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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4260-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TAMODD YOUNG, a/k/a
JASHON A. HOOVER and
TIJOHN CATO,

Defendant-Appellant.

Argued March 7, 2023 – Decided March 27, 2023

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 16-10-2947.

Marcia H. Blum, Assistant Deputy Public Defender,
argued the cause for appellant (Joseph E. Krakora,
Public Defender, attorney; Marcia H. Blum, of counsel
and on the brief).

Lucille M. Rosano, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued the cause
for respondent (Theodore N. Stephens, II, Acting Essex

County Prosecutor, attorney; Lucille M. Rosano, of counsel and on the brief).

PER CURIAM

Found guilty by a jury, defendant Tamodd Young appeals from his conviction and sentence for first-degree murder, second-degree unlawful possession of a handgun, second-degree possession of a handgun for an unlawful purpose, and third-degree hindering investigation. For the following reasons, we reverse and remand for a new trial.

I.

On March 21, 2016, Jerome Brown was fatally shot on a street in Newark. The police received two 9-1-1 calls about the crime. One caller described the shooter's clothing, but "couldn't see his face." The other caller, S.M.,¹ also described the shooter's clothing, but did not mention whether she could identify his physical characteristics.

Detective Kenneth Poggi was assigned as the lead investigator on the case. Detective Carlos Olmo was also assigned to the case. On March 31, 2016, Poggi and Olmo were canvassing the area of the crime when they saw defendant. The

¹ As the privacy interests of the witness outweigh the Judiciary's general commitment to transparency, initials are used to protect the witness' confidentiality.

detectives recognized defendant from video surveillance footage that "was tied into the incident." The detectives approached defendant, and explained they were "investigating an incident that had occurred in the area." They obtained defendant's "pedigree information," which included his "name, date of birth, address, [and] telephone number." The detectives then left.

On April 6, 2016, Poggi and Detective Ryan Funk further investigated the area of the crime. The detectives saw defendant, approached him, and explained they were investigating the Jerome Brown homicide. Defendant indicated that he knew the victim, and that they were cousins.² When the detectives asked to speak with defendant at their office, he agreed. At this point, defendant was a suspect in the case, but he was not charged, arrested, or otherwise restrained.

The Interview of Defendant By Detectives

The detectives transported defendant to the Essex County Prosecutor's Office (ECPO). Once there, defendant was placed in an interview room, and waited there while Poggi and Funk prepared "some photographs and a Miranda³ form." The room had a "lock system" and "audio/video equipment." The

² The victim and defendant were not actually cousins.

³ Miranda v. Arizona, 384 U.S. 436 (1966).

detectives entered the room, and began a recorded conversation with defendant.

The encounter began by Poggi stating:

Thanks for coming in today to help us out. Like I said, I'm Detective Poggi. This is Detective Funk. We want to speak to you about a few things and show you a few photos and things. But before we start, though, I want to go through this with you. It's a preamble to signed statements.

....

I am, or we are, going to ask you certain questions regarding the death of Jerome Brown. However, before beginning, I advise you of your rights. Okay?

Detective Poggi handed defendant a form titled "Preamble to Signed Statements (Miranda Warning)," which stated:

1. You have the right to remain silent.
2. Anything you say can be used against you in a court of law.
3. You have the right to talk to a lawyer and have him/her present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
5. You have the right to stop answering questions or giving a statement any time you wish and do not have to give a reason.

You also have the right to demand a lawyer during the giving of a statement or the answering of questions and may stop until he/she arrives. If you cannot afford a lawyer, one will be appointed to represent you.

Defendant and Poggi proceeded to read the rights aloud,⁴ and Poggi instructed defendant to "put [his] initials" next to the rights if he understood them. Defendant initialed every right. Poggi then had defendant read the "waiver" section of the form, which stated:

I have been advised and I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer at this time, but understand that I may have one at any time I so desire. I also understand that I may stop answering questions at any time. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Poggi told defendant that the waiver section was "important," and to not "rush through it." After defendant finished reading it, the following exchange occurred:

DETECTIVE POGGI: If that's true and you understand that, can you put your name right there, please?

