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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0676-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ZAKI JONES,

Defendant-Appellant.

Submitted April 28, 2022 – Decided May 6, 2022

Before Judges Mawla and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 16-07-2126 and 16-07-2127.

Joseph E. Krakora, Public Defender, attorney for appellant (Michael J. Zoller, Designated Counsel, on the brief).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In Indictment No. 16-07-2126, defendant Zaki Jones, together with co-defendants Rasuan Foster, and Jarret McEachin, were each charged with second-degree conspiracy, N.J.S.A. 2C:5-2, first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a). In Indictment No. 16-07-2127, defendant was charged with second-degree certain persons not to have weapons or ammunition, N.J.S.A. 2C:39-7(b). A jury convicted defendant of all charges. He challenges his convictions, which we now affirm.

On December 16, 2015, defendant borrowed Hasana Marshall's silver Acura TL. Foster drove because defendant did not have a driver's license and was not allowed to drive as a condition of his parole.

The State produced video surveillance footage from multiple locations in Orange and West Orange depicting the Acura driving around in the late hours of December 16 and early December 17, 2015. At approximately 12:56 a.m., surveillance video captured the Acura arriving at a liquor store. Foster exited the vehicle and tried to enter the store, but it was closed. Defendant and Foster then approached two women who exited the liquor store after purchasing champagne-type bottles, took a bag from them, and drove away. At

approximately 1:08 a.m., another surveillance camera showed the Acura stop across the street from a residence located at 1 Joyce Street in West Orange.

At 12:45 a.m., the victim Naji Everett and McEachin are captured on video walking towards Joyce Street. McEachin walked to the back of 1 Joyce Street while Everett stood in the driveway. The video shows defendant exited the Acura, approached Everett, and shot him multiple times. As the wounded Everett attempted to crawl away underneath a nearby vehicle, defendant continued shooting him, got back into the passenger side of the vehicle, and left the scene. Everett was shot ten times and died from multiple gunshot wounds to the torso, scrotum, and right hand.

Lead Detective Tanairi De Los Santos and Detective Edwin Diaz interviewed McEachin, who told them Foster drove the car and defendant shot Everett the night of the shooting. De Los Santos, Detective Kevin Green, and Lieutenant Thomas Kelly interviewed defendant for approximately an hour and a half.

Before defendant was questioned, the following colloquy took place:

De Los Santos: . . . [T]his is regarding a shooting incident that occurred December 17th.

[Defendant]: A shooting incident?

De Los Santos: Yeah, that occurred December 17th. However, before I begin questioning you[,] I'm going to read you your rights.

[Defendant]: Well, why am I being read my rights, though?

De Los Santos: Well, —

[Defendant]: Am I being arrested or something?

De Los Santos: No, I didn't say you w[ere] being arrested.

[Defendant]: Oh, all right —

De Los Santos: But I have to —

[Defendant]: — I was just making sure.

De Los Santos: — read you your Miranda^[1] rights first before I ask you anything about anything, —

[Defendant]: Okay.

De Los Santos read defendant his Miranda rights and had him read them aloud. The following discussion then occurred:

De Los Santos: Do you agree with that statement?

[Defendant]: I really don't because I don't know what's going on.

Green: Well, we're going to explain it to you. This is preliminary. We have to do this by law. That's why

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

we're reading this form here. Before we can talk to you by law we have to have you read this and understand it. Do you understand it?

[Defendant]: I understand it —

Green: All right.

[Defendant]: — but —

Green: Do you understand that paragraph?

[Defendant]: Yeah, I understand what it's saying but what I'm saying is I don't [k]now what you're questioning me about yet, —

Green: But once we get started—

[Defendant]: — so I don't know if I want to (indiscernible).

Green: All right. When we get into it if you feel at that point in time you . . . understand what the rights were, in other words, at any time — you can stop answering questions at any time —

. . . .

— so once you get into your statement if you don't like the line of questioning, then that's your choice at any time during the statement to say, you know, I think at this point I might . . . need a lawyer, all right. At this point we haven't beg[u]n, so once we begin . . . then that's your choice at any point in time during the statement to stop, —

[Defendant]: All right.

Green: — all right?

[Defendant]: Yeah.

Defendant then signed the Miranda form.

Defendant identified Marshall's car but denied driving it. He confirmed Marshall normally lent him her car and Foster always drove it. At one point during questioning, defendant said "you all playing these games. Just tell me why I'm here." De Los Santos responded, "I just told you[,] a shooting that occurred December 17th." Defendant then said it was possible he had Marshall's car on December 16 because he borrowed it a few times in December. He identified the liquor store he and Foster went to as the same one described in the surveillance footage and said Foster drove to and from the liquor store. Detectives showed defendant a still photo from the liquor store footage, and defendant confirmed he and Foster spoke with two women and he was depicted in the picture. He said the women gave them "Moscato or something, champagne[,] [He and Foster] rode down the street and went to [his] brother's house to see if he was there but his car wasn't there, so [they] . . . went home."

Defendant denied any involvement in the murder or ever seeing or knowing Everett. When De Los Santos told defendant Everett was dead,

defendant said, "[o]h, you said it was a shooting" Green responded, "[w]ell, in order for you to be dead something has to happen to you and he was shot, so it was a shooting." Defendant also denied knowing McEachin and knowing Foster's name, despite the fact Foster was his first cousin. Defendant identified Marshall's car in the vicinity of the shooting but denied parking the car in front of a house. He claimed he returned Marshall's car between 1:30-2:00 a.m. He confirmed only that he and Foster were in the car that night.

Near the end of the interview, Kelly asked defendant if he still wanted to answer questions. Defendant said he did not have anything else to talk about and asked Kelly if he was under arrest. Kelly responded, "[w]e'll let you know." Defendant was arrested approximately three months later for Everett's murder.

The State filed a motion to admit defendant's statement. De Los Santos testified defendant became a person of interest after detectives spoke with McEachin and reviewed the surveillance footage. She stated she went to defendant's house and he agreed to come to the Prosecutor's office to speak with detectives. According to De Los Santos, although there was some evidence accumulated against defendant at that time, she did not believe he was a suspect in the homicide when they brought him in for questioning, he had not been charged or arrested, and he could stop the questioning at any time. She testified

she Mirandized defendant because detectives "didn't want him to incriminate himself, so [they] had to make sure he understood what he was signing."

Defendant argued he did not knowingly waive his rights because he did not know the charges, was not informed the shooting resulted in a homicide, and was not properly advised of his rights. Referencing defendant's interview, the motion judge rejected these arguments and found:

A shooting can be a lot of things, but a shooting can most definitely be a homicide.

The waiver is rather clear that [detectives were] going to ask [defendant] certain questions regarding a shooting that occurred on December 17[], 2015, at [1] Joyce Street I believe it was very clear to [defendant] what the . . . detectives were questioning him on I have to imagine there was only one shooting that took place at [1] Joyce Street . . . on that particular day.

And I do not believe that [defendant] was confused about what the questioning was going to surround, clearly, the shooting.

The judge concluded defendant "was attempting to . . . convince the detectives that he was not involved when he was making those statements but that he knew full well what the question[ing] . . . was going to revolve around" and found the Miranda waiver was knowing and intelligent.

Defendant's trial lasted eight days and featured nine State's witnesses, including fact and expert witnesses. De Los Santos described in detail the process of locating the surveillance footage of the vehicle and the shooting, the videos' content, and the process of identifying the vehicle and Marshall as its owner. Detectives obtained texts from Marshall's phone showing a conversation with defendant around the time of the shooting. Marshall's texts expressed frustration that defendant took an hour to come to her home. De Los Santos used defendant's phone number to identify him through Facebook.

The State also played a video of defendant's statement to the jury. De Los Santos described the interview process and stated she did not show defendant the liquor store video before interviewing him because she wanted to see if he would identify himself. She stated, everything he said "matched exactly" what she saw on video. She also recovered a baseball cap from defendant like the hat he wore in the surveillance footage.

De Los Santos said she charged defendant because "[a]ll [the] evidence led [her] back to [him,]" and because of "him being in the passenger side of the Acura TL, his cousin being the driver. Speaking to the young ladies. The champagne bottle he obtained from the young ladies which we see on video" Also, detectives were unable to corroborate defendant's alibi.

Marshall testified for the State and identified her vehicle as the same one in the surveillance footage. She stated that on the night of the shooting, defendant told her he was going out with his cousin when he borrowed her car, and that he left around 8:00 or 9:00 p.m. and returned at 2:00 or 3:00 a.m. the next morning.

Defendant testified and denied he was in any of the surveillance footage, in the area on the night of the shooting, or knowing Everett. He claimed that when detectives came to interview him, he thought they were parole officers. He conceded detectives did not tell him he was under arrest when they interviewed him but felt he could not refuse to sign the Miranda waiver.

Defendant claimed he was driving the vehicle, but did not want to tell detectives because it would result in a parole violation and he "kind of figured that they already knew that [he] was on parole[,] but "didn't know for sure at the time." Likewise, he claimed he told detectives he did not know Foster's name because Foster was a convicted felon and spending time with him would violate his parole. He asserted he incorrectly identified himself in the still photo from the liquor store footage because he and Foster owned similar looking hats, but when he saw the video later "the thing that [he] thought was a hat was actually a scarf or something hanging off the guy['s] head" and Foster did not

wear scarves. Defendant maintained he saw Marshall the morning after the shooting and claimed he did not have her car that night because the texts demonstrate he asked her to open the door, and if he had her car keys, he would also have had her house keys.

The State called defendant's parole officer as a rebuttal witness who testified he interviewed defendant regarding the parole violation, and he admitted he was in Marshall's car the night of the incident and near the scene of the shooting because he was "looking for women." Defendant further admitted he went to a liquor store, which was closed, and that he and a friend "just drove around the area listening to music after."

Following the testimony and post-trial motions, the trial judge held a charge conference. The defense did not object to any of the proposed jury instructions during the charge conference.

The trial judge carefully charged the jury regarding fact and expert witness testimony, direct and circumstantial evidence, credibility, and elements of the offenses charged. The judge addressed the types of evidence presented in the case, including: photographs, surveillance videos, fingerprints, and video statements. Regarding the surveillance footage, the judge stated:

There is for your consideration in this case, several surveillance videos. While some witnesses

have testified concerning their belief as to what is depicted in the video, it is your function to determine what is depicted in the video and whether the video or any portion of it is credible. You may consider all the circumstances surrounding the video in making that determination.

Defendant raises the following points on appeal:

POINT I: THE TRIAL COURT ERRED WHEN IT REJECTED DEFENSE COUNSEL'S CONTENTION THAT DEFENDANT HAD NOT KNOWINGLY AND VOLUNTARILY WAIVED HIS MIRANDA RIGHTS.

A. BECAUSE DEFENDANT ARGUABLY HAD ASSERTED HIS RIGHT TO COUNSEL AND TO REMAIN SILENT, THE INTERROGATING OFFICERS HAD A DUTY TO INQUIRE ABOUT THE MEANING OF DEFENDANT'S STATEMENT AND NOT RESUME QUESTIONING UNLESS DEFENDANT MADE CLEAR HE WAS NOT INVOKING HIS MIRANDA RIGHTS.

B. BECAUSE THE INVESTIGATING OFFICERS CLEARLY HAD PROBABLE CAUSE TO ARREST DEFENDANT PRIOR TO HIS INTERROGATION, THEY WERE OBLIGATED TO INFORM HIM OF THE POTENTIAL CHARGES AGAINST HIM PRIOR TO ANY REQUEST THAT HE WAIVE HIS [MIRANDA] RIGHTS. THEIR FAILURE TO INFORM HIM OF THOSE CHARGES INVALIDATES DEFENDANT'S PURPORTED MIRANDA WAIVER.

POINT II: THE TRIAL COURT'S JURY CHARGE CONSTITUTED PLAIN ERROR. IT

UNDERSTANDABLY INSTRUCTED THE JURY ABOUT THE STATE'S VIDEOTAPE EVIDENCE BUT, IN DISREGARD OF THE SUPREME COURT'S HOLDING IN STATE V. CONCEPCION, 111 N.J. 373 (1988), IT OMITTED FROM ITS CHARGE ANY REFERENCE TO DEFENDANT'S EXCULPATORY TESTIMONY THAT HE WAS THE DRIVER, NOT THE PASSENGER, IN THE ACURA, WHICH "INCORRECTLY NARROWED THE FOCUS OF THE JURY'S ATTENTION." Id. at 380 (Not raised below).

I.

We defer to a "court's factual findings as to [a] defendant's Miranda waiver." State v. Tillery, 238 N.J. 293, 314 (2019). The trial court's findings "should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). We review a trial court's legal conclusions de novo. Tillery, 238 N.J. at 314.

A.

To admit a statement obtained during a custodial interrogation "the State must 'prove beyond a reasonable doubt that the suspect's waiver was knowing, intelligent, and voluntary in light of all the circumstances.'" Id. at 316 (quoting State v. Presha, 163 N.J. 304, 313 (2000)). The court considers factors including the defendant's "age, education, intelligence, previous encounters with law

enforcement, advice received about his or her constitutional rights, the length of detention, the period of time between administration of the warnings and the volunteered statement, and whether the questioning was repeated and prolonged in nature or involved physical or mental abuse." State v. Timmendequas, 161 N.J. 515, 614 (1999).

"[O]nce a request for counsel has been made, an interrogation may not continue until either counsel is made available or the suspect initiates further communication sufficient to waive the right to counsel." State v. Alston, 204 N.J. 614, 620 (2011). "[I]n situations where a suspect's statement arguably amount[s] to an assertion of Miranda rights," officers must seek further clarification. State v. Gonzalez, 249 N.J. 612, 630 (2022) (internal quotations omitted). "If the police are reasonably uncertain whether the person is asserting the right to remain silent, they may only ask questions directed to resolving that uncertainty." State v. Burno-Taylor, 400 N.J. Super. 581, 590 (App. Div. 2008).

Pursuant to these principles, we are unconvinced defendant invoked his right to remain silent. When defendant proclaimed he did not understand what was happening, detectives told him they would explain why they were questioning him and advised him he could stop the questioning at any time if he

wanted to have counsel. Defendant then signed the Miranda waiver and proceeded with the interview.

Contrary to defendant's argument, the facts of his case are unlike State v. Wright, 97 N.J. 113 (1984). There, the defendant stated: "I won't sign any more deeds [or waivers] without a lawyer present." Id. at 117 (alteration in original) (emphasis added). Defendant made no mention of a desire to speak with an attorney at any point during his interview.

B.

We reject defendant's assertion that the Miranda waiver was invalid because detectives were required to inform him he was a suspect and faced potential charges. We are also unpersuaded he was misled about the reason why detectives were questioning him.

In State v. A.G.D., the Court held police have a duty to advise a defendant that a criminal complaint or an arrest warrant was filed for the defendant's Miranda waiver to be knowing and intelligent. 178 N.J. 56, 68 (2003). The Court recently declined to adopt a standard requiring police inform an interrogee of the charges to be filed against him prior to arrest, where no complaint or arrest warrant has been filed identifying the charges regardless of whether the interrogee is a suspect or if the police have probable cause. See State v. Sims,

250 N.J. 189, 214-16 (2022). Sims stated: "Unlike the issuance of a criminal complaint or arrest warrant, suspect status is not an objectively verifiable and discrete fact, but rather an elusive concept that will vary depending on subjective considerations of different police officers." Id. at 213 (quoting State v. Nyhammer, 197 N.J. 383, 405 (2009)). As we recently noted "the bright-line notification requirement announced in A.G.D. is triggered only by the actual issuance of an arrest warrant or complaint-warrant, and not by the fact that police have probable cause to support an application for such a warrant." State v. Cotto, ___ N.J. Super. ___, ___ (App. Div. 2022) (slip op. at 27 n.7).

In Cotto, we held police did not err in arresting a defendant on traffic warrants and subsequently questioning him regarding an arson because "[a]t the outset of substantive questioning, the detectives explained that they wanted to talk to defendant about something other than the traffic warrants and then immediately directed defendant's attention to the [arson]." Id. at ___ (slip op. at 31).

At the outset, we note there was no arrest warrant or criminal complaint issued against defendant at the time of his questioning. Defendant was not under arrest and the facts do not support that he was in police custody. Further, we are unpersuaded that he was misled about the reason detectives were questioning

him because they began the interview by telling him it was about a shooting and he continued to answer questions. Detectives told defendant the shooting led to the death of the victim and he was a person of interest in the matter. The initial indication that they were inquiring about a shooting and the eventual revelation that it led to a death does not prove defendant was affirmatively misled. See State v. Diaz, 470 N.J. Super. 495, 527 (App. Div. 2022) (holding police did not mislead a defendant to believe he was being arrested for a less serious crime by deliberately withholding the information that a person died because of his actions.). As the motion judge noted, a homicide was a possible and logical outcome of a shooting. Nothing in the record supports a conclusion the revelation of the homicide was either a surprise or changed the dynamics of defendant's interview.

II.

"The appropriate time to object to a jury charge is 'before the jury retires to consider its verdict.'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 1:7-2). Where the defense does not object, we review the challenged jury instructions for plain error, defined as a "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that

of itself the error possessed a clear capacity to bring about an unjust result." State v. Torres, 183 N.J. 554, 564 (2005) (alteration in original) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

"[I]nsofar as consistent with and modified to meet the facts adduced at trial, model jury charges should be followed and read in their entirety to the jury." State v. R.B., 183 N.J. 308, 325 (2005). "When a jury instruction follows the model jury charge, although not determinative, 'it is a persuasive argument in favor of the charge as delivered.'" State v. Whitaker, 402 N.J. Super. 495, 513-14 (App. Div. 2008) (quoting State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000)).

Defendant's reliance on Concepcion is misplaced. There, the defendant was convicted of reckless manslaughter for the shooting death of the victim where the defense was that the shooting was accidental. 111 N.J. at 376. The trial court's instruction failed to describe the facts necessary for the jury to consider the defense's theory and instead instructed the jury to consider whether the presence of a gun "in the defendant's home created or presented a substantial and unjustifiable risk which the defendant was aware of and consciously disregarded." Id. at 378. The Supreme Court reversed, finding "[b]y selectively interpreting its charge to the jury in relation to one aspect only of the critical


events, the trial court may have misled the jury and influenced it to return a guilty verdict based solely on that conduct." Id. at 381.

Defendant also points us to State v. Gartland, where the Supreme Court reversed a defendant's reckless manslaughter conviction. 149 N.J. 456, 475-77 (1997). There, the defense argued self-defense and the jury charge advised the defense was unavailable if the defendant was able to retreat, yet the facts in evidence showed the defendant had no means of retreat. Id. at 475. The Court concluded the charge misled the jury and instead "should have asked whether, armed with a weapon, [the defendant] could have safely made her way out of the bedroom door without threat of serious bodily injury to herself." Ibid.

We discern no reversible error in the jury instruction here. The defense theory was that the videos did not depict defendant. Contrary to defendant's argument, the model instruction used by the judge relating to the surveillance video evidence did not comment on the weight of the evidence or solely advance the State's theory of the case. Instead, the instruction explained how to treat the video evidence and left the ultimate determination of the facts and credibility of the evidence to the jury. The instruction was not an error clearly capable of bringing about an unjust result.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION