**RECORD IMPOUNDED**



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2878-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

L.H.,

Defendant-Appellant.

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Submitted April 4, 2017 – Decided August 2, 2017

Before Judges Fisher and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 12-05-1445.

Joseph E. Krakora, Public Defender, attorney for appellant (Alicia J. Hubbard, Assistant Deputy Public Defender, of counsel and on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Kayla Elizabeth Rowe, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant L.H. appeals his conviction and sentence following a guilty plea. More particularly, he appeals the court's denial of his motions to suppress his statement to the police and to suppress an out-of-court identification. We reverse in part and vacate in part.

I.

During the summer of 2011, two women were sexually assaulted, and another woman was the victim of an attempted sexual assault. Defendant was taken into custody, interrogated about the assaults, and provided a statement to police. In addition, one of the victims made an out-of-court identification of defendant in a photo array presented by the police.

A grand jury indicted defendant for two counts of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1) (counts one and six); four counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3) (counts two, three, seven, and eight); three counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (counts four, nine, and twelve); two counts of third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (counts five and ten), and first-degree attempted aggravated sexual assault, N.J.S.A. 2C:5-1 and 2C:14-2(a)(3) (count eleven). Following the indictment, defendant moved to suppress the statements he made during the

custodial interrogation and separately to suppress the victim's out-of-court identification. The court denied defendant's motions.

Defendant subsequently pled guilty to two counts of first-degree kidnapping, two counts of first-degree aggravated sexual assault, and one count of first-degree attempted aggravated sexual assault. He was sentenced to an aggregate twenty-year custodial sentence subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2, parole supervision for life pursuant to N.J.S.A. 2C:43-6.4, and Megan's Law, N.J.S.A. 2C:7-2. This appeal followed.

On appeal, defendant makes the following arguments:

> POINT I
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> BECAUSE THE POLICE OBTAINED A CONFESSION ONLY AFTER LYING TO [DEFENDANT] BY SPECIFICALLY PROMISING THAT ANY CONVICTION PREMISED UPON THE CONFESSION WOULD NOT RESULT IN INCARCERATION, THE STATEMENT MUST BE SUPPRESSED.
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> POINT II
>
> THE MOTION TO SUPPRESS THE OUT-OF-COURT IDENTIFICATION SHOULD HAVE BEEN GRANTED BECAUSE THE STATE'S FAILURE TO RECORD THE NECESSARY DETAILS OF THE PHOTOGRAPHIC IDENTIFICATION PROCEDURE WAS CONTRARY TO STATE V. DELAGADO AND R. 3:11.

II.

Defendant first argues the court erred by denying his motion to suppress his statement to police. He claims his statement was

not given voluntarily because the police misled him during the interrogation by advising him that he would receive counseling, and would not be jailed, if he spoke with them. We agree.

When reviewing a trial court's denial of a motion to suppress a defendant's statement, we must "engage in a 'searching and critical' review of the record." State v. Maltese, 222 N.J. 525, 543 (2015) (quoting State v. Hreha, 217 N.J. 368, 381-82 (2014)), cert. denied, ___ U.S. ___, 136 S. Ct. 1187, 194 L. Ed. 2d 241 (2016). We defer to the trial court's findings supported by sufficient credible evidence in the record, particularly when they are grounded in the judge's feel of the case and ability to assess the witnesses' demeanor and credibility. State v. Robinson, 200 N.J. 1, 15 (2009); State v. Elders, 192 N.J. 224, 243-44 (2007). This standard of review applies even where the motion court's "factfindings [are] based on video or documentary evidence," such as recordings of custodial interrogations by the police. State v. S.S., __ N.J. __, __ (2017) (slip op. at 18, 24-25).

We will not reverse a motion court's findings of fact based on its review of a recording of a custodial interrogation unless the findings are clearly erroneous or mistaken. Id. at 16-17. We review issues of law de novo. Id. at 25; State v. Shaw, 213 N.J. 398, 411 (2012).

At a hearing challenging the admission of statements made during a custodial interrogation, the "state must prove beyond a reasonable doubt that a defendant's confession was voluntary and was not made because the defendant's will was overborne." State v. Knight, 183 N.J. 449, 462 (2005). The State must also prove "the defendant was advised of his rights and knowingly, voluntarily and intelligently waived them." State v. W.B., 205 N.J. 588, 602 n.3 (2011).

The determination of whether the State has satisfied its burden of proving beyond a reasonable doubt a defendant's statement was voluntary requires "a court to assess 'the totality of the circumstances, including both the characteristics of the defendant and the nature of the interrogation.'" Hreha, supra, 217 N.J. at 383 (quoting State v. Galloway, 133 N.J. 631, 654 (1993)). We must determine "whether, under the totality of the circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker' or whether 'his will has been overborne and his capacity for self-determination critically impaired.'" State v. Pillar, 359 N.J. Super. 249, 271 (App. Div.) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225-26, 93 S. Ct. 2041, 2046-47, 36 L. Ed. 2d 854, 862 (1973)), certif. denied, 177 N.J. 572 (2003). The "factors relevant to that analysis include 'the suspect's age, education and intelligence, advice concerning

constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature, and whether physical punishment and mental exhaustion were involved.'" Hreha, supra, 217 N.J. at 383 (quoting Galloway, supra, 133 N.J. at 654). The court should also consider defendant's prior encounters with law enforcement and the period of time that elapsed between the administration of Miranda warnings and defendant's confession. Ibid.

During a custodial interrogation, an officer may use "psychological coercion including trickery and deceit," without violating a defendant's right against self-incrimination. State v. Patton, 362 N.J. Super. 16, 29-31 (App. Div.), certif. denied, 178 N.J. 35 (2003)). "[M]isrepresentations by police officers to the subject of an interrogation are relevant in analyzing the totality of the circumstances," but "misrepresentations alone are usually insufficient to justify a determination of involuntariness or lack of knowledge." State v. Cooper, 151 N.J. 326, 355 (1997) certif. denied, 528 U.S. 1084, 1205 S. Ct. 809, 145 L. Ed. 2d 681 (2000); accord Pillar, supra, 359 N.J. Super. at 269. "Moreover, a misrepresentation by police does not render a confession or waiver involuntary unless the misrepresentation actually induced the confession." Pillar, supra, 359 N.J. Super. at 269 (quoting Cooper, supra, 151 N.J. at 355).

Likewise, an officer's promise of leniency is a factor in the totality of circumstances analysis. Hreha, supra, 217 N.J. at 383. However, "certain promises, if not kept, are so attractive that they render a resulting confession involuntary." Pillar, supra, 359 N.J. Super. at 273 (quoting Streetman v. Lynaugh, 812 F.2d 950, 957 (5th Cir.), reh'g denied, 818 F.2d 865 (5th Cir. 1987)). For example, "a promise of immunity in the form of an assurance by police that a statement would not be used against an accused, or would be considered confidential" renders a statement involuntary. Id. at 269.

A court should consider the circumstances surrounding a promise, including "the nature of the promise, the context in which the promise was made, the characteristics of the individual defendant, whether the defendant was informed of his rights, and whether counsel was present." Hreha, supra, 217 N.J. at 383-84 (quoting Pillar, supra, 359 N.J. Super. at 271). "Those considerations should be assessed qualitatively, not quantitatively, and the presence of even one of those factors may permit the conclusion that a confession was involuntary." Id. at 384. Whether a statement by a law enforcement officer constitutes a promise must be viewed from the defendant's perspective. State v. Fletcher, 380 N.J. Super. 80, 92 (App. Div. 2005).

Defendant argues that his statements were not voluntary because the police misled him by suggesting that if he spoke about what occurred he would get counseling. Defendant also asserts the police misled him by making "false promises of no jail time" if he spoke to them. Defendant contends that as a result of the officer's tactics, his will was overborne and his confession was not voluntary. The record supports his arguments.

Throughout the interrogation the officers told defendant he needed counseling to address issues he had with women and to prevent the commission of future acts of sexual assault. They consistently advised him that speaking with them would help determine the counseling he needed and facilitate his receipt of counseling. As correctly determined by the trial court, the officer's statements about counseling alone did not render defendant's confession involuntary under the totality of the circumstances. See, e.g., State v. Miller, 76 N.J. 392, 398, 404 (1978) (finding officer's promise to "do all he could to help defendant" if defendant spoke about the crimes "did not contribute to an 'overbearing of his will'" under the totality of the circumstances); Miller v. Fenton, 796 F.2d 598, 610, 612 (3d Cir. 1986) (finding under the same facts, the officer's promise of help to defendant in obtaining treatment did not constitute a direct

promise of leniency in the criminal proceedings and did not overbear defendant's will).

The officers, however, did not limit their efforts to convince defendant to speak with them to their statements about counseling. The officers also promised defendant that if he spoke to them, he would not go to jail. During an exchange with the officers defendant said he was tired, and one of the officers asked if defendant wanted something to eat or drink. In response, defendant asked "Am I going to jail tonight? Is this going to be my last meal or something like that?" The officer replied, "No, no, not at all."

Defendant responded to the officer's statement that he would not go to jail that evening, stating "That's what everybody says." He then explained that "the last time something happened" and he "told [the police] the truth," it "quickly happened," indicating that he was immediately jailed. The officers understood the statement as such. In response, one of the officers said "that's not gonna happen - it's not gonna go down like that," thus assuring defendant that unlike in his prior case where he told the truth and was jailed, that would not happen here.

The other officer reinforced the false impression, stating "I tell everybody who I interview in this room the same thing. . . . I'm gonna lock you up, I'm gonna tell you I'm gonna lock you

up." But the officer never contradicted the first officer's statement that defendant would not be jailed if he confessed, and during the interrogation did not tell defendant he would be "locked up" until after defendant confessed to his involvement in the sexual assaults.

Defendant also expressed hesitancy in responding to the questions, stating he felt like he was "shooting [himself] in the foot," and repeating that he would like counseling. The officers agreed defendant needed counseling, and explained they needed to obtain his statement about what occurred to "find out exactly where [defendant was] as far as getting the help [he] need[ed]." Defendant then asked, "The help I need is not sending me to jail is it?" Again reinforcing that defendant would receive counseling and not go to jail if he confessed, the officer responded, "Not at all. Nobody gets rehabilitated in jail."

The officers' statements that information supplied by defendant was required only to provide him with counseling, and would not result in him being jailed, made a false promise. On three separate occasions and in three different ways, the officers assured defendant that if he spoke with them, he would not be put in jail.

In State v. Puryear, 441 N.J. Super. 280, 288 (App. Div. 2015), we affirmed the trial court's suppression of a statement

where a detective told the defendant, "[t]he only thing you can possibly do here is help yourself out. You cannot get yourself in any more trouble than you're already in. You can only help yourself out here." The detective then read the defendant his Miranda[1] rights and the defendant agreed to speak with the officers. Id. at 289. We found the officer's instruction "contradicted a key Miranda warning" and "was not a permissible interrogation technique" because the fact that the State sought to admit the defendant's statement showed that the defendant "could hurt himself by giving the statement." Id. at 298.

Here, the officers' representations that defendant would not be jailed similarly misled defendant by suggesting that a confession would only help him to obtain counseling, and would not result in his incarceration. The representations were in direct contravention of the same key Miranda warning at issue in Puryear: that anything defendant said could be used against him. Id. at 298; see also Pillar, supra, 359 N.J. Super. at 268 ("A police officer cannot directly contradict, out of one side of his mouth, the Miranda warnings just given out of the other.").

In Fenton, supra, 796 F.2d at 610, the court noted that where implicit or explicit promises of psychiatric help suggest a

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

defendant will be treated rather than prosecuted, and thereby trick the defendant into confessing, the confession may be involuntary. Id. at 608. The court determined the officers' promises of help in that case did not render the defendant's confession involuntary because there was "no direct promise of [] leniency" and that "the only outright promise [] made was to get [the defendant] help with his psychological problem." Id. at 610. In contrast, here the officers' statements went well beyond promises about counseling. The officers directly assured defendant that if he spoke with them, he would not be jailed.

The record also shows that defendant was induced to confess by the officers' promises. See Pillar, supra, 359 N.J. Super. at 269 ("a misrepresentation by police does not render a confession or waiver involuntary unless the misrepresentation actually induced the confession"); cf. Fenton, supra, 796 F.2d at 612 (finding the defendant made a statement based on a desire to come clean rather than on a promise of leniency or psychiatric help). The officers relied on defendant's desire for counseling as the sole enticement for defendant to speak with them, and stated they needed defendant's statement in order to assess his need for "help." However, it was not until the officers assured defendant that his statements would not result in incarceration, and that

the "help" they discussed did not include jail, that defendant admitted his involvement in the offenses.

We are not persuaded by the contention that because defendant had a prior encounter with law enforcement, he therefore knew that the statements he made could result in his incarceration. While prior encounters with law enforcement are a factor in determining the voluntariness of a waiver of Miranda rights, Hreha, supra, 217 N.J. at 383, here the officers advised defendant to ignore his prior encounter with law enforcement by assuring him that situation was "different." As noted, following the officers' initial assurance defendant would not go to jail, defendant explained that in a prior encounter with the police, he was quickly jailed after providing a statement. In response, the officers assured defendant "that's not gonna happen — it's not gonna go down like that." Thus, the officers told defendant to disregard his prior encounter with law enforcement.

We are therefore constrained to conclude that the court erred by denying the motion to suppress defendant's statement. The court engaged in a detailed analysis of the circumstances but overlooked that the officers' false promise of no incarceration directly negated the Miranda warnings and induced defendant to confess. Like the officers' promise in Pillar, the assurances defendant would not go to jail presented an overwhelming enticement to admit

criminal activity without fear of incarceration, and "clearly had the likelihood of stripping defendant of his 'capacity for self-determination,'" Pillar, supra, 359 N.J. Super. at 272-73. (quoting Schneckloth, supra, 412 U.S. at 225-26, 93 S. Ct. at 2046-47, 36 L. Ed. 2d at 862). It thereby requires the conclusion that the State failed to establish defendant's statement was voluntary beyond a reasonable doubt. See id. at 273.

III.

Defendant also contends the court erred by denying his motion to suppress the out-of-court identification made by one of the victims. Defendant argues the out-of-court identification, which occurred during the fifteenth showing of various photo arrays to the victim, should have been suppressed because the State failed to comply with the recording requirements for out-of-court identification procedures under Rule 3:11[2] and the principles established in State v. Delgado, 188 N.J. 48 (2006).

In its denial of defendant's motion to suppress the out-of-court identification, the court stated that determining the

[2] We do not address defendant's contention the court should have suppressed the out-of-court identification based on a failure to comply with Rule 3:11 because the Rule was not in effect in 2011 when the identification procedures took place. Rule 3:11 did not take effect until September 4, 2012.

admissibility of an out-of-court identification required analysis under a two-part test. Citing State v. Madison, 109 N.J. 223 (1988),[3] the court found defendant must first demonstrate that the identification procedure was impermissibly suggestive and then the court will then consider the reliability of the identification. The court noted that the second prong of the test required a determination of whether the impermissible suggestiveness would lead to a very substantial likelihood of irreparable misidentification.

Applying the Madison standard,[4] the court found that "the composition of the [photo] arrays and manner in which they were displayed [to the victim here] is not disputed." The court based its findings on its review of the photo arrays and "information packets" that "were completed and preserved along with the photographs shown to the witness at the time [she] made her identification as well as the prior times when she was shown the photo arrays." Based on the court's review of the photographs and

[3] In Madison, id. at 232, our Supreme Court adopted the standard established by the United States Supreme Court in Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

[4] The out-of-court identification at issue here occurred prior to our Supreme Court's decision in State v. Henderson, 208 N.J. 208 (2011), which established a new framework for determining the admissibility of such identifications. The Court held that its decision applied prospectively. Id. at 302.

packets, it found that during each of the fifteen identification procedures, the victim was sequentially shown the photographs in the arrays by a detective not involved in the investigation, and that the photographs were of individuals having similar physical features. The court also found each information packet noted the victim's demeanor when reviewing the photo arrays.

The court held that defendant failed to make any showing of impermissible suggestiveness, and therefore was not entitled to a Wade[5] hearing on his suppression motion. The court, however, did not consider whether the alleged failure to make a record of the photo array identification procedures in accordance with Delgado necessitated a hearing on defendant's motion.

In 2001, the New Jersey Attorney General's Office issued guidelines "to ensure that identification procedures in this state minimize the chance of misidentification of a suspect." Delgado, supra, 188 N.J. at 61 (quoting Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 1 (Apr. 18, 2001)). The guidelines directed an administrator to:

> 1. Record both identification and non-identification results in writing, including the witness' own words regarding how sure he or she is.

[5] United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

> 2. Ensure that the results are signed and dated by the witness.
>
> 3. Ensure that no materials indicating previous identification results are visible to the witness.
>
> 4. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.
>
> [Ibid. (citing Attorney General Guidelines at 7).]

In Delgado, supra, 188 N.J. at 63, the Court exercised its supervisory powers under Article VI, Section 2, Paragraph 3 of the New Jersey Constitution and "require[d] that, as a condition of the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." The Court stated, "[w]hen feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing," and "[w]hen not feasible, a detailed summary of the identification should be prepared." Ibid.

In State v. Smith, 436 N.J. Super. 556, 574 (App. Div. 2014), we determined the officers failed to comply with Delgado where their report about a show-up procedure mentioned only that an

officer brought a victim to a suspect "to see if she could make a positive [identification] on this possible suspect. . . . [and] [the victim] related right away that he was the one who robbed her." Id. at 568. We found "[t]he limited comments recorded by police include [the victim's] identification, but omit what she was told, her response, or a statement of the specific procedures employed to effectuate the show-up." Ibid. We concluded that the identification was not reliable under the Madison standard, because the victim's account of the identification at the hearing, and the show-up procedure itself, indicated suggestiveness. Id. at 573.

Defendant contends the information packets concerning the fifteen identification procedures do not include the dialogue between the victim and police as required by Delgado. Although the court's findings were based on the information packets, they were not marked in evidence and are not part of the record on appeal. The court's factual findings, however, suggest that the packets did not include a verbatim account of the discussions between the officer and the victim, any showing that a verbatim account was not feasible, or if not feasible, a detailed account of the identification. See Delgado, supra, 188 N.J. at 63. Thus, it appears that as defendant contends, the police may not have complied with Delgado's requirements. Indeed, the court did not

make any findings that the information packets satisfied the requirements in Delgado.

We are convinced the court erred by denying defendant's request for a hearing without first considering and making findings concerning law enforcement's compliance with Delgado's requirements, including whether compliance was feasible. Ibid. Compliance with the recordation requirements is an issue separate from whether defendant made a showing of suggestiveness under the Madison standard. The recording requirement "protects a defendant's rights allowing examination of whether the procedure was impermissibly suggestive." Smith, supra, 436 N.J. Super. at 569. The Delgado requirements were intended to permit a defendant to obtain evidence of suggestiveness. Thus, it would be illogical to conclude that a defendant's failure to show suggestiveness precludes a hearing on whether the Delgado requirements were met.

We therefore vacate the court's denial of defendant's motion to suppress the out-of-court identification. We remand for the court to determine whether the police complied with Delgado's requirements, including whether it was feasible for the police to have done so. Any fact issues concerning compliance shall be resolved at an evidentiary hearing. If it is determined there was a lack of compliance, the court shall conduct such hearings it deems necessary to determine the admissibility of the out-of-court

identification. See, e.g., id. at 568-73 (finding the evidence presented at an evidentiary hearing showed the identification was unreliable where the police recordation of an identification procedure was deficient under Delgado).

We add that a failure to properly record the identification procedures as required under Delgado does not necessarily require the court to suppress the identification. See Delgado, supra, 188 N.J. at 64-65 (rejecting defendant's claim that the failure to make a detailed record of the out-of-court identification procedures denied him a fair trial because the defendant learned the details of every identification and nonidentification through police reports, a Wade hearing, and the witness's testimony at trial); State v. Joseph, 426 N.J. Super. 204, 223-24 (App. Div. 2012) (stating that the failure to retain photos from an array "does not automatically result in the suppression of an out-of-court identification," but rather, "if not explained, should be weighed in deciding upon the probative value of the identification") (quoting State v. Janowski, 375 N.J. Super. 1, 9 (App. Div. 2005)).

Reversed in part, vacated in part. Remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.