitchen.

Citing the United States Supreme Court's decision in Segura v. United States, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984), Judge DeLury found that the detectives properly asked defendant to leave his house so that they could secure it from the outside while they obtained the search warrant. Noting that, in Segura, the Supreme Court held that a seizure of a dwelling by the police for nineteen hours while a warrant was obtained was not unreasonable, the judge concluded that the nine- or ten-hour time span involved in this case was not violative of defendant's rights.

The judge also stated that defendant's cell phones were "contents" of the house and, therefore, the detectives properly did not permit defendant to take them when he left the house. In this regard, the judge stated that it "would have been unreasonable and risky to leave a suspect in a brutal homicide, who now knew police were aware of his location, in control of potentially incriminating evidence." The judge also found that there was no evidence that the police searched the house after defendant left and before it was secured. Instead, Detective Anton saw the laptop that Detective Rauch later mentioned in his probable cause

affidavit in the living room prior to defendant returning from the bedroom.

In Point I of the brief prepared by his attorney, defendant contends that (1) the detectives conducted an unlawful "protective sweep" of the house; (2) did not have probable cause to seize the house; and (3) relied upon "information learned during the illegal seizure" of the house to secure the search warrant. These arguments lack merit.

The scope of our review of a judge's findings of fact on a motion to suppress is limited. "We do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." State v. Barone, 147 N.J. 599, 615 (1997). We only determine "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964). We are not in a good position to judge credibility and should not make new credibility findings. State v. Locurto, 157 N.J. 463, 474 (1999). It is only where we are "thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction . . . [that we] appraise the record as if [we] were deciding the matter at inception and make [our] own findings and conclusions." Johnson, supra, 42 N.J. at 162.

"[S]earch warrants must be based on sufficient specific information to enable a prudent, neutral judicial officer to make an independent determination that there is probable cause to believe that a search would yield evidence of past or present criminal activity." State v. Keyes, 184 N.J. 541, 553 (2005). "Probable cause for the issuance of a search warrant requires 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" State v. Chippero, 201 N.J. 14, 28 (2009) (quoting United States v. Jones, 994 F.2d 1051, 1056 (3d Cir. 1993)).

When issuing a search warrant, a court must consider the totality of the circumstances to determine whether probable cause exists. State v. Novembrino, 105 N.J. 95, 122 (1987) (adopting the totality of the circumstances test set forth in Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). When reviewing whether probable cause exists for a warrant, a reviewing court must consider only the "four corners" of the affidavit and any sworn testimony given before the issuing judge. State v. Wilson, 178 N.J. 7, 14 (2003). A defendant has the burden to show the absence of probable cause. Keyes, supra, 184 N.J. at 554.

Applying these standards, we conclude that there was no error in denying defendant's motion to suppress the items seized pursuant

to the search warrant. Contrary to defendant's contention, Detective Rauch's affidavit in support of the search warrant painstakingly detailed the probable cause necessary to justify a search of defendant's house. The affidavit established that Heimlich talked and traded text messages on the night of his disappearance with someone using a Tracfone with a specific number. That individual asked Heimlich to come to defendant's house by promising him a sexual encounter. The detectives were able to secure a surveillance video that showed that defendant was the person who purchased the Tracfone. The detectives also learned from examining Heimlich's computer that he and Camacho had communicated using their respective computers. Heimlich's phone records indicate that he was in the vicinity of defendant's home that night and that he was never heard from again.

It was therefore reasonable for the Florida judge to conclude that a search of defendant's home might lead to the discovery of, among other things, the Tracfone, other cell phones, computers, and other electronic devices that might contain evidence relating to Heimlich's disappearance and death. Therefore, we discern no basis to disturb Judge DeLury's decision to uphold the validity of the search warrant.

Defendant next asserts that the detectives wrongfully conducted a "protective sweep" of his house and that they observed

items during that search which were later used by Detective Rauch to establish probable cause to support the issuance of the warrant. However, there is no basis in the record to support defendant's contention.

As defendant correctly points out, our Supreme Court has recently reiterated that "[a] 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." State v. Cope, 224 N.J. 530, 546 (2016) (quoting State v. Davila, 203 N.J. 97, 113 (2010)). In order to conduct a protective sweep, the law enforcement officers must be lawfully in the premises and must have a "reasonable [and] articulable suspicion that the area to be swept harbors an individual posing a danger." State v. Bryant, 227 N.J. 60, 70 (2016) (alteration in original) (quoting Davila, supra, 203 N.J. at 125); see also State v. Legette, ___ N.J. ___ (2017) (slip op. at 16-17) (holding that it was improper for a police officer who stopped the defendant outside his home to accompany the defendant into the home and then conduct a protective sweep of the entire premises).

Here, however, the detectives did not, as defendant alleges in his brief, "fan out" and "check[] [the house] to see if anybody

else was in the premises." Indeed, Detective Anton testified that there was no protective sweep. In arguing to the contrary, defendant points to the following exchange that occurred during the prosecutor's direct examination of Detective Anton at the suppression hearing:

Q. Do you know if at any point in time while officers were in the premises, if anybody checked to see if anybody else was in the premises?

A. Yes.

Q. Did you do it?

A. No, I did not.

Q. Okay. Was anybody else in the premises?

A. No.

What defendant apparently fails to acknowledge is that the prosecutor never asked the detective whether a protective sweep was conducted, only whether the detective knew if one had occurred. The detective never stated that the detectives swept through defendant's house looking for other suspects or for any other purpose. Indeed, the detective consistently stated that after defendant invited them into the house, the officers remained in the kitchen and, while there, he could also see into the living room.

If this point were not clear, Detective Anton made it so in response to defendant's trial attorney's questions on cross-examination. The detective specifically stated that he never said that officers "fan[ned] out inside of the property so that officers could assure themselves no one else was inside[.]" Defendant does not cite to this testimony in his brief. As noted above, Judge DeLury found the detective's testimony to be credible.

To be sure, a USTMF member trailed behind defendant as he went into his bedroom to get his shirt. But, as Judge DeLury found, defendant invited all of the officers, including Officer Green into his home. Defendant did not object when the officer followed behind him and stood outside the bedroom door. Although defendant was not under arrest at that point, we believe that it was prudent for the officer to monitor defendant, who was suspected of murdering a man and burning the body, for "officer safety." See State v. Bruzzese, 94 N.J. 210, 233-34 (1983) (holding that a police officer may monitor an arrestee's movements inside his home in order to protect the officer from harm), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984).

Significantly, Officer Green did not use his presence near the bedroom to make any observations that were later used to justify the search. Nor did the officer seize any of defendant's property. Indeed, there is nothing in the record indicating that

the officer made any observations or was involved in any way in the preparation of the search warrant. Thus, we reject defendant's contention on this point.

Defendant also asserts that Detective Anton learned that defendant had a laptop computer in the home as a result of an illegal search. However, as discussed above, defendant invited the detectives into his home; Detective Anton saw the laptop in the living room from his vantage point in the kitchen; and there was no impermissible protective sweep of the premises.

Moreover, Detective Rauch did not need to include Detective Anton's observation of the computer in the probable cause affidavit in order to justify the issuance of a search warrant seeking, among other things, one or more computers. The detectives' investigation had already revealed that Camacho used a computer to communicate with Heimlich and, given the totality of the circumstances, it was reasonable to conclude that a computer found in the house might contain evidence concerning Heimlich's death. In addition, as defendant specifically concedes in another section of his brief, "[i]n this day and age, one could presume that almost every household has cell phones and computers." Therefore, even if Detective Anton's observation of the laptop had been improper, and information concerning what he saw stricken from Detective

Rauch's affidavit, there would have still been ample probable cause to sustain the issuance of the warrant.

Finally, defendant argues that the detectives improperly "seized his house" for almost ten hours while they obtained a search warrant from the Florida judge and then executed it. We discern no basis to disturb Judge DeLury's rejection of this argument.

"Different interests are implicated by a seizure than by a search." Segura, supra, 468 U.S. at 806, 104 S. Ct. at 3386, 82 L. Ed. 2d at 609. "A seizure affects only the person's possessory interests; a search affects a person's privacy interests." Ibid. As a result, "warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant" have been approved. Ibid. This is all that occurred here. Defendant's constitutional rights were not violated by this seizure in any of the respects that he asserts on appeal, all of which lack merit.

III.

In Point II of the brief submitted by his appellate attorney, defendant argues that his sentence was excessive. We disagree.

Trial judges have broad sentencing discretion as long as the sentence is based on competent credible evidence and fits within the statutory framework. State v. Dalziel, 182 N.J. 494, 500 (2005). Judges must identify and consider "any relevant

aggravating and mitigating factors" that "are called to the court's attention[,]" and "explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Blackmon, 202 N.J. 283, 297 (2010)). "Appellate review of sentencing is deferential," and we therefore avoid substituting our judgment for the judgment of the trial court. Id. at 65; see State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 365 (1984).

We are satisfied that the sentencing judge made findings of fact concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record, and applied the correct sentencing guidelines enunciated in the Code. The sentence the judge imposed does not shock our judicial conscience. Case, supra, 220 N.J. at 65; O'Donnell, supra, 117 N.J. at 215-16. Accordingly, we discern no basis to second-guess the sentence.

IV.

The arguments raised in defendant's pro se supplemental brief are clearly without merit and do not warrant discussion in a written opinion. R. 2:11-3(e)(2). Therefore, we add only the following brief comments.

Contrary to defendant's argument in Point I of his brief, Judge DeLury correctly denied defendant's motion to dismiss the

superseding indictment. In examining the power of grand juries, our Supreme Court "has recognized the grand jury's independence and has expressed a reluctance to intervene in the indictment process." State v. Hogan, 144 N.J. 216, 228 (1996). Consequently, a trial court should disturb an indictment only "'on the clearest and plainest ground' . . . and only when the indictment is manifestly or palpably defective." Id. at 228-29 (quoting State v. Perry, 124 N.J. 128 (1991)).

A trial judge's decision denying a defendant's motion to dismiss an indictment is reviewed for abuse of discretion. State v. Saavedra, 222 N.J. 39, 55 (2015) (citing Hogan, supra, 144 N.J. at 229). Accordingly, the trial judge's "exercise of discretionary authority ordinarily will not be disturbed on appeal unless it has been clearly abused." Hogan, supra, 144 N.J. at 229.

Judge DeLury reviewed the evidence submitted to the grand jury and concluded that the evidence plainly supported each and every one of the charges. Contrary to defendant's assertion, the State advised the grand jury that defendant had secured an expert who disputed the State's claim that Heimlich was alive at the time defendant set his car on fire. We detect no abuse of discretion in the judge's sound ruling.

We also reject defendant's contention in Point II of his brief that Judge DeLury erred by denying his motion to suppress

evidence of his and Camacho's flight from the United States to Cuba. Defendant may have been legally permitted to travel to Cuba as a result of his status as a citizen of Malta. However, defendant and Camacho abruptly left a house they had just obtained in Florida, removed Camacho's children from school, and left the United States for Cuba less than a month after the execution of the search warrants and with full knowledge that the ACPO detectives considered them to be suspects in Heimlich's death. Defendant's actions certainly constituted "circumstances present and unexplained which in conjunction with the leaving, reasonably justif[ied] an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt." State v. Ingram, 196 N.J. 23, 46 (2008).

Moving to Point III of defendant's pro se brief, we are also satisfied that Judge DeLury properly granted the State's motion for permission to introduce other crimes evidence under N.J.R.E. 404(b) if the case went to trial. A trial court's evidentiary rulings are accorded substantial deference and will not be disturbed on appeal absent a finding that the court abused its discretion in admitting or excluding evidence. Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000). This standard governs review of the admissibility of prior bad acts under N.J.R.E. 404(b), which is

left to the discretion of the trial court, "because of its intimate knowledge of the case[.]" State v. Covell, 157 N.J. 554, 564 (1999) (quoting State v. Ramseur, 106 N.J. 123, 266 (1987)).

Here, the State sought to introduce evidence that a few weeks before defendant murdered Heimlich after learning he had an affair with Camacho, defendant also accosted another one of Camacho's co-workers, who he suspected of also having an affair with her. Following an evidentiary hearing, Judge DeLury concluded that the proffered evidence met all four prongs of the familiar Cofield test. State v. Cofield, 127 N.J. 328, 338 (1992). The evidence was clearly relevant to a material issue in dispute, namely, defendant's intent and motive. As Judge DeLury observed in his written opinion:

Defendant . . . was a man on a mission in the early morning hours of August 23, 2010. He wanted to get in [Heimlich's co-worker's] face about his intimate and provocative text exchange with . . . Camacho. Defendant['s] . . . actions all bespeak a man motivated by jealousy and a singular resolve to intimidate and threaten with acts of violence the [person who was] the focus of his jealousy.

Judge DeLury also properly found that the two incidents were similar in kind and that the State proved that the incident with the co-worker occurred by clear and convincing evidence presented at the evidentiary hearing. Finally, the probative value of the evidence was not outweighed by any prejudicial effect. Ibid.

Thus, the judge correctly determined that this evidence would be admissible at trial under N.J.R.E. 404(b).

Contrary to defendant's argument in Point IV of his brief, and as already discussed above, Judge DeLury properly denied defendant's motion to suppress the evidence seized during the search of his house on November 18, 2010.

Finally, defendant argues in Point V and VI that the search and seizure of the two GPS devices from his cars were improper. These arguments also lack merit.

The detectives interviewed Camacho's oldest child, who told them that Camacho and defendant drove them from Florida to New Jersey in a rented minivan and used GPS devices during the trip. Because the child was a witness, rather than a suspect of a crime, there was no requirement that the detectives contact Camacho prior to the interview. The child's statement that defendant used GPS devices provided further support for the overwhelming evidence that Detective Rauch already had at that point establishing probable cause for the issuance of a search warrant for defendant's cars for evidence related to Heimlich's disappearance and death.

As for the balance of any of defendant's arguments not expressly discussed above, they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION