SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4559-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONG B. LIN, a/k/a LIN DONG BIAO,

Defendant-Appellant.

Argued October 4, 2017 – Decided April 12, 2018

Before Judges Koblitz, Manahan, and Suter.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 10-10-1964.

James K. Smith, Jr., Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; James K. Smith, of counsel and on the brief).

Mary R. Juliano, Assistant Prosecutor, argued the cause for respondent (Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney; Mary R. Juliano, of counsel and on the brief).

PER CURIAM

Following his guilty pleas to first-degree murder and felony murder, defendant Dong B. Lin appeals from his May 5, 2015 judgment of conviction and sentence. Lin alleges he preserved the ability to appeal from the May 10, 2013 order that denied suppression of a statement he gave to the police on June 17, 2010. Lin claims his Miranda[1] rights were incorrectly translated, which rendered him unable to intelligently waive those rights and that the police improperly reinstituted interrogation after he invoked them. Lin appeals his sentence, contending that the trial court incorrectly found and weighed the aggravating and mitigating factors. We find no merit in these arguments and affirm Lin's conviction and sentence.

I.

The case arose from the 2010 murders of Yao Chen and his sister Yun Chen. Lin and co-defendant Zeng L. Chen were indicted on multiple charges. Lin's case was severed from Chen's in 2012.

In 2014, Lin pled guilty to two counts of first-degree murder, N.J.S.A. 2C:11-3(a)(1) (counts two and three) and two counts of felony murder, N.J.S.A. 2C:11:3(a)(3) (counts four and five). Lin was sentenced on count two to life in prison with an eighty-five percent period of parole ineligibility and on count three to thirty

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

years in prison with a thirty-year parole disqualifier concurrent with count two. Both terms require a five-year period of parole supervision. Counts four and five were merged into counts two and three, and the remaining charges were dismissed.

We gather the following facts from the record developed at Lin's suppression hearing. Lieutenant John Todd of the Freehold Township Police Department was on duty on June 16, 2010 when he received a call about an assault on South Street and to be on the lookout for "two Asian males, approximately 20 to 25 years old. One was wearing a green shirt; another one was wearing a light-colored shirt." Shortly after this, he observed two people (Lin and Chen) walking, who matched the description, and pulled over his patrol car in front of them. Their clothing appeared disheveled. He could see bloodstains on them. Todd ordered the two men to get on the ground, but they did not immediately comply. After he guided one of them to the ground, the other complied.

Officer Jason Slatas of the Freehold Borough Police Department testified that initially he provided first aid to a male victim on South Street, who was tied up and bleeding. He then searched for the assailants. He encountered Todd, who at that time had his weapon drawn and was ordering the suspects to the ground. They did not appear to understand Todd. Once they

were handcuffed, Slatas transported Lin to the police station. Lin did not speak English.

That evening, Patrolman Robert Wei of the Piscataway Township Police Department was contacted to act as an interpreter for the police because both Lin and Chen spoke Mandarin Chinese, not English. Wei was born in Taiwan and often acted as an interpreter for the police when needed. Wei met Detective Sergeant Michael Magliozzo at the Prosecutor's Office for the purpose of providing translation for Magliozzo's interview of Lin.

At the outset of the June 16, 2010 interview, Magliozzo read the Miranda rights card to Lin. Wei testified he did not translate this word for word because "[d]uring the translation from language to language, often . . . there isn't exact words." He testified he "made sure the message was conveyed to the defendant." He had no difficulty understanding Lin. Lin was responding to what Wei was saying.

When Wei translated the warnings, he said that Lin had the ability to "hire" an attorney, leaving out that if he could not afford one, an attorney could be appointed for him. Wei later translated that if defendant wanted an attorney and could not afford it, "we can provide one for you," but omitted the portion about "prior to any questioning." When Magliozzo informed Lin that he could not speak with him until Lin decided if he wanted

an attorney, Wei translated, "We can't talk to you until you decide if you want an attorney or not," but then on his own added, "[b]ut talking now will help you." Wei admitted that he added the latter comment because he was trying to encourage Lin to talk. Lin invoked his right to have an attorney prior to questioning and the interview was stopped.

The next day, June 17, 2010, at Magliozzo's direction, Wei advised Lin about the charges against him. Magliozzo testified that Wei translated the charges for Lin in an unrecorded setting because he "was not expecting any type of interrogation or interview. It was just a formality to read him the charges." As the charges were being read and Wei was interpreting, Lin indicated through Wei that he wanted to talk about what had occurred the day before. Magliozzo told Lin through Wei that he could not speak with him because he had asked for an attorney, but Lin told Wei, he did not want an attorney anymore and he wanted to speak with them.

The recording then was activated. The transcript provides in relevant part:

> M.M.: All right, Dong . . . a few minutes ago, we brought you in here to tell you your charges and feed you. Is that correct?
>
> R.W.: A few minutes ago, we brought you in here to feed you tell you why you are detained in here. Is that correct?

D.L.: Hmm.

R.W.: Yes.

M.M.: All right. Is it true that we told you . . . you are being charged with two counts of felony murder, two counts of murder, one count of robbery, one count of burglary, and one count of possession of weapon from unlawful purpose?

R.W.: Then . . . now I am going to explain to you the reason you are being detained. You killed two people.

D.L.: Right.

R.W.: You are a theft [sic]. You robbed other people's house and you had a knife.

D.L.: Right.

R.W.: Is that correct?

D.L.: Right.

R.W. Yes.

M.M.: Okay. Is it also true at that time you stated you wanted to talk now?

R.W.: Is it also true that at that time, you stated you wanted to talk now?

D.L.: Right.

R.W. Yes.

M.M.: Okay. We explained to you that you requested an attorney prior and that we were no longer allowed to speak to you.

R.W.: We explained to you last night and asked you if you wanted an attorney. You said you

wanted one, so we were no longer allowed to speak to you.

D.L. Yes.

R.W.: Yes.

M.M.: You then stated that you wanted to talk without an attorney.

R.W.: Then you told us that you wanted to talk without an attorney temporarily.

D.L.: Right.

R.W.: Yes.

M.M.: Is it your position now you still want to talk without an attorney?

R.W.: So you still want to talk without an attorney?

D.L.: Right.

R.W.: Yes.

Magliozzo again read the Miranda rights to Lin. Lin acknowledges that the rights were accurately interpreted. Lin advised that he wanted to speak with the officers without an attorney. Lin gave a statement incriminating himself.

In Lin's statement, he said that he and Chen had taken the bus to a house in Freehold "to steal things." Lin knew the family, because he had worked at the family restaurant over a year earlier, but had been fired. Once inside the house, they discovered a man was there. Lin and Chen "threatened that person not to talk."

Lin said that Chen insisted on looking for things to steal both downstairs and upstairs in the house. Lin went upstairs. He kicked in a door that was locked and found another person, a woman. She started to yell. Lin stated he was "very nervous" and "didn't know what [he] was doing." He killed the woman because he was "afraid she was going to call the police." She was covered by a blanket, but he "stabbed right through the blanket." He then went downstairs and killed the man downstairs because the man had seen them. Lin stated that Chen "helped me hold the guy [downstairs] down."

Lin filed a motion to suppress his statement. He contended that the Miranda warnings were not accurately translated on June 16, 2010. He contended that he should not have been interrogated on June 17 because he had invoked his Miranda rights. Lin's counsel argued there was a credibility issue about whether Lin had initiated communication with the police on June 17 once Lin was informed of the charges against him.

Lin's suppression motion was denied on May 10, 2013. The trial court found that there was nothing inculpatory about the first statement on June 16 because Lin invoked his right to an attorney. However, Lin was subject to a custodial interrogation, and Miranda warnings were necessary. The court found that the following day the charges were read to Lin and that the police did

not have to record this. The court also found that after Lin invoked his right to counsel on June 16, he re-initiated communications with the police on June 17. Lin said he did not want an attorney anymore and wanted to talk without an attorney. The court found both Magliozzo and Wei to be credible witnesses.

The trial court found that Lin "was adequately informed of the substance of his constitutional rights and knowingly, intelligently and voluntarily waived his rights before the confession to the police." The court noted that Lin invoked his right on the 16th so he "understood the difference between I want to speak or I don't want to speak." None of the translation inaccuracies occurred in the re-administration of Miranda. The court found that under the totality of the circumstances, Wei's "translation of the Miranda form satisfied the constitutional requirement."

Lin pled guilty on January 8, 2014, to two counts of first-degree murder and two counts of first-degree felony murder. As part of the recommended sentence, Lin agreed to testify against Chen and to tell the truth about what occurred. The prosecutor advised "there have been no other promises between the defendant and the State." However, during the plea hearing, the prosecutor asked Lin a number of questions about the offenses. Defense counsel objected to the extent of the prosecutor's questions

because they had a lengthy Miranda hearing. Defense counsel stated:

> DEFENSE COUNSEL: I don't think it's appropriate, and I've never seen this in the context of a plea hearing for the prosecutor to get into the specifics of the Miranda hearing. That's an issue we've preserved for appeal.

The court responded:

> THE COURT: Okay. I understand. [Referring to the prosecutor], if you want to ask another question without referencing the Miranda, because, again, it is something -- it is preserved on appeal.

The prosecutor did not respond to the representation that Miranda issues were preserved for appeal.

Lin was sentenced in accordance with the State's recommendation.

On appeal, Lin raises the following issues:

> POINT I. BECAUSE DEFENSE COUNSEL AND THE JUDGE, AND APPARENTLY THE PROSECUTOR, ALL UNDERSTOOD THAT DEFENDANT WAS PRESERVING THE DENIAL OF HIS MOTION TO SUPPRESS HIS STATEMENT, HE IS ENTITLED TO RAISE THE ISSUE ON THIS APPEAL.
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> POINT II. THE TRIAL JUDGE ERRED IN DENYING THE MOTION TO SUPPRESS DEFENDANT'S STATEMENT BECAUSE THE AFFIRMATIVELY INCORRECT AND MISLEADING TRANSLATION OF THE MIRANDA WARNINGS TELLING DEFENDANT THAT HE COULD "HIRE" A LAWYER AND THAT TALKING TO THE POLICE "WILL HELP YOU," LEFT HIM UNABLE TO INTELLIGENTLY WAIVE HIS RIGHTS.

A. Advice that Defendant Could "Hire" A Lawyer.

B. Advice that Defendant Could "Help" himself By Talking to The Police.

POINT III. AFTER DEFENDANT HAD INVOKED HIS RIGHT TO COUNSEL, THE POLICE OFFICERS IMPROPERLY REINITIATED THE INTERROGATION BY TRANSLATING THE CHARGES AGAINST HIM IN THE FORM OF AN ACCUSATION, CAUSING HIM TO ADMIT HIS RESPONSIBILITY FOR THESE OFFENSES PRIOR TO THE RE-ADMINISTRATION OF THE MIRANDA WARNINGS.

POINT IV. A REMAND FOR RESENTENCING IS NECESSARY BECAUSE OF THE TRIAL COURT'S INCORRECT FINDING AND WEIGHING OF THE AGGRAVATING AND MITIGATING FACTORS.

II.

A.

"[A] guilty plea generally constitutes a waiver of all issues which were or could have been addressed by the trial judge before its entry." State v. Gonzalez, 254 N.J. Super. 300, 303 (App. Div. 1992). "[A] defendant who pleads guilty is prohibited from raising, on appeal, the contention that the State violated his constitutional rights prior to the plea." State v. Crawley, 149 N.J. 310, 316 (1997). A motion to suppress evidence, however, is automatically preserved. R. 3:5-7(d). Additionally, a defendant may enter a conditional plea of guilty consistent with Rule 3:9-3(f) that preserves the right to appeal. A conditional plea of guilty requires "the approval of the court and the consent of the

prosecuting attorney," must be "on the record" and regard an "adverse determination of any specified pretrial motion." R. 3:9-3(f). "If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea." Ibid.; see State v. Davila, 443 N.J. Super. 577, 586 (App. Div. 2016).

In State v. Alexander, 310 N.J. Super. 348, 351 n.2 (App. Div. 1998), we rejected "the State's argument that defendant waived his right to appeal from [the outcome of his motion to dismiss] by entering an unconditional guilty plea" given "the prosecutor's apparent acquiescence in defense counsel's assertion at sentencing that defendant intended to appeal from the order denying his motion to dismiss the indictment." However, in Davila, 443 N.J. Super. at 586, we held that "defense counsel's casual mention of 'all of the motions' was insufficient" to "satisfy the requirement of judicial approval or constitute 'on the record' acknowledgment of a particular motion."

Here, defense counsel stated that Lin preserved the Miranda order for appeal; the court acknowledged that the issue was preserved and the prosecutor appeared to have acquiesced. Given this colloquy, we see no reason to preclude defendant from raising the issue on appeal.

B.

"Under Miranda, prior to any custodial interrogation, an accused must be advised of the Fifth Amendment right to remain silent and to have an attorney present during questioning." State v. Chew, 150 N.J. 30, 61 (1997) (quoting Michigan v. Mosley, 423 U.S. 96, 103 (1975)). The warnings include:

> that [the person] has the right to remain silent, (2) that anything he says can be used against him in a court of law, (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.
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> [State v. Nyhammer, 197 N.J. 383, 400 (2009) (quoting Miranda, 384 U.S. at 479).]

"The fifth requirement is that a person must be told that he can exercise his rights at any time during the interrogation." Ibid. However, "[t]he burden is on the prosecution to demonstrate not only that the individual was informed of his rights, but also that he has knowingly, voluntarily, and intelligently waived those rights, before any evidence acquired through the "interrogation can be used against him." Id. at 400-01. See State v. A.M., __ N.J. Super. __, __ (2018) (slip op. at 17) (2018) (finding the court "improperly shifted the burden of proof to defendant to alert the interrogating officers about any difficulty he may be having understanding the ramifications of a legal waiver").

"Once an accused invokes the right to counsel, that right must be 'scrupulously honored.'" Chew, 150 N.J. at 61. This means that questioning must stop until counsel is available or "unless the accused initiates further communication, exchanges, or conversations with the police." Ibid. (quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)). An "equivocal request for an attorney is to be interpreted in a light most favorable to the defendant." Id. at 63 (citing State v. Reed, 133 N.J. 237, 253 (1993)).

Here, the police first read Lin the Miranda warnings on June 16, 2010. Although Lin raises issues about the translation and thus, the content of the warnings, when Lin appeared to ask for an attorney, the officers properly terminated the interview as they were required to do under Miranda. Lin was not questioned further that night.

Lin challenges the translation of the Miranda warnings on June 16. Although the Miranda card was read to Lin by Magliozzo, when Wei translated the warnings he said that Lin had the ability to "hire" an attorney, leaving out that if he could not afford one, an attorney could be appointed for him. Wei later translated that if defendant wants an attorney and cannot afford it, "we can provide one for you," but omitted the portion about "prior to questioning." When Magliozzo informed Lin that he could not speak

with him until he decided if he wanted an attorney, Wei translated "We can't talk to you until you decide if you want an attorney or not" but then on his own added "[b]ut talking now will help you."

In State v. Mejia, 141 N.J. 475, 503 (1995), the Court recognized "[t]he problem of communicating Miranda rights to non-English-speaking defendants is important, particularly in a state with so diverse a population." However, the rights do not have to be read exactly. "Words which convey the substance of the warning along with the required information are sufficient." State v. Melvin, 65 N.J. 1, 14 (1974). "The essential purpose of Miranda is to empower a person--subject to custodial interrogation within a police-dominated atmosphere--with knowledge of his basic constitutional rights so that he can exercise, according to his free will, the right against self-incrimination or waive that right and answer questions." Nyhammer, 197 N.J. at 406. Although Wei's translation was not an exact rendering of Magliozzi's reading, Lin nevertheless invoked his right to remain silent and to ask for an attorney. We agree with the trial court that defendant understood the difference between speaking and not as reflected by the invocation of his rights.

On the next day, June 17, Wei informed Lin in Mandarin Chinese of the charges against him, including two charges of first-degree murder and two charges of first-degree felony murder. This was

not videotaped. We agree with the trial court that reading the charges to Lin did not constitute a custodial interrogation because it was "not designed to elicit an incriminating response." See State v. Cryan, 363 N.J. Super. 442, 452 (2003) (Miranda's protection extends only to words or actions of police officers that are "reasonably likely to elicit an incriminating response."). "Inquiries incidental to the custodial relationship . . . do not initiate further conversation concerning the interrogation." Chew, 150 N.J. at 64.

Wei testified, however, that when the charges were read to Lin, he asked to speak with them about the incidents from the day before. When Lin reiterated this and that he no longer wanted a lawyer, Lin was placed in an interrogation room so that his statement could be recorded.

If an accused "'initiates further communication, exchanges, or conversations with the police,' the police officer may continue the interrogation in the absence of counsel." State v. Melendez, 423 N.J. Super. 1, 29 (App. Div. 2011) (quoting State v. Edwards, 451 U.S. at 485)). "This type of waiver requires the suspect to 'personally and specifically' initiate conversation." Id. at 30 (quoting State v. Burris, 145 N.J. 509, 519 (1996)). The State also must prove that "the initiation constitutes a knowing,

intelligent, and voluntary waiver of the accused's rights." Chew, 150 N.J. at 61.

The trial court found the officer's testimony credible that Lin asked to speak with them without his attorney. We defer to the trial court's factual findings on a motion to suppress unless they were "clearly mistaken" such that appellate intervention is necessary in "the interests of justice." State v. Elders, 192 N.J. 224, 244 (2007) (citations omitted).[2] Wei's testimony supported the finding that Lin initiated communication with the officers about the murders, indicating a desire to speak with them without his attorney.

Magliozzo re-administered the Miranda warnings with Wei interpreting. Lin alleges the officers elicited a confession from him by the accusatory manner in which the charges were reviewed and also based on the translation errors from the day before.

We do not agree that Lin's responses at the outset of the transcript constituted an admission to the charges. When read in context, Wei's interpretation is giving Lin an overview of the events that lead up to the interview which were not recorded. Lin simply is agreeing with that.

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[2] Our review of "purely legal conclusions" is plenary. State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010) (citation omitted).

We also do not agree that Wei's interpretation on June 16 tainted Lin's "knowing and intelligent" waiver of rights on June 17. Lin plainly understood that he could remain silent and ask for counsel because he invoked those rights on June 16. We agree with the trial court that in looking at the totality of the circumstances, Lin was properly advised of his Miranda rights and waived those rights on June 17 voluntarily, intelligently, and knowingly before confessing to the police.

C.

We review the judge's sentencing decision under an abuse of discretion standard. See State v. Fuentes, 217 N.J. 57, 70 (2014). We discern no error by the trial judge in evaluating the aggravating and mitigating factors, which were based upon competent and credible evidence in the record.

The court found aggravating factors one, two and nine. Aggravating factor one concerns "the nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner." N.J.S.A. 2C:44-1(a)(1). The judge considered that the victims were stabbed repeatedly and suffered greatly; many of the wounds were defensive. We disagree with Lin that the judge erred by giving this substantial weight. Both victims were stabbed over seventy times, in multiple parts of their bodies.

Factor two concerns "[t]he gravity and seriousness of harm inflicted on the victim including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable . . . ." N.J.S.A. 2C:44-1(a)(2). Lin incredulously contends that "the record does not suggest that either victim was particularly vulnerable or incapable of resistance" when the evidence was that, while they each were being stabbed seventy or more times, the male victim was bound hand and foot and to the bed frame and the female victim was stabbed in bed directly through the comforter that held her down.

Lin contends that the court should have accorded more weight to mitigating factors seven and twelve and that the court should have included mitigating factor nine. N.J.S.A. 2C:44-1(b)(7), (9) and (12). The court found mitigating factor seven ("no history of prior delinquency or criminal activity") and twelve (willingness "to cooperate with law enforcement authorities"), but gave them little weight. This was appropriate on this record. Although Lin had no criminal history, his first crime was a double homicide. Lin testified against Chen, but that was in exchange for a plea bargain.

Lin contends that mitigating factor nine should have been found ("character and attitude of the defendant indicate that he is unlikely to commit another offense"). N.J.S.A. 2C:44-1(b)(9).

However, neither the report from Lin's clinical neuropsychologist nor the letter from the pastor cited by Lin said that he was unlikely to reoffend, offering only that the murders were committed in a panic and that the pastor was impressed by Lin's "sincerity and faithfulness." Thus, we find no abuse of discretion by the trial court in its application or weighing of the aggravating and mitigating factors.

Affirmed.