SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2587-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DEAN R. JONES,

Defendant-Respondent.

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Submitted October 31, 2022 – Decided December 12, 2022

Before Judges Whipple, Smith, and Marczyk.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 19-01-0075.

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for appellant (Kim L. Barfield, Assistant Prosecutor, of counsel and on the briefs).

Weinstock Levin, attorneys for respondent (Ed Weinstock, on the brief).

PER CURIAM

With leave granted, the State appeals from a March 29, 2022 order and from a subsequent April 13, 2022 order denying reconsideration. We affirm.

On July 21, 2018, defendant Dean Jones was pulled over. After detecting the odor of marijuana, the police arrested defendant, searched his vehicle, and found a handgun, marijuana, and drug paraphernalia in the car. Defendant was indicted for second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1), and second-degree possession of a weapon by a convicted person, N.J.S.A. 2C:39-7(b)(1).

On February 19, 2019, defendant's private investigator, William R. Scull, interviewed Rakwon Humphries, defendant's cousin, at defendant's attorney's office. At the outset of the interview, Scull confirmed with Humphries the information Humphries intended to provide could incriminate him "in potential charges of possession of a firearm or purchasing a firearm." Scull also confirmed Humphries had appeared for the interview voluntarily, did not have a lawyer, and was not asking to speak to a lawyer before giving his statement.

Humphries told Scull that on July 20, 2018—the day before defendant was arrested—he spent the afternoon and evening with defendant and his friends. Humphries stated he was wearing his fanny pack, which contained a

.38 caliber chrome silver pistol loaded with six bullets, a dark blue "doo-rag," and a scale for marijuana. He reported he had placed the fanny pack under the seat in defendant's car and left it there. Defendant, Humphries, and the others made multiple stops that day, ending up at a bar. According to Humphries, defendant ultimately left without him, leaving the fanny pack with the gun inside of it in the car.

Humphries told Scull he purchased the gun for $200 three weeks prior to defendant's arrest. He said defendant did not know Humphries had a gun that day, nor did he know the gun was left in the car. When questioned about his delay in coming forward, Humphries stated he planned to admit the gun was his, but was nervous. Humphries denied defendant pressured him to come forward or that anyone forced him to give this information.

A year later, Humphries was interviewed by Detectives Jay Pennypacker and John Borelli at the Cumberland County Prosecutor's Office. After waiving his Miranda[1] rights, Humphries recounted his activities with defendant on the night of defendant's arrest, telling much the same story he told Scull. Humphries stated that when defendant picked him up, he was wearing his fanny pack containing his gun, which he tucked under defendant's driver's seat.

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

They drove around, had some food, and eventually went to Larry's Bar, where they remained until defendant left—with the fanny pack and without Humphries.

At first, Humphries maintained the gun was his. The detectives questioned his story, because they thought he was lying to protect defendant. They told him they would access his phone records and compare his call times and GPS[2] data with his statements, which would, in turn, reveal whether or not he was lying. Detectives also told him they would be able to test the gun for his DNA.[3] The detectives explained the repercussions of having a conviction for unlawful possession of a handgun, stating that Humphries could be facing three to five years in prison, and that it could impact his likelihood of incarceration if he ever was arrested in the future. They urged him to consider the impact his incarceration would have on his family. Detectives also told Humphries that lying about the gun would only make things more difficult for defendant once the evidence contradicted Humphries's story. After Humphries continued to insist the gun belonged to him, the detectives asked him if he was willing to take a polygraph test.

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[2] Global Positioning System.

[3] Deoxyribonucleic Acid.

At that point Humphries recanted, stating "[i]t's not mine." He told the police he was "in Ancora"—the psychiatric hospital—at the time of the incident. When he was released, he decided to "take" the charge for defendant, because Humphries could say he had a gun because he was "crazy."

Humphries reported defendant spoke to him once he returned from Ancora and offered him "ten bands" to take the charge—which the detectives believed to mean $10,000—and that defendant had paid him $2,500 so far. Humphries told them he would not get the remaining money until after he served his sentence.[4]

Prior to trial, defendant moved in limine seeking, among other things, to admit Humphries's statement to Scull as a statement against interest under N.J.R.E. 803(c)(25) and preclude the State from introducing Humphries's recantation to the detectives.

The parties appeared before the trial court for oral argument on the motion. The State conceded Humphries's statement to Scull was admissible as a statement against interest. In granting defendant's motion, the court agreed and held this statement could be introduced under N.J.R.E. 803(c)(25) because

[4] According to the State, there were two additional meetings between the State and Humphries, on March 30, and April 19, 2022. They are not part of this appeal.

it exposed Humphries to potential criminal gun possession charges. The court also held Humphries's statement to Pennypacker could not be admitted, but the State could call Humphries as its own witness. The court noted the State would have to find Humphries and there was a possibility that he would assert his Fifth Amendment privileges. It also noted that if Humphries testified, his recorded statement to Detective Pennypacker could potentially be admitted as a prior inconsistent statement.

After the State raised questions about the court's ruling, the court conducted a conference to clarify its rulings on the motion in limine. Specifically, it addressed whether Pennypacker could testify about Humphries's statement from their February 4, 2020 interview.

The State presented two newly minted arguments as to why Pennypacker should be permitted to testify regarding Humphries's recantation even in the absence of Humphries testifying. First, it argued just like Humphries's statement to Scull, Humphries's statement to Pennypacker also was a statement against interest, because Humphries would be "potentially libeling himself" and subjecting himself to "hindering charges [and] obstruction." Second, it argued Pennypacker should be able to testify "under the doctrine of completeness," because Humphries's second statement "may be required to

explain" his first statement to Scull in order to "place the admitted part in context, avoid misleading [the] trier of fact or ensure a fair and impartial understanding."

The court noted it had not read the transcript of Humphries's interview with Pennypacker,[5] but found, without prejudice, that Pennypacker could not testify as to Humphries's statement during that interview. The court questioned whether Humphries's second statement could be admissible against him as a statement against interest—because he could then be charged with obstruction or hindering—but it noted it was not making such a finding at that juncture because it had not read the transcript. The court also noted it could be admissible as a prior inconsistent statement, but it again that it was not making such a ruling yet because it did not "know what those inconsistencies could be."

[5] On March 29, 2022, there was a discussion the State had not provided a transcript of Pennypacker's interview of Humphries, as it had changed its position on calling Humphries as a witness. The court directed the State to provide defendant with the interview transcript as soon as it was prepared, and this direction was included in its March 29, 2022 order. The court later received a copy of this transcript, although it does not appear the court reviewed it prior to deciding the State's motion for reconsideration.

The State moved for reconsideration of the court's ruling denying Pennypacker's testimony on Humphries's statement to him, presenting two arguments, which echoed the arguments made previously.

The court ruled Humphries's recantation to Pennypacker was inadmissible hearsay and would violate the Confrontation Clause because defendant had a right to cross-examine Humphries. The court declined to apply the doctrine of completeness, noting that doctrine applied when only a portion of a writing or statement was produced "to place the statement and/or words into context." The doctrine, the court stated, was "not an absolute to allow in, for example, pure hearsay, which would be Detective Pennypacker's testimony, especially whereas here [Humphries] remains an available witness for the state."

We granted leave to appeal. The State argues the trial court erred in excluding Pennypacker from testifying about Humphries's statement that the gun found in defendant's car did not belong to him, and that defendant paid Humphries to claim it was his gun. We disagree.

A trial court's evidentiary rulings are subject to an abuse of discretion standard of review. State v. Garcia, 245 N.J. 412, 430 (2021). "The abuse of discretion standard instructs us to 'generously sustain [the trial court's]

decision, provided it is supported by credible evidence in the record.'" State v. Brown, 236 N.J. 497, 522 (2019) (alteration in original) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010)). Similarly, the decision on whether to deny a motion for reconsideration under Rule 4:49-2 is also entitled to deference absent a showing of an abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

The trial court denied the State's motion for reconsideration because allowing Pennypacker to testify about Humphries's recantation would violate defendant's rights under the confrontation clause and because the doctrine of completeness was inapplicable. On appeal, the State argues there is no Confrontation Clause issue because defendant has access to Humphries, who is his cousin, and can call him as his witness.

The Sixth Amendment of the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution provide that the accused in a criminal prosecution has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. "Because '[t]he right of confrontation is an essential attribute of the right to a fair trial,' a defendant must be given 'a fair opportunity to defend against the State[']s accusations.'" State v. Basil, 202 N.J. 570, 590 (2010) (alteration in original) (quoting State

v. Branch, 182 N.J. 338, 348 (2005)). "The opportunity to cross-examine a witness is at the very core of the right of confrontation." State v. Cabbell, 207 N.J. 311, 328 (2011). Thus, testimonial evidence cannot be presented against a defendant unless the witness is "unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 59 (2004). Moreover, "[t]he government bears the burden of proving the constitutional admissibility of a statement in response to a Confrontation Clause challenge." Basil, 202 N.J. at 596.

The Confrontation Clause prohibits the use of a witness's out-of-court testimonial statements—even those permitted by state hearsay rules—unless the person who made the statement is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine that person. State ex rel. J.A., 195 N.J. 324, 342-43 (2008). Thus, regardless of whether Humphries's statement is admissible under a hearsay exception or under the doctrine of completeness, it is still subject to the Confrontation Clause. See State v. Kuropchak, 221 N.J. 368, 386 (2015) ("[H]earsay that is testimonial in nature is inadmissible, even if it satisfies a recognized exception to the hearsay rule, when the declarant does not testify.").

Humphries's statement to Pennypacker clearly qualifies as a testimonial statement. "[A] statement made to the police is testimonial when it is given in 'circumstances objectively indicat[ing] that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" Cabbell, 207 N.J. at 329 (second alteration in original) (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)). "[E]ven firmly established exceptions to the hearsay rule must bow to the right of confrontation." Branch, 182 N.J. at 369-70.

Most recently, in State v. Sims, the New Jersey Supreme Court stated that the United States Supreme Court

> has "never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant" and has instead "repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial."
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> [250 N.J. 189, 227 (2022) (quoting Maryland v. Craig, 497 U.S. 836, 847-48 (1990)).]

While this language seemingly limits a defendant's rights under the Sixth Amendment, it does not render a different outcome here. Sims involved a victim who testified he had no recollection of the incident or his out-of-court identification of the defendant, and thus his identification was admitted

through the detective's testimony. Id. at 201. Thus, that fact-pattern presented a unique scenario where a witness testified and was subject to cross-examination but could not be questioned on a particular issue due to his medical condition.

Moreover, in noting that certain hearsay statements may be admissible even if the defendant is unable to confront the declarant at trial, the Supreme Court in Craig, 497 U.S. at 847-48, cited to cases involving "dying declarations" and "co-conspirator exceptions" as the type of hearsay exception that could potentially overcome the confrontation clause. Neither of those exceptions are implicated here. Given the unequivocal language in Crawford, 541 U.S. at 36, and the caselaw recited to herein, it does not appear that Humphries's hearsay statement to Pennypacker, even if admissible on other grounds, can overcome preclusion under the Confrontation Clause.

The State argues there is no Confrontation Clause issue, because defendant can call Humphries as a witness himself. This, of course, runs contrary to the maxim that it is the State's burden to prove "each element of each offense beyond a reasonable doubt." State v. Medina, 147 N.J. 43, 54 (1996) (quoting State v. Purnell, 126 N.J. 518, 544 (1992)). The defendant has "no obligation to establish his innocence," nor is he required to "proffer[]

affirmative evidence on his own behalf." State v. Jones, 364 N.J. Super. 376, 382 (App. Div. 2003). This rule is not overcome simply because a witness may be more responsive to defendant than to the State.

Of course, the circumstances are different when "a defendant attempts 'to undermine the judicial process by procuring or coercing silence from witnesses and victims . . . .'" State v. Byrd, 198 N.J. 319, 342 (2009) (quoting Davis, 547 U.S. at 833). In such situations, a defendant's "confrontation rights under Article I, Paragraph 10 of our State Constitution will be extinguished on equitable grounds." Ibid. While the State contends defendant paid Humphries to lie and claim the gun was his, and that this, in turn, may result in the filing of obstruction or hindering charges against Humphries, the State has yet to argue that defendant has interfered in the State's ability to call Humphries as a witness, or that Humphries's statements can then be admitted without violating the Confrontation Clause under N.J.R.E. 804(b)(9), the forfeiture-by-wrongdoing exception to the hearsay rule. See Cabbell, 207 N.J. at 335 (explaining that N.J.R.E. 804(b)(9) "extinguishes a defendant's confrontation rights to keep a hearsay statement from the jury when the defendant has procured the unavailability of a witness through his wrongful conduct").

Moreover, the record establishes Humphries has participated in this proceeding so far. He was interviewed by Scull and Pennypacker and purportedly appeared in court on the first day of trial. Although the State portrays Humphries as a recalcitrant witness based on his subsequent statements he did not "want to go against his cousin" and did not want to speak to the State—statements which were not presented to the trial court at the time of the argument—there is nothing to indicate that Humphries is, at this juncture, an unavailable witness at trial as defined by N.J.R.E. 804(a). As the State argues, it is indeed possible that Humphries will appear to testify and invoke his Fifth Amendment right against self-incrimination. Humphries's invocation of his right against self-incrimination does not negate defendant's rights under the confrontation clause. See State v. Nyhammer, 197 N.J. 383, 414 (2009) (stating where a witness testifies, but then refuses to respond to certain questions, then there is a question of whether his or her "silence or unresponsiveness effectively denied defendant his constitutional right of confrontation").

We also reject the argument the State can introduce the second statement under the doctrine of completeness. The doctrine of completeness is codified in N.J.R.E. 106, and provides, "[i]f a party introduces all or part of a writing or

recorded statement, an adverse party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time."[6] Here, in rejecting the application of the doctrine of completeness, the trial court noted the doctrine is generally invoked to introduce the "remainder" of a writing or statement, to avoid one side from "cherry pick[ing] a sentence." For example, the court noted the doctrine of completeness is invoked when the State shows only a portion of the body worn camera, and defense counsel is then "allowed to show the rest of the interaction." Here, the statements were made remote in time, to two different audiences.

Traditionally, the doctrine of completeness provides the trier of fact with information that "was said at the same time upon the same subject matter."

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[6] It should be noted some of the caselaw cited to by the parties addressed a related, but distinct theory, sometimes referred to as the "doctrine of continuing trustworthiness." See State v. DeRoxtro, 327 N.J. Super. 212, 222 (App. Div. 2000). This doctrine applies where "the trustworthiness of the first statement 'rubbed off' on the second, imbued it with the same credibility, and thus enabled the second statement to 'tag along' and be admitted with the first statement." Ibid. While similar and sometimes reviewed together, the doctrine of continuing trustworthiness and the doctrine of completeness are two different inquiries. See, e.g., Gomez, 246 N.J. Super. at 219, 221 (reviewing both theories separately but noting "the criteria we identified for determining testimonial completeness are equally applicable in deciding whether the trustworthiness ascribed to a declaration against penal interest is transferable to subsequent exculpatory accounts.").

State v. Gomez, 246 N.J. Super. 209, 217 (App. Div. 1991) (citing State v. Wade, 99 N.J. Super. 550, 556-57 (App. Div. 1968)). However, the rule, on its face, does not place a time constraint on when the two statements must have been made, instead broadly stating the adverse party can seek to include "any other part" of the statement, or, more significantly, "any other writing or recorded statement, that in fairness ought to be considered at the same time." N.J.R.E. 106. "[A] second writing may be required to be read if it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding." State v. Lozada, 257 N.J. Super. 260, 272 (App. Div. 1992) (citing U. S. v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)). Thus, the question is whether there are limitations on what qualifies as a "second statement."

The prevailing rule is the doctrine of completeness does not apply to "separate utterances." State v. James, 144 N.J. 538, 555 (1996). N.J.R.E. 106 does not define what constitutes a second statement, other than qualifying it as something "that in fairness ought to be considered." Thus, the emphasis is not on whether the two statements were made contemporaneously, but whether such statements ought to be considered together. Notwithstanding the broad language of N.J.R.E. 106, there is no caselaw applying the doctrine to separate

statements made at different times, even if the statement is made by the same declarant and about the same subject. In contrast, the New Jersey Supreme Court held that the rule does not apply to "separate utterances." James, 144 N.J. at 555.

N.J.R.E. 106 hinges on the concept of "fairness," and the question of timing may be a component of this assessment. We find nothing to support the conclusion two separate statements, made one year apart, to two different speakers, must be viewed together under the doctrine of completeness. Rather, it appears, notwithstanding the fact that Humphries's statements related to the exact same incident and the exact same behaviors, these statements nevertheless constituted "separate utterances." Ibid.

We also reject the State's new assertion that if Pennypacker cannot testify to Humphries's statements, then Scull should not be permitted to do so either. While the State did not fully argue this point in its brief, and only mentioned it in its conclusion section, this argument centers on the State's notion of inequity in the trial court's rulings, and its view that admitting only Humphries's statement to Scull would mislead the jury. The State, however, conceded on March 29, 2022, that Humphries's testimony to Scull was admissible as a statement against interest under N.J.R.E. 803(c)(25).

To the extent we have not addressed the State's remaining arguments, we are satisfied they are without sufficient merit to warrant further 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.

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