⁴ Defendant read some of the rights, while Detective Poggi read others. Each right, however, was read aloud.

DEFENDANT: Well, this is -- it's -- I don't want to sign this because I don't know -- I didn't see anything and I don't know nothing.⁵

DETECTIVE POGGI: Well, I'm -- I'm asking you to sign . . . if you understand what it means. And you could put the time. I'll tell you what time it is. It is 1:57 p.m.

DEFENDANT: 1:57?

DETECTIVE POGGI: Yes.

DEFENDANT: P.m.?

DETECTIVE POGGI: Yes. All right. So, you signed that you understood what this means. I just want you to know, as I mentioned to you, the reason I asked you to come in with us today is because we're investigating the death of Jerome Brown. Okay? Can we speak a little bit about that and if you have any information that you wish to share, will you share that with me today?

DEFENDANT: I don't have no type of information right now for you.

DETECTIVE POGGI: Okay.

DEFENDANT: That's what I'm trying to tell you. I said if I know something, I would tell Vicki.

⁵ During the second day of the Miranda hearing, the parties agreed that this sentence should read as follows: "But -- but it -- this is -- it is -- I don't want to sign because I don't want to -- I ain't sharing with you, you know what I mean. I don't know nothing." When the same video was played at trial, the sentence was transcribed as follows: "Yeah, I see this. This one I don't want to sign, because I don't (indiscernible)."

DETECTIVE POGGI: All right.

DEFENDANT: Because that's his mother and I'll talk to her.

DETECTIVE POGGI: Right. Well, some things you might not think are important but it might help us in our investigation. Okay? Is it okay if we just speak for a few minutes about that today?

DEFENDANT: Can I see the pictures?

DETECTIVE POGGI: Yeah, I want to show you some pictures.

A forty-five-minute interrogation ensued, during which defendant made false and contradictory statements to the police regarding his whereabouts, clothing, and relationships. At the conclusion of the interrogation, defendant was arrested and charged with murder.

An Essex County grand jury issued an indictment against defendant—charging him with first-degree murder, N.J.S.A. 2C:11-3(a)(1)-(2); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and third-degree hindering investigation, N.J.S.A. 2C:29-3(a)(3).⁶

⁶ Count four should have cited N.J.S.A. 2C:29-3(b)(1), not N.J.S.A. 2C:29-3(a)(3). During the trial, the court granted the State's application to amend the indictment to correct the error.

The Motion to Suppress Defendant's Statement

Defendant moved to suppress his April 6, 2016 interrogation. On May 22, 2018, the trial court held an evidentiary hearing on the motion. Poggi testified for the State and the interrogation video was played during his testimony.

On January 7, 2019, the court heard oral argument on the motion and issued an oral decision and order denying suppression. The court reasoned:

[B]ased on the circumstances, I find that it would not be unreasonable for a person in defendant's situation to believe that he was not free to leave, and, therefore, I do find that Miranda rights are triggered.

The [next] question is whether the defendant received Miranda warnings

. . . .

It's clear that [Detective Poggi] was very meticulous with the defendant, explained things to him, allowed him the opportunity to read. And [that] defendant did receive appropriate rights, and that he understood the same

. . . .

[T]he defense asserts that the defendant invoked his Miranda rights to terminate the interrogation

. . . .

If [an] invocation is equivocal or ambiguous . . . [t]he Supreme Court has not required that [an] interrogation

immediately cease, but instead, permit[s] the officers to clarify . . . otherwise ambiguous words or acts.

However, I find that that is not the case here. The defendant, what he says, is, "I do not want to [sign]." He [then] immediately explains, "This is because I don't know anything." . . . [H]e tells detectives, "That's what I'm trying to tell you. I don't have no information."

When he states, "I don't have no type of information right now," he immediately explains that when he does have information, he will give that information to Vicky . . . who is the victim's mother. . . . As such, I find that the detectives did not act inappropriately in choosing not to ask defendant . . . additional follow-up, narrowed questions about his intention to speak, because the record indicates that the defendant's explanation was not that he was invoking his right to remain silent, but rather, that he was denying knowledge of the facts surrounding the murder

. . . .

So there is nothing in the record to support the idea the defendant's statements were so ambiguous as to . . . require [further] inquiry. The defendant himself explained what he mean[t], and he himself continue[d] to engage the officers by asking to see photos

. . . .

[T]here is no ambiguity. It is clear from the explanation the defendant provides that he is denying knowledge

. . . .

. . . .

I find based on that, that there was no Miranda violation, and for this reason, I find that the State has met its burden . . . beyond a reasonable doubt[] that the waiver was knowing[], intelligent, and voluntarily. And [thus] defendant's motion to suppress the statement is denied.

S.M.'s Identification of Defendant

The State filed a motion in limine regarding a witness' identification of defendant. One of the 9-1-1 callers, S.M., was expected to testify at trial for the State, but only knew defendant by his nickname, "Shooter." The State sought to have the nickname admitted for purposes of identification, while defense counsel argued that the nickname should not be admitted because it was highly prejudicial. Defense counsel argued that S.M. could testify that she knew defendant by a nickname, but not actually provide the nickname. The parties eventually stipulated that the State would not use the nickname.

The Trial

The case proceeded to an eight-day trial. As expected, the State called S.M. as a witness. She testified that she gave a statement to Poggi and Olmo on April 11, 2016, about witnessing the shooting. The statement was given at the ECPO in a room with "audio/video recording capability." S.M. told the detectives that she witnessed the murder, and that when police arrived, the perpetrator returned in different clothes, and recorded the crime scene.

Thereafter, Sergeant Murad Muhammad⁷ showed S.M. a photo array, and S.M. picked defendant's photo because "[i]t looked very familiar." The detectives asked if defendant was "involved in the incident," and S.M. responded "I know [he's] not the shooter . . . It's not him. I know who I seen . . . I know what I seen." S.M. stated "the shooter was shorter and smaller." She also stated multiple times, "I know exactly what I saw."

Sometime thereafter, the detectives reintroduced the photo array, and S.M. again stated "I know he's not involved." The detectives asked S.M. "if you saw the person, would you tell us," and she responded "[a]bsolutely[,] if I saw the shooter, I would select the photo." S.M. stated that defendant "look[ed] familiar" because she knew him "from the area" and he was "very flirtatious." The detectives asked her "[i]s there any chance you could be mistaken about the

⁷ Muhammad testified he had "no knowledge of who the target may be." In State v. Henderson, 208 N.J. 208 (2011), the Court explained the difference in administering lineup procedures in blind or double-blind fashion:

An identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion. Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array.

[Id. at 248.]

individual you saw shooting," and she stated "[t]here's no chance at all." S.M. explained that defendant "ha[d] tattoos on his face" and that she "saw the face of the shooter" and "did not see any tattoos." The detectives told S.M. that she was "wrong," and S.M. responded, "I saw what I saw." The detectives continued asking S.M. about the photo array, and S.M. maintained that defendant "did not do the shooting."

The detectives eventually took S.M. to a different room, and did not record the ongoing identification procedure. The detectives played a surveillance video that captured defendant wearing similar clothes to the ones that S.M. saw the shooter wearing. After reviewing the video, S.M. returned to the interview room, and the detectives asked her "if it would be fair to say that the individual [she] saw in the video [was] the same individual [she] observed do the shooting." S.M. replied, "I can't say that" and expressed concern about whether the shooter's face matched defendant's face. Nevertheless, S.M. eventually identified defendant as the shooter during this interview.

Defendant did not request a Wade⁸/Henderson hearing to determine if the identification procedure was impermissibly suggestive by considering system

⁸ U.S. v. Wade, 388 U.S. 218 (1967).

and estimator variables. See Henderson, 208 N.J. at 288-93 (enumerating the system and estimator variables to be considered at a pretrial identification hearing).

At trial, S.M. provided an in-court identification of defendant. She testified that she "lied" in her statement about the perpetrator returning to the crime scene, and about defendant not being involved in the shooting. She stated that she did so because she was "scared," and that she was correcting herself because she "want[ed] to do the right thing." We also note that S.M. testified that the shooter had a mohawk. Defendant had this type of haircut at the time of the crime.

Poggi testified at trial. During his testimony, the State played surveillance videos collected from businesses and street cameras. Poggi provided a running commentary on the videos, and in so doing, identified defendant multiple times. Most notably, the video of the shooting was captured by a far-off rooftop camera and the quality was very poor. Nevertheless, when the prosecutor played the video, the following exchange occurred:

PROSECUTOR: Okay. And what just happened there?

DETECTIVE POGGI: That's where the defendant shot the victim.

The trial court called counsel to sidebar, and then issued the following curative instruction to the jury:

[A]s judges of the facts, you need to make credibilities (sic) of all of the facts of the case, and that would include identification of persons who are in the video, what you see in the video.

All right? So, it will be up to you, your review as judges of the facts to make all determinations of what you see in the video, the identifications of the persons in the video as well. All right? That is the instruction of the [c]ourt.

After this instruction, Poggi identified defendant in another video, leading the trial court to strike that portion of his testimony.

Defense counsel subsequently moved for a mistrial based upon Poggi's testimony that identified defendant as the individual seen in the videotapes. Counsel argued the identification was improper lay opinion testimony regarding a factual issue the jury must decide.

The court initially reserved judgment on the motion, and allowed the trial to continue. Shortly thereafter, the court gave a second, more comprehensive curative instruction, stating:

You, the jury, are to disregard the testimony by Detective Poggi regarding his identification of the defendant in the videos . . . that have been played to you this morning.

It is improper for this witness to offer his opinion as to who he believes is depicted in the videos. It is up to you, the judges of the facts, to determine what, [] and whom, if anyone, can be seen, or identified in the videos in evidence.

Now, I am . . . going to remind you what striking is. That you are not to use the stricken testimony in your deliberations in any way. By my striking the answer of Detective Poggi, and directing you to disregard it . . . as I have just explained, it means that you are not to use this information.

Now, I'm not asking you to forget it. I am asking that when you remember what was stricken, that you understand, and you recall my instruction that you are not to use this information in your deliberations in any manner.

All right. Now, you, ladies and gentlemen, as I said this morning, and I'll say it again, you are the judges of the facts. That means you have to find all the facts including issues of identification and determination as to what is in evidence that is submitted to you, what's in the video, who's in the video, where it is. Those are issues of fact and . . . you alone will make those determinations. All right? That is the instruction of the [c]ourt.

On March 27, 2019, the court heard argument on the mistrial motion, and ruled against it. The court stated the error was not so prejudicial as to require a mistrial. The court reasoned it had provided two curative instructions, and that

it would "charge the [j]ury again" at the end of trial.⁹ The court also found that there was "other evidence" for the jury to consider, and, therefore, the case did not "hinge[] on the identification of the [d]efendant in those videos." Finally, the court noted that some of the videos were "clearer" than others, but "as a great precaution," the jury would not consider "any of [Poggi's] identification[s]."

On April 2, 2019, defendant moved for a judgment of acquittal. The trial court denied the motion, reasoning that the jury should determine whether the State had proven its case beyond a reasonable doubt. On April 3, 2019, the jury returned its verdict, finding defendant guilty of all four counts.

On November 1, 2019, defendant appeared for sentencing. The court merged the possession of a weapon for an unlawful purpose conviction into the

⁹ In its final charge to the jury, the court instructed:

Any testimony that I may have had occasion to strike is not evidence and will not enter in your final deliberations.

You will recall that I struck the testimony of Detective Poggi regarding [his] identification of the [d]efendant in videos As such, that said evidence must be disregarded by you. That means that even though you will remember the testimony, you are not to use it in your discussions or deliberations.

murder conviction. Defendant received a fifty-five-year term for the murder, subject to the parole ineligibility period imposed by the No Early Release Act, N.J.S.A. 2C:43-7.2. He received a concurrent ten-year term for the unlawful possession of a weapon, subject to the Graves Act, N.J.S.A. 2C:43-6(c). Defendant received a concurrent five-year term for the hindering. This appeal followed.

II.

Defendant raises the following points for our consideration:

I. IT WAS REVERSIBLE ERROR TO ADMIT DEFENDANT'S STATEMENT BECAUSE IT WAS ELICITED AFTER THE POLICE FAILED TO HONOR DEFENDANT'S REPEATED ATTEMPTS TO EXERCISE HIS RIGHT TO REMAIN SILENT.

A. The Police Must Scrupulously Honor a Suspect's Invocation Of His Rights.

B. The Miranda Colloquy.

C. The Police Failed to Scrupulously Honor Young's Attempts to Cut Off Questioning.

D. The Prosecutor Played Young's Statement at Trial and Again In His Summation, Telling the Jury That It "Was Full of Lies."

II. IT WAS REVERSIBLE ERROR TO ADMIT [S.M.'S] IDENTIFICATION BECAUSE: 1) SHE DID NOT IDENTIFY DEFENDANT IN THE BLIND ARRAY BECAUSE SHE KNEW THAT

DEFENDANT HAD FACIAL TATTOOS BUT THE GUNMAN DID NOT; 2) THE POLICE TOLD HER SHE WAS "WRONG" IN FAILING TO IDENTIFY DEFENDANT AND PRESSED HER TO DO SO; AND 3) THE POLICE DID NOT OBTAIN HER IDENTIFICATION UNTIL THEY CONDUCTED AN UNRECORDED PROCEEDING IN WHICH THEY SHOWED HER A VIDEO AND TOLD HER THAT THEY BELIEVED THE VIDEO ESTABLISHED THAT DEFENDANT WAS THE GUNMAN. ALTERNATIVELY, IT WAS REVERSIBLE ERROR FOR THE COURT TO NOT INSTRUCT THE JURY THAT IT COULD CONSIDER THAT THE POLICE DID NOT COMPLY WITH THE RECORDING REQUIREMENT IN DETERMINING THE RELIABILITY OF THE IDENTIFICATION. (Not Raised Below).

A. The Trial Court Was Obligated to Hold a Wade Hearing Due to the Failure to Record Part of the Identification Procedure and the Henderson Violations.

1. The Recording Violation.
2. The Henderson Violations.

B. Counsel was Ineffective for Failing to Move For a Wade Hearing and Failing to Ask For an Instruction on the State's Failure to Record Important Parts of the Identification Procedure.

1. The Failure to Move for a Wade Hearing.
2. The Failure to Request an Instruction.

C. The Court Had an Independent Obligation to Instruct the Jury to Consider the Police Failure to Comply With the Recording Requirement in Assessing the Reliability of the Identification.

III. IT WAS REVERSIBLE ERROR FOR THE COURT TO DENY DEFENDANT'S MOTION FOR A MISTRIAL AFTER THE LEAD DETECTIVE TESTIFIED THAT A VIDEO THAT CONTAINED ONLY MINUSCULE, SHADOWY IMAGES SHOWED "[T]HAT'S WHERE THE DEFENDANT SHOT THE VICTIM."

A. The Detective's Identification of "the Defendant" in S-31 Mischaracterized the Evidence.

B. The Detective's Testimony was Inadmissible Because it Intruded on the Jury's Exclusive Duty to Decide Guilt or Innocence.

C. The Instruction Could Not Cure the Prejudice.

IV. THE MATTER SHOULD BE REMANDED FOR RESENTENCING SO THAT THE COURT CAN APPLY MITIGATING FACTOR N.J.S.A. 2C:44-1(b)(14), WHICH REQUIRES IT TO CONSIDER THAT "THE DEFENDANT WAS UNDER 26 YEARS OF AGE AT THE TIME OF THE COMMISSION OF THE OFFENSE."

A.

We first address the denial of defendant's motion to suppress his statement to the detectives. Defendant argues his statement should have been suppressed because "the police did not scrupulously honor his repeated attempts to exercise

his right to remain silent." He contends that the failure to honor his invocation of the right to remain silent made waiver impossible. He also maintains the detectives did not properly explain the waiver form. Defendant asserts that he made "numerous damaging assertions in his statement," and that the prosecutor "used [the] statement against him . . . at trial." Defendant contends that because the admission of his statement was "clearly capable of producing an unjust result," his conviction must be reversed. The State argues defendant did not invoke his right to remain silent and knowingly, intelligently, and voluntarily waived his Miranda rights before making a statement to police. The State further argues that the admission of defendant's statement was harmless considering the overwhelming evidence against him.

"Appellate courts reviewing a grant or denial of a motion to suppress must defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015). This deferential standard applies "even when [a trial court's factual] findings are based solely on its review of a video recording." State v. S.S., 229 N.J. 360, 386 (2017). However, deference "is not required when [a] trial court's factual findings are clearly mistaken." Ibid. "In those situations, the interests

of justice require [a] reviewing court to examine the record, make findings of fact, and apply the governing law." Hubbard, 222 N.J. at 262-63.

"A trial court's interpretation of the law . . . and the [legal] consequences that flow from established facts are not entitled to special deference." Id. at 263. Rather, "legal conclusions are reviewed de novo." Ibid.

"The United States Constitution and New Jersey state law both guarantee the right against self-incrimination." State v. Rivas, 251 N.J. 132, 153 (2022) (footnote omitted). "Under the United States Supreme Court's interpretation of the Fifth Amendment, the police are required to stop a custodial interrogation when a suspect unambiguously asserts his right to remain silent." S.S., 229 N.J. at 382. However, "our state law privilege [against self-incrimination] 'offers broader protection than its Fifth Amendment federal counterpart.'" Rivas, 251 N.J. at 153 (quoting State v. O'Neill, 193 N.J. 148, 176-77 (2007)). Under our State law privilege against self-incrimination, "a request, however ambiguous, to terminate questioning . . . must be diligently honored." S.S., 229 N.J. at 382 (internal quotation marks omitted) (omission in original) (quoting State v. Bey II, 112 N.J. 123, 142 (1988)).

"[A]ny words or conduct that reasonably appear to be inconsistent with defendant's willingness to discuss his case with the police are tantamount to an

invocation of the privilege against self-incrimination." Ibid. (quoting Bey II, 112 N.J. at 136). If a "suspect's statement is susceptible to two different meanings, the interrogating officer must cease questioning and 'inquire of the suspect as to the correct interpretation.'" Id. at 382-83 (quoting State v. Johnson, 120 N.J. 263, 283 (1990)); accord State v. Maltese, 222 N.J. 525, 545 (2015) (when a "suspect's invocation [of the right to remain silent] is 'ambiguous,' officers are 'required to stop the interrogation completely, or . . . ask only questions narrowly directed to determining whether defendant [is] willing to continue.'" (second alteration in original) (quoting Johnson, 120 N.J. at 284)).

"In other words, if the police are uncertain whether a suspect has invoked his right to remain silent, two alternatives are presented: (1) terminate the interrogation or (2) ask only those questions necessary to clarify whether the defendant intended to invoke his right to silence." S.S., 229 N.J. at 383. "Unless the suspect makes clear that he is not invoking his right to remain silent, questioning may not resume." Ibid. The State has "the burden to prove beyond a reasonable doubt that a suspect's waiver of his privilege against self-incrimination . . . 'was knowing, intelligent, and voluntary in light of all the circumstances.'" State v. Sims, 250 N.J. 189, 211 (2022) (quoting State v. Presha, 163 N.J. 304, 313 (2000)).

Moreover, "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." State v. Burno-Taylor, 400 N.J. Super. 581, 589 (App. Div. 2008) (quoting State v. Hartley, 103 N.J. 252, 261 (1986)). "When the police fail to scrupulously honor the right to remain silent, that failure 'renders unconstitutionally compelled any resultant incriminating statement made in response to custodial interrogation [and] there can be no question of waiver.'" Ibid. (alteration in original) (quoting Hartley, 103 N.J. at 261).

"Words used by a suspect are not to be viewed in a vacuum, but rather in 'the full context in which they were spoken.'" S.S., 229 N.J. at 382 (quoting State v. Roman, 382 N.J. Super. 44, 64 (App. Div. 2005)). "To invoke the right to remain silent, a suspect does not have to follow a prescribed script or utter talismanic words." Id. at 383. Suspects can speak in "plain language using simple words." Ibid.

Here, after being advised of his rights, defendant was presented with a Miranda waiver, and the following exchange occurred: "But -- but it -- this is -- it is -- I don't want to sign because I don't want to -- I ain't sharing with you, you

know what I mean. I don't know nothing."¹⁰ Detective Poggi then stated "Well, I'm -- I'm asking you to sign . . . if you understand what it means. And you could put the time. I'll tell you what time it is. It is 1:57 p.m." Defendant then signed, and Detective Poggi stated "Yes. All right. So, you signed that you understood what this means." Detective Poggi then began asking defendant about the murder, and the following exchange occurred:

DEFENDANT: I don't have no type of information right now for you.

DETECTIVE POGGI: Okay.

DEFENDANT: That's what I'm trying to tell you. I said if I know something, I would tell Vicki.

DETECTIVE POGGI: All right.

DEFENDANT: Because that's his mother and I'll talk to her.

Words like "I ain't sharing with you" are sufficient to invoke the right to silence. See S.S., 229 N.J. at 386 (holding a suspect who stated "No, that's all I got to say. That's it." invoked the right to remain silent); Johnson, 120 N.J. at 281 (stating "a suspect who has 'nothing else to say' or who '[does] not want to talk about [the crime], has asserted the right to remain silent" (citations omitted)

¹⁰ As we have noted, this is the language the parties agreed upon at trial.

(alterations in original)); State v. Bey I, 112 N.J. 45, 64 (1988) (finding a suspect who stated "he would have nothing to say" invoked the right to remain silent).

Our Supreme Court has made clear that "any words or conduct that reasonably appear to be inconsistent with [a] defendant's willingness to discuss his case with the police are tantamount to an invocation of the privilege against self-incrimination." S.S., 229 N.J. at 382 (quoting Bey II, 112 N.J. at 136). Here, defendant's words conveyed his unwillingness to discuss the case. We hold that defendant invoked his right to remain silent. The interview should have ended at that point. Any subsequent statements are inadmissible at trial.

The detectives' failure to honor defendant's invocation means that "there can be no question of waiver." Burno-Taylor, 400 N.J. Super. at 589 (quoting Hartley, 103 N.J. at 261). In any event, the detectives failed to obtain a "knowing, intelligent, and voluntary" waiver. Sims, 250 N.J. at 211 (quoting Presha, 163 N.J. at 313). Equally troublesome is Poggi's statement to defendant about the waiver section of the Miranda form. Poggi told defendant, "I'm asking you to sign . . . if you understand what it means." This statement does not accurately convey the meaning or significance of signing a waiver, which is "tantamount to relinquishing [the] right to remain silent." Burno-Taylor, 400 N.J. Super. at 604. By signing the waiver, a suspect not only indicates he or she

understands what the waiver means, but also that the suspect is waiving the right to remain silent. Poggi misleadingly minimized the meaning of the waiver section. For this additional reason, defendant's statement was inadmissible.

The trial court's findings are clearly mistaken, including that defendant did not invoke his right to remain silent but instead waived that right. We are not bound by a trial court's determination of the validity of a defendant's invocation or waiver of constitutional rights, which are legal questions. State v. O.D.A.-C., 250 N.J. 408, 425 (2022). The State did not prove beyond a reasonable doubt that defendant knowingly, intelligently, and voluntarily waived his right to remain silent. The court erred by denying defendant's motion to suppress his statement. The statement, which contained damaging assertions that the State used against defendant at trial, was "capable of producing an unjust result," R. 2:10-2, and was "sufficient to raise a reasonable doubt whether the error led the jury to a result it otherwise might not have reached," State v. G.E.P., 243 N.J. 362, 389-90 (2020) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). We reverse defendant's convictions and remand for a new trial.

B.

Considering our reversal of defendant's convictions under our State law privilege, we do not reach defendant's other arguments except to direct that on

remand, the trial court shall conduct a Wade/Henderson hearing to determine the admissibility of the out-of-court and in-court identifications.

Reversed and remanded for a new trial. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION