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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3392-21**

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

LEONARD LUDWIGSEN,

Defendant-Respondent.

Submitted December 14, 2022 – Decided January 19, 2023

Before Judges Enright and Bishop-Thompson.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 21-07-0777.

William Reynolds, Atlantic County Prosecutor, attorney for appellant (John J. Santoliquido, Assistant Prosecutor, of counsel and on the brief).

Jacobs & Barbone, PA, attorneys for respondent (Louis M. Barbone, on the brief).

PER CURIAM

On leave granted, the State appeals from the May 25, 2022 order granting defendant Leonard Ludwigsen's suppression motion. We affirm, substantially for the reasons expressed by Judge W. Todd Miller, Jr. in his thoughtful written opinion.

I.

We glean the facts from Judge Miller's opinion and the motion record. On March 16, 2021, following the execution of a search warrant at defendant's trailer in Egg Harbor Township, he was detained and transported to the Atlantic County Prosecutor's Office (ACPO) for questioning. His interrogation began just before 6:00 a.m. After Detective Natasha Alvarado told defendant he was taken into custody regarding his potential involvement in the murder of Arturo Barrera, she read him his Miranda¹ warnings and asked if he wanted to speak with her. He responded, "[n]ot really, I mean." Alvarado instructed defendant he needed to provide a yes or no answer, so he checked the "No" box on his Miranda card next to the question, "Do you desire to waive these rights and answer question[s]?" He also signed the card.

Detective Alvarado ceased interviewing defendant but advised him he would remain detained in the interview room "for right now." Additionally, she

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

informed him if he changed his mind about wanting to speak with detectives, he should "let [them] know." She added,

there's a lot of stuff going on, . . . the FBI is here, they are at your parents' house this morning, . . . so this is bigger than just you right now. . . . [Y]ou're not here by mistake . . . and I think that there is a very logical explanation for things that happened that night[.] I don't think what transpired at Art's house was supposed to happen . . . but . . . this is an opportunity for you to come forward and talk about what happened.

In response, defendant told Detective Alvarado, "I wasn't even there." She answered:

Okay, just hear me out. . . . I'm just giving you what my [spiel] is so you know these are all things . . . we want to talk about . . . and if you weren't there then what I wanted to talk to you about you can tell me where you were — you can tell me how . . . Art, we can go through this whole thing. Okay so think about it, . . . but you know this isn't ending here today . . . you know and like I said I really do believe . . . there's an opportunity here for you to clear if you had nothing to do with this. Now is your time, dude, you know what I mean. We came to you once before to give you the opportunity and now we came at a totally different way, you know what I mean.

Defendant responded, "yeah," and Detective Alvarado continued speaking. The following exchange occurred:

Alvarado: You have to, this is your chance to talk to us and explain what the deal is.

Defendant: I just haven't had a good experience with you guys.

Alvarado: And that's, listen that's fair enough, you know what I mean. People aren't our biggest fans and . . . I can appreciate that. . . . I have to get to a point where . . . you['re] gonna have to either be willing to talk or you['re] not and I understand any hesitation or anything that you might have . . . but you know I'm hoping maybe if you take a minute just kind of collectively think about it, that's what I want to talk to you about okay . . . and if you had nothing to do with Art then . . . we need to explain it and figure it out because that's not where we are in this investigation I really would like to give you an opportunity to . . . come forward and talk about some things I understand a trust issue, I totally get it I know you've had some issues before but again, I think . . . you and I can have a conversation today that could . . . clear up a lot of things that we are trying to clear up So, you got a family to think about, you got a son to think about . . . this isn't going away today it's not just gonna be me knocking on the door and leaving again okay so it's much bigger th[a]n that today [J]ust think about that alright. . . . [W]e will be around[. I]f you change your mind, . . . you can just knock on the door and somebody will come and address that, cool?

Defendant replied, "Yup." Once defendant confirmed he did not need anything else, Detective Alvarado and other members of law enforcement left the interrogation room.

Approximately two hours later, detectives checked on defendant to see if he needed water or to use the bathroom. Detective Alvarado re-entered the room

without the solicitation of defendant at approximately 10:00 a.m. and defendant told her he was "freezing." Alvarado offered to get him a blanket. Without re-reading defendant's Miranda rights to him, she stated she "just wanted to pop back in," knowing defendant had "had a little bit of time" so she was "going to give [him] one more opportunity . . . to sit down and have a conversation." Detective Alvarado continued, "that's all on you right now." In response, defendant asked if he would be able to go to work. Alvarado advised him he was "gonna be held right now" and would probably not be released that day, but she and other detectives would need to "talk to [their] bosses" because "there were some things recovered from [defendant's] house."

Detective Alvarado again reminded defendant he had an opportunity to speak with law enforcement. He answered, "it doesn't sound like it's . . . gonna go too good either way." Alvarado replied:

I think . . . you know what happened at Art's house wasn't supposed to happen the way that it did . . . and that's explainable dude . . . and now is the opportunity [T]he FBI is here . . . and you have a son[.] I know you're close with him, . . . I know he is important to you [be]cause you see him more than once a week . . . you just don't forget about him. . . . [I]t's on you . . . at this point.

After defendant stated, "I don't know. . . . I got trust issues talkin[g] to you guys [be]cause of everything that happened in the past and what not,"

Detective Alvarado responded she understood, and continued talking. She told defendant:

We're talking about felony murder in the course of a robbery . . . that's a totally different ball game th[a]n some of the other stuff that you . . . might have dealt with before . . . and we can ask questions and . . . if you're not comfortable with something then . . . we can . . . not talk. . . . I get your trust issues. . . and I'm telling you, we're here for a reason. . . . [T]his is not a mistake . . . so you know this is the chance, this is not for me, you're not telling [th]em for my benefit, it's for your benefit dude, it's for your family, it's for your kid . . . to . . . sort this whole thing out. . . . [I]t's explainable, . . . it's not gonna go away, but . . . you have yourself to think about and you're also sitting here [with] no idea what anybody else told us, and why I'm coming back to talk to you, . . . don't let someone else's story be your story. . . . I hope you're thinking about what the right thing to do is

Defendant asked Detective Alvarado, "what are you looking for?" She answered she was "looking . . . to have a conversation" but because he initially stated he did not want to speak with law enforcement, she "would have to go back over the Miranda [rights] with [him] if [he was] willing to have a conversation with" law enforcement. Further, she told defendant she was not making him any promises and the decision to talk was up to him. Defendant expressed concern about his safety and the safety of his family if he talked with law enforcement. He stated, "I gotta worry about if I say something that they

are gonna come and do something." Alvarado acknowledged his concern, but reiterated, "this situation is not gonna go away." She reminded him the FBI had gone to his mother's and stepfather's home. After defendant again expressed safety concerns, he reiterated, he "wasn't even . . . there."

Detective Alvarado continued the conversation, stating, "it's better to deal with it now with us th[a]n another situation. . . . [Y]ou wouldn't want us kicking in your door again with your son being there and seeing that." She also offered to retrieve something for defendant to eat and drink. Another detective asked if it would be alright if the pair returned "in a minute or two." Although defendant did not answer the question, he accepted Detective Alvarado's offer to find him a cigarette to smoke.

Judge Miller described what happened next:

Following his cigarette break, detectives thanked defendant for allowing them to come back in and talk to him. Detective Alvarado explained she would have to read the Miranda warnings again and emphasized . . . defendant wouldn't have to make any decision until then. Before reading his rights, detectives reiterated that if at any time defendant wanted to stop talking, he could.

Defendant was read his Miranda warnings for a second time, from a blank Miranda card and was asked to read along as detectives read aloud. For the second time[,] defendant acknowledged he understood his rights. Detectives then asked him if [he] wished to speak with

them, again reassuring him that even if he began to talk, he could stop at any time. Defendant asked if he could leave that answer blank but was told that they could not speak [to him] until he memorialized his decision. One last time[,] Detective Alvarado told defendant he could stop at any point, for any reason, and that it would not be a "big deal" to stop the questioning. At 10:43 a.m. defendant indicated that he did wish to waive his rights, he did wish to speak, and confirmed that decision on the Miranda card.

Based on statements made by defendant during the balance of his custodial interview, he remained detained. Subsequently, defendant was indicted on charges of felony murder, N.J.S.A. 2C:11-3(a)(3); first-degree robbery, N.J.S.A. 2C:15-1(a)(3); conspiracy to commit robbery, N.J.S.A. 2C:5-2 and 2C:15-1(a)(3); possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1).

Defendant moved to suppress statements from his custodial interview. Following a testimonial hearing before Judge Miller, which included testimony from Detective Alvarado, the judge granted the suppression motion. In his comprehensive written opinion, Judge Miller found Detective Alvarado failed to "scrupulously honor" defendant's invocation of his Miranda rights. The judge concluded that from the time defendant invoked his Fifth Amendment right to remain silent at approximately 6:00 a.m. on March 16, 2021, until he waived his

right to remain silent at 10:43 a.m., Detective Alvarado "initiated conversation" with defendant without providing a "fresh set of Miranda warnings."

Additionally, the judge found that regardless of Detective Alvarado's intentions, she "undermine[d] defendant's will to resist and remain silent" and "compel[led] him to speak where he would not have done so freely." Further, the judge concluded that while the detective "did not explicitly ask [defendant] . . . questions," her "'updates' about the investigation served as the functional equivalent of questioning and subtl[ly] coerc[ed] defendant to come clean." Moreover, the judge found Alvarado increased the pressure placed on defendant by telling him "several times that this could all be explained away."

Alternatively, the judge found "Detective Alvarado's conversation with Ludwigsen fail[ed] the test laid out in United States v. Lafferty, 503 F.3d 293 (3d Cir. 2007) as to whether law enforcement 'scrupulously honored' defendant's right to cut off questioning." Referring to the first factor under Lafferty's four-factor test,² the judge found there was "no period of significant time lapse"

² The four factors are:

- (1) whether a significant amount of time lapsed between the suspect's invocation of the right to remain silent and further questioning;
- (2) whether the same officer conducts the interrogation where the suspect

between when defendant invoked his right to remain silent and his subsequent interrogation because "law enforcement would routinely come back into the room for 'status updates.'" Next, he found the same officer, namely Detective Alvarado, "questioned [defendant] throughout the day." As to the third factor, the judge relied on State v. Rhodes, 329 N.J. Super. 536 (App. Div. 2000) to find defendant "was not provided a fresh set of Miranda warnings before the subsequent conversations that served as the 'functional equivalent' of questioning." Finally, the judge observed, "[t]he fourth factor instructs the court to look to whether the subsequent interrogation concerns the same crime as the interrogation previously cut off by the suspect. In this case, it is irrefutable that the entire investigation centered around the murder of Barrera." Accordingly, the judge granted defendant's suppression motion, concluding defendant's Fifth Amendment rights were violated.

invokes the right and the subsequent interrogation; (3) whether the suspect is given a fresh set of Miranda warnings before the subsequent interrogation; and (4) whether the subsequent interrogation concerns the same crime as the interrogation previously cut off by the suspect.

[Id. at 303 (citation omitted).]

II.

On appeal, the State contends "defendant's will was not overborne by the investigators, who appropriately sought to allay defendant's fears of speaking to police." Additionally, the State argues "defendant voluntarily provided a statement to investigators after a break in questioning and following the re-administration of Miranda rights." These arguments are unavailing.

Upon reviewing a trial court's decision on a suppression motion, "we generally defer to the factual findings of the . . . court when they are supported by credible evidence in the record." State v. Sims, 466 N.J. Super. 346, 362 (App. Div. 2021), rev'd on other grounds, 250 N.J. 189 (2022), cert. denied, ____ U.S. ____, 143 S. Ct. 409 (2022) (citations omitted). "[A] 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)).

"Deference to a trial court's factual findings is appropriate 'because the trial court has the 'opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.'"" Sims, 466 N.J. Super. at 362-63 (quoting State v. S.S., 229 N.J. 360, 374 (2017)). "That standard governs appellate review even when the trial court's findings are premised on a recording

or documentary evidence that the appellate court may also review." State v. Tillery, 238 N.J. 293, 314 (2019) (citing S.S., 229 N.J. at 380-81). However, "[t]o the extent that a trial court determination involved legal conclusions, we review those conclusions de novo." Ibid.

"The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and this [S]tate's common law, now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503." S.S., 229 N.J. at 381 (quoting State v. Nyhammer, 197 N.J. 383, 399 (2009)). Thus, a suspect is afforded "a meaningful opportunity to exercise" the "right against self-incrimination when subject to police interrogation while in custody" and "the police must adequately and effectively advise an individual of [the] right to remain silent, and other rights, before questioning." Id. at 382 (citation omitted); see also Miranda, 384 U.S. at 478-79. That is because "the right to remain silent . . . during custodial interrogations [is] necessary to guarantee full effectuation of the privilege against self-incrimination." State v. Wade, 252 N.J. 209, 219 (2022) (internal quotation marks omitted) (quoting State v. McCloskey, 90 N.J. 18, 25 (1982)).

"If [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."

Miranda, 384 U.S. at 473-74; see also State v. Chew, 150 N.J. 30, 61 (1997). Moreover, once a person has invoked the right to remain silent, this choice must be "scrupulously honored" by investigators. State v. Hartley, 103 N.J. 252, 261 (1986) (citations omitted); see also Michigan v. Mosley, 423 U.S. 96, 103 (1975). The "failure [to] scrupulously honor a previously-invoked right to silence renders unconstitutionally compelled any resultant incriminating statement made in response to custodial interrogation." Hartley, 103 N.J. at 261 (noting "the requirement that the police 'scrupulously honor' the suspect's assertion of his right to remain silent is independent of the requirement that any waiver be knowing, intelligent, and voluntary").

In referencing its prior decision in Hartley, the Court found "the admissibility of statements made by an accused after invoking the right to silence depends on the resolution of two separate inquiries: first, was the right scrupulously honored; second, was the waiver knowing, intelligent, and voluntary?" State v. Fuller, 118 N.J. 75, 84 (1990). Further, the Court held,

[i]f the police have not scrupulously honored the suspect's right to silence, the court should not reach the waiver issue. "Care must be taken that there be no blurring of the separate lines of analysis that are followed in respect of the 'scrupulously honor' requirement on the one hand and the waiver issue on the other."

[State v. Adams, 127 N.J. 438, 445 (1992) (quoting Hartley, 103 N.J. at 261).]

Significantly, the Court also held "that if police are going to ask the accused to reconsider a previously-announced decision to remain silent, they must at the least readminister Miranda warnings as a reminder that the suspect can refuse." Fuller, 118 N.J. at 84. Further, the Court clarified that in Hartley, it "did not . . . state that fresh Miranda warnings alone are sufficient to satisfy the requirement that the right [to remain silent] be scrupulously honored, only that they are indispensable." Ibid.

"If an accused does initiate a conversation after invoking his rights, that conversation may be admissible if the initiation constitutes a knowing, intelligent, and voluntary waiver of the accused's rights." Chew, 150 N.J. at 61. However, "the suspect [must] personally and specifically initiate[] the conversation." State v. Burris, 145 N.J. 509, 519 (1996) (citing Edwards v. Arizona, 451 U.S. 477, 484 (1981)); see also Fuller, 118 N.J. at 83. The State must also show that in re-initiating the conversation, the defendant "was inviting discussion of the crimes for which he was being held." Fuller, 118 N.J. at 82.

Applying these standards, we agree with Judge Miller that law enforcement did not "scrupulously honor" defendant's assertion of his right to remain silent after he was first Mirandized. Instead, Detective Alvarado spoke

with defendant repeatedly about the case, without readministering Miranda warnings until almost five hours after he first invoked his right to remain silent. Moreover, we agree with Judge Miller's assessment that the detective's statements to defendant were the "functional equivalent" of questioning. Thus, we discern no basis to disturb the May 25 order and affirm substantially for the reasons outlined in the judge's comprehensive and cogent opinion.

To the extent we have not addressed the State's remaining arguments, we are satisfied they lack sufficient merit. 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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