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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4606-14

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PEDRO GUTIERREZ,

Defendant-Appellant.

Argued March 22, 2022 – Decided June 1, 2022

Before Judges Currier, DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 12-08-1182.

Jane M. Personette argued the cause for appellant (Bastarrika Soto Gonzalez & Somohano, LLP, attorneys; Jane M. Personette, of counsel and on the briefs).

William P. Miller, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; William P. Miller, of counsel and on the briefs; Catherine Foddai, Legal Assistant, on the briefs).

PER CURIAM

Defendant raises a number of issues in this appeal regarding his conviction and sentence for the murder of his wife. Although there were some irregularities in the jury selection process and a lengthy gap during trial to allow discovery regarding late-discovered evidence and to accommodate jurors' vacation plans, a careful review of the record does not reveal the court mistakenly exercised its discretion in conducting the jury voir dire or managing the trial, and defendant has not demonstrated he was prejudiced by the jury selection process or the delay in trial. We affirm.

Defendant was charged in an indictment with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); second-degree burglary, N.J.S.A. 2C:8-2; first-degree felony murder (burglary), N.J.S.A. 2C:11-3(a)(3); first-degree kidnapping, N.J.S.A. 2C:13-1(b); first-degree felony murder (kidnapping), N.J.S.A. 2C:11-3(a)(3); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3); first-degree felony murder (sexual assault), N.J.S.A. 2C:11-3(a)(3); first-degree aggravated sexual assault armed with a weapon, N.J.S.A. 2C:14-2(a)(4); first-degree sexual assault, N.J.S.A. 2C:14-2(a)(6); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); fourth-

degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and third-degree hindering apprehension, N.J.S.A. 2C:29-3(b)(1).

Trial was held from September 2014 to April 2015.[1] On April 2, 2015, defendant was found guilty on all counts except for burglary. During the sentencing hearing, the court merged the felony murder conviction into the murder conviction and sentenced defendant to an aggregate sentence of one hundred and fifteen years in prison; one hundred and ten years are subject to an eighty-five percent period of parole disqualification under N.J.S.A. 2C:43-7.2.

Defendant presents the following points for our consideration:

> POINT I
> MULTIPLE ERRORS DURING JURY SELECTION REQUIRE THAT DEFENDANT'S CONVICTION BE REVERSED AND THE MATTER REMANDED FOR A NEW TRIAL
>
> a. The method of jury selection violated N.J.S.A. 2B:23-2
>
> b. The voir dire conducted by the court during jury selection was wholly inadequate, deprived Mr. Gutierrez of the meaningful exercise [of] peremptory

[1] We are mindful this matter has a lengthy gap in time between the conviction and our decision. Defendant filed a timely notice of appeal but his failure to file a brief resulted in a dismissal of the appeal for an extended period of time. Defendant's brief was eventually filed in August 2020 and the State filed its opposing brief in May 2021. The case was then promptly scheduled on our calendar.

challenges, and compels the reversal of his conviction and the granting of a new trial

c. The [c]ourt . . . erred in failing to grant a mistrial or strike the array

POINT II
THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTIONS TO SUPPRESS

a. The [c]ourt erred in failing to suppress evidence

b. The [c]ourt erred in failing to suppress Defendant's statement

POINT III
THE PREJUDICE CAUSED TO DEFENDANT BY THE STATE'S DISCOVERY VIOLATION REQUIRES REVERSAL OF HIS CONVICTION

a. The lower court erred in allowing the State to introduce at trial evidence discovered during the course of trial and abused [its] discretion in failing to grant [d]efendant's motion for a mistrial

b. Defendant was gravely prejudiced as a result of the two month gap in the proceedings

POINT IV
THE TRIAL COURT'S MISHANDLING OF A JURY QUESTION THAT AROSE DURING DELIBERATIONS REQUIRES THAT THE CONVICTION BE VACATED AND THE MATTER REMANDED FOR A NEW TRIAL

POINT V
CUMULATIVE TRIAL ERRORS IN THE CONTEXT OF THE PROCEEDINGS BELOW DEPRIVED

DEFENDANT OF A FAIR TRIAL AND WARRANT REVERSAL

POINT VI
THE SENTENCE IMPOSED IS EXCESSIVE

a. The [c]ourt below failed to credit Mr. Gutierrez with all applicable mitigating factors

b. Concurrent sentences should have been imposed

I.

We begin our review with Point III: whether defendant invoked his right to remain silent during the police interview at the airport, requiring the suppression of the statement made to police. The court denied defendant's motion to suppress following a Miranda[2] hearing. We derive the following facts from that hearing.

On the afternoon of October 4, 2011, defendant's wife, Sally,[3] was found dead in her brother Andres's apartment. Police learned that defendant and his wife were separated and Sally had informed defendant she intended to return to Colombia permanently. Defendant became a suspect in the homicide.

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

[3] We use a pseudonym to protect the victim's identity. R. 1:38-3(d)(10). She does not share a surname with defendant.

After police learned defendant had flown that afternoon from John F. Kennedy Airport to Orlando, Florida,[4] they requested he be held in Orlando. Detective James Brazofsky of the Bergen County Prosecutor's Office and Detective Kevin Marrero of the Teaneck Police Department flew to Orlando that evening. Upon arriving, Brazofsky was told that defendant was in a holding cell at the airport and that no one had spoken to him about the incident.

Brazofsky and Marrero were taken to defendant and informed him that he was being charged with murder and weapons offenses. They asked defendant in Spanish whether he was willing to speak to them. Defendant agreed to speak with them on the condition that he be allowed to make phone calls to family members after the interview. Brazofsky and Marrero agreed and accompanied defendant to an interview room in the airport.

Brazofsky testified that once in the room, they presented defendant with a Miranda rights form written in Spanish. The three sat at a table and Brazofsky read defendant the rights form in Spanish; defendant responded that he understood each right by printing "si" and his initials after each right. Brazofsky then read the remainder of the form to defendant specifically asking him whether

[4] Defendant purchased a one-way ticket with cash with the final destination of Colombia—his native country. He had no luggage with him.

he was willing to talk to the detectives without an attorney. Defendant agreed and printed and signed his name on the form.

The interview, conducted in Spanish, began shortly after midnight on October 5, and lasted until 2:05 a.m., with a short break at 1:47 a.m. to permit defendant to make two phone calls. After the phone calls, defendant told the detectives that he did not want to answer any more questions without a lawyer present.

During his statement, defendant told detectives that he deleted Sally from his Facebook page after she posted photos of herself with other men on her page. He admitted feeling hurt and to crying and begging Sally to take him back. He also sent her flowers and chocolates about a week before she was killed, but she told him not to "get [his] hopes [up]."

Defendant stated that he texted Sally in the morning on October 4, asking if he could come over to her brother's apartment where she was staying to pick up clothes she had borrowed from defendant's cousin, and she agreed. After he arrived, they talked for a while and then had sexual relations, during which he used a condom. They then discussed Sally's desire to return to Colombia and go to school. Defendant told her that he also planned to return to Colombia, stating he had bought a ticket six months earlier.

Defendant stated that Sally then took a small knife from a drawer and told him, "[Y]ou are not moving from here." As she came towards him, defendant grabbed her hand, and took the knife from her. He said Sally then fell on top of him. When defendant pushed Sally off of him, the knife penetrated her. Defendant said he never looked at Sally "because [he] knew that [he] had hurt her." He then left the apartment and drove home, where he changed his clothes. He stated he took some items from the apartment because there was blood on them, including cables, a camera, and some gloves.

At this point in the interview, defendant said he "want[ed] to make . . . two phone calls" to his mother and a cousin. When Marrero asked if defendant could answer two more questions, defendant responded, "Let me make the phone calls." Marrero said, "Okay." Shortly thereafter, Marrero said, "[O]nly your mother at this moment," "for one minute, two minutes." Defendant told them that he also wanted to call his cousin. They then asked him which one he wanted to speak with, and he responded, "Dude, I don't know." Defendant then asked, "[C]an I talk to both," to which Marrero responded, "With time you can talk to both, one you can talk to now." Defendant told them that he would answer their questions at the end of the interview about the location of his clothes and the

knife. The officers agreed and defendant then said, "[Y]ou don't have to give me the calls right now."

In continuing to discuss the events, defendant claimed he was defending himself. He stated that he did not call for help for Sally possibly because of "desperation." He also said that the knife fell to the ground after he grabbed her hand, and he picked it up. Defendant claimed that he used "cables" to tie Sally up during sex because she liked that.

Later in the interview, defendant again asked to call his mother and cousin. The detectives permitted him to do so. After he finished speaking with his relatives, he told the detectives that he did not want to talk anymore. At that point, the interview ended.

In moving to suppress the statement, defendant asserted the detectives' promise of phone calls was made to induce his statement. He also contended his repeated requests to make the phone calls was an assertion of his right to remain silent.

In its written decision, the court found defendant made "a knowing, intelligent and voluntary waiver of his Miranda rights because he refused to answer certain questions and chose which questions to answer." In addition, the

court found that defendant's requests to speak to his mother were not an invocation of his right to remain silent, stating:

> [A]t no point during the interview did the defendant give the police any clear indication that he wanted to stop the interview. Quite to the contrary, the defendant was permitted to tell his self-serving side of the story including a tale of self-defense . . . . Furthermore, this court noted that during the interview the defendant never admitted to the brutality of the crime nor did he reveal the location of the knife and/or the rest of the evidence. To the contrary, the defendant refused to provide a location as to where any potential evidence could be found. As such, the defendant[']s statements were not coerced but voluntary.

The court further stated that defendant "determined the course of the interview by picking and choosing what questions would be asked and when." The court concluded: "When viewed in the totality of the circumstances the defendant's request to speak with his mother and cousin was not an invocation [of] the right to remain silent and the right to counsel."

II.

Defendant also moved to suppress the evidence seized after a search of his car. He contends the affidavit presented in support of the search warrant failed to state that the car was in New York.

During the continuing investigation and after interviewing Andres, law enforcement applied for and obtained a warrant to search defendant's vehicle.

The warrant authorized a search of the car between 5:00 p.m. on October 4 and 11:00 p.m. on October 5.

At the same time, investigators were attempting to locate defendant and his car. Detective Keith Delaney of the Bergen County Prosecutor's Office contacted defendant's cell phone provider and made an emergent request for defendant's cell phone records for the prior forty-eight hours as well as live monitoring of the number. Delaney discovered that an outgoing call had been made at 11:40 a.m. from East Elmhurst, New York. The location covered both Kennedy and LaGuardia Airports. Later in the afternoon, Port Authority police informed Delaney that defendant had taken a flight to Orlando that had departed from Kennedy at 1:37 p.m. In viewing the airport video, defendant's vehicle entered the airport parking lot shortly before noon on October 4, 2011.

The car was towed to a secure garage in New York to await issuance of a search warrant. New Jersey and New York law enforcement worked together to obtain a New York warrant to search the car. The warrant was obtained at 11:15 p.m. on October 4.

The vehicle was subsequently towed back to New Jersey and secured at the Bergen County Sheriff's Department at about 2:50 a.m. on October 5, 2011. The search of the vehicle took place at 10:15 a.m. that same morning. Two

white plastic bags were recovered from the back seat of the vehicle containing the following items: an orange t-shirt, a package of small zip ties, cut zip ties, a package of latex gloves, a Faberware kitchen knife with suspected blood, a plastic shopping bag with suspected blood, scissors with suspected blood, two torn condom wrappers, a roll of packing tape with suspected blood, a black bra in two pieces, latex gloves with suspected blood, a pair of jeans with suspected blood, and other items of men's clothing.

In denying defendant's motion to suppress the items, the court found probable cause existed under the totality of the circumstances to authorize and execute the New Jersey warrant. The court also noted two different judicial officers found probable cause under the affidavit sufficient to execute a search warrant for the car. The court found no merit in defendant's argument that because the affidavit did not specify the location of the car, the search warrant was invalid. The court stated: "[S]ince the car is an instrument capable of traveling across state lines, the fact that the police could not pinpoint the location does not make the warrant invalid."

III.

We turn next to a discussion regarding the jury selection. During voir dire, those prospective jurors who were not disqualified by their answers to

written questionnaires were directed to take one of the fourteen seats in the jury box. However, if the jury box was full, the jurors were instructed to sit in the first row of the courtroom which contained twelve seats. Peremptory challenges then ensued. After each challenge, the judge replaced the juror struck from the jury box with one from the first row of the courtroom. After six jurors had been empaneled in this manner, defense counsel asked the judge how she was selecting prospective jurors for voir dire from the first row. The following colloquy took place:

> THE COURT: Completely random.
>
> [DEFENSE COUNSEL]: By how?
>
> THE COURT: I close my eyes and pick whatever number. That's it. It's random. The whole process has to be random. I don't know who the next number is. You don't know who the next number is. The State doesn't know.
>
> [DEFENSE COUNSEL]: But the computer knows who the next number should have been.
>
> THE COURT: No. These are people that we've already sat down . . . . When they sit down I don't necessarily call them in the order they sat down. Then you know who the next juror is. The idea is for nobody to know w[ho] the next juror is.
>
> [DEFENSE COUNSEL]: But they have to be randomly selected in some manner.

> THE COURT: They are already randomly selected.
>
> [DEFENSE COUNSEL]: I'm sorry. There's a statute that requires that the [c]ourt gets a special list. But randomly selects what the order of people being called is. That's why we don't have it. We have it alphabetized. The [c]ourt has it.
>
> THE COURT: The computer uses the same names and puts them in a different order.
>
> [DEFENSE COUNSEL]: That's called random selection done by a computer. Now what has happened is that by virtue of doing it in this methodology the random selection done by the computer has been destroyed so to speak.
>
> . . . .
>
> THE COURT: [M]y purpose is to make sure that every aspect of the jury selection is random. If I were to pick them now in the order that they sat then you already know who the next juror is going to be. To me that's not random. You already know the next.

Defendant did not request a mistrial or make any further comment about the selection process.

Defendant exercised his twenty peremptory challenges. Thereafter, the State declared the seated jury satisfactory. However, before the court swore in the fourteen selected jurors, one of the jurors realized the projected trial dates conflicted with the Jewish holidays. The court told the attorneys they could agree to proceed with thirteen jurors or pick another juror.

The prosecutor agreed to proceed with thirteen jurors and also reminded defense counsel that it was pointless to call additional jurors because defendant did not have any peremptory challenges left. Defense counsel suggested another option was to strike the entire array. The court rejected that suggestion, noting it was not required to select fourteen jurors. The trial proceeded with thirteen jurors.

IV.

A.

During the trial, Andres testified that Sally was unhappy in her marriage and intended to end it and go back to Colombia to live with their father. In August 2011, Sally had traveled to Colombia and stayed for approximately a month. When she returned, she stayed with Andres in his basement apartment. Prior to her trip, Sally was living with defendant and his parents. Andres said Sally had purchased a ticket and intended to fly to Colombia on October 10.

Sebastian Colorado was friends with both Andres and defendant. He confirmed Sally's plan to return to Colombia to live with her father. Colorado testified he spoke to defendant on October 1, 2011, and defendant told him that he thought his relationship with Sally was over, but he wanted to get her back. Defendant told Colorado that "if I ever see her with somebody else . . . [I] will

kill them both." According to Colorado, defendant made this statement more than once. Defendant also showed Colorado text messages he had received from Sally asking defendant to leave her alone because she wanted to start a new life in Colombia. Defendant told Colorado that he planned to follow Sally back to Colombia in December 2011.

Vanessa Ramirez was Andres's girlfriend at the time of these events and was also friends with Sally. Ramirez testified that after Sally returned from Colombia in September 2011, she told Ramirez that she planned to go back to Colombia in October.

According to Andres, he left his apartment on October 4, 2011, at about 8:30 a.m., to go to class at Bergen County Community College in Hackensack. Sally was asleep when he left. Andres went to pick up Ramirez, who lived about ten minutes away. When he had traveled about a block away from his apartment, Andres saw defendant driving in his car. After he picked up Ramirez, Andres realized that he had forgotten a book, and he drove back to his apartment. He again saw defendant driving near the apartment. Andres told Sally he had seen defendant driving twice in the area of their apartment; he then left for school.

Andres finished his class at 11:45 a.m., and after running a quick errand, he and Ramirez drove back to the apartment. When he got inside, Andres said

he saw Sally lying on the bed covered by a blanket. He pulled back the blanket and saw that she was covered in blood with a cut on her neck.

German Quintero lived in the same building as Andres. He testified that he heard someone outside around noon screaming and asking for help. He saw Andres holding his sister in his arms and screaming. He described Sally as covered in blood with a cut on her throat. Quintero drove them to the hospital. During the drive, Andres screamed out two or three times, "Why did Pedro take her from me?"

Brazofsky testified that he observed Sally's body at the hospital and that she had a large open wound on the left side of her neck. He also noticed she had lines or indentations around her wrists, bruises on her arms, and bruises on her ankle and shin areas.

Defendant's recorded statement was played for the jury. In addition, Brazofsky testified that defendant never told the officers what happened to the knife and the other evidence taken from the scene. Brazofsky also showed the jury photographs taken of defendant depicting scrapes on his knuckles.

The State produced a forensic scientist as an expert in biological stain analysis. The expert stated that the vaginal and cervical swabs taken from Sally tested positive for the presence of semen. The rectal swabs tested positive for

the presence of blood and semen. There was also blood found on the jeans, several of the zip ties, a glove, and the knife.

A second forensic scientist testified for the State as an expert in DNA analysis. He stated that testing revealed that Sally was the source of the DNA found on the knife, a glove, and on defendant's jeans.

The medical examiner testified regarding the results of the autopsy. He testified Sally sustained a large sharp force injury in her left neck and a superficial wound below that. There were marks on her forearm and wrists as well on her lower legs. There were multiple stab wounds of the neck that severed the jugular vein and carotid arteries that were fatal. The expert said deliberate and considerable force was used to create those wounds and the injuries were caused by a single edge knife that had a blunt and sharp end. The knife recovered from defendant's car was consistent with that description. According to the medical examiner, Sally was alive when the six wounds were inflicted. The lack of stab wounds on her hands and arms indicated that she was not able to defend herself. The horizontal red lines on her arms and legs were consistent with the use of ligatures such as zip ties. She died as a result of the large amount of blood loss from the multiple stab wounds to the neck.

B.

As stated above, during a search of defendant's vehicle, investigators discovered four latex gloves in a bag. The gloves were sent for forensic testing. After the testing on one glove was positive for the presence of blood, the forensic scientist did not analyze the remaining gloves. They were never even taken out of their bag before they were returned to the prosecutor's office.

On November 21, 2014, while reviewing the evidence, Brazofsky discovered a condom stuffed into one of the untested gloves. The glove was fused closed. The State informed the court and defendant about the evidence the same day and moved for an order compelling the state police to test the condom on an expedited basis. The court granted the motion on November 24, 2014.

The order required the State to complete the testing before December 1, 2014. The court received the lab results on December 14 and provided them to counsel. The testing revealed that the condom found inside the glove contained sperm. DNA testing concluded defendant was the primary source of the sperm.

On December 3, defendant informed the court he wanted to conduct his own independent testing. Defendant also intended to file an application with the public defender's office for ancillary services for DNA testing. On December

4, the judge informed the jury there would be a six-week hiatus in the trial and the jurors would not have to return to the courthouse until January 21, 2015.[5] The public defender's office approved an expert to review the DNA laboratory reports and notes of the State's scientists. On January 13, 2015, defense counsel advised the court he did not intend to submit an expert report.

On January 20, 2015, defendant filed a motion for a mistrial. The following day, the trial continued. Prior to witness testimony, the judge and counsel conferred with the jurors, discussing and resolving individual juror's issues. No juror asked to be excused as a result of the delay in trial or because the trial was extending longer than originally planned. The judge informed the jury that the trial would only take place on two or three days a week to accommodate the jurors' various issues.

On February 10, 2015, the court denied the motion for a mistrial in a written opinion. In addressing defendant's argument that a mistrial was required under Rule 3:13-3(f) because the State failed to produce the condom evidence sooner, the court found a continuance rather than a mistrial was the proper "route to employ." The judge noted that the discovery of the evidence was inadvertent

[5] The December 4 transcript reflects all counsel agreed to return on January 21 to continue the trial.

and the State did not purposely conceal the evidence. In addition, the trial was adjourned for seven weeks for defendant to obtain an expert and review the evidence.

In response to defendant's argument that he would have formulated a different trial strategy had he known of this evidence earlier, the court stated:

> Defendant provided an audio recorded statement to the police upon arrest wherein he stated that he had consensual sexual intercourse with . . . the victim . . . and used a condom. A condom wrapper was also found within defendant's belongings in a bag within his vehicle . . . . Therefore, . . . the defendant cannot claim surprise as he was already on notice that the use of a condom would be presented at trial.
>
> The DNA evidence located within the condom actually corroborates the defense theory of the case that he and the victim had consensual relations as outlined in his recorded statement.
>
> . . . .
>
> Defense counsel have already extensively cross examined for a second time the forensic scientists that were recalled to the stand to report on the newly discovered DNA evidence in the condom. The defense counsel will also have the opportunity to cross-examine Detective James Brazofsky on this issue. Lastly, the defense has subpoena power and may recall any State witness to the stand to further cross-examine on this issue. Therefore, the defense has failed to establish prejudice.

C.

At the close of the trial day on February 18, 2015, the judge again discussed the schedule with the jurors. She told the jury the State had one more witness and then it was defendant's opportunity to "put on a case." She also explained the attorneys would give their closing arguments and she would provide the applicable law. The judge further informed the jury the case might continue into March depending on the length of testimony, closing arguments, and deliberations.

After the jury was excused, defense counsel moved for a mistrial. Counsel stated defendant's right to decide whether to testify or not was "impinge[d]" by the court's statements to the jury. The court denied the motion. The judge noted it was her "responsibility to tell [the jury] there was 'a very good possibility that' the case would go into March." She said she informed the jury that after the State concluded its case, the defense had the opportunity to put on witnesses and present evidence. And that it was defendant's choice whether to do so. The court reiterated its concern about accommodating the jurors' schedules and obligations. The judge concluded defendant was not prejudiced by her comments to the jury.

D.

On the second day of deliberations, the jury sent a note to the court that stated: "We would like to have the following: (1.) Andres's testimony (2.) Colorado's testimony (3.) Zip ties." The court noted for counsel that Andres's testimony was about three hours in length, and Colorado's was about one hour. The judge told counsel she planned to inform the jury of the length of the testimony so they would understand it would be "a four hour read back." Defendant objected to the court informing the jury of the length of the read back. In response, the court stated, "Jurors are allowed to narrow down the testimony if they want to. They're permitted to do that. They're permitted to narrow it down to a specific part if they want to."

The court proceeded to tell the jury that Andres's testimony was over two days, and Colorado testified over one day. One juror asked, "If there's only certain sections we're looking for would that help?" The court responded:

> Then you're going to have to rewrite this question and tell us the exact portions that you need, what the topics are. And then we will only read those portions you request. You can reduce the testimony to what you want, the subject matter that you want to listen to.

After the jury renewed deliberations, defense counsel told the court:

> [N]ot only did you tell them the number of hours, now you told them a couple of days. You told them Andres

> was two days and Colorado was a day. That has a chilling effect on whether or not they want to hear this testimony. Exponentially you did exactly what I asked you not to do . . . .

The court stated that it was proper to inform the jury that the readback involved testimony over the course of two days. And the judge reiterated that the jurors could narrow their request.

Thereafter, the jury asked the court to provide very specific portions of Andres's testimony. As the court conferred with counsel regarding the preparation of the testimony and proceeded to bring the jury into the courtroom, the jury sent out a final note stating, "We do not need any read back testimony." The court then spent an extensive period of time answering the jury's remaining questions regarding the charge and the law and sent the jury out again for further deliberations. The jury reached its verdict later that afternoon.

V.

We begin with a review of defendant's contentions regarding the denial of the motions to suppress his recorded statement and the evidence seized from his car.

A.

As to the recorded statement, defendant contends he did not make a knowing and voluntary waiver of his right to remain silent because he was

induced to speak by the promise that he would be permitted to make two phone calls afterwards.

In reviewing a trial court's decision on a motion to suppress a statement, we generally defer to the fact-findings of the trial court when they are supported by sufficient, credible evidence in the record. State v. Nyhammer, 197 N.J. 383, 409 (2009). However, the trial court's legal conclusions flowing from those facts are reviewed de novo. State v. Mann, 203 N.J. 328, 337 (2010).

After receiving Miranda warnings, a suspect may knowingly and intelligently waive their right to remain silent and agree to answer questions or make a statement. State v. Puryear, 441 N.J. Super. 280, 292 (App. Div. 2015). The State must establish beyond a reasonable doubt that the waiver was intelligent, voluntary, and knowing. Ibid.

Although the suspect is always free to waive the privilege and make a statement, the waiver must never be the product of police coercion. State v. Presha, 163 N.J. 304, 313 (2000). "At the root of the inquiry is whether a suspect's will has been overborne by police conduct." Ibid. In the context of a request by a custodial suspect to speak with someone other than an attorney, our Supreme Court has stated:

> Our analysis of a request by an adult to speak with a parent has been more nuanced. Although the

> mere request by an adult to speak with a parent does not equate to an invocation of the right to remain silent, it does necessitate a review of the context in which the request was made.
>
> [State v. Diaz-Bridges, 208 N.J. 544, 567 (2012) (footnote omitted).]

Thus, courts will look at the surrounding circumstances to determine whether the right to remain silent was invoked. Id. at 567-68.

In Diaz-Bridges, id. at 553, the defendant, a murder suspect, was interrogated for more than three hours without making any admissions when he began crying and asked, "Can I just call my mom first?" The detectives did not honor the request, instead continuing the interrogation despite the defendant's repeated requests to call his mother. Ibid. They did not permit him to call his mother until nearly four hours later. Ibid. The Court held that the defendant's request to speak to his mother did not constitute an invocation of his right to remain silent, stating:

> He repeatedly told them that he was willing to continue speaking with them, as a result of which his requests to speak with his mother cannot be interpreted to have been a desire to secure her advice about the waiver of his rights or an assertion of silence pending the grant of permission to speak with her.
>
> [Id. at 570 (footnote omitted).]

In State v. Brooks, 309 N.J. Super. 43, 52 (App. Div. 1998), a detective testified that the defendant said, during a custodial interrogation, "[I]f he could have a phone call to his mother, he would then tell [the detective] the truth, he would then tell [the detective] what occurred." The detective told the defendant that he "certainly would allow him to call his mother if we can resolve this matter." Ibid. The defendant was then allowed to speak briefly with his mother. Ibid. A few minutes later, the defendant made an oral and written confession. Ibid. We held that the defendant's request to speak to his mother did not constitute an invocation of his right to remain silent:

> There was no significant break in the interrogation, he had never expressed an unwillingness to talk with the police, he had signed the waiver form, and he voluntarily told the officer that if he could speak with his mother he would tell them the whole story. He did not indicate he wanted his mother's advice, and indeed, during his short telephone conversation with her he merely advised her that he was in trouble and that he loved her.
>
> . . . .
>
> In this case, every indicia points to a continued willingness on the part of the defendant to cooperate with the police investigation. He never deviated from that course. He did not indicate that he wanted to consult with his mother, or get her advice in any respect.
>
> [Id. at 56-57.]

As in Diaz-Bridges, defendant here repeatedly told the detectives he was willing to speak to them despite his expressed desire to talk with members of his family. And, like in Brooks, defendant voluntarily told the detectives if he could speak to members of his family, he would tell the officers what had happened. He did not tell the officers that he wanted to speak to his family to obtain advice or retain counsel. Defendant never suggested he did not want to speak further or wanted to stop speaking to the detectives altogether. Therefore, defendant did not invoke his right to remain silent.

Defendant further asserts that the detectives' promise to allow him to make two phone calls constituted an improper inducement which negated the voluntariness of his statement. We find this argument unavailing. As held in Diaz-Bridges and Brooks, mere promises made to a suspect that he could speak to a family member if he spoke to law enforcement, without more, does not constitute an impermissible inducement. Moreover, in this instance it was defendant who offered to speak to the officers if he could make the phone calls; the detectives did not initiate the offer.

In assessing the totality of the circumstances, as the trial court did, the denial of the motion to suppress the recorded statement was supported by the credible evidence. Defendant never asked the detectives to stop the interview.

To the contrary, he gave his version of the events, including an assertion of self-defense. When he did not want to answer a question or give certain information, he did not. His statement to the police was voluntary.

B.

We also discern no merit to defendant's argument that the evidence seized from his car should have been suppressed because the affidavit presented in support of the search warrant did not state the vehicle was in New York.

To invalidate a search warrant, there must be proof of deliberate falsehood or of reckless disregard of the truth. Franks v. Delaware, 438 U.S. 154, 171 (1978). Thus, a good faith mistake is insufficient to invalidate a search warrant. State v. Martinez, 387 N.J. Super. 129, 141 (App. Div. 2006).

The trial court authorized the search warrant for defendant's car based on Andres's observation of defendant driving his car near the scene of the murder two times in the hours before Sally's death. At the time, New Jersey law enforcement did not know the car was parked at Kennedy airport in New York. There is no evidence that the car's location in another state was withheld from the judge.

When the car was located, a search warrant was obtained in New York to seize and transport the car back to New Jersey. Defendant does not challenge

that warrant. The car was not searched until it was back in New Jersey, and the search took place within the dates and time delineated on the New Jersey search warrant. Defendant has not established there was a defective search warrant requiring a suppression of the evidence later seized from the car.

VI.

A.

We turn next to defendant's issues regarding the trial. We begin with a review of the jury selection process. Defendant contends that the method of jury selection violated N.J.S.A. 2B:23-2 because the jurors were not randomly selected for voir dire. In addition, he asserts the voir dire was inadequate because the court did not review the jurors' questionnaire responses with them. Defendant also argues that the court erred in either not granting his request to strike the jury array or to declare a mistrial.

As described above, the following procedure took place: prospective jurors who were not disqualified by their answers to the written questionnaires were directed to sit in one of the fourteen seats in the jury box. If the box was full, the jurors were instructed to sit in the first row of the courtroom which contained twelve seats. After a challenged juror was excused from the jury box, the judge replaced that juror with another one from the first row. When

defendant questioned how that selection process was being done, the judge said it was random. She said she was closing her eyes and picking a number, explaining that process ensured counsel did not know who the next replacement juror would be since they were not selected in the order they sat in the front row.

The State concedes that the trial judge's method of random selection "could have been more faithful to the statutory scheme in two respects." First, there should not have been a "first row pool." And if there was a pool row, the judge should have used a better selection method, such as placing the names of jurors into a box and having a court officer draw them. However, the State contends that defendant was not prejudiced by any error.

Jury selection is an integral part of the process to which every criminal defendant is entitled. State v. Singletary, 80 N.J. 55, 62 (1979). The trial judge plays a critical gatekeeping role in this regard. State v. Tyler, 176 N.J. 171, 181 (2003). "The proper selection of a jury that is as fair and impartial as our procedures permit starts with the random selection of citizens" under N.J.S.A. 2B:23-2. State v. Tinnes, 379 N.J. Super. 179, 184 (App. Div. 2005). Under N.J.S.A. 2B:23-2:

> a. When a jury is required for trial, the names or identifying numbers of the jurors who constitute the panel or panels from which the jury is to be selected shall be placed on uniform pieces of paper or other

> uniform markers. The markers shall be deposited in a box.
>
> b. The box containing the markers shall be shaken so as to mix the markers thoroughly and the officer designated by the court shall, at the direction of the court, publicly in open court, draw the markers from the box, one at a time, until the necessary number of persons is randomly selected. If any of the persons so selected is successfully challenged or excused from serving on that jury, the drawing shall be continued until the necessary number of persons is selected.
>
> c. The Assignment Judge of the county may provide for the random selection of jurors for impaneling by the use of electronic or electro-mechanical devices, if:
>
> (1) the method of random selection is specified with particularity in an order of the Assignment Judge; and
>
> (2) the specification of the method and any programs and procedures used to implement the method, including the relevant computer programs or portions of computer programs which are utilized, are available for public inspection upon request.

We begin in expressing our strong disapproval of the "first row pool" method of jury selection employed by the trial judge. As set forth above, there is a statutory procedure in place used routinely in every courthouse in this State. And the judge complied with that procedure in the initial selection of jurors after reviewing their written questionnaires and background qualifications. However,

once the fourteen seats in the jury box were full, the judge deviated from the statutory procedure in seating approved jurors in the front row of the courtroom.

However, we disagree with defendant that his right to a properly selected jury was so infringed to require a reversal of the jury's verdict. The judge only modified the statutory procedure in selecting the replacement jurors from the front row. She stated she picked the jurors from the front row completely randomly by closing her eyes and pointing to a name or number. This method, although unorthodox, did not violate the underlying principle of random selection. The judge employed this method so counsel would not know which juror from the front row was going to be selected next to replace an excused juror in the box. Therefore, the safeguards and the fundamental principles underlying the statutory procedure were preserved.

Defendant did not move for a mistrial during the jury selection process. After he inquired about the judge's process for selecting jurors from the front row, there was no further discussion about it. Both sides exercised peremptory challenges. And later that day, the State and defense counsel advised the court that the jury was satisfactory.

Thereafter, as stated above, one of the fourteen jurors told the court the trial dates conflicted with the Jewish holidays. The court told the attorneys they

could agree to proceed with thirteen jurors or continue the jury selection process. The prosecutor agreed to proceed with thirteen jurors; defense counsel suggested striking the array as an alternative, without citing any reasons for the proposal. Defendant never moved the court to strike the array because of irregularities in the jury selection process or even because the trial was going to proceed with thirteen jurors.

The trial judge properly noted there was no requirement to seat fourteen jurors. A court is not required to provide for any specific number of alternates in a criminal jury trial. R. 1:8-2(d)(1). "The number of additional jurors impanelled [sic] is left to the court's discretion." Pressler & Verniero, Current N.J. Court Rules, cmt. 4.1 on R. 1:8-2 (2022). Therefore, the court did not abuse its discretion in denying defendant's suggestion to strike the array.

B.

Defendant further challenges the voir dire procedure as inadequate because it was "perfunctory." We again disagree.

Voir dire is intended to identify and exclude people who cannot be impartial. State v. Andujar, 247 N.J. 275, 305 (2021). "To that end, trial judges pose a mix of pointed and open-ended questions to elicit relevant information from prospective jurors." Ibid. "In order to distinguish potential jurors who are

able to put their opinions or prior knowledge aside from those who are unable to serve in an impartial fashion, the trial court must conduct a probing voir dire of potential jurors." State v. Williams, 113 N.J. 393, 429 (1988).

We generally defer to a trial court's decisions concerning voir dire and will only reverse where there has been an abuse of discretion. Id. at 410. "[T]rial courts must be allotted reasonable latitude when conducting voir dire and, therefore, a reviewing court's examination should focus only on determining whether 'the overall scope and quality of the voir dire was sufficiently thorough and probing to assure the selection of an impartial jury.'" State v. Winder, 200 N.J. 231, 252 (2009) (quoting State v. Biegenwald, 106 N.J. 13, 29 (1987)).

The prospective jurors were provided a written questionnaire prior to the start of voir dire. The judge read each question out loud to the entire array before selecting the initial fourteen jurors. The judge told the jurors she would inquire about the answers written on the questionnaire. She instructed the jurors to "speak [their] mind honestly and plainly. It is very important that you answer each question fully and truthfully." The judge directed the jurors to reveal anything that would affect their impartiality. In addition, they were told that if there was a reason that they could not render a fair and impartial verdict not

covered in the questionnaire, they were obligated to disclose this information to the court when questioned.

Defendant asserts the court erred by not reviewing each juror's responses to the questionnaire. Instead, the court asked the jurors whether there was "anything in particular you'd like to discuss with us?" If the juror answered no, the court then asked, "If a police officer were to testify would you give them more weight, less weight or wait to see what they have to say?" The judge also confirmed with each juror whether they could be fair and impartial.

Defendant did not object to this procedure during the first full morning of selection. When the voir dire resumed in the afternoon, defense counsel asked the court if she could inquire of jurors one through five whether they had any "yes" answers. Counsel stated: "I think after [juror number] five you asked if they had yes answers on the form." The court brought the initial six jurors individually to sidebar and asked about their questionnaire answers. Defendant did not voice any further objection to the process for the remainder of that day.

The parties reconvened two days later to continue jury selection. Defendant objected to the questioning of one juror during the entire day of voir dire. The judge asked this juror whether he could accept that the burden of proof was on the prosecution to prove its case beyond a reasonable doubt and whether

he could find defendant not guilty if the State did not meet its burden. The juror responded "yes" to both questions and was seated.

Defense counsel argued to the judge that she did not ask the questions properly; but instead phrased them in a leading manner. The judge responded: "I said you responded 'yes' on your questionnaire. Is that because you agree with it? And he said yes. A lot of the jurors do that because they misread it." Defendant did not ask the court to excuse the juror for cause or to ask him any further questions.

We discern nothing in the judge's questioning of the prospective jurors that demonstrates an inadequacy in assuring the selection of an impartial jury. When defense counsel requested the court to inquire of the initial five jurors about their answers on their questionnaires, the court did so. Defendant did not voice any objection thereafter. Over two days of voir dire, counsel only cites to two jurors where he found the court's questioning deficient. Therefore, we are satisfied the court did not abuse its discretion in its questioning of the prospective jurors.

C.

We turn to defendant's argument regarding the late discovery of the condom in the glove. Defendant asserts the court abused its discretion in

admitting the condom as newly discovered evidence and not granting his motion for a mistrial because the State failed to discover and inform the defense of the evidence earlier. We are not persuaded.

The condom was found in the fused glove on November 21, 2014. That specific glove was not tested because another glove found in the same bag tested positive for blood. Therefore, the condom was not discovered until two months into the trial. When the State requested an adjournment to test the condom, defendant did not object. The State submitted its lab report on December 14, three weeks after the condom was discovered. The report revealed there was semen in the condom and defendant was the source of the semen.

Defendant then requested an additional adjournment to obtain its own expert to review the testing analysis. The court granted the request, adjourning the case until January 21, 2015. A month later, on January 13, 2015, defendant advised the court he did not intend to submit an expert report. On January 20, 2015, defendant moved for a mistrial.

The admission of evidence is a matter within the trial court's discretion. State v. Torres, 183 N.J. 554, 567 (2005). Whether to grant a motion for a mistrial is also a decision entrusted to the sound discretion of the trial judge, and

that decision will be reversed only for an abuse of that discretion which results in a manifest injustice. State v. Smith, 224 N.J. 36, 47 (2016).

The State was under a continuing duty to disclose. R. 3:13-3(f). If there is a violation of that duty, the trial court "may . . . grant a continuance or delay during trial, or prohibit the party from introducing in evidence the material not disclosed, or . . . enter such other order as it deems appropriate." Ibid. "Late discovery of evidence can cause unfair surprise and raise due process concerns." Smith, 224 N.J. at 48.

Defendant claims that the condom was not newly discovered evidence because it had been in the State's possession for several years. Although the State had possessed the glove since it was found in defendant's car, there was no allegation it had withheld the evidence improperly. The prosecutor informed the court and defendant the day the evidence was discovered and explained the glove was not tested and therefore the condom within it was not discovered.

The State requested a continuance to test the glove. Defendant did not object. To the contrary, after the test results were submitted, defendant requested and was granted an additional adjournment of the trial. Therefore, defendant had a full opportunity to investigate and analyze the evidence. Moreover, the testing of the condom corroborated defendant's statement: he had

sex with Sally and used a condom. Defendant has not shown any "cognizable prejudice." State v. Washington, 453 N.J. Super. 164, 191-92 (App. Div. 2018).

The court did not abuse its discretion in admitting the condom into evidence and in denying defendant's motion for a mistrial. Defendant has not demonstrated that the trial adjournment for the State's testing and an additional month for his own request to test the evidence was a manifest denial of justice. See R. 3:20-1.

D.

In a related argument, defendant asserts, without any specific bases, that he was prejudiced by the overall length of the trial. He states that since the trial extended months longer than originally predicted, "the integrity of the trial is called into question and prejudice may be presumed."

When the jury was sworn in on September 24, 2014, the court informed it the trial would finish by Thanksgiving. She gave the jury this date after conferring with counsel. When the jury returned on September 30, counsel gave their opening statements and the State called its first witness. The jury reported two or three days a week with an entire week off both in October and November. On November 20, the jury was instructed to return on December 2 and was told

the trial could go through December 11, depending on the length of deliberations.

But, as discussed above, on November 21, the condom was found in the glove and after the court granted both the State and defendant their adjournment requests, the trial did not start again until January 21, 2015.

The transcripts reveal that on December 3, 2014, the judge conferred with counsel regarding the return date for the jury in January and what she intended to say to the jury. There was no objection to her proposed explanation for the delay[6] and counsel agreed to January 21, 2015 as the recommencement of the trial.

As the trial continued through February and into March, the court accommodated jurors' requests for vacation, work commitments, medical issues, and other obligations. The trial was adjourned from February 26 until March 26 for the court's and jurors' planned vacations. When all reconvened on March 26, the lawyers presented their closing arguments. The court charged the jury on March 31, and the jury began its deliberations. A verdict was reached on the second day of deliberations—April 2.

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[6] The judge told the jury that "at times certain unforeseen developments" happen during the course of a trial and "there was a family emergency that occurred and had to be attended to . . . ."

As stated, defendant did not object to the testing of the condom in November 2014. And in fact, defendant requested an additional month to conduct his own testing which delayed the trial for two months, until January 21, 2015. Thereafter, the trial only took place on certain days in February and March to accommodate jurors' requests and vacation plans. Notably, no juror requested to be excused because of the lengthy extension of trial days and when questioned directly about it, the jurors responded uniformly that they had invested a lot of time and wanted to see the matter through to its end.

Defendant has not demonstrated he was prejudiced by the extension of the trial. The court adeptly managed the jury and accommodated its requests. There was no ground presented upon which to grant a mistrial.

VII.

In point IV, defendant contests the manner in which the court handled the jury's request for a readback of Andres's and Colorado's testimony. Defendant contends the court should not have told the jury how long the readback would take and it erred when it told the jurors the length in days rather than in hours. Defendant asserts these errors caused the jury to decide not to hear the requested readback of the testimony.

The reading of all or part of the testimony of one or more witnesses at trial, at the jury's request during their deliberations, is a matter within the trial court's discretion. State v. Wilson, 165 N.J. 657, 660 (2000). When the request is granted, the readback should include both direct and cross-examination. Ibid. However, "where a request is clearly circumscribed, the trial court has no obligation to compel jurors to hear testimony they have not asked for or to continue a readback after they have expressly indicated that they have heard enough." Id. at 661.

In State v. Rodriguez, 234 N.J. Super. 298, 311 (App. Div. 1989), we held that the trial court "acted within its discretion when it provided various readbacks of testimony requested by the jury but directed the jury to rethink its request for a readback which would have required approximately two days." Here, the court did not ask the jury to rethink its request because of length of time, but merely advised them of the number of days on which the testimony was given. The jury immediately responded that it only needed certain specific testimony. And, as the court was preparing the readback, the jury determined it was not needed at all. We discern no abuse of discretion in the court's management of the jury question.

In light of our discussions above, there was no cumulative error to entitle defendant to a new trial.

VIII.

We lastly consider defendant's arguments regarding his sentence. He contends the imposed sentence is excessive because the court failed to apply the applicable mitigating factors and erred in imposing consecutive sentences. We disagree.

In sentencing defendant, the court noted the nature and circumstances of the offense, the seriousness of the harm inflicted, the risk that defendant would commit another offense and the need to deter defendant and others as aggravating factors. See N.J.S.A. 2C:44-1(a)(1), (2), (3), (9). The court found defendant had no prior criminal history but gave that mitigating factor "little to no weight." The court imposed consecutive sentences on the murder, aggravated sexual assault, kidnapping, and hindering apprehension convictions, stating:

> [T]he crime of kidnapping, which is the restraining with the zip ties, was predominantly independent of the murder . . . . It was done separately in order to permit the victim to suffer and to sustain additional injuries and invoke and produce more terror for the victim. It was clearly done before the stab wounds at a different point in the time of the murder.
>
> . . . .

So the kidnapping is independent of the murder because it had a different objective and it was completed at a different time frame. It's also a crime that involved a separate act of violence or threat upon the victim. It was clearly meant for her to suffer, emotional suffering, and for it to be a slow and painful death.

With regards to the aggravated sexual assault, the reason why that is a consecutive sentence is also because the crime and the objective of the aggravated sexual assault was independent of the murder. It was meant to humiliate the victim. It involved a separate act of violence and a separate act of power and humiliation . . . over the victim that had to have been completed prior to the murder as evidenced by the Medical Examiner.

. . . .

[H]indering apprehension . . . clearly is a separate crime . . . because it was committed at a different time and place . . . . [Y]ou went back to your house, you took a shower, you packed everything with blood into a bag and put it in your car and it was clearly done to avoid the proper administration of justice so that's a separate victim and it's also committed at a different time.

It's also a separate act, separate from the murder because these are acts in an effort to subvert the police from arresting you.

[T]he objective of the crime is obviously different, . . . to avoid your arrest and your detection. So for that reason that is a totally separate crime.

In reviewing a sentence, we must determine whether the findings of fact on the aggravating and mitigating factors were based on competent and credible evidence in the record, whether the court applied the correct sentencing guidelines enunciated in the Criminal Code, and whether the application of the facts to the law constituted such an error of judgment as to shock the judicial conscience. State v. Roth, 95 N.J. 334, 363-65 (1984).

Defendant contends the court should have applied the following mitigating factors: no prior criminal record, his conduct was the result of circumstances unlikely to recur, and his imprisonment would entail excessive hardship. N.J.S.A. 2C:44-1(b)(7), (8), (11). The sentencing court did note defendant's lack of a criminal record.

However, the record does not reflect evidence to support the additional two mitigating factors now raised on appeal. Defendant cannot show his conduct was the result of circumstances unlikely to recur, namely, that he would not react with violence when angry with a romantic partner. He also has failed to produce any facts that incarceration would cause him excessive hardship.[7] Therefore, the court did not err in failing to apply any of the mitigating factors.

[7] Defendant has no dependents. He alleged only a hardship to himself.

Defendant also asserts that the court erred in imposing consecutive sentences. In determining whether sentences should be concurrent or consecutive, the sentencing court must consider the following guidelines:

> (1) There should be no "free crimes" in a system where punishment fits the crime.
>
> (2) The reasons for consecutive or concurrent sentences should be separately given.
>
> (3) The court should consider the facts of the crime, including whether:
>
> > (a) the crimes and their objectives were independent of each other;
> >
> > (b) the crimes involved separate acts of violence;
> >
> > (c) the crimes were committed at separate times or places, rather than indicating a single period of aberrant behavior;
> >
> > (d) the crimes involved multiple victims; and
> >
> > (e) the convictions are numerous.
>
> (4) There should be no double counting of aggravating factors.
>
> (5) Successive terms for the same offense should ordinarily not equal the punishment for the first offense.
>
> [State v. Yarbough, 100 N.J. 627, 643-44 (1985).]

Defendant contends that the crimes and their objectives were not independent of one another. However, as the court noted, the offenses of kidnapping Sally, by restraining her, and murdering her were sufficiently dissimilar to warrant imposition of consecutive sentences. Cf. State v. Mejia, 141 N.J. 475, 504 (1995) (chasing and striking the victim with a gun to take money and then killing him warranted imposition of consecutive sentences for armed robbery and murder). The same can be said for sexual assault and murder. See State v. Rivera, 232 N.J. Super. 165, 181 (App. Div. 1989) (sentences for aggravated sexual assault and murder convictions occurring at the same time may run consecutively). In addition, hindering apprehension and the underlying offense have been held to be distinct and dissimilar offenses warranting the imposition of consecutive sentences. See State v. Perry, 124 N.J. 128, 176-77 (1991) (hindering apprehension and drug possession); Yarbough, 100 N.J. at 638 (hindering apprehension and sexual assault). Therefore, the court did not err in imposing the consecutive sentences. We see no reason to disturb the imposed sentence.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION